

# The Role Of The Host State To The Protection Of Human Rights And The Environment From The Violation Done By Transnational Corporations

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## Abstract

Transnational Corporations (hereinafter TNCs) have great influence in the economic development and social welfare in host states. Due to the strong economic power owned by TNCs, they are able to influence the government of the host states. However, to certain extent, in order to gain a great profit, they often violate human rights and the environment in the host states. Unfortunately, the TNCs are not the subject of international law, thus international environmental law and International human rights law cannot be applied to TNCs. It seems that TNCs are out of the ambit of Law. However, it is essential to enhance the role of the host state government to enforce the law in order to protect human rights and environment in the host state.

This paper undertakes a critical examination of the issues relating to human rights violations and environmental damage done by TNCs in developing countries. The research method of this article is qualitative and the approach of the research is normative. The research finds that the role of the host state to enforce the law to protect human rights and environment from the violation done by TNCs is paramount.

Key words : TNCs, violation of human rights, host state, environmental pollution.

## Abstrak

*Pengaruh Perusahaan Transnasional (TNCs) terhadap perkembangan ekonomi dan peningkatan kesejahteraan sosial di host state sangatlah signifikan. Di lain pihak, kekuatan ekonomi yang dimiliki TNCs mampu mempengaruhi pemerintah negara dimana mereka menanamkan modalnya. Oleh karena itu, demi memperoleh keuntungan yang besar, Perusahaan Transnasional tidak segan-segan untuk melakukan pelanggaran hak asasi dan perusakan atau pencemaran lingkungan di negara penerima modal. Sayangnya, perusahaan transnasional bukanlah subyek hukum internasional, sehingga hukum lingkungan internasional dan hukum hak asasi manusia internasional tidak dapat diterapkan kepada perusahaan transnasional. TNCs seolah-olah lepas dari jerat hukum. Metode yang digunakan dalam penelitian ini adalah kualitatif, sedangkan pendekatan yang digunakan adalah normatif. Adapun hasil penelitian ini menemukan bahwa sangatlah penting peran negara penerima untuk menegakkan hukum kepada TNCs dalam rangka memberikan perlindungan kepada hak asasi dan lingkungan di negara penerima.*

*Kata kunci : Perusahaan transnasional, pelanggaran hak asasi, pemerintah negara, pencemaran lingkungan.*

## Background

Over the last thirty years<sup>1</sup> the power and role of Transnational Corporations (hereinafter TNCs) in international trade creates major impacts that cannot easily be ignored in the world. Basically, transnational enterprises are businesses that operate internationally. Hence, Transnational enterprises employ a variety of operational structures that mirror their international character. If the home or parent organization is located within a single state, the organization is usually fairly simple. On the other hand, enterprises with various parents located in multiple states often have quite complex structures.<sup>2</sup> Indeed, those TNCs<sup>3</sup> influence other countries through two types of foreign investment: foreign direct investment (hereinafter FDI)<sup>4</sup> and foreign indirect investment or also called portfolio investment.

The reasons why TNCs conducted business in developing countries are various. However, it can be generalized that the fundamental objective to conduct business in developing countries is to gain a huge profit. This objective can be achieved because of some reasons, such as lower production costs in developing countries, the availability of the raw materials, and big market access in developing countries. Indeed, it is not only the lower labour costs that attract capital into other countries. Additionally, the developing countries have conditions where regulations on safety and health at work, weak protection of human rights and environmental protection, where wages are below the subsistence level.<sup>5</sup> These conditions are an extra attraction or investment, because they reduce costs in those industries where largely semi-skilled workers are used.

In many countries, TNCs effectively control the economy and thus define the social conditions for much of the population.<sup>6</sup> The most concern of the TNCs is the

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<sup>1</sup> Christen Broecker, "Better You Know the Devil: How State Approach to Transnational Corporate Accountability", *New York University Journal of International Law & Policy*, Vol. 41, 2008 p. 162.

<sup>2</sup> The general definition of TNCs is any non-state-owned business corporation, which has formal relationships with business entities in other states, such that it exercises effective control in determining the activities of these other entities. See, Glen Kelly, "Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations", *Columbia Journal of Transnational Law*, Vol. 39, 2001, p. 484. See also, Engebo Amaseh, et al, "Corporation, CSR and Self Regulation: What Lessons from the Global Crisis?", *German Law Journal*, Vol. 11, 2010, p. 234.

<sup>3</sup> Zakia Afrin, "Foreign Direct Investment and Sustainable Development in the Least-Developed Countries", *Annual Survey of International & Comparative Law*, Vol. 10, 2004, p 217.

<sup>4</sup> According to UNCTAD, FDI is an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor. ... The investor's purpose is to gain an effective voice in the management of the enterprise. The foreign entity or group of associated entities that makes the investment is termed the direct investor. See, <sup>5</sup> John H Dunning and John R Dilyard, "Towards a General Paradigm of Foreign Direct Investment and Foreign Port Folio Investment", <http://unctc-unctad.org/data/lib.vo/3a.pdf>, accessed on 23 August, 2010.

<sup>6</sup> Andreas George Scherer and Marc Smid, "The Downward Spiral and the U.S. Model Business Principles-Why

financial health of the corporation and its shareholders, and not to the social and environmental needs of the host states. The host government typically faces a conflict between its responsibility to protect human rights and safeguard the environment, and its needs to establish favourable economic conditions to attract foreign investment. When the host states attempt to renegotiate how to protect the worker rights, community responsibility, environmental regulations, and industrial practices, the TNCs may jeopardise through an implied threat to leave and seek out a more favourable location.

TNCs may freely exploit economic, natural, and human resources of many states without respecting the basic human rights and environmental protection of their population. Nonetheless, many states are unwilling or unable to influence the behaviour of those companies effectively, or to protect their residents from abuses that may occur.<sup>7</sup> It is often argued that national systems should have a primary role in enforcing the accountability of non-state actors. However, victims normally face numerous obstacles in enforcing the accountability of TNCs in the national courts.<sup>8</sup>

Hence, it is submitted that those obstacles could be addressed by recourse to certain international procedures. Unfortunately, the existing international human rights law is mainly state-centric as it creates obligations primarily upon States to promote human rights.<sup>9</sup> TNCs have been able to operate in a legal vacuum because international human rights law imposes no direct legal obligations on TNCs. Thus, it is imperative to encourage and to enhance the role of the host state governments to handle and to enforce the law to the TNCs that violate human rights and the rights to enjoy the healthy environment. However, in many cases the government of the developing countries are powerless and reluctant to enforce the host state law to TNCs.

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MNEs Should Take Responsibility for the Improvement of World Wide Social and Environmental Conditions”, Paper submitted to the Journal Management International Review”, October 1998 [http://www.iou.uzh.ch/bul/publications/manuskripte/scherer\\_Smid\\_mir\\_2000\\_ssrn.pdf](http://www.iou.uzh.ch/bul/publications/manuskripte/scherer_Smid_mir_2000_ssrn.pdf). Accessed on 20 August, 2010.

<sup>7</sup> Erin Elizabeth Macek, “Scratching the Corporate Back: Why the Corporations Have no Incentive to Define Human Rights”, *Minnesota Journal of Global Trade*, Vol. 11, 2002, p. 102.

<sup>8</sup> Jernej Letnar Cernic, Crossing the Rubicon: How to Construct the International Legal Responsibility of Transnational Corporations for Ius Cogens Human Rights Violations”, <http://www.imgard-Comnx-Shifting.de/fileadmist/-upload/pdf/archive/log.ceonic.pdf>. Accessed on 2 August, 2010.

<sup>9</sup> *Ibid.*

### **Statement of Problems**

Based on the background which is mentioned previously, the following questions are closely examined. *Firstly*, what are the impacts of TNCs in economic development and social welfare in the host states? *Secondly*, how is the human rights development in international law? *Thirdly*, what kinds of violation that are done by TNCs in the host states? *Finally*, how is the role of the host state governments in protecting the human rights and the right to enjoy the healthy environment from the violations done by the TNCs?

Permasalahan dalam penelitian ini: *pertama*, apa akibat dari keberadaan TNC dalam pembangunan ekonomi dan kesejahteraan sosial di *host states*. *Kedua*, bagaimana pembangunan hak asasi dalam hukum internasional, *Ketiga*, apa macam kekerasan yang dilakukan oleh TNC dalam *host state*? Terakhir, bagaimana peran pemerintah *host state* dalam melindungi hak asasi dan hak untuk menikmati lingkungan yang bersih dari kekerasan yang dilakukan oleh TNC?

### **Objective of the Research**

The objective of the research, as followed: *Firstly*, to analyze the impacts of TNCs in economic development and social welfare in the host states. *Secondly*, to examine the human rights development in international law. *Thirdly*, to analyze and examine the violations that are done by TNCs in the host states. *Finally*, to analyze the role of the host state governments in protecting the human rights and the right to enjoy the healthy environment from the violations done by the TNCs.

### **Research Method**

It is a qualitative research. It uses normative approach. While the main research materials used in the research are primary and secondary sources. The primary sources consist of the Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the UN's Norms for Corporations, Code of Conduct of Transnational Corporation, and Global Compact, Stockholm Declaration and Rio Declaration. While the secondary sources consist of books, journals and internets which relate to the subject matter.

## Discussion and Result

### The Impacts of TNC to the Economic Development and Social Welfare

Economic development becomes one of the objectives of developed and developing countries. The role of TNCs in economic development as well as in social welfare is indispensable. In the economic context, the role of TNCs can be emphasised due to the fast growth of FDI as well as a central role in as a global industrial producer.<sup>10</sup> A significant amount of FDI is in capital and technology-intensive sectors,<sup>11</sup> and TNCs have become the single most important actors in the expansion of technology flows to both developed and developing countries and are therefore central in determining the economic political and social welfare of numerous countries.

Business and production globalization makes national economies and destinies of their communities to be increasingly interconnected. In traditional economic theory, FDI can, in principle, have a positive or negative impact on national welfare, but many argue that global production and competition increase efficiency of the global economy because transnational corporations encourage international labour division, so that countries become more specialized in producing goods that have a comparative advantage.<sup>12</sup> Competition reduces monopolistic profits and intensifies pressure for innovation. Therefore TNCs can improve national economic performance, since these firms tend to have higher productivity than domestic firms and contribute to the spread of new technologies and to raising skill levels of national labour force. Additionally the ability of corporations to organise production at the global level is seen as giving them a huge structural strength compared to the national government and labour force at the national level.<sup>13</sup> However, TNCs' activity was often seen as distorting development priority and producing excess profits which were repatriated particularly in developing countries.<sup>14</sup>

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<sup>10</sup> Kathleen Morris, "The Emergence of Customary International Law Recognising for Violations of International Human Rights and Environmental Law", *Gonzaga Journal of International Law*, Vol. 11, 2007, p. 4.

<sup>11</sup> Ransella Pereira, "Power Imbalance in Mediations Between Transnational Corporations and Host States". <http://pegans.rutgers.edu/rcrlj/articles/pdf/pereira.pdf>, accessed on 24 August, 2010.

<sup>12</sup> *Ibid.*

<sup>13</sup> Larry Cata Backer, "The Autonomous Global Corporation: On the Role of Organisational Law Beyond Asset Petitioning and Legal Personality", *Tulsa Law Review*, Vol. 41, 2006, p. 554-555.

<sup>14</sup> Peter Utting, "Promoting Development through Corporate Social Responsibility-Prospect and Limitations". <http://www.er.cqam.ca/nobel/r22714jur7642/resp.utting.pdf>, Accessed on 29 August, 2010.

## Human Rights Development in International Law

Taking into account the strong factual relationship between environmental degradation and the impairment of human rights, it is important to consider how these two fields interrelate within the law. The Czech jurist and first Secretary General of the International Institute for Human Rights in Strasbourg divided human rights into three generations as early as 1977.<sup>15</sup> The so-called *first-generation* (human) rights refer to traditional civil and political liberties prominent in Western liberal democracies, such as freedom of speech, religion, and the press, as well as freedom from torture, which presuppose a duty of non-interference on the part of government towards individuals.<sup>16</sup> For many years, the dominant position was that only these rights were genuine human rights. Second-generation rights have generally been considered as rights which require affirmative government action for their realisation.

*Second-generation* rights are often styled as group rights or collective rights, in that they pertain to the wellbeing of whole societies.<sup>17</sup> In contrast with first-generation rights, which have been perceived as individual entitlements, particularly the prerogatives of individuals. Second-generation rights are held and exercised by all the people collectively or by specific subsets of people. Examples of second-generation rights include the right to education, work, social security, food, self-determination, and an adequate standard of living. These rights are codified in the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) and also in Articles 23–29 of the Universal Declaration of Human Rights (hereinafter UDHR).<sup>18</sup> Similarly, critics have opined that, regardless of the political system or level of economic development, all states are able to comply with civil and political rights, but not all states have the ability to provide the financial and technical resources for the realisation of affirmative obligations such as education and an adequate standard of living.

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<sup>15</sup> Sophia Buranakul, “White Paper on Industrial Development in the Existing Context of Globalisation and Its Impact on Sustainability for World Summit on Sustainable Development 2002, Johannesburg, South Africa. Good Governance for Social Development and the Environment Institute (GSEI) Thailand”. <http://www.gsei.or.th/pdf/WhitePaper.eng.pdf>, accessed on 25 September 2010.

<sup>16</sup> Oliver C. Ruppel, “Third Generation Human Rights and the Protection of the Environment in Namibia”. p.2. [http://www.kas.de/upload/uuslandshomepage/namibia/Human Rights/ruppel 1.pdf](http://www.kas.de/upload/uuslandshomepage/namibia/Human%20Rights/ruppel%201.pdf), accessed on 28 August, 2010.

<sup>17</sup> Susan Emmenegger and Axel Tschentscher, “Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law”, *Georgetown International Environmental Law Review*, Vol. 6, 1994, p. 552.

<sup>18</sup> Natso Taylor Saito, “Beyond Civil Rights: Considering ‘Third Generation International Human Rights Law in the United States’”, *University of Miami Inter-American Law Review*, Vol. 28, 1997, p. 291.

*Third-generation* or solidarity rights are the most recently recognised category of human rights.<sup>19</sup> This grouping has been distinguished from the other two categories of human rights in that its realisation is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual. Rights in this category include self-determination as well as a host of normative expressions whose status as human rights is controversial at present.<sup>20</sup> These include the right to development, the right to peace, the right to a healthy environment, and the right to intergenerational equity.

In fact, the right to a healthy environment requires a healthy human habitat, including clean water, air, and soil that are free from toxins or hazards that threaten human health. Indeed, there are two main visions of how human rights doctrine could be developed to help victims of environmental degradation, which can be obtained simultaneously.<sup>21</sup> Given the current existence of an international human rights legal structure, the first and most immediate remedy would be to link environmental damage to an established or fundamental human right. The second, long-term theory would be to broaden substantive human rights to include an environmental human right, most likely the right to a safe environment.<sup>22</sup> Thus, if the right to healthy environment is recognised as an integral part of substantive human rights, the victim of environmental damage conducted by TNCs may get access to gain proportional compensation through the human rights mechanism.

The Stockholm and Rio Declarations attempt to link environmental concerns to existing international human rights,<sup>23</sup> such as the right to life, the right to health, and the right to an adequate standard of living. Furthermore, Agenda 21 provides an important basis for the promotion of environmental health through the application of international environmental law of both the global and international spheres.<sup>24</sup>

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<sup>19</sup> Thomas T. Ankersen & Thomas K. Ruppert, "Defending the Polygon: the Emerging Human Right to Communal Property", *Oklahoma Law Review*, Vol. 59, 2006, p. 687.

<sup>20</sup> Eric Engle, "Universal Human Rights: A General History", *Annual Survey of International & Comparative Law*, Vol. 12, 2006, p. 238-239.

<sup>21</sup> Jennifer A. Down, "A Healthy and Ecologically Balance Environment: An Argument for A Third Generation Right", *Duke Journal of Comparative & International Law*, Vol. 3, 1993, p. 359-360. See also, William Andrew Shutkin, "International Human Rights Law and the Earth: The Protection of Indigenous People and the Environment", Vol. 31, 1991, *Virginia Journal of International Law*, p. 490-491.

<sup>22</sup> Lauren A. Mowery, "Earth Rights Human Rights: Can International Environmental Human Rights Affect Corporate Accountability?", *Fordham Environmental Law Journal*, Vol. 13, 2002, p. 347-348.

<sup>23</sup> Sumudu Atapattu, "The Right to Healthy Life or the right to Die Polluted?: The Emergence of a Human Right to Healthy Environment under International Law", *Tulane Environmental Law Journal*, Vol. 16, 2002, p. 85-86.

<sup>24</sup> Karrie A. Wolfe, "Greening the International Human Rights Sphere? An Examination of Environmental

Therefore, there are concerns over using the existing human rights framework to enforce environmental rights. Further, the existing international human rights, such as the ICCPR addresses traditional political rights. However, some of these rights can be said to implicate an environmental human right. Most notably, Article 6(1) the right to life, often is cited as the ultimate right which, by necessity, encompasses a right to environment. The relevant paragraph states, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>25</sup>

However, the right to life provided for in the ICCPR and the Universal Declaration has come to embrace, through custom and usage, the broader, substantive aspects of a right to life. A solid argument can be made that a right to environment is presumed within a right to life for two reasons. First, certainly no person can experience the right to life in an environment that is incapable of sustaining or which insufficiently supports life. The right to life would be rendered meaningless under such circumstances. Second, the right to life is directly violated where, in the most egregious cases involving environmental abuses, persons are physically injured or even killed.<sup>26</sup>

### **The Impacts of TNCs to the Protection of Environment and Human Rights in the Host States**

The impacts of TNCs in the host states may positive and negative. For instance, TNCs in host states often violate human rights and environmental protection directly or indirectly. They operate in a wide range of pollution-intensive and hazardous industries that have products or processes that may harm the environment or negatively impact human health. Moreover, through FDI processes have shifted environmental pollution problems increasingly to developing and transitional countries.<sup>27</sup> Ideally, TNCs should have a better record in relation to environmental, health, and safety concerns than local or state-owned enterprises in developing countries, because TNCs are larger than local firms, they can more readily absorb

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Rights and the Graft Declaration of Principles on Human Rights and Environment”, *Journal Environmental Law & Practice* Vol. 13, 2003, p. 112.

<sup>25</sup> William Onzivu, “International Environmental Law, the Public Health, and Domestic Environmental Governance in Developing Countries”, *American University International Law Review*, Vol. 21, 2006, p.605.

<sup>26</sup> The International Human Rights Committee examined environmental threats to the right to life under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR).

<sup>27</sup> .Melanne Andromedea Civic, “Discovering and Enforcing A Human Right to Environmental Protection”, 1997, *Journal Natural Resources & Environmental Law*, Vol. 13, p. 124.



the costs of environmental controls and employ more qualified managers and better skilled workers.<sup>28</sup>

Moreover, TNCs should recognise the value of environmental management developments abroad and to have access to and the capacity to transfer modern environmental technology to their operations in developing countries. Hence, the performance of TNCs may create a good image to their consumers. However, in practice, not all the TNCs have a good performance. Since, several factors may induce or enable TNCs to avoid national controls of environmental, health and safety matters, particularly in developing countries.<sup>29</sup>

On the other hand, in the case of protection of human rights, TNCs should be able to prevent or actively support the protection of human rights in the host states due to the great influence of TNCs in the host states. However, in reality, TNCs does not support the protection of human rights in the host states, but it is very often TNCs uses the government of the host states to support their interest by violating human rights in the host states directly or indirectly.<sup>30</sup> In addition, TNCs search for the most reasonably priced manufacturing and operation sites, they are inevitably drawn to countries that offer inexpensive labour and in which labour health, and other basic human rights go unenforced. Consequently, TNC business activity affects the full range of human rights and does so in a wide range of countries and industries. Thus, the individuals affected are diverse and including employees, consumers, and the communities that surround such businesses.

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<sup>28</sup> David Graham and Ngaire Woods, "Making Corporate Self-Regulation Effective in Developing Countries". <http://www.elsevier.com/locate/worlddev>, accessed on 29 August, 2010.

<sup>29</sup> It is no doubt that TNCs have the potential for introducing environmentally sound technologies in host developing countries, their actual environmental impact will, however, depend on many factors, including: i) the sectors in which they invest, the age of their facilities, their strategies -i.e., market, resource, efficiency or asset-seeking and the degree of export orientation of the investment (specially when the destination market is "environmentally-sensitive"); ii) their corporate environmental policies, their approach towards environmental management, and the magnitude and type of their linkages with domestic suppliers, clients and competitors; iii) the host country environmental regulations and their degree of enforcement and the role played by stakeholder groups such as nongovernmental organizations, consumers, workers and local communities; iv) home country regulations regarding the responsibility of MNCs shareholders for their overseas operations and the role played by third party lenders -for example, international financial institutions- in -reinforcing environmental standards as a condition of lending. See, Daniel Chudnousky and Andres Lopez, "TNCs and the Diffusion of Environmentally Friendly Technologies to Developing Countries", <http://www.fund-on/org.ai/Descargas/tncs.pdf>, accessed on 25 July, 2010.

<sup>30</sup> Joshua P.Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Rights to A Healthy Environment", *Boston University International Law Journal*, Vol. 15, 1997, p. 262.

### Violation of Human Rights Protection by TNCs in the Host States

The violations of human rights by TNCs may occur in a variety of ways, such as directly violating human rights, assisting in violations, failing to prevent violations, remaining silent about violations, or even operating in a state that violates human rights.<sup>31</sup> Hence, the level of an TNCs' responsibility in these varying situations differs. Indeed, TNCs violate a wide range of human rights - from civil and political to social, economic, and cultural - and could remain unaccountable for their conduct by exploiting the loopholes of existing regulatory regimes.

For instance, forced relocation, forced labour, rape, torture and murder: these were the charges that Burmese peasants brought against the U.S. oil company, Unocal, in 1996.<sup>32</sup> Burma's Yadana gas field, located in the Andaman Sea about 60 kilometers off Burma's southwest coast, was developed in 1992 under a conventional "production sharing" contract between Unocal (28.26%), Total FinaElf, the project operator (31.24%), the state-owned oil companies of Thailand (PTT-EP) (25.50%), and Burma (MOGE) (15%). The human rights abuses discussed here occurred along the 65-kilometer onshore Burmese section of the \$1 billion pipeline constructed in 1998 to carry the gas 649 kilometers across Burma into Thailand.<sup>33</sup> However, in order to protect the citizens of these countries, to promote long-term sustainable development, and to legitimize corporate-led globalization, it is submitted that human rights concepts must be applied to these business projects.

Certainly, international human rights laws safeguard rights to life, liberty, and physical integrity by prohibiting actions that are injurious to the inherent dignity and security of the human being. Such actions include war crimes, genocide, crimes against humanity, arbitrary killing, torture, and other cruel, inhuman, or degrading treatment or punishment.<sup>34</sup> While at international law the duties not to engage in

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<sup>31</sup> Rebecca M. Bratspies, "Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities", [http://www1.cuny.edu/law/faculty-staff/R\\_Bradt\\_SpiesPubs/organsociety.pdf](http://www1.cuny.edu/law/faculty-staff/R_Bradt_SpiesPubs/organsociety.pdf) accessed on 27 August, 2010.

<sup>32</sup> Simon Chesterman, "The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations-the Case of Norway's Sovereign Wealth Fund", <http://lsr.nellco.org/nyu-plltwp/84>, accessed on 24 September, 2010.

<sup>33</sup> Tarek F. Maassarani, Margo Talgenhorst Dracos and Joanna Pojkowska, "Extracting Corporate Responsibility: Toward a Human Right Impact Assessment", *Cornell International Law Journal*, Vol. 40, 2007, p. 136. See also, "Benjamin C. Fishman, "Binding Corporations to Human Rights Norms Through Public Law Settlement", *New York University Law Review*, Vol. 81, 2006, p. 1434.

<sup>34</sup> Caroline Kaeb, "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks", *Northwestern University Journal of International Human Rights*, Vol. 6, 2008, p. 336. See also, Glen Kelly, "Multilateral Investment Treaties: A Balance Approach to Multilateral Corporations", *Columbia Journal of Transnational Law*, Vol. 39, 2001, p. 493.

such criminal acts are not directly imposed on corporations, though, they may be with respect to their officers and/or employees they can be and are imposed indirectly, by way of states passing on their obligations through national law and policy.<sup>35</sup> It is in this manner that the UN's Norms for Corporations hold that transnational corporations and other business enterprises, their officers and persons working for them are obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments<sup>36</sup>.

In most cases, these duties would focus on the matter of corporate complicity because businesses are more likely to be complicit (with their state partner) in the commission of war crimes, genocide, and crimes against humanity, rather than directly to commit those crimes themselves. As the UN Norms stipulate then, TNCs should have the obligation to avoid complicity in supplying products or services or providing financial or other material support, when they are aware that such conduct would further the design to commit war crimes, genocide, and crimes against humanity.<sup>37</sup>

### **Violations of Environmental Protection by TNCs in the Host States**

TNCs activities in the host states often cause environmental degradations. For example, in Ecuador, TNCs that extract oil from the ground have poisoned ecosystems, thereby endangering the welfare of indigenous people who are dependent on those ecosystems.<sup>38</sup> Moreover, TNC activities most commonly identified as raising environmental concerns are the export of harmful products and the export of hazardous processes or technologies.<sup>39</sup> Indeed, TNCs export hazardous processes by establishing highly-polluting industries outside home countries, thus creating potential problems with pollution control, disposal of hazardous wastes, workers' health and safety, and the risk of major accidents, such as the Union Carbide Chemical Disaster.

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<sup>35</sup> Carlos M. Vazquez, "Direct Vs. Indirect Obligations of Corporations under International Law", <http://www.columbia.edu/cu/jtl/vol-43-3-tiles/vazquez.pdf>, accessed on 26 August, 2010.

<sup>36</sup> Kendra Magraw, "Universally Liable? Corporate-Complicity Liability under the Principle of Universal Jurisdiction", *Minnesota Journal of International Law*, Vol. 18, 2009, p. 464.

<sup>37</sup> Tracy M. Schmidt, "Transnational Corporate Responsibility for International Environmental and Human Rights Violations: Will the United Nations Norms Provide the Required Means?", *California Western International Law Journal*, Vol. 36, 2005, p. 227-228.

<sup>38</sup> Lauren A. Dellinger, "Corporate Social Responsibility: A Multifaceted Tool to Avoid Alien Tort Claims Act Litigation While Simultaneously Building A Better Business Reputation", *California Western International Law Journal*, Vol. 40, 2009, p. 65-66.

<sup>39</sup> Judith Kimmerling, "International Standard in Ecuador 's Amazon Oil Field", *Columbia Journal of Environmental Law*, Vol. 26, 2001, p. 297.

Furthermore, primary industry activities also impact biodiversity and can carry serious consequences for indigenous peoples.

While all of these considerations may have induced TNCs to perform above the levels of their local counterparts in developing countries, there still appears to be a gap between local and home country performance which is reflected in a failure to introduce new technologies to affiliated plants in developing countries. It has been alleged that TNCs are engaged in dumping outmoded environmental technologies in developing countries such as, in *Beanal v. Freeport-McMoran*,<sup>40</sup> A group of Indonesian citizens filed a class action suit under ATCA against a U.S. mining company claiming that mining operations in Irian Jaya, Indonesia, caused environmental torts, human rights abuses, and cultural genocide.<sup>41</sup> Thus, TNCs who have significant political power and authority should entail responsibility and liability, specifically direct liability for environmental degradations.

### **The Law Applied to TNCs**

Due to the facts that TNCs violate human rights and caused environmental damage in the host states cannot be disregard. The impacts of their conducts cause suffering to the people in the host states. Thus, TNCs shall be responsible to their conducts. However, it is difficult to enforce liability to TNCs to be responsible for their violations of human rights and the environment, if there principles of the voluntary international instruments, such as Code of Conduct, Global Compact and UN Norms have not yet recognised as customary international law. Hence, it is very important to exhaust local laws.

The enforcement of local law can promote and enhance environmental, cultural, social and economic sustainability, and also protection of human rights, if the government in the host states have a great awareness to protect the environment and human rights. However, even the best local responses will ultimately fail if the host states situate the rights of investors above those of communities. To be effective, local responses need to be embedded within an international framework dedicated to the promotion and enhancement of life values. The democratization of globalisation

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<sup>40</sup> Shelly P. Battram, "International Transfer of Hazardous Technology and Substances: Caveat Emptor or State Responsibility? The Case of Bhopal, India", *American Society of International Law Proceedings*, Vol. 79, 1985, p. 303.

<sup>41</sup> Peggy Rodgers Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" *Colorado Journal of International Environmental Law & Policy*, p. 195.

and the democratisation of local spaces should thus be seen as symbiotic and mutually reinforcing processes. The social and environmental consequences of corporate practices should no longer be subordinated to the quest for profit.<sup>42</sup>

### **International Instruments**

International legal Instrument dealing with TNC issues are channeled in two ways: (i) through binding treaties in which States entities are the direct addressees of rights and obligations, but which directly affect and have domestic impact upon TNC operations; and (ii) "Soft law" that is directly addresses to TNCs.<sup>43</sup> Examples of the former include the vast majority of International Labour Organisation (hereinafter ILO) Conventions, Bilateral Investment Treaties ( hereinafter BITs), industrial pollution related treaties, and others.<sup>44</sup> While, examples of soft law include the Organisation for Economic Co-operation and Development (hereinafter OECD) Guidelines, the Un Global Compact and the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (hereinafter Un Norms), the Preamble to the 1948 Universal Declaration of Human Rights (hereinafter UDHR), the Rio Declaration on Environment and Development.<sup>45</sup> Although, typically, these guidelines are not directed at corporations themselves (rather, they are directed at states whose task it is to apply them to the corporations within their jurisdiction).

The OECD's 1976 Guidelines for Multinational Enterprises (as revised in 2000) recommend that enterprises respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.<sup>46</sup> Specifically, they recommend that enterprises contribute to policies of non-discrimination with respect to employment, to the effective abolition of child labour, and to the elimination of all forms of force or compulsory labour. However, the guidelines are not legally mandatory to OECD government or OECD-based

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<sup>42</sup> *Ibid.*

<sup>43</sup> Neil.A.F Popovic, "In Pursuit of Environmental Human rights Commentary on the Draft Declaration of Principle on Human Rights and the Environment", *Columbia Human Rights Law Review*, Vol. 2, 1996, p. 497-498.

<sup>44</sup> Edwin C. Mujih, "Co-Deregulation of Multinational Corporation Operating in Developing Countries: Partnering Against Corporate Social Responsibility?", *African Journal of International and Comparative Law*, Vol. 16, 2008, p. 252-253.

<sup>45</sup> Ilias Bantecas, "Corporate Social Responsibility in International Law", *Boston University of International Law Journal*, Vol. 22, 2004, p. 311.

<sup>46</sup> Rebecca Kathleen Atkins, "Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social responsibility", *Vanderbilt Journal of Transnational Law*, Vol. 40, 2007, p. 248.

Company.<sup>47</sup> Hence the guideline is lack of enforcement either, because it is voluntary in nature.

The UN Global Compact is another soft law instrument directed at TNCs. Though it is not strictly a code of conduct, its object is to encourage businesses to “embrace and enact” nine core principles<sup>48</sup> relating to respect for human rights, labour rights, and protection of the environment, both through their individual corporate practices and by supporting complementary public policy initiatives.<sup>49</sup> However, again, the lack of independent monitoring and enforcement<sup>50</sup> via sanctions highlights the limited ambition, and therefore, impact, of this initiative in providing protection against corporate abuse of human rights.<sup>51</sup> It is true that the UN expressly acknowledges that it has neither the mandate nor the capacity to monitor and verify corporate practices.<sup>52</sup> Yet, there is some concern as to the credibility of the Global Compact given that it is quite possible for TNCs to continue to violate human rights while enjoying the status of signatory to the Global Compact.

Finally, the UN Norms are phrased in mandatory terms and apply not only to transnational corporations, but also to other business enterprises, as well as their subcontractors and suppliers.<sup>53</sup> The UN Norms thus go many steps beyond previous guidelines, further evincing expanding notions of corporate liability. Like all of the instruments discussed above, the UN Norms are presented in the form of

<sup>47</sup> Edwin C. Mujih, *Op. Cit.*, p. 254.

<sup>48</sup> Sean D Murphy, “Taking Multinational Code of Conduct to the Next Level”, *Columbia Journal of Transnational Law*, Vol. 43, 2005, p. 400.

<sup>49</sup> A Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principle, [http://www.unglobalcompact.org/content/Public\\_Documents/gcguide.pdf](http://www.unglobalcompact.org/content/Public_Documents/gcguide.pdf), accessed on, 10 October 2010. These principles were centered generally around well-accepted standards of human rights, labour rights, and environmental issues, derived from the UN Declaration of Human Rights, the International Labour Organization Declaration on Fundamental Principles and Rights at Work, and the Rio Declaration on Environment and Development: (i) To support and respect the protection of internationally proclaimed human rights; (ii) To avoid complicity in human rights abuses; (iii) To uphold freedom of association and the effective recognition of the right to collective bargaining; (iv) To eliminate all forms of forced and compulsory labor; (v) To abolish effectively child labor; (vi) To eliminate discrimination with respect to employment and occupation; (vii) To support a precautionary approach to environmental challenges; (viii) To promote greater environmental responsibilities; and (ix) To encourage the development and diffusion of environmentally friendly technologies.

<sup>50</sup> Rebecca Kathleen Ahkins, *Op. Cit.*, p. 241.

<sup>51</sup> Surya Deva, “Global Compact: A Critique of the UN’s ‘Public Private’ Partnership for Promoting Corporate Citizenship”, *Syracuse Journal of International Law & Comparative*, Vol. 34, 2006, p. 110. See also, Lisbeth Segerlund, “Thirty Years of Corporate Social Responsibility within the UN: From Code of Conduct to Norm”. [http://archive.sgir.cu/upload/Segerlund\\_thirty\\_years\\_of\\_corporate.pdf](http://archive.sgir.cu/upload/Segerlund_thirty_years_of_corporate.pdf), accessed on 22 August, 2010.

<sup>52</sup> Evaristus Osheonebo, “The UN Global Compact and accountability of Transnational Corporations Separating Myth from Reality”, *Fla.J.Int’l L.*, Vol.19 2007, p. 9-10.

<sup>53</sup> Cynthia A. William, “Civil Society Initiatives and Soft Law in the Oil and Gas industry”, *New York University Journal of International Law and Politiv*, 2004, p. 473.

recommendations and guidelines that create no legally binding obligations. Although the UN Norms<sup>54</sup> may help establish customary law, provide guidance to courts trying to determine the extent of corporate norms, or serve as the basis for later treaties, they do not have the same effect that binding obligations have. A binding consensus of corporate obligations has proven to be difficult, but the Ruggie Report provided a framework in an effort to facilitate that goal.<sup>55</sup>

### National Regulation

Reviewing the soft law instruments of the OECD, the ILO, and the UN's Global Compact, and UN Norms<sup>56</sup> one might conclude that in practice they have achieved little of substance, due largely to their non-binding nature and the lack of meaningful implementation mechanisms and enforcement.<sup>57</sup> However, they have at least demonstrated an increased willingness on the part of certain multilateral institutions to formulate some human rights standards against which the conduct of TNCs can be measured. Indeed, there is a possibility that such soft-law initiatives may be elevated to hard-law through the formation of customary international law. However, it may be time-consuming process in a world of diverse interests to recognise soft law international instruments to be hard law.<sup>58</sup> It is almost inevitable that there will be adjournment before the law can properly respond to human rights abuses by TNCs, in which case there will be victims left without legal redress in the interim.

Thus, in order to accomplish the legal *lacuna* in international law, it is essential to enforce national law properly. The host states needs to enforce the domestic regulation of environmental practices and protection of human rights deal with the conducts of

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<sup>54</sup> Michael K Addo, "Human Rights Perspective of Corporate Groups", *Connecticut Law Review*, Vol. 37, 2005, p. 678.

<sup>55</sup> Furthermore, six different sets of obligations can be deduced from the general obligations of the UN Norm that companies shall have the responsibility: 1) to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses and 2) to ensure that they do not benefit directly or indirectly from those abuses; 3) to refrain from undermining efforts to promote and ensure respect for human rights; 4) to use their influence to promote respect for human rights; 5) to assess their human rights impacts; 6) to avoid complicity in human rights abuses. See, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. See also, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003.

<sup>56</sup> David Kinley, Justine Nolan and Natale Zerial, "The Politics of Corporate social Responsibility: Reflections on the United Nations Human rights Norms for Corporation", [http://www.unctad.org/en/docs/iteirf\\_2005\\_en.pdf](http://www.unctad.org/en/docs/iteirf_2005_en.pdf), accessed on 24 August, 2010.

<sup>57</sup> Klaus M. Leisinger, "Business and Human Rights", [http://www.UNglobalcompact.Org/docs/news\\_events/9.6/corpresforhr-kl.pdf](http://www.UNglobalcompact.Org/docs/news_events/9.6/corpresforhr-kl.pdf), accessed on 24 August 2010.

<sup>58</sup> Su ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law", *Columbia Journal of Transnational Law*, Vol. 38, 2000, p. 608.

TNCs properly. Since, the enforcement of national law by host states is perhaps still the most feasible and desirable method of controlling TNCs, although it poses many problems in developing countries.

### **Enforcing Regulations by the Host States**

Due to the fact, that the international instruments deal with protection of human rights and environmental right are not effective, it is essential to exhaust national regulations to be enforced to TNCs. Since, the fact that every state has jurisdiction over crimes committed in its own territory is a universally accepted maxime.<sup>59</sup> However, it should take into account that the exhaustion of national regulations in order to protect human rights and the environment face many hurdles. *Firstly*, in some instances, the states themselves may be abusers of human rights and protection of the environment, enjoining TNCs into complicit violation against local populations. *Secondly*, the states may have little or no power against the TNCs due to the strength and position of TNCs, and perhaps even the terms of the bilateral investment agreement or trade rules under which the TNC has gained access to the host state's territory and market.<sup>60</sup>

Alternatively, the host state which engaged in providing incentives to a TNC for its FDI is now caught in an awkward position of having to take action to effectively regulate or perplex activities related to the particular FDI initiative. *Thirdly*, the host state may be the beneficial owner of a partner operating in a joint venture with the TNC, thereby compromising the host state's real ability to hold the TNC accountable for any violations of human rights.<sup>61</sup> Finally, the host state may simply lack the resources to engage in any action against the TNC, either because of lax environmental or labour standards which contributed to the incident at hand, or the lack of legal or judicial infrastructure to adequately try a TNC.<sup>62</sup>

It is submitted that is appropriate to strengthen the national environmental regulations and human rights regulations in the host states. Thus, human rights approach to address environmental degradation issues caused by foreign investment

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<sup>59</sup> David Kinley and Junko Tadaki, n, 50, p. 942.

<sup>60</sup> Viljam Emstrong, "Who is Responsible for Corporate Human Rights Violation?", <http://web.abo.fi/institut/imr/nortalville.pdf>, accessed on 27 August, 2010.

<sup>61</sup> Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means Holding Private Actors Accountable for Human Rights", *Melbourne Journal of International Law*, Vol.5, 2004, p. 19-21.

<sup>62</sup> *Ibid.*



must be incorporated in the national regulations. Governments will be bound to create pressure on corporations if they are under public assessment.<sup>63</sup> Subsequently, if the host states want to protect human rights and the environment by empowering the national regulations, the host states must change their behaviour in increasing economic development, such as the investment law should be in accordance with the sustainable development principle and in accordance with international instruments of human rights law, such as the UDHR, ICCPR, Global Compact, and the UN Norms. Thus, the sustainability of the economic development can be maintained without violating human rights and the environment.

Consequently, in order to take benefit of the international instruments in protecting human rights and the right to enjoy the healthy environment in the host states, the government of the host states may incorporate the provision international instruments into investment contract which legally binding to the TNCs. By incorporating the international instrument in the clause of the contract will change the status of the international instruments from soft law become hard law. In essence, if the host states want to enforce national regulations to protect human rights of their citizens, the host states shall embody all the international human right instruments and environmental instruments into national regulations. However, the national regulations needs to be enforced continuously and consistently. If regulations are rarely enforced, the regulation are usually simply ignored, for instance the Nigeria's regulations.<sup>64</sup>

Additionally, it is very important to gain public awareness of the host state citizens to augment their knowledge deal with human rights and protection of environment. If the citizens aware of their basic human rights and the rights to enjoy the healthy environment, they will affect the law enforcement of the host states. Thus, public participation and willingness of the government are the factors that may be used to enhance human rights and environmental protection by the host states from abusing by TNCs.

## Conclusion

TNCs have a great power to affect a state's social and economic policies. A TNC could use its power to positively influence a country's international human

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<sup>63</sup> Peggy Rodgers Kalas, "International environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law & Policy*, Vol. 12, 2001, p. 192.

<sup>64</sup> Zakia Afrin, *Op. Cit.*, p. 224.

rights practices and the protection of the environment by refusing to invest in or deal with countries violating human rights and environment standards. However, in practice, TNCs often violate human rights and the environment in the host states directly or indirectly. It has been submitted that in most of the major cases of reported corporate human rights abuse, the host state has been involved. Indeed, TNCs violations on the human rights and environmental protection cause a great suffering to the victims and adverse impacts to the environment which are proven by many cases in the past. Due to the facts that TNCs is not subject of international law, TNCs in a certain extent are able to escape from direct responsibility to the human rights violation and environmental protection.

In order to protect human rights and environment in the host states, such as Code of Conduct, UN Global Compact and UN Norms are lack of legal enforcement mechanism and they are not legally binding. Thus, it is indispensable the role of the host states to enforce national law to the TNCs that violate human rights protection and environment. Consequently, the enforcement requires a great commitment and willingness of states as the primary actors of international human rights law and international environmental law to enforce the instruments through international and national mechanism. Besides that, it is evident that the elements of international custom, uniform practice exist to bind TNCs to recognised international human rights and environmental standards in their international operations. Thus, the international instruments can be used to strengthen the legal basis of the host states to enforce the national law.

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