The Implications of the Global Compact Human Rights Principles for Multinational Enterprises in Malaysia

Thesis submitted for the degree of Master of Philosophy in Law at the University of Leicester

By

Nisar Mohammad AHMAD B.A (Hons), LL.M
School of Law
University of Leicester

September, 2010
DECLARATION

I declare that this work is entirely my own which has not previously been published for any assessed qualification. I also declare that all material which is not my own has been appropriately quoted and referenced.

Nisar Mohammad AHMAD

29th August 2012
THE IMPLICATIONS OF THE GLOBAL COMPACT HUMAN RIGHTS PRINCIPLES FOR MULTINATIONAL ENTERPRISES IN MALAYSIA

Nisar Mohammad AHMAD

ABSTRACT

As a developing economy, Malaysia is at the crossroads between fostering its economic growth and protecting the human rights of its own citizens. Given the inadequacies in human rights regulations, the corporate-related human rights violations have become ubiquitous. Generally, the level of understanding among business entities in Malaysia of their human rights and social responsibilities and their commitment to pursue such responsibilities is still at infancy stage. There is a need to explore the use of soft laws through social non-judicial enforcement as a complementary method of remedy. The objective of this thesis is thus to present the UN Global Compact (GC) human rights principles as a valuable mechanism for enhancing the human rights compliance of multinational enterprises (MNEs) in Malaysia. The GC is a UN initiative aimed at garnering support from non-state actors, especially the MNEs, in the pursuit of good corporate citizenship. Based on the underlying factors contributing to corporate human rights violations and with the special reference to John Ruggie’s ‘Protect, Respect and Remedy’ Framework, this thesis advocates the idea of complementing the traditional judicial-based enforcement with a non-judicial social enforcement strategy. The thesis explores the extent to which the MNEs in Malaysia can benefit from the Compact’s human rights principles in enhancing their human rights compliance. It illustrates the methods of applying GC principles within the state-based institutions as well as within the MNEs business structure. The research draws upon the experience by human rights and business entities in Malaysia namely the National Human Rights Commission (SUHAKAM), Bursa Malaysia and Sime Darby Berhad, especially their efforts in putting human rights and social responsibilities within the practical aspects of their respective institutions. The GC, in relation to its human rights principles has not been explored previously in context of MNEs operation in Malaysia. Both qualitative and quantitative methods have been used for this research. The findings of the study is that the non-judicial social enforcement strategy embodied in the GC soft law principles can be used to remedy corporate human rights violations and invariably contribute to the creation of a socially-responsible and sustainable business environment in Malaysia.
DEDICATION

To my beloved father - Ahmad Yusuf,

wife – Nooraini,

and children,

Naiemullah, Najihah and Najwan
# TABLE OF CONTENTS

Declaration ii  
Abstract iii  
Dedication iv  
Table of Contents v  
Acknowledgements ix  
List of Abbreviations xi

## INTRODUCTION

1. Research Overview 1  
2. Problem Statement 7  
3. Research Objectives 9  
4. Research Questions 10  
5. Significance of the Study 11  
6. Scope and Limitations 11  
7. Research Methodology 14  
8. Chapter Break-down 16

## CHAPTER 1 : THE COMPLEX RELATIONSHIP BETWEEN BUSINESS AND HUMAN RIGHTS

1.1 Introduction 20  
1.2 The Rise of Multinational Enterprises and the Global Economy 21  
1.2.1 Definition of MNE 21  
1.2.2 The Key Landmarks in Cross-Border Economic Activities 24  
1.2.3 The birth of modern MNEs 25  
1.3 The growth of Multinational Enterprises in Malaysia 28  
1.4 Human rights as Part of Business Responsibilities 32  
1.5 MNEs and Human Rights: Between Friends and Foes 34  
1.5.1 MNEs as Direct Violators of Human Rights 36  
1.5.2 MNEs' Complicity in Human Rights Abuses 42  
1.5.3 MNEs as Promoters of Human Rights 43  
1.6 Conclusion 45

## CHAPTER 2 : CORPORATE HUMAN RIGHTS VIOLATIONS IN MALAYSIA

2.1 Introduction 47  
2.2 Understanding the Context of Corporate Human Rights Violations in Malaysia 49
2.3 Case studies

2.3.1 Bakun Hydro-Electric Project in Bakun Dam, Sarawak 52
2.3.2 Murum Hydro-Electric Project in Murum Dam, Sarawak 56
2.3.3 Plantation and Logging Projects in Ulu Belaga, Sarawak 61
2.3.4 Violation of the Rights of Indigenous People in Peninsular Malaysia 64
2.3.5 Violation of Worker’s Rights 66

2.4 The Contributing Factors

2.4.1 The issues of ‘enforcement and compliance’ in Corporate Human Rights Violations 70
2.4.2 The polemic on the scope of MNEs’ human rights responsibility 77
2.4.3 Lack of Awareness among Business Entities of their CSR / human rights responsibilities 79

2.5 Conclusion 86

CHAPTER 3 : INADEQUACIES IN INTERNATIONAL AND NATIONAL REGULATIONS OF HUMAN RIGHTS VIOLATIONS BY MNEs 89

3.1 Introduction 89

3.2 The Context of MNE’s Human Rights Regulation under International Law 91

3.2.1 Direct Obligation - MNE’s Responsibility 94

3.2.1.1 Host State Level 94
3.2.1.2 Home State Level 95
3.2.1.3 Regional and International Levels 98

3.2.2 Indirect Obligation – State Responsibility 102

3.3 Existing Malaysian Laws Governing Companies 107

3.3.1 Human Rights in the Federal Constitution of Malaysia 108

3.3.2 Avenues for Regulation 109

3.3.2.1 Contract and Tort Law 109
3.3.2.2 Criminal Law 110
3.3.2.3 Employment Law 111
3.3.2.4 Environmental Law 112
3.3.2.5 Consumer Protection Law 115

3.4 Inadequacies in International and National Human Rights Standards for MNEs 116

3.4.1 The polemic on MNE’s Human Rights obligations and legal personality 118

3.4.1.1 MNE as an ‘Organ of Society’ 119
3.4.1.2 MNE’s Legal Personality 124
### 3.4.2 The ‘transnational’ nature of MNEs and the manipulative ‘forum-non-conveniens’ doctrine

- Page 128

### 3.4.3 The State’s Limitation in Applying Extra-territorial Jurisdictions

- Page 130

### 3.4.4 The Weaknesses of domestic legal and human rights standards

- Page 132

### 3.4.5 The issue of Ratification Status of International Human Rights Standards by Malaysia and its Impact

- Page 135

### 3.5 Using ‘soft laws’ to address loopholes enforcement and compliance issues

- Page 137

### 3.6 Advantages of Relying on Non-Regulatory Human Rights Approach

- Page 140

### 3.7 Conclusion

- Page 141

---

### CHAPTER 4: THE GLOBAL COMPACT: A “SOFT LAW” MECHANISM FOR ENHANCING HUMAN RIGHTS COMPLIANCE BY MNEs IN MALAYSIA

- Page 144

#### 4.1 Introduction

- Page 144

#### 4.2 Global Compact: The UN’s attempt to Control Corporate Behaviour

- Page 146
  - 4.2.1 Overview
    - Page 146
  - 4.2.2 Objectives and Advantages
    - Page 148
  - 4.2.3 How does the Global Compact Work?
    - Page 153
  - 4.2.4 Challenges and Critiques
    - Page 156
  - 4.2.5 Contribution to Global Governance
    - Page 157

#### 4.3 Soft Laws as a Complementary to Hard Laws

- Page 160
  - 4.3.1 Global Compact as a form of Soft Laws
    - Page 165

#### 4.4 Human Rights and the Global Compact

- Page 166
  - 4.4.1 The Scope of Human Rights in the Global Compact
    - Page 168
  - 4.4.2 Principle 1 – *Internationally-proclaimed Human Rights* and the MNEs’ ‘Sphere of Influence’
    - Page 174
  - 4.4.3 Principle 2 – MNEs’ Complicity in Human Rights Abuses
    - Page 179
  - 4.4.4 Institutionalization of GC human rights principles into business management
    - Page 182
  - 4.4.5 The Global Compact Network Malaysia
    - Page 186

#### 4.5 Ruggie’s ‘Protect, Respect and Remedy’ Framework as an Authoritative Framework for Global Compact

- Page 188
  - 4.5.1 State’s Duty to Protect Human Rights of its Citizen
    - Page 191
  - 4.5.2 Corporate Responsibility to Respect Human Rights
    - Page 192
  - 4.5.3 The Need for Greater Access to Effective Remedy
    - Page 193

#### 4.6 Conclusion

- Page 194
CHAPTER 5 : THE APPLICATION OF THE GC PRINCIPLES AS A SOCIAL / NON-JUDICIAL ENFORCEMENT AND COMPLIANCE STRATEGY 197

5.1 Introduction 197

5.2 Non-judicial Social Enforcement of Human Rights Standards 199
   5.2.1 The ‘social’ nature of the enforcement 199
   5.2.2 Means of Implementing Social Enforcement 200
   5.2.3 Advantages of relying on Non-judicial social enforcement mechanism 208

5.3 Part A - The GC Application: Institutional Aspect 209
   5.3.1 Initiatives by the National Human Rights Commissions (SUHAKAM) 210
      5.3.1.1 Round table discussions towards National policy 212
      5.3.1.2 Technical Committee on Social Responsibility (TCSR) 214
      5.3.1.3 Meetings and dialogues 215
      5.3.1.4 Regional partnerships 217
      5.3.1.5 Other Initiatives 219
   5.3.2 The CSR Framework of Bursa Malaysia 219
   5.3.3 Initiative by CSR Malaysia 223

5.4 Part B - The Corporate Perspective of GC Application: The Case of Sime Darby Berhad 224
   5.4.1 The Company's Relevance with Research Problem 225
   5.4.2 Area of Operation 226
   5.4.3 Multinational Dimension 229
   5.4.4 Nature of CSR / human rights Initiatives 230

5.5 Conclusion 237

CHAPTER 6 : THE WAY FORWARD: TOWARDS NATIONAL HUMAN RIGHTS STANDARDS FOR BUSINESS & MNEs IN MALAYSIA 241

6.1 Introduction 241
6.2 The novelty of Research Findings 242
6.3 Looking Ahead 251
6.4 Conclusion 253

CHAPTER 7 : CONCLUSION 255

Appendices 259
Bibliography 277
List of Cases 301
List of National Instruments 303
List of International Treaties and Instruments 305
ACKNOWLEDGEMENTS

First and foremost, all praises are due to Allah the almighty whose endless blessings and guidance have given me the opportunity and ability to undertake and accordingly finish this research. Indeed, there are a lot of people who have made this extra-ordinary journey a lot easier. Firstly, I would like to express my deep and sincere gratitude to my supervisors, Professor Mads Andenas and Dr. Priscilla Schwartz for their guidance, advice, support and encouragement. Both are brilliant and I feel privileged to have worked with them. Thank you also to other members of staffs at the School of Law, University of Leicester, especially Prof. Mark Bell (Director of Research) and Mrs Jane Sowler (Postgraduate Research Administrator) for their unceasing readiness in helping me getting through this research. Unforgettably, I am extremely indebted to my wife Dr. Nooraini Abdullah and children, Naiemullah and Najihatussolehah for being my great supporters and best friends. They are part and parcels of me whose lives have been dragged into my study journey, sharing together all the ups and downs, the tears, the laugh, the sweat and the hardships with me. They have been there, through thick and thin, in giving me moral support and valuable motivations to face whatever doldrums occurred during this tough period.

My special thanks also go to my father, Haji Ahmad Yusuf for the valuable upbringing since the death of my mother when I was not even one year old. He is a man of principle who is always optimistic with his children’s future despite all the difficulties. I admit, without his sacrifices and hardships, I would have not been able to reach this level. Many thanks also to my stepmothers – Mak Sabariah and Mak Jah as well as my parents in-law Haji Abdullah Ahmad and Hajjah Sharifah Saad for their endless support. I am also grateful to have supportive siblings; namely, my full siblings; Abg Ghani/Kak Ma, Kak Idah/Abg Man and Abg Din/Kak Min, my maternal half-siblings; Kak Hasna/Abg Zack and Abg Halim/Kak Sahata and my paternal half-siblings; Kak Zauyah/Abg Tayib, Abg Asri/Kak Fatimah, Adik-adik Najwa/Muhamad, Safuan/Hanis, Muhamad/Rehan, Suhimi/Najwa, Najib, Azzam, Siti Fitriyyah, Fauzan, Munirah dan Hajar. This big family has always made me motivated while facing hard times. Not to forget my thanks also go to other
family members, in-laws and friends for the support, friendship and encouragement – especially my Leicester Malaysian friends – MASLEICS (whom I treated as much as my family members while undertaking my PhD studies).

Indeed, my studies would also not have been possible without the support from my sponsor - the Ministry of Higher Education, Malaysia (MOHE) and employer – Universiti Sains Islam Malaysia (USIM). My special thanks go to USIM’s key people, Prof. Emeritus Tan Sri Dr. Abdul Shukor Hj. Husin - the former Vice-Chancellor, Prof. Dato’ Dr. Muhammad Muda - the current Vice-Chancellor, Prof. Dato' Dr. Mohamed Asin Dollah – Deputy Vice Chancellor (Students Affairs and Alumni), Prof. Dr. Musa Ahmad – Deputy Vice Chancellor (Academic and Internationalization), Prof. Dato' Dr. Mohamad Hj. Alias – former Deputy Rector / Deputy Vice Chancellor, Mr. Muhammad Haizuan Rozali – Registrar, Prof. Dr. Hj. Abdul Samat Musa - former Dean of Faculty of Syariah and Law and Dr. Yasmin Hanani Mohd Safian - Acting Dean of Faculty of Syariah and Law. Not to forget, thanks also to staff members at Scholarship Division, MOHE and Study Leave Unit, USIM – En. Asri Husain, En. Md. Ishah Abd Rahman etc for their understanding in meeting the necessary needs for the accomplishment of this research. Finally, my special thanks also go to Dr. Haniff Ahamat and Dr. Halyani Hassan of the IIUM as well as my faculty-mates at FSU and other faculties and departments in USIM for all the support and encouragement.
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AI</td>
<td>Amnesty International</td>
</tr>
<tr>
<td>APF</td>
<td>Asia Pacific Forum</td>
</tr>
<tr>
<td>ATCA</td>
<td>Alien Tort Claims Act</td>
</tr>
<tr>
<td>BCSDM</td>
<td>Business Council for Sustainable Development Malaysia</td>
</tr>
<tr>
<td>BMF</td>
<td>Bruno Manser Fund</td>
</tr>
<tr>
<td>CMS</td>
<td>Cahya Mata Sarawak Bhd.</td>
</tr>
<tr>
<td>COAC</td>
<td>Centre for Orang Asli Concerns</td>
</tr>
<tr>
<td>CoP</td>
<td>Communication on Progress</td>
</tr>
<tr>
<td>CPO</td>
<td>Crude Palm Oil</td>
</tr>
<tr>
<td>CPP</td>
<td>Child Protection Policy</td>
</tr>
<tr>
<td>CSPO</td>
<td>Certified Sustainable Palm Oil</td>
</tr>
<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
</tr>
<tr>
<td>DOE</td>
<td>Department of Environment</td>
</tr>
<tr>
<td>DOH</td>
<td>Department of the Environment</td>
</tr>
<tr>
<td>DOSH</td>
<td>Department of Occupational Safety and Health</td>
</tr>
<tr>
<td>DSM</td>
<td>Department of Standards Malaysia</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>UN Economic and Social Council</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FIDA</td>
<td>Federal Industry Development Authority</td>
</tr>
<tr>
<td>GBI</td>
<td>Global Business Initiative on Human Rights</td>
</tr>
<tr>
<td>GCNM</td>
<td>Global Compact Network Malaysia</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>GLC</td>
<td>Government-Linked Companies</td>
</tr>
<tr>
<td>GLC</td>
<td>Government-linked Company</td>
</tr>
<tr>
<td>HICOM</td>
<td>Heavy Industry Corporation of Malaysia</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>ICC</td>
<td>International Coordinating Committee for National Human Rights Institutions</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICHR</td>
<td>International Council on Human Rights Policy</td>
</tr>
<tr>
<td>ICHR</td>
<td>International Council on Human Rights Policy</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>IGO</td>
<td>Inter-governmental Organization</td>
</tr>
<tr>
<td>IIIS</td>
<td>Institute for International Integration Studies</td>
</tr>
<tr>
<td>IIM</td>
<td>Malaysia Institute of Integrity</td>
</tr>
<tr>
<td>IJSE</td>
<td>International Journal of Social Economics</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>IMD</td>
<td>Institute for Management Development</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>IRDA</td>
<td>Iskandar Regional Development Authority</td>
</tr>
<tr>
<td>JAKOA</td>
<td>Department of Orang Asli Development</td>
</tr>
<tr>
<td>MAI</td>
<td>Multilateral Agreement on Investments</td>
</tr>
<tr>
<td>MHP</td>
<td>Murum Hydroelectric Project</td>
</tr>
<tr>
<td>MICG</td>
<td>Malaysia Institute of Corporate Governance</td>
</tr>
<tr>
<td>MNE</td>
<td>Multinational Enterprise</td>
</tr>
<tr>
<td>MTUC</td>
<td>Malaysian Trades Union Congress</td>
</tr>
<tr>
<td>MTUC</td>
<td>Malaysian Trades Union Congress</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>NCR</td>
<td>Native Customary Rights</td>
</tr>
<tr>
<td>NGO</td>
<td>Non Government Organization</td>
</tr>
<tr>
<td>NHRAP</td>
<td>National Human Rights Action Plan</td>
</tr>
<tr>
<td>NHRI</td>
<td>National Human Rights Institution</td>
</tr>
<tr>
<td>NIC</td>
<td>Newly Industrialized Countries</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization of Economic Cooperation and Development</td>
</tr>
<tr>
<td>OHCHR</td>
<td>The Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>OHCHR</td>
<td>UN Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>PLCs</td>
<td>Public Listed Companies</td>
</tr>
<tr>
<td>RISPO</td>
<td>Roundtable on Sustainable palm Oil</td>
</tr>
<tr>
<td>RTD</td>
<td>Roundtable Discussions</td>
</tr>
<tr>
<td>SAM</td>
<td>Malaysia’s Friends of Nature Society</td>
</tr>
<tr>
<td>SEB</td>
<td>Sarawak Electricity Bhd.</td>
</tr>
<tr>
<td>SEB</td>
<td>Sarawak Energy Berhad</td>
</tr>
<tr>
<td>SMIs</td>
<td>Small and Medium Size Industries</td>
</tr>
<tr>
<td>SOCSO</td>
<td>Social Security Organization</td>
</tr>
<tr>
<td>SPU</td>
<td>State Planning Unit</td>
</tr>
<tr>
<td>SRSG</td>
<td>Special Representative of the UN Secretary-General</td>
</tr>
<tr>
<td>SUHAKAM</td>
<td>Human Rights Commission of Malaysia</td>
</tr>
<tr>
<td>TCSR</td>
<td>Technical Committee on Social Responsibility</td>
</tr>
<tr>
<td>UNCTC</td>
<td>United Nations Centre on Transnational Corporations</td>
</tr>
<tr>
<td>UNDP</td>
<td>UN development Program</td>
</tr>
<tr>
<td>UNEP</td>
<td>UN Environmental Program</td>
</tr>
<tr>
<td>WCY</td>
<td>World Competitiveness Yearbook</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
INTRODUCTION

I. RESEARCH OVERVIEW

The association of human rights and business has gained a strong foothold in international and domestic laws. The corporate world has seen growing momentum on the importance of social and human rights responsibilities, apart from the traditional profit-making responsibility. This trend implies the business’ response to the fact that many companies and business entities today have come under fire for their alleged human rights violations affecting the community within their sphere of influences. Such corporate-related human rights violations appear to reflect the impact of business activities, including those carried out by multinational enterprises (MNEs), on people’s enjoyment of human rights. Just as the MNEs are enjoying immense growth on an unprecedented scale stretching their influence into all sectors of society, the impact their operations have had on human rights cannot be overlooked.

There have been instances where some MNEs, particularly those operating in third world countries, have manipulated the lax and insufficient legal structure in the host states to optimize their companies’ business agenda. To make matters worse, regulatory frameworks at both international and domestic levels are not doing enough to solve the problems. Practical barriers always keep victims from accessing remedies. In some countries, victims’ lawyers, like other human rights advocates, face intimidation, threats and violence for doing their work. In contrast, in many countries, particularly the third world and developing countries, companies have close connections to governments. Senior government officials
may hold ownership interests in the same countries they are responsible for regulating, may have worked for these companies very recently, or may have their election campaigns financed by these companies or their owners. Such officials can therefore be compromised, or at least may be less than rigorous, in enactment and enforcement of human rights protections.¹

As a result, basic human rights of the local people have been violated and compromised. For example, in the countries such as Burma, Colombia, Nigeria and Sudan, the resource extraction companies have been accused of providing logistical and financial assistance to repressive state security forces and relying on those forces for protection from the local people.² Additionally, similar scenarios also happened in Bhopal, India and Niger Delta, Nigeria, where massive human rights violations have taken place. In Bhopal, thousands of people died due to the releases of toxic waste whereas in Niger Delta, the Ogoni people have been denied to freely enjoy their basic rights. In fact, there have been cases where the leaders of the local people's movement have been unfairly arrested, tortured and jailed by the military who act on behalf of the oil companies operating in the area.³

Being a vibrant developing economy, Malaysia is stuck at the crossroads between fostering its economic growth and protecting the human rights of its citizen. Despite the fact that MNEs have the ability to promote and generate economic growth and development of the country, and thereby enhance enjoyment of human

---

³ Amnesty International (2005), Union carbide Corporation (UCC) DOW Chemical and the Bhopal Communities in India. General Article, AI Index: ASA 20/005/2005
rights, there is also no doubt that MNEs can and do violate human rights of its citizens. The ever-increasing events of corporate human rights violations committed by numerous MNEs, globally and domestically, are the manifestation of the widening gap between the pursuit of economic development and respect for human rights. There are loopholes within the human rights traditional judicial regulatory frameworks concerning business activities both at international and domestic levels. Also, the state-centred judicial enforcement mechanisms have been ineffective due to the reluctance on the part of governments to take action against big businesses. Such reluctance was due to the fact that business operations have helped the governments in revenue production, employment, economic and social development and even political stability within a State.

In Malaysia, corporate human rights violations are normally associated with economic, social and cultural rights. The dismissal of seven Guppy Plastic Industries Sdn. Bhd. workers\(^4\) in 1998 for setting up a union, the sacking of flight attendant Beatrice Fernandez\(^5\) by Malaysia Airlines in 1991 after she got pregnant, and the death of 5,116 workers in workplace accidents between 2006 and 2008 are among the best examples to explain how business entities in Malaysia have violated the rights of their stakeholders, in particular their employees.\(^6\) In addition, the Bakun and Murum Dams hydro-electric power and oil palm plantation projects in Sarawak state have been the nucleus of numerous human rights violations – most of which the susceptibility of the indigenous peoples' traditional lands

---

\(^4\) Gan Soh Eng & Ors v. Guppy Plastic Industries Sdn Bhd [Case No: 26(14)/4-244/05] [2008] 3 ILR 414
\(^5\) Beatrice A/P AT Fernandez v. Sistem Penerbangan Malaysia & Anor [2004] 4 CLJ 403
(Native Customary Rights – NCR) to encroachment as they had not been recognized by the authorities.

*Kajing Tubek & Ors v Ekran Bhd & Ors*[^7] is considered a landmark case in this issue as it argues whether the Environmental Quality Act (EQA) is applicable in the hydro-electric projects. Apart from that, the displacement of local and indigenous communities, the reduction of water quality and the mass death of fish due to the high rate of erosion and siltation, flash floods resulting from the massive logging of rainforests.[^8] There have also been allegations of Penan women and girls being raped by employees or associates of timber companies operating nearby their settlement. Despite being urged to set up a Royal Commission to investigate the complaints over the issues, the Government however rejected this on the basis that the matter is not urgent.[^9]

Indeed, economic development of the country and the human rights protection of the people are both equally importance for any country including Malaysia. In boosting the country’s economic agenda - as part of Vision 2020’s target, the implementation of privatization policies have somewhat been liberalized to attract foreign investors. Foreign investors are also welcome to participate in these and other privatization efforts. With relatively loose and lenient trade policies, including in certain issues like fulfilling the Environmental Impact Assessment (EIA) requirement, major human rights violations by companies have taken place in the name of ‘developmental’ agenda. While many tycoons from the concerned

[^7]: *Kajing Tubek & Ors v Ekran Bhd & Ors* [1996] 2 MLJ 388
companies and MNEs may get ample benefits out of such lucrative developmental projects, the people at large are suffering with the violations of their basic human rights.\textsuperscript{10}

The involvement of corporate entities, mainly the MNEs in human rights violations has prompted a need to rethink the business’ agenda which should not only limited to profit-making, but also to include social and human rights perspectives. The notion of Corporate Social Responsibility (CSR) has since become popular among MNEs as their drive to ‘humanize’ their appearance thus bridging the gap between them and the society. In the same vein, the United Nation has introduced Global Compact (hereafter the GC or Compact) initiative in 1999 as a collective platform for companies to embed social values and common objectives of all segments of world population.\textsuperscript{11} The idea of such Compact was initiated by the then Secretary-General of UN, Kofi Annan while delivering his keynote address to the World Economic Forum in Davos on 31 January 1999.

In his address, Mr. Annan challenged business leaders to join the UN in its aim to forge stronger social and environmental pillars to sustain the global economy by incorporating the Compact principles within their business structure.\textsuperscript{12} Annan observed: “I see the Compact as a chance for the UN to renew itself from within, and to gain greater relevance in the 21st Century by showing that it can work with non-state actors, as well as states, to achieve the broad goals on which its members have


agreed.” Indeed, considering that the legal and regulatory-based approaches in controlling MNEs saw some setbacks, such as MNEs will try to manipulate some principles like forum-non-conveniens to avoid litigation, the use of soft laws and voluntary-based principles implemented through social enforcement like the Compact principles have to be utilized in improving human rights compliance by the MNEs. While the Universal Declaration of Human Rights (UDHR) applies to all “organs of society”, there is no excuse for companies to exclude themselves from their human rights responsibilities.

As far as the human rights practice in Malaysian business environment is concerned, the general literature is almost silent and no specific research has been undertaken to discover the extent of human rights violations by MNEs and business entities. Also, no specific mechanism has been produced by any institution to address such violations. It was only recently, the Human Rights Commission of Malaysia (SUHAKAM) as the Malaysian National Human Rights Institution (NHRI) has pioneered the effort to draft a national policy on business and human rights – to be enforced by the Government and observed by business entities. The drafting of such policy is still in progress as it will consider the outcomes from a series of roundtable dialogues with Government agencies, NGOs and business community.14

In this regards, this thesis is dedicating the UN Global Compact’s human rights principles as a contribution towards preparing the draft policy on human and

---


business thus enhancing human rights compliance among MNEs and business
entities operating in Malaysia. This thesis proves, in the face of the inadequate or
ineffective hard laws and traditional judicial-based human rights regulatory
frameworks and the international and national levels, the voluntary could serve as
a complementary solution mechanism. The thesis also proves that it is possible,
viable and preferable to use the soft-law GC human rights principles as non-judicial
social enforcement and compliance strategy to address the issues of corporate
human rights violations in Malaysia.

II. PROBLEM STATEMENT

There are inadequacies in legal regulation of human rights violations by MNEs and
other business entities. International law has treaty mechanisms to address human
rights violations in particular the UDHR, the International Covenant on Civil and
Political Rights (ICCPR) and the International Covenant on Economic, Social and
Cultural Rights (ICESCR). However, the above treaties are meant for State actors.
As such, the implementation of the standards contained therein is hampered by
various factors including the effect of MNEs being a non-State actor in preventing
effecting legal enforcement. The debatable issue of MNEs’ ‘legal personality’ and
human rights subjectivity have also made the business-human rights relationship
more complex.

Furthermore, at the domestic level, there is reluctance of governments to apply
human rights laws and regulations against MNEs due to the economic benefits that
MNEs bring to the State. To make matters worse, very few MNEs and companies
have a good understanding of CSR and human rights responsibilities – let alone
their implementation. The GC initiatives were introduced by the UN, bringing forward a more direct approach to addressing the interlocking between commerce and human rights which has been characterised by numerous events of corporate human rights violations. Such initiative opens a window of opportunities for a greater role of both regulatory and voluntary initiatives in ensuring human rights compliance by business entities, particularly MNEs. There is a need for existing laws on companies to be complemented by a set of principles and values to give them new breath. Such principles and values are found in the UN GC - to be used as a platform for operationalizing human rights compliance by MNEs in Malaysia.

There is also a need to utilise voluntary soft law mechanisms from the perspectives of social enforcement and compliance in the pursuit to ensure the MNEs’ business operations are undertaken with serious consideration to the need to respect human rights. Since this research will focus on Malaysia, it will undertake a study of business-human rights’ relationships against the backdrops of the application of the UN GC principles to corporate human rights violations in Malaysia. The UN GC principles will be evaluated not only in the context of controlling the conducts of MNEs, but also in terms of incorporating the values within such principles into business management through voluntary approach. In addition, this research will analyze how the use of UN GC contributes towards the national guidelines which can thus induce human rights compliance by MNEs in Malaysia.

Also, this thesis will reinforce the idea of using soft laws - the GC principles in particular, as social enforcement outside the traditional state-centred mechanism to enhance MNEs' human rights compliance. This thesis proves that despite the
many constraints, there is always a possibility to bridge the gap between business and human rights. It confirms the flexibility of the voluntary GC principles that permits for their incorporation into policy and legal framework that enhance human rights protection at the national level. It also demonstrates that a success in harmonizing economic growth and protecting human rights principles will harness the great power of economic development to align with the great principle of human dignity.

III. RESEARCH OBJECTIVES

This study aims to explore the business-human rights' relationships against the backdrop of the application of the UN GC principles to address corporate human rights violations in Malaysia. The goal is facilitated through the following objectives;

a. To examine the impact of GC initiatives on MNEs in Malaysia.

b. To establish a practical understanding of the existing laws infrastructure on company that regulates behaviour of MNEs vis-à-vis the promotion of human rights.

c. To analyze the GC principles and demonstrate the possibilities of applying the principles as a complement to the existing legal structure in Malaysian.

d. To operationalise the GC principles within the business processes of the MNEs in Malaysia.

e. To explore the use of GC principles as a non-judicial social mechanism enforcement and compliance strategy to address the issues of corporate human rights violations.
f. To establish a foundation on which further activities / efforts could be done towards the creation of a socially-responsible business.

IV. RESEARCH QUESTIONS

This study focuses on the voluntary soft law mechanism of GC as a solution to corporate human rights violations in Malaysia, and will address the following research questions;

1. How soft law influences the implementation of international human rights standards against business entities including MNEs?

2. How the use of GC contributes towards the national guidelines which can thus induce human rights compliance by MNEs in Malaysia?

3. What is the scope of voluntary mechanisms of ensuring MNEs’ human rights compliance via GC principles in Malaysia?

4. Whether the mechanisms created by GC membership can increase the level of awareness among members (MNEs) in Malaysia?

5. How do the GC principles provide for enforcement through institutionalizations and non-judicial social means?

6. How the use of the GC can complement the existing legally-binding laws affecting the companies and MNEs?

7. In what way can the GC human rights principles be institutionalized within business structure of MNEs, in order to enhance their human rights compliance?

8. Whether the GC membership can increase the level of awareness among members (MNEs) in Malaysia?
V. SIGNIFICANCE OF THE STUDY

This thesis believes in its noble contribution to addressing the aforementioned research problems. It is based on the following hypotheses;

1. MNEs’ compliance with human rights standards will be facilitated by the use of UN Global Compact principles.

2. The soft law in GC principles can be used to influence the development of a legal framework or human rights framework / guidelines that enhances human rights compliance by MNEs.

3. Through extensive analysis on GC principles, this thesis proposes the idea of complementarity between voluntary and regulatory approaches to controlling corporate human rights violations, particularly in Malaysia.

4. The non-judicial social enforcement and compliance strategy based on GC human rights principles will be a supplementary to the insufficient regulatory and judicial-based human rights frameworks.

VI. SCOPE AND LIMITATION

The thesis attempts to both justify and operationalise the GC human rights principles within the legal framework or policy guidelines for enhancing human rights compliance by MNEs. For that purpose, only the Compact’s human rights principles i.e. its first two principles will be analyzed. The remaining principles related to labour standards, environment and anti-corruption shall not be discussed in depth because such areas are very vast and may hinder the focus of this research. The voluntary mechanism in the GC will form the soft law approach.
for solution mechanism. The voluntary GC was designed specifically for companies in the pursuit to ensure their profit-making agenda is in tandem with human rights compliance, even though such compliance is not the main concern of their existence. In addition, to get operational clarity to the GC principles, the Ruggie’s ‘Protect, Respect and Remedy’ Framework and Guiding Principles for its implementation will also be taken into consideration.

On the other hand, reference will also be made to several international human rights standards / treaties namely the UDHR, the ICCPR and the ICESCR, etc. However, the study in this thesis will not include detail analysis of those treaties’ provisions as the focus will only be on the linkage between GC and those treaties. Despite the fact that such treaties are meant for State actors, the standards therein can still be used as basic human rights guidelines for non-State actors like MNEs. Considering that the human rights principles of the Compact are the inherent birthrights derived from the UDHR, the ICCPR and the ICESCR which form the International Bill of Human Rights, it is well-known that GC advocates the human rights principles which are universally-recognized and naturally common for everyone.

Thus, compliance with and the implementation of the Compact’s human rights principles by the MNEs may resemble an effective vehicle towards complying with the human rights treaties although MNEs are not the signatory of the human rights treaties. In addition, Malaysia will be made the focus of this research realizing that business and human rights issues are still new in Malaysia. Human rights issues within the Malaysian business perspective are rarely discussed. It was only
recently that the principle of CSR started to become familiar among business leaders as the reaction to various alleged human rights violations by business entities. Realizing that Malaysia is not a signatory to the major international human rights treaties, this research shall use the Compact human rights principles in order to induce human rights compliance by MNEs in Malaysia.

In other word, such compliance will be tailored in a way that conforms to the internationally-proclaimed and universally-recognized human rights principles. The incorporation of the GC principles within the domestic judicial mechanism is also an important section of inducing human rights compliance by MNEs in Malaysia. It could be done indirectly, for instance, if human rights are complied with by the MNEs, the government will give some benefits such as in the forms of tax exemptions, fairer competitions and other benefits.

On the other hand, this research acknowledges the difficulties in getting information from MNEs on their human rights performance as they will never disclose the ‘dark’ part of their records to the public. Disclosing their human rights violations will only tarnish their corporate image thereby hampering their profit-making agenda. It was normally the good part of their activities which will be recorded in their annual report or website. As such, this difficulty constitutes a major limitation for this research. There are also the limitations in getting first-hand information from the local and indigenous people whose human rights have massively been affected by MNEs’ business operations. The issues of language barriers, networking and their nomadic settlement further added the limitations in
obtaining the information from them who made up the major victims of the
corporate human rights violations in the country.

In addition, the fact that many MNEs operations involve high-profile projects, they
therefore heavily guarded and monitored by the authorities. As such, the only
possible channels to be used in getting that information are by approaching human
rights activists and NGOs, civil societies, SUHAKAM and other related organizations
and individuals. SUHAKAM, for example, has organized a series of national
inquiries and dialogues with respective agencies, namely the Government
agencies, the human rights NGOs and activists, the local people as well as the
business community. The outcomes from such inquiries and dialogues are very
pertinent as a basis in justifying some arguments in this research.

VII. RESEARCH METHODOLOGY

The methodologies chosen for this research are both library research and
fieldwork. For library research, documented materials as well as materials
downloaded from the internet have been analyzed. The primary materials include
major international human rights treaties, UN Global Compact principles, the
Ruggie’s ‘Protect, Respect and Remedy’ Framework, the UN Guiding Principles on
Business and Human Rights, selected Malaysian legislation on business,
newspapers and reports from human rights-based NGOs and organization.
Analyses on these materials aim at understanding fundamental principles of
human rights which the MNEs failed to comply with. These materials also provide
background information on the problems underlying the issues of corporate
human rights violations. In addition, a number of secondary materials like annual
reports, textbooks, journal and non-journal articles, seminar papers and website materials have also been analyzed and can be cross-referenced from the literature review.

The information and data gathered from the primary and secondary materials are analyzed using the following methods, namely; content analysis, contextual analysis and doctrinal analysis. Content analysis is used to examine the human rights treaties from which the human rights principles of the GC were derived. Contextual analysis is the method used to assess the text in those materials within their legal, historical, economic and social-cultural perspectives. Doctrinal analysis, on the other hand, is a method used to examine case laws and secondary materials like journal and book reviews. Such analysis, mainly on the Compact principles is important in assessing whether the content of a legal opinion in the principles was effectively reasoned or whether such principles have implications within business operations.

The fieldwork research, which primarily consisted of conducting semi-structured interviews with relevant experts from business and human rights institution, was used to collect data and information. The respondents were the SUHAKAM Commissioner, the Head of Sustainability Risk, Group Sustainability and Quality management, Sime Darby Berhad and representatives from other relevant institutions, namely the GC Malaysia Network, Human Rights NGOs and activists, selected governments sectors and the academics.
In principle, Sime Darby was chosen as a case study in this research based on its capacity as an established and leading Malaysia-based multinational with sizeable workforce across more than 20 countries in the world. A study on such company will reflect the nature of MNE’s business operation from a Malaysian perspective. Indeed, with over 100 years of experience in major industries - especially oil palm plantations, the company presents the best recipe on building a sustainable and responsible business operation. With its considerable size, it may therefore have a huge impact, be it positive or negative, on its stakeholders. As such, the way the company addresses and manages human rights risks and issues within the company will provide relevant information for this research. This includes the use of human rights principles and initiatives by the company as part of its business culture.

The findings and feedbacks sought from the interview are meant to provide practical and real implications of GC on human rights practices of MNEs in Malaysia. In addition, a seminar paper was presented in Universiti Sains Islam Malaysia and a Research Workshop in Bangkok, Thailand on the “Role of National Human Rights Institutions for Business and Human Rights in Southeast Asia” [details as in Appendices] was attended to gain additional information and feedbacks for the betterment of this research.

**VIII. CHAPTER BREAK-DOWN**

To ensure that objective of this research is successfully achieved, a well-structured explanation and analysis is necessary. Generally, this research is set out in chapters. The present chapter involved introductory arguments. In addition to
providing the introductory remarks on the research, it also outlines the purpose and methodology of the research along with the background to the research question. In general, this chapter is the synopsis that briefly previews the thesis’ forthcoming chapters.

Chapter 1 then evaluates the complex relationship between business and human rights to discover how the growth of business entities, notably the MNEs, has impacted on everyday life of the society, in particular from the human rights perspective. The chapter then identifies the forms of linkage between MNEs and human rights; i.e. in what situations and capacities may the corporate entities, in particular the MNEs, have a relationship with the human rights principles, and which category of human rights that the MNEs commonly violate while operating their business activities. This chapter proves that the MNEs-human rights relationship possess significant roles and impact on the people’s enjoyment of human rights; therefore it needs to be managed and addressed carefully by using specific and effective regulatory mechanisms.

Accordingly, in Chapter 2, the nature and context of commonly occurring violations of human rights committed by MNEs and business in Malaysia are examined. In so doing, this chapter presents a number of case studies relating to human rights abuses – most of which types of abuses are related to displacement of people due to plantation and hydro-electric projects. The chapter subsequently analyses the three problems contributing to the deficit in corporate human rights responsibilities.
Moreover, Chapter 3 examines the inadequacies in international and national human rights standards for MNEs’ human rights violations. It discussed the existing legal framework, why they cannot work effectively and how soft law and non-judicial mechanism could supplement such inadequacies.

Seeking an answer for such a dilemma, Chapter 4 explores the possibilities of using human rights principles of the Global Compact as a solution mechanism. This chapter explains why the GC was chosen and how it can contribute towards enhancement of human rights compliance by business entities. The Ruggie ‘Protect, Respect and Remedy’ Framework is also examined. It provides operational clarity on how to put human rights agenda into business practise.

In Chapter 5, the thesis further examines how the previously-discussed human rights frameworks are implemented by relevant entities in Malaysia. For this purpose, the initiatives and practices are examined both from institutional perspective - by reference to the Malaysian NHRI, SUHAKAM and Bursa Malaysia; and from a corporate perspective – using the case of the Sime Darby Berhad. The study on the institutional and corporate aspects reveals that there have been ongoing and consistent efforts by these entities towards materializing a socially responsible and sustainable business environment in Malaysia.

Chapter 6, on the other hand, presents the findings of the research by providing several ideas, discoveries and recommendations for future improvement. This includes, among others, the contribution of this research to the process of preparing national policy / guidelines on human rights for businesses spearheaded
by SUHAKAM. It is somewhat appealing to note that, based on the research presented in this thesis, the author has had an opportunity to share some insights with SUHAKAM officers and worked as part of SUHAKAM research team in the pursuit to produce the national policy.

On the other hand, this chapter also highlights the important of non-judicial enforcement mechanism to supplement the loopholes in the current judicial enforcement. This will be better done through adoption and implementation of GC and Ruggie’s Framework. Also, the author argues that human rights awareness among Malaysian at various levels should be enhanced. Government should be aware of its human rights duty, so is the business. Both entities should act in a spirit of ‘public-private’ partnership since human rights causes cannot be upheld if neither takes responsibility. Finally, the concluding remarks for the whole discussion of the thesis are presented in Chapter 7.
Chapter 1:
THE COMPLEX RELATIONSHIP BETWEEN BUSINESS AND HUMAN RIGHTS

1.1 INTRODUCTION

The developing countries’ dependency on MNEs has become almost inevitable, in particular during the 1980s, when the events like oil crises, ensuing debt crisis and the liberalization of trade and capital flows have been increasingly commonplace.\(^1\) While economic development was made their top priority, most developing country governments were persuaded that it was in their interests to be more lenient in their economic policies. In essence, they tend to do away with controlling and regulating MNEs and toward facilitating their operations in host economies. This is because, for those countries, attracting more FDIs are seen as necessary for moving their nations forward economically and socially.\(^2\) The growing size and influence of the MNEs, despite bringing some economic benefits to the host states, has also become a matter of concern to those states. In other words, the MNEs may threaten the host states’ political independence and the human rights enjoyment of their people.

It is not the aim of this chapter, however, to list down the manifold type of human rights abuses committed by MNEs and other business entities. Rather, this chapter aims to achieve two purposes: first, it will explore the multi-dimensional character of the business-human rights’ complex relationship to know how the rapid emergence of business entities, in particular the MNEs, has contributed to the ever-

\(^2\) Ibid., p. 303.
increasing events of corporate human rights abuse. Initially, clarification will be made on the definition of MNE and its historical background both at global and Malaysian levels, followed by an assessment of their human rights perspective. This will provide some idea as to how such companies have played their roles in having influential impacts on the society at large.

Secondly, through the existing literature reviews, this chapter will clearly identify the nature and the extent of the problems that stemmed from business-human rights relationship. In other words, the contextual background of such problems will be examined with an aim to seek for practical solutions which will be discussed in the following chapters. This chapter proves that the relationship between businesses, in particular the MNEs, and human rights, possess significant roles and have significant impacts on the people's enjoyment of human rights. The business-human rights relationship therefore needs to be seriously and properly addressed by using practical solution mechanisms.

1.2 THE RISE OF MULTINATIONAL ENTERPRISESS AND THE GLOBAL ECONOMY

The emergence of numerous MNEs has played a significant role in reshaping the pattern of today's global economy. Thus, it is important to have a clearer view of what constitutes a multinational enterprise (MNE).

1.2.1 Definition of MNE

A multinational enterprise, put simply, can be defined as an economic firm whose affiliates and subsidiaries are located in more than one country. According to
Dunning, a multinational enterprise (MNE) is an enterprise that engages in foreign direct investment (FDI) and owns or controls value-adding activities in more than one country. This is the threshold definition of an MNE, and one that is widely accepted by agencies such as the Organization for Economic Cooperation and Development (OECD), the United Nations Centre on Transnational Corporations (UNCTC) and by most national governments. Theoretically, an MNE has two distinctive features. First, it organizes and coordinates multiple value-adding activities across national boundaries and, second, it internalizes the cross-border markets for the intermediate products arising from these activities.

Furthermore, an MNE may be privately or publicly owned and / or managed. Bearing in mind the different impact “ownership” and “control” have, the assets of an MNE may be owned and controlled by citizens or institutions of a single country such as Virgin Atlantic and Mars; nationally controlled but internationally managed and owned, such as Ford and Sony; or internationally owned and controlled, such as Royal Dutch-Shell. In practice, most MNEs are nationally controlled but internationally owned, although the extent and form of their cross-border equity and non-equity participation varies a great deal between industries and firms and even within the same firm over time.

---

4 According to the IMF and OECD definitions, direct investment reflects the aim of obtaining a lasting interest by a resident entity of one economy (direct investor) in an enterprise that is resident in another economy (the direct investment enterprise). The "lasting interest" implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the latter. Direct investment involves both the initial transaction establishing the relationship between the investor and the enterprise and all subsequent capital transactions between them and among affiliated enterprises. For details, see: Duce, M. (2003). Definitions of Foreign Direct Investment (FDI): a methodological note. p.2. Retrieved on 15th August 2012, from: [http://www.bis.org/publ/cgfs22bde3.pdf](http://www.bis.org/publ/cgfs22bde3.pdf)
5 Ownership means that one has legal "title" to a resource, good, or commodity. Control, on the other hand, means that one has the ability to determine how a resource, good, or commodity is used. While it would seem as though these two always go together, such is not the case. People generally have ownership and control over their labour and personal property (clothing, furniture, canned goods, etc.). But in some circumstances ownership is absent of control and control exists without ownership. For details, see Economic Glossary - available at [http://glossary.econguru.com/economic-term/ownership+and+control](http://glossary.econguru.com/economic-term/ownership+and+control)
6 Dunning, J. H. (1993) (n 3 above) (pp.4-5).
The emergence of MNE has been fuelled by the massive wave of FDI that reflects the emerging economic orthodoxy of “Neoliberalism”\(^7\) based on market liberalization, privatisation and deregulation.\(^8\) Such phenomenon has a close relationship with the process of economic globalisation which has spurred the utilisations and movements of the factors of production namely, capital, labour, raw materials and land beyond a State’s territorial boundaries and nationality. As will be seen below, there is also a correlation between the emergence of MNEs and colonialism as FDI has flowed from developed countries\(^9\) to developing and least developed countries,\(^10\) via MNEs which are most attached to developed countries creating dependence of developing countries on the MNEs. As MNEs have contributed to a large share of government’s revenue, particularly in the developing countries, MNEs are now able to have their interest included, considered and protected by the government.

Due to their immense size and fiscal powers, MNEs also contribute significantly to job creation which is crucial to the political, economic and social well-being of a country. Since the emergence of MNEs has been part of the ongoing globalisation process, the subsequent discussion will discuss the key landmarks in the historical development of cross-border economic activities. In this regard, some historical

---

\(^7\) Neoliberalism is "the dominant ideology shaping our world today". "It is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade." For details, see Harvey, D. (2005) A Brief History of Neoliberalisms, USA: Oxford University Press. p. 2.

\(^8\) Jerbi, S. (n 1 above) (p. 303).

\(^9\) Developed country typically refers to a country with a relatively high level of economic growth and security. The World Bank main criterion for classifying economies is gross national income (GNI) per capita (formerly known as gross national product, of GNP). Some of the most common criteria for evaluating a country’s degree of development are per capita income or gross domestic product (GDP), level of industrialization, general standard of living and the amount of widespread infrastructure. Increasingly other non-economic factors are included in evaluating an economy or country’s degree of development, such as the Human Development Index (HDI) which reflects relative degrees of education, literacy and health.

\(^10\) Terms such as "emerging countries," "third world countries" and "developing countries," are commonly used to refer to countries that do not enjoy the same level of economic security, industrialization and growth as developed countries. The United Nations Conference on Trade and Development (UNCTAD) points out that the least developed of the developing countries are "deemed highly disadvantaged in their development process – many of them for geographical reasons – and (face) more than other countries the risk of failing to come out of poverty." For details, see: <http://www.investopedia.com/terms/d/developed-economy.asp#ixzz2371Z7VQo>
analyses will be made, in order to understand how the MNE has evolved and emerged thereby transforming itself into a key player in the global economy whose existence interacts with legal entitlements of human rights.

1.2.2 The Key Landmarks in Cross-Border Economic Activities

A fundamental aspect of the history of cross-border economic activities is the event of imperialism and colonialism by the European powers.\textsuperscript{11} The period between the fifteenth and seventeenth centuries saw the Portuguese and Spanish conquistadors, and later the Dutch, French and English colonialists dominated the exploration of other parts of the globe notably to America, West Indies, South America, Africa and Asia. Such exploration aimed at opening new trade routes and extending their empires' territory thus gaining economic benefits out of such territories. The era when Vasco de Gama sailed around the Cape of Good Hope and the Spanish conquistadors conquered Latin America and the emergence and the expansion of the first global trade networks of the Dutch and English i.e. the Dutch United East Indies Company (VOC) and the British East India Company, respectively, were influenced by European colonialism. Drawing upon this range of argumentation, two key historical landmarks can be identified that eluded the pre-development phase of economic globalization.

First, the discovery of America by Christopher Columbus which reflected the inception of colonialism and imperialism era paved the way for water-based commerce thus allowing for home-grown goods of a tribe or civilization to be

traded with other cultures, tribes and nationalities.\textsuperscript{12} The second key landmark is the emergence of the first multinational which could be identified as a symbol of the early establishment of capitalism as the world’s dominant economic system. This was particularly evident when the Dutch United East Indies Company (VOC) was founded on 20\textsuperscript{th} March 1602.\textsuperscript{13} The establishment of multinational economic entities was further augmented by the development in communication system and technology. The technological innovations, particularly in transport and communication, extraction of natural resources, and manufacturing industries formed the primary foundations of economic globalisation, allowing for deeper economic interlinkages between regions of the world.\textsuperscript{14} This early stage of MNEs’ emergence exemplified the massive roles played by government-linked institutions that aimed to expand their States’ empire through trans-boundary economic activities.

1.2.3 The birth of modern MNEs

Theoretically, according to some economic historians, MNEs have existed since the ancient times, in particular during the times of Roman, Greek, Mesopotamian, and Anatolian civilizations as vehicles for cross-border trade in goods.\textsuperscript{15} The first ever recorded MNE is believed to have appeared in the Old Assyrian Kingdom shortly after 2500 BC, when Sumerian merchants found in their foreign commerce that they needed men stationed abroad to receive, store and sell their goods. In this

\begin{footnotes}{
\end{footnotes}
sense, the economic historians found that MNEs in ancient times have a number of similarities with modern ones.\textsuperscript{16} Having explored and paved the pathway of cross-border trading activities, the ancient MNEs therefore engendered the development of many of the forerunners of modern MNEs.

During the early 19\textsuperscript{th} century, the American and European economies were at the forefront of the Industrial Revolution through which their companies were significantly involved in business activities beyond their national borders.\textsuperscript{17} With capital intensive projects focusing on enhancing the competitive advantage of their nations, they were able to perfect their craft within their backyard using their own indigenous resources. Their colonies at that time were very rich in key ingredients for the expansion of the Industrial Revolution, not only within their boundaries but to outside territories as well.\textsuperscript{18} Before the Industrial Revolution, most value-adding activities were initiated by a number of economic entities, such as the state, private corporations, families or individuals.

In principle, there were three factors contributing to the establishment of the aforementioned economic entities. The first was the desire to promote trade and financial activities to meet the needs of the state, or that of individual producers or consumers. The second was the gaining of new territories and new forms of wealth and the third was to find out new avenues for the use of domestic savings. Hence, it can be concluded that the aims of the first MNEs were mainly based on resource-cultivating investments which, at the end of the day, would bring minerals, natural

\textsuperscript{17} Dunning, J. H. (n 3 above) (p. 99)
\textsuperscript{18} Anon. (2\textsuperscript{nd} February 2012) (n 12 above).
resources and other lucrative raw materials back to the home country leaving starvation and poverty in their colonies. As for the MNEs, the ‘fruits’ of colonization would only be used for domestic industries and to protect or widen their indigenous market.

Additionally, during the period between the 16th and 17th centuries, the genealogy of modern MNEs entered its subsequent phase, a phase of new development in international business where immense FDI took place across the globe. At the utmost, the purpose of FDI during this period was to support the trading activities of the home countries. This period was in fact the era of the first major colonizing ventures of Western European companies. Among the best known trading firms of this period were the British East Indian Company (chartered in 1602), the Dutch East India Company (chartered in 1600), which became deeply involved in India and the Far East, the Muscovy Company (chartered in 1553), formed to pioneer the North East Passage, the Royal African Company (chartered in 1672), and the Hudson’s Bay Company, which was one of the first companies to set up a major wholesale trading operation in North America.

The events of colonialism and imperialism play a considerable role in the establishment of early MNEs. The trends of MNEs’ emergence, being contributed by the three factors discussed before, prove that the MNEs are meant to gain profit for the benefit of Western imperialists – from which the MNEs are originated. This phenomenon continues to exist in this modern time as a new form of colonialism. As a new form of ‘colonialism’, the MNEs have increasingly presented influential

---

19 Eroglu, M. (n 16 above) (p. 40).
20 Dunning, J. H. ( n 3 above) (p. 98).
impact on the daily life and human rights of the people living in their host states which used to be the Western colonies. From the preceding historical analysis, it can then be said that both old and new versions of colonialisms generated by MNEs’ business activities have presented major impacts on the enjoyment of human rights by the people within their business influence. This can be seen from the alleged events of human rights violations committed by MNEs in developing and third world countries.

1.3 THE GROWTH OF MULTINATIONAL ENTERPRISES IN MALAYSIA

At present, Malaysia possesses a diverse economic climate, comprising an active private sector of multinational and indigenous business and a public sector with extensive involvement in business.21 Due to the government’s privatization policy, the private sector is expected to play a significant role in shaping the Malaysian economy thereby assisting the government to achieve its Vision 2020; that of gaining a fully-developed nation status. In gaining such status, government’s policies are also directed toward attracting foreign investments; with a view to further develop the industrial base of the country.22 To achieve such aim, Malaysia has evolved into an industrialized country by implementing privatization policy along with a more liberalized economic policy to attract foreign investors.

Indeed, foreign competition can be beneficial in encouraging Malaysian companies to enhance competitiveness and improve efficiency and productivity. At the same

---


time, it will also enable Malaysian companies to expand their operations abroad. Nevertheless, the existence of numerous MNEs across Malaysia nowadays is not a new phenomenon. It can be dated back since the era of British colonialism, during which Malaysia was then called ‘Malaya’. According to Edmund and Jomo, historically, the development process of the Malayan economy was mainly contributed by the British Colonial Administrative state interest and attention. Before its independence, the Malayan economy was heavily dependent on primary products, particularly tin and rubber, to generate growth and employment.

From these two major products, a number of companies were established namely Sime Darby Corporation, London Tin Corporation, Anglo Malayan Tin Limited, Kinta Kellas Tin Mining Limited and Malayan Tin Dredging Limited. A diversification of oil palm began in the late 1960s, followed by the manufacturing and industrial activities as the country embarked into an industrialised country with an export-driven economic model. In the same vein, immigrants from China and India were brought to Malaysia for construction of public works and also as workers in production and manufacturing sectors.

The positive economic development, since its beginning era until today, has made Malaysia a highly competitive manufacturing and export base. Its rapid move towards the k-economy allows companies to do business in an environment that is geared towards information technology. In addition, the structural transformation

of Malaysia’s economy over the last 40 years has been spectacular. Having been blessed with wealth mineral resources and fertile soils, Malaysia did not rest on its laurels but took decisive steps to progress from a traditional agricultural-based economy to a manufacturing-based and export-driven economy.\textsuperscript{26} Moreover, according to the World Investment Prospect Survey 2007-2009 by the UN Conference on Trade and Development (UNCTAD), Malaysia was ranked among the world’s top 20 attractive countries for FDI.

Among the Southeast Asian countries, Malaysia comes third, after Vietnam and Thailand as favourite FDI location.\textsuperscript{27} At present, having been attracted by the conducive business environment, the country has been one of the world’s top locations for manufacturing and service based operations - thanks to numerous MNEs from more than 60 countries which have invested in over 3000 companies in Malaysia’s manufacturing sector. The main sources of FDI were from the USA, Germany and Japan.\textsuperscript{28} Additionally, despite the diversity in economic circumstances, Malaysia for the first time has earned a position among the 10 most competitive countries in the world, according to the 2010 World Competitiveness Yearbook (WCY), published by the Swiss-based Institute for Management Development (IMD) – \textit{(Table 1 below)}. 


\textsuperscript{27} Anon. (31\textsuperscript{st} July 2008). Malaysia ranks among top 20 attractive investment locations. Malaysian Investment Development Authority (MIDA). Retrieved on 25\textsuperscript{th} March 2012, from; \url{http://www.mida.gov.my/env3/index.php?mact=News,cntnt01.print,0&cntnt01articleid=10&cntnt01showtemplate=false&cntnt01returnid=144}

\textsuperscript{28} Raman, R. (n 26 above) (p. 2).
TABLE 1. Source: IMD Competitiveness Yearbook 2011

<table>
<thead>
<tr>
<th>Rank</th>
<th>Country</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Hong Kong</td>
<td>86.425</td>
</tr>
<tr>
<td>2</td>
<td>Singapore</td>
<td>86.418</td>
</tr>
<tr>
<td>3</td>
<td>Switzerland</td>
<td>86.413</td>
</tr>
<tr>
<td>4</td>
<td>Finland</td>
<td>86.407</td>
</tr>
<tr>
<td>5</td>
<td>Sweden</td>
<td>86.400</td>
</tr>
<tr>
<td>6</td>
<td>Taiwan</td>
<td>86.390</td>
</tr>
<tr>
<td>7</td>
<td>Canada</td>
<td>86.320</td>
</tr>
<tr>
<td>8</td>
<td>Qatar</td>
<td>86.240</td>
</tr>
<tr>
<td>9</td>
<td>Australia</td>
<td>86.224</td>
</tr>
<tr>
<td>10</td>
<td>Germany</td>
<td>86.216</td>
</tr>
<tr>
<td>11</td>
<td>Luxembourg</td>
<td>86.212</td>
</tr>
<tr>
<td>12</td>
<td>Norway</td>
<td>86.190</td>
</tr>
<tr>
<td>13</td>
<td>Netherlands</td>
<td>86.160</td>
</tr>
<tr>
<td>14</td>
<td>Ireland</td>
<td>86.120</td>
</tr>
<tr>
<td>15</td>
<td>Malaysia</td>
<td>86.120</td>
</tr>
<tr>
<td>16</td>
<td>Brazil</td>
<td>86.120</td>
</tr>
<tr>
<td>17</td>
<td>Austria</td>
<td>86.120</td>
</tr>
<tr>
<td>18</td>
<td>China Mainland</td>
<td>86.100</td>
</tr>
<tr>
<td>19</td>
<td>United Kingdom</td>
<td>86.090</td>
</tr>
<tr>
<td>20</td>
<td>New Zealand</td>
<td>86.060</td>
</tr>
<tr>
<td>21</td>
<td>Korea</td>
<td>86.040</td>
</tr>
<tr>
<td>22</td>
<td>Belgium</td>
<td>86.030</td>
</tr>
<tr>
<td>23</td>
<td>Ireland</td>
<td>86.020</td>
</tr>
<tr>
<td>24</td>
<td>Chile</td>
<td>86.020</td>
</tr>
<tr>
<td>25</td>
<td>Japan</td>
<td>86.020</td>
</tr>
<tr>
<td>26</td>
<td>Thailand</td>
<td>86.020</td>
</tr>
<tr>
<td>27</td>
<td>UAE</td>
<td>86.020</td>
</tr>
<tr>
<td>28</td>
<td>France</td>
<td>86.020</td>
</tr>
<tr>
<td>29</td>
<td>Czech Republic</td>
<td>86.020</td>
</tr>
<tr>
<td>30</td>
<td>Iceland</td>
<td>86.020</td>
</tr>
<tr>
<td>31</td>
<td>Mexico</td>
<td>86.020</td>
</tr>
<tr>
<td>32</td>
<td>Poland</td>
<td>86.020</td>
</tr>
<tr>
<td>33</td>
<td>Spain</td>
<td>86.020</td>
</tr>
<tr>
<td>34</td>
<td>Kazakhstan</td>
<td>86.020</td>
</tr>
<tr>
<td>35</td>
<td>Indonesia</td>
<td>86.020</td>
</tr>
<tr>
<td>36</td>
<td>Mexico</td>
<td>86.020</td>
</tr>
<tr>
<td>37</td>
<td>Turkey</td>
<td>86.020</td>
</tr>
<tr>
<td>38</td>
<td>Portugal</td>
<td>86.020</td>
</tr>
<tr>
<td>39</td>
<td>Philippines</td>
<td>86.020</td>
</tr>
<tr>
<td>40</td>
<td>Italy</td>
<td>86.020</td>
</tr>
<tr>
<td>41</td>
<td>Poland</td>
<td>86.020</td>
</tr>
<tr>
<td>42</td>
<td>Brazil</td>
<td>86.020</td>
</tr>
<tr>
<td>43</td>
<td>Lithuania</td>
<td>86.020</td>
</tr>
<tr>
<td>44</td>
<td>Colombia</td>
<td>86.020</td>
</tr>
<tr>
<td>45</td>
<td>Hungary</td>
<td>86.020</td>
</tr>
<tr>
<td>46</td>
<td>Slovak Republic</td>
<td>86.020</td>
</tr>
<tr>
<td>47</td>
<td>Russia</td>
<td>86.020</td>
</tr>
<tr>
<td>48</td>
<td>Slovenia</td>
<td>86.020</td>
</tr>
<tr>
<td>49</td>
<td>South Africa</td>
<td>86.020</td>
</tr>
<tr>
<td>50</td>
<td>Jordan</td>
<td>86.020</td>
</tr>
<tr>
<td>51</td>
<td>Argentina</td>
<td>86.020</td>
</tr>
<tr>
<td>52</td>
<td>Bulgaria</td>
<td>86.020</td>
</tr>
<tr>
<td>53</td>
<td>Greece</td>
<td>86.020</td>
</tr>
<tr>
<td>54</td>
<td>Ukraine</td>
<td>86.020</td>
</tr>
<tr>
<td>55</td>
<td>Venezuela</td>
<td>86.020</td>
</tr>
</tbody>
</table>

The World Competitiveness Scoreboard presents the 2011 overall rankings for the 59 economies covered by the WCY. The economies are ranked from the most to the least competitive and the results from the previous year's scoreboard (2010) are shown in brackets. The Scores shown to the left are actually indices (0 to 100) generated for the unique purpose of constructing charts and graphics.

---

With an index score of 87, 228, Malaysia joined the ranks of the top-ten most competitive countries in the world along with Singapore, Hong Kong, the US, Switzerland, Australia, Sweden, Canada, Taiwan and Norway.\textsuperscript{30} Indeed, the current trend of MNEs operations in Malaysia signifies their role as catalyst to the country’s economic development. This research, however, sees that rapid development in the economic sector alone is not enough in order to have a healthy and sustainable economic atmosphere in this country. In that sense, the following section shall discuss why human rights issues are important to MNEs and thus should be made as part of their business considerations and strategies.

1.4 HUMAN RIGHTS AS PART OF BUSINESS RESPONSIBILITIES

In the wake of the extraordinary pattern of business growth and economic globalization, MNEs found themselves in the astonishing position of outperforming the fiscal power of the States. They have gained unprecedented economic power beyond their traditional geographical boundaries exceeding the governments’ power. Research by Gabel and Bruner\textsuperscript{31} suggested that the three hundred largest corporations account for more than one-quarter of the world’s productive assets, whereas a study by Anderson and Cavanagh\textsuperscript{32} found that among the top 100 largest economies in the world, 51 are the corporations while only 49 are countries. In addition, according to a UNCTAD list that ranks both countries and MNEs based on their value added, twenty-nine of the world’s 100 largest economic entities are the MNEs.


All in all, studies by UNCTAD estimate that the MNEs today make up one-third to half of the world's 100 largest economic entities.\textsuperscript{33} Taking into consideration the abovementioned scenario of business power, business entities and MNEs can and do certainly have positive and negative impacts on virtually all human rights. Efforts to define the nature and scope of business responsibilities concerning internationally-recognized human rights standards have taken a more central place on the corporate responsibility agenda in recent years.\textsuperscript{34} However, the extent of business' human rights responsibilities is still a debatable issue. There has been opinion on the business-human rights relationship which stresses that human rights are not part of business agenda and responsibilities.

According to Muchlinski,\textsuperscript{35} such position is based on two main reasons, firstly; corporate are only obliged to their shareholders and to the legal environment where they operate and secondly; the fact that the more ethical corporations invest time and money to observe human rights, the more they will be at a competitive disadvantage with corporations that do not care about human rights. Nevertheless, the attitude that human rights are not a business responsibility has changed due to the growing pressure by NGOs, consumer and public at large following human rights violations by corporations. In response to the pressure by their stakeholders and acknowledging some level of their human rights responsibilities, the corporate leaders started to meet the demands of CSR through


\textsuperscript{34} Jerbi, S. (n 1 above) (p. 299).

their policy statements and operating practices.\textsuperscript{36} Although human rights discourse has traditionally limited its application to the relationship between the governments and the governed, it increasingly also functions as a reference point for relationships between individuals and corporate actors. For example, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)\textsuperscript{37} foreshadowed this spill-over effect by requiring state parties \textit{inter alia} “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”

Indeed, it is clear-cut that the observance of human rights is also the responsibility of business and thus cannot only be limited to states and governments. However, regulation of business entities and the MNEs is still at infancy stage as many debates and efforts are still going on to find out the best solutions. Before moving to the discussions on the possible ways in regulating corporate behaviour, it is noteworthy to initially look at the perspectives of MNEs’ relationship with human rights. This will give some insights on how such MNEs may cause impacts to their stakeholders’ enjoyment of human rights.

\textbf{1.5 MNEs AND HUMAN RIGHTS: BETWEEN FRIENDS AND FOES}

As indicated in the previous section, the last few decades saw a dramatic shift in economic and political power from the hegemony of States to corporate institutions especially the MNEs. The MNEs, with their massive fiscal power and through their business operations, have taken over many of the roles usually


\textsuperscript{37} Article 2(e).
played by the States e.g. in creating job opportunities and providing better standard of living to the people at large. Indeed, whether one thinks of businesses as critical for the prosperity and economic success of the community or focuses upon the problems they may cause, MNEs are certainly powerful forces in local communities, around the nation and throughout the world. In the face of their economic might, it is not strange to come across with reports and allegations concerning their roles in human rights violations committed through their business activities across the world particularly in developing countries.

The MNEs are indeed increasingly subject to high-profile consumer boycotts over their alleged complicity in human rights abuses. Human rights, being founded on respect for the dignity and worth of all human beings to ensure freedom from fear and want, have always been compromised by business entities, in the name of the ‘developmental agenda.’ Mindful of human rights’ status as a defined area of international law laid down in various international treaties and conventions and also interpreted by various international bodies and international courts, it should be noted that human rights are also universal, inalienable, indivisible, interdependent and interrelated and therefore cannot merely be compromised for whatever reasons. There are no rights and freedoms that are absolute and in that sense, the rights to development must be enjoyed responsibly insofar as such enjoyment does not inhibit the other rights.

---


39 Ahmad, N. M. (n. 21 above) (p. 279).
According to Jagers,⁴⁰ MNEs play a threefold role, as far as human rights are concerned. First, they can be direct violators of human rights. The direct violations of human rights by MNEs affirm their status as an important social actor whose policies have major implications on both those who are and are not directly involved in the business.⁴¹ For example, by making use of forced labour or paying unreasonable wages. Secondly, they can indirectly violate human rights by supporting a regime that violates human rights. This indirect violation was usually referred to as corporate complicity in human rights violations undertaken by the third parties, for instance, the government. A clear example to explain this is that of the violations of human rights by The Royal Dutch/Shell in the Delta Niger, Nigeria.⁴² Thirdly, despite their threats, the MNEs can also generate positive influence. For instance, by uplifting the standard of living and improving respect for economic, social and cultural rights. The following analysis shall discuss this threefold role in turn.

1.5.1 MNEs as Direct Violators of Human Rights

MNE’s immediate and common linkage with human rights is attributed to its role as a direct violator of human rights principles. This violation normally affects those who have close proximity with their business operations. Among the MNEs’ closest stakeholders are their employees. As such, violations of rights under the ambit of labour rights constitute the major direct human rights violations carried out by MNEs. In the events of the MNEs operating in countries with a limited legal system,
it is obvious that the MNEs’ refusal to give sufficient respect to their employees’ human rights is very significant. They can abuse their employees’ rights by mistreating and exploiting them, preventing them from being involved in trade unions, making use of child labour and by implementing discriminatory practices in recruitment processes. In general, there are three major categories of human rights upon which the conduct of business entities and MNEs commonly have impacts. To make things clear, this section shall briefly assess, in turn, to what extent the MNEs could violate these rights.

i. Violations of Economic, Social and Cultural Rights

As indicated before, most of the rights that are commonly violated by the MNEs and business entities are those of an economic and social nature. In principle, Economic, Social and Cultural Rights are a broad category of human rights mainly enumerated in the UN’s International Covenant on Economic, Social and Cultural Rights (ICESCR) and other legally binding international and regional human rights treaties. Almost every country in the world is party to the ICESCR or other related legally binding treaties/documents that guarantees these rights which include, among other things, rights at work, the right to education, the right to adequate housing, the right to food and the right to water. Such treaties, being a chapter under the ambit of International Law, shall therefore have indirect affect on business.

---

In other words, States which ratified any of the aforementioned treaties are legally bound to conform and act in accordance with the rules therein. Any acts which violate human rights including those committed by business entities and MNEs must be stopped by the government. Nevertheless, despite the fact that the primary responsibility in guaranteeing these rights fall within the duties of the states and governments, this by no means negates the fact that the corporations and MNEs play an increasingly significant role in the realization or denial of human rights. The MNEs’ reluctant in taking into account human rights issues within their business operations brings more harm than good. This is evident when many corporations these days are under fire for their alleged violations of human rights in which cases the economic, social and cultural rights are the most affected.

In breaking down the bulk of this category of rights, the Norwegian Employers’ Union, through its brochure entitled “Companies’ relationship to human rights: a checklist for companies that operate internationally” has spelled out an array of rights that are likely to be encountered by companies in their operations. Among other things, the rights are; the right to work and rights at work, the rights to rest and leisure, minority rights and protection of identity, the rights to an adequate standard of living (including food, clothing, housing and medical care and necessary social services), the rights to education and the freedom of opinion and expression all of which are specified in both the UDHR and the ICESCR.

---

47 See for example Articles 6, 7, 11 and 12.
A simple example of MNEs’ human rights violation of this kind is whenever the MNEs pay exceedingly low wages, use forced labour or force employees to work under hazardous conditions without adequate safeguards. This will undoubtedly violate their employees’ right of the enjoyment of just and favourable conditions of work such as fair wages and equal remuneration for work of equal value and safe and healthy working conditions.\textsuperscript{48} In respect to social rights, the corporations may interfere with the right to the enjoyment of the highest attainable standard of physical and mental health\textsuperscript{49} by dumping toxic waste or causing widespread pollution. The infamous Bhopal incident is a good example of this kind of human rights abuses. The incidence occurred in Bhopal, India, in 1984, when forty-one tons of \textit{methyl isocyanate} were released from a plant owned by Union Carbide Corporation.\textsuperscript{50} As a result, at least 15 000 people were killed and more than 170 000 people were disabled. Local water and soil still remain contaminated, and birth defects continue to be reported.\textsuperscript{51}

Similarly, the Bakun and Murum Dams hydro-electric power and oil palm plantation projects in Sarawak state\textsuperscript{52} have been the nucleus of numerous human rights violations in Malaysia. For example the indigenous peoples’ traditional lands (Native Customary Rights) have been susceptible to encroachment by respective companies with little or no redress from the government authorities. \textit{Kajing Tubek & Ors v Ekran Bhd & Ors}\textsuperscript{53} is probably the best case to describe the dissatisfaction of the local people with the operations of companies in hydro-electric projects. In

\textsuperscript{48} UN, ICESCR (n 43 above) Article 7.
\textsuperscript{49} Ibid., Article 12(1).
\textsuperscript{50} Amnesty International (2005), \textit{Union carbide Corporation (UCC) DOW Chemical and the Bhopal Communities in India. General Article, AI Index: ASA 20/005/2005}
\textsuperscript{52} \textit{See Case Studies in pages 54-57.}
\textsuperscript{53} \textit{Kajing Tubek & Ors v Ekran Bhd & Ors} [1996] 2 MLJ 388
that case, the local people claimed that the companies did not comply with the rules in the Environmental Quality Act (EQA) of 1974. In other words, the acquisition of the indigenous peoples’ traditional lands by the said companies was not made according to law and thus violated their rights to an adequate standard of living which also includes rights to land ownership.

In the same vein, the reduction of water quality and the mass death of fish due to the high rate of erosion and siltation and flash floods resulting from the massive logging of rainforests have similarly violated the rights of the local people. Their rights is consistent with the ICESCR provisions entitling them to freely pursue their economic, social and cultural development, including the right not to be deprived of their own means of subsistence. In addition, there have also been allegations of Penan women and girls being raped by employees or associates of timber companies operating nearby their settlement. Despite being urged to set up a Royal Commission to investigate the complaints over the issues, the Government however rejected this on the basis that the matter is not urgent.

ii. Violations of Civil and Political Rights

The second category of rights which commonly violated by MNEs’ business activities are those contained under the ambit of Civil and Political Rights whose basic treaty – the International Covenant on Civil and Political Rights (ICCPR) constitutes part of prominence UN’s human rights treaties. The rights contained therein are the very crucial rights of a human being without which the enjoyment

---


55 UN, ICESCR, (n 43 above) Article 1(1).


of life would be incomplete. These are the right to life, liberty and security; the right not to be discriminated against on the basis of race, colour, sex, language, religion, social class or political opinion; the right to vote, freedom of speech and freedom of press; the right to be free from arbitrary invasion of privacy, family or home; and legal rights such as the right to due process of law and the presumption of innocence until proven guilty. The human rights abuse by Royal Dutch/Shell Company in Nigeria is the best example to explain how this kind of human rights is violated by a business entity.

In *Wiwa v. Royal Dutch Petroleum Co.*, the plaintiff alleged that the Royal Dutch/Shell recruited the Nigerian military to suppress opposition to the company’s oil exploration activities in Nigeria’s Ogoni region. This includes the acts of arresting, jailing and torturing two leaders of the opposition movement, Ken Saro-Wiwa and John Kpuinen, who were later hanged on fabricated murder charges. The plaintiff further claimed that Royal Dutch/Shell had instigated, planned and facilitated the human rights abuses that the Nigerian military inflicted on the Ogoni people. The company’s complicity in this series of human rights violations was evident in the fact that it had allegedly provided money, weapons and logistical support to the military. If those allegations were proved, they would suggest that the company interfered with the plaintiffs’ rights to life, freedom from torture, freedom from arbitrary arrest and detention, and a fair trial.

---

58 226 F.3d 88 (2nd Cir. 2000).
59 Ibid., p.92.
60 Ibid., Article 6(1).
61 Ibid., Article 7.
62 Ibid., Article 9.
63 Ibid., Article 14.
iii. Violations of Rights Protected Under International Humanitarian Law

In addition, MNEs may also play a variety of roles in the most severe human rights violations, such as genocide, crimes against humanity, and war crimes, which generally occur in the context of systematic mass violence. This may also include manufacturing prohibited classes of weapons for the use of enemy troops or civilian populations. Apart from that, corporations may also involve themselves in warfare itself by selling the services of private security forces, which are as capable as committing war crime as any public army. Additionally, corporations, in particular financial institutions may participate in a state’s “plunder of public or private property” by laundering the proceeds of such acts. In this regard, a number of recent cases against Austrian, French, German, and Swiss financial institutions have highlighted the role that financial institutions can play in acts of plunder of public or private property.

1.5.2 MNEs’ Complicity in Human Rights Abuses

Apart from the previously-mentioned direct violation of human rights, MNEs may also indirectly violate human rights by participating or offering assistance to other parties, especially governments or state actors, to commit any kind of human rights abuses, in which occasions they can be said as being complicit in the violations. In other words, being complicit in human rights abuses may imply the perpetrations of violations are not done by the MNEs but such violations should have not happened without the support and assistance from them. It is therefore important for an MNE to avoid being a part of any conspiracy aimed at violating

---

65 See for example, Bodner v. Banque Paribas, 114 F. Supp. 2d 117
the people's human rights as complicity may have a significant moral impact on and ethical implications for its image and brand value.66

If, for example, an MNE was found to have links with any kind of human rights violations perpetrated by any parties including governments, it would encounter the possibility of being boycotted by the stakeholders who are part of its society. The lower moral responsibility that a company has, the higher possibility there is that its reputation will be tarnished. Having a tarnished brand image may lead to unfruitful consequences in its corporate agenda. As such, in order to maintain the success in its business agenda, an MNE has to ensure that it can, not only gain, but also maintain the trust from their stakeholders. This can be achieved by being a more ‘humane’ and socially-responsible company which fully complies with and respects the internationally proclaimed human rights within its sphere of influence.

1.5.3 MNEs as Promoters of Human Rights

In an extremely different dimension compared to the previous two, MNEs may also have a good impact on human rights. Given their sizeable economic power, they may promote good compliance with human rights principles and help protect those rights from being violated. Companies that manage to take appropriate measures to protect the rights of their employees, for example, are also promoting good adherence to human rights principles. This includes the setting up of a company’s code of conduct along with effective monitoring mechanisms to avoid

66 In chapter four, under the Global Compact's sub-chapter, the MNE's complicity in human rights abuses will be clarified in detail to explain how a company could be considered as colluding with other parties, particularly the states, in abusing human rights. The nature of complicity includes 'direct complicity', 'beneficial complicity' and 'silent complicity'; all of which conduct could have a significant impact on the perpetuation of human rights abuse carried out by governments and other parties.
any malfunction or mismanagement that could lead to a violation of human rights. According to Frey, the utmost responsibility of a company, in regards to human rights, is to try its best to prevent human rights violations that arise directly from the conduct of its business. This responsibility lies at the first level as the violation takes place within the boundary of a company's business activities. However, this is by no means to imply that a company shall have no serious responsibility towards the violations of human rights which take place outside its business's boundaries.67

In principle, a company may also promote human rights of persons outside its business activity whether they are indirectly connected to the company's activity or not at all. The positive reactions over the issues of human rights violations reflect the company's awareness of the situation that surrounds it, a situation that commonly takes place in a country where the rule of law is absent. Again, given the company's enormous financial and economic power over the government, a company could use its influence to promote human rights more generally to the diverse stakeholders around it. This can be done by making a public statement calling for the respect of human rights, lobbying the government, assisting the activities of NGOs and the inclusion of human rights considerations in all levels of the decision-making process.68 After all, a company will benefit the good human rights practice within and outside its business sphere as it cannot flourish in an area where human rights principles are not respected.


1.6 CONCLUSION

Generally, this chapter sought to clarify the complex relationship between business and human rights. Such a relationship offers a strong ground to support the fact that the emergence of multinational business entities, in particular the MNEs, has had enormous implication on the various dimension of society’s everyday life, including human rights. Moving from explaining the rise of multinational enterprises and the global economy, this chapter has accordingly explained such phenomenon from Malaysian perspective. It argued that the historical background and the early stages of the MNEs have been contributed to by the phenomena of colonialism and imperialism. The mainly business-centred approach of imperialism did not give any attention to human rights and not exaggeratedly, this is still the case at the present time when the MNEs reflect the new forms of ‘colonialism’.

The discussion on the pattern in the evolution of the MNEs from historical and modern perspectives within both global and Malaysian viewpoints has revealed the fact that the increasing power of MNEs has superseded the governments in many aspects. They have even replaced the roles of governments in providing basic needs and rights for the people. In the attempt to further relate business and human rights, this chapter accordingly examined whether human rights responsibility is any part of MNE’s business. It has demonstrated that in spite of the fact that human rights responsibilities are traditionally considered as the States’ primary obligation, such rights should not be ignored by business entities. There is a need for human rights to be incorporated into MNEs business
operations, in light of the series of corporate-related human rights violations and the increasing pressure from the NGOs and the public.

Furthermore, I have emphasized the idea that it would be much easier to understand the impacts of the MNEs if their dimensional roles towards the human rights principles are deeply analyzed. Bearing in mind that the MNE is meant for business and profit-making activities, the violations of some rights have frequently taken place in the name of ‘developmental agenda’. This phenomenon commonly happens through the government’s development activities and projects. It indirectly suggests the inability of government to ensure the full and utmost respects of its people’s human rights. In short, this chapter has clearly identified the background of the main problems underlying the business-human rights debates in this thesis.

This paves the way for the following chapter which will discuss in detail the nature and extent of the problems as well as the factors leading to corporate human rights violations in Malaysia. Once the problems discovered, the best solutions could easily be carried out. Similarly, if this were to be put in a medical perspective, it is pertinent to initially know the exact nature of a disease. Only then we will know the most suitable medicine to treat such disease.
Chapter 2:
CORPORATE HUMAN RIGHTS VIOLATIONS IN MALAYSIA

2.1 INTRODUCTION

Nowadays, the complex relationship between business players and human rights has become an integral part of the society across the globe. The business activities undertaken by the MNEs are beneficial in the sense that they can help the government in providing basic needs and infrastructure thus fulfilling the economic and social rights of the people. However, the social and human rights values have failed to be instilled within this developmental process thus making way for the massive encroachments and violations of such rights by corporate entities - whose core-business is profit-making. Realizing that corporate human rights violations appear to be commonplace in Malaysia these days, it can then be said that something has gone wrong with the business-human rights relationship. This chapter therefore seeks to investigate the factors contributing to these issues.

Understanding the background of corporate human rights violation issues is crucial to establishing possible mechanisms to harmonize human rights and business. This chapter provides an insight into the nature of corporate human rights violations committed by MNEs in Malaysia and the contributory factors of such violations. At the onset, this chapter explains the general overview of corporate human rights violations in Malaysia. This overview gives some insights on how and why these violations have been taking place. This chapter subsequently explains a number of selected case studies which illustrate the nature of human rights violations and the ‘controversies’ behind them. The
selected case studies will focus on the State of Sarawak and several other parts on Peninsula Malaysia, where these violations mainly occur in various industries namely, hydroelectric projects, plantation and logging as well as building and construction.

This chapter will argue that the illustrated examples of human rights violations have had some relations with the problems in the traditional state-centred sanctions and judicial approach to enforcement of MNEs’ human rights compliance in Malaysia. It will further establish a rationale for canvassing an enhanced non-judicial social enforcement as important mechanism for ameliorating such violations. In addition, this chapter will identify and clarify the main factors behind the continued existence of human rights violations committed by the MNEs in Malaysia. The first factor, which relates to the problems with ‘judicial’ approach to enforcement of corporate human rights compliance in Malaysia, will be dealt with in Section 2.4.1. Under Section 2.4.2, this chapter will further discuss the second factor i.e. the on-going polemics of the companies’ human rights responsibilities. Finally, the third factor i.e. the insufficient awareness and misunderstanding of corporate human rights responsibilities among business entities will be discussed under Section 2.4.3.

In short, the aforementioned threefold factor proves that a sole reliance on regulatory and traditional judicial-administrative approach as well as state-centred sanction to control corporate behaviour may not be effective enough. There is a need to equally have a non-judicial social enforcement which focuses more on the principles of corporate accountability, good governance and corporate
social responsibility. For that purpose, the Global Compact model, in particular its human rights principles and values as well as the extent to which it would address the problems that contribute to corporate human rights violations in Malaysia shall be discussed in detail in the 4th chapter.

2.2 UNDERSTANDING THE CONTEXT OF CORPORATE HUMAN RIGHTS VIOLATIONS IN MALAYSIA

Business activities in Malaysia, particularly those of sizeable magnitudes undertaken by the MNEs are among the key elements behind the government's tireless effort to gain a fully-developed nation status by 2020. The success of such aim - always dubbed as 'Vision 2020' definitely requires a strategic ‘public-private’ partnership. In essence, an active private sector of multinational and indigenous business and a public sector with extensive involvement in business\(^1\) are equally important to materialize such aim. Also, the government's privatization policy has engendered a considerable amount of FDI which reflects the significant role played by the MNEs in shaping the Malaysian economy thereby assisting the government to achieve its Vision 2020.

Suffice it to say, the government policy plays key role in the process of economic development. Pistor and Wellons’ study of the relationship between law and economic development in 10 Asian countries found that there has been an increased liberalization trend in Malaysian economy from the mid 1980s. It is reflected by the relaxation of foreign equity ownership in manufacturing firms;

revision of bankruptcy law to assist credit; law reform to make financial sector more efficient and competitive; reduction in the licensing control for manufacturing companies; amendment to the company laws to strengthen shareholders’ rights; market-based procedures for commodity trading; and new legislations for offshore insurance, banking and trust.\(^2\)

Undeniably, with a more ‘friendly’ and liberalized economic policy to attract foreign investors as mentioned above, it is not surprising to see that, to date, numerous MNEs from more than 60 countries - mainly from the USA, Germany and Japan have invested in over 3000 companies in Malaysia’s manufacturing sector.\(^3\)

These business entities are indeed the key driving forces behind the Malaysian economic development. Notwithstanding their advantages which are vital to the country’s development, the companies’ role in the area of human rights is increasingly coming under public scrutiny. Essentially, their business activities do and can have considerable impacts on the lives and human rights of people within their sphere of influences.

There have been instances where economic development in Malaysia brought to the fore contending sectional interests which undermined the very notion of developmental justice. There are sections of Malaysian societies who find themselves trapped in the “development vs. human rights” conundrum and are quick to believe that economic development and social justice are opposing to each


other, that economic development benefits only a few but victimizes many others.\(^4\)
Indeed, the government’s unbalanced focus in boosting the country’s economic development at the expense the people’s social justice and human rights enjoyment has made way to many corporate-related human rights violations.

Frankly speaking, human rights issues are in the first place a ‘new’ phenomenon in Malaysia. This is not because the term has never been used but rather due to the lack of understanding among the people about its concept and principles. There have been instances where some judges and top government officials whose ministerial roles relate with international trades do not aware of some human rights issues such as Malaysia’s ratification of international human rights standards.\(^5\) There have also been some sections of the society who treated human rights as a new ‘religion’. These scenarios prove how limited the human rights understanding among Malaysians – let alone the companies and MNEs, whose legal obligation is to make profit for the benefit of their shareholders.

As far as business and human rights issues in Malaysia are concerned, the violations of human rights by MNEs have primarily been affecting the rights which fall under the cluster of economic, social and cultural rights. More precisely, the violations involve directly with the issues of rights to land, poverty and inadequate standards of living i.e. inadequate access to basic needs such as nutritious food, healthcare, education, housing, clean and safe drinking water.

\(^4\) Mohamad, M. (n 2 above) (p. 51).
While the Government bears the primary obligation to ensure the promotion and protection of human rights, companies and MNEs – as organs of society also have a duty to promote and secure the rights detailed by the UDHR. The rights provided in the UDHR reflect the universally-recognised and basic human rights which have been adopted in numerous human rights conventions, agreements or guidelines at a global, regional or national level and therefore need to be seriously heeded by the MNEs. In understanding the nature of human rights violations by MNEs and business entities in Malaysia, the following sections shall discussed several case studies which involve a number of MNEs from various business sectors.

2.3 CASE STUDIES

2.3.1 Bakun Hydro-Electric Project in Bakun Dam, Sarawak

At present, there are about 11 dams in Malaysia which are either in operation or under construction. They include the Batang Ai, Murum and Bakun Dams in Sarawak, Batu Dam and Selangor Water Works (Selangor), Cenderoh Power Station and Temenggor Dam (Perak), Klang Gates Dam (Kuala Lumpur suburb), Pergau Dam (Kelantan), Sultan Mahmud Power Station (Terengganu) and Tenom Pangj Dam (Sabah). Among them, the Bakun Hydroelectric Project (BHP) in Sarawak - soon be the largest dam in Malaysia, is one that has already raised many eyebrows. Various national and international bodies criticize the project for its costs and benefits, especially towards the indigenous people who were said to have been displaced and had lost their native lands and main source of livelihood.6

---

In essence, the project has also raised concerns over the communities’ participation in decision making and informed consent, compensation as well as adequate housing, and thus implicates their human rights. This development project was riddled with much controversies, reflecting the two contending interests which need further observation - that of the displaced communities on the one side and the political and corporate elites on the other. The map shown below illustrates the location of the project as well as the route of transmission cable to transmit the power from the dam to Peninsula Malaysia.

![Map of Bakun Dam](image)

**MAP 1: BAKUN DAM, Courtesy of International Rivers Network – internationalrivers.org**

The Bakun Hydro-electric Project, officially started in the 1980s, is a government-supported mega project which was executed based on initial studies during the 1970s. The project, upon completion, is expected to have power generating capacity of 2400 MW despite the projected energy needs for the whole of Sarawak.
was only 200MW for 1990.\textsuperscript{7} Since the commencement of this project, there have been several attempts undertaken by a number of companies to take on the project’s operations. Among others, they include Ekran Berhad, Bakun Hydroelectric Corporation, Sarawak Hidro and Sime Darby. Currently, the Bakun dam is owned by Sarawak Hidro Sdn Bhd, a subsidiary of Minister of Finance Inc.\textsuperscript{8} However, due to unavoidable problems - notably the economic recessions in 1986 and 1997, the project has experienced delays and revivals thereby triggering its date of completion to be regularly revised.

Adding fuel to a burning ‘fire’, an aluminium smelter at Sarawak’s coastal town of Bintulu was also proposed to take up the surplus energy. Shortly, it was announced that the Bakun dam, upon completion, would be a massive 205-metre high concrete face rockfill dam – one of the highest dams of its kind in the world.\textsuperscript{9} The dam will also put 70,000 hectares of tropical rainforest under water - a size equivalent to that of Singapore and displace approximately 10,000 native residents (mainly Kayan and Kenyah) of the indigenous peoples who lived in the affected area. Moreover, the rainforest in this part of Southeast Asia has some of the highest rates of plant and animal endemism, species found there and nowhere else on Earth, and this dam has done irreparable ecological damage to that region.

Due to the aforementioned massive displacement of local people, many Sarawak natives have been relocated to a longhouse settlement named Sungai Asap in Bakun. Most of them were subsistence farmers. The construction of this dam has

\textsuperscript{7} Mohamad, M. (n 2 above) (p. 51).
\textsuperscript{8} Wong, J. (2009, July 7). Malaysia-Sarawak Submarine Cable Contract to Be Awarded Next Year. The Star (Kuala Lumpur).
prompted environmentalists’ concerns over such issues as relocation of people, the deforestation of 230 km$^2$ of virgin tropical rainforest, possible dam collapse issues, increase in water-borne diseases such as *schistosomiasis*, *opisthorchiasis*, *malaria*, *and filariasis*, and sediment accumulation shortening the useful lifespan of the dam. The diseases affected by water-borne vectors resulting from this project may interfere with the right to the enjoyment of the highest attainable standard of physical and mental health, whereas by destroying and relocating the habitats of indigenous peoples, MNEs may interfere with the rights of all people to freely pursue their economic, social and cultural development, including the right not to be deprived of their own means of subsistence.$^{10}$

The aforementioned disadvantages of the project further proved that this project brought more harm than good to the local people. Concerned NGOs have all along called for the abandonment of this monstrous Bakun dam project because it is economically ill-conceived, socially disruptive and environmentally disastrous. The environmental destruction is evident many miles downstream since the whole Bakun area has been logged by those who have already been paid by Sarawak Hidro.$^{11}$ Cynthia Gabriel, director of rights group SUARAM, said that the project has trampled on people’s rights, all because the government insists on a project that can only hurt the environment, disorient the people and lose money from day one.$^{12}$


$^{11}$ Soong, K.K. (n 9 above).

Indeed, the economic viability of the Bakun dam project has been in doubt from the beginning and the announcement to build two more dams merely reflects a cavalier disregard for the indigenous peoples, more desecration of Sarawak’s natural resources and a blatant affront to sustainable development. The factors contributed to human rights violations in this project are detailed in Section 2.4 below.

2.3.2 Murum Hydro-Electric Project in Murum Dam, Sarawak

The RM 3.5bil Murum Hydroelectric Project (MHP) in Murum Dam, Sarawak is yet another mega project in the State spearheaded by Sarawak Energy Berhad. Having initially been planned in 1985, the project was recently leased out by the State Government of Sarawak to the China Three Georges Project Corporation (CTGPC).\textsuperscript{13} The project officially commenced in 2008 and as of July 2011, it was 35% completed. The project is expected to be fully operational by the end of 2013.\textsuperscript{14} Located in upper reaches of the Rajang River in Central Sarawak, the dam project is expected to add up to 944MW by the end of 2012, fuelling concerns that together with the Bakun dam’s 2400 MW project, there will be a power glut in the state – let alone their negative impacts on the local communities.

SUHAKAM, based on its meeting with representatives from relevant government agencies, noted that a total of 8 Penan Community villages would be affected.\textsuperscript{15}

Map 2 below plots the Hydropower Projects in Sarawak to be implemented.

\textsuperscript{13} Human Rights Commission of Malaysia (SUHAKAM). (2009). (p. 6 above) (p.3).
\textsuperscript{15} Human Rights Commission of Malaysia (SUHAKAM). (2009)(n. 6 above) (pp.5-6).
between 2008 and 2020 while Table 1 shows the status of those projects (as of 24 April 2009).


<table>
<thead>
<tr>
<th>Project</th>
<th>Installed Capacity (MW)</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murum</td>
<td>944</td>
<td>Start of construction</td>
</tr>
<tr>
<td>Batang Ai Extension*</td>
<td>80</td>
<td>Decided not to proceed</td>
</tr>
<tr>
<td>Baram</td>
<td>800</td>
<td>Feasibility study</td>
</tr>
<tr>
<td>Baleh</td>
<td>1,300</td>
<td>Feasibility study</td>
</tr>
<tr>
<td>Limbang</td>
<td>200</td>
<td>Feasibility study completed</td>
</tr>
<tr>
<td>Lawas</td>
<td>105</td>
<td>Feasibility study</td>
</tr>
<tr>
<td>Metjawah*</td>
<td>101</td>
<td>Not feasible</td>
</tr>
<tr>
<td>Belaga</td>
<td>180</td>
<td>Feasibility study</td>
</tr>
<tr>
<td>Ulu Ai</td>
<td>54</td>
<td>Tender design completed</td>
</tr>
<tr>
<td>Tutoh</td>
<td>110</td>
<td>Basin study</td>
</tr>
<tr>
<td>Belepeh</td>
<td>140</td>
<td>Basin study</td>
</tr>
<tr>
<td>Linau</td>
<td>320</td>
<td>Basin study</td>
</tr>
</tbody>
</table>

Note: The project marked with (*) will be replaced with other projects.

Source: Sarawak Energy Berhad.
According to the Chief Minister of Sarawak, Tan Sri Abdul Taib Mahmud, apart from making up for the energy from Bakun dam which will be transmitted to Peninsular Malaysia, the MHP would also enable the setting up of two proposed aluminium smelter plants in Bintulu. Several discussions have been made for power to be used by the smelter project carried out by Cahya Mata Sarawak Bhd. (CMS) – a company owned by Taib’s family and Australia-based Rio Tinto Alcan\(^\text{16}\) whose operational process require between 900MW and 1200MW for an initial annual capacity of up to 720000 tonnes when it is ready.\(^\text{17}\) Another deal involved at the negotiation stage was GIIG Holdings Sdn. Bhd. and China’s Aluminium Corp’s joint venture Smelter Asia, with an initial annual capacity of 330 000 tonnes requiring 600MW. GIIG Holdings is owned by the local iconic, government-friendly tycoon, Tan Sri Syed Mokhtar Al-Bukhary.

Similar to the BHP, the MHP has attracted criticisms from NGOs, community-based organisations and local activists who were concerned about indigenous communities whose welfare and human rights would be affected by such project. Among major issue being raised was the right of local and affected people to get access to information and participation in the respective project. Undeniably, it is common for corporate decisions - even those which affect stakeholders - are shrouded in secrecy, and taken without any participation of affected societal constituents.\(^\text{18}\) This is the earlier ‘sign’ of MNEs’ involvement in human rights violations. The denial of such right is clearly against the principles in the United

---

\(^{16}\) The CMS-Rio Tinto aluminium smelter project was however scrapped due to unfinalized power supply terms. See Anon. (2012, March 27). Rio Tinto, Cahya Mata Scrap US$ 2b smelter project in Malaysia. Retrieved on 20th April 2012 from; http://www.themalaysianinsider.com/litee/malaysia/article/rio-tinto-cms-scrap-us2b-smelter-project-in-malaysia


Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP) – which Malaysia has been a member state since 2007.

The principles in the UNDRIP strongly require governments as well as its commercial arms to, *inter alia*, obtain the free, prior and informed consent of the indigenous people before implementing development projects and programmes within or over their territory. It was however noted by NGO Aliran that, as far as the Murum dam project is concerned, neither Sarawak Government nor Sarawak Energy has complied with such principles.\(^{19}\) In fact, the plan to construct MHP was only made public by the Sarawak Energy Berhad, during the China-ASEAN Power Cooperation & Development Forum, held in Guangxi, China in October 2007 - despite such plan had been with the Government since 1994. Many had raised their concerns on why the notification about the project was only made outside Malaysia and after more than ten years - leaving the local people in the dark. It looks like that the local people’s participation was unimportant in the project despite it severely affects their lands.

Even though the SEB or Sarawak Government have always maintained that some NGOs and community leaders have been consulted before the commencement of the project, it appears that such participation was only during the preliminary stages and not throughout the project, which include the decision making process. This clearly violates Article 18 of the UNDRIP which provides the right of indigenous peoples to participate in decision making in matters that would affect

\(^{19}\) ALIRAN (2 September 2011). *Stop Suggesting the Baram Dam has been Approved.* Retrieved on 14 April 2012, from: http://aliran.com/6594.html
their rights. Thus, the rights to participation and free and informed consent should be complied with by the respective companies and agencies as they are fundamental aspects and move parallel with the rights to information guaranteed to the local indigenous community.

In addition, the MHP has also affected the rights to land ownership and stewardship of the local people. The community leaders have expressed their concern that the dam will lead to the loss of their ancestral land. Indeed, the issues of native customary rights (NCR) to land have been a debatable issue in Sarawak for years. The Government, through its affiliated companies have always used Sarawak Land Code 1958 to justify the legality of their land acquisitions for its developmental projects. The Code as it stands presently does not provide provisions for the local community to establish ownership of land which they have traditionally lived within for generations. Such justifications clearly inconsistent with a number of Articles under UNDRIP which establish the following:

**Article 19**
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

**Article 26**
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

---

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

In line with the above Articles, and acknowledging the local people’s customs which have long been existed before the codification of the Sarawak Land Code 1958, it is therefore prudent to consider the customs as basis of state laws rather than the latter becoming the basis for the extinguishment of the former.21

2.3.3 Plantation and Logging Projects in Ulu Belaga, Sarawak

Ulu Belaga in Sarawak is home to a large settlement of indigenous people – mainly the Penans community. The Penans, numbering around 15,485 persons to date, are one of the indigenous communities in Sarawak. They have a unique system of establishing ownership and stewardship of land. This practise has been inherited from one generation to another up until today. Having stayed, roamed and cultivated such lands, they feel that they have the rights over the lands concerned and thus such rights should be recognised. Nevertheless, in 2001, the commencement of Shin Yang Forestry Sdn. Bhd. (Shin Yang) business activities

21 Ibid., p.11.
which include logging, oil palm plantation and reforestation was seen as an encroachment to the Penan’s native rights.22

The controversial acquisition of Penans’ ancestral land by Shin Yang - having hidden behind a valid license from the State Government, has also been riddled with the non-existence of prior consultation and inadequate amount or no compensation. The Penans were told that they do not have the right to claim anything from the Company since the company’s acquisitions of the land were based on valid Government license. In addition, it was also claimed that, with the commencement of the Company’s business operations, the land concerned has been fenced, gated and security personnel had been placed. This denies the Penans’ rights to get access to the forest thereby hampering their ability to get access to food and basic necessities – once easily obtained from the forest.

Indeed, without access to surrounding forest areas, the Company’s activities have deprived the Penans’ means of subsistence and accordingly violated their rights to have an adequate standard of living – a right enshrined and guaranteed in various human rights frameworks.23 The violations of local communities’ rights by the logging and plantation companies were not only limited to the issues of land and standard of living. There have also been allegations of sexual violence and exploitations of Penan women and girls by workers from logging companies. More frustratingly, some schoolchildren, while on their way to school have been raped by lorry drivers attached to the logging companies. Sadly though, the

23 UN, ICESCR (n 10 above) Article 11. See also Article 25 of the Universal Declaration of Human Rights (UDHR) and Article 13 of the Federal Constitution of Malaysia.
whistleblowers, especially the human rights activist however, have been banned from entering the state.\textsuperscript{24}

Despite being an ‘old’ issue with reports have been made to the police and other related authorities over many years i.e. since 2000, this issue, however, was treated trivially and has never been addressed seriously.\textsuperscript{25} It was only recently that this issue garnered widespread attention from the public when it re-surfaced with a media release on 15 September 2008 by the Swiss-based NGO, Bruno Manser Fund (BMF).\textsuperscript{26} Following to the BMF’s media release, the Malaysian media\textsuperscript{27} have reported extensively on the sexual abuse allegations by Penan women against employees of two logging companies.

Meanwhile, SUHAKAM, the Women, Family and Community Development Ministry and the Sarawak Police have announced that they will investigate the complaints. But it was sad to know that in the end, the Police have closed the case controversially. Deputy Inspector-General of Police Tan Sri Ismail Omar and Sarawak Police Chief Commissioner Datuk Mohamad Salleh had confirmed that the police had closed their investigations and will no longer probe the sexual abuse reports. Both said such decision was made due to “lack of evidence and lack of cooperation from the victims and from the NGOs that had made the rape reports”.\textsuperscript{28}

\textsuperscript{24} Nayagam, J. (2012) (n 5 above).
\textsuperscript{28} See Then, S. (2009, November 15). Sarawak police get the thumbs down over Penan girls rape cases. \textit{The Star Online}. 63
2.3.4 Violation of the Rights of Orang Asli / Indigenous People in Peninsula Malaysia

The Orang Asli are the indigenous minority Malaysians of Peninsula Malaysia. The name is a Malay term which transliterates as ‘original’, ‘aboriginal’ or ‘natural’ people. Officially, there are 18 Orang Asli tribes categorised according to their different languages and customs under three main groups namely Negrito, Senoi and Proto-Malay. As at 2003, they number around 147,412 persons out of the 26.5-million Malaysian population.29 Being Indigenous People living in Malaysia, they have two statuses each of which has its set of inalienable rights – as ‘Malaysian citizens’ on the one hand and as ‘indigenous people’ on the other. However, for the purpose of this chapter, only the second status30 shall be focused since it very much reflects their vulnerability and marginalised situations with many of their rights always been deprived and violated.

Indeed, the fact that they make up among the poorest in Malaysia has manifested their marginalisation and disenfranchisement from the mainstream society on account of the non-recognition of their rights as contained in both national and international customary law.31 The development process – being generated mainly by business entities have had major impacts on Orang Asli’s daily life. In general, there have been various types of business operations operated by MNEs and other business entities in Malaysia which affected the rights of Orang Asli. While this community largely live in or close to forest, the forestry-related business activities

and industries such as logging, plantations, pulp and paper industries as well as deforestation for the purpose of ‘development’ have therefore had direct impact on their rights.

Among examples of business activities affecting Orang Asli in Malaysia are the desecration of two Orang Laut of Seletar burial sites near Johor Bahru to make way for development projects under the purview of the Iskandar Regional Development Authority (IRDA) – a Malaysian Government statutory body; and the loss of Orang Asli’s 6932 hectares traditional lands to others for developmental purposes – often without them knowing it, let alone being consulted. The Kuala Lumpur International Airport (KLIA) in Sepang, Selangor – once the homeland of two Temuan settlements, is an example of Orang Asli’s land acquisition saga in which they had been forced to forego their land for the airport and be resettled in a swampland 40km away.

In addition, it was also reported that 13 Orang Asli of the Temiar community were arrested by the police on 24th January 2012 for allegedly leading a gathering of 800 of their people in Gua Musang, Kelantan in protest against the encroachment on their ancestral land for logging and opening for plantations. In 1986, as a result of active logging activities, a massive mudslide occurred in Pos Gedung, Perak, killing five Orang Asli people. Despite being protested by the local people, the project continues until today. Similarly, in August 1996, another mudslide has


destroyed Pos Dipang Orang Asli settlement in the state of Perak, leaving 45 dead. Despite being claimed as a ‘natural disaster’, the affected communities alleged such mudslide was the result of active logging activities which have been taken place nearby their settlement.\textsuperscript{35}

Indeed, the abovementioned forestry industries, spearheaded by companies licensed by the Government have violated various rights of Orang Asli. In particular, these rights include the rights to self-determination, to land and natural resources, to get free, prior and informed consent, to culture and identity and to security. The violations of such rights are against the principles in various human rights standards including the UNDRIP, the ICESCR, the ICCPR, the Federal Constitution and the Aboriginal Peoples Act 1954 (revised 1974). Although the Government had established a special department in-charge of Orang Asli affairs namely the Department of Orang Asli Development (JAKOA) – violations of Orang Asli’s rights remain an ongoing dilemma which requires firm and effective solutions.

\textbf{2.3.5 Violation of Worker’s Rights}

In Malaysia, issues related to human rights violations by MNEs towards their workers are not new. Generally speaking, there have been a number of worker’s rights so often violated by the companies. Among others, they include; the rights to association, the rights to organise and bargain collectively, the rights to acceptable conditions of work and fair wages – all of which have been clearly guaranteed by the Federal Constitution. The best examples to illustrate the violations of those

rights, include the controversial dismissal of nine Guppy Plastic Industries Sdn. Bhd.\(^{36}\) workers in 2001 as a result of a newly-introduced retirement policy, the sacking of flight attendant Beatrice Fernandez\(^{37}\) by Malaysia Airlines in 1991 after she got pregnant, and the death of 5,116 workers in workplace accidents between 2006 and 2008.\(^{38}\)

In the case of *Gan Soh Eng & Ors v. Guppy Plastic Industries Sdn. Bhd.* mentioned above,\(^{39}\) it was reported that in July 2001, eight women were forced by their employer – the Guppy Plastic Industries Sdn. Bhd. to retire upon reaching the age of 50. This is based on a new regulation listed in a handbook introduced by the company. Unhappy with such a ‘discriminatory’ policy, the eight affected female workers took their case to the Industrial Court. The Court, in its ruling in 2008, ruled in favour of the workers, citing the archaic nature of the Company’s regulation. The company, however, sought a judicial review and in April 2010, the High Court reviewed the previous judgment and ruled in favour of the company. Dissatisfied with such a verdict, the workers continued their legal battle by taking the matter to the Court of Appeal in the same year.

The High Court finally ruled out in March 2012 that the Guppy Plastic Industries was right in implementing its termination policy on the eight female workers.\(^{40}\) In his ruling, Justice KN Segara, who led a three-man bench, said that it was a straight

---

\(^{36}\) *Gan Soh Eng & Ors v. Guppy Plastic Industries Sdn Bhd* [Case No: 26(14)/4-244/05] [2008] 3 ILR 414  
\(^{37}\) *Beatrice A/P AT Fernandez v. Sistem Penerbangan Malaysia & Anor* [2004] 4 CLJ 403  
\(^{39}\) *Gan Soh Eng & Ors v. Guppy Plastic Industries Sdn Bhd* (n 36 above).  
forward case and it did not involve gender discrimination. The verdict attracted

    criticism from various sections of the society. An activist of a local-based human
    rights NGO, S Arutchelvan said that, with such a ruling, a company can terminate
    all its female staff saying that they are medically unfit even when the employer has
    no valid medical proof to support their claims. This verdict is totally against the
    virtue of the UN Convention on the Elimination of All Forms of Discrimination
    against Women (CEDAW) which Malaysia has adopted on 4th August 1995.

    In addition, there have also been instances where workers’ rights to a fair wage
    and rights to a safe and acceptable working condition have been violated by the
    companies. According to the Human Resource Ministry, more than 30% of the
    country’s 1.3 million workers were earning less than RM700 per month. The
    Malaysian Trades Union Congress (MTUC) has long called for an RM900 minimum wage to be set across the board plus an RM300 living allowance to help those earning below the poverty line of RM720 a month. Among the severely-affected in this right to a fair wage saga are the foreign workers. According to a result of a survey conducted by the Federation of Malaysian Manufacturers during the year of 2010, the average monthly wage of foreign workers engaged in the manufacturing sector was RM581. This amount fall short of the proposed minimum wage by the MTUC and wage council set up by the Government.


Malaysia is indeed dependant on foreign labours or migrant workers to support its developmental agenda. Between 3-4 million (30-35%) of its labour forces are made up by these workers. Unfortunately, despite such number, migrant workers are not protected under Malaysian Employment Act 1955 – leaving them with very little protection.\textsuperscript{44} The migrant workers and labourers, legal and illegal, often forced to work under difficult conditions and perform hazardous duties. For example, on 22 March 2010, six Filipino workers died after inhaling carbon monoxide gas while cleaning a tank at a water treatment plant in Kota Kinabalu, Sabah. On 16 August 2010, a Nepalese worker, Karna Bahabar Gharti Magar, died inside his workplace - JCY Sdn. Bhd., computer parts company based in Johor Bahru, Johor.\textsuperscript{45} It was alleged that he fell ill and requested treatment that was initially denied by the company. In response to his death, 5000 foreign workers protested for three days until employers and the company agreed to pay compensation of RM10000 to the victim’s family.\textsuperscript{46}

Indeed, the Occupational Safety and Health Act 1994 requires workers to use safety equipment and cooperate with employers to create a safe, healthy workplace. Employers or employees who violate the Act are subject to a substantial fine or imprisonment up to five years. However, the MTUC complained that some employers flouted the rules with impunity. In fact, there are no specific statutory or regulatory provisions that provide a right for workers to remove themselves from dangerous workplace conditions without arbitrary dismissal.

\textsuperscript{44} Nayagam, J. (2012) (n 5 above).
\textsuperscript{45} US Department of States. (2011, April 8) (n 43 above).
2.4 THE CONTRIBUTING FACTORS

2.4.1 The issues of ‘enforcement and compliance’ in Corporate Human Rights Violations

Indeed, much has been said about the ineffectiveness of the Government’s ‘judicial’ approach or traditional regulatory and administrative mechanisms to enforcement of corporate human rights compliance in Malaysia. In essence, this approach - which includes, 
*inter alia*, court processes, special inquest, national inquiry by special commission, and other administrative actions was seen as ‘not doing enough’ to solve the issues of human rights violations committed by MNEs and business entities. The public distrust on the way and manner such violations being dealt with by the relevant MNEs and authorities was reflected by the many protests, criticisms, police reports, sending of protest memorandum etc made by the affected communities, human rights activist and NGOs as well as the political parties.

Essentially, the above sections of Malaysian societies did not satisfy with the Government’s developmental policies which only focus on rapid economic development - which in most occasions, has been benefited greatly by few elitists at the expense of their life and human rights. From the events of corporate-related human rights violations illustrated in the case studies discussed before, it is crystal clear that there have been a number of ‘controversies’ and ‘suspicious’ nature of business-oriented dealings plotted by some ‘hidden hands’ in the implementation of every government’s project. This scenario has fundamentally hampered the effective enforcement and compliance processes on MNEs and business entities thus allowing their human rights violations to continuously happen. In essence,
there have been a number of elements which have undermined the state-centred sanctions on the companies. Among others, they include;

i.  **The political interventions by the Government leaders in the business operations of the companies.** There have been instances where most of the companies operating in the affected areas are closely connected to or ‘protected’ by some key people in the Government. In essence, the former are benefiting the latter’s role in ensuring the smooth-running of their business activities whereas the latter are also benefiting financially from the former. For example, in Bakun Hydroelectric Project, the contract of the RM15 billion-project was awarded without an open tender to a company owned by a politically well-connected businessman – Dato’ Ting Pek Khiing. The non-transparent policy in awarding contracts to companies – particularly when it comes to the companies which closely-linked to the Government, has led to accusations that the government practiced favouritism.47

Thus, if a company happen to be alleged of committing human rights violations of the local people, its business operations will normally be protected by the Government machinery if it were to have a close relationship with the Government. In February 1995, the political intervention by the State Government in the Bakun Project has increased the controversies, fuelling further pressures from the local community. The Government has approved the commencement of the project despite the study on its environmental impact has yet to be completed. In fact, in order to speed up the project and to get away from strict environmental

---

47 Mohamad, M. (n 2 above) ( p. 52).
regulations, the government has also decided to break the Environmental Impact Assessment (EIA) reports into three areas namely; creation of the reservoir, building of the dam and transmitting of the power – although the areas are actually from the same project.48

The Malaysia’s Friends of Nature Society (SAM) was among the prominent NGOs that strongly opposed the Bakun project. Its President, S.M Mohamed Idris slammed the move to separate the EIA reports as “impossible and illogical” since the three areas are a ‘part and parcel of the same project.’ Similarly, in the Murum Dam Project, the non-transparent policy by the State Government was also implemented. The project contractor – the Sarawak Energy Berhad (SEB) and the State Government have failed to provide sufficient information about the project to the affected communities. This was evident when the local people were only made to understand about the proposed project in 2007 despite the plan had been with the Government since 1994.

In fact, they only know about the plan indirectly from a second-hand source i.e. when it was made public by SEB during an economic forum in China in 2007. This has clearly violated their rights to participation and free and informed consent. In addition, there have also been instances in this Murum Dam project where the SEB – 65% owned by the State Government, has awarded an RM99-million worth contract to Universal Cable (Sarawak) Sdn. Bhd. to build a transmission line to take electricity from Murum. Both SEB and the Universal Cable are controlled by

48 Ibid. p. 51.
Chairman Abdul Hamed Sepawi and Abu Bekir Taib, respectively. Hamed is the cousin of Sarawak Chief Minister, Taib Mahmud and Abu Bekir is Taib’s son. Looking at this ‘intimate’ relationship between the State Government and the companies involved in Murum project, it is doubtful that the Government will put a strict sanction on those companies, should there been concerns raised by the affected communities on human rights violations by the companies.

ii. **Non-recognition of customary land despite endorsement by the Court’s Judgement.** The issues of encroachments of native customary rights (NCR) over land by the business entities have long been a major concern of the local indigenous people. This is because, from the violation of this right, many other rights will also be involved. They include; the rights to get access to adequate standard of living, the rights to food, the rights property, the rights to health and the right not to be deprived their means of subsistence. The violations of these interconnected rights commonly happen when the indigenous people have been displaced and forced to move to resettlement areas without their consent as a result of business operations in their places. Despite having stayed and cultivated the land for ages, their ownership right was never recognised by the government.


* [2001] 6 MLJ 241.


* [2005] 3 CLJ 697.
The judgment in these cases essentially confirmed the fact that native title arises out of native customs. These customs, which define the content of native title, constitute part of Malaysian law and are also protected by the Federal Constitution. In addition, the implementation of customs is also consistent with common law which directs our courts to define native title with reference to native customs.

Nevertheless, despite the courts’ decisions made in favour of the people, the Malaysian government and its agencies refused to accept these judgments as legal precedents. Instead, the appointed prosecution teams have appealed and the case went to the Court of Appeal or Federal Court – continuing the delay in the people’s NCR plight. The Attorney General’s Chamber of Sarawak even maintained that, despite the judgments of the courts recognise and uphold native title, they do not however determine how his state treats the rights of indigenous peoples to their traditional lands. He said that; “the natives of Sarawak may have and in fact do have many customs but these costumes to have effect as “customary law” they must have sanction of the law”… “Thus, in relation to land, the practise of native custom does not necessarily give rise to rights over land. It is only of those customs which are part of the customary law of Sarawak, which can create rights to land and this is evident by the provisions Section 5(1) of the Land Code…”

---

54 [1996] 2 MLJ 388
57 Quoted from a presentation made by the Attorney General’s Chamber of Sarawak to SUHAKAM during a dialogue session with SUHAKAM held on 13 December 2001.
Along the same vein, in the case of *Bato Bagi*,\(^{58}\) it is quite disturbing to find Abdul Aziz Abdul Rahim J held that "In cases of customary native lands without title over which customary right subsist, the issue of acquisition does not arise. This is because the lands never belonged to the natives."\(^{59}\) Additionally, in the Federal Court appeal submission in the case *Sagong Tasi* cited above, the notion of native title has been rejected by the Malaysian government. The government, citing Sections 3 and 6 of the Civil Law Act, also asserted that if a local, appropriate law is available, there is no need for it to be subjected to the articles of the Federal Constitutions or to any international customary law instrument.\(^{60}\)

From the abovementioned response to the Court’s decision, it is pretty clear that the Malaysian government rejects the right of indigenous peoples to their traditional lands, territories and resources to favour business entities. Even if the courts’ judgment was made in favour of the indigenous people, it does not however change that status quo. This shows that the judicial approach through court proceeding or ‘legal-battle’ is not effective and reliable enough in ensuring the compliance by companies with their human rights responsibilities.

**iii. Other elements generally undermining the judicial approach enforcement.** In addition to the above two elements, there are some other elements contributing to the ineffectiveness of state-centred sanctions on companies’ compliance to their human rights responsibilities. For example, in the case of sexual exploitation of Penan women and girls by workers of logging

---

companies in Sarawak, it has been discovered that the victims did not want to go to
the authorities owing to the police’s lackadaisical in the past and further obstacles
including the lack of identity cards, language barriers and the prohibitive cost of
travel. The Police, while announcing their move not to go ahead with further
probe on the Penans’ sexual abuse reports, claimed that there have been
insufficient evidence and cooperation from the victims.

The ‘miserable’ move by the Police was slammed by the Sarawak Indigenous
Rights Association President, Michael Jok who claimed that justice was not served
in this issue. The fact that the police seemed to be in a hurry to end their
investigations into these cases were deplorable and this will further increase the
public’s distrust to the police, he said. On the other hand, in Malaysia, the
Government has established the National Human Rights Commission or SUHAKAM
to assist the State in promoting human rights. In particular, SUHAKAM’s roles are,
among others; to monitor infringements of human rights wherever they occur and
to advise the Government on the improvement of laws, regulations and practices.

Since its establishment, SUHAKAM has been actively involved in various dialogues,
national inquiries and roundtable discussions on human rights with major groups
of people, NGOs, business entities as well as relevant Government agencies. For
example, in the cases of human rights violations involving Indigenous People,
especially in the Hydroelectric projects in Sarawak, SUHAKAM has undertaken a
series of national inquiries and dialogues with the parties involved and later

---


recommended some solutions mechanisms to the Government. However, there is a big obstacle that hinders its effectiveness, that is SUHAKAM does not have enforcement or executive power but rather only functions as a ‘watchdog’ who will make comment and advise on certain policies and practices of government agencies as well as other parties.

2.4.2 The polemic on the scope of MNEs’ human rights responsibility

Apart from the issues of enforcement and compliance in corporate human rights violations, the ongoing polemic on the scope of MNEs’ human rights responsibility remains another obstacle that inhibits the effective corporate human rights compliance. In other words, the companies have always and persistently claimed that human rights are not their business but the Government’s and the State actors’. Moreover, there has been a ‘conflict of interest’ between the Government – as the primary duty holder of human rights and the companies and MNEs – whose business activities have violated various human rights. Essentially, the Government cannot be very strict with those companies because they contribute significantly to the country’s revenue.

As illustrated in the case studies discussed before, many companies did not even aware of their human rights responsibilities. This was reflected by their poor human rights compliance while undertaking their business activities. Legally speaking, it is understood that, traditionally, the States or Governments who sign the human rights conventions or treaties are the ones who will be legally bound should they breach any articles stipulated therein. Because of this traditional understanding, the MNEs have claimed that they should be left untouchable
because of their incapability of observing human rights that are directed at state and government. They seem to perceive human rights responsibilities as solely governmental issues. However, the current situation suggests that such perception is no longer relevant. The MNEs have now become the global players with substantial impact and influence on the society at large. MNEs can affect the economic welfare, social affairs and human rights of the communities in which they operate.

Given the indivisibility nature of human rights, the MNEs have a direct impact on the extent to which economic and social rights, especially labour rights in the workplace, can be enjoyed. As such, without the participation of companies and MNEs, the respect and compliance of human rights principles could not effectively materialize. Indeed, it is evident that, so far, there has not been any agreement or any international instrument directly addressing MNEs reached by the international community. This does not, however, mean that MNEs do not possess any international personality. In fact, it should be admitted that, as far as human rights principles are concerned, the MNEs do have rights and duties despite the international law suggesting otherwise.

The MNEs are even sometimes capable of enforcing these by bringing about international claims. Additionally, the issues and developments that feature in the present situation require MNEs to have a legal personality, thus implying that they are subjects of international law. It was also evident that no legal obstacles exist as these business entities have rights and duties and procedural capacity under

---

Having mentioned that, it is crystal clear that the MNE, as an organ of the society and whose profit gained and accumulated also from the society should therefore play a proactive role in respecting human rights of the people within their sphere of influences.

2.4.3 Lack of Awareness among Business Entities of their CSR / human rights responsibilities

Generally speaking, the term human rights has been commonplace in Malaysia but its concepts and principles are poorly understood by majority of the people. There are instances where some top business leaders and top government officers including judges do not aware of human rights issues such as the country’s ratification status of international human rights standards, the companies’ human rights responsibilities etc. There are also some sections of the society who treated human rights as a ‘western’ product which is incompatible with some ‘eastern’ culture. Sadly, there are some entities, including companies who have taken advantage of the people’s ignorance about human rights for the sake of fulfilling their personal ends. The lack of understanding among Malaysians has indeed led to various human rights violations which also include those committed by corporate entities.

A report of a survey made on 200 Malaysian Public Listed Companies (PLCs) produced by Bursa Malaysia found poor CSR engagement by Malaysian PLCs. On average, the companies surveyed demonstrated a lack of knowledge and awareness of CSR. In this sense, it was crystal clear that, lack of awareness among

---

Malaysian PLCs has been the key problem in CSR practices and therefore need to be seriously addressed. The report said the two key areas that required more attention were environment and diversity.\(^6\) Despite such finding, it was acknowledged that in the recent years, there has been a positive sign where many companies have started to initiate their own corporate code of conduct and embrace CSR initiatives in order to be seen as a ‘socially-responsible’ entity.

The notion of social responsibility, be it in the name of corporate social responsibility (CSR), corporate human rights responsibility, corporate governance, corporate citizenship, sustainable development, business ethics and so forth - is not an entirely new phenomenon in Malaysia. Many Malaysians, from the corporate leaders to the general public, agree that being good to society and the environment constitutes an essential part of a successful business. A number of empirical researches have suggested that there has been an increasing trend in the business recognition and awareness of the essentiality of their corporate responsibility. Both Ahmad and Rahim\(^6\) and Rashid and Ibrahim\(^6\), for example, have clearly indicated the increased level of CSR awareness in Malaysia over the past decade. Research by Ahmad and Rahim shows that 93.1% of the managers sampled are relatively aware of CSR.

Nevertheless, such awareness was not effectively reflected in their business operations. Many Malaysians regard the notion as still at its infancy stage. In fact,

\(^6\) Rashid, MZA. and Ibrahim, S., (2002). Executive and management attitudes towards corporate social responsibility in Malaysia. Corporate Governance, 2, 10-16.
the misunderstanding and the lack of holistic awareness among business entities about the notion of their corporate responsibility has contributed to their non-compliance to human rights principles. This was proven by the research finding which concludes that the managers do not fully comprehend the importance of CSR.\textsuperscript{69} Similarly, in SUHAKAM’s series of round table discussions on “Business and Human Rights” with business entities and other relevant parties, it was discovered that human rights awareness appears to be lacking in the business sphere. Some businesses are even unaware of the CSR.\textsuperscript{70}

It is indeed a fact that, in general, various MNEs and business entities in Malaysia may have been aware of the idea of CSR but their understanding of holistic nature of such concept was questionable. This include the issues of human rights compliance which also a component of CSR. Such misunderstanding contributed to their non-compliance to human rights principles and to their human rights violations. Additionally, any form of partnership or networking on corporate responsibility being established on the basis of such CSR-related misunderstanding will therefore be ineffective and hopeless. The aforementioned twofold consequence which reflects the MNEs’ lack of holistic awareness and understanding of their CSR will be discussed in turn.

i. Non-holistic manner of CSR practice

The infancy stage, being previously explained based on the practice of corporate responsibility in Malaysia implies that the corporate responsibility concept was only understood and implemented partly but not holistically as it is supposed to

\textsuperscript{69} Ahmad N.N. and Rahim, N.L.A. (n 67 above).
\textsuperscript{70} Human Rights Commission of Malaysia (SUHAKAM). (2012) (n 63 above) pp. 81 & 82.
be. In other words, the manner of ‘being good’ to society and environment, even if comprehended in various dimensions by different entities, was translated and implemented in such a limited and typical perspectives. This phenomenon is the consequence of the obvious confusion in comprehending the concepts and aspects of corporate responsibility. The trend and level of CSR awareness and understanding among Malaysian executives and managers are believed to have been rooted primarily in family upbringing, traditional belief, custom and religion. Such a background enables them to have a common concern of morality.\footnote{Lu, J. Y. and Castka, P. (2009) Corporate Social Responsibility in Malaysia – Experts’ Views and Perspectives. Corp. Soc. Environ. Mgmt., DOI 10.1002/csr.184. Retrieved on 12\textsuperscript{th} May 2009, from:<http://www3.interscience.wiley.com/cgi-bin/fulltext/122246727/DF START>}

The general understanding of morality signifies that being good to people is necessary and this could normally be done through helping the needy people. As for business, corporate social responsibility seems to be only about giving donations and sponsorship but not other aspects of responsibility. Whilst there has been no universal understanding on the corporate responsibility, many quarters of Malaysian society view and concentrate corporate responsibility on the perspectives of ‘philanthropy’ and ‘public relations,’ despite their recognition of other major aspects.\footnote{Ibid.} As such, it is commonplace for many Malaysian corporate managers and executives to claim that they are responsible enough by only sponsoring the education of poor students or giving donations to the needy people. It seems to them that corporate responsibility is only about charitable activities which sometimes were done in an unplanned and unorganized manner.
Undeniably, the today's more cynical and complex global scenario has suggested the difficulties in doing the right thing for the protection of reputation. At some point, something which considered as beneficial and good by companies might implicate bad consequences to the society. As argued by George Kell73 - the Executive Head of the UN Global Compact, doing the right thing can generate more damage than good if it is not tied into a holistic, long-term perspective. For example, arranging scholarships for ten bright kids in a poor country while ignoring other young people may contribute to social unrest. Similarly, if pharmaceutical companies hand out a few packages of life-saving medicine but give no thought to the long term robustness of a poor country's healthcare system, they may well be “doing the right thing” but failing to get to the heart of the matter.

“We are speaking of complicated issues: how to get development going, how to ensure that a more accountable and enabling environment is created”, he added.

Indeed, the misunderstanding about doing the right thing among Malaysian companies has contributed to the sidelining of many other corporate responsibility aspects especially those related to human rights issues, many of which have been touched upon in previous sections. From the above analysis, it could be concluded that there are two challenges to take on, as far as the Malaysian corporate responsibility practices are concerned. Firstly, there is a clear need to address the confusion among Malaysian in understanding the meaning of CSR. The generally limited and typical understanding of CSR aspects in Malaysia should be expanded and its scope should be widened to address a lot more core issues not only limited

to grants, donations, sponsorship and support for educational activities. This very fundamental problem has caused the impractical and improper actions by several parties in dealing with issues of corporate human rights violations.

Secondly, there should be a universal understanding and wide-ranging perspective on CSR in order to have efficient implementation of social responsibility in business practices of Malaysian companies. As many companies and bodies have their own sets of rules and codes of conduct depending on how they perceive the notion of corporate responsibility, there seem to be some differences in the implementation of the concept. Such differences may hinder success in tackling the issues pertaining to corporate behaviour which has now become an increasingly global issue. For that reason, the appropriate bodies and respective authorities can play their roles in standardizing and conceptualizing the codes of conducts for companies and business entities to comply with.

ii.  **No effective CSR network in Malaysia**

As the understanding of corporate responsibility aspects is limited, any form of partnership or networking on corporate responsibility being established accordingly will therefore achieve a similarly limited outcome, at least on how the notion was understood. Hence, the network based on this selective or limited CSR understanding will eventually bring about an incompetent strategy and worthless solutions to the mounting problems of corporate human rights violations. As such, it is pertinent in the first place to educate people in the quest for a clear understanding on what basically CSR aims for. There is also a need for government, other institutions and media to work together to educate and inform
In general, there are some networks working on corporate social responsibility in Malaysia. Among others, they include Department of Standards Malaysia (DSM), Business Council for Sustainable Development Malaysia (BCSDM), Malaysia Institute of Corporate Governance (MICG), Malaysia Institute of Integrity (IIM), Malaysian Employers Federation (MEF) and Bursa Malaysia. Currently, organizations like BCSDM, MICG and IIM are tirelessly encouraging more companies to join as members and have held information sessions, seminars and workshops on subjects like safety management, sustainable development, corporate governance, integrity and so forth to promote CSR aspects.

However, the existence and modus operandi of these networks are mainly based on specific aspects of CSR and it is very rare for a single network to be seen as covering all the elements contained in the CSR. For example, the MICG is only focusing on corporate governance whereas the BCSDM focuses on sustainable development. The nature of selective emphasis on CSR aspects is obvious as different bodies may have a different understanding of CSR aspects. This scenario indicates the manner of how the aspects of CSR are addressed in Malaysia. Bearing in mind the limited understanding of the concept of CSR by Malaysian managers and the general public, the different perspectives of CSR in different bodies and
non-holistic practices of the Malaysian CSR network, it could be assumed that the expected outcome of corporate responsibility in Malaysia is inimical.

As a result, there are still companies in Malaysia which violate fundamental rights of the people and environment within their sphere of influence despite already becoming part of the aforementioned corporate responsibility networks and actively involved in charitable activities. Ostensibly, the absence of an appropriate and efficient corporate responsibility network, chiefly because of the lack of understanding in the aspects of the corporate responsibility network, seems to impede the process of making Malaysian companies accountable for the human rights principles they have abused. Malaysian companies should engage in a practical network whose core objectives and practices cover the whole and universal aspects of corporate responsibility and not limited to specific aspects only. The limited and non-holistic implementation, due to the limited understanding of the concept will only be avoided if the understanding of the concept is correct in the first place.

2.5 CONCLUSION

This chapter presents a brief but useful background to the ongoing series of corporate human rights violations in Malaysia which seems to be an ‘unavoidable price’ for the country’s development process. Indeed, the mushrooming emergence of MNEs as the current global players, brought together with their unprecedented power and far-reaching influence superseding the State actors, demonstrated how their existence has had an impact on every single entity on the earth. People today go nowhere without connecting themselves with business or MNEs’ activities. If
not as employees or shareholders, they may at least be customers or buyers of MNEs’ products. In the same vein, Malaysia was not excluded from being affected by the impacts of the MNEs’ business activities.

Unfortunately, the Malaysian government’s privatization policy and other liberal policies which allowed the rapid expansion of MNEs in Malaysia did not quite match with the concurrent need to uplift and uphold the enjoyment of fundamental human rights. The need to respect people’s human rights seems to be less important compared to boosting the country’s economic growth. Such liberal economic policies have, at some point, resulted in the indirect perpetuation of corporate human rights violations. Having provided some insights on the general overview of corporate human rights violations in Malaysia, I have accordingly explored a number of selected case studies which illustrate the nature of business-related human rights violations.

The case studies, among others, include; the Hydroelectric Projects in Bakun and Murum Dams, Sarawak; the plantation and logging activities in Ulu Belaga, Sarawak; the violations of Orang Asli’s rights in Peninsula Malaysia as the result of developmental projects; and the violations of workers’ rights. Through such case studies, it has been discovered that a number of factors have contributed to the ongoing existence of business-related human rights violations. The factors include the issues of ‘enforcement and compliance’ in dealing with corporate human rights violations, the ongoing polemic on human rights responsibilities of the MNEs as well as the lack of accurate awareness and understanding about the CSR concept among the MNEs and business entities.
In short, this threefold factor proves that there have been inadequacies in the existing approach of dealing with corporate human rights violations. The sole reliance on the traditional state-centred sanction and judicial approach may not be effective enough. There is therefore a need to have a non-judicial social enforcement approach which focuses more on the principles of corporate accountability, good governance and corporate social responsibility. Similarly, the issues of lack of awareness among MNEs and business entities about their social and human rights responsibilities should be overcome. In addition, the formation and setting-up of various corporate responsibility networks did not bring about any positive or credible changes to the current level of corporate responsibility in Malaysia. In this regard, I argued that this problem could be solved if the corporate responsibility concept was properly and correctly understood.

For that purpose, the Global Compact model, in particular, its human rights principles and values as well as the extent to which it would address the problems that contribute to corporate human rights violations in Malaysia shall be discussed in detail in the 4th chapter. The Compact principles, though voluntary in nature, could give moral and legal values to the many existing regulations, circulars, code of ethics and so forth in order to bring the corporate human rights compliance to the next level. Suffice it to say that, the adherence to human rights principles while doing business is not contradictory to a profit-maximization agenda. In fact, it will ensure the profit accumulation within responsibility, which is important for MNEs’ endurance in the long run.
Chapter 3:
INADEQUACIES IN INTERNATIONAL AND NATIONAL REGULATIONS OF HUMAN RIGHTS VIOLATIONS BY MNEs

3.1 INTRODUCTION

Indeed, much has been said about the non-effective nature of traditional State-centred sanction and judicial approach in dealing with issues of corporate human rights violations in Malaysia. From a range of examples presented in the previous chapter, it has been discovered that there is still much room for improvement in ensuring better human rights compliance by business entities in Malaysia. While the previous chapter rightly indicated that the corporate human rights violations occurred because something went wrong with the Government’s state-centred measures, this chapter however believes that the ‘mystery’ behind such violations does not end at that point. In essence, the current chapter espouses the idea that, apart from the deficits in domestic frameworks, there have also been some sorts of ‘accountability gap’ or inadequacies in the existing international and national human rights standards governing the MNEs.

In principle, the current chapter serves to illustrate the point that the issues of corporate human rights violation in Malaysia are not readily addressed under the current legal mechanisms, both at international and national levels. That is why the soft-law approach of Global Compact principles is proposed as a solution by this thesis. Generally speaking, this chapter is divided into two parts. The first part deals with the general perspective and the context of human rights obligations of the MNEs under international law. This will shed some light on the extents to
which an MNE or business entity should play their role in respecting, protecting and fulfilling human rights principles within their sphere of influences. This part accordingly analyses how and under which jurisdictions the MNEs can be held responsible for their human rights violations. This will reinforce the idea that MNEs are ‘part and parcels’ of the society and therefore shall be responsible for any abuses they have committed to the society. For such purpose, the existing regulations - which include direct obligation (by taking MNEs responsible) and indirect obligation (by taking State responsible for violations by MNEs) – shall be discussed in turn.

Also, an analysis will be made on the existing regulatory frameworks governing corporate human rights violations in Malaysia. The second part, on the other hand, examines the alleged inadequacies and ineffectiveness of the existing international and domestic human rights regulations governing MNEs. Such inadequacies were contributed to by a number of hurdles, among others, include; the ongoing polemic on MNEs’ legal personality, the transnational nature of MNEs which facilitates them to avoid regulations, the misuse of doctrine of ‘forum non conveniens’ by the MNEs, the issues of States ratifications to human rights treaties and the conflict between international laws and the national laws.

Viewing such gap as a loophole in the existing rules, this chapter accordingly presents a preview of soft-law analysis as instrument applicable to address enforcement and compliance problems discussed previously. The in-depth analysis of Global Compact soft law will be discussed in Chapter 4. In short, this chapter proves that the existing legal apparatus, international and national alike, are still
not ready to deal with the issues of corporate human rights violations in Malaysia. Thus, a soft-law approach will need to be used as an alternative solution mechanism.

3.2 THE CONTEXT OF MNE’s HUMAN RIGHTS REGULATION UNDER INTERNATIONAL LAW

The recent decades saw an increasing demand in the global community to challenge the traditional profit-oriented and shareholder-centred of business practices. The tone of such demand becomes louder when many MNEs have been alleged of committing human rights violations. There have been constant calls for regulating the MNEs with human rights standards, but the extent of business’ human rights obligations is still a debatable issue. In reality, the notion of controlling corporations’ and MNEs’ behaviour through the implementation of rules-based regimes and democratic control is not new. Such an approach has long been used to ensure that MNEs are accountable to the society at large.

Despite the debates on how to control MNEs’ conduct and of whether or not MNEs – as a corporate entity – have human rights duties and responsibilities towards their stakeholders and society at large are still ongoing and far from over, the need to extend human rights responsibilities on MNE cannot be disputed. Realizing the massive impacts they may have on the international flow of capital, material, goods and technology through their cross-frontier business operations, they should always be deemed responsible for whatever misconduct they have committed to their stakeholders within their sphere of influence. To this effect, the academics and legal scholars have considered MNEs as a type of corporate entity falling
within the scope of international law and, consequently, possessing certain rights and duties under international law.¹

In principle, holding MNEs accountable for their human rights violations through a regulatory approach is an effective approach given that it requires monitoring and enforcement mechanisms, characteristics that a self-regulation approach does not offer. The regulatory approach is one of the mechanisms designed to respond to the growing pressure, mainly from human rights NGOs and activists as well as academia and consumer associations. They demand the imposition of tight and strict legal obligations on companies in the attempt to hold them accountable for human rights violations. This was based on several arguments, one of which derived from an expression made by the UN Sub-Commission on the Protection and Promotion of Human Rights which has, among other things, stated that;

"It is not possible for private actors whose actions have a strong impact on the enjoyment of human rights by the larger society.... to absolve themselves from the duty to uphold international human rights standards."²

A regulatory approach signifies forms of ‘hard laws’ or an approach which is legally binding or of a quasi-legal nature. Such a regulatory framework will correspondingly lead to an enforcement mechanism or an imposition of a penalty to those MNEs that fail to comply with a defined set of rules. In other words, by implementing such a regulation, companies will be more serious about any activities they are considering engaging in - especially misconduct relating to

human rights violations, will be scrutinized and will also amount to legal action being taken upon them.

Suffice it to say, while there is a general idea that it is better not to legally bind the MNEs in order to encourage them to build their own self-regulatory approach on a voluntary basis, the debates over the pros and cons of both approaches are widening. In this regards, it has been suggested that there are a number of potential advantages to the legal approach. As the International Council on Human Rights Policy points out;

“Voluntary codes rely entirely on business expediency or a company’s sense of charity for their effectiveness. By contrast, legal regimes emphasize principle of accountability and redress, through compensation, restitution and rehabilitation for damage caused. They provide a better basis for consistent and fair judgments (for all parties, including companies).” 3

Fundamentally, MNEs can either be directly or indirectly accountable. Directly, MNEs can be held accountable for their human rights violations by invoking a domestic legal structure that exists in home or host States as well as mechanisms and approaches at both regional and international levels. On the other hand, MNEs can also be indirectly controlled by holding governments or States to account for the MNEs’ misconduct taking place within their territories. This is because the States are obliged to protect the rights of people in their jurisdiction, and this implies that they must regulate companies operating or domiciled in their jurisdiction.4 This duty requires States to ensure that proper national laws are in place to control corporations; in this way States fulfil their duty to protect human


rights. For the purpose of this section, both direct and indirect obligations will be analyzed sequentially.

3.2.1 Direct Obligation - MNE’s Responsibility

In general, the imposition of human rights obligations directly on companies and MNEs offers convincing and greater possibilities for winning actual redress for victims of abuses by MNEs. This approach can be made under either national or international law at the following three levels:

3.2.1.1 Host State Level

Generally speaking, the most obvious source of accountability is regulation by the host State - the State in which the abuse of human rights occurs. This is because the violations happen within State’s territory and it is the State’s obligation to stop any human rights violations within its territory. The host State’s national regulations may take many forms in areas such as criminal law, environmental protection, civil rights, anti-discrimination law, labour rights, consumer protection and anti-corruption legislation. However, it seems barely possible for the host States - usually referred to as less-developed and developing countries – to effectively implement a set of rules and regulations to hold MNEs accountable for any human rights violations. This is because, in most cases, these States depend heavily on MNEs to boost their economic development. They would rather prefer to keep a blind eye to human rights violations of their own people than to lose grips on lucrative FDI generated by the MNEs. The drawbacks and inadequacies of regulations at host State level shall be discussed in detail in the following sub-chapter.
3.2.1.2 **Home State Level**

Whilst the regulations at the host States levels are usually seen as impractical and less-effective, regulation by home States - the States where the parent corporation of the MNE is located, are instead seen as a more reliable platform for taking effective action in relation to imposing international human rights regulations on the MNEs. In general, the home States are of developed nations whose effective and stringent legal systems possess the requisite technical expertise to impose sufficient safety standards, and to have the benefit of a legal system able to cope with a proper attribution of responsibility within complex corporate arrangements.\(^5\)

Undeniably, it is common for developed nations to demand greater standards of behaviour from an MNE within their jurisdiction than do developing and less-developed nations.\(^6\) In fact, it is not a problem for a developed home State to regulate the activity of the parent company as it is clearly within its jurisdictional competence. However, it is not common for home States to enforce such standards when it comes to extraterritorial operations. Such regulation is likely to be perceived as interference in the national sovereignty of another State, an act that contrary to international law.

Nevertheless, it has been suggested that the home States do possess the extraterritorial jurisdiction on the grounds of the nationality principle which holds that a State has jurisdiction over its nationals in relation to offences committed by

---


6 Ibid., p. 274.
them anywhere in the world. This regulation can be imposed to uphold the general interest of the international community, a principle that has been collectively agreed by all States in the Vienna Declaration which, *inter alia*, reads “*The promotion and protection of all human rights is a legitimate concern of the international community*”.⁷

Hence, to this extent, the home State’s regulation on parent corporations is lawful, thereby waiving suspicion of collusion with foreign policy goals or domestic benefit of the home State.⁸ As far as the home State’s extraterritorial legal jurisdiction is concerned, there have been clear signs that some developed countries where giant MNEs are originated - most notably the common law countries like the USA, the UK, Canada and Australia, are gradually widening their net of human rights laws. This move, among other things, will make it possible for claimants from host countries to hold MNEs legally accountable in their home countries.

In the USA for example, the Alien Tort Claims Act (ATCA) has been used by the US authorities to legally bind and control its MNEs for human rights violations. The Act, being the US 200-year old law, is considered the most useful instrument to date which empowers the US Courts’ jurisdiction to hear cases of human rights abuses committed in violation of the laws of nations or treaty of the US (violations of customary international law) occurring anywhere in the world so long as the US courts have jurisdiction over the defendant. The Act covers a limited range of

---


charges of severe human rights abuses, namely slave labour, collusion in genocide, collusion in torture, and collusion in extrajudicial murder. ⁹

There were a number of cases being brought before the US courts on the basis of this Act. Of the notable cases was the case of Doe v. Unocal, in which Unocal, a US-based company, was tried by a Californian District Court over the alleged human rights violations within its joint-venture project in Burma. In this case, it was held that, for the first time, ¹⁰ an American-registered MNE could, in principle, be held directly liable under the ATCA ¹¹ for acts done in concert with, or by, a foreign government with which it was in partnership, that constituted violations of internationally recognized human rights instruments. ¹²

However, in its judicial Statement, the Court dismissed the case on the ground that, despite being a joint-venture partner, Unocal was not directly involved in the alleged abuses which were the responsibility of the Burmese authorities alone. On 18 September 2002, the District Court’s decision was reversed upon an appeal made by the Plaintiffs before the United States Court of Appeals for the Ninth Circuit, allowing the lawsuit against Unocal to go forward. In December 2004, a final settlement agreement has been reached in the Doe v. Unocal litigation in which plaintiffs and their representatives will be compensated with funds to improve living conditions, healthcare and education and protect the rights of people from the company’s project region. It is believed that such initiatives will

⁹ IRENE. (n 4 above) (p. 4).
¹¹ 28 USC s. 1350.
provide substantial assistance to the affected people within the region. The outcome of this litigation set a milestone in extra-territorial business litigations in which a private non-State actor can be sued before the home State Courts (in this case in the US) for alleged violations of human rights.

3.2.1.3 **Regional and International Levels**

Apart from being implemented at national level, a successful regulatory mechanism must also include the regional and international standards that directly bind MNEs. This international regulation is premised on the current scenario which sees that, whilst more and more MNEs have expanded their operations over the past 30 years beyond national borders, the ability of individual States to hold corporations accountable for their activities and to safeguard public interests through national regulation alone has substantially diminished. Realizing this, developing countries and civil action groups have demanded a strong international regulatory regime to hold MNEs accountable to citizens wherever they operate in the world.

Most of the States, to the contrary, have long resisted such attempt as it would give companies status in international law and thereby undermine their legal sovereignty. Be that as it may, it should be borne in mind that international institutions are more powerful and superior in the supervision, enforcement and the implementation of binding standards. It is under the purview of international

---


human rights law that there exist possibilities for international and national companies to be held accountable. Nevertheless, to date, such possibilities have been more widely used in relation to States. In fact, there is no effective and consistent network of binding laws and standards at international level. So far, the only existing direct international regulation of MNEs consists of ‘soft’, non-binding international law instruments which act as guides for the appropriate behaviour of MNEs.16

As the ‘soft-law’ instruments do not offer enforcement and monitoring mechanisms, it seems barely possible for such instruments to effectively control the MNE’s behaviour. Nonetheless, despite being seen as non-enforceable approach, it does not necessarily imply that such instruments are completely worthless and useless. The standards therein can be useful guidelines for national governments that wish to impose binding domestic duties on MNEs within their territories. In addition, these instruments may also be useful for NGOs seeking ammunition for campaigns against certain MNEs, and unforgettably for MNEs themselves, especially those who care to adopt and implement an internal code of conduct.17

Be that as it may, the international legal codes can also establish coherent universal standards and provide a ‘level playing field’ for all businesses; something that cannot be offered by the codes of conduct and other voluntary initiatives.18

Generally, there have been a number of approaches identified at different regional

---

16 Kinley, D. (n 12 above) (p. 15).
18 Ibid., pp. 6 and 14.
levels, including the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Organization of Economic Co-operation and Development (OECD). The attempt undertaken by the OECD through the introduction of its Guidelines for Multinational Enterprises in 1976, for example, marked the preliminary endeavour to establish such an international mechanism that is specifically directed towards MNEs.

The Guidelines are recommendations governing the operation of MNEs within all 29 OECD nations, and three other non-members. They are the result of a ‘constructive dialogue with the business community, labour representatives, and non-government organizations’¹⁹ which require MNEs to follow the principles and standards laid down in the fields of environment, transparency in operation, anti-bribery, consumer interests, and competition. Although to some extent the Guidelines may be useful as moral force to inculcate human rights in business practise, they are really only moral requests and are no better than the Codes of Conduct adopted by many MNEs. Due attention therefore needs to be given to their implementation in order to achieve their actual objective.

In addition, on top of the above mentioned regional frameworks governing business, there are also similar frameworks at international level – mainly under the auspices of the UN. Generally speaking, there a number of UN frameworks which directly address human rights issues in business. Firstly, The UN Norms, which was released by the UN Sub-Commission for the Promotion and Protection of Human Rights, presents a set of promising human rights norms for MNEs.

Despite not being a formal treaty assuming binding legal obligations, the Norms are more authoritative than the many codes of conduct adopted by companies, and are a significant advancement over existing standards. For a number of reasons, the UN Norms are likely to have some legal effect. This was, however, the main reason why most companies opted to oppose these Norms.20

Secondly, the UN Global Compact was also seen as another UN initiative that seeks to embed human rights principles within business practice. The Compact commits all the signatories, within their sphere of influence, to protecting and promoting human rights as expressed in a set of ten universal principles. Specifically, these cover the area of human rights, labour, environment and anti-corruption.21 Due to its precious human rights principles and values, the Global Compact has been made the main focus by this research; to the extent that the 4th Chapter of this thesis has been dedicated to a thorough examination of this initiative; this chapter however, does not intend to conduct similar discussion. Rather, the mention of the Global Compact in this chapter seeks to clarify the position of the initiative within the international regulatory structure in respect to corporate human rights responsibilities.

Thirdly, the UN Human Rights Council endorsed by consensus the Guiding Principles on Business and Human Rights in June 2011.22 The Guiding Principles implement the UN ‘Protect, Respect and Remedy’ Framework proposed by Special

---


21 Kinley, D. (n 12 above) (p.5).

Representative to the UN Secretary-General (SRSG) on business and human rights, John Ruggie. This Ruggie’s three-pillar Framework will also be discussed with some details in the next chapter since it provides operational clarity for the GC principles. Also, in June 2011, the UN Human Rights Council has established a UN Working Group on business and human rights. One of the working group’s purposes is to “continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities.”

3.2.2 Indirect Obligation – State Responsibility

From the previous discussion, it has been acknowledged that the existing direct obligation on MNEs at both national and international level - despite offering some ‘hope’ for solution, is still a principally hypothetical debate without any convincing monitoring and enforcement procedures. Host States, being mostly the developing countries, see the strict regulations on corporate behaviour as obstacles which might impair their economic development agenda whereas the international legal regime suffers with the non-existence of legally binding framework directly targeting business. As such, indirect obligation – which targets the State’s responsibly for MNEs’ human rights violations, could serve a meaningful outcome.

As opposed to direct obligation, an indirect assumes, by virtue of international law framework, the State’s responsibility to take action upon MNEs for human rights violations.

---

violations they committed within its territory. In other words, the problems of corporate human rights violations could be solved by taking governments to account for MNEs behaviour instead of putting the spotlight on the MNEs. Putting the burden of law on the States was seen by some quarters as a more feasible approach since the States are the subjects of international law thereby owe certain obligatory duties as prescribed in the treaties they have signed. Indeed, the State is traditionally seen as entity primarily responsible for upholding human rights on the international level as well as in the national sphere.

However, with the appearance of a whole spectrum of non-State entities on the global scene, many questions can be asked in connection with the State’s liability for human rights violations committed by non-State actors.24 For example, when would actually a corporate human rights violation be deemed as the result of the State’s failure to observe its international responsibility? How extensive are the duties of States to promote and protect human rights, especially when powerful non-State actors threaten these rights? Article 11(1) of the International Law Commission (ILC)’s Draft articles on State Responsibility25 affirms that “the conduct of private individuals acting not on behalf of the State shall not be considered as an act of the State under international law.”

The State, however, shall remain responsible when it fails to carry out an international obligation to act. Thus a State in deemed as in breach of its

international obligations not only if it violates human rights in the traditional sense but also if its fails to exercise due diligence to prevent or remedy any event of human rights violation committed by private and business entities within its territories. As signatories of various international treaties, States are obliged to protect the rights of people in their jurisdiction. This signifies that they must regulate companies operating or domiciled in their jurisdiction. In other words, the States have the obligation to respect, fulfil and protect the human rights of individuals.

The obligation to ‘protect’ also includes the State’s duty to ‘protect people by stopping private actors from abusing rights’. In this regard, reference can be made to various international treaties from which the human rights regulations are derived. For example, article 28 of the UDHR, and Articles 2(1) of the ICCPR and ICESCR relate to and define the obligation of State parties. The ICCPR, a treaty that has been ratified by 167 nations (as of March 2012) including the United States, provides in its Article 2 that each State party

“[u]ndertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”

One aspect of the quote indicates that it is up to the States, and States only, to carry out the obligations established by the Covenant. More interestingly, the two aspects defining the obligation – to ‘respect’ and to ‘ensure’ – indicate slightly

---

26 International Council on Human Rights Policy (n 3 above) (p.p.5-6).
different things. The obligation to respect is a negative obligation, asserting a
direct prohibition on State violation of human rights. In addition, the obligation to
‘ensure’ extends further, indicating that State parties must take positive steps to
give effect to the ICCPR rights. In other words, it is not enough for a State to merely
refrain from violating human rights themselves, but the State is also required to
take positive and proactive measures by taking preventative action. This implies
an obligation to adopt the necessary “legislative and other measures”\(^\text{30}\) to provide
an effective remedy to victims and establish institutional safeguards.

In addition, the Covenant also indirectly hinted that it may also, to a certain extent,
apply to corporations, though not directly. The Covenant’s Article 5(1) States that;

“[n]othing in the present Covenant may be interpreted as implying for any State,
group, or person any rights to engage in any activity or perform any act aimed at the
destruction of any of the rights and freedom recognized herein....”

Equally, the UN Convention on the Elimination of All Forms of Discriminations
against Women (CEDAW) – which Malaysia ratified in 1995, enjoins the Member
States;

“[t]o undertake all appropriate measures to eliminate discrimination against women
by any person, organization or enterprise.”\(^\text{31}\)

In the same vein, Article 2(1)(d) of the International Convention on the Elimination
of All Forms of Racial Discrimination\(^\text{32}\), \textit{inter alia}, requires States to

“[p]rohibit and bring to an end, by all appropriate means, including legislation as
required by circumstances, racial discrimination by any persons, group or
organizations”.

\(^{30}\) UN, ICCPR (n 28 above) Article 2(2)


As such, by the virtue of the above provisions, States have indirect responsibility for preventing destruction of any rights as well as racial or sexual discrimination by any organization or private entities. The failure to protect such rights will therefore amount to a States’ violation of human rights enumerated in the treaties. As indicated by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,

“a violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant.” \(^{33}\)

Accordingly, it was further concluded therein that;

“the obligation to protect includes the States’ responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights” and thus “…, the failure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable condition of work”. \(^{34}\)

Ostensibly, the range of the above provisions indicates that the States are the key-actors in ensuring the MNEs’ due compliance with human rights principles within their territories. The State’s duty to protect human rights could, therefore, be an effective vehicle for arguing that a number of human rights treaties specifically require States to regulate private actors to prevent violations of rights protected by the treaties. \(^{35}\) This indirect responsibility could be undertaken by requiring the States to ensure that proper national laws are in place to control corporations. In this way States can fulfil their duty to protect human rights. Indeed, given the lacuna in the international legal structures for direct accountability, the indirect

\(^{33}\) UN, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, para 11

\(^{34}\) Ibid., paras 6 and 18.

obligations imposed on companies by nation States may give us valuable clues as to the emerging norms on which any international regulatory theory could be based. This will ensure that the private actors also have their duties and responsibilities in maintaining human rights standards together with nation States.

3.3 EXISTING MALAYSIAN LAWS GOVERNING COMPANIES

Generally speaking, major human rights being frequently affected by the MNEs’ business activities in Malaysia include the issues of equality, life and security, personal freedom, displacement of people, gender discrimination as well the rights under the cluster of economic, social and cultural rights which mainly consist of labour- and environmental-related issues. Similar to that of at an international level, the Malaysian legal system does offer a range of regulations concerning the business conduct which may have an effect on the aforementioned rights. Nevertheless, the current state of Malaysian law does not seem to provide a conducive platform in order to hold the MNEs responsible for their human rights violations.

As most of the regulations are of shareholders-based, such as the Companies Act 1965, there has been a complete absent in term of specific human rights laws on companies. There have been, however, a number of existing laws which can be considered as a platform for the Malaysian government to control the conducts of MNEs as well as a platform to obtain justice and redress for victims of corporate human rights violations. To be precise, in most cases, the causes of action related to business-human rights issues are primarily rested on the traditional contractual and tortuous liabilities. Among these laws are Contract Law, Consumer Protection
Law, and Environmental Law etc. For example, if a victim who is an employee of the respective MNE may also resort to employment law protection. Victims who have no contractual relationship with the MNE, such as consumers of hazardous products and environmental victims may rely on consumer law protection and tort law remedies respectively.36

Hence, any attempts to seek justice and redress from the corporate human rights abuse could only be channelled through the available legal avenues. However, before assessing such legal avenues, it is worth having a sound understanding of the main legal source of the country i.e. the Federal Constitution, from which such legal avenues are derived.

### 3.3.1 Human Rights in the Federal Constitution of Malaysia

In general, human rights protection in Malaysia is provided under Articles 5-13 of the Constitution - commonly referred to as the ‘Fundamental Liberties.’ Among others, these articles are related to the rights to life and liberty, equality, freedom of movement, freedom of speech, assembly and association, freedom of religion, rights in respect of education and right to property. The meaning of the term ‘Fundamental Liberties’, however, was not explained and defined, neither by the drafter of the Constitution i.e. the Reid Commission nor the Government. It was only in 1999, when the Human Rights Commission of Malaysia Act (Act 597) was enacted, the meaning of ‘fundamental liberties’ has been specifically enlightened.

---

Section 2 of the Act, in particular, provides that ‘human rights refer to fundamental liberties in Part II of the federal Constitution’.

In the light of Section 2, it could be summarised that ‘fundamental liberties’ provided in the Constitution reflect the basic human rights guaranteed for the citizens. As such, any discussion about human rights in Malaysia is incomplete without referring to any of the Articles in Part II of the Constitution. Nevertheless, it should also be noted that, for the purpose of the Act, references can also be made to the UDHR insofar as it is not contradictory to the Federal Constitution.37

3.3.2 Avenues for Regulation

The available legal avenue which governs companies in Malaysia touches directly the people within the companies (the shareholders) and MNEs’ ‘sphere of influence’ (the stakeholders). This theory was canvassed by Principle 1 of the Global Compact that determines the extent of MNEs’ responsibility. The people within the MNEs’ sphere of influence include their employees, communities and general public, all of which may be affected by their business operations. For this purpose, this sub-section will analyze several related legal avenues in turn.

3.3.2.1 Contract and Tort Law

Generally speaking, legal actions under the purview of contract law are permissible as long as the individuals have contractual nexus with the MNEs. In principle, a contract established following the relationship between employees and employers may imply that such employment-based contract lies under the ambit of Employment Law. However, individuals who bring claims and whose relationship

with MNEs is not based in an employee capacity are usually confined to Contract Law. These individuals include those who are not defined as employees under the Employment Act 1955, sole traders who supply goods and services to the MNEs as well as independent contractors. In addition, human rights abuses can also be classified and recognized as tortious claims in national courts. For example, a claim of negligence provides a basis of private law protection from injury to the person and / or damage to property.\textsuperscript{38} The doctrine of vicarious liability applies, following which a corporate entity, as principal, is vicariously liable for the torts committed by its employees, as agents, in the course of their employment.\textsuperscript{39}

3.3.2.2 Criminal Law

In general, criminal law in Malaysia is territorial in nature. The criminal liability in Malaysia is primarily governed by the Penal Code.\textsuperscript{40} Section 11 of the Code defines ‘person’ as including ‘any company or association or body of persons, whether incorporated or not’, therefore making corporate entities liable for criminal offences in Malaysia. Corporate entities cannot, however, be sentenced to imprisonment or be convicted of offences which by their nature can only be committed by natural persons. As such, they may only be liable for criminal offences if such offences are committed either by their directing organs which ordinarily include the directors, managing directors and / or senior officers. In addition, they may also be vicariously liable for the criminal acts committed by their employees within the scope of their employment.

\textsuperscript{38} See Woon Tan Kan (deceased) & Seven Ors v Asian rare Earth Sdn Bhd [1992] 4 CLJ2299
\textsuperscript{39} Oxford Pro Bono Publico (n 36 above) (p.178).
\textsuperscript{40} (Act 574) (Revised 1997)
3.3.2.3 **Employment Law**

Malaysian legal framework provides a number of laws regarding labour matters covering a broad range of labour-related rights and issues. As labour matters lie under the jurisdiction of the Federal Government, there is a high degree of uniformity and certainty in labour-related policies. The main labour laws include the Employment Act 1955 (EA), the Industrial Relation Act 1967 (IRA), the Employees Social Security Act 1969 (ESSA), the Occupational Safety and Health Act 1994 (OSHA) and the Trade Unions Act 1959 (TUA). The EA enumerates laws on employer-employee relations. In essence, it spells out the various statutory rights, including the working hours, working conditions, wages, holidays, and other such matters. The IRA essentially governs employer-union relations. For this purpose, it establishes the legislative policies on which these relations are founded, namely trade unionism, union recognition, collective bargaining and dispute resolutions.

The ESSA, on the other hand, underlies provisions covering social security protection to all employees and their dependants as well as the employers. This Act is administered by the Social Security Organization (SOCSEO), Malaysia. In addition, the OSHA, which is administered by the Department of Occupational Safety and Health, enumerates issues relating to safety, welfare and health of persons of workplaces or in the operation of high risk machinery against risks to safety or health. The TUA defines trade unions, regulates their composition and membership, and sets out their rights, powers, duties and responsibilities. The

---

labour court and the industrial court, as opposed to civil courts, are tribunals and essentially hear various types of labour disputes.

However, it should also be noted that the civil courts have supervisory jurisdiction over the labour and industrial courts, which means that there is some degree of ‘checks and balances’ on administrative actions and decisions. In general, the prevailing labour law in Malaysia is, on the whole, satisfactory. Despite this, it is recommended that there is a continuation of the reformation of laws to provide greater accord with market-oriented norms. In this regard, it is vital to maintain a balance between the rights of the employees on the one hand, and the expectations of foreign investors on the other. Moreover, the industrial administrative tribunals should continuously strive to be relevant, as their absence would probably increase transaction costs, which would stifle Malaysia’s competitiveness.44

3.3.2.4 Environmental Law

As indicated earlier, violating environmental rights may also imply violating the people’s right to the enjoyment of the highest attainable standard of physical and mental health. This will happen when the companies adversely emit, discharge or deposit any harmful toxic wastes or oils into inland waters. Similarly, in undertaking any projects, some companies might consider relocation and thereby destroy the habitats of indigenous peoples. The best examples to explain the violation of environmental law are the Bakun hydro-electric power and oil palm plantation projects in Sarawak state which have been the venues where numerous human rights violations have taken place. These violations’ impacts include the

displacement of local and indigenous communities, the reduction of water quality and the mass death of fish due to the high rate of erosion and siltation, flash flooding resulting from the massive logging of rainforests as well as other social problems committed by workers of the logging companies.

Hence, by doing so, MNEs may interfere with the rights of all people to freely pursue their economic, social and cultural development, including the right not to be deprived of their own means of subsistence.\footnote{UN, ICESCR (n 27 above) Article 1(1).} Having considered that violations of environmental rights are not only harmful to the environment but also to the people within the effected environment, a number of rules and regulations have been deployed by the Malaysian government to solve the problem. It is acknowledged that Malaysia has a fairly systematic law on the environment and more improvements on the existing laws have been made from time to time. In the latest one, the government enacted the Environment Quality Act 1974 (EQA), as amended in 1996 (EQU), and a number of secondary legislations thereunder. The Department of the Environment (DOE), under the purview of the Ministry of National Resources and Environment, is a body-in-charge for the monitoring and enforcements of the environmental regulations.

In short, the EQA legislative policies are ‘an Act relating to the prevention, abatement, control of pollution and enhancement of the environment, and for the purposes connected therewith.’\footnote{Preamble of the EQA 1974} Despite the presence of institutional development, before the mid 1970s, environmental problems tended to be addressed in an \textit{ad hoc} basis. Violations often went unpunished as government
officials were preoccupied with attracting firms rather than ensuring better environmental standards. The environmental management was further saddled with weak institutions and relatively weak enforcement, a lack of industrial players’ participation, potential conflicts between the federal and state governments, and politicization.\textsuperscript{47} Research shows that textile industries often emitted their used resins into streams from the 1960s until the late 1980s.

Similarly, until the 1980s, electronic firms did little to safely retain CFCs generated from manufacturing. However, these violations of environmental rights do not become a ‘big deal’ unless the environmental mishaps claim lives or seriously affect the lives of workers and proximate inhabitants. Among obvious examples was the death of three workers in a molten steel accident at the Malayawata Steel mill which is a Japanese-Malaysian joint venture project. Within its steel making section alone some 923 workers were injured, while the 2000 residents staying near the firm have often been subjected to dust.\textsuperscript{48} Hence, despite the bad management of environmental governance and having already had the laws calibrated in legislative text, a systematic reform of the relevant institutions and streamlining of procedures is now required to be consistent with the modern business practice.

In so doing, the plethora of secondary legislation under the EQA and other sectoral laws that address environmental matters should be constantly reformed to strengthen the certainty and predictability of the law. Most importantly, the elements of integrity, transparency and accountability must be adhered to at all

\textsuperscript{47} Rajenthran, A. (n. 44 above) (p.21).
levels. In sum, environmental governance must progress in tandem with changing business trends and the ongoing globalization tide. Studies show that mere ‘command and control’ types of legal framework would not be productive or desirable in the long run. In this regard, ‘information regulation’ is the latest phase in the evolution of pollution control paradigms.

3.3.2.5 Consumer Protection Law

Another possible avenue to legally bind business entities and MNEs for their human rights violations is through the Consumer Protection Act 1999 (CPA 1999). The individuals who have a direct relationship with MNEs, such as employees may not need to use this Act to bring legal action upon their employers as this is already contained in the Employment Act. Rather, the CPA 1999 is normally applied to the individuals who do not have a direct relationship with the MNEs or to areas of consumer protection that are not already covered by other statutes such as the Contract Act 1950, the Sale of Goods Act 1957 as well as the Sale of Drugs Act 1952. Among other things, the CPA 1999 provides consumers with protection from products, services and manufacturing processes that may expose their health and life to danger.

In addition, in the event that the product does not comply with the implied guarantee, the customer is also entitled to claim damages for any loss or damage directly caused by the failure of the product to perform properly and for the

---

49 Rajenthran, A. (n. 44 above) (p.21).
50 Ibid., p.22.
51 Consumer Protection Act 1999 (Act 599) (CPA 1999) s 5
52 Ibid., Part III
reduced value of a product. Apart from providing civil remedies to consumers, the CPA 1999 also contemplates criminal liability against suppliers and manufacturers who contravene the mandatory safety standards set out in Part II of the CPA 1999.

3.4 INADEQUACIES IN INTERNATIONAL AND NATIONAL HUMAN RIGHTS STANDARDS FOR MNEs

Despite a strong tendency in the international communities to subject MNEs to international standards for their human rights violations and despite the possibilities to directly and indirectly impose human rights obligations on MNEs, it has to be acknowledged that such human rights frameworks suffer a number of inadequacies. In essence, as indicated before, there has been no clear sign of the existence of an effective and consistent web of binding laws at international level on the part of corporations to observe human rights. It is only through the ‘horizontal effects’ doctrine i.e. by imposing indirect responsibility on State for human rights violations by non-State actors. Such a duty can only arise under domestic law and it is through this sphere that the legal development of a binding duty to respect human rights will first evolve. In this sense, the virtue of international law could be extended to the corporations and MNEs through the vehicles of State’s domestic laws.

Nevertheless, as far as Malaysian perspective is concerned, international and national frameworks are inadequate to ensure legal enforcement and compliance

---

53 Ibid., S 52.
54 Ibid., S 25.
of domestic violations of human rights committed by the MNEs. Generally speaking, human rights jurisprudence in Malaysia is still at infancy stage. The country is slow in enforcing its own charter on human rights provided in Articles 5-13 of its Federal Constitution, let alone the international human rights standards.\(^5\)\(^6\) In the same vein, the Human Rights Commission of Malaysia (SUHAKAM) - while acknowledging that the Government has made some progress in improving its human rights compliance, the pace has been rather slow and the record rather patchy and inconsistent. Most of SUHAKAM’s recommendations have not been accepted by the Government and the annual reports submitted to Parliament were never debated upon. This indeed requires more serious and strenuous effort on the part of everyone who wishes to see more tangible achievements in the human rights field.\(^5\)\(^7\)

Reflecting the inadequacies in international and national human rights standards for MNEs in Malaysia, there have been a number of hurdles at both respective political levels, in enforcing or developing a binding legal duty on MNEs to observe human rights. The key obstacles include the polemic on MNE’s legal personality and jurisdictional limits on the process and liability of MNEs; the absence of international legal personality for corporate actors and a limited avenue for direct human rights obligations on MNEs and corporate actors; the transnational nature of MNEs and the ‘manipulative’ forum-non-conveniens doctrine; limitations in applying extra-territorial jurisdictions; the weaknesses of domestic legal and human rights standards; the issues of Malaysia’s ratification status of the

---


International Human Rights standards and the conflict between International Law and Malaysian Laws - all of which shall be discussed in turn in the following subsection.

3.4.1 The polemic on MNE’s Human Rights obligations and legal personality

A US Economist, Milton Friedman has once said that “there is one and only one social responsibility of business that is to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game....”

The Friedman’s statement above has shown a controversial point of view in modern business. Some people disagreed with Friedman’s ideas on the basis that the business makes profit from the society and therefore the society’s rights cannot be neglected. Some others, on the other hand, are in favour of Friedman’s views owing that business is a profit-oriented entity. Without profit, a business cannot survive. But, solely and excessively targeting for profit will trigger businesses’ minimal or no human rights obligations. They even, to some extent, place the burden of responsibility totally on the States – who they considered the primary duty-holder for human rights.

Despite the traditional notion of international laws that emphasizes no imposition of human rights obligations directly on companies, there are some indications that this situation may change in the near future. It should be acknowledged that corporate entities, in particular the large-scale MNEs - given their ample business’ magnitude and influential impact on society, are in no way exempted from owing the greatest human rights duties to whom they have contact while undertaking

their business activities. It is correct that States still owe the primary human rights duties but the fact that an MNE also have some human rights roles to play cannot be disputed. This very notion was firmly embedded in the Preamble of the UDHR which calls for “every individual and every organ of society to jointly strive for better compliance with the internationally-proclaimed human rights principles.”59

In fact, as rightly pointed out by Professor Louis Henkin,60 whilst every individual includes juridical persons, every individual and every organ of society excludes no one, no company, no market, no cyberspace. The UDHR applies to them all. In order to understand the polemic on the extent of MNE’s human rights obligations, it is worthwhile to examine the MNE’s nature of ‘organ of society’ and legal personality.

3.4.1.1 MNE as an ‘Organ of Society’

The definition of the notion of ‘organ of society’ enumerated in the UDHR Preamble could also extend to business entities as they play a clear economic and increasingly social function in society.61 This basis has been invoked by international communities at various levels in taking companies into consideration while dealing with corporate human rights violations. However, there has been a debate over the use of the term ‘strive’ in the Preamble which symbolizes no more than an ‘aspiration’ to promote respect for human rights without direct indication on the imposition of a binding legal obligation. This might be true but bear in mind,

61 Gatto, A. J. C. (n 8 above) (p.26).
there is also other part in the body of the text of the UDHR itself which suggested a stronger language that may reflect a serious adherence to the Declaration.

Article 29, for example, specifies that “[e]veryone [including non-State actors] has duties to the community,”\(^\text{62}\) whereas article 30 contains a strong warning to the individuals to ‘do no harm’. The combination of Articles 29 and 30 can be read together as constituting a statement of non-State actors’ duties not to deny or violate the human rights of others.\(^\text{63}\) Despite the Preamble of UDHR not setting out legally binding norms, it can however be used to interpret the rest of the document. The UDHR should be viewed as an aspirational standard toward which the legally-binding obligations should be striving.\(^\text{64}\)

Moreover, it has been argued that whether or not it is legally binding and enforceable, the Preamble of the UDHR may be interpreted in the sense that the States which drafted it, by considering private enterprise as an organ of society, called on business to respect the same human rights that the State themselves have agreed to respect.\(^\text{65}\) This interpretation of UDHR Preamble is further supported by the wide consensus reached at UN world conferences on the fact that companies share some responsibility with governments and the UN Draft code of conduct.\(^\text{66}\)

Furthermore, it must also be admitted that the UDHR provisions have been endorsed in the preamble of every human rights treaty, some of which have been incorporated into many national constitutions and laws. The Declaration has been

\(^{62}\) UN, Universal Declaration of Human Rights (UDHR) (n 59 above). Article 29, Para 1.


\(^{65}\) International Council on Human Rights Policy. (ICHRP). (n 3 above) (p.61).

\(^{66}\) Gatto, A. J. C. (n 8 above) (p. 26).
approved repeatedly in political resolutions as well as conferences of world organizations. For example, in 1993 at the UN World conference in Vienna, 171 States reaffirmed their commitment to the purposes and principles contained in the charter of the UN and the UDHR. Indeed, the vast recognition of the concepts and principles within the UDHR by various organizations and bodies at different levels symbolizes the worthy roles played by the UDHR in benchmarking a universal and hegemonized set of rights that are common for everybody. This constitutes the UDHR as a key reference and guidelines in the formulation of human rights framework at various levels, be it legally binding or voluntary in nature, by organizations, State-actors and non-State actors alike.

In addition, Professor John Ruggie - the Special Representative of the UN Secretary-General (SRSG) indicated in his Interim Report that there has been a strong trend to subject corporations and MNEs to international criminal standards. In principle, all the existing instruments specifically aimed at holding corporations to international human rights standards are of a voluntary nature. Relevant instruments that do have international legal force, including some ILO labour standards and the CEDAW impose obligations only on States, not companies. Ruggie, however, states in the Report that, while human rights instruments do not generally impose duties directly on corporations, the imposition of obligation on States also includes the State obligation to prevent private actors from violating human rights.

---


In fact, there have been “emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labour, torture and some crimes against humanity’.” On the other hand, it was suggested that human rights duties of companies can be construed using a traditional analysis of human rights law. Most human rights give rise to four complementary duties: to respect, protect, promote and fulfil.

As for governments, the burden of duties placed upon them encompass not only passive, ‘negative’ duty to avoid violations of right (i.e. to respect), but also with the active, ‘positive’ duties which under certain circumstances require the provision of essential services (i.e. to protect, promote and fulfil). All these four areas of duties are a usable yardstick to be looked for by human rights monitors e.g. Special Rapporteur assigned by the UN Human Rights Commission to assess whether a government is acting in compliance with its obligations. Notwithstanding the extensive responsibilities incumbent upon governments, it was also suggested that the human rights obligations for companies have always been construed in negative terms; that is to abstain from violating human rights, owing to the ‘do no harm’ philosophy underlined by the UDHR.

However, by virtue of the UDHR, the ‘do no harm’ notion should not supposedly be used to limit the role of MNEs as merely to that of human rights violators, but they

---

69 Ibid., para. 61.
can be seen, to a certain extent, as protectors and promoters of human rights. The Declaration should be interpreted in a broader perspective which does not only call on companies to respect human rights principles; that is to avoid committing any human rights violations, but also to participate positively in society by endorsing positive obligations to protect, promote and fulfil human rights. The obligation to protect signifies the duty to prevent other entities or individuals from impeding the enjoyment of a right whereas the duty to promote entails that the duty holder must take measures to facilitate people's enjoyment of a right. Finally, the obligation to fulfil requires the duty holder to take appropriate measures towards the full realization of the right.

The idea to encourage MNEs to bear positive obligations of protecting, promoting and fulfilling human rights as do the States, however, encounters the general objection that companies, as private actors, cannot be bound by human rights obligations to the same extent as States, who are still the primary duty bearers. It was argued that despite some MNEs being considered to be more powerful than many States that seek to control them, and some performing many of the tasks usually expected of governments, it cannot simply be assumed that MNEs should have the same human rights duties as do the States. As private entities, MNEs are designed to serve the primary economic purpose of profit maximization, not to assume broad-based welfare functions. Merely to extend the human rights duties of States to companies and business enterprises, therefore, is to ignore the

---

71 Gatto, A. J. C. (n 8 above) (p. 25).
differences between the nature and functions of States and corporations. This
difference, certainly, has something to do with the question of jurisdiction which
will determine the legal personality of both States and corporations.

Indeed, the clear indication on the MNEs human rights obligations in the UDHR
and in any other documents presented above suggest that the debates on the
extent of MNE's human rights obligation are still far from over. The non-existence
of an effective and consistent web of binding laws at international level, coupled
with hopeless domestic legislations has contributed to the persistence of this
dilemma. Hence, bearing in mind that human rights obligations for companies are
still debatable, there is therefore a need to reconstruct the current form of
international human rights laws so that MNEs can be allocated responsibilities
appropriate and proportionate to their nature and activities.\textsuperscript{75} To this end, having
a clear picture of the legal personality of MNEs is useful to determine the viable
human rights obligations that would meet the nature of MNEs.

3.4.1.2 MNE's Legal Personality

In order to identify whether or not an entity owes responsibilities to the
international community under international law, the legal personality of the
respective entity should first be determined. This is pertinent as only entities that
are considered subjects of law, or in other words, the bearers of international legal
personality could be assumed to comply with the human rights obligations
underlined by international laws.\textsuperscript{76} The question of whether MNEs are subjects to

\textsuperscript{75} Kinley, D. and Tadaki, J. (2004). From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at

international law would be easier to answer if there were clear agreement among scholars on what constitutes legal personality under the international legal system. Unfortunately, as Charney observed, “there is little agreement among scholars on the essential elements of legal personality.”78 This situation signifies the complexity of the controversy surrounding the issues in order to present a clearer picture of the status on MNEs in international law.

In this regards, Professor Christian Okeke has observed that there are three essential elements that should be considered *conditio sine qua non* for an entity to be properly regarded as a subject of a legal system. In essence, to be a ‘subject of law’, an entity must, firstly, possess duties as well as responsibility for violating those duties; secondly, have the capacity to benefit from legal rights as a direct claimant and not as a mere beneficiary; and thirdly, in some capacity, be able to enter into contractual or other legal relations with other subjects of the system.79 The extents to which any entity meets these criteria appear to be strong factors in determining whether or not they are considered subjects of the international legal system.80 Additionally, as described in an International Court of Justice (ICJ) case,81 the international legal personality entails a twofold character.

First is the ability of possessing international rights and duties and second; the capacity to maintain these rights by bringing international claims. Before bringing

---

any claims, an entity should first have legal personality and thus possess international rights and duties which can be obtained, for example, through a combination of treaty provisions and recognition by other international persons. Indeed, the issue of MNEs’ legal personality symbolizes the difficulty that has resulted in the general shortcomings related to the fact that international law was originally addressed to State actors. Due to the ill-defined character of their legal personality, MNEs have often attempted to abstain from adhering to the human rights laws because for them, the laws are written for governments. This seems to contribute to massive corporate human rights violations which have miserably tainted our today's business world.

Therefore, before attempting to hold an MNE accountable for its human rights violations, it is necessary to identify whether or not the MNE possesses legal personality. In so doing, the best way is to find out if it in fact possesses any rights and duties under international law. Indeed, it is a primary principle that it is only by possessing 'right' that an entity or a person could have a corresponding 'duty' to somebody else. The duty comes after right, and in this sense, it is fundamental to identify whether or not the companies have rights before listing down their duties towards a society. In this regard, there have been two issues which will be addressed in turn. Firstly, do MNEs possess any rights? The traditional international law displays the tendency to emphasize the rights of MNEs.

---

82 Gatto, A. J. C. (n 8 above) (p.31).
83 Jagers, N. (n 76 above) (p.264).
84 Jungk, M. (n 70 above) (p. 5).
Since the era of the World War II, the emphasis has been concerned with protecting investment - touching the issues of expropriation and compensation, rather than regulating the duties of MNEs. This rights-based emphasis changed during the seventies, towards the duties-based emphasis resulting in the introduction of various international Codes of Conduct for MNEs. However, in the present decade, the trend has been changed back to the emphasis on the rights of MNEs, which also contributes towards free trade. This emphasis has made MNE the bearers of specific rights under international law thus enabling them to invoke international law should the dispute happen. Secondly, as far as the issues of MNEs’ duties are concerned, the international instruments that directly address MNEs are soft laws, voluntary or non-binding in nature. The best examples are the introductions of the codes of conduct during the seventies.

Thus, binding international duties for MNEs have to be derived from instruments that were originally directed at States. This can be considered as indirect obligation by making States accountable for the human rights violations undertaken by companies operating within their territories. In this respect, some recent interesting developments are taking place in the domestic courts of the United States and United Kingdom where reparations have been sought by the victims of corporate human rights violations. At least for the time being, through this means, an MNE can be held accountable for the human rights violations they have committed. From the above analysis, it seems crystal clear that the polemic

---

on the scope of MNEs’ responsibility for human rights remains far from over, thus triggering the persistence of ‘regulatory vacuum’ in respect to MNEs conducts.

3.4.2 The ‘transnational’ nature of MNEs and the manipulative ‘forum- non-conveniens’ doctrine

In addition to substantive and doctrinal obstacles to MNEs’ human rights liability discussed before, procedural obstacles have arisen out of the mismatch between national reach of the legal systems and the transnational reach of MNEs’ business activities. Thus, claims against the parent company of the MNE have often been subjected to lengthy and costly litigation over jurisdiction. These obstacles become more evident if the claimants or the victims involved are the vulnerable people such as the indigenous people or people with disabilities who usually cannot afford with the expensive cost of litigation. Indeed, the MNEs’ transnational character, their economic and legal versatility, their enormous economic and financial power and their great political and social influence are the important obstacles in any attempt to exert legal and social control over them.

As a profit-oriented entity, maximizing the profit and minimising the costs are part of MNEs main strategies. It is common for many MNEs in the world to operate their business activities in less-developed or developing countries. By making such countries as their host States, they can gain benefits of, among others, cheap labour costs – or sometime to the extent of using child labours; the cost-effective business operations as well as non-stringent legal and human rights frameworks. As a multinational entity, MNE can easily move their base to more business-friendly...

host States thus escaping from being subjected under strict legal frameworks. Another hurdle which will be engendered from the transnational nature of the MNEs is the doctrine of *forum non conveniens* which could easily be manipulated by the MNEs to avoid litigation.

In general, *forum non conveniens* is a doctrine according to which courts determine whether another court would be better positioned to hear a matter and decide the dispute. Under this doctrine, a court has discretionary power to decline hearing a case when there exists a foreign court more appropriately situated to hear the matter. It is unfortunately a doctrine that has been arguably misused by parent companies to avoid liability in their home jurisdictions for alleged offshore transgressions. This has proved to be an impediment to the conduct of human rights-based litigation against parent companies of MNEs. The essential purpose of this doctrine is to operate as a jurisdictional stricture, locking out cases from being heard in domestic courts where, by the circumstances of the case, a hearing in a foreign court is deemed more appropriate; or at any rate, the forum of the domestic court is deemed inappropriate.

“It is”, as Sarah Joseph has observed, “a doctrine which is used, and arguably abused, by parent companies to avoid liability in their home jurisdictions for alleged offshore transgressions.” It was evident that based on the experience of the existing cases, the companies tend to exploit the doctrine to avoid being called to account. As an example, this doctrine has been improperly used to deny relief to Indian plaintiffs in American courts against Union Carbide after the Bhopal

---

90 Muchlinski, P. (2007) (n 87 above) (pp. 153-60).
disaster, despite ample evidence that Indian law did not provide an adequate remedy.\(^9\) Indeed, the above-mentioned technical problem should not have happened as it is clearly mentioned in article 2 of the Brussels Convention on jurisdiction (which applies to all EU-based companies), that the place of jurisdiction of a case is the country of domicile of the parent company. Obviously indeed, the economic power of the MNEs may therefore be abused to dissuade corruptible and/or vulnerable governments from establishing regulatory regimes to enforce human rights regulations on corporations.\(^9\)

Although legal accountability is not completely absent in the developing world, it should be noted that, with such a disparity of power existing between MNEs and the host States, it seems impracticable to depend exclusively on host States to hold MNEs accountable for the human rights violations.\(^9\) This argument was strengthened by the fact that the host States’ agencies have reportedly been colluding and co-operating with the MNEs in violating a series of well-planned human rights violations. Therefore, it is necessary to examine alternative sources and forms of accountability that may offer greater and more effective solutions to these so-called corporate human rights violations.

\section*{3.4.3 The State’s limitations in applying Extra-territorial Jurisdictions}

While extending human rights obligations on MNEs within own territories may be possible for Malaysia and many host States in the world, similar move would be impossible if their MNEs committed human rights violations outside their territories. Unfortunately, the framework of international human rights law today

---

\(^9\) In re Union Carbide Corp. Gas Plant Disaster (Bhopal Case) 809 F.2d 195
has not yet evolved so as to hold States responsible for the actions of their non-
governments entities, including corporate nationals, abroad.\textsuperscript{95} Although such a regulatory approach has been argued to be legally possible – as illustrated in Bhopal case which was heard in a US Court, it seems reasonable to conclude that human rights law itself has not yet evolved this far. Home States are not currently liable in international human rights law for failing to prevent, punish, or otherwise regulate the delinquencies of their MNEs’ overseas operations. Given the nonexistence of such a regulation, home States have been reluctant to regulate the extraterritorial activities of their MNEs. They may perceive that such regulations will constitute a competitive disadvantage for their corporations with other countries’ corporations.\textsuperscript{96}

In short, holding States accountable for their MNEs human rights violations seems to be only feasible within the States’ territories. A jurisdictional restructuring therefore needs to be undertaken by the respected international bodies to ensure that the reliable and effective regulation frameworks are in place not only when a violation happens within the States’ territories but also when violations occur abroad. Such restructuring needs to consider the universal values underlined in the Global Compact human rights principles. These include the need to ensure that human rights principles are present within the policy-making institution of the MNEs, within their networking and communications as well as within their reporting and auditing procedures.


3.4.4 The weaknesses of domestic legal and human rights standards

Generally speaking, the legal systems and human rights standards at the State level suffer a number of setbacks. This scenario commonly happens in less-developed and developing countries, including Malaysia – the countries where most MNEs open their operational bases. Firstly, the MNEs are large-scale and powerful - most notably economically and financially, thereby empowering them to exercise bargaining power over the governments of host States\textsuperscript{97} which in turn can be lax in enforcing legislation in order to retain the investment of an MNE. In addition, the economic strength of the MNEs may allow them to resist domestic sanctions. For example, they may terminate business dealings in the sanctioning State and establish themselves in a more corporate-friendly State.\textsuperscript{98} They may also even be able to discourage sanctions by threatening to disengage from a State, many of which perceive that they need MNE investment to improve their economic development.\textsuperscript{99}

Secondly, the host States can also sometimes lack the technical expertise to monitor and regulate corporate activities and in some circumstances the judiciary is not even reliable enough to seek justice and fairness. For example, it is difficult for these States to decide whether the environmental practices or safety precautions are satisfactorily met and fulfilled by the respective companies.\textsuperscript{100}

Furthermore, the developing nations may also lack the legal apparatus, for example, the resources, to undergo a complex discovery of documents or to

unravel the corporate veil - which may shield an asset-rich parent company behind an asset-poor local subsidiary.\textsuperscript{101}

Finally, the fact that MNEs are uniquely international and uniquely mobile have also contributed towards the ineffectiveness of regulations by host States. The complex structure of an MNE has led to the difficulty in determining the liability between parent and subsidiaries, and indeed the host States can be significantly ill-equipped to deal with such these cases.\textsuperscript{102} In addition, as far as the human rights standards in Malaysia are concerned, there is no specific framework exists to hold companies and MNEs accountable for their human rights abuses. Instead, various legal framework, policy instruments and institutions have been deployed by the government only to maintain the competitiveness of FDI determinants – generated by MNEs.

Whilst enhancing the utility of the existing determinants is vital to encounter fresh challenges posed by FDI, considering new strategies and enhancing FDI legal framework are also Malaysia's main efforts in attracting FDI.\textsuperscript{103} It should be noted that the government’s principal policy is to harness FDI as part of the economic development strategy in order to obtain foreign technology, capital and skills. Such policy, however, does not extend to making human rights concerns of the people as part of key business strategy. As mentioned elsewhere in this chapter, human rights in Malaysia was defined by Section 2 of the SUHAKAM Act which provides that ‘human rights refer to fundamental liberties in Part II of the Federal

\textsuperscript{101} Anon, (September 1998) A Law unto Themselves – Holding Multinationals to Account. \textit{World Development Movement Discussion paper}, p.4
\textsuperscript{102} Gatto, A. J. C. (n 8 above), (p.38).
\textsuperscript{103} Rajenthran, A. (n 44 above) (p.1).
Constitution’. For the purpose of the Act, the Act also allows regard to be made to the UDHR insofar as it is not contradictory to the Federal Constitution.\textsuperscript{104}

\textbf{TABLE 3: Comparison on Human Rights Provisions between Federal Constitution of Malaysia and the UDHR}\textsuperscript{105}

<table>
<thead>
<tr>
<th>Federal Constitution</th>
<th>Universal Declaration of Human Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 5 – Personal Liberty</td>
<td>Articles 3, 9.</td>
</tr>
<tr>
<td>Article 6 – Abolition of slavery and forced labour</td>
<td>Article 4</td>
</tr>
<tr>
<td>Article 7(1) Prohibition of retrospective criminal laws. Article 7(2) – Protection against double jeopardy</td>
<td>Article 11(2)</td>
</tr>
<tr>
<td>Article 8 – Equality and non-discrimination</td>
<td>Articles 2, 6, 7, 23(2).</td>
</tr>
<tr>
<td>Article 9 – Protection against banishment and freedom of movement</td>
<td>Articles 9, 13</td>
</tr>
<tr>
<td>Article 10(1)(a) – Freedom of speech</td>
<td>Article 19</td>
</tr>
<tr>
<td>Article 10(1)(b) – Freedom of assembly</td>
<td>Article 20(1)</td>
</tr>
<tr>
<td>Article 10(1)(c) – Freedom of association</td>
<td>Articles 20(2), 23(4)</td>
</tr>
<tr>
<td>Article 11 – Freedom of religion</td>
<td>Article 18</td>
</tr>
<tr>
<td>Article 12 – Rights in respect of education</td>
<td>Article 26</td>
</tr>
<tr>
<td>Article 13 – Right to property</td>
<td>Articles 17, 27(2)</td>
</tr>
<tr>
<td>Article 14 – 28 Right to citizenship</td>
<td>Article 15</td>
</tr>
<tr>
<td>Article 119 – Right to vote in elections</td>
<td>Articles 21(1) &amp; 21(3)</td>
</tr>
</tbody>
</table>

As indicated in Table 3 above, there are a number of UDHR provisions which share some similarities with the Federal Constitution. It shows that some rights in the Constitution are not explicitly guaranteed and maybe rendered meaningless unless supported by other implied though un-enumerated rights. For example, the wording of 'life' in Article 5(1) was phrased in a very general manner. It will therefore depend on the discretionary power of the Judge in order to interpret the

\textsuperscript{104} Section 4 (4) of the Human Rights Commission of Malaysia Act 1999 (Act 597).  
\textsuperscript{105} Ibid. p.3.
word ‘life’ which could also include, for example; the right to livelihood, reputation and native land customary rights (NCR).106

3.4.5 The Issue of Ratification Status of International Human Rights Standards by Malaysia and its Impact

So far, out of the many human rights treaties, Malaysia has only ratified three treaties namely; the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Person with Disabilities (CRPD). Other treaties which have yet to be ratified by Malaysia include, the International Covenant on Economic, Social and Cultural Rights (ICESCR), The International Covenant on Civil and Political Rights (ICCPR), The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), The International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the United Nations Convention Relating to the Status of Refugees 1951.107

Indeed, there have been many debates about the status of Malaysia’s ratification of major human rights treaties. In particular, on whether such status may give any impact on the implementation of human rights standards at domestic level. In principle, an international law or treaty that is ratified by Malaysia will not automatically have legal effect domestically. Unlike in Germany and the USA, the Federal Constitution of Malaysia does not provide any clause to confer legal status on international treaties. It implies the fact that, in Malaysia, international law

---

106 Fanuqi, S. S. (n 56 above), (pp.5-6).
cannot override the supreme constitutions of sovereign States.\textsuperscript{108} Section 4(4) of the Human Rights Commission of Malaysia Act 1999 (Act 597) indicated that the UDHR 1948 would only be given effect insofar as it is not inconsistent with the Federal Constitution. In addition, the Constitution did not make international law as part of the definition of ‘law’ stipulated under its Article 160(2).

In fact, in the event of any conflict between international norms and national rules, courts of most countries adopt the rule that national law prevails. In Malaysia, the Constitution is silent as to the primacy of international law over municipal law or \textit{vice versa}. If there is any conflict, then the general rule is that the state law shall prevail. In \textit{Public Prosecutor v Wah Ah Jee},\textsuperscript{109} the learned judge stated that; “the Courts here must take the law as they find it expressed in the Enactments. It is not the duty of a Judge of Magistrate to consider whether the law so set forth is contrary to international law or not.” Nonetheless, international laws and treaties which have been ratified can still be part of law of the land if such treaties have been incorporated into the local laws. In essence, Article 74(1) of the Constitution states that; “Parliament may make laws with respect to any matters enumerated in the ‘Federal List’ or the ‘Concurrent List’”. The ‘Federal List’ in the Ninth Schedule includes:

\textit{“1. External Affairs, including –
(a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries;
(b) Implementation of treaties, agreements and conventions with other countries;”}

\textsuperscript{108} Faruqi, S. S. (n 56 above) (p. 3).
\textsuperscript{109} \textit{Public Prosecutor v Wah Ah Jee} [1919] 2 FMSLR 193
Thus, reading together the wording of Article 74 above and the Federal List, it can be concluded that, although the Government has ratified a treaty and such treaty binds the Government, it has no legal effect domestically unless the Legislature passes a law that gives legal effect to the treaty.\(^{110}\) As an active member of international community, transforming itself as an emerging economy that strives to become a fully-developed nation in the year 2020, there is no reason why Malaysia should not give effect to major international human rights treaties. Whenever a treaty, which affects the rights of the Malaysians or requires a change in Malaysian domestic law, has been ratified or acceded to, the Executive must take every effort to prepare without delay a draft enabling statute and submit it to the Parliament. Only this way can the Malaysian courts apply international treaties and conventions effectively through enabling statutes.\(^{111}\)

### 3.5 USING ‘SOFT LAWS’ TO ADDRESS LOOPHOLES ENFORCEMENT AND COMPLIANCE ISSUES

In the light of the foregoing, it has to be admitted that heavily depending on traditional and international regulatory-based mechanism or the so-called ‘hard laws’ to hold companies and MNEs responsible for their human rights violations might not lead to a fruitful outcome. Given the current issues of corporate human rights violations are not readily addressed by the international legal regime and Malaysian legal systems, there seems to be a crucial need to have an alternative approach. The use of ‘soft laws’, for example through the code of conduct, could be explored and emphasized so as to address the loopholes in the MNEs’ human

---


\(^{111}\) Ibid. pp. 201-202 & 207.
rights enforcement and compliance. With the increase of awareness among the public and the civil society about their human rights, many companies and MNEs have now embarked into a more stakeholders-based business approach, portraying themselves as a more 'humane' personality.

Indeed, the escalating trend among business entities including those operating in Malaysia to adopt good corporate governance and corporate social responsibility has proven the companies’ awareness on their human rights responsibilities towards their stakeholders. There has also been increasing support and encouragement from the Malaysian government so as to ensure social dimension is also included within the companies’ business structure and agenda. Minister of Domestic, Cooperatives and Consumerism, Datuk Seri Ismail Sabri bin Yaakob, for example, has recently urged the companies operating in Malaysia to look at corporate responsibility as an opportunity rather than as a burden. The Government, he said, supported strongly the adoption of CSR reporting and standards by Malaysian companies, even if on a voluntary basis.

It was emphasised that, while broader adoption of corporate governance (CG) and corporate responsibility (CR) programmes would be beneficial to companies as they would enhance their profitability and sustainability, the Government’s role would be facilitative in nature.\textsuperscript{112} The Government, according to the Minister, supports the adoption of CSR in the private sphere for several reasons. Firstly, there tend to be a positive correlation between corporate responsibility and share

price. It was argued that the companies’ stakeholders i.e. the public, customers and consumers tend to measure a company’s performance based on its economic, environmental and social perspectives. Secondly, when a company has a strong brand value as a result of its CR programme, its competitiveness will be increased particularly now that investors and consumers have become ever more discerning.

Having CG practices in place also gives foreign investors confidence that the company is operating in a responsible, ethical and transparent manner. Along the same vein, Bursa Malaysia – the Malaysia’s exchange holding company, has required companies’ disclosure of their CG practices as part of its listing requirements. In fact, in proving its seriousness in strengthening CG, the Malaysian Government has also amended the Companies Act 1965 to underpin the eight crucial principles of good governance, namely; transparency, rule of law, participation, responsiveness, equity, efficiency and effectiveness, sustainability and accountability.113

On the other hand, the Government has recently agreed to establish a National Human Rights Action Plan (NHRAP) as an attempt to ensure human rights issues in the country are tackled structurally and strategically.114 This is yet another example which shows the Government’s seriousness in enhancing the human rights compliance by various Malaysian entities, State Actors and Non-State Actors alike.

113 Ibid.
3.6 ADVANTAGES OF RELYING ON NON-REGULATORY HUMAN RIGHTS APPROACH

It is quite common that some people perceive the integration of human rights principles through voluntary approaches as a hopeless endeavour due to the lack of monitoring and enforcement procedures. Regardless of all the difficulties and problems in the quest to successfully implement voluntary human rights approaches, such approaches - notably the voluntary codes of conduct, offer perhaps the best, if not the only, way to bridge the gap between an MNE’s performance and societal expectations in developing countries in particular in the areas of sweatshops, human rights violations and environmental degradation.\textsuperscript{115}

From the MNEs’ point of view, the codes provide business entities with a flexible approach to addressing some of society’s concerns. They create mechanisms through which a company can fashion solutions in a way that is focused, cognizant of the corporations’ special needs and public concerns, and economically efficient. In addition, by taking into account recommendations from NGOs and local social activists, MNEs will also have the benefit of anticipating societal concerns in general and those of important stakeholders in particular. The correct understanding of societal concerns over business operations will enable a company to respond and address the concerns in an appropriate manner.

The effective codes that match societal concerns will then engender public trust through the reputation effect which is beneficial for the MNE’s business endurance. Similarly, the voluntary codes also serve as an important purpose for enhancing

the understanding of the public’s perspective. As their non-legal nature suggests, the voluntary codes minimize the need for further governmental and bureaucratic regulation, which is more expensive and less efficient because governments must deal with political considerations and the need to create regulations that cover all possible situations and contingencies. Apart from being cost-effective, the codes could trigger a speedy response by MNEs when any issues arise, considering that there is not much bureaucracy that needs to be followed.\textsuperscript{116}

Furthermore, the voluntary codes also allow moderate nongovernmental organizations among the affected groups to seek reasonable solutions before the issues are captured by more radical elements who may be more interested in escalating the level of social conflict rather than fashioning feasible solutions that are mutually acceptable. The above arguments proves that integrating and incorporating human rights principles through voluntary approaches may, to some extent, have considerable advantages including acting as a complement to the existing legal regime.

\section{3.7 CONCLUSION}

This chapter has shown that both the human rights agenda and corporate goals can co-exist owing to the correlation and complementing nature of both. To date, human rights roles of business are no longer at the point where companies can sensibly regard them as discretionary or optional. In fact, human rights now represents a distinct business issue in its own right. It offers enormous opportunities both for business growth and for the benefit of individuals and

\textsuperscript{116} Ibid., pp.81-82.
communities in countries in which the companies are operating. As such, human rights should form a distinctive part of the legally binding regulations that govern the MNEs’ business conduct.

In this chapter, I have argued that the existing regulatory approaches at various levels suffer several shortcomings mainly on the enforcement and monitoring procedures. This lacking seems to indicate that holding business accountable for their human rights abuses is a fairly difficult job. At international level, there have been no legally-binding law or human rights standards that directly govern MNEs. Moreover, relying on indirect corporate duties had proved to be grossly inadequate since states routinely failed to comply with their duty to protect against corporate abuses. The national legal systems in Malaysia, on the other hand, do not offer effective judicial-based solutions mechanisms to the issues of corporate human rights violations.

There are also some other hurdles leading to inadequacies of international laws and domestic laws. They include: the ongoing polemic on MNEs’ legal personality, the transnational nature of MNEs which allows them to avoid regulations, the misuse of doctrine of ‘forum non conveniens’ by the MNEs, the issues of States ratification of human rights treaties and the conflict between international laws and the national laws.

Another imperative conclusion that can be drawn from this chapter is the fact that there has been a growing acceptance of the concept of corporate social and human rights responsibility. The Malaysian Government, through various initiatives, has
strongly supported the adoption of corporate governance and corporate responsibility by the companies. This is based on the belief that the business entities are highly expected by their stakeholders to act more ‘humanely’ especially in matters relating to human rights. Thus, the traditional notion of business as a solely money-making institution is now diminishing since more and more people start to realize that this old-fashioned trend has been a factor in all the vulnerable events of corporate human rights violations across the globe.

The bottom line is, whilst a regulatory framework could be considered the ultimate goal, it cannot be expected that the merging needs of society would be immediately translated into fully-fledged legislation. Such needs must gain progressive wide acceptance on an ethical basis before being translated into a legal setting. It could then be said that, the ethical-based moral obligations will increase awareness among business entities on their human rights responsibility and eventually pave the way towards a legally-binding framework. In this context, self-regulatory measures and social enforcement mechanism based on the Global Compact principles can be used to channel the shift from ethical-based obligations to legally enforceable ones in order to follow change and growing awareness in the society. This will be discussed in detailed in the next chapter.
Chapter 4: THE GLOBAL COMPACT: A “SOFT LAW” MECHANISM FOR ENHANCING HUMAN RIGHTS COMPLIANCE BY MNEs IN MALAYSIA

4.1 INTRODUCTION

As indicated in the previous chapter, there have been strong tendencies from corporate sectors in Malaysia as well the Malaysian government in taking corporate citizenship and CSR to the next level. Many companies, especially the MNEs, have embarked into a more people- and environmental-friendly business approaches. This reflects their recognition to the fact that, these days, their business performance is measured by their stakeholders based on economic, environmental and social perspectives. If, for example, any company has committed human rights violations within its business sphere, the society will boycott the company and its brand value will then be affected. On the part of government, soft law mechanism can be a complement to the so-called ineffective traditional judicial and regulatory mechanism in order to ensure better human rights compliance by the business entities.

Indeed, in the light of the foregoing, there is always a need to ensure that globalization and its economic momentum are embedded in social values and reflected the common objectives of all segments of the world's population. MNEs and business entities should in no way abstain from any human rights commitment since they are also 'parts and parcels' of the society from which they are making money. The MNEs could show their commitment to human rights by

---

‘humanizing’ their corporate culture in the sense that they recognize social and human rights dimensions as part of their responsibilities, although the extent of such responsibilities may not necessarily resemble the governments’ obligations.

This research dedicates the UN Global Compact (hereinafter the GC or the Compact) as a workable ‘soft laws’ model to help enhancing companies’ human rights compliance. In addition, it was also observed that the UN, through its mandate to its Special Representative on Business and Human Rights - Professor John Ruggie, has produced the Guiding Principles on Business and Human Rights (hereinafter the UN Guiding Principles) for implementing the UN ‘Protect, Respect and Remedy’ Framework. The principles relating to the responsibility of business enterprises to respect human rights are of particular relevance to the aims of the GC. In that sense, the UN Guiding Principles provide practical tools and guidance as well as further conceptual and operational clarity for the two human rights principles championed by the GC.

This chapter aims at providing background information of both the UN Global Compact as well the Guiding Principles. It will serve firstly, to establish the reason why the ‘soft laws’ GC human rights principles is proposed in this thesis as a solution mechanism to issues of corporate human rights violations. Secondly, it seeks to emphasise the significance and relevance of the Guiding Principles and the GC principles. The present chapter will present an overview of the GC as a positive attempt by the UN to regulate or control corporate behaviour. In particular, it

---

discusses the GC’s key objectives, advantages, challenges and critiques as well as its contribution to the global governance. It then engages in an analysis on the status of human rights within the GC which is reflected in its first two principles. The principles offer more ‘social’ means of enforcement and therefore help to enhance MNEs’ human rights compliance. Finally, the Ruggie’s ‘Protect, Respect and Remedy’ Framework will be explored to explain how such framework reinforces the GC Principles.

### 4.2 GLOBAL COMPACT: THE UN’S ATTEMPT TO CONTROL CORPORATE BEHAVIOUR

#### 4.2.1 Overview

On 31st January 1999, at the World Economic Forum in Davos, Switzerland, the then Secretary-General of the UN, Kofi Annan presented the UN Global Compact to the business leaders who attended the Forum. Mr. Annan asked them to join the initiative and to voluntarily support human rights, implement social and environmental standards, and to fight corruption in their business operations and their entire sphere of influence. He warned the private sector that the imbalance between the rule-making of the economic, social and political realms could trigger a backlash against globalization. While many rules that favour global market expansion had been developed and their enforcement enhanced by the institutions like the World Trade Organization (WTO), rules aimed at promoting social objectives like human rights, labour and environmental standards lagged behind and were to be implemented by under-funded and relatively weak UN agencies.\(^5\)

Following the enthusiastic response from the business leaders and governments to the Secretary-General’s call to action, the operational phase of the GC was officially launched at the UN Headquarters in New York, on 26th July 2000. By July 2011, which is exactly 11 years after its official launch, it was recorded that the initiative has grown to more than 8000 participants, including over 6000 businesses in 135 countries all over the world, making it the largest corporate citizenship network in the world. As members of the GC, all participating parties are expected to seek joint solutions to the imbalances and dislocations resulting from the gap between the global economy and national communities. Today’s uncertain global economy has indeed become the reason why an international framework like GC is gravely needed to assist companies in the development and promotion of global, value-based management.

---

**Figure 1**  
The 10 Principles of the Global Compact

<table>
<thead>
<tr>
<th>Human Rights</th>
<th>Business should support and respect the protection of international human rights within their sphere of influence; and make sure they are not complicit in human rights abuses.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Business should uphold the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.</td>
</tr>
<tr>
<td>Environment</td>
<td>Business should support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; and encourage the development and diffusion of environmentally friendly technologies.</td>
</tr>
<tr>
<td>Anti-Corruption</td>
<td>Business should work against all forms of corruption, including extortion and bribery.</td>
</tr>
</tbody>
</table>

---

6 UN Global Compact (n 4 above) “Participants and Stakeholders.”
As illustrated in the Figure 1 above, the GC is comprised of ten principles encompassing a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. It was initially nine principles when the Compact was firstly devised in 1999 while the tenth principle was added in 2004. The GC asks companies to embrace, support and enact these principles within their sphere of influence. The principles enjoy universal consensus as they are derived from leading intergovernmental instruments namely; the UDHR, the International Labour Organization’s Declaration on Fundamental Principles and rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption.

4.2.2 Objectives and Advantages

According to Mr. George Kell, the GC’s Executive Director, the Compact pursues two “complementary goals”: first, making efforts to internalize the Compact principles as part of business strategy and operations and second, facilitating “co-operation and collective problem-solving between different stakeholders.” At a wider level, the vision of the GC is “to promote responsible corporate citizenship so that business can be part of the solution to the challenges of globalization,” e.g., good corporate citizenship could contribute to establishing a “more sustainable and inclusive global economy.” In the same vein, Zinkin and Williams went on to describe the GC’s main goals as, firstly; “to bring a set of universal principles of responsible business into mainstream activities of companies around the world,

---

and secondly; to act as a catalyst for initiatives in support of wider UN goals in the area of social and environmental development.”

The Compact’s ten principles were therefore seen as a set of all-embracing elements needed by a company in order to be socially-responsible. Considering that the GC principles are a derivation of internationally-recognized standards and frameworks mentioned before, adherence to the GC principles therefore mirrors the MNEs’ commitment to those standards. In addition, in the event of obvious absence of international mechanism to hold MNEs accountable coupled with insufficient and weak legal apparatus at state level, incorporation of Compacts principles by the MNEs could be seen as a vehicle towards enhancing their compliance with the internationally-proclaimed human rights standards. Moreover, the GC is an unprecedented and unique initiative.

Among its key assets are the international credibility and convening power of the UN, epitomized by the courage, authority, and appeal of the founder of the initiative, the former Secretary-General Kofi Annan. It is also the only arrangement of its kind that is based on principles that were universally endorsed by governments. From the very beginning, the GC thus had the potential to constitute a truly global platform with appeal to all societal actors from all over the world.

As John Ruggie said; “no other voluntary initiative can be so ambitious because

---


11 Brinkmann-Braun, J. & Ples, I. (n.5 above) (p. 6).
none can claim a similar basis of legitimacy.”12 Indeed, there are a number of reasons supporting the choice of the human rights initiatives within the GC framework as the key research area in this thesis.

Firstly, the GC’s flexible nature constitutes its greatest advantage that has enabled the initiative to transform itself and to overcome critical shortcomings. According to its website, the GC viewed itself as “a practicable principle-based initiative to encourage innovations, creative solutions, and good practices among participants, and to encourage the alignment of corporate policies and practices with internationally accepted values and objectives.”13 It is not meant to be a regulatory instrument created to police, measure or monitor the behaviour or actions of the companies. Neither it is a substitute for effective action by governments, nor does it present a regulatory framework or code of conduct for companies. Rather, it is conceived as a value-based platform designed to promote institutional learning with few formalities and no rigid bureaucratic structures.14

Although considered as ‘soft-law’ or non-regulatory in nature, the codes of conduct initiated by the GC principles could complement legal frameworks and both should be used to influence corporate conduct. This is the case as the GC endorses both a profitable business environment and a salutary human rights environment on the same core foundations of rules of law and good governance thereby creating a win-win situation for government, civil society and private sectors. While emphasizing that the governments have the main responsibility for implementing universal

13 UN Global Compact (n 4 above) "UN Global Compact in Action".
human rights values, members of the GC are asked to embed, embrace and implement the GC principles in their business operation. Thus, the GC can be said to lie between regulatory and voluntary initiatives as it is not a substitute for effective action of government, nor does it supplant other voluntary initiatives.15

Secondly, the GC is also an apparently strategic and popular avenue through which CSR or Corporate Citizenship could be exercised.16 The GC sets a standard for corporate behaviour and responsibility so that the corporate power can be transformed, not only to win the global needs of economic advancement but also to recognize various social and human rights issues within their respective sphere of influences.17 It also encourages its members to share good practices and experiences with other companies in particular in addressing key issues related to sustainable development and corporate citizenship. According to Kell,18 the principles-based Compact utilizes a ‘top-down’ formula, beginning with CEO commitment, effective communication with employees, implementation within the organization and communication about GC issues such as CSR and sustainability reports through corporate documents.

Although GC is not a benchmarking system aimed at measuring the good and bad actions of companies, it rather serves as a learning dialogue and a platform for action that will embed principles within the organization. Once principles are

embedded in organizations through new practices, improvement will subsequently occur. Thirdly, the GC does not recognise class-based or friction-based interactions between diverse actors in which inequality, exploitation and class struggle are noticeably absent. As opposed to the highly uneven and contradictory terrain of global capitalism, the GC offers a smooth and level playing field where powerful MNEs, NGOs ranging from Oxfam to local organizations based in the Third World, the states of developing and industrial countries – all are viewed as harmoniously co-existing.19 With such an all-inclusive platform, the GC helps its members to build goodwill in communities where they operate. Transforming into a more ‘humane’ appearance will enhance the companies’ reputation, increase employee morale and productivity as well as improve operational efficiencies.

Fourthly, the fact that the GC is a UN initiative has made it easy for this effort to leverage the UN’s global reach and convening power with governments, business, labour, civil society and other stakeholders. This advantage facilitates the Compact’s agenda in bringing all the social actors together to initiate and share substantive action in pursuing its principles. As a UN initiative, the GC has direct access to the UN’s deep knowledge and expertise related to development issues, key country information and facilitation of broad multi-stakeholder partnerships. The fact that the GC has gained support and recognition by various institutions like the UN General Assembly, the G8, the African Union as well as in the Doha Declaration,20 signifies the significant role it plays as an innovative public-private partnership to advance UN values and responsible business practices within the UN system and among the global business community.

19 Soederberg, S. (n. 1 above) (p. 505).
20 UN Global Compact. (n 4 above) “About the GC”.

152
With its principles being endorsed universally, the GC provides its members with a widely-recognized form for corporate citizenship. Even though it barely possible for GC to resolve every single deficiency of global capitalism, it can still make a significant contribution by laying a foundation of shared values and harnessing the skills and resources of the private sectors. Such universal values, being rooted in business practices, will bring massive and profitable social and economic gains. Bearing in mind the all-encompassing values championed by the GC principles, many have seen such values being significant in the quest to improve the company’s CSR standards. In short, the engagement of MNEs with the GC principles via their business practices will enable them to implement a good practise of CSR and corporate citizenship.

4.2.3 How does the Global Compact Work?

To know how the GC works, understanding its constituent actors and their respective roles is a must. According to Kell & Levin, the GC’s network is comprised of four main actors, namely; the UN systems, businesses, governments and civil society and labour organizations. Firstly, the Global Compact Office that belongs to the UN Secretary-General’s Executive Office sets the administrative frame, provides strategic direction and performs quality control tasks. Other UN agencies, among others the UN Office of the High Commissioner for Human Rights (OHCHR), the International Labour Organization (ILO), the UN Environmental Program (UNEP) and the UN development Program (UNDP) offer assistance in their special areas of expertise.

---

21 Kell, G. and Levin, D. (n 14 above) (p. 2).
22 Ibid. p. 22.
Secondly, businesses form the nucleus of the GC. With currently 8000\textsuperscript{23} participants from all over the world, they are expected to express publicly their commitment to the GC principles and the evidences of such commitment shall be made in writing in the form of “Communicating on Progress” (CoP) on an annual basis. Thirdly, governments facilitate the GC principles by setting up a regulatory framework at national or supra-national level. The legal environment created acts as an enabling force that underpins and strengthens the GC principles. Fourthly, civil society and labour organizations constitute the closest entity with the majority groups of the business’ stakeholders i.e. the society and the labours.\textsuperscript{24} Due to their close relationship with the groups, such organizations have in-depth knowledge with regards to practical problems within the groups they represent.

Apart from playing a vital role in dialogue and learning activities, the civil society and labour organizations also act as a ‘check and balance’ agent or as watchdog institutions that will speak up if business participants violate any of the GC principles.\textsuperscript{25} The four actors are linked by the GC through a threefold engagement mechanism. The mechanisms are designed to function both at the global and national/regional levels. On the national/regional level, engagement is ensured through local networks, which have now been approximately 95 networks altogether, from all over the world. The three engagement mechanisms are introduced and their roles on the global and national/regional level are described in the Figure 2 below. Partnership projects seek to discover a common ground of interests between the GC actors and thus combine and leverage available skills and

\textsuperscript{23}See UN Global Compact (n 4 above) “Participants and Stakeholders.”
\textsuperscript{25}Ibid., pp. 519-520.
resources on both sides. *Dialogue events* are about identifying new emergent issues that relate to any of the GC’s ten principles. However, it also attempts to build relationships and trust with other actors e.g. by entering into partnership projects.\(^\text{26}\)

**Figure 2**

**The Engagement Mechanisms of the Global Compact**

---

In addition, *learning events* are closely related to dialogue, however the focus is more on sharing pre-existing solutions and best practices and thus do not specifically aim to find new ways to promote the ten principles. Learning is important as participants can learn from available good practices and thus follow notable examples that were developed under consideration of their region and sector. As indicated by the arrows in the Figure 2 above, the three engagement mechanisms of the GC work together e.g. projects also create learning effects. However, the engagements alone do not ensure that a participant fulfils the goals.

\(^{26}\) *Ibid.*, pp. 519-520.
underlined by the GC. Rather, such engagements need to be backed up by implementation of the principles throughout a participant's value chain.27

4.2.4 Challenges and Critiques

Despite its advantages, the GC is not without its critics. Firstly, and probably the most popular one, is the fact that the GC is not a regulatory-based mechanism with a legally-binding set of standards, but rather a voluntary corporate citizenship initiative.28 It thus lacks monitoring requirements and is not accountable due to missing verification. Nolan, for example, argues that “accountability, or rather the lack of it, is the crucial issue that faces the Global Compact.”29 Deva further argues that the lack of serious monitoring, sanctions, enforceable rules and independent verification fosters the misuse of the Compact as a marketing or public relation tool. In that sense, this critic views that the GC allows powerful MNEs to “bluewash” their tarnished image i.e. by associating their operations with their blue UN flag in order to gain legitimacy.30

Williams, on the other hand, labelled the GC as providing a 'venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions.31 Secondly, the GC has been alleged by its critics for being too vague and lack of clarity with regard to its principles, thus hard to implement. Nolan argues that the GC adopts a descriptive

27 Ibid., pp. 519-520.
28 Soederberg, S. (n. 1 above) (p. 508).
rather than prescriptive approach\textsuperscript{32} and by defining the requisite behaviour only in terms of actions that embrace, support and enact rights, the GC immediately appears to be more promotional than protectionist in nature.\textsuperscript{33} In addition, Deva notes that the GC principles hardly provide concrete guidance to corporations about the expected conduct. The language of these principles is so general that insincere corporations can easily circumvent or comply with them without doing anything.\textsuperscript{34}

Finally, there has also been allegation raised by the critics that the GC opens a window of opportunity for business to capture the UN. In other word, there is a fear that big businesses will pursue its policy interests within the UN more directly by signing up to initiatives like the GC. The close relationship between business and the UN raises concerns that the latter adopts a ‘pro-market spin’ instead of the supposed rule setter.\textsuperscript{35}

4.2.5 Contribution to Global Governance

Notwithstanding its alleged weaknesses, the GC does have a role to play in promoting a greater understanding of the links between business and human rights. A number of contributions to be discussed next are also considered as the responses to the aforementioned criticisms raised on the GC. Firstly, to a claim that says the GC is suffered from its non-accountability nature and the lack of enforcement and monitoring mechanisms, it must be noted that the voluntary nature of the GC has always been made very clear. It serves as a ‘guide-dog’ rather

\[\text{\textsuperscript{32} Nolan, J. (n 29 above) [p. 461].}\]
\[\text{\textsuperscript{34} Deva, S. (n 30 above) (p. 129).}\]
\[\text{\textsuperscript{35} Rasche, A. (n 24 above) (p. 521).}\]
than a ‘watch-dog’. It is a ‘complement’ and ‘not a substitute’ to existing and future regulatory approaches. Thus, it is strange to criticise the GC for something it has never pretended or intended to be. In that sense, the criticism of the GC for not undertaking a regulatory approach rests on a misconception of the original idea of the initiative.  

From its inception, the initiative was never designed as a seal of approval for participating companies as certification would require far more resources than are currently available. The GC instead expects proactive behaviour from its participants. Neither a regulatory regime nor a code of conduct, the GC seeks to achieve its objective through its learning network-approach. Its learning approach is useful insofar as a code of conduct is always static and therefore does not allow participants to react flexibly to varying environmental circumstances. There are measures to ensure the GC is not misused by entities with opportunistic behaviour. In order to safeguard the integrity of the GC from potential abuse and to further develop its learning opportunities, the initiative has introduced specific requirements for business participants and other integrity measures.

For example, the ‘Communication on Progress’ (CoP) has been implemented as a measure through which the GC Office can gain an overview of a company’s actions and activities in support of the GC principles. The submitted CoPs can be used by other parties like the NGOs as grounds to judge corporate behaviour and file complaints that the GC can use as a basis for investigations. If a company fails to submit a CoP report within a year it is labelled ‘non-communicating’, while after a

37 Ibid, (pp. 7-8).
second year of non-reporting the firm is then labelled as ‘inactive’ and completely delisted after yet another year of non-communication.\textsuperscript{38} Nevertheless, such measure does not ultimately require close monitoring of corporate actions. The decision faced by rule-setters is not between fully monitoring corporate behaviour of not monitoring at all. Rather there is something in between.\textsuperscript{39}

Indeed, this rather flexible nature enables the GC to complement the existing regulatory approaches which, in most cases, may not effectively work as expected. Secondly, to a claim that says the GC’s principles are too vague and lack clarity, it must be borne in mind that the very idea of the GC is the creation of the long-term learning network that is used by business and non-business participants to share innovative ideas and best practices as to how the ten principles can be implemented. The goal is to establish consensus and best practices on what, for instance “a precautionary approach to environmental challenges” means within a firm’s respective region and sector. Over-specified principles could even turn out to be counterproductive as they would limit the scope of possible solutions rights from the very beginning.

In addition, the wide variety in corporate size, sector, region and available resources of participating companies does not allow for the introduction of clear-cut principles. For example, Principle A is more relevant and has different meaning to a large MNE but it may not necessarily the case for smaller companies like the SMEs. In other word, the nature of the GC highlights the fact that there is considerable scope for adapting the initiative to the specific needs and situation of

\textsuperscript{38} Rasche, A. (n 24 above) (p. 525)
\textsuperscript{39} Ibid., p. 524.
the individual participant. The bottom line is that there are a variety of ways to implement the GC principles. The GC’s values need to be translated into action, a task that can be approached from different angles. Finally, collaboration between the UN and business is not only desirable but also needed as the UN’s goals can no longer be achieved without collaboration with business. In a world of growing interdependencies, neglecting UN-business partnership can only come at the price of sticking to existing ideologies.

Essentially, there is no basic inconsistency between the goals of the UN and businesses; both are interested in the existence of a stable global market that is sustainable and based on a social consensus of shared values. With the national governments, especially in developing countries, increasingly fail to set a regulative framework under which social, human rights and environment issues can be resolved, and with many of today’s problems cannot be solved on a national level at all but to be addressed globally, e.g. through the MNEs, the UN-business collaboration is indeed inevitable. Neglecting this collaboration may be possible in the short run but will go against the UN’s mission over a longer timeframe. In that sense, the allegation that says the UN, through the GC is being manipulated by big businesses for their own agenda, is a non-issue and uncalled-for.

4.3 SOFT LAWS AS A COMPLEMENTARY TO HARD LAWS

Nowadays, in our new global economic order, it is commonplace for an increasing number of firms to begin seriously and voluntarily integrating human rights

---

41 Ibid., p. 524.
43 Rasch, A. (n 24 above) (p. 522)
considerations into their mainstream business decision-making. More and more companies have started to recognize that respect for human rights as enshrined in the UDHR constitutes a basic and inevitable part of being a responsible business entity. Such escalating awareness demonstrated by the business community can be regarded as a response to the regulatory pressures coming from different groups in society as well as due to an increasing acknowledgement of the fact that “human rights are good for business”. In this sense, the voluntary human rights initiatives – commonly referred to as ‘soft laws’ are considered a necessary supplement especially in the events where the traditional hard laws are not working efficiently or are completely absent.

In a purely legal definition, ‘soft law’ means commitments made by negotiating parties that are not legally binding. Shelton, for example, views that ‘soft law’ ‘usually refers to any written international instrument, other than a treaty, containing principles, norms, standards or other statements of expected behaviour’. Hard law, on the other hand, refers to binding laws. In international law, hard law includes self-executing treaties or international agreements, as well as customary laws. These instruments result in legally enforceable commitments for countries (states) and other international subjects.

In this thesis, soft law is discussed in the context of its voluntary nature so as to encourage companies and business entities to enhance their human rights compliance. It is important to note that, despite voluntary in nature, soft law statements often contain aspirational language that inspires reliance on them to improve policy-making in areas such as the environment, sustainable development and human rights. In fact, an important role of soft law instruments is their ability to influence the future development of hard law commitments. Analysis on soft law instruments will thus provide useful and innovative alternative solution mechanism. This is because soft law can be a bridge between no commitments and legally binding commitments.

It is indisputable that the concept of voluntary-based corporate codes of conduct and corporate responsibility – including human rights consideration are becoming increasingly important to both local and transnational companies. This can be seen from the increasing number of initiatives aimed at promoting the concept.48 As for the MNE’s business context, it appears to be unavoidable that, apart from financial factors, other considerations such as environmental and human rights issues also constitute pivotal determinants in the decision making of the corporations, particularly when they interact globally.

Indeed, keeping a good reputation by engaging in human rights protection campaigns are now becoming part of MNEs’ core agenda owing to the fact that there can be financial benefits in being good global citizens, and not to forget, a good corporate image makes sound economic sense too. Voluntary approaches

---

48 Nolan, J. (n 29 above) (p. 448).
which could be beneficial for MNEs in incorporating human rights principles and values within their business operations can take a number of forms. Among other things, the approaches may include the promulgation of the corporate codes of conduct by MNEs, NGO activities such as working on standards and codes of conduct, raising public awareness, solidarity with claimants, research and evidence-gathering, and advocacy with governments and companies which can complement legal work.\textsuperscript{49}

The promulgation of an MNE’s voluntary codes of conduct can benefit from the collective voluntary approaches undertaken by the UN agencies and other Intergovernmental Organizations (IGOs) as well as the works of some NGOs that have come out with their recommendations for such codes to be applied by MNEs. In general, there is not much difference between the substance of the codes, especially those initiated by the UN and individual companies/NGOs. Most of the individual codes of conduct make reference to the existing international documents such as the UDHR, the Declaration of the ILO on fundamental principles and rights, the Rio Declaration from the 1992 UN Conference on Environment Development and the UN Convention Against Corruption.

A recent inventory by the OECD, for example, lists up to 246 individual corporate codes of conduct.\textsuperscript{50} Nonetheless, the success of voluntary approaches is not as easy as providing public statements of good intent. In this regard, there are a number of weaknesses and challenges which an MNE should give attention to while undertaking their voluntary initiatives. First, meaningful self-regulation is likely to

be undertaken only by a small number of companies, whereas the vast majority of other companies are merely paying lip service by adopting such self-regulation just to win the hearts of their stakeholders, not because of their sincere recognition and acknowledgement to the principle of human rights per se.

Secondly, public commitments may not always translate into changed corporate behaviour and thirdly, such voluntary efforts depend upon the continued vigilance of concerned citizens, consumers, NGOs and investors. In short, the proven inability of many MNEs to adhere to their own codes of conducts and the vague, unenforceable and poorly-defined nature of most collective efforts illustrate the limitations of a purely voluntary approach. Nevertheless, it has to be admitted that, despite the above weaknesses, the corporations’ commitment to the principle of corporate social responsibility through voluntary initiatives brings more good than harm. This lies in the fact that social responsibility and profitability can coexist.

In so doing, it was suggested that there were a number of determinants put forward that explain the driving force behind compliance with voluntary initiatives. Namely, these were: long-term interactive relationships, reputation, social consensus on the underlying norms, the need to maximize welfare and minimize transaction costs, the threat of sanctions, and institutional structures which encourage transparency and accountability. As far as a reputation perspective is concerned, we should acknowledge that social quality is valuable for

---

business entities as a competitive asset. A tarnished brand image and the loss of consumer goodwill are not good for business.

In addition, a corporation's respect for human rights will not only give rise to goodwill, but will eventually contribute to a stable and rule-based society in host states, which in turn promotes the smoother and more profitable operation of businesses. Indeed, these factors were so instrumental in causing many MNEs to accede to private initiatives that greater corporate compliance with international human rights standards was advocated.54 Given the substantial number of companies which have now shown their commitment to the internationally recognized human rights principles through their engagement in social responsibility initiatives, it seems viable that such voluntary initiatives would play a significant role as a model for enhancing MNEs human rights compliance as well as a supplement to existing binding regulations / hard laws.

4.3.1 Global Compact as a form of Soft Laws

As indicated before,55 the UN Global Compact is a clearly CSR-oriented mechanism and is ‘soft law’ in nature. It was not meant to substitute, but rather, to supplement the existing regulatory approaches. As stated in its website, the initiative views itself as “complementing other voluntary initiatives and regulatory approaches by helping to establish the business case for human rights, environmental stewardship and the fight against corruption.”56 Its learning-based approach, in particular, is a supplement to regulation especially in the event where regulations fail or are ineffective and need further development. The learning process in the

56 UN Global Compact. (n 4 above) “About the GC - Frequently Ask Questions”.
Compact allows MNEs to establish compliance with existing regulations in the first place. The plethora of corporate scandals throughout the globe shows that regulation by itself is in no way sufficient.

As such, the Compact serves to help corporations to address such issues by providing a forum that disseminates best practices and thus translates existing regulations e.g. international law with regards to human rights issues into real-life actions.\(^{57}\) In this regards, the former UN Secretary General, Kofi Annan referred to the Compact as “a pragmatic interim solution with regards to deficits in existing regulations.”\(^{58}\) While the term ‘pragmatic solutions’ was chosen, it was not however meant to suggest that learning and the formulation of shared values will entirely fill the governing gaps. Rather, it stressed that, in the pursuit towards good governance, regulations should always be supplemented, not replaced by a learning-based approach. Echoing the same idea, the International Chamber of Commerce claimed that “the Global Compact’s greatest strength lies in its voluntary nature, which acts as a powerful complement to the necessary action by governments themselves to safeguard and advance its principles.”\(^{59}\)

### 4.4 HUMAN RIGHTS AND THE GLOBAL COMPACT

In line with the thesis’ core objective, out of the GC’s ten principles, there will only be a thorough analysis of the first two. The Compact’s Principles 1 and 2 are dedicated to human rights and the fact that human rights issues were put at the very beginning of its ten principles spells out the close connection between the

---

\(^{57}\) Rasche, A. (n. 24 above) (p. 23).


initiative with human rights, thereby affirming its strong commitment to strive for better human rights compliance, in particular in the business arena. The fact that GC is meant for companies and business entities therefore suggests that human rights issues and values really matter to business activities. The idea of increasing human rights commitment by companies was significantly contributed to by the many public criticisms in the context of human rights being directed at the multinational enterprises for their alleged affiliation with gross and systematic violations of rights. These have often been in the form of their complicity in a series of abuses committed by state forces that would not have happened had it not been for the presence or support of the company.\textsuperscript{60}

As a result of the escalating criticisms, the MNEs are confronted with a number of challenges, one of which is the need to come to grips with the human rights framework and how a company's own activities might relate to it. Indeed, a growing moral imperative to behave responsibly is allied to the recognition that a good human rights record can support improved business performance.\textsuperscript{61} This is also consistent with the stance premised by Mary Robison\textsuperscript{62} who has put a clear emphasis on human rights needing business and similarly business needing human rights. This was, according to her, based on a twofold basis; first, business cannot flourish in an environment where human rights are not respected, and second, companies that fail to respect the human rights of their stakeholders will be monitored and their reputation will suffer.


\textsuperscript{61} UN Global Compact. (n 4 above). "The Ten Principles".

In some other cases, companies are often uncertain as to how to avoid complicity in human rights abuse and where the boundaries of their human rights responsibility lie. There is indeed a ‘pressing’ need for tools and guidance to help companies with their implementation efforts. The Global Compact Office has been providing an ample avenue for the solution of this debate by highlighting the relevance of human rights for business, demonstrating the business case for human rights, emphasizing practical solutions, and pointing to useful tools and guidance materials. It was the GC’s goal to show and prove that advancing human rights is not just about managing risks and meeting standards and expectations, but it is also about realizing new opportunities.

4.4.1 The Scope of Human Rights in the Global Compact

In the attempt to underpin the corporate accountability for the issues of human rights violations, a clear understanding about the human rights standards that can be applied to, and by them is a must. This should not only reflect the direct applicability of the laws and standards but might also determine corporate complicity in human rights violations. It has been acknowledged that the plethora of human rights is to include legal, ethical and philosophical foundations as well as its rather vague definition of “all what is good for human beings.” However, it is not the aim of this chapter to include all of them due to this chapter’s limited space. In order to be more focused and in parallel with this thesis’ subject matter, it is therefore worthwhile to only focus on the legal character of human rights.

---

62 UN Global Compact. (n 4 above) “Issues”.
63 Ibid.
rights since this will bring about a more constructive and effective mechanism in facing the issues of corporate human rights violations.

In general, the basic understanding of human rights could be obtained by examining the term ‘human rights’ itself. Literally speaking, ‘human rights’ means the rights which are based on respect for the dignity and worth of all human beings and seek to ensure freedom from fear and want. Rooted in ethical principles and usually inscribed in a country's constitutional and legal framework, human rights are essential to the well being of every man, woman and child. Also, being premised on fundamental and inviolable standards, they are universal, indivisible and inalienable. Human rights are in fact a defined area of international law laid down in various international treaties and conventions and also interpreted by various international bodies and international courts.\(^67\) The basic foundation for the international law on human rights can be found in the UDHR - a universally recognized human rights standard adopted and proclaimed by the General Assembly of the United Nation in 1948.\(^68\)

The entitlement of the rights and freedoms enshrined in the UDHR applies to all human beings regardless of their race, skin, colour, sex, language, religion, political or other views, national or social origin, property, birth, or any other criteria. Indeed, the almost universal acknowledgment of the idea that all people have inalienable rights that are not conferred or granted by the state, a party, or an organization but that are non-negotiable principles is one of the greatest


achievements of civilization.\textsuperscript{69} The traditional view, however, limits the human rights in the UDHR to civil and political rights which includes \textit{inter-alia} the right to life, liberty and security; the right not to be discriminated against on the basis of race, colour, sex, language, religion, social class or political opinion; the right to vote, freedom of speech and freedom of press; the right to be free from arbitrary invasion of privacy, family or home; and legal rights such as the right to due process of law and the presumption of innocence until proven guilty.

Nevertheless, over the past 50 years, the traditional view of human rights above has been challenged. Some say that it is too limited in scope and that a more multidimensional and holistic approach must be taken. Consequently, through various instruments, charters and declarations, the basic traditional civil and political rights have been expanded to also include crucial social, economic and cultural rights. These include: the right to an adequate standard of living; the right to education; the right to work and to equal pay for equal work; and the right of minorities to enjoy their own culture, religion and language.\textsuperscript{70} In general, the UDHR defines human rights, embracing three critical areas;

\textbf{i. Rights protecting life and security of the person}, developed through, \textit{inter alia}, the rights to life, liberty and security; the right to be free from slavery, servitude, torture, and cruel, inhuman or degrading treatment or punishment; the right to equal protection of the law; the right to be free from arbitrary arrest; and the right to judicial remedy against human rights violations before a court.


ii. **Economic, social and cultural rights**, encompassing, *inter alia*, the right to standard of living adequate for health and well-being that includes food, clothing, housing, medical care and access to social services and social security; the right to education; the right to just and favourable remuneration ensuring the worker and the worker’s family an existence worthy of human dignity; the right to form and join trade unions; and the right to rest and leisure. These rights are to be materialized through national efforts and international cooperation in accordance with conditions in each state.

iii. **Personal and political rights and freedoms**, including freedom of movement and rights protecting a person’s privacy in matters concerning family, home and correspondence; the right to take part in government; the right to vote; the right to equal access to public service; the right to own property; and the right to freedom of expression, religion peaceful assembly and association.

From the UDHR, various instruments and treaties have been derived - most notably the 1966 International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). Additionally, there were also some other instruments that supplement the preceding instruments, with specific focus on certain rights, for example the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment (CAT, 1984) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW, 1979). At regional level, similar instruments have also been adopted. This includes the European Convention of

Although being enumerated and prescribed in various instruments and at different levels, the human rights own identical fundamental characteristics like universal, indivisible, interdependent and interrelated. As major governments have now shown their commitment to respect the universally proclaimed human rights, it can therefore be said that the range of these rights can be a yardstick or parameter to measure not only the action of government, but also individuals which also include the MNEs. This was evident in the fact that the national constitutions of various governments adopted some key features of the UDHR. In addition, despite the broad perspectives of the International Human Rights Law instruments mentioned above, there exists only one overarching objective – that is to protect human rights.71

Under this basic ‘to protect’ - objective, there flow three specific obligations; to prevent human rights abuses, to provide means and mechanisms for human rights compliance; and to promote the understanding, appreciation, and application of human rights standards.72 Given the self-reflexive nature of human rights duties derived from the instruments mentioned above, the proposition that MNEs are so bound is relatively uncomplicated, requiring principally that the MNEs refrain from infringing on full enjoyment of human rights by adopting preventive strategies to curb and scrutinize their own actions. Indeed, this is the minimum

---

71 The third paragraph of the Universal Declaration of Human Right provides that it is essential that human rights be protected by the rule of law.
duty to ‘do no harm’ to all those with whom MNEs have contact. The greater the proximity of the MNEs to human rights bearers, the greater will be the duties of the MNEs towards them.\textsuperscript{73} Hence, MNEs owe the greatest human rights obligations and duties to those within their sphere of influence, such as workers, consumers and member of local community.

Additionally, MNEs must also have a duty not to be complicit in any human rights violations by other parties with whom they are working.\textsuperscript{74} In principle, the range of rights being commonly infringed on by the corporate entities includes economic, social and cultural rights; civil and political rights; rights protected under international humanitarian law, all of which enumerated in various international treaties and customary international laws.\textsuperscript{75} The International Bill of Human Rights which consists of the UDHR (1948), ICESCR (1966) and ICCPR (1966) have clearly enumerated the classification and division of these rights, save for the rights protected under international humanitarian law which have been spelled out in the Geneva and Hague Conventions.

Despite the classification of rights mentioned above, the United Nations constantly emphasizes the indivisibility and interdependence of every human right. Be it civil, political, economic, social and cultural, every type of human rights is sharing and enjoying the same degree of indivisibility interdependency, interrelation and is of equal importance for human dignity.\textsuperscript{76} There is therefore no such thing as first


\textsuperscript{74} U.N. Global Compact (n 4 above).


class rights that need to be prioritized or second class rights that should be made secondary or unimportant. In more precise terms, there should not be a victimization of a right for the sake of upholding the other rights. All types of human rights should altogether be respected and promoted in due process. As an example, in enhancing economic development that respects the economic rights of its citizen, a government cannot deny the importance of their fundamental civil and political rights.

Although economic development could lead to the improvement of living standards of the people, this should in no way compromise the impairment of other civil and political rights, such as the right to life or the right to establish union. As for MNEs, they regularly use a similar argument to justify their presence in countries with terrible human rights records by promoting the production of wealth and prosperity thus improving economic and social rights, but at the same time, other basic civil and political rights like the right to life and freedom from torture are often overlooked and sidelined. It is indeed unacceptable that the violations of some rights are made the unavoidable price of improving other rights, such as economic development under the ambit of economic rights.

4.4.2 Principle 1 – *Internationally-proclaimed Human Rights and the MNEs’ ‘Sphere of Influence’*

The Principle 1 of the UN Global Compact reads as follows; “*Businesses should support and respect the protection of internationally proclaimed human rights*”. From this principle, it can be understood that the business entities are called upon

---

77 Steiner, H. J. and Alston, P. (n 72 above) (p. 268).
to make the internationally-recognized human rights principles as part of their business agenda within their sphere of influences. Also, under this principle, there could be extracted two essential key-words, upon which one needs to pay extra attention in order to appreciate the practical implications of this principle. In more precise words, one should identify what the ‘internationally proclaimed human rights’ principles are relevant to MNEs’ activities and what the extent of MNEs’ ‘sphere of influence’ is.

The International Bill of Human Rights spells out a useful starting point to understand the nature of the ‘internationally proclaimed human rights’. As previously discussed, the bill is made up of the UDHR, ICESCR and the ICCPR. The UDHR, for example, defines itself as a “common standards of achievement for all peoples and all nations,” both proclaims a set of fundamental values shared by the international community, and sets standards recognizing rights and the corresponding duties to protect those rights. While the ICESCR, ICCPR and UDHR are together referred to as the International Bill of Human Rights, both ICESCR and ICCPR are also part of the seven international treaties in which the rights laid down in the UDHR have been further elaborated.79

In addition, the fact that the human rights principles in Compact are derived from the UDHR has made it clear that the principles are in accordance with the existing human rights framework. As such, the GC is undoubtedly capable of producing a practical solution to contemporary problems related to globalizations, corporate citizenship and sustainable development in a multi-stakeholder context. The UDHR

79 UN, OHCHR. (n 60 above) (p. 3).
and the other range of human rights frameworks, albeit specifically putting their burden of responsibilities primarily on states, have also called on every organ of the society to strive to protect, promote and fulfil human rights. The terms ‘every organ of the society’ also includes business entities despite the exact nature of responsibility to safeguard these rights remains the subject of some debate.

Apart from striving to support and respect the protection of internationally proclaimed human rights, companies and business entities must also adhere to and respect the existing domestic laws in the countries where they operate. This issue however posed a pivotal dilemma to companies on the practicality of their involvement in contributing to an improved human rights framework. Also, the dilemma is based on whether this involvement could lead to undue intervention and influence by the non-state actors in the policy-making activities of the host country governments.\(^8\) However, in this sense, the companies’ involvement in contributing to an improved human rights framework should not be viewed as an encroachment on the policy-making roles of the host country’s governments. Rather, it should be considered as a form of companies’ commitment to work hand-in-hand with governments in upholding the very principles of human rights within their territory.

On the other hand, the term ‘sphere of influence’ used in the GC’s Principle 1 may raise several questions on the extent of MNEs’ responsibility. Is this only limited to their employees within their ‘factory-gates’ or might it also go beyond that

---

boundary. It is therefore worthy to identify to what extent the MNEs have to exercise their human rights responsibilities. These extents limit the scope of commitment made by MNEs in the GC to support and respect human rights and avoid complicity in human rights abuses. At the same time, it should help draw the boundaries between the MNEs’ responsibilities and the States’ obligation so that the MNEs do not take on the States’ policing role. The extents have been documented in various academic documents and discussed by various scholars, academics and politicians at different levels. Such extent may vary depending on the human rights issues in question, the size of the company, and the proximity between the company and the (potential) victims and (potential) perpetrators of human rights abuses.

Every company, be it large or small, has a sphere of influence, though obviously the larger or more strategically significant the company, the broader its sphere of influence is likely to be. However, a company does not have complete control over every business partner, and cannot be responsible for the actions of partners over which it has little influence. The closer a company is to actual or potential victims of human rights abuses, the greater will be its control and the greater will be the expectation on the part of stakeholders that the company is expected to support and respect the human rights of proximate populations. Similarly, the closeness of a company’s relationship with authorities or others that are abusing human rights may also determine the extent to which a company is expected by its stakeholders to respond to such abuse.

---

82 UN Global Compact (n 4 above).
83 Ibid.
Aside from that, it is also crucial to understand who is actually in the MNEs’ sphere of influence. Given the absence of detailed and specific definition by international human rights standards on the concept of ‘sphere of influence’, this concept is seen to refer to those individuals or organizations that have a certain contractual, political, economic or geographic proximity to the MNEs. Typically this includes the MNEs’ employees, neighbouring communities, business partners, and relevant authorities of the MNEs’ host governments.\(^{84}\) The relationship a company has with its employees lies at the centre of its sphere of influence. As such, a company or MNE has to ensure that its own workers are necessarily enjoying their human rights while at work. Beyond its employees, a company has relationships with a broader range of actors over whom it may have the ability to exert influence to varying degrees with regards to human rights. This may include communities living near its operations and its business partners such as suppliers, contractors and joint venture partners.

In addition, consumers may also have connections with companies which produce goods, although the former may not be physically proximate. Likewise, the environment within which the companies are operating their business should also be part of the company’s sphere of influence beyond its own employees. A violation of the environment will end up with an infringement of various human rights of local people. Last but not least, companies and MNEs may also have direct and close connections with the companies’ host or home governments, or with armed groups that control the territory in which they operate. Through the advocacy and lobbying activities of sectoral, national or international business

\(^{84}\) Hanks, J. (n 80 above) (p 5).
associations of which a company is a member, its sphere of influence may furthermore extend to governmental and inter-governmental policy-making bodies.\textsuperscript{85}

4.4.3 Principle 2 – MNEs’ Complicity in Human Rights Abuses

As the continuation to Principle 1, Principle 2 of the UN Global Compact urges business entities to make sure that they are not complicit in human rights abuses. To understand this principle, one should first understand; under what circumstances might the company be ‘complicit’ in human rights abuses? In general, corporate complicity in human rights abuses means that a company is participating in or facilitating human rights abuses committed by others, whether it is a state, a rebel group, another company or an individual. Literally speaking, participating in this sense might imply aiding, abetting, counselling, procuring, inciting, facilitating, conspiring, assisting, encouraging, authorising, tolerating, acting as accessory, failure to control, relieving, comforting and handling\textsuperscript{86} - an action without which a human rights abuse should not have happened.

The Office of the High Commissioner for Human Rights (hereinafter the OHCHR), in its recent briefing paper defined the notion of ‘corporate complicity’ as “a company that authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse.”\textsuperscript{87} However, citing an American court case,\textsuperscript{88} the OHCHR

\textsuperscript{85} UN, OHCHR. (n 60 above). (p.4).
\textsuperscript{86} Leisinger, K. M. (n 69 above) (p.15).
\textsuperscript{87} UN, OHCHR. (n 60 above). (p. 6).
stated that it is not merely the company’s participation that actually causes the abuse, instead, the company’s assistance or encouragement should reach such a degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way. Whether a company is a principal actor or an accomplice in the human rights abuse might depend on such factors as the company’s knowledge of the abuse, its intentions, whether its actions helped to cause the abuse, and the relationship between the company and the victims or perpetrators.

In principle, there are four ways in which a company can support a regime which systematically violates human rights. Firstly, by producing products or providing major sources of revenues or infrastructures, such as roads and firearms, the MNEs may facilitate the regime’s repressive conduct and capacity. Secondly, a company may also, in its multinational capacity, provide international credibility to an otherwise discredited regime. Thirdly, the companies may get commercial benefit in cases in which governments commit abuse to produce infrastructure designed for business use.

In other words, the government’s human rights violations (e.g. the use of forced labour) may not taken place without the participation of companies which in this case use the infrastructure for their business purposes. The best example to reflect this issue is the case of Unocal in Burma,\textsuperscript{89} whereby it could be said that the company gained benefits from the use of forced labour by the government in

building the infrastructure for the Yadana Pipeline. Accordingly, the fourth way that companies could play their role in government human rights violation is by influencing government in the perpetration of abuse in order to provide themselves with resources. Governments, particularly from the developing economies are financially and economically inferior compared to companies and yet a significant amount of their income comes from companies operating within their territories. Ensuring the survival of companies also means maintaining their financial capability and fiscal revenue. Thus, for the sake of maintaining the companies, in some circumstances governments may have to pay at price that can be as high as violating human rights of their own citizens.

Additionally, despite the myriad of ways in which companies may contribute towards violations of human rights undertaken by government actors, the debate over the forms of corporate complicity is still ongoing. Can the mere presence and existence of a company within a site affected with human rights violations by governments be considered as corporate complicity? Arguing this, the OHCHR - from a business point of view, has made it clear that the notion of corporate complicity can be categorized into three distinct forms.

First is the ‘direct complicity’ which, with no doubt, portrays companies’ direct complicity to government’s human rights violation. This occurs when the company knowingly assists in the violation of human rights. For instance by assisting in forced relocation of people on occasions related to a business activity. The second, being the ‘beneficial complicity’, implies the benefits directly gained from the

---

90 International Council on Human Rights Policy. (ICHRP). (n 73 above) (pp. 131-132).
91 UN, OHCHR. (n 60 above) (p. 6).
human rights abuses committed by someone else. This may include, for example, benefiting from the use of repressive measures committed by security forces guarding company facilities. Finally, the ‘silent complicity’, constitutes a rather simplistic but influential type of complicity of the abuses carried out by governments. This might take place whenever a company fails to question systematic or continuous human rights violations in its interactions with the appropriate authorities.

Hence, by remaining in silence without any reactions, a company is indirectly giving its agreement for the violations to happen in areas in which it has influence. This silent complicity could include, for example, the company’s acceptance of the systematic discrimination in employment law against a particular group on the basis of ethnicity or gender. Having said that corporate complicity symbolizes the indirect involvement of companies in government-led human rights violations, it is a rather complicated job to prove the complicity in a strictly legal sense. Nevertheless, the court of public opinion may, alternatively, deem the complicity by invoking the notion of corporate moral responsibility. Such moral complicity may have a significant impact on and implications for the company’s image and brand value.\textsuperscript{92} The lower moral responsibility that a company has, the higher the possibility there is that its reputation to be tarnished.

\textbf{4.4.4 Institutionalization of GC human rights principles into business management}

The integration of human rights into business management being suggested by this research will consider the need to take into account the four values derived from

\textsuperscript{92}Hanks, J. (n 80 above) (p. 6)
the GC human rights principles. These values consist of leadership, networking, learning and education as well as transparency and accountability. Under the purview of these four values, a practical guideline will be provided for MNEs as a reference for making a proactive improvement of the human rights and social dimensions of their existing policy- and decision-making frameworks. Before mainstreaming the Global Compact human rights principles into its existing business operations and activities, an MNE should first understand human rights from a business point of view.

In this regard, four elements need to be taken into account. In essence, an MNE should develop the business case for human rights, familiarize itself with the broad content of human rights and the available resources, understand the implications of the Global Compact’s first two principles as well as develop and encourage a ‘rights-aware approach’ to its business. Developing a business case for human rights implies the identification of main benefits and new business opportunities brought about by human rights for an MNE. For example, these main benefits include: improved stakeholder relations, enhanced corporate reputations and brand image, strengthened shareholder confidence as well as more sustainable business relationships with governments, business partners, trade unions, subcontractors and suppliers.

As to becoming accustomed to the broader human rights’ content and to understanding the implications of the Global Compact human rights principles, the

---

earlier part of this chapter has made both matters clear and precise for MNE to refer to. This chapter has also made a strong argument that, while becoming familiar with human rights relevant to business which should normally refer to the International Bill of Human Rights, understanding the implications of the Global Compact human rights principles requires a thorough look at the concepts of ‘sphere of influence’ and ‘avoiding complicity’. Both concepts have been thoroughly discussed previously in this chapter. These are to be comprehended comprehensively by an MNE who seeks to integrate the Global Compact human rights’ principles in its organization structure.

Furthermore, to create a precise business context for understanding human rights, an MNE should endeavour to make sure that it is willing to accept that its stakeholders have universal rights and that any decisions made by the MNE should strive to respect these rights. This attempt, better known as the ‘right-aware approach’, would also mean that an MNE would identify the rights at issue and its corresponding responsibilities in terms of international human rights standards before determining any appropriate action to solve the issue. On the other hand, in the pursuit to integrate and institutionalise corporate responsibilities, including that of the GC human rights principles into business management, it is also worthwhile to know the degree of MNEs’ human rights ‘embeddedness’.

To this end, Simon Zadek has developed five stages of organizational learning model. These five stages explain how and in which manner the GC human rights could be embedded into business strategy and operation. The first, being the

---

94 Ibid., p.10
defensive stage – refers to company’s denial of any responsibility, followed by the compliance stage where a company moves to adopt a policy-oriented compliance approach. The third stage; managerial – on the other hand, indicated the state where a company has embedded societal issues into its core management process. The company will then attain strategic level if it managed to add value to its business through the integration of societal issues in its business strategies.

Finally, the civil stage is a position where the company actively engaged in collective rule-making process on a global level, and thus, not only fulfil an economic but also a political role. In general, the defensive stage does not apply to MNEs and companies that have signed up to the GC. This is because such membership already indicates the companies’ voluntary acceptance to some kind of corporate responsibility contained in the GC principles. The compliance stage, on the other hand, represents a very limited, purely legalistic view of responsibility.

In other words, at the compliance stage, the company merely exercises nothing more than the negative obligation of ‘to respect’ and to ‘do no harm’ with regards to human rights i.e. to refrain from violating human rights. It was only in the further stages e.g. managerial, strategic and civil the company started to engage positive obligations in a more proactive manner i.e. ‘to protect, promote and fulfil’ human rights responsibilities. Although traditionally being considered the nature of State’s human rights obligations, positive obligations for Non-State and private actors means a more serious and explicit business strategy to take human rights cause to the next level, rather than merely acting in negative, passive manner.

96 Baumann, D. and Scherer, A. G. (n 16 above) (p. 22).
97 Ibid., p. 24.
4.4.5 The Global Compact Network Malaysia

The UN Global Compact operates through a network of local organizations. Their role is to facilitate the progress of companies (both local firms and subsidiaries of foreign corporations) engaged in the Global Compact with respect to implementation of the ten principles, while also creating opportunities for multi-stakeholder engagement and collective action. In Malaysia, the Global Compact is a fairly new momentum. It was only after five years of its inception that the Global Compact network emerged in Malaysia but it is now gaining considerable impetus through the support from diverse parties. The network is currently being established in Malaysia under the auspices of the UNDP Malaysia and in collaboration with the Caux Round Table (Malaysia).

The Global Compact Network Malaysia (GCNM) is a network that works to promote the GC ten principles concerning human rights, rights of workers, the preservation of the environment and anti-corruption among companies in Malaysia. By connecting to the network, businesses are given the opportunity to showcase their CSR activities internationally as well as an arena for interaction with organizations and other businesses. Indeed, the network is very keen on encouraging Malaysian companies to become signatories of the UN Global Compact and be active participants in realizing the goals and objectives of the UN Global Compact in Malaysia.

---

The Malaysian network, together with UNDP and CRT, has been holding a series of events and meetings to promote the Global Compact to Malaysian companies.\(^9\) By August 2010, 62 companies and organizations had joined the GCNM, of which the majority of the companies were multinational companies. DiGi Communications is one of the companies that are affiliated with the network. As emphasized by GCNM, DiGi is the only Malaysian company that has signed the "Caring for Climate" initiative. The participation of these organizations gave new momentum to the network to achieve its mission to promote good governance by building its capacity and awareness of ethics, integrity and corporate responsibility in the Malaysian corporate sector.

As the Asian region has demonstrated a capacity for rapid economic growth, the GCNM is therefore considered a workable tool to offer an opportunity to reveal the depth of this growth in Malaysia through Malaysian organizations' commitment to global principles that can have a significant local impact. This is in line with the network's vision to be the most open, innovative and responsive platform in Malaysia for testing and showcasing good business practices, thereby reflecting the dynamism of Malaysia's corporate sector, and the commitment of the government, businesses and civil society to continue to develop the country in a sustainable manner.\(^10\) It is through this network that the GC could serve as a conduit for information exchange through which the involved agencies have developed synergies in learning the most reliable and productive solutions for their respective projects. Through this network aslo, the GC envisages the possibilities of

---

\(^9\) UN Global Compact (n 4 above) "News and Events".

how business can be part of the solution and not just avoid being part of the problem.

4.5 RUGGIE’S ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK AS AN AUTHORITATIVE FRAMEWORK FOR GLOBAL COMPACT

In the pursuit to further empower human rights cause in business arena, the then UN Commission on Human Rights (now Human Rights Council) appointed Professor John Ruggie of Harvard University in July 2005 as the Special Representative of the UN’s Secretary-General (SRSG) on the issues of human rights and transnational corporations and other business enterprises. The mandate was created in an effort to move beyond what had been a long-standing a deeply divisive debate over the human rights responsibilities of business entities. Ruggie’s aim was to build meaningful consensus among all stakeholders about the roles and responsibilities of both States and companies with regard to business’ impact on human rights. To achieve that consensus, he led the six years of research and consultations involving governments, companies, business associations, civil society, affected individual and groups, investors and others around the world.

The result of Ruggie’s consultation process is the UN ‘Protect, Respect and Remedy’ Framework (the Framework) which was unanimously welcomed by the Council in 2008. A set of Guiding Principles, namely the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), were later developed to operationalise the Framework and to take the next step of providing concrete guidance and recommendations to States and businesses, as well as benchmark by which their

---

performance can be assessed by other stakeholders. The Guiding Principles provide an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activities. They also provide tools to measure progress by business in meeting their human rights responsibilities.¹⁰²

Generally speaking, the work of the SRSG has evolved in three phases, following to several renewals of the initial mandates. The first phase was a preliminary duration of two years mandate, i.e. from 2005-2007, intended mainly to “identify and clarify” existing standards and practices relating to human rights and business. Ruggie’s mandate was later renewed by the UN Human Rights Council (the Council) for an additional year (2007-2008) to enable him to submit recommendations. This constitutes the mandate’s second phase. During this period, Ruggie observed that, despite the existence of various initiatives, none of them managed to add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge.¹⁰³

Accordingly, in June 2008, the SRSG submitted a report, proposing a three-pillar framework for corporate accountability for human rights, which he describes as “Protect, Respect and Remedy”. With a renewed mandate from the Council - which marked the mandate’s third phase (2008-2011), Ruggie moved to


‘operationalise’ the three-pillar framework by developing concrete and practical recommendations for its implementation through the Guiding Principles set forth in his March 2011 Report. The Principles were later unanimously endorsed by the UN Human Rights Council on 16 June 2011. Indeed, there have been many connections between the UN Guiding Principles and the UN Global Compact in the sense that both firmly advocate the enhancement of business responsibilities to respect human rights.

In particular, Principle 1 of the GC calls upon companies to respect and support the protection of internationally proclaimed human rights whereas the Principle 2 calls upon them to ensure that they are not complicit in human rights abuses. As a global standard applicable to all business enterprises, the Guiding Principles do not only provide operational clarity to the GC’s two human rights principles, but also strengthen the GC by providing an authoritative framework for participants in implementing this commitment. This includes guidance on putting in place robust policies and procedures and communicating annually with stakeholders about progress.

Furthermore, the Guiding Principles also highlight what steps States should take to foster business respect for human rights; provide a blueprint for companies to know and show that they respect human rights, and reduce the risk of causing or contributing to human rights harm; and constitute a set of benchmarks for

---


stakeholders to assess business respect for human rights.\textsuperscript{106} The principles are organized under the UN three-pillar framework which ‘rest on the differentiated but complementary responsibilities’. Such responsibilities include; the state duty to protect against human rights violations by or involving corporations; the corporate responsibility to respect human rights; and effective access to remedies.\textsuperscript{107}

4.5.1 State’s Duty to Protect Human Rights of its Citizen

Under this pillar, Ruggie reemphasized the State’s existing obligations under the domain of International human rights law to respect, protect and fulfil human rights. The Guiding Principles make clear that, in meeting their duties to protect, States should put in place effective policies, legislations, regulations and adjudication and that doing so provides guidance, encouragement, greater clarity of expectations and consistency for business in relation to human rights.\textsuperscript{108} Also, Ruggie pointed out on the importance of protection against human rights abuses involving business enterprises. In this regards, the 2009 Report notes that ‘States are not held responsible for corporate-related human rights abuse \textit{per se}, but may be considered in breach of their obligations when they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.’\textsuperscript{109}

\textsuperscript{106} Ruggie, J. (n 102 above).


\textsuperscript{108} UN Global Compact. (n 105 above) (para 17).

4.5.2 Corporate Responsibility to Respect Human Rights

The second pillar of Ruggie’s framework emphasized the companies’ responsibility to respect human rights by establishing a minimum global standard on human rights for all business enterprises wherever they operate. It requires business enterprises to avoid causing or contributing to adverse human rights impact through their business operations. Where they have not contributed to such human rights impacts, business enterprises should seek to prevent or mitigate impacts that are directly linked to their operations, products or services by their business relationship.110 Ruggie is of the opinion that, since the companies have the potential capacity to impact all recognised rights, companies should consider all these rights. The duty to respect human rights, according to him, is defined by social expectation.111

In assisting the companies to meet their responsibility to respect human rights, Ruggie encourages the companies to have in place appropriate policies and procedures. This includes making a policy commitment to meet the responsibility to respect human rights, to exercise human rights due diligence, to identify, prevent, mitigate and account for how they address the impacts on human rights, and engage in processes to enable the remediation of any adverse human rights impacts they cause or contribute to.112 Also, in achieving similar aim, Ruggie has recommended in his 2011 Report that the MNEs and business entities should consult and engage with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-

---

110 UN Global Compact. (n 105 above) (para 20).
111 Amao, O. (n 107 above) (p 6).
112 UN Global Compact. (n 105 above) (para 27).
stakeholder initiatives. Nevertheless, there have been many companies who have misused the notion of ‘Corporate Social Responsibility’ (CSR) and philanthropic activities as a tool to ‘cover up’ their human rights impacts. In this regards, Ruggie observes that CSR cannot compensate for human rights abuse. He further noted that, “since the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere.”

### 4.5.3 The Need for Greater Access to Effective Remedy

Following to human rights abuses by companies, there comes a vital issue – how and through which forum can a victim enforce corporate human rights violations? Under this third pillar, Ruggie went on to focus on ensuring that, in the events of people’s rights being harmed by business activities, there should always be accessible forums for the victims to gain effective redress. As part of their duty to protect against business-related human rights abuse, the States must ensure that those affected in such abuse have equal access to effective remedy, be it through judicial or non-judicial mechanisms. Similarly, for the companies, effective operational level grievance mechanisms could be used to give early warning of problems and help mitigate or resolve them before abuses occur or disputes compound.

---

114 Amao, O. (n 104 above) (p. 7).
4.6 CONCLUSION

Having explained the context and factors contributing to the issues of corporate human rights violations in the earlier chapters, the present chapter has widely assessed the UN Global Compact human rights principles – a soft law which could serve as a viable solution. Emerging in the era of the global economic crisis and the ensuing decline in corporate human rights and social responsibilities, the GC represents a global platform initiated by a global political body to solve the global economic problems. With its non-regulatory nature, the principle-based GC gives more emphasis on effective action to supplement the existing regulations by guiding MNEs on their human rights responsibilities, rather than trying to compel or punish. Despite the fact that the States traditionally remain the primary duty holder of human rights responsibilities, the current trend of MNEs’ increasing awareness and commitment to CSR and human rights responsibility shows strong reasons to suggest that being socially responsible could reinforce their profitability in the long run.

Indeed, human rights is the GC’s core commitment due to the fact that the human rights principles have been positioned at the very top, i.e. the first two, of its ten principles. Be that as it may, the GC is not without its critics. Lack of enforcement mechanisms, possible exploitation of the GC / UN by opportunist MNEs and vague nature of the principles are among the examples. But such critics could not outshine the GC’s advantages and contributions towards global governance. In this chapter, I have argued that the GC is the world’s largest CSR initiative of its kind – having recorded more than 8000 participants from 135 countries. As such, the initiative possesses the potential to successfully bring human rights issues within
the global business arena. It is indeed an effective forum through which corporate entities could leverage the UN’s global reach and convening power with governments, fellow corporate institutions, civil society and other stakeholders in the drive to achieve a greater corporate citizenship.

The John Ruggie’s ‘Protect, Respect and Remedy’ Framework brought together by this chapter emphasized the Framework’s significant relevant to the GC principles. It provides operational clarity on how to put principles in place to achieve the underlined goals. Above all, what seems certain is that the movement towards greater corporate responsibility is one of the most deep-rooted developments in the human rights story of this era. The GC principles, being supported by the Ruggie’s framework could together lead to a major contribution to the cause of human rights and business in the years to come. In essence, the momentum generated by the GC and the Ruggie’s Framework may result in certain reforms of corporate organizations that may lead to significant legal consequences. In particular a binding duty of care towards foreseeable potential victims of human rights infringements arising out of investment projects may eventually crystallised. It is inherent in the human rights due diligent concept and there is no reason whatsoever why existing laws cannot evolve to contain such a duty.

Similarly, it seems clear that any move towards operationalising the corporate responsibility to respect human rights will involve a departure from a shareholder-based corporate governance model towards a more stakeholder-based model. In sum, this chapter affirmed that, in the events where the existing legally binding mechanisms or ‘hard laws’ were seen as ‘not doing enough’ to curb business
misconducts, soft laws and social means of enforcements are useful to bridge the companies’ accountability gap. In fact, in this case, any attempts to produce ‘soft laws’ based on self-regulation is better than existing without law at all. With a more ‘humane' image, it seems foreseeable in the near future that the events of corporate human rights violations will slowly diminish, if not entirely disappear.
5.1 INTRODUCTION

In the previous chapter, I presented the context and nature of the Global Compact human rights principles as a form of soft law which complement the toothless state-based judicial means of enforcement. The present chapter takes this idea one step further by analysing the practical aspects of the GC soft law mechanism within the Malaysian business perspective. Indeed, the voluntary soft law mechanism which exemplifies severally in the name of Corporate Governance, Corporate Citizenship, Corporate Social Responsibility (CSR) or sustainable development have become a common phenomenon in today's business arena, not only in Malaysia, but also across the world. The CSR, in particular, has been a ‘buzz’ word which forms part of business’ key agenda. Along the same vein, the need for companies to adhere to human rights standards as part of their social responsibilities has been in the limelight, in particular in the wake of growing trend of allegations against their human rights violations.

In general, it is pretty clear that most of the companies operating in Malaysia, especially the MNEs, understand and aware of the current economic development which requires them to play an important role in social, environmental and human rights issues. However, there remains an issue which has yet to be clarified, that is - to what extent such understanding has been put in place by the respective companies, organizations and other organs of communities? This chapter thus
aims to examine the practical aspect of CSR and human rights within business sphere in Malaysia. This will be done by looking at the practices of selected business and institutions in Malaysia relevant to the GC soft law mechanism.

In essence, this chapter will reinforce the idea that it is possible, viable and practicable to use the GC soft law mechanism as a non-judicial social enforcement and compliance strategy in order to address the issues of corporate human rights violations in Malaysia. It begins with an explanation on the concept of non-judicial social enforcement of human rights standards relevant to business entities. In other word, it justifies why such enforcement is termed ‘social’ and how such enforcement could be achieved. Accordingly, the chapter will look at the practical aspect of GC human rights principles from both the business and institutional perspectives.

The discussion on practical aspect of GC human rights principles is divided into two parts. Part A, deals with a number of relevant institutions namely: the Malaysian National Human Rights Institution (NHRI) i.e. the Human Rights Commission of Malaysia (SUHAKAM), Bursa Malaysia – an exchange company with 1000-odd public listed companies (PLCs) as well as the CSR Malaysia – a CSR network of corporate and academic institutions. Part B, on the other hand, will look at the experience of a leading Malaysian MNE – Sime Darby Berhad who became a GC member since 2011. This part will examine the strategy of relevant company / institutions for social enforcement and compliance of human rights by companies and how they implement it voluntarily as per GC principles.
5.2 NON-JUDICIAL SOCIAL ENFORCEMENT OF HUMAN RIGHTS STANDARDS

Before attempting to apply the soft-law GC human rights principles as a mechanism for social enforcement of human rights standards for MNEs, it is worthwhile to provide some important insights into how such social enforcement mechanism could be implemented.

5.2.1 The ‘social’ nature of the enforcement

According to Deva, the notion of social enforcement of human rights standards against corporations and MNEs envisages the idea that various segments of society will perform the role of regulators.1 As its name suggests, the enforcement will be done by members of the society and not through the traditional way of government- or state-centred mechanisms. Deva further argued that, ideally, this method of enforcement is considered ‘social’ based on a three-fold justification. First, it occurs within the informal vistas of society; second, it is implemented by societal organs; and third, the implementation is made through social sanctions.2

To be precise, human rights obligations are to be enforced outside the traditional state-centred judicial enforcement mechanisms which usually implemented through the official state regulatory institutions such as courts, tribunals and departments, shall no longer be used.

The social enforcement will instead take place within and around the informal societal institutions such as communication mediums, educational institutions, factories, markets, public gathering spaces, NGOs, trade unions etc. Social

2 Ibid., p. 109.
enforcement serves as a complementary to the judicial enforcement and the use of judicial enforcement will be sparse when pitched against social enforcement. Moreover, as the social enforcement does not involve formal state regulatory institutions, it therefore does not require state policing. The monitoring and enforcement process will instead be secured by various organs of society such as the media, NGOs, human rights and social activists, trade unions, consumers and consumer associations, investors and shareholders.

Finally, the social nature of this enforcement lies in the fact that it does not rely on civil and criminal sanctions but on social sanctions. As such, the companies’ observance to human rights standards are not to be motivated by the court-administered coercion but rather by the elements of persuasion, negotiation, consumers-investors-shareholders’ behaviour, market incentives, social pressure and social shaming.\(^3\) Since the members of society have the persuasive power i.e. in their capacities as consumers and stakeholders to the company, they can therefore give influential impact on the companies to ensure that the latter observe human rights standards within their sphere of influence.

5.2.2 Means of Implementing Social / Non-judicial Enforcement

The MNEs, the NHRIs, relevant institutions and civil society can play their respective roles to implement social enforcement through a number of approaches. In this regard, the GC Principles and Ruggie’s Framework – discussed extensively in Chapter 4 - could provide some valuable insights to influence and reinforce this implementation strategy.

\(^3\) Ibid., p. 110.
I. Human Rights as a Corporate Culture

The MNEs and companies, for example, can portray their commitment to human rights standards by establishing their own codes of conduct. Such codes should consider precautionary measures in their business operations – especially those which will involve vulnerable people e.g. indigenous people – to avoid human rights violations. Human rights should indeed be made the companies’ culture - to go hand in hand with the traditional profit-making nature of the companies. In so doing, understanding or some experience of human rights issues should be an essential part of the requirements to be directors and executives of the companies. Also, training and education on human rights are to be implemented to all staffs across the companies’ levels. This will ensure the companies are complying with human rights standards.

In addition, the people-friendly business operations with emphasis on human rights issues could be established through engagement with human rights institutions, NGOs and activists as well as civil societies who will help the business entities provide their best efforts in putting human rights as part of their main agenda. In this sense, the GC network⁴ which comprises of the UN systems, businesses, governments, civil society and labour organizations could provide a strategic and useful channel through which CSR or Corporate Citizenship could be exercised.⁵ Similarly, the second pillar of Ruggie’s framework emphasized the companies’ responsibility to respect human rights by establishing a minimum global standard on human rights for all business enterprises wherever they

---


operate. It requires business enterprises to avoid causing or contributing to adverse human rights impact through their business operations.\(^6\)

Along the same vein, the national human rights institution also plays a key role in ensuring that the companies are complying with human rights frameworks. The Malaysian NHRI – SUHAKAM has implemented a number of initiatives like round table discussions, dialogues, inquiries and discussions with all relevant stakeholders in order to ensure the companies are not violating human rights while doing their business activities. In addition, SUHAKAM and other human rights organizations can play their role to advise and recommend the government to ensure that the companies – especially those securing government projects – to implement human rights educations and training to their directors and staffs. This involves two important aspects of assessing the human rights implications of business decisions and balancing business interests of a corporation with its human rights obligations. It is plausible to argue that by adopting these measures, a human rights culture could be institutionalised within business and thus lead to a better compliance with human rights standards.\(^7\)

II. Human Rights as Basis for Information, and Participation in Decision Making

Having understood and complied with human rights standards, business executives and corporate leaders should then ensure their human rights policies and approaches are made public through formal publications such as annual reports. This will allow public access to a company's records. The more people


\(^7\) Deva, S. (n 1)(p.111).
know about companies’ approaches, the more avenues and opportunities for the
companies to improve their business images and track record in particular in
respect to human rights issues. This transparency policy has clearly been
emphasised by the GC principles which consist of four main values, namely;
leadership, networking, learning and education as well as transparency and
accountability.\(^8\) Also, the companies should also consider and take into account all
the criticisms and feedbacks by the public to ensure that their operations are held
to high standards of due diligence and accountability. This approach in fact might
be a promising way of increasing managerial circumspection and activating social
pressure.\(^9\)

As has been discussed elsewhere in this thesis, there has been a direct link
between the corporate decisions made in secrecy and MNEs’ involvement in
human rights abuses. Indeed, most of corporate decisions – even those which
affect stakeholders – that are taken without any participation of affected societal
constituents will usually end up with human rights violations – all in the name of
business operations and ‘developmental’ agenda. As such, the MNEs and business
entities - especially whose business activities affect the public, should consider
making known of their business activities to the respective people. The community
leaders and representatives should also be consulted by the companies in order to
ensure the planned business operations will not impair their human rights.

\(^{8}\) See generally Section 4.4.4 above.
ACT700011998en.pdf> {pp.44-45}. 

203
The civil society and human rights institutions shall recommend and to the government and relevant agencies to ensure that no licence and permission be granted to companies to begin their business operations without prior consultation or agreement with the community involved. They can also put a pressure on government, in order for a licence to be granted, the application process should incorporate a provision regarding the rights of stakeholders to obtain information – easily, speedily and at a minimum cost – not only about the human rights policies of a corporation generally but also about a specific project which raises human rights concerns.

It is reasonable to hope that the involvement of stakeholders and civil society organs in corporate decisions that directly or indirectly affect them would have ensured that MNEs do not blatantly ignore human rights concerns while making business decisions. On the other hand, awareness-raising, education and public campaigning may also have a considerable impact on influencing MNEs to improve their social responsibility and public accountability. It is aimed by such campaigns to build a critical mass of informed public opinion, calling for corporations to be accountable for their activities. This has been done by some NGOs by publishing awareness-raising and campaigning materials, including regular newsletters to equip members of the public to call companies to account.

Indeed, by making human rights as a basis for information and participation in companies’ decision making, any potential human rights violations can be avoided. This approach relies on the basis of transparency values being emphasised by the

---

human rights principles of the GC and the Ruggie’s Framework. By being aware of the corporations’ human rights performance, the society and community at large will have some basis in making judgments and considering on the acceptance of the corporations’ products or services. Overall, only the socially responsible MNEs will get support from society whereas the violators of human rights will suffer from boycotts and resistance of communities and consumers.

III. Human Rights as Bargaining Plank during Negotiations

In addition, human rights obligations could work as a bargaining plank or requirement during negotiations between MNEs on the one hand and their stakeholders on the other. For example, local communities could negotiate with corporations the operating conditions of particular business activities which require specific human rights approaches. This is the case, especially, where the local people affected by companies operations are disadvantaged sections of society such as aborigines or people with disabilities. In this regard, Ruggie has recommended in his 2011 Report that the MNEs and business entities should consult and engage with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

On the other hand, supply chains and workers – whether acting individually or through organisations or labour unions – could also make human rights norms as guidelines to negotiate their working conditions in areas such as wages, work

---

12 UN Global Compact. (n 6 above) (para 27).
safety, health and social security.\textsuperscript{14} By requiring MNEs and corporations to take heed of these human rights issues – the stakeholders may put a pressure on companies and thus providing impetus to non-judicial social enforcement of human rights obligations in several other ways discussed in this sub-chapter. However, this method will only effectively work in those countries where labour unions are strong and workers rights are protected.

IV. Human Rights as Moulding Choices/Preferences of Consumers and Investors

Other non-judicial social mechanism by which human rights observance by MNEs and companies could be secured is through the involvement of consumers and investors. In this sense, approaches that might be useful are social labels and public disclosure. Social labels are words or symbols on products which seek to influence the purchasing decisions of consumers by providing an assurance about the ethical and social impact of a business process on other stakeholders. Despite implying the use of possible extra costs, the social labels may also have marketing advantages.\textsuperscript{15} In this regard, human rights could form a basis and yardstick to guide the choices and preferences of consumers as well as investors.

The fact that consumers/investors’ choices could work as rewards in a market setting, the behaviour of consumers and investors could have brought a long lasting positive effect on the corporate observance of human rights standards.\textsuperscript{16} The logic is simple: positive or negative response of consumers and investors directly affect the bottom line of corporations. This is based on the fact that most

\textsuperscript{14} Deva, S. (n 1)(pp.111-112).
\textsuperscript{16} Deva, S. (n 1)(p.113).
consumers prefer to buy product from more ethical companies with good human rights practises. Also, consumer associations could play their role to put a pressure on companies whose products or business operations are not complying with human rights standards. This approach will work as a social enforcement which will help companies enhancing their human rights practices.

In addition, in the light of public interest towards which the MNEs owe responsibility, public disclosure is needed even more than what is normally required by the financiers of the corporation. A broader disclosure through social reporting and auditing is also likely to make the market mechanisms that steer companies towards responsible conduct more effective. For example, an important requisite for consumer action is access to information about the company activities and their impact. Indeed, public disclosure and strategic engagement with investors and consumers are consistent with the GC's transparency principle. Also, in this regard, Ruggie encourages the companies to have in place and make public appropriate policies and procedures. This includes making a policy commitment to meet the responsibility to respect human rights.17

V. Human Rights as 'Naming and Shaming' Device

Finally, in the current era of extensive use of information and communication technology (ICT) and social media, stakeholders and civil societies may utilise such channels to voice up their human rights concerns affected by business activities. It is acknowledged that the MNEs and corporations generally take their companies’ reputations and brand image very seriously. They invest lots of resources, time

---

17 UN Global Compact. (n 6 above) (para 27).
and energy in building up their goodwill as it brings several positive financial and non-financial benefits. As such, it is common to assume that corporations will do everything, reasonable and within their means, to safeguard and preserve their reputation. In this sense, Fisse and Braithwaite have demonstrated through their case studies,\textsuperscript{18} why and how adverse publicity – both at formal and informal levels could help in controlling harmful business conduct. They argue that ‘publicity is a technique of social control which may have special merit where corporations are the targets.’ Hence, ‘naming and shaming’ based on human rights issues could be part of enforcement strategy in order to ensure human rights observance by corporations and business entities.

5.2.3 Advantages of relying on Non-judicial social enforcement mechanism

Indeed, the means of non-judicial social enforcement discussed above are among the important mechanisms through which the issues of corporate-related human rights violations could be addressed. These social enforcement mechanisms serve as an alternative to the judicial enforcement of human rights against MNEs and consequently contribute to the evolution of a robust mechanism of corporate accountability. In general, the social enforcement could have a number of advantages over the judicial enforcement. Among others, they include, first; as no judicial procedures through traditional court setting are used, the misuse of \textit{forum non conveniens} doctrine will no longer be an issue. This is because, no forum will ever become inappropriate or inconvenience, especially when information technology has enabled global networking among organs of civil society.\textsuperscript{19}

\textsuperscript{18} Fisse, B. and Braithwaite, J. (1983) \textit{The Impact of Publicity on Corporate Offenders}. Albany: State University of New York Press.

Second, as compared to the rigid ‘judicial perception’, the dynamic and flexible nature of ‘social perception’ represents the realities and correct understanding of societal concerns over business operations. Such social perception - which is not confined to the bureaucratic procedures of judicial enforcement such as the use of rules, principles and doctrines - may be closer to the business reality of a corporate group. In fact, social perception will trigger business entities to flexibly respond and address the concerns in a more appropriate manner. The companies’ responses that match societal concerns will then engender public trust through the reputation effect which is beneficial for the MNE’s business endurance.

Third, social enforcement will promote a responsible behaviour on the part of all concerned. It in fact, may be able to prevent and pre-empt human rights violations in certain situations. Fourth, as compared to court proceeding which usually costly (in terms of court fees, counsel fees, and other enforcement related expenditures) and time consuming, social enforcement will reduce such burdens and thus be a better choice especially to the poor and less fortunate victims. Not only the financial burden is lightened, social enforcement will also result in swift settlement due to its less bureaucracy nature.

5.3 PART A - THE GC APPLICATION: INSTITUTIONAL ASPECT

For the purpose of understanding the practical aspects of the application of the Global Compact soft law mechanism from the institutional aspect, this section will sequentially examine the role and practices of three human rights and business institutions in Malaysia, namely; SUHAKAM, Bursa Malaysia and the CSR Malaysia.

---

5.3.1 Initiatives by the Human Rights Commission of Malaysia (SUHAKAM)

SUHAKAM is the Malaysian NHRI established under the Human Rights Commission of Malaysia Act 1999 (Act 597). Its history can be traced back to the first international workshop on National Institutions for the Promotion and Protection of Human Rights held in 1991 in Paris where Paris Principles were outlined and defined. The Principles were later adopted and reaffirmed by the United Nations Human Rights Commission by Resolution 1992/54 of 1992, and by the UN General Assembly in its Resolution 48/134 of 1993. The Paris Principles are now broadly accepted as the test of institution’s legitimacy and credibility. Today there are well over 100 NHRI operating around the world and it is worthwhile to note that SUHAKAM has managed to maintain its ‘A’ status based on its full compliance with the Paris Principles.

As the key human rights institution in the country and being mandated by the Act of Parliament, SUHAKAM plays crucial roles - within the constraints of its mandated power and functions – to ensure promotion and protection of human rights in Malaysia. Among others, SUHAKAM is mandated to advise and assist the Government on human rights issues, to undertake national and public inquiries upon receiving complaints from the public on any infringement of human rights and to undertake research by conducting programmes, workshops and seminars to

---

21 Section 3 of the Act provides the details about the establishment of the Commission.


disseminate and distribute the outcome of such research with the ultimate aim to promote awareness of human rights among Malaysians. As far as the issues of human rights and business are concerned, SUHAKAM has established Economic, Social and Cultural Rights Working Group (ECOSOC) whose aim is to highlight the plight of vulnerable groups vis-à-vis their economic and social rights.

Indeed, in the prosperous economy and a fair and just society of Malaysia, business especially the MNEs have enormous potential to create opportunities and improve life chances for nearly 28 millions of Malaysians. To achieve such goals, according to Commissioner James Nayagam, it is crucial that business respects their obligation to uphold human rights. It is worthwhile to note that, as far as SUHAKAM is concerned, almost every area of its work is related to the intersection between business and human rights. The issues of migrant workers, land acquisition, people with disabilities, gender discrimination and child labour are all related to the decisions and practices of business. In recent years, a number of business-related human rights issues have been referred to SUHAKAM, often in the form of formal complaints. Among notable examples of major issue facing communities are land acquisitions to develop dams, log timber or grow oil palm especially in Sabah and Sarawak as well the treatment of migrant workers in Malaysia.

To ensure better human rights compliance in business sphere, SUHAKAM can help the private sectors understand and implement human rights standards in their

---

workplace, business practices and supply chains. Despite not having mandates for enforcement and prosecution, SUHAKAM can play, and in fact has played key roles in enhancing human rights compliance by business entities in Malaysia through a number of mechanisms. Among others, they include round table discussions, policy-making, issuance of press statements, conducting training and conferences, national inquiries, networking with other regional NHRIs, acting as intermediary body between government agencies and business / civil societies, receiving memorandums and making investigation, undertaking research on specific issues and duly disseminating reports and outcomes and finally; preparing policy guidelines / blue prints for relevant entities on human rights issues based on research findings.

5.3.1.1 **Roundtable discussions towards National policy**

Realizing the absence of specific guidelines on human rights compliance by business entities as an obvious missing piece in the country’s human rights-business puzzle, SUHAKAM has started preliminary efforts towards establishing national policy as guidelines to business entities and MNEs relating to their human rights responsibilities. Since 2010, a series of roundtable discussions (RTDs) were convened with involvements from business, governments and civil society representatives. To be precise, the first two RTDs were held in 2010, on 2\textsuperscript{nd} September and 1\textsuperscript{st} November,\textsuperscript{27} respectively, whereas the third RTD was held on 16\textsuperscript{th} March 2011. The discussions serve as foundations through which a roadmap could be drafted to bolster respect for human rights in the private sector. The result of the discussions was a two-part draft national policy on human rights and

business. The first part sets out broad principles and objectives whereas the second part addresses specific areas of concern.\textsuperscript{28}

In preparing for such a policy, SUHAKAM has made particular consideration to the work of John Ruggie – the Special Representative of the UN Secretary General on the issues of human rights and transnational corporations and other business enterprises.\textsuperscript{29} This includes his series of reports, Guiding Principles on Business and Human Rights\textsuperscript{30} as well as his ‘Protect, Respect and Remedy’ Framework. Indeed, as discussed before, there have been many connections between the UN Guiding Principles and the UN Global Compact in the sense that both firmly advocate the enhancement of business responsibilities to respect human rights. The Guiding Principles do not only provide operational clarity to the GC’s two human rights principles, but also strengthen the GC and by providing an authoritative framework for participants in implementing this commitment.

These Guiding Principles also provide guidance on putting in place robust policies and procedures and communicating annually with stakeholders about progress.\textsuperscript{31} In this sense, by adopting Ruggie’s Guiding Principles, SUHAKAM therefore indirectly made reference to the GC human rights principles. Ruggie, through his work,\textsuperscript{32} has indeed indicated the vital role played by the NHRI s in advancing human rights in practice. In particular, he recommends that, in order to advance

\textsuperscript{28} See also Anon. (undated). James Nayagam, Human Rights Commission of Malaysia (n 26 above).
their human rights practises, the business entities should draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.33

Indeed, the three series of RTDs being convened by SUHAKAM have been very fruitful with many positive feedbacks and concerns being raised by the participants. Among the issues being raised - which are very important for the preparation of policy, include; lack of awareness among business on their human rights and social responsibilities, human rights through CSR, code of best practice and workers rights.34 As for now, the policy has yet to be finalised and SUHAKAM will make use of all the feedbacks gained in the three RTDs in order to come out with a national policy on business and human rights. Once completed, the policy will be recommended to the Government for enforcement and to be observed by private business entities operating in Malaysia.35

5.3.1.2 Technical Committee on Social Responsibility (TCSR)36

SUHAKAM has also had an opportunity to pursue the promotion of human rights in business sector through it membership in TCSR. TCSR, chaired by SIRIM Bhd.,37 is a

---


34 Human Rights Commission of Malaysia (SUHAKAM). (2012). (n 27 above) (pp.81-83).


37 SIRIM is a wholly-owned company of the Malaysian Government under the Ministry of Finance Incorporated. It has been the government’s mandated machinery for research and technology development, and the national champion of quality in particular in the development of the country’s private sector. For details, see <http://www.sirim.my/home>
combination of various agencies and organizations whose portfolios and roles are closely related to business and human rights issues. Among others, they include; the Ministry of Domestic Trade, Cooperatives and Consumerism, Ministry of Human Resources, the Malaysian Trades Union Congress (MTUC), Attorney-General’s Chambers, SME Corporation Malaysia, Standards Users, National Council for Women’s Organisations, Transparency International and the MARA University of Technology. The TCSR has resolved to draft a standard on social responsibility that is suitable for the current context in Malaysia. This standard is being drafted based on, and toward, full compliance with the ISO 26000 on Social Responsibility.

On its capacity as an NHRI, SUHAKAM has been assigned to the Task Group on Human Rights headed by the Attorney-General’s Chambers. This sub-group is entrusted with assessing the human rights clause of the ISO 26000 to be adapted and included in the draft standard. This opportunity has been used by SUHAKAM to promote better human rights compliance especially by business entities. At a meeting of the TCSR on 4 October, SUHAKAM was able to ensure that most of the provisions in the human rights clause of the ISO 26000 were included in the draft standard. It will monitor the finalised standard for inclusion of a human rights chapter that sufficiently spells out the role of businesses in promoting and protecting human rights.

5.3.1.3 Meetings and dialogues

In the issues of human rights violations in the Murum Hydroelectric Dam Project, in the State of Sarawak, SUHAKAM has played its role as intermediary body to convene a series of dialogues and meetings between the relevant agencies /
companies and affected parties. On 29th March 2011, SUHAKAM was invited by the State Government of Sarawak to observe negotiations between State Planning Unit (SPU), the District Office, the Land and Survey Department, Sarawak Electricity Bhd. (SEB) – all of which are directly involved in the project, and the affected communities. The dialogues mainly discussed the resettlement plan of the affected communities where many concerns and complaints have been raised. Such complaints included insufficient access to utility supplies, basic amenities, job and land for cultivation as well as inadequate compensation.38

Indeed, there have been positive improvements on the part of relevant agencies / companies in term of respecting human rights of the affected communities following the dialogues. For example, the State Government agreed to provide sufficient facilities such as service centre, community hall, playground, new cemetery and pre-school facility - to meet the needs of the communities. The SEB will construct a chapel for the communities to perform their religious ceremony.39

SUHAKAM has played its roles through participation in the dialogues by communicating its views and recommendations. For example, SUHAKAM emphasised the need to ensure the resettlement plan complies with the principle of free, prior and informed consent as provided in Article 10 of the United Nations Declaration on the Rights of Indigenous People (UNDRIP).40 SUHAKAM has recommended that the requirement for free, prior and informed consent be incorporated through policy changes covering the whole process of a project.

In addition, SUHAKAM has also made recommendations on some other issues, such as adequate housing, development assistance and undocumented people within the communities. With regards to adequate housing, SUHAKAM has recommended that new houses are built in accordance with the agreed specified terms including the use of standard building materials, legal security of tenure, affordability, accessibility etc. SUHAKAM also emphasised that assistance to the affected communities should not end with their relocation. Rather, support should be maintained to facilitate the communities’ ability to cope with their new environment. Similarly, issue of undocumented people – mainly aborigine Penan, needs to be resolved swiftly as it restricts the Penans from accessing basic needs, such as education, healthcare services, employment and government-run poverty eradication programmes.41

5.3.1.4 Regional partnerships

Since its establishment, SUHAKAM has been very active in working with its regional and international counterparts in order to enhance human rights awareness and compliance by the people and government in Malaysia. SUHAKAM participated in the Asia Pacific Forum (APF) conference on ‘Business and Human Rights’ from 11-13 October 2011, jointly hosted by the South Korean Commission and the APF in Seoul, to follow up on the Edinburgh Declaration42 adopted in October 2010. Commissioner James Nayagam highlighted the Commission’s initiatives in organising roundtable discussions on ‘Business and Human Rights’ with key stakeholders in Malaysia, as well as the Commission’s plan to formulate a

41 Human Rights Commission of Malaysia (SUHAKAM). (2012). (n 27 above) (pp.80-81).
policy on business and human rights to be observed by the private sector, and which will be submitted to the Government for its consideration.

The Conference concluded with the adoption of the Conference Outcomes by APF member-institutions. Among other aspects, these require member-institutions to:

i. Review and revise their Strategic Plan to ensure that action is identified and prioritised to address human rights violations by the business sector;

ii. Review their institutional capacity and identify training needs so that they can take effective action in relation to business and human rights;

iii. Create a focal point for business and human rights within their respective institutions, if they have not already done so; and

iv. Develop relationships with key stakeholder groups, including the government, business sector and civil society, for on-going dialogue on business and human rights.\(^\text{43}\)

According to Commissioner James Nayagam, NHRIs need to act together on areas of common interest or shared concern. “With transnational corporate activities increasing, national institutions have to work together and network. For instance, they can inform the institution in the home country if a particular company is not meeting its human rights obligations,” he says. He also stressed that the Conference left him and SUHAKAM with an uphill task i.e. to be more optimistic about what can be done to bring about positive changes. He further contended his passion about business-human rights area of work which, according to him, is very relevant, effective and can address many important human rights issues at their

---

source, as well as contribute to progress on broader issues such as climate change and a healthy environment.\textsuperscript{44}

5.3.1.5 Other Initiatives

Other initiatives within its statutory mandate which could or have been done to enhance human rights understanding and compliance by companies are through press statements,\textsuperscript{45} trainings, recommendations to governments (especially on law reforms and treaty obligations) etc. SUHAKAM has now been able to make its voice heard. An obvious example of improvement in this, Government has admitted the need to consult SUHAKAM on any human rights issues in the country including in the enactment any new laws on human rights.\textsuperscript{46}

5.3.2 The CSR Framework of Bursa Malaysia

Bursa Malaysia is an exchange holding company established in 1973 and listed in 2005. It was approved under Section 15 of the Capital Markets and Services Act 2007. Today, it is one of the largest bourses in Asia, hosting just under 1,000 diversified companies. It operates a fully-integrated exchange, offering the complete range of exchange-related services including trading, clearing, settlement and depository services. In assisting the development of the Malaysian capital market, Bursa Malaysia is committed to provide the infrastructure needed to create a globally competitive and vibrant marketplace.\textsuperscript{47} This noble effort also includes the needs to ensure the public listed companies (PLCs) are operating in

\textsuperscript{44} Anon. (undated). James Nayagam, Human Rights Commission of Malaysia (n 26 above).
\textsuperscript{46} Nayagam, J. (January 2012). (n 26 above).
due diligence and in a sustainable manner. In this sense, ensuring the PLCs to embrace CSR is among its core aims.

Bursa Malaysia believes that being a socially and environmentally responsible company is not about how a company spends money, but it is about how the company makes money.\textsuperscript{48} CSR goes beyond doing good deeds or giving money to charities. It is about companies making money in a responsible manner. Realizing the escalating acceptance of CSR which has increasingly had a profound effect on the conduct of business locally and globally, Bursa has implemented a number of initiatives in order to encourage companies and business entities operating in Malaysia. For example, the Prime Minister, in his Budget 2007 speech announced the requirements for Public Listed Companies to report on their CSR initiatives.

The announcement by PM has paved the way to the launch of Bursa Malaysia’ CSR framework for Malaysian PLCs.\textsuperscript{49} It aims to guide PLCs in defining their CSR priorities, implementation and reporting. In principle, the Framework covers four focus areas – Environment, Workplace, Community and Marketplace, in no order of priority to highlight the various types of CSR issues and activities relevant to organisations. The framework can be used to support management as well as reporting of CSR. The aim is to go beyond compliance towards making CSR integral in business operations. Through its regulatory role, Bursa Malaysia has the ability


to influence the way all the other 1000-odd PLCs view, adopt and integrate CSR into their own business practices.

Appendix 9c, Part A (29) of Bursa’s Listing Requirements provides the companies’ annual report should contain; “A description of the corporate social responsibility activities or practices undertaken by the listed issuer and its subsidiaries or if there are none, a statement to that effect.”\textsuperscript{50} In addition, Bursa Malaysia has also launched its Business Sustainability Programme in November 2010, in order to have the Malaysian public-listed companies integrate sustainability into their business strategies. The program includes the publication of a sustainability guide for company directors and the introduction of a Sustainability Knowledge Portal on Bursa Malaysia’s website. In addition, they have announced that an Economic and Social Governance index should be ready by 2012.\textsuperscript{51}

Indeed, Bursa Malaysia is committed to using its influence in driving CSR forward within Malaysia. A notable step towards such aim is to determine the current status of CSR within Malaysia. In so doing, Bursa Malaysia has commissioned CSR Asia to design a CSR survey in line with international standards. The survey involved sample 200 companies covering the four dimensions defined in Bursa’s CSR Framework, namely: marketplace, workplace, environment and community. Companies were assessed according to the completeness of the disclosure provided in the survey rather than the relative performance on CSR in each


company. To measure the companies’ level of CSR practices, each company was
given a rating based on a point scoring system.\textsuperscript{52}

Following the survey, a report was published in April 2008 and reveals that
Malaysian PLCs generally lag behind international best practices in CSR disclosure
and approach. The survey found poor CSR engagement by Malaysian PLCs and on
average, the companies surveyed demonstrated a lack of knowledge and
awareness of CSR. In this sense, it was crystal clear that, lack of awareness among
Malaysian PLCs has been the key problem in CSR practices and therefore need to
be seriously addressed. The report said the two key areas that required more
attention were environment and diversity.\textsuperscript{53}

According to the bar chart above, the survey found that only 32.5\% of PLCs was
either in the above average, good, or leading categories for CSR practices. At the

\textsuperscript{52} Bursa Malaysia. (2008). CSR 2007 Status Report – Corporate Social Responsibility in Malaysian PLCs: An Executive
\textsuperscript{53} Ibid. pp.4-5.
other end of the spectrum, two-thirds of PLCs ranked either average (27.5%),
below average (28.5%) or poor (11.5%). Only 4.5% were in the leading category,
with 67% of them being multinational companies. 54

Responding to the survey's findings, the Bursa Malaysia's Chief executive officer
(CEO) Datuk Yusli Mohamed Yusoff said the stock exchange operator was “not
surprised” by the findings. “We are at the beginning of this journey. We introduced
our CSR framework in late 2006. We are still a developing nation and so would
expect that our practices would most probably lag behind the best international
practice. So, I think we need to take the results of the survey within that context,” he
said.55 Indeed, the findings of the survey have clearly provided a significant and
usable data on current level of CSR understanding and practices among Malaysian
PLCs. The survey will be a foundation on which further efforts could be undertaken
in improving CSR culture within business perspectives in Malaysia.

5.3.3 Initiative by the CSR Malaysia

Apart from the above two institutions, CSR Malaysia has also play their role –
though still at infancy stage, to promote human rights awareness among business
entities in Malaysia. CSR Malaysia was established on 16th November 2006, in the
wake of the Government’s announcement on requiring Public Listed Companies to
report on their CSR initiatives. CSR is a network of corporate and academic
institutions, committed to advancing responsible business strategy and practices.
Its strategies are founded on the needs to enhance the level of CSR awareness

54 Ibid., p. 4.
among corporate entities in Malaysia in particular in increasing the capacity and capability to combat environmental and social concerns. In other word, CSR Malaysia is working hard to promote responsible businesses to be part of solution towards sustainable development.

There are currently 28 companies as corporate members of CSR Malaysia who share the similar beliefs and aspirations. They include, among others; Nestle Malaysia, BP Malaysia, BAT Malaysia, Shell Malaysia, YTL Corp, HSBC, Standard Chartered Bank, Maxis Communication, Digi, TNB and Telekom Malaysia - to name a few. In the pursuit to boost the level of CSR awareness and understanding among business entities in the country, CSR Malaysia encourages Malaysian companies to embrace CSR principles and practices through the adoption of the UN Global Compact. The UN Global Compact has indeed achieved outstanding results through the power of collective action since it launch in year 2000. CSR Malaysia truly believes that by participating in a initiative such as this, businesses can be part of the solution to the challenges of globalisation, and not merely a bystander that acts upon the call of needs such as when faced with immediate crises.

5.4  PART B  -  THE CORPORATE PERSPECTIVE OF GC APPLICATION: THE CASE OF SIME DARBY BERHAD

With over 100 years of evolution, Sime Darby Berhad has now become one of the Malaysia's leading multinational conglomerates, spearheading various key industries, namely plantations, property, motors, industrial equipment, energy & utilities and healthcare. As of 15th July 2012, the company's market capitalisation

---

stood at RM 59.73 billion (USD 18.79 billion) and it is also currently listed on the Main Board of Bursa Malaysia, the Malaysian Stock Exchange. With a total workforce of over 130,000 employees in over 20 countries, Sime Darby Berhad is committed to materializing its familiar tagline - ‘developing sustainable futures’, especially for all its stakeholders.\(^{57}\)

5.4.1 The Company’s Relevance with Research Problem

Sime Darby was chosen as a case study in this research for two main reasons. Firstly, it is an established and leading Malaysia-based multinational with sizeable workforce across more than 20 countries in the world. A study on such company will reflect the nature of MNE’s business operation from a Malaysian perspective. Secondly, Sime Darby is committed to exposing itself as a socially-responsible company. It has been a member of the UN Global Compact since January 2011 and has done its best in embracing the GC’s ten principles. The company has also expressed its support to the UN’s ‘Protect, Respect and Remedy’ Framework as well the Guiding Principles for its implementation. Despite only becoming GC’s member in 2011, the company has actually been ahead in term of human rights and CSR performance.

In 2009, for instance, Bursa Malaysia approved the company as one of the top 5 outstanding CSR performance.\(^{58}\) Sime Darby has indeed proven itself as a corporate citizen with ‘humane’ image. Its respect for fundamental human rights is enshrined within its Group Policies and Authorities which govern all its operations.


and its Code of Business Conduct which outlines the standard of behaviour expected of its Directors, employees, counterparts and business partners such as the Roundtable on Sustainable palm Oil (RISPO) by its plantation division.

5.4.2 Area of Operation

Sime Darby Berhad is a key player in Malaysian economy. Its core business operations involved in key growth sectors, namely, plantations, property, motors, industrial equipment, energy and utilities and healthcare.

Plantation

The company’s plantation division- Sime Darby Plantation is one of the world’s largest palm oil producers, contributing 13% of Malaysia’s palm oil production\(^59\) and producing with about 2.4 million tonnes or 6% of the world’s crude palm oil (CPO) output annually.\(^60\) Being the key business sector in the Group, Sime Darby Plantation contribute majority of the Group’s profit. In 2009, for example, it was recorded that the company contributed some 70% of the Group's total profit. As of 31\(^{st}\) January 2012, Sime Darby Plantation has a total planted area of more than


682, 616 hectares in Malaysia and Indonesia – of which 519, 620 hectares are planted with oil palms whereas in Liberia, Sime Darby Plantation has 220, 000 hectares concession area – of which 1, 190 hectares planted with oil palms. As one of the founding members of the RISPO, Sime Darby is committed to having all its strategic Operating Units (SOUs) certified by end 2011. To date, almost a third of its production – totalling more than 800, 000MT, is Certified Sustainable Palm Oil (CSPO), making it the largest producer of sustainable edible oil in the world.61

Property
The Sime Darby Property Division is a leader in building sustainable communities with a global presence. It is an integrated property player involved in property development, asset management, hospitality and leisure. According to its website,62 currently, the Property Division has a significant presence in the Asia-Pacific region with projects in Malaysia, Singapore, Australia, Vietnam and China. The Property Division is created through the integration of the property arms of the former Golden Hope Plantations Berhad, Kumpulan Guthrie Berhad and Sime Darby Berhad. Together, the Property Division is currently involved in the development of some of the well-known townships/projects in the country.

Industrial
Sime Darby Industrial Division is world’s fifth largest Caterpillar dealer, with Caterpillar dealerships across more than 100 branches in 10 countries throughout the Asia Pacific region. As a business entity, Sime Darby Industrial is capable of offering a comprehensive variety of equipment and services, from sales of new

62 Ibid.
machines, engines or used equipment to rental and providing the full range of product support and financing services. Sime Darby Industrial, with a good presence and track record in the Asia-Pacific region, is a strong contributor to the Group’s bottom line, contributing more than 25% of the Group’s revenue of RM32.8 billion in 2010. For the Malaysian market, Sime Darby Industrial Sdn Bhd offers a comprehensive list of heavy equipment and services, ranging from the sales of new machines, engines or used equipment to rental through its chain of Cat Rental Stores nationwide. It is also involved in equipment manufacture under license and after sales support. Equipment leasing is provided through Cat Finance.

**Motors**

Sime Darby Motors is one of the major automotive industry and luxury marques players in Malaysia, Singapore, China, Australia and New Zealand, with business activities that vary from country to country, and includes importation, assembly, distribution and retail of vehicles. The Division represents various brands and luxury marques ranging from BMW, Mini, Rolls-Royce, Porsche, Jaguar and Lamborghini, to Hyundai, Land Rover, Alfa Romeo, Ford, Peugeot, Mitsubishi, Ssang Yong and Chevrolet.

**Healthcare**

Sime Darby Healthcare is at the forefront of the private healthcare industry, and aims to become the gold standard healthcare provider in the Asia Pacific region.

The Division comprises 5 private entities, namely:

---

64 Sime Darby Berhad. (2011) (n 57 above).
• Sime Darby Medical Centre Subang Jaya (SDMC SJ) - flagship tertiary care 393-bed hospital.
• Sime Darby Specialist Centre Megah (SDSC Megah) - outpatient and daycare.
• Sime Darby Nursing & Health Sciences College.
• Sime Darby Medical Centre Ara Damansara (SDMC AD) - Centres of Excellence for Brain, Heart and Spine & Joint.
• Sime Darby Medical Centre ParkCity (SDMC ParkCity) - opening in 2013.

Energy & Utilities

Sime Darby has core businesses in Engineering Services, Ports & Logistics, Power and Water Management. It is supported by a team of over 1,000 people throughout our operations in Malaysia, Singapore, Thailand and China.

5.4.3 Multinational Dimension

As indicated earlier, Sime Darby has now had its brand presence in more than 20 countries with supports from over 100,000 employees. In general, Sime Darby Plantation has the most multinational operations where it runs both upstream and downstream operations in 16 countries, namely: Malaysia, Indonesia, Liberia, the United States of America, Canada, the Netherlands, Germany, United Kingdom, South Africa, Thailand, South Korea, Japan, China, Hong Kong, Vietnam and Singapore. Some of other Sime Darby divisions might also have business presence in these countries. Apart from the aforementioned countries, other Sime Darby Divisions also have business presence in any of the following countries, namely; Australia, New Caledonia, Solomon Islands, Papua New Guinea, Nauru, Bangladesh, and Maldives. Indeed, with such this huge business operations, Sime Darby
similarly has significant impacts on its stakeholders as well as the people around their vast business sphere of influence.65

5.4.4 Nature of CSR / human rights initiatives

Indeed, beginning the mid-1990s, there has been a steady rise in the expectation of companies to meet their corporate responsibility to respect human rights and so be part of creating socially sustainable business plans, value chains, markets and economies. The centrality of human rights and labour rights in the UN Global Compact principles is demonstrative of this trend. In June 2011, the United Nations Human Rights Council endorsed new Guiding Principles for Business and Human Rights, including elaborating the corporate responsibility to respect human rights. Business leaders around the world now recognize that respect for human rights is becoming an essential element of good risk management, enabling companies to navigate non-technical, non-financial risk in line with international norms; to secure the social license to operate; to enter new markets; and to avoid unnecessary litigation costs and legal liability.66

Indeed, as a key player in major growth sectors, whose presence entrenched in more than 20 countries, Sime Darby Berhad is aware of the impacts it may have on the rights of the people within its sphere of influence. To show its commitment in taking human rights issues to a higher level, Sime Darby Berhad has participated in UN Global Compact in 2011, expressing its full support to the ten principles of the

GC with respects to human rights, labour, environment and anti-corruption.\textsuperscript{67} The company has also pledged to support the UN’s ‘Protect, Respect and Remedy’ Framework developed by the UN SRSG, Professor John Ruggie. It believes that such Framework will help businesses better understand and manage their roles and responsibilities in human rights. In general, Sime Darby’s support and respect to fundamental human rights principles is exemplified through the following initiatives;

**Grievance Procedures**

Sime Darby has commitment to ensure that any grievance arising between an employee and the Company, or a third party and the Company, is settled as equitably and as quickly as possible, at the lowest level and/or point of origin. The company has a policy in place that informs employees how and where to channel their grievances accordingly and in turn, assist their immediate superior, Head of Department, Human Resources/Industrial Relations representative, on how to handle a grievance brought to their attention by employees.\textsuperscript{68} This initiative thus reflects the company’s seriousness to use non-judicial enforcement and compliance for any cases of human rights abuses within its business sphere. Providing accessible remedy to victims of human rights-related grievances constitutes part of the key components in the UN Guiding Principles on Business on Human Rights which among others are grounded on the recognition of “the

\textsuperscript{67} Salleh, M. B. (2010, November 25\textsuperscript{th}). Letter of Commitment from Sime Darby Group President and Chief Executive – Dato’ Mohd Bakke Salleh to the UN Secretary-General, Ban Ki-moon. Retrieved on 27\textsuperscript{th} March 2012, from: <http://www.unglobalcompact.org/system/commitment_letters/13164/original/UNGC_application.pdf?1296187392>

need for rights and obligations to be matched to appropriate and effective remedies when breached.”

Roundtable on Sustainable Palm Oil (RSPO)

Sime Darby is one of the founding members of the RSPO. 50 out of our 62 strategic operating units (SOU) in its Plantation division are currently RSPO certified with the remaining 12 SOUs having undergone the external RSPO certification and are currently within the certification process. The company’s Plantation operations have fully committed to the RSPO’s Principles and Criteria (P&C) which include environmental responsibility and conservation of natural resources and biodiversity, and responsible consideration of employees and of individuals and communities affected by growers and mills. In accordance with our commitment to the RSPO’s P&C, we ensure that grievance channels are made available, and Social and Environment Impact Assessments and community engagements, with a view to attaining Free, Prior and Informed Consent, are carried out prior to new developments.

Child Protection Policy

Sime Darby does not employ children. However, children may be found living on its plantation estates together with their parents who are employees of the company. Sime Darby’s Child Protection Policy (CPP) Programme was developed to raise awareness on issues pertaining to child safety, well-being and protection within Sime Darby's business context. Through dialogues and interactive

---


70 Sime Darby Berhad. (January 2012). (n 68 above) p. 3.
workshops, employees are empowered and encouraged to be effective child protectors, influencing business operations and extending beyond the work environment. The Programme also looks into protocols and procedures for dealing with reported and/or suspected cases and support for children who have survived reported cases of abuse.

After the launch of the corporate policy in 2010, the Programme is now being rolled out in stages across the Sime Darby Group, starting with the Plantation Division. Various engagements have been carried out such as working visits to the crèches in the estates, discussions with subject matter experts from Government Ministries to local Non Governmental Organisations, CPP awareness workshops and discussions with management and various levels of employees, as well as school holiday camps focusing on safety issues for children living within the company’s plantation operations. Since its inception, more than 20 engagements have been completed involving participants and stakeholders from various backgrounds.71

Global Business Initiative on Human Rights (GBI)

To enhance the effectiveness of its human rights practices, Sime Darby participated in the GBI. GBI is a unique business-led initiative focused on advancing human rights in a business context around the world – with a particular focus on emerging and developing markets. Through core group work streams and business outreach activities GBI seeks to build a truly global community of business leaders sharing good practices, identifying barriers to corporate respect for human rights in

71 Ibid. p. 3.
diverse contexts and inputting into international policy developments. GBI works in collaboration with the UN Global Compact Office and is supported by the Swiss Government.

Currently, GBI has 14 corporate members (including Sime Darby) from 11 industry sectors and representation from Latin America, Asia, Europe, North America, and the Middle East. Among others, they include; ABB, Chevron, General Electric Company, HP, Novo Nordisk, Shell, Total, Coca Cola and Unilever. Participating in GBI may enhance Sime Darby's human rights understanding practices for a number of reasons. Among others, the GBI as a vehicle for the human rights journey; as a community of peers and experts to tackle major challenges and dilemmas; GBI work streams can be used to check company practice against UN Guiding Principles and inform stakeholder expectations; GBI Roundtables are unique opportunities to engage with issues and individuals in the value chain; GBI members are exposed to, and inform, policy leaders and developments and lastly GBI as a reputation enhancer.

Considering that GBI is the only business-led initiative in the world focusing solely on human rights, being its member has clear reputational benefits. In addition, apart from its cross-regional participants, GBI works with national and regional organizations (business associations, human rights groups, national human rights institutions, Global Compact Local Networks etc,) in collaboration with the UN Global Compact Office and is supported by the Swiss Government. A team of advisors including individuals from the Institute for Human Rights and Business,

---

72 Global Business Initiative. (n 66 above).
the Danish Institute for Human Rights, and members of Professor John Ruggie’s team support the GBI Secretariat.

Workshop and Dialogues

Another example of its initiative to enhance its respect to human rights principles in its business activities is through workshops and dialogues where the company acted as the co-host. The workshop, held in early 2011 in Kuala Lumpur, was meant to discuss and explain the UN’s ‘Protect, Respect and Remedy’ Framework for the Senior Managers from some of Malaysia’s major Government-linked companies (GLCs). The participants were both positive and encouraged that the Framework offered practicable steps through the sensitivities and complexities that often shroud human rights issues. In November of the same year, Sime Darby, has taken its dialogue initiative to the Association of South East Asia Nations (ASEAN) level. It hosted the GBI’s roundtable event in Kuala Lumpur for ASEAN business leaders on “Implementing Corporate Respect for Human Rights.”

The Roundtable took place months after the United Nations endorsed Guiding Principles on Business and Human Rights developed by the Professor John Ruggie. Among others, the Roundtable’s objectives were to clarify the link between human rights and business; to discuss the business case for using human rights as a way to understand and implement corporate responsibilities; to exchange good practices, dilemmas and challenges for corporations (in ASEAN and around the world) in implementing the corporate responsibility to respect human rights in their

---

operations; to identify the possible contribution of the ASEAN business community to the human rights and business agenda, and vice-versa; and to brainstorm a road-map for exploring human rights and business in ASEAN. The organisation of the Roundtable indicates the participants increasing recognition to the fact that international human rights standards offer a highly practical and socially legitimate framework for corporate responsibility.

Business leaders in the Roundtable also acknowledged that the approach in the Framework can enable them to align themselves with international policy norms, multinational and national regulatory frameworks, the aspirations of employees and workers, and the creation of a socially sustainable business environment, governments and civil society. In the ASEAN region, among the relevant developments following to this Roundtable initiative include the ASEAN socio-economic blue-print which calls for ASEAN member states to develop policies on corporate social responsibility, the creation of an ASEAN CSR network to help support ASEAN business leaders in this space and the work of the ASEAN Intergovernmental Commission on Human Rights, which this year is conducting a study on corporate social responsibility and human rights.

The Gender Policy and Pilot Programme

Sime Darby is an equal opportunities employer. However, there are large differences between the ratio of men and women employed in some of its divisions. These differences are mainly driven by industry trends such as

---


75 Ibid.
predominantly male employees in our Plantation Division and female employees in our Healthcare Division. Sime Darby currently employs more than 8,000 women workers in its Plantation estates and mills across Malaysia. Following the need to address fair and equal gender policies in the work place, Sime Darby implemented the Gender Policy Programme in Sime Darby Plantations in 2008. The programme aims to improve and uphold women’s rights, working conditions, housing and amenities, wages, safety and security, gender-based discrimination, sexual harassment, domestic violence, reproductive health and child care.

In 2010, the company commenced the pilot phase of the programme in a collaborative effort between Sime Darby Plantation Division and Tenaganita, a non-governmental organisation dedicated to protecting the rights of women and migrants. This involved a series of workshops and engagement sessions with female employees across all plantations in Malaysia. Social impacts assessments were also conducted to assess the progress of Gender Committees set up and internal consultation were carried out to assist the programmes at site. To ensure optimum uptake and success, the workshops were conducted in three languages – English, Bahasa Malaysia and Tamil. 500 employees have since participated in 14 engagement sessions and a manual has been developed to guide our plantation managers and Strategic Operation Unit Gender Committees.

5.5 CONCLUSION

Business leaders around the world now realize that responsible and sustainable business is far beyond legal compliance and philanthropy. Business should expect to go the extra miles with their social, human rights and sustainability initiatives,
especially in the wake of increasing pressure from the public over business-related human rights abuses. Issues finding their way into boardrooms across the world and region include opposition to land use and acquisition by industry; competition over scarce natural resources, operating in conflict-affected areas, creating diverse and dynamic workforces, entering new markets around the world, access to capital from investors expecting higher social performance, achieving sustainable labour relations in complex supply chains, including respecting migrant worker rights, and more.

Responding to such critical issues, many major corporations now see the clear, long-term business case for respecting human rights including improved risk management, improved compliance, efficiency gains, reduced operational disruption, sustained license to operate, new business models, reduced reputational risk and access to capital and markets. The present chapter discussed how the soft law GC Principles, along with Ruggie’s Framework and its Guiding Principles have been translated into practises within institutional and business perspectives in Malaysia.

In this respect, this chapter discussed the novelty of SUHAKAM’s works – as the Malaysian NHRI, in order to bring human rights to a higher level and into the corporate’s business agenda. This includes its function to increase awareness among government agencies, business entities and the public at large on the need to respect human rights. Another key development in SUHAKAM work is its ongoing effort to draft a national policy on business and human rights which will
finally be recommended to the Government for enforcement and to be observed by private business entities operating in Malaysia.

The proposed policy takes into consideration the findings from SUHAKAM-supported roundtable discussions. Although non-binding in nature, the policy is indeed very important as key human rights guidelines to Malaysian MNEs and business entities. In the same vein, the Bursa Malaysia and CSR Malaysia have also played their role in ensuring better human rights compliance by business entities. Bursa’s CSR Framework for its public listed companies, for instance, has been introduced to support management as well as reporting of CSR.

The Framework covers four core areas, namely; Environment, Workplace, Community and Marketplace with specific highlights on various types of CSR issues and activities relevant to organisations. The framework aims to go beyond compliance towards making CSR integral in business operations. Through its regulatory role, Bursa Malaysia has the ability to influence the way all the other 1000-odd PLCs view, adopt and integrate CSR into their own business practices. On other hand, the important findings from its research has help Bursa in addressing many human rights issues particularly the lack of awareness about human rights relating to business activities in Malaysia.

From business perspectives, Sime Darby has indeed been ahead in its human rights practices. Although there are human rights issues involving its business operations, the company managed to provide solutions through its Grievance Procedures. Sime Darby, with its membership in human rights initiatives and
experience in sustainability issues, has also played key role in exchanging knowledge, information and experience with other Malaysia-based business entities. Indeed, Sime Darby's active role and involvement in championing human rights issues is exemplary. In this respect, it is appealing to note that its Group Chief Sustainability Officer, Mr. Puvan J. Selvanathan, has been appointed the first Chairperson of the newly-set up UN Working Group on Business and Human Rights. Such appointment reflects the UN’s acknowledgement to the diligence and outstanding works being done by the Company in enhancing human rights compliance by business entities both in Malaysia and ASEAN countries.76

In short, the present chapter has strengthened the idea that it is possible, viable and practicable to use the GC principles and soft law mechanism as a non-judicial or social enforcement and compliance strategy in order to address the issues of corporate human rights violations in Malaysia. The initiatives taken by the above institutions and business entities have been very promising in enhancing awareness among business entities about their human rights responsibilities. Such initiatives, driven by the adoption of GC principles and Ruggie's Framework will enable MNEs and business entities to tailor their operations in such a manner that meets international policy norms, multinational and national regulatory frameworks, the aspirations of employees and workers, and the creation of a socially sustainable business environment.

Chapter 6:
THE WAY FORWARD: TOWARDS NATIONAL HUMAN RIGHTS STANDARDS FOR BUSINESS & MNEs IN MALAYSIA

6.1 INTRODUCTION

The current scenario of the international business indicated the importance of corporate social and human rights responsibilities as one of the integral characteristics that a responsible and successful business entity should have. A growing number of companies are no longer in dispute that, while the governments are in principal the primary duty holder in safeguarding human rights, companies also have an obligation to conduct their business in accordance with universal human rights principles. The growing respect of human rights principles was based on the premise that both business and human rights are interrelated, thus needing to complement each other. Whilst a company may not flourish within an area with human rights crisis, human rights principles similarly might not properly be upheld and respected without contribution from good business conduct.

Notwithstanding the above trend, corporate human rights violations have continued to exist. In Malaysia, it has to be admitted that human rights in business is a relatively new phenomenon with majority of corporate entities and MNEs do not aware of their human rights responsibilities – let alone to put them into practise. The ubiquitous inadequacies in judicial mechanisms, both at domestic and international level have made matters worse. In this respect, there are some foreign MNEs which observe human rights standards while operating in their
home country but they do not do the same when operating outside their countries especially in the developing or less-developed countries.¹ As the result, the violators always go unpunished whereas the victims are left without proper remedy or no remedy at all.

Realizing the deficit in the state-centred judicial mechanisms in addressing the issues of business-related human rights violations, this research discovered that the use of social and non-judicial enforcement mechanisms could complement the existing laws. For such purpose, the Global Compact human rights principles, reinforced and supported by the UN ‘Protect, Respect and Remedy’ Framework and its Guiding Principles have been widely analysed and extensively discussed in this thesis. In fact, the increasing awareness of such important international human rights standards among human rights institutions and business entities in Malaysia indicated a positive trend which will facilitate the realization of effective social and non-judicial enforcement of human rights standards for business. It is also important to combine the efforts and initiatives by different entities in order to come out with specific human rights guidelines of a Malaysian niche for Malaysian business entities.

6.2 THE NOVELTY OF RESEARCH FINDINGS

There have been several findings derived from this research. Among other things, this research has established the idea that human rights principles and a business agenda can co-exist. In other words, making human rights part of a business core

agenda will help to sustain the development of an MNE’s business activities. This will ultimately enhance human rights compliance by companies and MNEs thus helping them to avoid committing human rights abuses. In this regard, the present research has brought about several important recommendations, discoveries and ideas which could contribute towards establishing sustainability business operations and socially-responsible business entities in Malaysia.

1. **National Human Rights Policy / Guidelines for Business and MNEs in Malaysia**

This idea has been initiated by SUHAKAM, on its capacity as the mandated NHRI in Malaysia to help addressing the issues related to human rights and business. As part of its ongoing efforts to materialize such a policy, SUHAKAM has begun the process to undertake research entitled “*The Role of SUHAKAM in Addressing Corporate Human Rights Violations: A Study on Logging and Plantation Industries in Malaysia*”. The research is a continuation of the Research Workshop on the Role of NHRI for Business and Human Rights in Southeast Asia.² It is important in order to enhance practical implementation of human rights standards by understanding and exploring the role, mandate and experiences of the NHRI in addressing business human rights violations. The research aims to establish a foundation on which further activities / efforts could be done for the realization of the issues of business and human rights in Malaysia.

As one of the four-people research team, I have had an opportunity to share some thoughts and insights based on my previous exposure to the topic while undertaking and writing this thesis. It is interesting to note that, parts of the works in this thesis, especially on the use of social non-judicial human rights mechanism, have been warmly welcomed and referred to by SUHAKAM as a model and guidelines in developing the research and finally to come out with the national policy. The national policy and guidelines, once completed, will be recommended to the Government for enforcement and to be observed by private business entities operating in Malaysia. Indeed, in that sense, the idea presented in this thesis has had some novelties and contributions for the people, especially in Malaysia in issues related to business and human rights.

2. Non-judicial and Social Enforcement Mechanism as Complementarity to Ineffective Judicial Mechanisms

Another important finding of this thesis is that, non-judicial and social enforcement mechanism of human rights standards on business entities can be used and explored as a possible, viable and preferable method to address the issues of business-related human rights violations. As indicated elsewhere in this thesis, social and non-judicial enforcement mechanism may offer effective grievance mechanism and better platform for remedy to the victims of corporate human rights violations. This mechanism could supplement traditional state-centred judicial mechanisms which suffered a number of setbacks and insufficiencies. It is also important to note that majority of the companies and

---

MNEs prefer to settle any human rights grievances and issues outside the court. They opposed to prescriptive regulations, monitoring mechanisms and new legal frameworks imposed on them, favouring instead voluntary business initiatives and stress, that companies are already supporting other human rights initiatives like the Global Compact.  

In general, there are a number of examples of how social non-judicial mechanism would be considered as possible, viable and preferable over the judicial mechanism. First, social non-judicial mechanism is more flexible, dynamic and change over time, whereas legal changes - which are much more formal, are delayed and must await bureaucratic procedures in the enactment of a law, regulation, or court decision. Indeed, it takes a long time for the enactment of any single law and the decisions of a court case. This mechanism does not offer a speedy remedy to the victims yet they will feel depressed with the delay of the mechanism processes. As such, the flexible nature of social non-judicial mechanism which does not require many bureaucratic procedures will offer a cost-effective solution which could trigger a speedy response by MNEs when any issues arise.

Secondly, specific social values may contradict each other, whereas there is a presumption of consistency in the legal code. In addition, the formal nature of the law confers on the legal code a degree of social acceptance that a social system may not be willing to accord to certain activities during a transitional period, although

---

it may tolerate such activities informally or on a small scale.\(^5\) Thirdly, the use of soft laws through social non-judicial mechanism will allow moderate nongovernmental organizations among the affected groups to seek reasonable solutions before the issues are captured by more radical elements who may be more interested in escalating the level of social conflict rather than fashioning feasible solutions that are mutually acceptable. Hence, it seems that the rigid nature of the laws judicial mechanism is not always an effective approach; rather, it may be beneficial for business entities, human rights institutions, civil societies, NGOs and the public at large to use soft laws through social non-judicial mechanism to better address business human rights violations.

3. **UN Global Compact and Guiding Principles on Business and Human Rights as Practical and legitimate Soft-Law Frameworks for Corporate Responsibility**

Recently, there has been a growing moral imperative among MNEs and business entities to behave responsibly. This was allied to their increasing recognition of the fact that “human rights are good for business”. In addition, a good human rights record can support improved business performance. In this regard, this research believes that, in order to advance their human rights records, the manner of such human rights complied with by the MNEs should not only be based on the negative terms of a ‘do no harm’ principle which only requires the companies to abstain from violating human rights or to meet the minimum standard of laws. Rather, the corporate responsibility notion should also be undertaken in a positive manner i.e. to fulfil, promote and protect human rights principles within their business sphere.

---

The MNEs compliance with human rights principles should always go beyond what is required by law as the standards required by law do not necessarily meet societal expectations.

Indeed, in the event of the absent or ineffective judicial enforcement or ‘hard laws’, any attempts to produce ‘soft laws’ through self-regulation and social enforcement is better than existing without law at all. In that sense, this research has established the idea that the UN Global Compact, the UN 'Protect, Respect and Remedy' Framework and Guiding Principles for its implementation have been widely accepted by various institutions and business entities in Malaysia. Through the adoption of these initiatives, many major corporations now see the clear, long-term business case for respecting human rights including improved risk management, improved compliance, efficiency gains, reduced operational disruption, sustained license to operate, new business models, reduced reputational risk and access to capital and markets.⁶

The aforementioned international human rights frameworks, though not legally binding, have made significant impact on business’ human rights practices. These frameworks have been able to align the MNEs and business entities with international policy norms, multinational and national regulatory frameworks, the aspirations of employees and workers, and the creation of a socially sustainable business environment. Malaysian NHRI, SUHAKAM has used these initiatives as basic guidance in preparing its soon-to-be-produced national policy.

---

on human rights for business in Malaysia. Many companies, notably Sime Darby Berhad and its other fellow GBI members such as HP, Coca Cola and Shell have all welcomed the release Ruggie’s ‘Protect, Respect and Remedy’ Framework.\textsuperscript{7} The GBI has, in fact, engaged with Professor Ruggie since his mandate began in 2005.


The proposal for using social non-judicial mechanism based on soft laws approach to address business-human rights issues does not mean a total rejection of the traditional judicial mechanism and court litigation based on hard-laws approach. A total rejection on soft law approach may not be beneficial either. Both are equally important and their implementation should not be therefore made in isolation. Loopholes, inadequacies and weaknesses in hard laws approach – internationally and domestically alike, have reinforced the idea that the remedy system in business-human rights issues should be reconceptualised and given new breath. There should therefore be harmony or complementarity between the both approaches as each approach will be weak and inefficient if it were to be applied in isolation.

As indicated earlier, hard law approach suffers a number of setbacks, so is the soft laws approach. Soft laws approach may suffer from the fact that public commitment may not always translate into changed corporate behaviour and also, the voluntary soft laws efforts depend upon the continued vigilance of concerned citizens, consumers, NGOs and investors. Thus, having realized that both approaches suffer from their own weaknesses, the research in this thesis

\textsuperscript{7} Some inputs and expressions of support for Professor Ruggie’s work have been collated on the GBI website. See <http://www.global-business-initiative.org/SRSGpage>
discovered that they need to be implemented hand-in-hand, thus complementing each other to ensure effective human rights compliance by MNEs. Indeed, the fundamental driver for business in this arena is therefore not law or voluntary norms alone; rather it is the symbiosis between mandatory and voluntary action. As such, voluntary initiatives must be coupled with regulation in order to provide space for positive incentives and innovation.8

Having discussed the effectiveness of corporate responsibility through the Global Compact, it can be concluded that the fundamental driver for business in this arena is not law alone, rather it is the symbiosis between mandatory and voluntary action through both hard-laws and soft-laws approaches.9 Both approaches should couple and complement each other to provide space for positive incentives and innovation.10 This idea was agreed by the International Council on Human Rights Policy (ICHRP) which notes that voluntary codes could complement a legal framework, and that both are essential elements to be used in influencing corporate conduct.11 Notwithstanding whatever one's stance is in the ongoing business and human rights debate, it is a clear and undeniable fact that there is a keen demand for embedding human rights principles within the business arena.

As far as the voluntary principles of the Global Compact are concerned, it was identified that the idea of instigating this initiative was justified on the basis of the less effective and failing existing legal framework. However, the response to it so

---


far indicates that it may be time to rethink the soft voluntary format of the learning network model of the Global Compact in favour of stronger notions of enforcing corporate accountability. This research, therefore, believes that it is not a good idea to only concentrate such initiatives on its inherent voluntary nature. Rather, it should also be adopted and deployed in such a manner that may transform into a legally binding nature of enforcement.

5. Human Rights within States and MNEs: Complementing Responsibilities

In reality, there has been obvious lack of care and unawareness among both State and Non-State actors in Malaysia of their human rights responsibilities within their respective capacities. This phenomenon contributed to the ineffective judicial mechanism of human rights standards on business entities offered by Government and the continued human rights violations committed by MNEs and business entities. This thesis has indicated that majority of the business leaders in Malaysia are not aware of what responsibilities they actually have on human rights, especially on their stakeholders. The Government has taken advantage of the people’s ignorance about their rights and the companies are unwilling to observe human rights principles. Together they have failed to offer effective, accessible remedies to the victims of business human rights violations.

Platforms for remedy, where they exist, are very difficult to access and unfriendly, especially to the vulnerable people. Despite the fact that human rights compliance was targeted on companies and MNEs within their business sphere, this thesis generally believes that the endeavour to improve the levels of corporate human rights responsibility should be undertaken within the structure of public-private
partnership concept. Both state and non-state actors play their own role within their sphere of influence to ensure that the fundamental human rights principles are properly complied with. The novelty of this partnership idea relies on the general motivation that human rights cannot be unilaterally upheld by companies without the support from the authorities who own the legislative powers. Similarly, the government alone will not be able to effectively implement its human rights agenda unless it is supported by the private entities on which many governments nowadays financially rely.

6.3 LOOKING AHEAD

From the discoveries throughout this thesis, it is important to consider two areas which were not covered by this research which could be considered for the purpose of future research on addressing business and human rights violations. First is the use of state-based non-judicial mechanisms (NJMs). This mechanism requires a strong political will on the part of government since this mechanism will be undertaken by government-supported agencies. Many states around the world have already developed new institutions to provide alternative means of dispute resolution and, specifically, to make it easier and cheaper for individuals (especially less well-off people) to enforce their rights.12

The last few decades have seen a steady growth in state-based NJMs, used in a variety of different regulatory areas, through which people can air their complaints, reconcile their differences, resolve their disputes and receive some

form of satisfaction without the need to resort to expensive and uncertain court action. Examples of the methods of non-judicial or alternative dispute resolutions include negotiation, mediation, adjudication and arbitration. Second area with possible research exploration is the extension of the NHRI’s mandates. Indeed, the missing part of the accountability framework jigsaw currently is the accessible methods of resolving human rights-related disputes between people and companies that are fit for purpose and capable of producing legally binding outcomes.

There is a need for institutions such as NHRI to contribute to greater consensus on addressing corporate harm. However, in practise, the legislative mandate of NHRIs to deal with the human rights impacts of companies is often limited, if it exists at all, to a narrow range of issues (usually discrimination). There is therefore no reason why the mandates of the existing NHRIs could not be extended to explicitly cover corporate human rights impacts and to provide for additional dispute resolution capabilities.13

As provided under the best practice guidance set out in the Paris Principles,14 NHRIs are to be given “as broad a mandate as possible”, with responsibilities that include advising government on “any matters concerning the promotion and protection of human rights” (including advice on legislation), investigating cases of human rights violations and then publishing reports, ensuring that domestic legislation is consistent with international human rights standards, cooperating

13 Ibid., pp. 13-14.
with the United Nations and regional and foreign domestic human rights institutions, and education.

6.4 CONCLUSION

The present chapter explained in general the findings from the research undertaken through this thesis. It justified how such findings are novel and thus capable of bringing about practical changes and improvements in business and human rights arena in Malaysia. In particular, social non-judicial enforcement offers possible, viable and practicable mechanism to address human rights issues relating to business activities. The use of UN Global Compact and UN Framework / Guiding Principles provides further clarity on how to put social non-judicial enforcement into practise. In addition, the ongoing effort by SUHAKAM in preparing national policy / guidelines on human rights for business in Malaysia is an exemplary work.

The series of roundtable discussion with various entities, namely; government agencies, business entities, NGOs and civil society have raised various issues and concerns which will form some bases in drafting the policy. In addition, this chapter has also highlighted the fact that although this thesis advocates a social non-judicial enforcement mechanism as solution mechanism, this does not mean the total rejection to the traditional state-centred judicial mechanism. It is just because currently the judicial mechanism looked as not doing enough to address human rights issues in business. Hence, the social non-judicial enforcement comes to supplement such ubiquitous deficits.
Also, the perspectives on human rights responsibilities should be viewed as the duty of both State and Non-State actors, despite the extent of the latter’s duty might not resemble the former’s duty. As indicated by the Preamble of UDHR, every organ of the society will have their own roles within their own capacities to ensure human rights principles are duly respected and upheld.
Chapter 7: CONCLUSION

The present research affirmed the fact that it is not a healthy atmosphere for Malaysia, as a vibrant developing economy, to have an unbalanced policy between the focus on boosting its economic development and protecting the human rights of its people. Focusing excessively on developmental agenda while human rights causes are largely abandoned will not lead to a better Malaysia. This unhealthy atmosphere, mainly contributed by events of corporate human rights violations committed by MNEs and other business entities, should be addressed seriously. This research discovered that the issues of ‘enforcement and compliance’ in Corporate Human Rights Violations, the polemic on the scope of MNEs’ human rights responsibility as well as the lack of awareness among business entities of their CSR / human rights responsibilities are the key factors behind the persistent events of corporate human rights violations in Malaysia.

Aiming to address such deficits, this research dedicates the Global Compact human rights principles reinforced by the UN ‘Protect, Respect and Remedy’ Framework and its Guiding Principles, as a basic foundation and guidelines for human rights institutions, business entities, NGOs and civil society. These international human rights frameworks enable business entities to align themselves with policy norms, multinational and national regulatory frameworks and the aspirations of stakeholders - all of which are primary requirements for the creation of a socially sustainable business environment. The UN ‘Protect, Respect and Remedy’ Framework, for instance, advocated three important pillars for business and human rights issues. The pillars are the State duty to protect human rights, the
corporate responsibility to respect human rights and access to remedy. These pillars are on the rights track since they reflect the needed recipe to address deficits and contributing factors to business human rights violations discussed before.

To better understand how the author conceptualised methods to address the business-related human rights violations, this thesis has been divided into a number of chapters. The brief preview of the research is dedicated in the introductory chapter where the research’s problems, purposes and methodology have all been presented. The contextual chapter of the thesis begins with an examination of the complex relationship between business and human rights. This examination proved that such a relationship possesses significant roles and impacts on people’s enjoyment of human rights, therefore needing to be managed and addressed carefully by using specific and effective regulatory mechanisms.

Accordingly, Chapter 2 illustrated the nature and context of commonly occurring violations of human rights committed by MNEs and business in Malaysia. For that purpose, a number of case studies relating to human rights abuses have been presented. This was followed by an analysis of the three problems contributing to the deficit in corporate human rights responsibilities. Overall, this chapter discovered and confirmed that the relationship between MNEs, business and human rights still suffers with ineffective and loose synchronization in the sense that there has been no effective corporate human rights responsibility framework, ineffective judicial mechanism, and lack of awareness among business entities of their human rights responsibilities. Chapter 3 accordingly examined the
inadequacies in international and national human rights standards for MNEs’ human rights violations. It discussed the existing legal framework, why they cannot work effectively and how soft law and non-judicial mechanism could supplement such inadequacies.

Seeking an answer for such a dilemma, Chapter 4 has explored the possibilities of using human rights principles of GC as a solution mechanism. This chapter explained why GC was chosen and how it can contribute towards enhancement of human rights compliance by business entities. The Ruggie’s ‘Protect, Respect and Remedy’ Framework was also examined as it provides operational clarity on how to put human rights agenda into business practise. Additionally, in Chapter 5, the thesis further examined how the previously-discussed human rights frameworks can be or have been implemented by relevant entities in Malaysia. For this purpose, the author examined the initiatives and practices from institutional aspect - by Malaysian NHRI, SUHAKAM and Bursa Malaysia, and from corporate aspect – by Sime Darby Berhad. It was discovered that there have been ongoing and consistent efforts by these entities towards materializing a socially responsible and sustainable business environment in Malaysia.

Chapter 6, accordingly, presented the findings of the research by providing several ideas, discoveries and recommendations for future betterment. This includes, among others, the contribution of this research to the process of preparing national policy / guidelines on human rights for businesses spearheaded by SUHAKAM. It is somewhat appealing to note that, based on the research presented in this thesis, the author has been consulted with by SUHAKAM and also made part
of its research team in the pursuit to produce the national policy. On the other hand, this chapter also highlighted the important of non-judicial enforcement mechanism to supplement the obvious loopholes in the current judicial enforcement. This will be better done through the implementation and adoption of GC and Ruggie's Framework. Also, the author argued that human rights awareness among Malaysian at various levels should be enhanced. Government should be aware of its human rights duty, so is the business. Both entities should act in a spirit of 'public-private' partnership since human rights causes cannot be upheld if neither takes responsibility. Finally, the concluding remarks of the whole discussion of the thesis are presented in this chapter.

In summary, this thesis has built a strong premise to support the fact that the compliance of human rights in the business sphere should be undertaken within the structure of the public-private partnership concept. An effective mechanism implemented by government coupled with a proper compliance by MNEs will make this idea successful. The genesis of this partnership idea stems from the fact that human rights cannot be unilaterally upheld by companies without the support from the authorities who own the legislative powers. Similarly, the government alone will not be able to effectively implement its human rights agenda unless it is supported by the private entities on which many governments nowadays financially rely on. After all, in the spirit of the UDHR, every organ of the society, especially business and State-actors, have their own roles to play in the pursuit to create a socially responsible and sustainable business environment in Malaysia.
### APPENDICES

Appendix 1: Comparisons of fiscal power between Companies and States

<table>
<thead>
<tr>
<th>Rank</th>
<th>Name of TNC/Company</th>
<th>Value* added</th>
<th>Rank</th>
<th>Name of TNC/Company</th>
<th>Value* added</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>United States</td>
<td>9,510</td>
<td>51</td>
<td>Czech Republic</td>
<td>51</td>
</tr>
<tr>
<td>2</td>
<td>Japan</td>
<td>4,765</td>
<td>52</td>
<td>United Arab Emirates</td>
<td>48</td>
</tr>
<tr>
<td>3</td>
<td>Germany</td>
<td>1,866</td>
<td>53</td>
<td>Bangladesh</td>
<td>47</td>
</tr>
<tr>
<td>4</td>
<td>United Kingdom</td>
<td>1,427</td>
<td>54</td>
<td>Hungary</td>
<td>46</td>
</tr>
<tr>
<td>5</td>
<td>France</td>
<td>1,294</td>
<td>55</td>
<td>Ford Motor</td>
<td>44</td>
</tr>
<tr>
<td>6</td>
<td>China</td>
<td>1,080</td>
<td>56</td>
<td>DaimlerChrysler</td>
<td>42</td>
</tr>
<tr>
<td>7</td>
<td>Italy</td>
<td>1,074</td>
<td>57</td>
<td>Hyundai</td>
<td>41</td>
</tr>
<tr>
<td>8</td>
<td>Canada</td>
<td>701</td>
<td>58</td>
<td>General Electric</td>
<td>39</td>
</tr>
<tr>
<td>9</td>
<td>Brazil</td>
<td>595</td>
<td>59</td>
<td>Toyota Motor</td>
<td>38</td>
</tr>
<tr>
<td>10</td>
<td>Mexico</td>
<td>575</td>
<td>60</td>
<td>Kuwait</td>
<td>38</td>
</tr>
<tr>
<td>11</td>
<td>Spain</td>
<td>561</td>
<td>61</td>
<td>Romania</td>
<td>37</td>
</tr>
<tr>
<td>12</td>
<td>Korea, Republic of</td>
<td>457</td>
<td>62</td>
<td>Royal Dutch Shell</td>
<td>36</td>
</tr>
<tr>
<td>13</td>
<td>India</td>
<td>457</td>
<td>63</td>
<td>Morocco</td>
<td>33</td>
</tr>
<tr>
<td>14</td>
<td>Australia</td>
<td>388</td>
<td>64</td>
<td>Ukraine</td>
<td>32</td>
</tr>
<tr>
<td>15</td>
<td>Netherlands</td>
<td>310</td>
<td>65</td>
<td>Siemens</td>
<td>32</td>
</tr>
<tr>
<td>16</td>
<td>Taiwan Province of</td>
<td>309</td>
<td>66</td>
<td>Vietnam</td>
<td>31</td>
</tr>
<tr>
<td>17</td>
<td>Argentina</td>
<td>285</td>
<td>67</td>
<td>Libyan Arab Jamahlya</td>
<td>31</td>
</tr>
<tr>
<td>18</td>
<td>Russia Federation</td>
<td>251</td>
<td>68</td>
<td>BP</td>
<td>30</td>
</tr>
<tr>
<td>19</td>
<td>Switzerland</td>
<td>239</td>
<td>69</td>
<td>Walmart Stores</td>
<td>30</td>
</tr>
<tr>
<td>20</td>
<td>Sweden</td>
<td>229</td>
<td>70</td>
<td>IBM</td>
<td>27</td>
</tr>
<tr>
<td>21</td>
<td>Belgium</td>
<td>229</td>
<td>71</td>
<td>Volkswagen</td>
<td>24</td>
</tr>
<tr>
<td>22</td>
<td>Turkey</td>
<td>200</td>
<td>72</td>
<td>China</td>
<td>24</td>
</tr>
<tr>
<td>23</td>
<td>Austria</td>
<td>189</td>
<td>73</td>
<td>Hitachi</td>
<td>24</td>
</tr>
<tr>
<td>24</td>
<td>Saudi Arabia</td>
<td>173</td>
<td>74</td>
<td>TotalFinaEif</td>
<td>23</td>
</tr>
<tr>
<td>25</td>
<td>Denmark</td>
<td>163</td>
<td>75</td>
<td>Verizon Communications</td>
<td>23</td>
</tr>
<tr>
<td>26</td>
<td>Hong Kong, China</td>
<td>163</td>
<td>76</td>
<td>Matsushita Electric Industrial</td>
<td>22</td>
</tr>
<tr>
<td>27</td>
<td>Norway</td>
<td>162</td>
<td>77</td>
<td>Mubad Company</td>
<td>20</td>
</tr>
<tr>
<td>28</td>
<td>Poland</td>
<td>158</td>
<td>78</td>
<td>Elf</td>
<td>20</td>
</tr>
<tr>
<td>29</td>
<td>Indonesia</td>
<td>153</td>
<td>79</td>
<td>Oman</td>
<td>20</td>
</tr>
<tr>
<td>30</td>
<td>South Africa</td>
<td>126</td>
<td>80</td>
<td>Sony</td>
<td>20</td>
</tr>
<tr>
<td>31</td>
<td>Thailand</td>
<td>122</td>
<td>81</td>
<td>Mitsubishi</td>
<td>20</td>
</tr>
<tr>
<td>32</td>
<td>Finland</td>
<td>121</td>
<td>82</td>
<td>Utrigtay</td>
<td>20</td>
</tr>
<tr>
<td>33</td>
<td>Venezuela</td>
<td>120</td>
<td>83</td>
<td>Dominican Republic</td>
<td>20</td>
</tr>
<tr>
<td>34</td>
<td>Greece</td>
<td>113</td>
<td>84</td>
<td>Thailand</td>
<td>19</td>
</tr>
<tr>
<td>35</td>
<td>Israel</td>
<td>110</td>
<td>85</td>
<td>Phillip Morris</td>
<td>19</td>
</tr>
<tr>
<td>36</td>
<td>Portugal</td>
<td>106</td>
<td>86</td>
<td>Slovakia</td>
<td>19</td>
</tr>
<tr>
<td>37</td>
<td>Iran, Islamic Republic of</td>
<td>105</td>
<td>87</td>
<td>Croatia</td>
<td>19</td>
</tr>
<tr>
<td>38</td>
<td>Egypt</td>
<td>99</td>
<td>88</td>
<td>Greenfield</td>
<td>19</td>
</tr>
<tr>
<td>39</td>
<td>Indonesia</td>
<td>95</td>
<td>89</td>
<td>Luxembourg</td>
<td>19</td>
</tr>
<tr>
<td>40</td>
<td>Singapore</td>
<td>92</td>
<td>90</td>
<td>SEC Communications</td>
<td>19</td>
</tr>
<tr>
<td>41</td>
<td>Malaysia</td>
<td>90</td>
<td>91</td>
<td>Hokkaido</td>
<td>18</td>
</tr>
<tr>
<td>42</td>
<td>Colombia</td>
<td>81</td>
<td>92</td>
<td>Kazakhatan</td>
<td>18</td>
</tr>
<tr>
<td>43</td>
<td>Philippines</td>
<td>75</td>
<td>93</td>
<td>Slovenia</td>
<td>18</td>
</tr>
<tr>
<td>44</td>
<td>Chile</td>
<td>71</td>
<td>94</td>
<td>Honda Motor</td>
<td>18</td>
</tr>
<tr>
<td>45</td>
<td>Exxon Mobil</td>
<td>63</td>
<td>95</td>
<td>Efi</td>
<td>18</td>
</tr>
<tr>
<td>46</td>
<td>Pakistan</td>
<td>62</td>
<td>96</td>
<td>Nissan Motor</td>
<td>18</td>
</tr>
<tr>
<td>47</td>
<td>General Motors</td>
<td>56</td>
<td>97</td>
<td>Toshiba</td>
<td>17</td>
</tr>
<tr>
<td>48</td>
<td>Pei</td>
<td>53</td>
<td>98</td>
<td>Syrian Arab Republic</td>
<td>17</td>
</tr>
<tr>
<td>49</td>
<td>Algeria</td>
<td>53</td>
<td>99</td>
<td>Grahamshville</td>
<td>17</td>
</tr>
<tr>
<td>50</td>
<td>New Zealand</td>
<td>51</td>
<td>100</td>
<td>BT</td>
<td>17</td>
</tr>
</tbody>
</table>

*GDP for countries and value added for TNCs. Value added is defined as the sum of salaries, pre-tax profit and depreciation and amortization.
*Value added is estimated by applying the 30% share of value added in the total sales, 2000, of 66 manufacturers for which the data were available.
*Value added is estimated by applying the 16% share of value added in the total sales, 2000, of 7 trading companies for which the data on value added were available.
*Value added is estimated by applying the 37% share of value added in the total sales, 2000, of 22 other tertiary companies for which the data on value added were available.

Note: Ranked according to the top 100 economies/TNCs.
Appendix 2: Penan - the Most Affected Tribe of Sarawak Hydroelectric Projects

**WHO ARE THE PENANS?**

1. The Penan are aboriginal people from Sarawak.
2. There are currently about 10,000 Penan people, with over 400 of them leading nomadic lifestyles. However, most of them were nomadic until the 1950s.
3. Penan people mainly live in the Ulu Baram district, but also reside in Limbang, Miri, Tutoh and Belaga.
4. The Penan people cultivate rice and garden vegetables. Their diet mainly consists of sago, jungle fruits and wild animals such as wild boars, deers and snakes.
5. Hunters in the tribe catch the animals using “lepu” or a blowpipe.
6. The Penan people are known to be highly tolerant and generous.
7. They also practise “molong”, which means never taking more than what is needed.
Appendix 3: Deforestation in Sabah and Sarawak, Malaysia.
Appendix 4: Request for Interview

Nisar Mohammad bin Ahmad
Faculty of Syariah and Law
Universiti Sains Islam Malaysia
Bandar Baru Nilai,
71800, Nilai,
Negeri Sembilan.

PhD Candidate in Law
School of Law
University of Leicester,
United Kingdom.

25th JUNE 2012

TO WHOM IT MAY CONCERN

Dear Sir/Madam,

REQUEST FOR INTERVIEW ON THE SUBJECT OF THE APPLICATION OF THE UN GLOBAL COMPACT HUMAN RIGHTS PRINCIPLES / CSR INITIATIVES WITHIN MALAYSIAN BUSINESS PRACTICES (FOR THE PURPOSE OF PHD RESEARCH)

I am an academic staff at the Faculty of Syariah and Law, Universiti Sains Islam Malaysia and currently at the final stage of completing my PhD studies at the School of Law, University of Leicester, UK. My PhD thesis entitled “The Implications of the Global Compact Human Rights Principles for Multinational Enterprises in Malaysia” and the thesis’ submission deadline will be on 31st August 2012. My PhD research is supervised by Dr. Priscilla Schwartz who can be contacted at: ps162@leicester.ac.uk. The research generally relates to the impacts of Global Compact human rights principles in enhancing human rights compliance by multinational enterprises in Malaysia.

2. This proposed interview generally serves to complete the empirical part of my thesis. The findings sought from this interview are meant to reinforce the idea advocated by my research i.e. that the soft law, voluntary Global Compact human rights principles could be a possible, viable and preferable non-judicial social enforcement and compliance strategy to address the issues of corporate human rights violations in Malaysia.

3. I acknowledge your busy timetable but an opportunity to interview you at any time during June-July 2012 would be both highly appreciated and beneficial for my research. This is because your institution is very relevant with my topic. While I understand that my research topic will touch on the institutional and business’ policies on CSR and human rights – which may fall on the ‘secret zone’ of business operational strategy, the outcome of this interview will exclusively be used for academic purpose. It aims to provide me with the real and practical situations relating to CSR and human rights practices within Malaysian business arena. Should you have no problem with my request, I would appreciate if you could give suitable time an exact date for the interview session.

4. I am in principle in favour of conducting this interview in person as a matter of exposure and experience. If you have no problem to participate and contribute in this research, please feel free to let me know. However if you wish to answer my interview questions through email, I attached here the list of interview questions and you may
answer the questions accordingly. Before answering the questions, kindly read the Information sheet and then fill in the consent letter attached. I appreciate your kind cooperation in answering all the questions and kindly email the answers to my email at: nisar_kuim@yahoo.co.uk.

5. Many thanks in advance for your kind consideration and I am looking forward to hearing your response in the near future.

Yours sincerely,

Nisar Mohammad AHMAD
Email: nisar_kuim@yahoo.co.uk
Mobile: +60195264691
Appendix 5: Participant Consent Form

Participant Consent Form Version

“The Implications of the Global Compact Human Rights Principles for Multinational Enterprises in Malaysia”

Name of Researcher :  Mr. Nisar Mohammad bin Ahmad
PhD Candidate in Law
School of Law

Please initial box

1. I confirm that I have read and understood the research information for the above study as contained in the cover letter and have had the opportunity to ask questions.

2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason, without my conditions of employment or legal rights being affected.

3. I understand that my responses will remain confidential.

4. I understand that my data will be stored in accordance with the Data Protection Act (1988).

5. I understand that only anonymised quotes will be used and published in the final report and that if an individual is mentioned, a pseudonym will be provided to protect that individuals’ identity.

6. I agree to be audio-taped during the interview

7. I agree to take part in the above study.

____________________  ____________________  __________________
Name of Participant         Date                Signature

________________________  ______________     __________________
Name of Person taking consent  Date                   Signature

1 form for Participant
1 to be kept as part of the study documentation.
Appendix 6: Interviews Questionnaires

LIST OF PROPOSED INTERVIEW QUESTIONS TO RELEVANT BUSINESS AND INSTITUTIONS IN MALAYSIA

1. As a developing country and in the pursuit to achieve a full-fledged developed nation status by 2020, Malaysia is very much dependent on business operations of multinational enterprises and private actors to help boost its economic development. Looking this issue from a business / a human rights institution perspective, could you think such ‘high dependence’ on multinationals lead to Governments being more lenience when regulating issues of corporate misconducts and human rights violations?

2. Indeed, any move towards operationalising the corporate responsibility to respect human rights will involve a departure from a shareholder-based corporate governance model towards a more stakeholder-based model. What is your comment on this?

3. In what way that you think the human rights compliance and good corporate citizenship of a company may enhance its profitability in the long run?

4. In your opinion, what are the obstacles which may have impaired good human rights compliance by MNEs / companies?

5. What would you suggest to the Government, MNEs/business entities, NGOs, civil societies and members of the public in order to make human rights as part of business’ main responsibilities along with their profit-making agenda?

6. Your company officially became a member of the UN Global Compact on 31st January 2011 and subsequently submitted the first Communication on Progress (CoP) on 2nd February 2012. How far did you see the initiative had improved and enhanced your CSR practises compared to the periods prior to becoming a GC member?

7. As you may aware, human rights issues are at the very top of the GC’s 10 principles thus reflecting the key significant of human rights compliance by an MNE / business entity. How did your company translate the first two principles of the GC in your business strategy?

8. The GC is a soft law and voluntary in nature. In the events of ineffective or absent of traditional judicial-based regulatory mechanisms, in what way that you see such initiative could be a complementary in order to solve the issues of corporate misconduct and human rights violations?

9. The Global Compact Malaysian Network is a relatively new development in our country’s CSR practices. It aims to enhance companies’ human rights compliance and to improve their corporate citizenship. So far, how did you see the Network’s progress and contribution towards such objectives?

10. It was stated in your 2007 CSR Status Report that there has been significant lack of understanding among companies of their key CSR concepts – thus leading to corporate misconduct and human rights violations. How did Bursa view this phenomenon in the sense of establishing solution mechanism especially on Bursa’s Public Listed Companies (PLCs)?
11. From the report it was also recorded that, out of the many business sectors, construction sectors exhibited the lowest level of CSR engagement. Many have been alleged of failing to provide safe, just and favourable work conditions and many more employee-related rights in particular to the foreign workers. What are your approaches and strategies to ensure those companies improve their human rights compliance?

12. How would you see the adoption of CSR reporting by Malaysian companies could reinforce and enhance their human rights, corporate citizenship and CSR practices?

13. As a commission that has a key responsibility to advise the government on human rights issues in the country, what are your general comments on human rights compliance by companies especially the multinationals in Malaysia?

14. Several researches have suggested that the ongoing corporate human rights violations omnipresent in the country are the results of, first; the lack of awareness among the MNEs/business entities on their CSR and human rights responsibilities, and second; the ineffective traditional-judicial human rights enforcement and compliance for MNEs. How you see the authenticity of such claim?
Appendix 7: Invitation to Research Workshop on the Role of NHRIs for Business and Human Rights in Southeast Asia

RAOUL WALLenberg INSTITUTE

OF HUMAN RIGHTS AND INTERNATIONAL LAW

2012-05-23

Mr. Tans Sri Hasmy Agam,
Chairperson
Human Rights Commission of
Malaysia

Invitation to Research Workshop on the Role of NHRIs for Business and Human Rights in Southeast Asia
Bangkok 9-12 July 2012

Dear Mr. Tans Sri Hasmy Agam,

We are very pleased to invite you to nominate participants to a workshop for Southeast Asian National Human Rights Institutions (NHRIs) and academics interested in conducting research on the current role and potential of NHRIs with respect to business and human rights. The overall aim is to support the practical application of human rights standards.

The workshop is organised by the Raoul Wallenberg Institute (RWI), which will support national research teams of NHRIs and academics to carry out collaborative research during 2012, with a view to disseminating results in early 2013. This workshop, which I will lead, is made possible through support from the Swedish International Development Cooperation Agency (Sida).

You are welcome to nominate four candidates to participate in the workshop, which will be held in Bangkok 9-12 July. One of your candidates should come from an Academic Institution. We suggest that you consider sending people with the following expertise:

1. An NHRI Commissioner, or senior staff member, committed to the role of your NHRI in pursuing business and human rights issues;
2. An NHRI officer responsible for overseeing the research mandate or working with the research area of your NHRI;
3. An NHRI officer with specific business and human rights knowledge or experience, (possibly an officer who attended the 2010 ICC Business and Human Rights Biennial Meeting, or the 2011 APF conference on business and human rights);
4. A senior or suitably experienced academic, interested in working closely with your NHRI on a collaborative research project, with practical value for promoting and protecting human rights.

Gender balance should be considered in nominating your participants.

I would be grateful if you would submit the attached application forms to RWI for the nominated candidates no later than 15 June 2012, addressed to Ms Sonay Jalili (Sonay.Jalili@rwliu.se).

Sida will cover costs related to your nominees’ participation in the workshop, including international travel (economy class; excursion fare), accommodation, meals and training materials.

Raoul Wallenberg Institute of Human Rights and Humanitarian Law
Södra Gråbrödargatan 17 B | P.O. Box 1105 SE-221 05, Lund, Sweden | Phone +46 46 222 12 00 | Fax +46 46 222 12 22

267
Questions regarding the workshop or nominations may be directed to Ms. Helena Olsson (Helena.Olsson@rwi.lu.se). For questions regarding applications, travels and practical arrangements, kindly contact Ms. Sonay Jalili (Sonay.Jalili@rwi.lu.se).

With Best Wishes,
Yours Sincerely,

Sincerely,

[Signature]

Professor Brian Burdekin AO
Visiting Professor
Raoul Wallenberg Institute
Appendix 8: Confirmation of Participation

To whom it may concern

This letter confirms that Mr. Nisar Mohammad bin Ahmad has participated, and constructively contributed, to the RVI Research Workshop on the Role of NHRIs for Business and Human Rights in Southeast Asia Bangkok 9-12 July 2012.

Sincerely,

Helene Olsson
Programme Officer
Raoul Wallenberg Institute
Appendix 9: Pre-workshop Questionnaire Research Workshop on the Role of Business & Human Rights in Southeast Asia

Pre-workshop Questionnaire
Research Workshop on the Role of Business & Human Rights in Southeast Asia

Research Workshop on the Role of NHRIs for Business and Human Rights in Southeast Asia
Bangkok 9 – 12 July 2012

PRE-WORKSHOP QUESTIONNAIRE

The following questionnaire contains a total of thirty questions and is divided into three main sections:

• The first section addresses the business and human rights situation in your country, requiring you to reflect on substantive business and human rights related issues.

• The second section considers the specific role of your NHRI on business and human rights, including your mandate as well as previous, current and planned actions on business and human rights that your NHRI has taken.

• The third section requires you to reflect on your NHRI’s research mandate, including previous projects and research collaboration.

SECTION ONE: HUMAN RIGHTS AND BUSINESS

Question One: [DESIGNATED PRIORITY QUESTION]
What industries and business sectors exist in your country where severe or systematic cases of human rights abuses (including infringements of labour rights) have been credibly evidenced? Where possible, provide specific examples.

Question Two:
What regulatory framework governs the infringement of human rights by business? Please give examples of any specific legislation, regulations or policies?

Question Three:
Have there been any recent regulatory initiatives to strengthen the legal framework and judicial enforcement to address business infringements of human rights? Please give specific details of these initiatives.

Question Four:
Have there been any recent governmental policies to encourage responsible business practices? Please give details of any policies.
Question Five:
Has there been any significant litigation (judicial cases) where national or multinational companies operating in your country were held liable for violating human rights, or related harm such as damage to the environment? Please give specific examples, including case details.

Question Six:
What access do victims of human rights violations by business have to national remedies?

What are the remedy avenues?

Please specify for which human rights violations remedies might be sought through these national mechanisms?

Are there any challenges to the efficacy of these national mechanisms? For example, how strong are their powers of enforcement, are there large delays in accessing the mechanism, or are national mechanisms completely unavailable?

Question Seven:
Are there any notable initiatives by industries or groups of companies that evidence improvement in business conduct regarding human rights? Please give specific examples.

Question Eight:
What level of attention is given by civil society groups and other sectors in society to Corporate Social Responsibility initiatives or advocacy? Please give specific examples of initiatives or campaigns.

Question Nine:
Are there any other notable developments promoting corporate responsibility in your country?

SECTION TWO: THE ROLE OF YOUR NHRI IN HUMAN RIGHTS AND BUSINESS

MANDATE

Question Ten: [DESIGNATED PRIORITY QUESTION]
Does the establishing legislation of your NHRI explicitly address the institution’s mandate with respect to business human rights violation? Or does your establishing legislation explicitly prohibit the NHRI from addressing business violations? Please provide excerpts of your
establishing legislation as appropriate.

**Question Eleven:**
Is your NHRI mandated to receive complaints of non-state actor violations, including business?

**Question Twelve:**
If you answered yes to Question Eleven, please provide the following details:

a) What types of complaints are admissible?

b) Who may lodge a complaint?

c) What is the procedure for lodging a complaint?

d) Against what types of companies may a complaint be lodged?

e) What powers of investigation does your NHRI have in respect to business violations?

f) What avenues of dispute resolution may your NHRI pursue in relation to business violations?

g) What remedies may your NHRI order?

h) Does your NHRI have the power to enforce any ordered remedies?

i) Does your NHRI have the power to refer a complaint to another authority, such as the judiciary, or others?

j) Does your NHRI have the power to follow up compliance with any orders or recommendations?

k) Are there any avenues for appeal of NHRI decisions in relation to business human rights violations?

l) Does your NHRI have the power to publicise any findings arising out of an alleged business violation?

Please provide specific examples of complaints against business human rights violations with which your NHRI has dealt.

How many complaints has your NHRI received on an annual basis over the last five years in relation to business human rights violations?
Question Thirteen:
If you answered no to Question Eleven, how does your NHRI respond if a business related human rights violation is brought to your attention? Do you ever enjoin another party, such as the State, in these circumstances? Please give specific examples.

Question Fourteen:
Does your NHRI monitor the impact of business on human rights? If yes, please specify how this monitoring is carried out.

Question Fifteen:
Does your NHRI regularly report on business related human rights violations, for example, in its annual reports or in other submissions to the executive or legislature? Please provide an excerpt from the most recent Report if relevant.

Question Sixteen:
Has your NHRI ever made proposals or recommendations for change to national legislation, regulations or policies in relation to business and human rights? Please give specific examples.

Question Seventeen:
Has your NHRI undertaken any promotional activities with business or industrial sectors to raise the awareness of human rights issues? Please give specific examples.

Question Eighteen:
Has your NHRI ever facilitated dialogue between business and other groups, such as community groups to address potential or actual human rights violations? Please give specific examples.

REGIONAL ENGAGEMENT

Question Nineteen:
Has your NHRI previously collaborated with other NHRIs in the region (or beyond) to address business human rights violations? Please provide examples.

Question Twenty:
Has your NHRI engaged with the Asia Pacific Forum’s initiatives on business and human rights? For example, by attending the APF Regional Conference on Business and Human Rights in October 2011, contributing to the APF Advisory Council of Jurist’s Reference on Human Rights and Corporate Accountability, or other initiatives. Please specify.
INTERNATIONAL ENGAGEMENT

Question Twenty-One:
Has your NHRI engaged with any International Coordinating Committee of NHRI initiatives on business and human rights? For example, by attending the ICC’s 10th Biennial Conference on business and human rights in October 2010; contributing to the ICC’s Working Group on Business and Human Rights; or other initiatives? Please specify.

Question Twenty-Two:
At the ICC’s 10th Biennial Conference on business and human rights in October 2010 the 80 NHRIIs present unanimously agreed that they would “actively consider how their mandates under the Paris Principles can be applied or where necessary strengthened, in order to promote and protect human rights as they relate to business” and further, “to proactively consider new ways in which NHRIIs’ mandates can be used to advance the ‘protect, respect and remedy’ framework” (The Edinburgh Declaration). Has your NHRI undertaken any steps to meet these commitments? Please give examples.

Question Twenty-Three:
Has your NHRI contributed in other international fora on business and human rights issues? Please give examples.

SECTION THREE: THE RESEARCH MANDATE OF YOUR NHRI

Question Twenty-Four:
Does your NHRI have a legislative mandate to conduct research? If yes, please excerpt the relevant provisions of your establishing legislation.

Question Twenty-Five:
Is research being conducted currently within your institution?

If yes, please describe, including:

a) Current thematic areas being researched

b) The reasons for instigation of research

c) What the actual or expected outputs and outcomes from research are
Question Twenty-Six:
How many staff members are currently engaged in research? What research expertise, experience or qualifications do staff have?

Question Twenty-Seven:
Has your NHRI produced any research publications?

If yes, please provide a reference list and attach any major research publications.

Question Twenty-Eight:
Is research explicitly included in your NHRI’s strategic planning process?

Question Twenty-Nine: **[DESIGNATED PRIORITY QUESTION]**
Does your institution currently have any external research partnerships or informal research activities with external actors? (For example with academic institutions, civil society groups, business actors, government agencies etc) Please provide examples.

Question Thirty:
If yes, please describe these partnerships, including information on:
   a) How the relationship was established?

   b) Why it was established?

   c) The duration of the relationship

   d) How the relationship operates in practice

   e) The actual or intended outcomes of the partnership

   f) The benefits and challenges of the partnership

   g) Any external funding which supports the collaboration

If no, have you ever tried to establish any external research partnerships, or had previous external research partnerships? Describe your experience including:
   a) Why the relationship was instigated
b) Why the relationship either was not established or no longer exists

c) Factors which would have facilitated an ongoing relationship
BIBLIOGRAPHY

BOOKS

a) Authored Books


b) Edited and Translated Books


c) Contribution to Books


ARTICLES

a) Published articles


b) Electronic journals


c) Forthcoming articles and working papers


5. Findlay, R. (undated) The Emergence of World Economy. *Columbia University Department of Economics Discussion Paper No. 9596-08*


OTHER SOURCES

a) General Principles


3. Amnesty International (2005), Union carbide Corporation (UCC) DOW Chemical and the Bhopal Communities in India. General Article, AI Index: ASA 20/005/2005


290


51. UN Global Compact. (undated). *What is the Global Compact.* Retrieved on 01 April 2008, from; <www.unglobalcompact.org>


56. UN, Human Rights Council. (22 April, 2009). *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the


b) Theses


c) Seminar papers


d) Websites

1. ALIRAN (2 September 2011). Stop Suggesting the Baram Dam has been Approved. Retrieved on 14 April 2012, from: http://aliran.com/6594.html


e) Newspaper / Magazine Articles


f) *Interviews*


LIST OF CASES

Malaysia

4. Gan Soh Eng & Ors v. Guppy Plastic Industries Sdn Bhd [Case No: 26(14)/4-244/05] [2008] 3 ILR 414
5. Kajing Tubek & Ors v Ekran Bhd & Ors [1996] 2 MLJ 388
8. Public Prosecutor v Wah Ah Jee [1919] 2 FMSLR 193

International

2. Dagi v BHP [1995] 1 VR 428 (SCt Vic)
4. In re Union Carbide Corp. Gas Plant Disaster (Bhopal Case) 809 F.2d 195
5. Lubbe & Other v Cape plc [2000] 1 WLR 1545
7. Suresh v Canada (Minister for Citizenship and Immigration) [2000] 183 DLR (4th) 629 (Fed Canada) 659
8. Tolofson v Jensen [1994] 3 SCR 1022 (SCt Canada) 1049
LIST OF NATIONAL INSTRUMENTS

MALAYSIA

Pre-independent legislations /instruments

1895
The Mining Code

1899 & 1929
Mining Enactment

1920
Water Enactment

1934
Forest Enactment

1936
Penal Code (Act 574) (Revised 1997)

1950
Contract Act

1952
Sale of Drugs Act

1953
Irrigation Areas Ordinance

1954
Drainage Works Ordinance

1955
Employment Act

Post-independent legislations /instruments

1957
Federal Constitution of Malaysia
Road Traffic Ordinance
Sale of Goods Act

1958
Pioneer Industry Ordinance (PIO)
1959
Trade Unions Act (TUA)

1963
Fisheries Act

1965
Companies Act

1966
Petroleum Mining Act and the Continental Shelf Act

1967
Industrial Relation Act (IRA)

1968
Radioactive Substances Act

1969
Employees Social Security Act (ESSA)

1974
Environment Quality Act (EQA)

1975
Industrial Coordination Act (ICA)

1986
Promotion of Investment Act (PIA)

1994
Occupational Safety and Health Act (OSHA)

1999
Consumer Protection Act (CPA)
Human Rights Commission of Malaysia Act (Act 597)

UNITED STATES OF AMERICA

1789
Alien Tort Claims Act (ATCA)

2006
LIST OF INTERNATIONAL TREATIES AND INSTRUMENTS

1948
Universal Declaration of Human Rights (UDHR)

1950
European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

1951
United Nations Convention Relating to the Status of Refugees

1965
International Convention on the Elimination of All Forms of Discrimination (ICERD)

1966
International Covenant on Civil and Political Rights (ICCPR)
International Covenant on Economic, Social and Cultural Rights (ICESCR)

1968
Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

1969
American Convention on Human Rights

1976
The OECD Guidelines for Multinational Enterprises

1977
The ILO Tripartite Declaration of Principles Concerning Transnational Enterprises and Social Policy

1979
Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

1981
African Charter of Human Rights
1984
Convention against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment (CAT)

1989
Convention on the Rights of the Child (CRC)

1992
Rio Declaration on Environment and Development

1993
Principles relating to the Status of National Institutions (The Paris Principles)

1998
ILO Declaration on Fundamental Principles and Rights at Work

2000
Maastricht Guidelines on Violations of Economic, Social and Cultural Rights
United Nations Global Compact (UNGC)

2003
Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

2006
Convention on the Rights of Person with Disabilities (CRPD)

2007
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

2008
UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights (the Framework)

2011
UN Guiding Principles on Business and Human Rights