

Liability of Transnational Corporations for Indigenous Peoples Human Rights Violations



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ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFRODAD	African Forum & Network on Debt & Development
ATCA	Alien Tort Claim Act
CAT	Convention Against Torture
CBD	Convention on Biological Diversity
CCPOP	Chad-Cameroon Pipeline & Oil project
CEDAW	Convention on Elimination of Discrimination against Women
CERD	Convention on Elimination of Racial Discrimination
COTCO	Cameroon Oil Transportation Company
CRC	Convention on the Rights of Children
CRMW	Convention on the Rights of Migrant Workers and the Members of their Families
CSR	Corporate Social Responsibility
GDP	Gross Domestic Product
ECOSOC	United Nations Economic and Social Council
ECHR	European Court of Human Rights
FDI	Foreign Direct Investment
FOE	Friends of the Earth International
HRC	Human Rights Committee
ILC	International Law Commission
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil Cultural and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IFC	International Finance Corporation
ILO	International Labor Organization
IPP	Indigenous Peoples' Plan
IPRA	Indigenous Peoples Rights Act
IWGIA	International Working Group on Indigenous Affairs
MNC	Multinational Corporation
NGO	Non-Governmental Organization
NYU	New York University
OECD	Organization for Economic Co-operation and Development
OEDCR	Operational Evaluation Department Country Evaluation and Regional Relations
OHCHR	Office of High Commissioner on Human Rights
SRSG	Special Representative of the United Nations Secretary-General
TNC	Transnational Corporation
TNOC	Transnational Oil Company
TOTCO	Tchad Oil Transportation Company
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development

UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNHCHR	United Nations High Commissioner on Human Rights
UNPFII	United Nations Permanent Forum on Indigenous Issues
US	United States of America
WGIP	Working Group on Indigenous Population
WW II	World War Second

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ABSTRACT

It was around the beginning of November 2006. I was reading a book by Prof. Koen De Feyter *World Development Law* where I first see the term ‘indigenous peoples’. Two of the cases summarized in the book had taken my attention, i.e., the case of *Mayagna (Sumo) Awas Tingni* indigenous community of Nicaragua, and *Ogoni* people of Nigeria.

The cases were brought at different regional human right courts of America and Africa, respectively. However, both cases involved TNCs complicity in human rights violations of indigenous communities namely, Sol del Caribe S.A. (SOLCARSA) in Nicaragua, and Royal Shell in Nigeria. Both allegations were also brought against the respective states. I keep wondering why the TNCs escape liability which becomes the basic research question for this thesis.

The thesis is a critical legal analysis of TNCs human rights liability from the perspective of indigenous peoples human rights violations. The study analyses the problematic situation of TNCs liability in existing state-centered system of international law. It observes the particular weakness of the current system of international law when the human rights victims of TNCs happened to be indigenous peoples.

The study also analyses the effectiveness of different attempts made by international organization, corporations and civil society groups towards imposing human rights liability on TNCs. Despite the lack of legal bite and enforceability, the study finds the lack of sensitivity to indigenous peoples human rights in such emerging regulatory and voluntary initiatives which are categorized broadly as soft-laws, self-regulations and social initiatives.

This study argues for a binding international law on TNCs as an ultimate solution, but it also equally argues for increased concern to indigenous peoples human rights as an indispensable issue in corporate human rights discourse. In this regard the thesis offers some general and transitional policy measures.

CHAPTER 1. MAPPING THE STUDY

1.1. Introduction

Human rights have been the concern of the international community for half a century. However, different strategies have developed through time to achieve the ultimate goal of human rights protection. Particularly, in the last few decades, due to the increased global reach of Transnational Corporations [hereafter TNCs], the focus of human rights has expanded from abusive governments to business enterprises. The focus of human rights has also expanded from individuals to collective rights. In this regard the human rights of indigenous peoples is a remarkable dynamic in the realm of international law. This thesis is, thus, the intersection point between these two dynamics of international law. What is the situation of indigenous peoples human rights in the context of TNCs business operation in lands and territories occupied by indigenous peoples is examined in this study.

While not all TNCs are abusive of human rights, some communities including indigenous peoples are more susceptible than others. However, if TNCs are implicated in human rights violations of indigenous peoples, the threshold question will be is the current international law capable of regulating such human rights abusive acts of TNCs.

In fact, international law for long has been dealing with the activity of states and not private actors including TNCs. it does not, however, mean that private actors have never been regulated by international law. It is rather about the mechanics of international law which imposes direct human rights obligations on states and the later intern regulate the private actors operating in their jurisdiction. What is wrong then with system of international law when it comes to regulating TNCs is the milestone question considered in this study.

On the other hand, a number of stakeholders including intergovernmental organizations such as the United Nations (UN), International Labor Organization (ILO) and Organization for Economic Co-operation and Development (OECD); human rights Non-Governmental Organizations (NGOs) such as Human Rights Watch; the academia; consumers; affected communities such as in Ecuador, Burma and Indonesia; and TNCs

themselves have taken various actions. Such actions range from imposition of human rights norms on TNCs – reporting of human rights abuses – researching on theoretical and philosophical challenges of imposing human rights liability on TNCs – boycotting of products – initiating law suits brought in United States (US) under the Alien Tort Claims Act (hereinafter ATCA) and developing TNCs codes of conduct as a means of self-regulations. How is the effectiveness of such various efforts in establishing TNCs human rights liability in general, and in satisfying the human rights protection claim of indigenous peoples in particular are the issues considered in this study. Nonetheless, emphasis has paid on the normative efforts than social measures.

This chapter, thus, begins by framing the research problem, research questions and the hypothesis, and goes on indicating the methodology used. Then it defines the objectives and describes the relevancy of the study. Finally, it narrows down the focus of the study, and gives recognition to former works in the area through literature review. Finally, the chapter ended up by showing the structure of the thesis and highlighting the main issues approached in each chapter.

1.2. Framing the Issue

Globalization has manifested itself as a leading economic policy following the fall of the Berlin wall, the end of the Cold War, and the virtual disappearance of socialism.¹ For the purpose of this study ‘globalization’ refers to “... the process by which powerful economic interests seek to expand their reach beyond national borders, moving towards global reach”² or “the accelerated internationalization of the world economy”.³ Both definitions highlight two important social processes of ‘internationalization’ and ‘privatization’ in which international business has accelerated. TNCs became the main global actors by taking control of businesses which need big capital investment and formerly controlled by governments.⁴ The accelerated force of globalization was also supported by factors such as trade liberalization, the rapid increase of stakeholders and

¹ Chandler. 2003: 22

² Eide. 2000: 27

³ Chandler. 2003: 22

⁴ See Salazar. 2004: 124-126; see also Sullivan. 2003: 22

the growth on communication technology which all played great role in facilitating TNCs driven economy.⁵

Besides the lack of a precise definition and consistent choice of terminology; the term ‘transnational corporations’ is preferred here being aware of the other terms such as ‘multinational corporations’, ‘international companies’, ‘multinational enterprises’, ‘global corporations’ primarily because it has long been the term of choice within the system of the UN. I also adopt the definition provided by the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights [hereafter UN Norms] that a TNC is “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.”⁶

The activities of TNCs are affecting, both positively and negatively, every part of individuals’ life and in many cases, particularly in the south,⁷ to the same extent or more than the activities of governmental entities. This study focuses on indigenous people as one of the most vulnerable groups for human rights abuses by TNCs particularly of those engaged in the extractive sector. This does not mean that TNCs implication in human rights violations are limited to sectors that have received the most attention to date such as extractive and manufacturing sectors. As indicated by the findings of a very recent study made by Human Rights Watch, “the activities of all types of businesses – large and small, domestic and international, public and private – in all sectors can implicate human rights.”⁸ Nor does it mean that indigenous peoples are the only victims of TNCs. TNCs abuses vary from labor rights such as the use of slave labor in Burma, child labor in

⁵ See Salazar. 2004: 124-126

⁶ UN Norms. 2003. Parag. 20

⁷ The ‘North – South’ division in this study is used as analytical concept which categorize the entire developed world as North and all the so-called the developing world in the South irrespective of the factual geographical location. Terms such as developing and developed countries are also used interchangeably. See for detail understanding of the North-south discourse Hall. 1992: 276-330

⁸ See Human Rights Watch. 2008: 48-49

Malaysia, dangerous working condition in Asia, and intimidation of trade unionists in Costa Rica; to consumers' rights abuses such as the baby milk and cigarettes.⁹

The transnational nature and their big capital involvements are, however, the most significant characters and sources of the current regulatory challenge. According to the 2000 UN Conference on Trade and Development (UNCTAD) report, there were 33,000 parent TNCs having about 690,000 foreign affiliates.¹⁰ In six years, they have reached 77,000 with more than 770,000 foreign affiliates.¹¹ This number has increased very speedily in a year time and reached 78,000 parent TNCs with 780,000 foreign affiliates in 2007.¹² This highest extraterritorial expansion and global reach of TNCs poses a regulatory challenge that states-based classical international law remains ineffective to govern TNCs.

TNCs expansion has also a particular North – South trend, and such premise specially holds true with regard to TNCs engaged in the extractive industrial sectors. As pointed out by UNCTAD, “some developing and transition economies are among the main producers and net exporters of various minerals, while developed countries and fast-growing emerging economies are the major consumers and importers.”¹³ An increased share of developing and transition economies in hosting TNCs in the extractive sectors has also observed in the last two decades.¹⁴ The implication is that many TNCs are operating in lax regulatory regimes of the south where human rights in general have got little attention let alone specific rights of indigenous peoples.

The relative flow of Foreign Direct Investment (FDI) also follows a similar North – South pattern. According to UNCTAD report, despite the rising of south – south FDI flows, TNCs from developed countries remained the leading sources of FDI accounting for 84% of the global out flows; US go in front and followed by European states notably France, Spain and United Kingdom (UK).¹⁵ The high demand of FDI in host states, many

⁹ See a comprehensive analysis of different human rights impacts of TNCs such as rights to security of the person, economic and social rights, civil and political rights, labor rights etc in Human Rights Watch. 2008.

¹⁰ UNCTAD. 2006: 6

¹¹ UNCTAD. 2006: 1-2

¹² See UNCTAD. 2007: 11

¹³ UNCTAD. 2007: 23

¹⁴ See UNCTAD. 2007: 24

¹⁵ UNCTAD. 2007: 8-13

of which are developing countries, together with other detrimental factors such as the debt crisis and bad-governance, has the implication that many governments may give priority to TNCs investment even at the expense of human rights.

On the other hand, some TNCs happen to have more economic control than political entities. For instance, the 2003 sales of the world's biggest corporations Wal-Mart (US\$256 Billion) was larger than the economies of all but world's thirty richest countries.¹⁶ Its sales per day are also greater than the Gross Domestic Product (GDP) of thirty-six countries.¹⁷ Hence, TNCs happened to be powerful economic actors than states, and taking in to consideration the current fusion of power in economy with power in politics,¹⁸ TNCs become even powerful political actors. This great economic power of TNCs which even exceeds the economy of many developing countries has posed a particular challenge in the regulatory and bargaining power of many developing countries which host TNCs' investment in their territories. Hence, even if developing states happened to be willing to protect the human rights of their people including indigenous peoples human rights, their capability to effectively regulate such powerful TNCs is put under scrutiny.

1.3. Hypothesis and Research Questions

The primary hypothesis of the thesis is that the current international law has little space to regulate the human rights behaviors of TNCs which is a contemporary challenge on the very essence of the international human rights framework. It then argues that for lack of sensitivity of emerging regulatory regimes towards human rights of indigenous peoples, they have left of little redress. Based on this hypothesis, 'where is the liability of TNCs for their complicity in human rights violations of indigenous peoples?' is the central research question of the thesis. However, it also raises the questions that: what is the legal status of indigenous peoples human rights under international law? What is the human rights impact of TNCs on indigenous peoples? Do TNCs have human rights liability under international law? Are the emerging regimes capable of regulating TNCs and how sensitive they are towards indigenous peoples human rights?

¹⁶ Alston. 2005:17

¹⁷ Alston. 2005:17

¹⁸ See Stephens. 2002: 45

1.4. Methodology

The study primarily builds on regress legal analysis of existing international human rights system with regard to TNCs liability and an extensive literature review of many articles of legal scholars published in different human rights journals and books. For greater access, different universities and international organizations, public libraries, databases and internet sources are consulted. Among from the list are: UN Head Quarters New York Library, New York University School of Law, New York Public Research Libraries, and Pennsylvania, Drexel University are consulted. Access to Drexel and all the New York libraries is the product of my exposure to New York through the internship programme which I participated at the UNPFII.

Second, the thesis is supported by different discussion and working papers of consecutive four conferences held recently in 2006 on TNCs liability for human rights, and reports of high officials such as John Gerard Ruggie – the SRSG for Business and Human Rights; and Rodolfo Stavenhagen – UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples.

Third, the thesis is also benefited from my participation in a seminar made with the Special Rapporteur Stavenhagen held at the UN Head Quarters, New York during the duration of my internship at UNPFII.

Last but not least, this thesis is not a product of pure theoretical discussions. Rather three empirical cases are analyzed for better understanding of the human rights cost of TNCs and nature of TNCs complicity in indigenous peoples human rights violations.

1.5. Objectives & Relevancy

The thesis primarily intended to indicate the short hands of contemporary system of international law in imposing human rights liability on TNCs. It then aims to indicate the complexity of the problem when the human rights danger of TNCs happened to be on indigenous peoples whose rights are often invisible in the state system. Finally, the study has intended to indicate the lack of concern for indigenous peoples human rights in the global effort towards establishing human rights liability of TNCs.

This study is significant in bringing to the fore the issue of indigenous peoples human rights and TNCs as an agenda that needs a particular concern in the whole effort of establishing corporate human rights liability. It is a small contribution in the whole big debate of corporate liability for human rights; however, it is directly relevant to all stakeholders in the area.

First, it strengthens indigenous people struggle for recognition as a distinct people and support their call for collective human rights protection through analyzing international human rights standards of special importance to indigenous peoples. Second, it reminds states of their repeated failure of discharging their responsibility of human rights protection and often their implication in human rights violations of their people in collision with private actors, and gives a wake up call for better commitment. Third, the study shows the multidimensional human rights costs of TNCs operation on indigenous peoples land and territory and hence gives a warning of no more tolerance for their implications. Fourth, the study gives a new insight of advocacy for NGOs, organizations and individuals working on the field of corporate human rights responsibility through emphasizing the particular human rights threat indigenous peoples face. Fifth, through analyzing the inefficiency and ineffectiveness of the current international legal system to impose human rights liability on TNCs, the study reflects the need for new dimensions of international human rights liability which can go beyond a state and address directly TNCs. Last, this study is a contribution for all human beings who believe in greatest protection of human rights and equal respect for all.

1.6. Focus of the Study

This study cannot pretend to be comprehensive covering all the issues related to the liability of TNCs towards the human right violations of indigenous peoples as it is limited both in time and space. Both the issue of TNCs liability on the area of human right and the human rights of indigenous people as collective rights are very complex issues demanding a dynamic international law and international human rights law. Hence, it will be difficult if not impossible to exhaust these new developments in this thesis.

To begin with, as indicated in the title the subject of the study focuses on indigenous peoples human rights issues, rather than human rights in general, and only on TNCs

excluding any other forms of corporations or business enterprises. Second, except some domestic and regional law developments considered to demonstrate and/or support the issue at hand, the theoretical aspect of the study is restricted to the domain of international law, and international human rights law. My approach focuses on international law because TNCs are current international actors operating in a minimum of more than two countries' jurisdiction, and the domestic law of one country is inadequate to govern TNCs. Hence, it is necessary to have international standards for international actors is the idea behind it.

Third, despite the lack of consensus regarding whether criminal, civil or administrative liability is the best way of establishing corporate liability,¹⁹ this thesis focuses only on civil liability aspect of TNCs excluding the rest. Last, unlike the case of 'corporate responsibility' which refers to "any attempt to get corporations to behave responsibly on a voluntary basis, out of either bottom-line consideration",²⁰ this study focuses on 'TNCs liability' interchangeably used with 'accountability' in some literatures. Corporate responsibility is a broad ethical theory consisting of core issues of good governance, good citizenship and social responsibility.²¹ Nevertheless, the theory of 'corporate liability' or 'accountability' analyzes the existence of a legal basis of obligations which will entail legal remedies in case of breach.²² TNCs liability for their complicity in violations of indigenous peoples human rights is analyzed in this thesis under such legal terms.

1.7. Literature Review

Both corporate liability for human rights and the human right of indigenous people are relatively new subjects in the international human right arena developed in the 1970s. In fact since the 1920s when the movement on corporate responsibility for human rights began, it has counted more than half a century.²³ Nevertheless, the first strong wave of corporate liability initiatives are made in the 1970s as reflected by the emergence of OECD Guideline for Multinational Enterprises (1976); ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977); and the UN

¹⁹ See different lines of arguments in this regard in Ruggie. 2006: 18-19

²⁰ Clapham. 2006: 195

²¹ See the detail in Addo. 1999: 19-22

²² Clapham. 2006: 195

²³ See Blumberg. 2000 – 2001: 297

Draft Code of Conduct on Transnational Corporations (1986). The advocacy in the 1970s and even in the early 1990s was mainly focused on the impact of corporations on the physical environment, labor and employment rights rather than their impact on the human rights of communities and peoples living in the areas of operation.²⁴

In the last decade of the 20th century, however, as part of the ‘positive engagement of business’, human rights of affected communities has become the agenda.²⁵ This expansion of paradigm can mainly be the result of increased concerns on the impacts of globalization, and the record of high profile devastated human rights abuses such as Shell operation on *Ogonie* land Nigeria, Exxon in Myanmar Burma, Texaco in *Oriente* Ecuador, Freeport-McMoran in Papua New Guinea Indonesia, etc. The involvement of big human right NGOs such as Amnesty International, Human Rights Watch and Survival International in reporting such devastated human rights violations by TNCs has contributed in exposing TNCs’ human rights behavior to the general public. Highly visible court cases have also appeared at different regional courts and national jurisdictions such as US and UK. The *Awas Tingni* Case (1998) brought at the Inter America Court of Human Rights, the *Ogoni* case (1996) at the African Commission on Human and peoples Rights and ATCA cases are notable once.

Following company’s disaster lots of researches and scholarly articles also flourish dealing on the nature and scope of liability of TNCs for human right protection and promotion. The whole volume of *Human Rights Standards and the Responsibility of Transnational Corporations* edited by Addo (1999), *Liability of Multinational Corporations under International Law* edited by Kamminga & Zia-Zarifi (2000), *Human Rights and Private Enterprise: With an Emphasis on Companies Operating Abroad* edited by Stokke et al (2000), *Transnational Corporations and Human Rights* edited by Frynas & Pegg (2003) and very recently the volume on *Transnational Corporations and Human Rights* edited by De Schutter (2006) provide rigorous legal analysis on corporate

²⁴ See, for instance, the emerged conventions such as the International Convention on Civil Liability for Oil Pollution Damage which entered in to force by June 19, 1975 which is replaced by its 1992 Protocol as amended in 2000, European Union Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment of June 21, 1993, and African Union Bamako Convention on the Ban of Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa which opened for signature by June 30, 1990. See also Chandler. 2000: 7-8

²⁵ See Chandler. 2000: 8-10

liability for human rights violations and problematize the TNCs liability agenda under international law with no particular attention to indigenous people human rights. Others such as the volume on *Human Rights and the Oil Industry* edited by Eide et al. (2000) mentioned indigenous people's victimization just to illustrate the issue at hand.

The second half of the 1990s is also considered as the revival of the initiative on corporate liability for human rights due to the emergence of improvements in international instruments such as the Revised 2000 OECD Guidelines, and two international developments, namely, the Global Compact (1999) and the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises (2003).²⁶ Still the debate on corporate human rights responsibility is on-going at different national and international forums.²⁷

On the other hand, researches on human rights of indigenous peoples flourish mainly since the 1990s. *Indigenous peoples, the United Nations and Human Rights* edited by Pritchard (1998); Roulet's (1999) *Human Rights and Indigenous Peoples: A Handbook on the UN System*; Thornberry's (2002) *Indigenous Peoples and Human Rights*; *International Human Rights in the 21st Century: Protecting the Rights of Groups* edited by Lyons & Mayall (2003), and Anaya's (2004) *Indigenous Peoples in International Law* are among the remarkable research developments dealing on the human right of indigenous peoples as new dimension of group rights under international human rights law. Nevertheless neither of them has paid emphasis on the challenging situation of indigenous people human rights and TNCs business operation.

As I have learned from the intensive study I made on the thematic issues of different sessions of the United Nations Working Group on Indigenous Populations (UNWGIP) and UNPFII during my internship in the later; the impact of large-scale or major

²⁶ See De Schutter. 2006: 9-10

²⁷ Just to mention some: four international workshops were convened by the year 2006 alone, the 1st held at Chatham House (The Royal Institute of International Affairs) in London (15 June) on 'the potential uses of extraterritorial legislation and civil litigation against TNCs'; the 2nd convened in Oslo hosted by the Council of Ethics for the Norwegian Government Pension Funds (23-24 Oct.) 'on political, legal and ethical perspectives on corporate complicity in human rights violations'; the 3rd held at Brussels (3 & 4th of Nov.) on 'extraterritorial territorial legislation as a means to improve the accountability of transnational corporations for human rights violations', and the 4th convened at New York university school of law (17 Nov.) on issue of 'attributing human rights responsibilities to corporations under international law'. The findings are summarized in Ruggie. 2006.

development projects on the human rights and fundamental freedom of indigenous peoples have been repeatedly pointed out by indigenous representatives. There are also country based reports made by the Special Rapporteur Stavenhagen – on major development projects and their impact on the lives and livelihood of indigenous peoples as well as the environment.²⁸

Hence, while the debate on human rights liability of TNCs is still on-going, this study argues that indigenous peoples are the disproportionate bearers of the human rights cost of TNCs; and hence international human rights law should give special concern to the rights, special situations and needs of indigenous peoples in relation to TNCs liability. Moreover, the study is a legal analysis and a critical appraisal of soft law and voluntary initiatives in the area from the point of view of indigenous peoples human rights. In this regard the study emphasized the lack of sensitivity of emerging regulatory regimes to indigenous human rights and recommend indigenizing the emerging regulatory mechanisms.

1.8. Thesis Structure

The thesis has structured in to six chapters. While this chapter gives a general highlight about the whole thesis; the second chapter provides conceptual understanding about human rights and their special nature, and the concept of ‘indigenous peoples’. It also investigates the status of indigenous peoples human rights under the international legal framework. The third chapter is about TNCs implication in human rights violations of indigenous peoples, and the nature of alleged violations. The case of Texaco oil operation in the Ecuadorian Amazon of the *Oriente*, TVI Resource and others mining TNCs operation in Mt. Canatuan – the indigenous Subanon sacred place in Philippines, and Chevron et al. oil and pipeline project in Chad-Cameron crossing the indigenous land of the Bygali (Pygmy as often called by others) are analyzed as specific examples of TNCs’ implications in human rights violations of indigenous peoples.

The fourth chapter addresses the contemporary regulatory challenge posed by TNCs and shows the more defective nature of the existing state-based international legal system

²⁸ See Stavenhagen Reports. On-line available at: http://ap.ohchr.org/documents/sdpage_e.aspx?m=73&t=9
Visited 30 Mar. 2008

when it comes to indigenous peoples human rights protection. It examines, on the one hand, host states ability to control TNCs, and in contrast considers the effectiveness of extraterritorial legislations from home states taking ATCA of US as an example. It also critically analyzes unjust enrichment claims and private law approach as alternative basis of TNCs liability.

The fifth chapter questions the effectiveness and adequacy of the current global efforts, which are categorized broadly as soft-laws, self-regulations and social-initiatives; and questions the sensitivity of such emerging regulatory regimes towards indigenous peoples human rights. Finally, conclusions are drawn and policy considerations are provided both in general terms as a long term proposal and transitional measures as a short term redress.

CHAPTER 2. THEORETICAL FRAMEWORK OF THE STUDY

Human rights are expressed in general terms as inherent rights of all individuals and peoples reflecting their universality, indivisibility and interdependency. At times, however, human rights norms refer to specific groups of population and protect the rights of such groups only. This is the case, for instance, in human rights of women, children, migrant workers, minority groups, indigenous peoples and so on.

As one can learn from the very title of this thesis, ‘indigenous peoples human rights’ is the basic concepts on which the research evolved. However, the very concept of the general ‘human rights’ and their distinguishing characters should be clear to deal with the specific human rights of indigenous peoples. Hence, this chapter first asks what human rights are and what distinguish human rights from other rights. Then it goes on the subjects of the research and raises the questions that who are indigenous people, and what makes them different from others such as minority groups. And finally it examines if there exists a so-called ‘indigenous peoples human rights’ under international law.

2.1. Conceptualizing Human Rights

2.1.1. The Notion of Human Rights

As enshrined in the preamble of the Universal Declaration of Human Rights (UDHR), human rights are inherent to human beings and hence can neither be granted nor taken away by any authority whatsoever. However, human rights have been considered as matters of domestic law until the 20th century when they attract international concern of states. Hence, for the sake of enforceability and legitimacy human rights has got legal recognition through different international human rights instruments.

The first international human rights law initiative made in 1946 with a mandate extended to the United Nation Commission on Human Rights (UNCHR) to prepare a Universal Declaration inspired by, among others things, the desire to establish a comprehensive system for the promotion and protection of human rights, and to develop a universally

valid definition.²⁹ In the course of two years the international community has reached agreement on the basics of human rights and came up with the UDHR.

The UDHR, which consists of basic list of fundamental rights and freedoms, is an authoritative interpretation of the term ‘human rights’ in the UN Charter.³⁰ Despite the fact that several provisions of UDHR have achieved the status of customary international law and therefore binding on all states, the UDHR being a declaration is non-binding instrument. The UDHR serves as a basis for the 1966 twin Covenants: International Covenant on Civil Cultural and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR), which together with UDHR and the Optional Protocol to ICCPR called the International Bill of Rights.³¹

Needless to say, the International Bill of Rights were the beginning of binding international human rights law-making process in the UN system. While Subsequently supplemented by a number of international human rights covenants, declarations and ‘soft-laws’;³² ICCPR, ICESCR, Convention on Elimination of Racial Discrimination (CERD) of 1965, Convention on Elimination of Discrimination against Women (CEDAW) of 1979, Convention Against Torture (CAT) of 1984, Convention on the Rights of Children (CRC) of 1989, and Convention on the Rights of Migrant Workers and the Members of their Families (CRMW) of 1990 are the principal and most used Human Rights Conventions in the realm of international human rights law.³³

The term ‘human rights’ in this study, thus, used as a legal concept referring to the sum of civil, political, economic, social, cultural and collective rights laid down in international human right instruments.³⁴ The emphasis of this study on human rights is also not an arbitrary choice rather justified by the distinguishing characteristics of human rights, as discussed below, that make human rights free to be enjoyed by all human beings, and so are indigenous peoples.

²⁹ See the detail in Nowak. 2003: 75-77

³⁰ Nowak. 2003: 76

³¹ See the detail on the historical codification of these rights in Nowak. 2003: 79-83

³² See all the conventions, Declaration and other relevant human rights instruments in UNHCHR web page www.ohchr.org

³³ See www.ohchr.org

³⁴ See the philosophical and descriptive definition of human rights in Nowak. 2003:1

2.1.2. The Basic Characteristics of Human Rights

Even if the international community has reached agreement on the basics of human rights within two decades, identifying the characteristics was a forty years long journey. In the 1993 Vienna World Conference human rights are declared as ‘universal’, ‘indivisible’ and ‘interdependent’ and ‘interrelated’.³⁵ Based on these basic characteristics the ‘fundamental’ and ‘inalienable’ natures of human rights are deducted and serve as additional distinguishing factors. All these six characteristics are yet far from consensus but still stand out through criticisms.³⁶

1. *The Universality of Human Rights*: It means in the one hand that human rights are equally possessed by all human beings as envisaged in the UDHR that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁷ On the other hand, the universality principle is a reflection of the universal normative values recognized by roughly 200 countries of the world which had participated in the Vienna World Conference.³⁸
2. *The Indivisibility, Interrelated and Interdependency of Human Rights*: It means that human rights are so connected in nature and the neglect in one category of such rights has detrimental impact on others. Hence, it calls for “a fair and equal” treatment of all human rights in “the same footing, and with the same emphasis.”³⁹
3. *The Fundamental Nature of Human Rights*: Human rights are fundamental in the sense that they are of basic needs, as opposed to ‘mere wants’, which cannot be denied by any person or institution.⁴⁰ They are also fundamental as they set only the minimum standards which should be met by all.⁴¹

³⁵ Vienna Declaration and Programme of Action. 1993. Art. 5

³⁶ See Nowak. 2003: 3

³⁷ UDHR. 1948. Art. 2. Currently the universality of human rights is challenged by the theory of ‘cultural relativism’ according to which human rights should be cultural specific rather than universal. See this debate in Weston. 2006: 27-38

³⁸ Nowak. 2003: 3

³⁹ Vienna Declaration and Programme of Action. 1993. Art. 5

⁴⁰ Sullivan. 2003: 71-72

⁴¹ Sullivan. 2003: 72-73

4. *The Inalienable Nature of Human Rights*: Human rights exist independent of a codification by a specific state, and this characteristic distinguishes them from positive laws which are subject to the wills of the legislator to exist.⁴² In addition, the inalienable nature of human rights has two practical implications that any authority cannot take away these rights from their possessors and also any possessor of such rights can not legally give away them by consent.⁴³

These set of basic characteristics distinguish human rights from other values and justify their normative power. In general, human rights are high-priority claims that every human being can fairly claim from other people, social institutions or government as a matter of justice.

2.2. Identifying the Subjects of the Study

While the first part of this section devoted to define who indigenous peoples are so as to avoid an ideological confusion with either minority or tribal groups; the second part will explore if there is a legally recognized indigenous human rights in the realm of international law as the whole theory of ‘liability’ cannot stand tenable without the pre-existence of legally recognized human rights.

2.2.1. Describing Indigenous Peoples

Worldwide, indigenous peoples account over 370 million, divided in to at least 500 groups and dispersed in more than 70 countries.⁴⁴ They occupy only 20% of the world’s land surface but consist of and nurture about 80% of the world’s cultural and biological diversity.⁴⁵ Indigenous peoples live in all continents of the world engaged in various means of livelihoods from reindeer herders in the Arctic to traditional hunter-gatherers in forests of Amazon and Congo to subsistence farmers in many Latin American countries and the Pacific Cost to pastoralist in many African countries.⁴⁶ Despite their diversity they have considerable similarity in the ‘structural positions’ they hold within very different nation-states. As discussed by Saugestad – Professor and Head of Department of

⁴² Sullivan. 2003: 73-74

⁴³ Sullivan. 2003: 73-74

⁴⁴ IWGIA. 2006: 1

⁴⁵ See University of Minnesota Human Rights Center. 2003.

⁴⁶ See IWGIA. 2007.

Anthropology at University of Tromsø – indigenous peoples shared in common the fate of marginalization, discrimination, dispossession and neglect or in short the history of injustice.⁴⁷

Besides its universal application,⁴⁸ there is no global consensus about a single final definition of the term ‘indigenous peoples’. This is not only due to lack of agreement between states but also is the preference of indigenous representatives as a precise definition would be disadvantage than advantage.⁴⁹ Considering the diversity of indigenous peoples any specific definition may have the effect of excluding some indigenous groups from the category.⁵⁰ A strict definition may also serve as excuse for governments not to recognize indigenous peoples in their jurisdiction.⁵¹ Hence, no legal definition of indigenous peoples is either necessary or desirable remains a prevailing view.⁵²

To date the one proposed by José Martínez Cobo – the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities – on the first-ever UN study concerning indigenous peoples: *Study of the Problem of Discrimination and Protection Against Indigenous Populations* is the most comprehensive and most cited description of indigenous peoples. According to Cobo:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invention and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continues existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁵³

Cobo’s description, thus, came up with the following characteristics as measures of ‘indignity’ emphasizing special attachment to land as a primary marker: historical

⁴⁷ See Saugestad. 2001: 46-47

⁴⁸ In fact different terminologies referring to these group of peoples used in different parts of the world such as ‘Aboriginals’ in Australia, ‘First Nations’ in Canada, ‘Native Indians’ in USA; however within the system of the United Nations and other international organizations working on indigenous issues such as ILO, ‘indigenous peoples’ is the preferred term that gets uniform application at the international fora.

⁴⁹ Meijknecht. 2001: 73

⁵⁰ Meijknecht. 2001: 73

⁵¹ ACHPR Report. 2005: 87

⁵² ACHPR Report. 2005: 87

⁵³ Cobo. 1986. Add. 1-4.

continuity, distinctiveness, non-dominancy and cultural preservation. Analytically speaking, thus, the term ‘indigenous peoples’ refers to both the descendants of the native inhabitants of a country or region as well as those people who live in the above prescribed positions but whose ancestors do not necessarily pre-date other inhabitants of a given county or region. These elements are also fundamental in the sense that they help to distinguish indigenous people from other minority and tribal groups within a state.

2.2.2. Indigenous Peoples v. Minority Groups

The concept of indignity both in its literary and analytical understanding is less complicated in the context of those states where colonialist remain there and still control the main economic, political and social powers as is the case in North America, Australia, and even in some Central and South American Countries. It is also less challenging issue in less diversified societies such as Scandinavian countries. However, due to the highest variety of tribalism and ethnicity, and taking in to consideration the post-colonial society where the colonists left the continents and the rest of the people were there before colonialism, who are indigenous peoples in the African and Asian context is the most appealing issues in indigenous discourse.⁵⁴

Often arguments forwarded from the Asian and African group suggest that the term ‘minorities’ is more appropriate than ‘indigenous peoples’ particularly in the context of the two continents.⁵⁵ Even if distinguishing minorities from indigenous peoples and vice versa is not an easy task; still there are remarkable differences between the two in their defining elements as well as in the rights they are aspiring to suggesting that we have to stick to the term ‘indigenous peoples’.

Primarily, while indigenous people have historical continuity from their ancestors to present, which can be manifested through occupation of ancestral lands, or at least of part of them; common ancestry with the original occupants of these lands; culture in general, or in specific manifestations and so on;⁵⁶ minorities may not have such connections. Indigenous peoples are also first peoples in the areas where they reside in the sense of

⁵⁴ See the issues concerning the concept of ‘indignity’ in Africa in Saugestad. 2001: 52-54 and the controversy in Asia in Kingsbury. 1998: 416-419

⁵⁵ See ACHPR Report. 2005: 95

⁵⁶ See UNPFII. 2004: 2

time immemorial or at least prior to the majority living there, while immigrant group of people in a certain country may constitute a minority regardless of their time of arrival.

Second, the socio-economic and political non-dominancy within the majority system can be a common character of both indigenous peoples and minority groups. Since minority is always a relative term which refers back to a majority; non-dominancy in terms of numerical values, i.e., small in number suffices to be a minority.⁵⁷ However, indigenous peoples vary from numerically small in number like the case in Argentina (3-5%), Colombia (3.4%) to the majority in Guatemala (60%) and Bolivia (62%).⁵⁸ Regardless of their number they all are non-dominant in relation to the structural position they assume in the state system.

Third, the 'distinctiveness' criterion for minorities is related to ethnic, religious or linguistic nature.⁵⁹ However indigenous people are distinct due to their special way of life which is prominently related to their special attachment to the ancestral land and territory.⁶⁰ Distinctiveness should be both objective and subjective, i.e., the peoples should identify themselves as indigenous and also considered distinct by others.⁶¹ It has also internal character in that an individual who identify himself/herself as belonging to a particular indigenous group should also be accepted by that group as such.⁶²

Besides its theoretical significance, the distinction between indigenous peoples and minority groups serves a legal purpose. Qualifying a group as a minority instead of indigenous peoples has different legal consequence under international human rights law. For instance, while indigenous people claim collective human rights as a people, the claim of minority groups as reflected in the wordings of some articles of ICCPR as

⁵⁷ Even though the purely numerical criterion for minorities is controversial, it is generally accepted as a significant element so long as it is measured in terms of the entire state rather than a single province where they reside. See the detail in Meijknecht. 2001:77-79; see also Fresa. 2000: 2-4

⁵⁸ See IWGIA. 2007.

⁵⁹ See Declaration on the Rights of Persons Belonging to National or Ethnic or Religious and Linguistic Minorities. 1992.

⁶⁰ See the Preamble of UNDRIP. 2007. While the notion of special historical attachment to the land is a vital element even in the etymology of the word 'indigenous' itself, it has posed a particular challenge to 'indignity' in the African context which lead to the claim that all Africans are indigenous. See Gilbert. 2006: xv (15) about the origin of the term 'indigenous'. See also the detail of the debate in Africa in Saugusted. 2001: 52-54

⁶¹ According to ILO-169 Art 1(2) Self identification is considered as fundamental criterion for indignity and to benefit from the convention. See the detail discussion on this criterion in Meijknecht. 2001: 87-89.

⁶² UNPFII. 2004: 2

“rights of persons belonging to minorities” is individualistic.⁶³ Besides, while the basic claim of indigenous peoples is to continue as a distinct people (separatist policy),⁶⁴ the claim of minority groups is to gain *de facto* and *de jure* equality with the majority and to integrate within the majority (integrationist approach).⁶⁵

The whole analysis, however, is not to indicate the existence of clear cut boundary between the two. In fact there is the possibility of overlapping. Some indigenous peoples are minorities like the case of the Sámi in Scandinavian and vice versa. But not all minorities are indigenous peoples or not all indigenous peoples are minority groups. The strict application of the defining elements to categorize groups as indigenous peoples or minorities would have a potential danger, just like that of a strict definition of indigenous peoples, of excluding some groups from the category. However, this theoretical analysis is useful to protect the misuse of the discourse on indigenous peoples by other groups who do not so qualify. Moreover, as Scheinin – Professor of Constitutional and International Law and Director of the Institute for Human Rights, Åbo Academy University – argued “... the international community – which still today is primarily constituted of states – will not grant far reaching rights to indigenous peoples unless the scope of application of the legal concept of indigenous peoples is at least reasonably precise.”⁶⁶

In general, as emphasized by Cobo’s definition nativity by itself is not the most important element in the analytical use of the term ‘indigenous peoples’. It is rather the special attachment to land and the distinctiveness criteria, the later also emphasized by Art.1 of ILO Convention No.169 (ILO-169), which are the basic features of indignity. Besides all the elements of indignity are inextricably linked to their claimed rights to continue ‘traditional’ way of life, to keep their cultural distinctiveness, to stay in their traditionally occupied territories and control their resources, and to exercise their rights to self-determination.

⁶³ See, for instance, ICCPR. 1966. Art. 27

⁶⁴ The separatist claim of indigenous peoples is clearly reflected by the revocation of International Labor Organization Convention No. 107 (ILO-107) which is condemned as perpetrating integrationist and assimilationist policy. See also Anaya. 2004: 58-59

⁶⁵ Meijknecht. 2002.

⁶⁶ Scheinin. 2005: 13

2.3. Indigenous Peoples Human Rights under International Law

The current movement of indigenous peoples is a legitimate claim to alleviate the particular form of discrimination they have faced for centuries due to their distinct culture, means of subsistence and marginalized positions. Nonetheless, it has faced serious resistances and skepticism at various levels in both developed and developing nations. It has also faced theoretical debate under international law which distributes sovereignty among states. In spite of such challenges, indigenous peoples' rights are recognized by some but very significant international human right instruments. Recently, it has further confirmed by the adoption of UNDRIP – a special declaration dealing specifically on the Human Rights of Indigenous peoples. This topic covers these emerging indigenous peoples human rights under the current international human rights law framework.

2.3.1. Indigenous Peoples Human Rights under ILO Framework

The ILO has a long history of addressing the right of indigenous peoples. The 1957 ILO Convention No. 107 (ILO-107) 'Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries' is the first legal instrument in recognizing the collective right of indigenous peoples in international paradigm. The intrinsic idea under ILO-107, which followed the common paternalistic approach of international human rights law, was that indigenous people will gradually extinct and absorbed by the majority population within a state.⁶⁷ Due to its limitation and criticisms on this assimilative policy it envisages, ILO-107 is explicitly renounced in 1989 by the subsequent Convention ILO-169 'Concerning the Protection of Indigenous and Tribal Peoples in Independent Countries'.

ILO-169 remains a leading international legal instrument with the status of a convention that clearly defined its applicability to indigenous peoples within states.⁶⁸ Compared to the UNDRIP, discussed under the following section, ILO-169 is less generous in recognizing the right to territorial control but put the first landmark in recognizing

⁶⁷ See Anaya. 2004: 58-59

⁶⁸ Note that 'convention', 'treaty', 'protocol', 'covenant', 'charter', 'accord' and 'agreement' are common terminologies used interchangeably under international law to refer to legally binding instruments through states' act of adoption/ratification, or accession/succession. And it is only conventions that would be open for ratification by states, and other declarations would be open only for vote to be adopted.

indigenous peoples rights to land. While Art.13 gives protection to indigenous land rights in relation to their cultural and spiritual connection to it; Art.15 goes further and recognizes indigenous peoples rights to participate in the use, management and conservation of natural resources.

According to the classical land law conception, “*cuius est solum eius est usque ad coelum et useque ad inferos* – the owner of the soil owns up to heavens and down to the depth.”⁶⁹ However, Art.15 has no reference to rights of ownership rather recognize the right to participate in the use, management and conservation of natural resources, such as flora fauna, freshwater areas, sea ice, minerals and other sub-surface resources, located in indigenous territories. This provision is in fact smart in avoiding the complex legal issue of right of ownership but criticized as inefficient in the factual situation of most developing countries where sub-surface resources are owned by the government and it has left indigenous peoples only with the right to be consulted.

ILO-169 also came up with the standard of ‘free prior and informed consultation’ of indigenous peoples which shall be undertaken ‘in good faith and with the objective of achieving consent’.⁷⁰ ILO-169 also remains a significant legal instrument in protecting indigenous peoples traditionally occupied, used, owned land, territory and resources as long as there is continuation as reflected by the phrase ‘traditionally occupy’ under Art.14(1).

As of January 2007, ILO-169 has ratified only by 23 countries lead by Denmark, Fiji, Norway, the Netherlands, and Spain; and followed by additional 18 countries including 13 Latin America countries – Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominica, Ecuador, Honduras, Guatemala, Mexico, Paraguay, Peru, and Venezuela.⁷¹ The increased ratification of the convention, even if at a very slow pace, particularly by those countries in Latin America and the Pacific, where indigenous human rights are seriously violated for almost half a century following the Spanish conquest, is a sign of

⁶⁹ Gilbert. 2006: 105

⁷⁰ See the cumulative readings of ILO-169. 1989. Art 6 & 16; see also the brief analysis of such concept in Anaya. 2004: 153-156

⁷¹ See <http://www.unhchr.ch/html/menu3/b/62.htm> Visited 14 Apr. 2008

growing acceptance of the international community on indigenous human rights.⁷² It will also strengthen the legacy of its status as customary international law which is already argued by human rights scholars such as Anaya – Professor of Human Rights and Policy at University of Arizona and the newly appointed UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedom of Indigenous Peoples.⁷³

2.3.2. Indigenous Peoples Human Rights under UNDRIP

In 1982 the Working Group on Indigenous Population (WGIP), the world's largest human rights forum in which more than 200 Indigenous organizations participated and the first and only UN body involved exclusively with matters concerning the human rights of indigenous peoples, was formed as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights.⁷⁴ WGIP has composed of five independent experts drawn from the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the current Sub-Commission on the Promotion and Protection of Minorities (hereinafter the Commission) primarily charged with the preparation of a Draft Declaration.⁷⁵ In 1994 the WGIP experts completed 'the UN Draft Declaration on the Rights of Indigenous Peoples' and unanimously recommended to the Commission which in turn passed to the General Assembly on June 2006 by a vote of 30 in favor, 2 against and 12 abstentions.⁷⁶

The Draft Declaration has been debated for more than two decades and finally adopted by 13th of September 2007 by affirmative vote of 143 states. Only four countries but with significant number of indigenous populations in their territory – the United States, Canada, Australia and New Zealand – voted against it, while 11 states – Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine – abstained.⁷⁷ It has been commented by human rights experts that the

⁷² See the historical situations of indigenous peoples human rights in Latin America countries in Todorov. 1992.

⁷³ See Anaya. 2004: 61-96

⁷⁴ As a big deviation from the general principle of participation within the UN system, NGOs and indigenous organization with no ECOSOC consultancy status have participated in the WGIP. See OHCHR web page www.ohchr.org

⁷⁵ See www.ohchr.org

⁷⁶ See www.ohchr.org

⁷⁷ See www.un.org/News/Press/docs/2007/ga10612.doc.htm Visited 22 Mar. 2008

Declaration does not come up with new human right principles, but rather concentrated on indigenous peoples as such rights had, over the years, been denied to indigenous peoples.⁷⁸ However, taking into account some nation states' serious resistance against its adoption and the valuable rights it has incorporated, the UNDRIP has opened a new paradigm of indigenous peoples human rights in the realm of international human rights law.

The adoption of the Declaration is “a triumph for justice and human dignity” as it is called by Arbour – the UN High Commissioner for Human Rights⁷⁹ – or “a fundamental landmark for indigenous peoples which represents their important contribution to the construction of the international human rights system” as expressed by Stavenhagen⁸⁰ or “a milestone in the long and arduous march of what have come to be known as ‘indigenous peoples’ through the major institution of organized intergovernmental society: the United Nations” in the words of Anaya.⁸¹

The UNDRIP consists of the most prized indigenous human rights such as Art. 3 on the right to self-determination, even if it is the replica of the standard formulation of such a right contained in prior international legal instruments as commented by Stavenhagen in a seminar held at UN Head Quarters, New York, which I get the privileged to attend;⁸² Art. 10 on relocation which requires free and informed consent, rights to get fair and equitable compensation and when possible with the option to return; Art. 20 on rights to full participation in decisions that can affect their life; Art. 25 on the right to maintain and strengthen distinctive spiritual and material relationship with traditionally owned, occupied or used land, territory, water or resource; Art. 26 on the right to own, develop, control and use traditionally owned, or occupied or used land, territory or resource; Art. 27 right to restitution in case of forced occupation, confiscation, use or damage, or at least right to ‘just and fair compensation’; and Art. 31 on the rights to self-determination.

⁷⁸ See, for instance, the statement of Les Malezer – Chairperson of the Global Indigenous Caucus. 13 Sep. 2007. On-line available at: www.iwgia.org. Visited 12 Apr. 2008

⁷⁹ See the statement of Arbour – High Commissioner for Human Rights. 13 Sep. 2007. on line available at: www.galdud.org Visited 15 Oct. 2007

⁸⁰ See Stavenhagen's statement. 14 Sep. 2007.

⁸¹ See Anaya's speech. 3 Oct. 2007. On-line available at: www.law.arizona.edu. Visited 13 Jan. 2008

⁸² Stavenhagen. 26 Oct. 2007. Participatory Observation in a seminar held at UN: New York.

The Declaration has no explicit provision on indigenous peoples' rights concerning resources beneath the surface. However, Art. 30 declares the sovereign right of indigenous peoples in requiring states to get the prior free and informed consent of indigenous peoples in any "project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." Hence, unlike ILO-169 which minimized indigenous peoples rights to consultation, the UNDRIP has emphasized on the right to consent.

What is debated now is the status of the UNDRIP under international law particularly with regard to those states voted against it. As a basic principle on international law, a Declaration has no legally binding effect even on the states that have voted in favor of it but rely purely on the moral weight it carries. However, such moral weight has big role towards its development of customary international law,⁸³ and even *jus cogens* - a peremptory norm. Moreover as Anaya argued "the name 'Declaration' appears to give it a more solemn ring, takes it closer to most important policy statements of the organized world community – into the vicinity of instruments such as the 1948 Universal Declaration of Human Rights."⁸⁴ Hence, the UNDRIP will exert a considerable amount of moral force through increasing states performance in this regard. Moreover, as explained by Stavenhagen, the Declaration itself is a reflection of already growing international consensus "concerning the content of the rights of indigenous peoples, as they have been progressively affirmed in domestic legislation, in international instruments, and in the practice of international human rights bodies."⁸⁵

Following the adoption of the Declaration whether it is time to work on a convention is the other emerging issue. In this regard, Stavenhagen has pointed out that taking in to consideration the current resistance against the adoption of the Declaration from states with significant number of indigenous peoples, i.e., USA, Australia, New Zealand, & Canada, and the existing lack of clarity on its implementation even among the states who have voted in favor of it; rushing in to a convention could weaken the power of the

⁸³ Customary international law developed "... when a preponderance of states and other authoritative actors converge on a common understanding of the norms' contents [*opinio juris*] and generally expect future behavior in conformity with the norms [oughtness]." Anaya. 2004: 61

⁸⁴ See Anaya's speech. 3 Oct. 2007. On-line available at: www.law.arizona.edu. Visited 13 Jan. 2008

⁸⁵ Stavenhagen's Statement. 14 Sep. 2007

Declaration.⁸⁶ The Rapporture also argued that, the international community is not yet ready to enter into a binding obligation regarding human rights of indigenous peoples and hence even if the UN has come up with a convention, it would not have enough signatory states.⁸⁷ Hence, it is rather time to deal with implementation processes at regional and national levels than working on a convention.

2.3.3. Indigenous Peoples Human Rights under ICCPR & ICESCR

The twin covenants ICCPR and ICESCR are equally significant international legal instruments protecting the human rights of indigenous peoples without mentioning any reference to the notion of ‘indigenous peoples’. As Scheinin argues, based on the joint Art I, indigenous peoples who qualify as ‘peoples’ under the notion of public international law, i.e., those who are ethnically, linguistically, geographically, historically distinct from the majority are entitled to the full right to self-determination as a people.⁸⁸

However, under public international law a right to self-determination is not an absolute right. As identified by the Supreme Court of Canada in Quebec case, self-determination in its extreme form of secession is allowed only in three situations. First is for former colonies; second is when a people oppressed, as for instance, under foreign military oppression or alien subjugation; and third is when a group in a state are denied meaningful access to the government to exercise their socio-economic and political rights and suffered from extreme form of exclusion.⁸⁹ As justified by the Court, Succession is allowed in such situations because a group has been denied their right to pursue the right to self-determination in its other forms and secession is provided as an *ultimum remedium* or a last resort right.⁹⁰

Hence, indigenous peoples who are capable of instituting as a people under public international law would have a right to self-determination including the right to secession, in fact up on the fulfillment of its limitations. However, indigenous peoples ‘that did not so qualify would still have the right to self-determination’ in the form of

⁸⁶ Stavenhagen. 26 Oct. 2007. Participatory Observation from a seminar held at UN: New York.

⁸⁷ Stavenhagen. 26 Oct. 2007 Participatory Observation from a seminar held at UN: New York.

⁸⁸ Scheinin. 2005:6

⁸⁹ See Scheinin. 2004: 11-12

⁹⁰ Scheinin. 2004: 11-13

effective participation, free and informed consent as well as socio-economic and political autonomy within a state.⁹¹ This view is also in line with the level of right to self-determination claimed by indigenous peoples as emphasized by some of their representatives participated in the early 1998-1999 meetings of WGIP, and in fact, none of them has spoken of the right to secession.⁹² It should, however, be noted that there is still no international consensus on the legal implication of ‘indigenous peoples rights to self-determination’.

On the other hand, are indigenous peoples beneficiaries of the cultural rights protected under Art. 27 of ICCPR? Some human right experts argue that all indigenous peoples are minorities for the purpose of Art. 27.⁹³ However, for a group to be considered as a minority, among others, the numerical element is very significant. None of the working definitions of minority goes without mentioning the essential element of numerical minority as it is in the very essence of the naming ‘minority groups’ itself.⁹⁴ Nevertheless, some indigenous peoples such as in Guatemala, Bolivia, for instance, constitute the majority in the state and hence failed to meet one of the essential elements to be considered as a minority group to benefit under Art.27 of ICCPR. Thus, it is not all indigenous peoples that are entitled to cultural protection under Art. 27. But only those who are minorities in the state are the beneficiaries of this provision just the same as not all indigenous peoples qualify as a people under public international law to benefit from the common Art I of the twin covenants on rights to self-determination.

To what extent does Art. 27 protect the cultural rights of indigenous peoples is the other issue here. The Human Rights Committee (HRC), a special body entitled to interpret the provisions of ICCPR, has interpreted the concept of ‘culture’ under Art. 27 in various broad terms.

First, HRC considered culture as a particular way of life like fishing and hunting in the case of *Lubicon Lake Band v. Canada* where the Committee ruled that state exploitation of timber, gas and natural resources in areas traditionally used by the Band for hunting

⁹¹ See the broader conception of the right to self-determination in Anaya. 2004: 97-128, Scheinin. 2004: 7-16 & Gilbert. 2006:199-225

⁹² See Fresa. 2000:17-18; see also Meijknecht. 2001:162

⁹³ See, for instance, Scheinin. 2005:6

⁹⁴ See, for instance, the description given by Meijknecht. 2001: 67-70 & Fresa. 2000.

and fishing will destroy through time the resource basis of traditional economic activities of the Band.⁹⁵

Secondly, culture is defined as a traditional economic activity in *Kitok v. Sweden* case where the Committee decided that reindeer herding is part of the Sámi culture and the government of Sweden should respect this lifestyle.⁹⁶

Lastly, culture is interpreted as a right to traditional land in *Länsman v. Finland No. I & II* cases.⁹⁷ While *Länsman I* was about the harmful effects of a stone quarry on the flank of the Etela-Riutusvaara Mountain and its transportation through reindeer herding territory of the Sámi in Finland alleged as a violation of enjoyment of culture; *Länsman II* was related to the government forest lodging activity in the reindeer herding lands of the same Sámi community. In *Länsman I & II*, thus, HRC strengthened the protection of traditional livelihood as a culture even if it is supported by modern techniques so long as it is 'essential for the culture and necessary for its survival'.⁹⁸ In *Länsman* cases HRC further developed the combined test of 'effective participation' and 'sustainability' which secure indigenous peoples land rights.

In general, Art.27 of ICCPR is developed in the jurisprudence of HRC in a way that favors indigenous peoples' rights to traditional land and territory, and means of subsistence as part of the fundamental right to culture. As commented by Gilbert, this approach to cultural rights is a new paradigm of rights that transcends the traditional dichotomy of international human rights as civil and political rights *vis-á-vis* economic, social and cultural rights.⁹⁹

The UNDRIP, ICCPR, ICESCR & ILO conventions are the principal but not the only international legal instruments protecting the human rights of indigenous peoples. CERD, CRC, and CBD have also incorporated significant provisions protecting indigenous peoples' right to non-discrimination; recognize various rights of indigenous children; and indigenous peoples traditional knowledge and resource rights, respectively.

⁹⁵ Bernard Ominayak, Chief of the *Lubicon Lake Band v. Canada*. 1984. Summarized in Scheinin. 2004:5

⁹⁶ *Ivan Kitok v. Sweden*. 1985. Summarized in Meijknecht. 2001:94

⁹⁷ *Länsman I et al. v. Finland*. 1992 & *Länsman II et al.* 1995. Summarized in Meijknecht. 2001:95-98

⁹⁸ See the summary in Meijknecht. 2001: 95-98

⁹⁹ Gilbert. 2006: 116

2.3.4. Indigenous Peoples Human Rights under Regional Human Rights Instruments

Apart from international legal instruments, the regional human rights systems, i.e., the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR), and the European Convention on Human Rights (ECHR) have also significantly protect the human rights of indigenous peoples in their respective regions.¹⁰⁰ Given the scope of this study in the realm of international law, I will not go in depth analysis of indigenous human rights protection at the regional levels. However, a jurisprudence of the Inter-American Court of Human Rights (IACHR) is considered to emphasize the significance of these instruments beyond the regional level.¹⁰¹

The Mayagna (Sumo) indigenous community of *Awás Tingni* filed a petition before IACHR against the government of Nicaragua alleging that the government of Nicaragua has not met its constitutional and international law obligations to recognize and safeguard the community's rights to their lands which was degraded by granting a concession to a foreign company called SOLCARSA to carry out road construction work and Timber logging on the community land without their consent.¹⁰² The Inter-American court analyzed Art. 21 of the ACHR in conjunction with the constitution of Nicaragua, which recognizes the right to indigenous people to maintain their communal forms of land ownership, use and enjoyment, as well as Nicaraguan domestic legislation, which requires the demarcation of indigenous territories, and commented that:

[s]ome specifications are required on the concept of property in [I]ndigenous communities. Among [I]ndigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on individual but rather on the group and its community.¹⁰³

IACHR, thus, interpreted Art. 21 of ACHR on the right to property in line with indigenous peoples communal property jurisprudence as opposed to the western

¹⁰⁰ Despite some efforts, Asia has not yet come up with a regional human rights instrument. See De Feyter. 2001: 262

¹⁰¹ A similar jurisprudences has also developed from ACHPR in the case of *Ogoni v. Nigeria* summarized in De Feyter. 2001.

¹⁰² Case of the *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*. 31 August 2001.

¹⁰³ Case of the *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*. 31 August 2001. Parag. 149

individual property conception.¹⁰⁴ This judicial opinion at *Awsa Tingni* case contributed to the *opinio juris* – the physiological force which derive states to a certain practice or ‘subjectivities of oughtness’¹⁰⁵ – developing on the territorial right of indigenous peoples. It also puts a positive remark on states’ liability under international law for failure to recognize, respect and even demarcate the lands, territories and resources of indigenous peoples.

To conclude, this chapter approached some primary questions which may pop up to the readers’ mind just by looking at the very title of the thesis. It defined human rights as inherent rights of all human beings but get their normative expression through legal instruments. It also underlined the importance and distinguishing character of human rights from other rights which entails enjoyment by all including indigenous peoples and call for observance by all including all state and non-state actors with no exception to TNCs. The chapter also described indigenous peoples as different groups from minorities or other tribal groups which entails sticking to the term ‘indigenous’. It highlighted indigenous peoples human rights recognized under some significance international conventions such as the ICCPR, ICESCR and ILO-168, and in fact pointed out the significance of the UNDRIP which joined the category of high moral value legal instruments like UDHR.

¹⁰⁴ See the detail about indigenous peoples v. western conception of property in Anaya. 2004: 141- 148

¹⁰⁵ See such a concept in Anaya. 2004: 61-62

CHAPTER 3. TNCs COMPLICITY ON INDIGENOUS PEOPLES HUMAN RIGHTS VIOLATIONS

Having defined indigenous peoples and the status of their human rights recognized under existing international legal framework in the previous chapter, this chapter will proceed on analyzing three empirical cases to illustrate the violations of some of these rights by TNCs operating on indigenous peoples inhabited areas. The cases have particularly focused on TNCs engaged in the extractive sector and operating in the developing nations of Latin America, Asia and Africa. The chapter, thus, raises three basic questions that: are TNCs complicit to human rights violations of indigenous peoples? If so, whether states are implicated in such alleged violations and to what extent?

3.1. Conceptualizing Corporate Complicity

Currently ‘corporate complicity’ in human rights violations is the buzzword in the relatively new discourse of corporate human rights accountability. ‘Complicity’ is the notion of criminal law but commonly applied to indicate the potential of corporation to threat human rights and the consequential liability. According to Clapham & Jerbi,¹⁰⁶ the notion of ‘corporate complicity’ to human rights abuses can best be understood in three categories: direct, indirect and silent complicity.¹⁰⁷ Direct complicity is when a corporation authorized and/or intentionally participated in human right abuse by others often the state.¹⁰⁸ Here the intention should not be equal to the intention to do harm but even knowing the likely consequences of the act suffices.¹⁰⁹

A corporation can also be complicit indirectly by continuing to accrue benefit from human rights violations by others.¹¹⁰ Silence is not neutrality is the third principle. Even if a TNC neither directly involved nor accrues a benefit out of the situation, its failure to

¹⁰⁶ Andrew Clapham is Associate Professor of Public International Law, Graduate Institute of International Studies, Geneva; and Scott Jerbi is a senior advisor for the Ethical Globalization Initiative and was speechwriter for the United Nations High Commissioner for Human Rights.

¹⁰⁷ The notion of ‘corporate complicity’ is highly debated concept which lacks academic consensus as well as uniform company practices. But scholars more or less follow a similar fashion of classification with Clapham, while some add more subtypes under each of the three categories. See Clapham & Jerbi. 2000-2001: 340; see for detail Tófaló. 2005: 1-36

¹⁰⁸ See Clapham & Jerbi. 2000-2001: 342.

¹⁰⁹ See Clapham & Jerbi. 2000-2001: 342-46

¹¹⁰ Clapham & Jerbi. 2000-2001: 346

attempt to influence the government to stop the alleged human rights abuses constitutes complicity through abstention. Chandler – the founder Chair of Amnesty International UK Business Group – justifies this last principle that “the UDHR, calling on all individuals and organs of society to support human rights, provides legitimacy for a company to speak out in their defense.”¹¹¹

The silence is not neutrality principle appeals to the whole ideological debate on the extent of corporate accountability for human rights. While the question should corporations have human rights liability is still contested, there is a growing consensus on corporate responsibility for human rights, at least, at less legal level or in terms of moral obligations.¹¹² Whether corporations are expected simply to abstain from human rights violations or expected to engage in human rights protection and promotion is, however, the current on-going debate. It is not the purpose of this study to deal with such issues. However, as a matter of justice and taking into account that TNCs are business groups rather than human rights institutions, imposing extended obligation in this regard will not gain much weight.

Corporate complicity in general is a wide and in depth complex notion that may include mere presence in human rights volatile regions and warns TNCs to be ware of the general human rights environment of their operations. TNCs complicity is, thus, analyzed in such broad terms here.

3.2. Justifying Limitations

As highlighted earlier, this chapter introduces three empirical cases each taken from the developing continents to illustrate the nature of indigenous peoples human rights violations by TNCs and the situation of increasing their vulnerability for further abuses by others. The cases provide examples among many cases where TNCs have allegedly been involved in series indigenous peoples human rights violations often in collusion with host state governments in the developing world. They are, thus, far from exhaustive and in fact subject to the following limitations.

¹¹¹ Chandler. 2000: 14 -15

¹¹² Here it could be enough to mention the fact that currently about 152 companies have made explicit commitment to the UDHR and other human rights norms. See Business and Human Rights Resource Center Web Page: www.business-humanrights.org/Home Visited 9 Nov.2007.

First, the cases do not analyze the human rights impact of all TNCs but only those TNCs engaged in the extractive industrial sectors. While TNCs engaged in the extractive sectors such as oil, gas and mining production constituted three-thirds of the total reported cases of human rights abuses by TNCs;¹¹³ there exists an alarming tension between indigenous peoples and these extractive TNCs.¹¹⁴ The geological dependency – natural resource availability such as oil, gas, diamond, gold, copper, uranium and other minerals – of TNCs in the extractive sectors, the large scale and land based nature of the production has assumed special importance in the context of indigenous peoples attachment to their environment.

Second, contrary to the impact of TNCs on the general human rights situation of affected communities, the cases focus on the human rights of indigenous peoples in general terms with particular focus on social categories such as children, women or elders. The gross human rights impact and abuse by TNCs on different local communities, tribal groups and indigenous peoples has manifested through time. Indigenous peoples, however, disproportionately bear the human rights cost of TNCs' operation due to *inter alia* their distinct culture and social attachment to their territories which implicate a multidimensional nature of the violation. The treaty bodies in their recommendations to state parties to protect the rights of indigenous peoples also document increased human rights abuse of TNCs on indigenous peoples land and territory.¹¹⁵

Third, the cases are geographically limited to developing continents of Latin America, Asia and Africa where indigenous peoples human rights violations or general human rights situations has got little weight due to other considerable factors which worsen the situation. TNCs complicity in human rights violations are persistent in almost all regions in poor and rich, developed, less developed and under developed nations with no uniform regional trends.¹¹⁶ However, as reflected in a more recent founding of the SRSG, it has assumed a particular north to south trend. Accordingly, since 2000 nearly all corporate related human rights cases were in low income countries of which almost two-thirds were

¹¹³ Ruggie. 2006a. Parag. 25

¹¹⁴ Ruggie. 2006a. Parag. 25

¹¹⁵ See Ruggie. 2007a. Parag. 72-80

¹¹⁶ Forest People Programme & Tebtebba Foundation. 2006: 7-8

either recently emerged from conflict or were still in it.¹¹⁷ Besides, all except two of the countries were below the world average based on the World Bank's 'rule of law' standard.¹¹⁸

The resource factor is also influential here. Most indigenous peoples in the north are already dispossessed of their territories to the extent of treated as second citizens in their ancestral land as is the case in Australia,¹¹⁹ Canada, and US where the nations are now in the hands of the descendants of the colonists and other migrant peoples. Moreover, since the end of the 1980s, a changing focus of international mining companies has observed on four main areas of growth: Latin America, Asia the Pacific and Africa, where the highest concentration of indigenous peoples claimed to be found.¹²⁰ Thus, the following case studies analyze TNCs complicity in violations of indigenous peoples human rights in the context of these developing nations.

3.3. When TNCs Trespass Human Rights: Case Studies

3.3.1. Oil Extraction in *Oriente*, Ecuador

The eastern cost of Ecuadorian Amazon basin stretching from the North to the Southern cost is known as the *Oriente*. The *Oriente*, which encompasses over 32 million acres of tropical rain forests is home for eight groups of indigenous peoples – the Quichua, Shuar, Achuar, Cofan, Huaorani, Shiwiar, Secoya and siona – who were estimated to be 85,000 to 250,000 (25-50 %) of the total population at the beginning of the 1990s.¹²¹

¹¹⁷ Ruggie. 2007b: 32

¹¹⁸ See Ruggie. 2007b: 32

¹¹⁹ After centuries of denial and injustice, the Australian government very recently on 13 Feb 2008 has issued a public apology for the historic injustice that the Aboriginals have suffered. See www.survival-international.org Visited 14 Feb 2008.

¹²⁰ Whiteman & Mamen. 2002: 13

¹²¹ Kimmerling. 1990-1991: 853



Map. 3.1. The Oriente Amazon Basin, Ecuador (colored light Blue).

Since the Spanish arrival in the 16th century and followed by the conquest of missionaries, indigenous peoples of the *Oriente* have been threatened in their land. However, they have more threatened than ever since the early 1970s ‘oil boom’.¹²² In 1967, after three years of prospecting, the US Oil giant Texaco (now ChevronTexaco following a merger with Chevron in 2001) has discovered commercial quantities of oil in *Oriente*.¹²³ The extraction entered in 1972 together with Petro-Ecuador, Ecuador’s national oil company, on one million hectares of land in the *Oriente* including over 300 wells, 29 production camps and four pipelines.¹²⁴ However, within two decades the oil exploration has covered three million hectares carried out by Petro-Ecuador and a coalition of nine foreign companies: Oryx (US), Petro-Canada (UK), ARCO (US), British Gas (UK), Unocal (US), Elf Aquitaine (France), Occidental Exploration and Production Company (US), Conoco (US), and Consortium Braspetro (Brazil).¹²⁵

¹²² Kimmerling. 1990-1991: 855

¹²³ Kimmerling. 1990-1991: 857

¹²⁴ Kimmerling. 1990-1991: 857-858

¹²⁵ See Kimmerling. 1990-1991: 858-859

The Ecuadorian Law treated large parts of the Amazonian territory which is occupied by indigenous peoples including the *Oriente* as *terra nullius*, which is free to occupation,¹²⁶ and continued to attract many TNCs in the area.¹²⁷ By 2001 the government allowed the construction of a 298 miles pipeline that runs from the *Oriente* to Esmeraldas in the Pacific coast, by Oleoducto de Crudos Pesados Ltd., a consortium of seven TNCs including Occidental Petroleum (US), Kerr McGee, Alberta Energy (Canada), Agip oil company (Italy), Repsol YPF (Spain), Perez Compac (South Africa), and Techint of Argentina.¹²⁸

The oil exploration in Ecuador from its initial seismic studies to the final stage of transportation process had devastated impact on the human rights of the *Oriente* indigenous peoples.¹²⁹ During the seismic studies the clearing of forests, using explosives to drill holes destroyed their habitats, foods and medicine; disturbed the animals as well as the spirit of the forest.¹³⁰ The use of water resources such as lakes and rivers for fishing and other purposes with no regard to sacred sights as well as certain restrictions disrespected the indigenous culture.¹³¹ In the exploratory drilling process again the clearing of forests continued to build a drilling platform which needs 2-5 hectares of land and up to 15% of the surrounding forests are disturbed by logging for boards to lie beneath the platform.¹³² Moreover, wells drilled on indigenous people settlement areas without considering the peoples shifting way of life disrupted their very means of subsistence.¹³³

At the production stage, since oil is extracted in mixture with water and gas it should be

¹²⁶ Kimmerling. 1990-1991: 856. Under international law states can occupy any empty territory based on the Roman law principle of *terra nullius*, meaning that any uninhabited territory is open to conquest and can be occupied by states. '*Terra nullius*', thus, literally means land or territory with no owner. For a comprehensive overview of *terra nullius*, see Lessaffer. 2005.

¹²⁷ Kimmerling. 1990-1991: 856-857

¹²⁸ Amnesty International U.S. On-line available at: www.amnestyusa.org/business/ecuador.html Visited 19th Jun. 2007. pp. 5

¹²⁹ See the detail about each process and the impacts on indigenous human rights in a wider perspective in Kimmerling. 1990-1991: 860-881

¹³⁰ See Kimmerling. 1990-1991: 860-864

¹³¹ See Kimmerling. 1990-1991: 861

¹³² See Kimmerling. 1990-1991: 862-863

¹³³ Until 1992, Texaco has drilled about 339 wells in over a million acre of concession land. See Lyons. 2003-2004: 704

pumped to a central separation facility and then the separated oil should be sent out through a pipeline. In this separation process about 235, 600 million cubic feet of gas has burned on open space only between 1972 and 1990 which polluted the air and poisoned the rain.¹³⁴



*Fig. 3.1. Gas burning in the separation process, Oriente: Ecuador.
N.B. Photo by Lou Dematteis, courtesy of Amazon Watch.*

Moreover, leakages of hazardous chemicals have heavily distorted the indigenous areas of the *Oriente*. Every two weeks an estimated amount of 17,000 – 21,000 gallons of oil were dumped in the *Oriente* trough spills from flow lines alone (excluding transnational and secondary pipelines) and left unclean.¹³⁵ Besides, toxic and waste water were dumped directly into streams and the jungle to maximize profits through technology costs minimization. It has been reported that the technology to re-inject waste in to the ground would have cost Texaco about \$3.00 per barrel, and Texaco has saved an estimated amount of five billion dollars in the total twenty years of its stay in *oriente* and generated 40 billion dollars revenue annually.¹³⁶ On the other hand, toxic dumping has reported to affect one million hectares of rainforest and about 30,000 indigenous population of the *Oriente*.¹³⁷

¹³⁴ Kimmerling, 1990-1991: 865-66

¹³⁵ See Kimmerling, 1990-1991: 865-66

¹³⁶ Fielding, 2001: 133

¹³⁷ See Chelala & Garro. 14 Jun. 2007. On-line available at: www.commondreams.org visited 15 Apr. 2008



*Fig.3.2. Waste pit filled with crude oil left in the forest Oriente: Ecuador.
N.B. Photo by Lou Dematteis, courtesy of Amazon Watch*

In 1972 Texaco completed a road construction at the heart of *Oriente* which principally aimed for better access to the extraction areas.¹³⁸ However, colonists, land speculators, loggers, ranchers, and agro-industry follow the roads into the forests and it has become the ‘primary engine of deforestation’.¹³⁹ It has been estimated that 2.5 million acres of rain forest were opened up this way, and increased the vulnerability of the indigenous community of the *Oriente* for further dispossession.¹⁴⁰

The whole activity of the transnational petroleum companies including Texaco, from 1964 until it left Ecuador in 1992; Petro-Ecuador; and the nine foreign companies involved in the project dispossessed indigenous peoples, forced them to change their traditional way of life such as hunting and fishing, degraded the forest resources on which the indigenous people depend for food, medicine, spiritual sacrifices, ancestral connections and disturbed the whole indigenous way of life. It also exposed them to respiratory and toxic infectious diseases.¹⁴¹

This case illustrates the situation of direct complicity where the TNCs had directly involved in the abuse of indigenous peoples human rights protected by ILO-169

¹³⁸ Fielding. 2001: 132

¹³⁹ Kimmerling. 1990-1991: 875

¹⁴⁰ Lyons. 2003-2004: 706

¹⁴¹ See Kimmerling. 1990-1991: 868-870

concerning the rights to ancestral land and territory; ICCPR Art. 27 on rights to land, means of subsistence and cultural practices as cultural rights, and the common provision I of the twin covenants on rights to self-determination at least in the sense of a right to have a say in decisions that affect their existence.

3.3.2. Mining in the Subanon's Indigenous Territory, Philippines

According to Mato – Secretary General of Siocon Subanon Association – the Subanon (meaning river-dwellers) are the largest indigenous groups in Philippines estimated to be more than 320,000 peoples in 2000.¹⁴² They live in Siocon – a town located in the southern part of Philippines in the province of Zamboanga del Norte, Mindanao – which



covers an area of 50,320 hectares with 80.34 % of forest land and includes Mt. Canatuan, a respected traditional prayer, worship and sacred burial ground of their ancestors. The Subanon are mainly dependent on agriculture followed by subsistence fishing.¹⁴³

Map2. The province of Zamboanga, where the Subanon are located & mining took place. (The red arrow and circle indicates)

Unlike the situation in Ecuador, the Subanon and other indigenous peoples in Philippines have constitutional recognition since 1987. Indigenous Peoples Rights Act (IPRA) has passed a decade later, and in the same year the government has granted to the Subanon a

¹⁴² Mato statement made at WGIP 2001 meeting. On-line available at: www.tebtebba.org Visited 16 July 2007

¹⁴³ Asuncion. 2005: 1-3

Certificate of Ancestral Domain Claim over 6,522,684 hectares in Siocon which later converted in to a Certificate of Ancestral Domain Title in 2003.¹⁴⁴ These domestic legal instruments have provided indigenous peoples of the Subanon with basic rights to ancestral domain, self-governance, the right to cultural integrity, and the right to free prior and informed consent as a precondition for any exploration, development, exploitation, and utilization of natural resources within their ancestral domains.¹⁴⁵

In the 1990s mining companies are attracted to indigenous ancestral domains including the sacred Mt. Canatuan. A prospector and financier named Ramon Bosque applied for a prospecting permit and later entered a Royalty Agreement with Benguet Corporation, Philippines' oldest mining company, in 1990 and received approval for a Mineral Production Sharing Agreement in 1996.¹⁴⁶ On the other hand, in 1993 TVI Resource Development Phils Inc. – a subsidiary of TVI International Marketing Limited (Hong kong) which is wholly owned subsidiary of TVI Pacific of Alberta Canada – entered mining operation in the same indigenous ancestral land of Siocon.¹⁴⁷ In 1994, TVI Resource and Benguet executed an exploration agreement which is approved by the Department of Environment and Natural Resources in 1998 to operate in the name of TVI Resource.¹⁴⁸

TVI Resource started the mining operation without paying due regard to indigenous people rights protected under IPRA or the national constitution. As indicated in the picture below, the mining activities have desecrated the sacred burial grounds and the worship places on Mt. Canatuan.

¹⁴⁴ Holden. 2005: 423

¹⁴⁵ Holden. 2005: 421-422

¹⁴⁶ Asuncion. 2005: 3-4

¹⁴⁷ Asuncion. 2005: 3

¹⁴⁸ Asuncion. 2005: 4-5



*Fig.3.5. TVI mining site at the top of Mt. Canatuan, a sacred site of the Subano: Philippines.
N.B. Photo by a member of the Subanon community.*

The Subanon in Siocon considered Mt. Canatuan as traditional prayer and worship area and as the sacred burial ground of their ancestors and they have a story that:

During Timuay Manglang's leader ship,¹⁴⁹ an epidemic struck the community. To spare the people, he offered the highest kind of ritual at Mt. Canatuan. It was believed that the prayer done in Mt. Canatuan was what saved the tribe.¹⁵⁰

It is the interest of the Subanon, hence, to keep Mt. Canatuan to remain untouched so as not to disturb the spirit of their ancestors and prayers.

TVI also displaced indigenous communities from their certified ancestral domain for the construction of mine plant, offices, barracks and warehouses; and continued bulldozing which forced many others to left their land.¹⁵¹ Moreover, it has employed a paramilitary force called the Special Armed Auxiliaries who barred access of the indigenous community including food entry by blocking the roads; harassed community leaders; burned houses and fired rifles on indigenous leaders.¹⁵²

In addition, the mining companies sought for judicial invalidation of IPRA. In 1998 a retired Supreme Court judge called Isagani Cruz and a lawyer called Ceasar presented a claim of invalidation of IPRA as an unconstitutional Act arguing that the Act is not in line with the 1987 constitution Section 2 of Art XII which gives the state the property

¹⁴⁹ 'Timuay' is the Subanon term for 'hereditary leader'. Asuncion. 2005: 4

¹⁵⁰ Asuncion. 2005: 4

¹⁵¹ Asuncion. 2005: 5

¹⁵² Asuncion. 2005: 5-6

rights to all natural resources.¹⁵³ The Supreme Court entered a split decision in 2000 when for the absence of majority consciences the IPRA ruled to remain a valid Act.¹⁵⁴

The case of the national mining corporation (Benguet) and TVI Resource TNC goes beyond legislative gaps and government complicity problems. It shows the issue of lack of enforceability of indigenous peoples rights even in states where they got legal recognition. As is the case in Philippines, governments may use indigenous rights Acts for mere diplomatic and political purposes while soliciting the economic greed of some TNCs and political elites.

It has been emphasized by Stavenhagen, in a seminar I participated, that closing the gap between law and practice is the current most appealing challenge of indigenous human rights movement in many countries where indigenous peoples human rights has got legal recognition, and this particularly holds true in Latin American countries.¹⁵⁵ In fact, the whole situation points to the power of TNCs to influence states, and put a question of host states capability to protect the human rights of indigenous peoples and other vulnerable communities in their territories which will be dealt by the next chapter.

3.3.3. The Chad-Cameroon Pipeline & Oil Project and the Bagyeli/pygmy people

The Chad-Cameroon Pipeline & Oil Project (hereinafter CCPOP) is a striking example of complicity involving three powerful actors – the state, international financial institutions and TNCs – in human rights abuses of the Bagyeli indigenous community. The CCPOP is the largest (\$ 4.2 billion) development project in Africa financed by an international consortium composed of Chevron (25%), PETRONAS (35%) and led by ExxonMobil, the US based world's wealthiest Corporation, holding the biggest share of \$3.7 billion (40%).¹⁵⁶ The World Bank provided \$39.5 million to finance minority holdings Tchad Oil Transportation Company (TOTCO) and \$53.4 million to Cameroon Oil

¹⁵³ Holden. 2005: 423

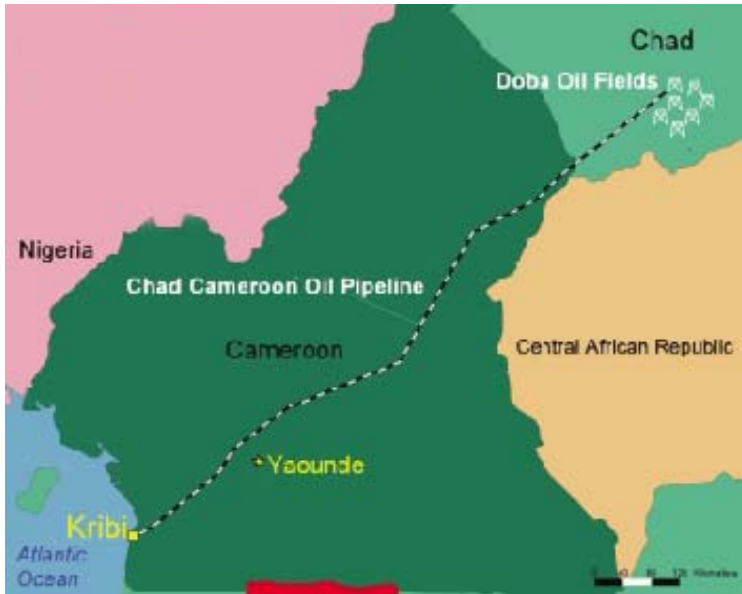
¹⁵⁴ While seven of the fourteen justices declared its unconstitutionality, the other seven declared it as constitutional and for the absence of majority consciences the Act ruled to remain valid. See Holden. 2005: 424

¹⁵⁵ Stavenhagen. 26 Oct. 2007. Participatory Observation in a Seminar held in UN, New York.

¹⁵⁶ See Friends of the Earth International (FOE) Cameroon et al. On-line available at <http://bankwatch.org> Visited 29 May 2007

Transportation Company (COTCO).¹⁵⁷ In addition, the International Finance Corporation (IFC), one of the Banks' private sector arms, provided loans of \$100 million each to TOTCO and COTCO and mobilized an additional \$100 million from other sources, known as B-loans.¹⁵⁸

As envisaged in the Map below, the basic project is a construction of a 650-mile (1,070 Km.) long pipeline passes through Cameroon to the Atlantic coast where the oil is finally shipped to the US and Europe. However, it also included the development of 300 oil wells in Doba basin of southern Chad, building a marine pipeline at Kribi to a floating storage offloading vessel, and production of 225,000 barrels of oil per day.¹⁵⁹



Map 3.3. The Chad Cameroon Oil & Pipeline Project (the broken line indicates)
N.B. Map by Peter Black.¹⁶⁰

The international consortium required World Bank's support as a pre-condition to pursue the project because, first, to get political risk insurance in a volatile region, and second to attract additional co-financing from other sources such as the US Export-Import Bank and the European Investment Bank, the later approved \$120 million.¹⁶¹ It has been commented that the project would not have been viable without the Banks

¹⁵⁷ See Horta. 2006: 2

¹⁵⁸ Horta. 2006: 2

¹⁵⁹ See Horta et al. 2002: 3

¹⁶⁰ Taken from Horta et al. 2002: ii

¹⁶¹ See Horta. 2002: 233

involvement,¹⁶² and hence deep analysis of the project impact should have been the banks' priority.

The indigenous peoples of Central Africa traditionally called the 'pygmy' refer themselves as 'people of the forest' estimated to be 500,000 in numbers when the project pursued in 2000.¹⁶³ They live in the forest Congo basin ranging from Cameroon to Burundi. The people of forest constitutes indigenous peoples of the Ba'Aka, Babongo, Bacwa, Bagyeli, Baka, Bakola, Baluma, Bambenjelle, Bambuti, Bangombe, Basua, Batua, Batwa, Benet, Bofi, Bororo, Efe, Ik, Kirdi, Mbororo, Medzan, Mefa, Mikaya, and Pokot – same people named differently in different countries.¹⁶⁴

The CCPOP affected the Bagyeli, also called the Bakola forest people who reside in the forest of Cameroon. The pipeline construction crosses Bagyeli land at least five times in the Bipindi and moved the Bagyeli to other camps.¹⁶⁵ The clearing of forest in fifteen meters at either side of the pipeline devastated medical plants, damaged sacred sites, and dispossessed traditional lands.¹⁶⁶



*Fig. 3.4. Cleared forests 15 meters on each side of the pipeline.
N.B. Picture by Courtesy of Forest People Programme.¹⁶⁷*

¹⁶² See Horta et al. 2002: 5

¹⁶³ Jackson. 2004: 15

¹⁶⁴ Jackson. 2004: 14; see also ACHPR. 2005: 15-16

¹⁶⁵ Nelson et al. 2001: 12

¹⁶⁶ Nelson et al. 2001: 12-13

¹⁶⁷ Taken from Horta et al. 2002: ii

The opening up of the forest has also further human rights impacts in that of increasing the Bagyeli vulnerability to outsiders exposing them to new diseases, and more economic and socio-cultural discriminations. For instance, an increase in commercial bush-meat hunting by outsiders, such as loggers and poachers, moving into the area has documented.¹⁶⁸

It should be noted that the legal status of indigenous peoples in many African countries including Chad and Cameroon is different from their fellows in Latin America. Neither Chad nor Cameroon recognizes the very existence of indigenous peoples in their national territories.¹⁶⁹ Moreover, both Chad and Cameroon are not signatories of the most important convention on indigenous land rights ILO-169. However, this fact would not lessen either TNCs or states liability for human rights nor does it undermines alleged human rights violations. First, ILO-169 entails human rights obligation even on non-ratifying states due to its growing status as customary international law.¹⁷⁰ Second, ratification is an issue to determine states' obligation vis-à-vis the rights incorporated in the specific convention rather than concern of human rights violation by private actors. Thirdly, whether an international human rights instrument is ratified or not, it serves as a standard of measurement for human observance/non-observance, as the case may be.¹⁷¹ Thus, non-ratification is not excuse for indigenous human rights abuse by any actor in a state. Besides, both countries are members of other human rights conventions significant for indigenous peoples such as ICCPR, ICESCR, ICERD and ICRC,¹⁷² which entail states' obligation to recognize, respect, protect and promote the human rights of all peoples in their territories including the Bagyeli.

In general, this case primarily illustrates the complicity of the oil TNCs and the World Bank in the human rights abuse of the Bagyeli people of forest of Cameroon. The project could not escape from criticism in its very beginning due to the fact that both countries

¹⁶⁸ Nelson et al. 2001:12

¹⁶⁹ Horta. 2006:11

¹⁷⁰ See the detail in Anaya. 2004: 61-96

¹⁷¹ See, for instance, the jurisprudence of IACHR which referred to ILO-169 in *Awes Tingni* case, while Nicaragua was not a party to it.

¹⁷² While Cameroon has ratified ICCPR & ICESCR since Sep 1995, ICERD by Jul. 1971 and ICRC on Feb. 1993; Chad has ratified ICCPR & ICESCR since Sep 1984, ICERD by Sep. 1977 and ICRC on Nov. 1990. See www.ohchr.org

were governed by authoritarian regimes, have been ranked amongst the most corrupt countries in the world on Transparency International's Corruption Perception Index, and both documented by the State Department's Annual Report on Human Rights as the world's most poorly governed countries.¹⁷³ Internal and external voices have also been heard to postponement of the project until a political willingness for poverty reduction and respect for human rights has shown in both countries.¹⁷⁴

Disregarding the plea the Bank decided to proceed with the project in 2000 and simultaneously built the capacity of both governments.¹⁷⁵ According to Tófalo “financing a repressive regime, where a bank provided a government with a bad human right record, serves its abusive policies” and amounts to indirect complicity.¹⁷⁶ The project construction has completed in 2003 one year a head of the expected time; but as predicted it has worsened the human rights conditions in both countries, affected many communities, and increased the vulnerability of the poor and indigenous peoples.¹⁷⁷

Some compensation has been arranged for some affected communities from both the Bagyeli and Bantu. However, it has been criticized as inadequate, discriminatory and deceitful.¹⁷⁸ Moreover, compensation has inherent shortcomings regarding some of the losses sustained by indigenous communities. For instance, in case of destruction of sacred sites, compensation assessment works only in relation to the values of the trees removed and the cleared land. To quote Jackson, for the pygmy, “the whole forest is sacred; the spirits of the ancestors and the forest are one and the same being. ‘The spirits of the ancestors are in the forests. Spirit and forest are one, inseparable, one always’.”¹⁷⁹

¹⁷³ Horta. 2002: 233

¹⁷⁴ For instance, the Chadian civil society organizations and Cameroon’s Center for Environment and Development; coalition of NGOs from developed countries; and the US Congress through a Bi-partisan Congressional letter addressed to the then World Bank President, James Wolfensohn had all requested for the project’s postponement. See Horta. 2006: 3-4

¹⁷⁵ Horta. 2006: 3

¹⁷⁶ Tófalo. 2005: 7

¹⁷⁷ Horta. 2006: 4

¹⁷⁸ It has been mentioned that the Bantu has been well informed about the project and the compensation plan while the Bagyeli are not; the Bantu has deceitfully claimed Bagyeli lands as their own and received compensation taking advantage of the better information they have received, their dominancy both in number and local politics, and prior knowledge of the Bagyeli way of life and traditional land system. See Nelson. 2001: 9-11; FOE Cameroon et al. pp.7. See also Horta. 2002: 234 for other compensation related problems.

¹⁷⁹ Jackson. 2004: 15

Compensation cannot measure such loss of spiritual values, and cultural attachments in material terms. This is of special concern for the Bagyeli given the irreversible loss of the forest and their land where the pipeline traverses.

Second, the case proves the World Bank's failure to respect its own Guidelines on indigenous peoples. To the extent that the World Bank plays a vital role in financing this project, it should have been adhere to its policy on indigenous peoples.¹⁸⁰ The Bank's policy on Indigenous Peoples Operational Directive 4.20 (hereinafter OD 4.20), which was in effect at the time of loan preparation and until 2005, request, among other things, impact assessment to be made by the Bank where there is a legal gap concerning the recognition of local communities' rights.¹⁸¹ The Bank had relied on Indigenous Peoples' Plan (IPP), which was meant to develop the indigenous community, but criticized of the following defects.

First, IPP was built on the assumption that future commitments would be made by the government of Cameroon towards protection of the indigenous communities affected by the project.¹⁸² Yet any of such commitments had achieved until 2007.¹⁸³ Second, IPP was not prepared in line with the Bank's OD 4.20 which stresses the informed participation of local communities.¹⁸⁴ A finding of participatory consultation made at grassroots levels revealed information gaps about the Bagyeli means of livelihood amongst COTCO officials, who are responsible for implementing the compensation process and for drawing up the IPP, and about the pipeline project amongst the Bagyeli.¹⁸⁵ Third, the Cameroonian foundation established with a trust fund of \$3 million from the oil consortium, to finance both implementation of the IPP and the management of two

¹⁸⁰ A reader should note the fact that the World Bank is not a human rights organization. It is a financial institution with the main purpose of giving loan for development projects and making the assurance of its return unless in the case of concession agreements. However, recently the Bank has declared its concern for human rights of indigenous peoples with the adoption of OD 4.20.

¹⁸¹ The directive provides policy guidance to (a) ensure that indigenous people benefit from development projects, and (b) avoid or mitigate potentially adverse effects on indigenous people caused by Bank-assisted activities. It also requires special action to be taken by the Bank where its investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources. See Operational Directives 4.20 on Indigenous Peoples. 1991.

¹⁸² Horta. 2006: 11

¹⁸³ See AFRODAD. 2007: 19-21

¹⁸⁴ See OD 4.20. 1991. Parag. 6, 8 & 9

¹⁸⁵ See the detail in Nelson et al. 2001.

national parks (Campo Ma'an and Mbem-Djerem) had failed due to internal conflict, lack of strategic objectives and proper financial planning.¹⁸⁶

Last but not least, the case illustrates the collusion of TNCs, host states and even international financial institutions in indigenous peoples human rights violations. Oil companies have almost always been denounced of complicity in human rights violations particularly in Africa. In CCPOP, however, the co-financing of the project by the World Bank has taken the attention from the corporations. The blame by both domestic and foreign human rights NGOs, governments concerned with the issue as well as indigenous group representatives were successfully led astray to the World Bank. In general the whole process of relocation and forest clearing as well as lack of participation in impact assessment plans and discrimination in compensation contravenes indigenous peoples human rights to land, their cultural rights and rights to self-determination and rights to non-discrimination protected under ILO-169, ICCPR, UNDRIP & ICERD.

To conclude, the cases analyzed here do not intended to mean that all TNCs violate human rights and are always contempt for humanity. Even if it is debatable that whether such developments benefits brought by TNCs trickle down to indigenous peoples; the positive impacts of TNCs such as opening new jobs, increasing capital and technology along with their derivative benefits such as health facilities, education, and even political rights must be acknowledged. It does not also means that indigenous peoples are the only human right victims of TNCs. Other vulnerable groups, communities, and tribal groups are also susceptible to these abuses. Nonetheless, the cases discussed in this chapter evidenced the factual worse scenarios of indigenous peoples human rights abuses and violations by TNCs observed in the last few years in order to avoid a purely theoretical and elusive discussions. It is not my purpose to establish liability, but the cases provide a more conceptual understanding of the human rights situations that need to be addressed.

Having identified what sorts of indigenous peoples human rights are affected by TNCs and indicating the situation of increased vulnerability of these people for further human rights abuses by others, the next chapter will examine if such acts of TNCs entail liability under the existing system of international law.

¹⁸⁶ Horta. 2006:11

CHAPTER 4. REGULATORY CHALLENGE POSED BY TNCs

This chapter is organized into four parts each addressing different but interrelated legal questions. The first part raises two basic issues dealing with the indirect approach of classical international law in regulating non-state actors including TNC. First, is the classical state-based international law capable of regulating TNCs? Second, do states have ‘vicarious’ or ‘indirect’ liability for human rights violations by TNCs? On the basis of these issues it deals with if host states can effectively regulate TNCs and impose liability in case of breach. It also analyses whether extraterritorial legislations from home states, ATCA taken as an example, can serve as effective instruments to impose human rights liability on TNCs for their complicity in human rights abuses abroad.

The second part deals with whether TNCs have direct human rights liability under the current international law. Then it tackles the theory of ‘corporate veil’ which further impede the direct liability approach, and analyzes proposed solutions.

In its third part, the chapter considers if there is alternative basis of TNCs liability. To this end it analyses the effectiveness of ‘unjust enrichment’ claims for indigenous human rights victims who claim monetary compensation from TNCs. Then the fourth part goes on discussing if private law, i.e., bilateral and multilateral agreements can be a solution, and end up by drawing conclusion.

4.1. The Human Rights Liability of TNCs: the Indirect Approach

Conventionally international law imposes human rights responsibility directly on states to regulate private actors including TNCs not to infringe the human rights of their people.¹⁸⁷ TNCs human rights behaviors, thus, regulated indirectly through their home or host states. Host state refers to those states where TNCs operate their businesses when it is different from their country of citizenship or incorporation. Despite the debate that TNCs are global citizens and can not be subject to certain country citizenship, the term ‘home state’ is used to refer broadly to TNCs’ country of citizenship or incorporation.

¹⁸⁷ We can find this reflection in many convents such as ICCPR, IESCR, ICERD, ICRC etc.

4.1.1. Host States-based Liability

The theory of states liability for internationally wrongful acts is incorporated under the Draft Articles on Responsibility of States for Internationally Wrongful Acts which later adopted by the International Law Commission (ILC) and annexed to the General Assembly Resolution in 2001 [hereinafter ILC Articles on Responsibility of State].¹⁸⁸ Legally speaking, the ILC Articles on Responsibility of State are not binding principles. However, since they are the reflections of “highly recognized publicists in international law” and “evidences of established and developing customary international law”; they have high authoritative force.¹⁸⁹

An act is qualified as an internationally wrongful act up on the fulfillment of two cumulative elements. First, the act should be attributable to the state through action or omission or both; and second, the act must constitute a breach of a valid international obligation of a state which is in force for that state at that specific time.¹⁹⁰ States being artificial creations of the law can act only “by and through their agents and representatives.”¹⁹¹ International law, thus, attributes the acts of state representatives – government organs which naturally presumed as state representatives to exercise power – and agents – any person who has acted under the ‘direction’, ‘instigation or control of those organs’ – as acts of the state.¹⁹²

Theoretically the act of individuals, corporations or collectivities linked to the state by nationality, permanent residence or incorporation may attribute to the state regardless of any connection with the government.¹⁹³ However, this view is disregarded under international law so as to limit the liability of states only to acts that engage the state as an institution and also to recognize the autonomy of persons (both legal and natural persons) acting in their own account.¹⁹⁴ Hence, the general principle remains that “the only conduct attributed to the state at the international level is that of its organs of

¹⁸⁸ See Clapham. 2006: 241

¹⁸⁹ Chirwa. 2004: 5

¹⁹⁰ ILC Articles on Responsibility of states. 2001. Art 2; see the detail in ILC Commentaries to the Draft Articles on Responsibility of State for Internationally Wrongful Acts. 2001: 68-74 [hereafter ILC Commentary]

¹⁹¹ See ILC Commentary. 2001: 71

¹⁹² See ILC Commentary. 2001. Art.4, 5, 8 in pp.84-86

¹⁹³ ILC Commentary. 2001: 80

¹⁹⁴ ILC Commentary. 2001: 80

government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.”¹⁹⁵

The flip side of this argument is that the act of private actors including TNCs is not *prima facie* attributable to a state to entail international liability unless the state empowers the corporation to exercise public authority or the wrongful act is performed under the ‘instruction of’, or ‘direction or control of’ that state.¹⁹⁶ This holds true “even where such corporation is wholly owned by the state or the state has a controlling interest in it.”¹⁹⁷ In this case a TNC may become public authority rather than private entity and hence its acts considered as acts of the state. Otherwise, neither the TNCs nor the national affiliates are part of organs of the government to be attributed to neither the host nor the home state and to entail liability there to. Hence, the human rights abusive acts of TNCs are not attributable to either home or host states under international law except for the above, less probable, conditions of acting as states representatives. Whether a wrongful act which is not directly attributable to a state can still implicates states’ ‘vicarious’ or ‘indirect’ liability under international law is the other issue.

Under international human rights law states have the obligation to respect, protect, and fulfill human rights of every individual within their territory and subject to their jurisdiction against any violation by private organs including TNCs.¹⁹⁸ In fact most states have explicitly undertaken these human rights obligations through ratification of different international human rights conventions. States are obliged not only to refrain from infringement of human rights but also to ensure that others, including business entities such as TNCs, do not infringe such rights. According to Chirwa, the state obligation to protect human rights entails three main obligations: “to prevent violations of human rights in the private sphere; to regulate and control private actors; and to investigate violations, punish perpetrators and provide effective remedies to victims.”¹⁹⁹

The treaty bodies in most cases also require states to establish monitoring, regulatory and adjudication mechanism. Accordingly, those host states that have ratified the

¹⁹⁵ ILC Commentary. 2001: 80

¹⁹⁶ ILC Commentary. 2001: 110-112; see also the detail in McCorquodale & Simons. 2007: 606-608

¹⁹⁷ ILC Articles on Responsibility of States. 2000. Art. 8

¹⁹⁸ See the detail in Ruggie. 2007a. Parag. 39-71

¹⁹⁹ Chirwa. 2004: 4

international conventions which safeguard the rights of indigenous peoples such ICCPR, ICESCR, CERD, CRC and ILO-169 have a treaty based legally binding international obligations to respect the human rights of indigenous peoples enshrined in these conventions and to ensure the observance of such rights by other non-state actors including TNCs.

There is also non-treaty based obligation on host states when the breached law is a peremptory norm or *jus cogens* or a general principle applicable in the international legal order. In discharging such obligations host states have a legitimate right to establish regulatory regimes that can hold TNCs fully and directly liable for any infringement of human rights, “including legislations, adjudication through judicial remedies and compensation where appropriate.”²⁰⁰ These human rights obligations of host states, thus, are relevant not only in imposing indirect liability on TNCs who allegedly violate human rights through the mechanism of host state regulatory mechanisms but also in implicating host states’ indirect liability for such acts.

Host states failure to take necessary measures to avoid the infringement or to effectively redress the victims entails liability on the host states themselves. As commented by the IACHR in *Velásquez Rodríguez v. Honduras* case that “a human rights violation which is initially not directly imputable to a state can lead to international responsibility of the state ‘not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it’.”²⁰¹ Hence, TNCs implication in human rights violations will not *per se* entail direct liability of host states under international law, but states can be held liable for failure to exercise ‘due diligence’ to protect the human rights of their people from being infringed by non-state actors including TNCs.

Taking into account the current global power of TNCs, the pressure of globalization and international financial institutions on market deregulation, the debit crisis and most states implications in alleged human rights violations by TNCs; whether host states, most of which are developing countries, are willing and/or capable of imposing direct obligation on TNCs to respect the human rights of indigenous peoples living in their territory is an

²⁰⁰ Rugie. 2007a: 15

²⁰¹ Chiwa. 2004: 14; see also in detail the concept of ‘due diligence’ in pp. 14-18

appealing issue. In short, whether host states' domestic legal systems are capable of regulating TNCs is the issue. There are four basic obstacles in this regard.

First, the dilemma of prioritizing respect for human rights in general or indigenous human rights in particular from the debt crisis they are in. Host states, most of which happen to be developing countries, often refrain from imposing human rights standards on TNCs being afraid of losing the investment market to their competing neighborhoods.²⁰² Second, most governments of both host and home states have less political will to recognize the very existence of 'indigenous peoples'; and even those states which recognize indigenous peoples do not want to go far in recognizing land and resource rights.²⁰³ Third, even if there is a political will, the unequal economic power with TNCs and the lack of adequate judicial mechanisms make the host states regulatory mechanism less effective. Fourth, the traditional mechanisms of ensuring human rights through domestic legal framework could not work with TNCs as they are global actors operating across borders and hence not effectively subject to domestic jurisdiction of host states. These and other factors limited the effectiveness of host states-based human rights liability of TNCs.

4.1.2. Home States-based Liability

Whether home states have the obligation to ensure the activity of TNCs headquartered on their territory, subsidiaries or sub-contractors to comply with international human rights standards in their overseas operation is the questions here. As a matter of principle, under international law states have the obligation to ensure the activity of their people or legal entities not to infringe the human rights of others.²⁰⁴ However, whether the duty to protect extends beyond jurisdiction or extra-territorially remains an open debate that requires detail analysis.²⁰⁵

²⁰² See the detail analysis on the human rights impact of competing for FDI in Chu Yun Juliana Nam. 2005.

²⁰³ For instance, the 2004-2006 UN Human Rights Treaty Bodies review reveals violations of indigenous peoples' rights to own and control their traditional lands and resources in all except one of the states reviewed. Forest People Programme & Tebtebba Foundation. 2006.

²⁰⁴ It is the extension of the obligation to protect human rights against violations committed by its agents, private persons or entities. See the General Comment 31 by the Human Rights Committee discussed in. Ruggie. 2007a: 14

²⁰⁵ See, for instance, Ruggie. 2007a. Parag. 81-92

According to the Committee on ECSCR, states have to take action to prevent their citizens' and companies' human rights violations even abroad in observance of the principle of 'non-intervention to the internal affairs of a state'.²⁰⁶ The Committee on Elimination of Discrimination Against Women also encouraged and even required state parties to take appropriate action to hold accountable their corporations accused of human rights violations abroad.²⁰⁷ There are also some jurisprudences developed in the last few years based on the requirement of exerting effective control. Accordingly, home states can assume jurisdiction on non-state actors at overseas operation so long as they exercise 'effective control' and hence their obligation can be extended extraterritorially in this regard.²⁰⁸ Thus, up on the limitation of 'non-intervention' in sovereignty of states and with the fulfillment of 'effective control' home states have the obligation to regulate their TNCs operating across their borders.

Despite such forceful arguments, however, there is no specific international law which obliges states to assure human rights observance by their private actors in their overseas operation. The New York and Brussels Workshops (2006) also affirmed that "neither the treaty regime nor customary international law currently impose an obligation on states to regulate [TNCs], as opposed to allowing states the freedom to do so."²⁰⁹ Hence, the current human rights environment is permissive regarding home states' obligation to regulate the human rights behavior of their TNCs operating beyond their jurisdictions.

Very recently in 2007 legal scholars have developed an argument that TNCs complicity in human rights violations abroad can implicate home states liability under international law. This unique approach taken by McCorquodale & Simons²¹⁰ is that even if home states do not intend to encourage their TNCs operating abroad to commit human rights norms, home states somehow have contributed to the creation of human rights conducive environments through engagement in foreign relations that assist TNCs to 'win contracts

²⁰⁶ See Ruggie. 2007a: 15

²⁰⁷ See Ruggie. 2007a: 15

²⁰⁸ See the jurisprudence of IACHR, ECHR & HRC discussed in McCorquodale & Simons. 2007: 602-05

²⁰⁹ Ruggie. 2006b: 11

²¹⁰ Robert McCorquodale is Professor of International Law and Human Rights at the School of Law, University of Nottingham, UK and Penelope Simons is an Associate Professor at the Faculty of Law, University of Ottawa, Canada.

in foreign markets and lobby against regulatory and political barriers'.²¹¹ Even if no jurisprudence so far has developed in this regard to elaborate further, home states' involvement in negotiating human rights terms with host states through bilateral agreements and its impact on human rights has documented.²¹²

Despite the lack of clarity regarding home states liability either to regulate their TNCs operating abroad or their own liability based on the recent indirect implication theory through foreign affairs; some home states have made initiatives towards imposing human rights liability in their TNCs. Hence, while extraterritorial legislations of home states remain a more viable alternative in many situations, its effectiveness is analyzed as follows taking ATCA as an example.

4.1.3. Extraterritorial Legislations: Experience from the US ATCA

In the last few decades, extraterritorial legislations appeared mainly from the developed countries of the common law system. The oldest Alien Tort Claim Act (ATCA) of US (1789), which expanded its jurisdiction to TNCs recently,²¹³ the US Corporate Conduct Bill (2000) which is not yet a law; the Australian Corporate Code of Conduct Bill (2000) which is discarded by the parliamentary committee as "impracticable, unworkable, unnecessary and unwanted",²¹⁴ and the Belgian Code on Corporate Governance (2004) from the civil law system are the remarkable ones.²¹⁵

All these legislations may give the forum for plaintiffs from the developing world to bring their claims in more developed legal systems where the defendant TNCs are based and where their assets are available for satisfaction of eventual judgments.²¹⁶ Nonetheless, the US ATCA would be of particular interest here as it is a unique Act with rich jurisprudence, and allows any alien, including indigenous peoples, to bring a tort claim against TNCs through pleading a violation of the 'law of nations' or 'treaty of US'.

²¹¹ McCorquodale & Simons. 2007: 598-9; see the detail in pp. 611-615

²¹² Suda. 2006: 73-160

²¹³ The Alien Tort Claim Act 28 USC § 1350

²¹⁴ See the critics on this comment in Deva. 2004a: 57-63

²¹⁵ England, Spain and Canada also developed similar extraterritorial acts. See Joseph. 2004: 114 -128; See also Chirwa. 2004: 32-33

²¹⁶ Stephens. 2002: 85

Originally, ATCA grants district courts of US to assume original jurisdiction over any civil action based on tort (extra-contractual liability) brought by an alien in violation of the law of nations or a treaty of US.²¹⁷ ATCA, however, was not referred adequately before the case of *Filartiga v. Pena-Irala* (1980) which came up with its modern interpretation that claims of customary international law violations by state officers can be adjudicated.²¹⁸ Deviating from the traditional assumption that only states are capable of violating human rights, the case of *Filartiga* brought a new scenario that private actors, i.e., individuals can violate customary international law and can be adjudicated under ATCA for such violations.

The jurisdiction of ATCA has further expanded to adjudicate non-state actors violations of *jus cogens* norms which by definition could not be derogated by states or private actors in the case of *Kadic v. Kardadzic*.²¹⁹ Later on, in the case of *Doe v. Unocal* the jurisdiction of ATCA extended to cases of TNCs up on the fulfillment of state compliance.²²⁰ Since then many TNCs have experienced human rights litigations under ATCA.²²¹

Under ATCA with out a need to be US citizen/ resident plaintiffs from all over the world can initiate a suit against TNCs regardless of the later's country of incorporation or citizenship. Nevertheless, for the US district courts to assume *ratione personae* or personal jurisdiction on foreign TNCs, the parent corporations should be located in US or there should exist 'sufficient' business presence in the US.²²² As explained by De Feyter, "the court verifies whether international law exists; whether the US recognizes the applicable law or whether the alleged violation is breach of customary international law [the law of nations] regardless of US Treaty membership; whether the law is still valid

²¹⁷ Salazar. 2004: 119

²¹⁸ Before this case, jurisdiction under ATCA was claimed only a couple of times in 1795 case of *Bolchos v. Darrell & in Adra v. Clift*. See Salazar. 2004: 120; see also the detail about *Filartiga* case in Salazar. 2004: 127-133

²¹⁹ See Salazar. 2004: 133-135

²²⁰ This case was brought by a group of Burmese villagers against Unocal due to alleged human rights abuses committed during the construction of a pipeline joint venture project in Burma. See Salazar. 2004: 136-139; see also the summary of the case in Steinhardt. 2005: 195-196

²²¹ For instance, cases have been brought against Shell and Chevron for environmental and human rights abusive operations in Nigeria, Texaco for environmental abuse in Ecuadorian Amazon, ExxonMobil for alleged complicity in human rights violations committed by Indonesian military units in Indonesia, and Talisman for alleged abuse of human rights in Sudan. See Steinhardt. 2005: 194-196

²²² Kinley & Tadaki. 2003-2004: 941-942

and whether the defendant violated the law.”²²³ However, in its current application TNCs can be sued under ATCA up on the fulfillment of one of the following two conditions. First, the alleged violations should be a violation of *jus cogens* norms and/or second, there should be proof of state complicity.²²⁴

The state complicity requirement would not pose big challenge since in almost all major cases of reported human rights abuses by TNCs the host states were prominently and actively involved and often engaged in contractual agreements of various kinds such as concessions, joint ventures, and production-sharing agreements.²²⁵ The challenge rather lies on proving a violation of the ‘law of nation’ which is understood as customary international law or a *jus cogens* norm recognized by the US legal system. Piracy, war crimes, genocide, crimes against humanity, and slavery are the only *jus cogens* norms recognized by Federal Courts of US.²²⁶

However, the US Supreme Court has commented that “... the present-day law of nations rest on a norm of international law character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”²²⁷ Hence, the US courts adhere to progressive interpretation approach in appreciation of such norms. For instance, in the case of *Unocal* forced labor was equated to modern day slavery, and, thus, considered as the violation of a *jus cogens* norm.²²⁸ This evolutionary approach is significant as human rights are often written in general terms, leaving ample scope for the judges to creatively apply the provisions taking in to account up-to-date situations.

²²³ De Feyter. 2001: 194

²²⁴ Salazar. 2004: 139

²²⁵ To mentions some, Unocal and Burma were in joint venture for the construction of a pipeline that allegedly resulted in displacement of villagers and the use of forced labor. Exxon Mobile was in joint and several liability agreements for human rights abuses allegedly committed by the Indonesian military assigned to protect gas production facilities in northern Sumatra. Texaco and Ecuador were in concession agreement for the extraction of oil in the Ecuadorian Amazon that allegedly damaged indigenous peoples human and environmental rights. See Alford. 2007: 13-14

²²⁶ Salazar. 2004: 140; N.B. It is relevant to note here the discussion made under chapter 2 regarding some indigenous human rights as achieving the status of customary international law and some *jus cogens*.

²²⁷ Opinion of the US Supreme Court in case of *Sosa v Alvarez-Machain* quoted in Wilson. 2006: 45

²²⁸ Salazar. 2004: 137

Scholars argued that ‘Cultural Genocide’ should be considered as an international crime against humanity and some court cases have also appeared under ATCA.²²⁹ Regardless of the debate that whether cultural genocide can be categorized under the *jus cogens* norm ‘genocide’ and constitutes an international crime against humanity; the concept could be of relevant for indigenous claimants, who faces the danger of cultural extinction due to TNCs operation in their land, to bring a suit under ATCA.

Furthermore, Salazar has argued on the possibility of bringing a suit under ICCPR and ICESR which can be considered as part of customary international law taking into consideration their long years of entry into force and the high number of ratified states.²³⁰ In fact, this view has basis in the General Comment of the UN Human Rights Committee that many of the rights contained in the twin covenants including Art. 27 which deals with cultural rights of minorities has the character of *jus cogens* norms.²³¹ Yet no jurisprudence has developed so far.

ATCA is also considered as a very significant legislation to initiate a case against TNCs due to some procedural advantages that the US legal system provides for plaintiffs. First, unsuccessful litigants are not required to pay opponents’ cost unless it is found as absolutely ‘vexatious’ litigation – brought merely to harass the other party.²³² This is particularly important in human rights cases brought against TNCs for the arguments raised are ‘novel and therefore especially risky’ and costly.²³³ Moreover, the risk of covering contingency fee if they lose the case would have frustrated indigenous plaintiffs’ from initiating the suit. Second, the lawyers’ in US often agree on contingency basis which lowers the plaintiff’s legal cost in case of loss.²³⁴ There are also public interest legal sectors that take cases at minimal costs, and rewards for successful law firms which encourage firms to take such kind of difficult and novel cases.²³⁵ Third, in

²²⁹ See Herth. 2000-2001: 503-505

²³⁰ Salazar. 2004: 144

²³¹ Genugten. 2000: 79

²³² Joseph. 2004: 16

²³³ Joseph. 2004: 16

²³⁴ Joseph. 2004: 16

²³⁵ For instance the two Ecuadorian lawyers, Pablo Fajardo Mendoza & Luis Yanza, who have brought the environmental damage claim against Texaco, have awarded the 2008 Goldman environmental prize. See “Activist Lawyers Win award following Chevron Suit” News on-line available at: www.business-humanrights.org/home Visited 16 Apr. 2008

US damage awards are higher than other countries and indigenous peoples who win the case could be well compensated, at least in monetary terms.²³⁶ Last but not least, under ATCA the US district courts will assume jurisdiction based on the plaintiffs' successful plea of a violation of international law as opposed to any domestic laws.²³⁷ Even if Such claim of 'universal jurisdiction', which depicts the idea that "states may (or perhaps in most cases must) exercise their own lawmaking capacity to make the relevant offence punishable *under domestic law* no matter where in the world it takes place, or who commits it" is still disputed,²³⁸ the US courts assumption of jurisdiction on the basis of violation of international law will ease the issue of extraterritorial application of laws.

Nevertheless, ATCA has both procedural and substantive limitations partly because it has never originally intended to regulate the newly emerged transnational global actors nor to safeguard indigenous peoples human rights. Particularly, due to strong procedural obstacles, at least until 2006, no case has been decided on the merits with an award of compensation to the victims while twenty have been dismissed for procedural obstacles and only three settled.²³⁹

As noted by scholars, the notion of '*forum non conveniens*' is one of the procedural impediments under ATCA that serves TNCs to escape human rights liability in general, and for parent companies to shed themselves from being held liable for the overseas activities of their subsidiaries.²⁴⁰ The common law doctrine '*forum non conveniens*' gives the US district courts the discretionary authority to refuse a hearing of a case brought under ATCA if it serves justice and the 'best' interest of the defendant, and the court can order the case to be heard in an alternative forum where the alleged violations committed.²⁴¹ Thus, once a defendant raised such a defense and pointed out other appropriate forum, the burden shifts on the plaintiff to convince the court that justice cannot be served in that convenient forum.

²³⁶ Joseph. 2004: 16

²³⁷ Salazar. 2004: 145

²³⁸ Wilson. 2006: 58; See also pp.58-59

²³⁹ Ruggie. 2006a. Parag. 62

²⁴⁰ See Kinley & Tadaki. 2003-2004: 943

²⁴¹ Kinley & Tadaki. 2003-2004: 942-943

In general, both the home and host states based liability have critical limitations proving their inefficiency and ineffectiveness to ensure TNCs liability for indigenous people human rights violations. Even if some home states based legal forums are available, due to their serious limitations they are far from being effective. If we take ATCA, for instance, despite the procedural limitations there are also logistic impediments such as the cost of traveling abroad for indigenous plaintiffs and their witnesses, staying abroad or going back to attend hearings, finding advocates, and so on. Moreover, extraterritorial jurisdiction is not an equal choice available to all states as most states in the developing world have no capacity to exercise judicial power extraterritorially.

On the other hand, the very idea of extraterritorial legislation is very controversial in that of contravening the sovereignty – non-intervention in the internal affairs of states. The issue debated here is whether exercising extraterritorial jurisdiction with the goal of protecting human rights could also amount to intervention. As argued by De Feyter “... extraterritorial application of home state legislation should not be problematic to the extent that home state law reflects international law. [...] For want of an international forum, US or other domestic courts could in such cases act as ‘agents’ of international law.”²⁴² Still a problem remains regarding adjudication of cases involving TNCs as international law is applicable on states and not on TNCs.²⁴³ Hence, extraterritorial legislation regarding TNCs is not as such a reflection of international law and justified only through indirect extension of home state’s obligation to provide domestic remedies for victims of their corporations operating abroad.²⁴⁴

Taking into consideration the high resource capacity and ‘better’ judicial systems, home states adjudications of TNCs by applying host state laws in home state courts is proposed as another possible approach. While this approach eases the issue of extraterritoriality, it is criticized as ‘judicial imperialism’.²⁴⁵ It is also suspicious of resulting in imposition of ‘protectionist laws’ under the guise of human rights enforcements.²⁴⁶ There are also

²⁴² De Feyter. 2001: 196

²⁴³ This idea is discussed in detail below under 4.2. Direct Liability of TNCs under International Law.

²⁴⁴ De Feyter. 2001: 196-197

²⁴⁵ See, for instance, the critics on the New York Court of Appeal’s decision (2002) that “any judgment against Chevron Texaco in an Ecuadorian Court would be enforceable in the United States.” in Kinley & Tadaki. 2003-2004: 943

²⁴⁶ Joseph. 2004: 12-13

some frustrations that it may result in “unrealistic expectations on states to keep abreast of every overseas abuse by a related TNC”, and/or TNCs may delegate most of their activities to local companies to evade parents’ liability at home.²⁴⁷ After all, as pointed out by Ruggie home state are not kin to control their TNCs operating abroad particularly if that can put them in disadvantage positions, too costly, time-consuming, or politically hazardous;²⁴⁸ and may “give higher priority to the creation of an investment-friendly environment than to promotion of human rights.”²⁴⁹

These and other shortcomings make either host or home states-based liability less effective and left the issue of TNCs human rights liability open for alternative mechanisms.

4.2. The Human Rights Liability of TNCs: the Direct Approach

As we have seen so far, the classical theory of international law which regulates TNCs human rights liability indirectly through home or host states’ legal system is neither effective nor efficient to regulate TNCs’ human rights misconduct. The alternative approach, thus, focuses on the TNCs themselves, i.e., whether TNCs have human rights liability under the existing system of international law, and if so to what extent.

Under the classical concept of international law states are primary bearers of human rights responsibility, and there is no direct corporate liability for human rights.²⁵⁰ It is justified among others due to:

a lack of state practice supporting such a development; likely resistance by states (especially states from the global south that are actively seeking foreign investment); the difficulty of TNCs in relying on the defenses available to states confronted with new obligations (such as state sovereignty, the ability to opt out, lodge reservations, etc.); and problems with attributing international legal personality to corporations.²⁵¹

There are, however, different arguments developed on the basis of UDHR, ICCPR & ICESR that TNCs have direct human rights liability under international law. The UDHR requires “every individual and every organ of society” to “strive”, “to promote respect” for human rights and freedoms and “to secure their universal and effective recognition

²⁴⁷ Ruggie. 2006b: 16

²⁴⁸ Ruggie. 2006b: 16

²⁴⁹ Deva. 2004a: 63

²⁵⁰ Ruggie. 2006b: 8

²⁵¹ Ruggie. 2006b: 8

and observance.”²⁵² ICCPR and ICSCR have also nearly similar phrases which prohibit “any state, group or person” to engage in any activity that contravene the international human rights incorporated therein.²⁵³ It is widely argued that the reference by UDHR to ‘organs of society’s to respect and promote human rights is a direct imposition of human rights obligation on TNCs as part of ‘organs of society’.²⁵⁴ Moreover, the reference of the twin covenants to ‘persons’ is open to interpretation that it can include in legal terms both physical and legal persons, and, thus, apply to TNCs as artificial creatures of the law.

However, even if UDHR and the twin covenants seemingly establish direct human rights liability on corporations; states were designed as the only duty bearers who could violate international human rights law and corporations are liable for human rights only indirectly through the state regulatory mechanisms. Hence, with the absence of direct reference to corporations’ liability for human rights under UDHR or ICCPR & ICESCR, imposing direct human rights liability on TNCs on the basis of these human rights bills remains uncertain. Besides even if UDHR is a strong legal instrument as most of its provisions have the status of customary international law, whether the obligation on ‘organs of society’ appears in its preamble has such a customary law status is debatable.²⁵⁵

To sum up, despite the above and other related forceful arguments, there is no clear and precise international law that imposes direct liability on TNCs for human rights concerns. Besides, as Ruggie argues the recent effort to establish direct TNCs human rights liability on the basis of existing human rights instruments and simply assert that many of their provisions are binding on corporations has no authoritative base in ‘international law – hard, soft, or otherwise’.²⁵⁶ TNCs, however, are not only free from direct human rights liability; they also benefit from the theory of ‘corporate veil’ which limited their liability.

²⁵² See UDHR. 1948. Preamble. Parag. 8

²⁵³ See ICCPR & ICESCR. 1966. The common Art. 5

²⁵⁴ See, for instance, the discussion in Vázquez. 2004-2005: 942

²⁵⁵ See Vázquez. 2004-2005: 942

²⁵⁶ Ruggie. 2006a.

4.2.1. The Notion of Corporate Veil

A discussion on theory of direct corporate responsibility to human rights will not be full if it fails to address the complementary doctrines of ‘corporate legal personality’ and ‘limited liability’ which are known as ‘Corporate Veil’. Corporate legal personality is an old legal concept which traces back to Roman law. Based on the legal personality theory, corporations have an artificial personality created by the law which, in one hand, makes them different from its incorporators, shareholders (both individuals and corporations), managers, or directors; while on the other hand, empowers them to exercise certain juridical rights such as the right to sue and be sued, to enter contract, and to acquire and dispose property.²⁵⁷ Hence, TNCs have fictitious personality created by the law which enables them to exercise some legal rights and to assume some obligations with different status from the physical persons acting behind them.

Later on, the ‘corporate limited liability’ theory emerged and widespread in US and England in the early and end of the 19th century, respectively.²⁵⁸ Until the late 19th century, however, being suspicious and afraid of corporation’s monopoly on power; corporations were prohibited by law to own stock in other corporations.²⁵⁹ Even if TNCs start to flourish beginning from mid 19th century, the growth of the modern form of TNCs has observed by the end of WWII which is followed by the creation of the World Bank, the International Monetary Fund and the General Agreement on Tariffs and Trade (now called the World Trade Organization) implemented by the allied powers to liberalize trade across borders so as to ease the economic devastation they have faced.²⁶⁰ Later by the end of the Cold War globalization has expanded and increased trade between TNCs and states.²⁶¹ In the last years of the same century corporations based in England, Germany and other European countries began to expand their direct investment across the border.²⁶²

²⁵⁷ Stephens. 2002: 54

²⁵⁸ Stephens. 2002: 55

²⁵⁹ It was particularly the case in US and UK. See Stephens. 2002: 55; see also Blumberg. 2000-2001: 3-6

²⁶⁰ See Salazar. 2004: 124-126

²⁶¹ See Salazar. 2004: 124-126

²⁶² Stephens. 2002: 55

Without due consideration to these emerging new form of corporations, i.e., corporations with share holders in other corporations or corporations owning other corporations and corporation operating across border, the modern form of TNCs ‘immediately’ become beneficiaries of the existing limited liability theory.²⁶³ It is this unprecedented historical extension that remains a principle to date. Hence, as a matter of principle corporations, including TNCs, have limited liability that the shareholders’, even if they are other corporations who hold the share, cannot be hold legally responsible for any liabilities of the corporation beyond their share values.

The corporate veil, thus, gives TNCs multiple layers of limited liability which also enables allocation of legal responsibility through varies subsidiaries and corporate forms to minimize parent TNCs’ exposure to direct liabilities.²⁶⁴ Since the legal effect of the veil is to give protection to the persons (natural or artificial) acting behind the corporation not to hold liable beyond their respective share values, in any satisfaction of judgment entered against TNCs, the judgment creditors²⁶⁵ (including indigenou peoples) cannot look for the assets of the share holders (be individuals or other corporations), managers or directors.²⁶⁶ The limited liability theory, thus, gives parent TNCs further advantage to hide from liability when the alleged violation is committed by their subsidiaries or other consultancies even if they act in their ‘sphere of influence’.²⁶⁷

4.2.2. Piercing the Corporate Veil and Other Solutions

In general terms, three basic solutions are proposed to defeat these legal impediments and to hold parent TNCs liable in lieu of the acts of their subsidiaries, or in general, other contractors operating abroad but under the sphere of influence of parent TNCs:

I. Piercing the Corporate Veil: it is a legal principle developed in common law systems where courts can ‘pierce’ or ‘shift’ the corporate veil and impose liability on the share

²⁶³ Stephens. 2002: 56

²⁶⁴ Joseph. 2004: 177

²⁶⁵ A party that wins a monetary award in a lawsuit is known as a judgment creditor until the award is paid, or satisfied. The losing party, which must pay the award, is known as a judgment debtor.

²⁶⁶ Joseph. 2004: 129-130

²⁶⁷ While the concept of TNCs ‘sphere of influence’ has been criticized for its vagueness, it envisages the idea that TNCs human rights liability is not by any means equated to that of states’; however the more TNCs’ become powerful, the more it will be justified to impose internationally human rights standards on them. See De Schuter. 2006: 11-13 & 17

holders when “... shareholder/s exercise extreme control over the relevant company, and the consideration of justice and policy mandate that the shareholder/s should bear the burden of a wrong perpetrated by the company, rather than the person/s who have suffered from that wrong.”²⁶⁸

However, when is a parent company said to have control over the subsidiary or what kind of control suffices to entail liability – administrative (over the board of directors), financial (by ownership of shares), and structural (through management of operations and affairs) – and what level of control – whether control should be to the extent of considering the subsidiary as mere agent of a parent company – are difficult issues to handle in empirical cases.²⁶⁹

A findings of a survey conducted on around 4000 piercing cases also indicated that courts are less likely to pierce the veil on corporate groups than on individual shareholders due to *inter alia* the requirement of a strong evidence of misuse of corporate form, and within the category of corporate groups the veil lift often in tort cases than in contracts.²⁷⁰ For our purpose, while less probability of shifting the veil in corporate groups is a disadvantage as it avoids parent TNCs liability for alleged violations by subsidiaries; the high chance of shifting in tort cases, where most indigenous human rights claims against TNCs will fall, is a positive finding. The problem, however, is on defining how strong the misuse should be to shift the veil. Since ‘a strong misuse’ standard is too vague and subjects to the judiciary personal appreciation and understanding, it may weaken the development of consistent jurisprudence in this regard.

II. The ‘Integrated Enterprise Approach’: this approach presumes that the acts of a subsidiary are directly attributable to the parent due to the interconnectedness of what otherwise be separate legal entities; and hence parent TNCs should always held liable even if the alleged violation is actually committed by their subsidiaries..²⁷¹ It has been argued that the UN Norms under Art. 20 enforce such a normative approach in that: “since the definition of TNCs does not recognize the distinct legal personalities of the

²⁶⁸ Joseph. 2004: 130

²⁶⁹ See Ruggie. 2007b: 7

²⁷⁰ See Thompson. 1998-1999: 380-86

²⁷¹ Ruggie. 2006b: 17

corporations that together constitute the TNC, the *Norms* essentially pierce the corporate veil for all litigation involving an allegation of breach of its provisions.”²⁷²

This approach may ease the obstacles to recovery against a parent corporation by litigants pursuing action against the operations of an affiliate, subsidiary, related corporation, or other entity.²⁷³ However, it will destruct the whole theory of corporate legal personality and limited liability and would create business insecurities among share holders, directors and managers. This insecurity would intern defeat the purpose of the corporate veil which is intended to encourage investment through limiting risk.

III. Imposing Direct Liability on the Parent Company: this theory advocates for the imposition of direct liability on the parent company based on the notion of ‘due diligence’. The idea is that a parent company’s failure to exercise due diligence, i.e., failure to act (in case of direct/indirect involvement in subsidiaries act) and omission (through failure to control the act of the subsidiary) should be understood as taking responsibility.²⁷⁴ This theory can be viable alternative as it limits parent TNCs liability on the basis of exercising ‘due diligence’. In doing so, it makes the theory of limited liability as a conditional right to be enjoyed by TNCs and can be invoked in situations of parent TNCs failure to exercise ‘due diligence’. However, the concept of ‘due diligence’ is too vague and need practical clarity.

The purpose of the whole discussion on theories of legal personality and limited liability is not to challenge their very applicability to TNCs which would be detrimental to the interest of individuals who own the corporation and would end up by creating business insecurity. Rather it is to underline a couple of points. First the deviation of TNCs from the ancient corporate forms on which these doctrines were intended to apply in that of having corporate shareholders and their cross boarder operations should be noted. Keeping this consideration in mind would help courts in deciding whether or not to pierce a corporate veil and to go against parent TNCs for alleged human rights violation by their subsidiaries or those acting in their spheres of influence.

²⁷² Backer. 2005: 145

²⁷³ Backer. 2005: 145

²⁷⁴ Ruggie. 2006b: 17

Second the aim is to emphasize the subsequent impact of the corporate veil in collecting judgments. In relation to resource availability factor for indigenous judgment creditors, both theories of legal personality and limited liability have almost similar consequences of limiting the liability to the assets of the subsidiary or the affiliated organs which actually perpetrated the alleged violations. As often is the case, parent TNCs are very rich and indigenous judgment creditors who succeed the case would not face resource problem during the execution process. Nonetheless, due to the benefits of limited liability indigenous claimants may face a shortage of resources registered in the name of a subsidiary or implicated affiliates of the TNC to execute judgments entered in their favor. This particularly may hold true when the judgment entered consists of huge amount of monetary compensations as usually the case in such kind of claims. Hence, despite the lack of direct human rights liability on TNCs the theory of corporate veil has put further legal impediments on TNCs liability.

4.3. Unjust Enrichment as an Independent Basis of Liability

Unjust enrichment is a legal theory of recovery developed to fill gaps left by conventional civil law categories of contract, tort or property; and suggested by Fagan to serve as ‘a strong legal base’ for particular claims of indigenous peoples human rights violations by TNCs.²⁷⁵ Indigenous plaintiffs who want to bring an unjust enrichment claim should fulfill the standards that: first, the defendant must accrue enrichment; second, the enrichment must occur at the expense of the plaintiff; and third, the enrichment must be contrary to justice or must be unjust.²⁷⁶ Besides, in an unjust enrichment claims since the burden of prove is on the plaintiff(s), “the claim must survive any countervailing defenses or considerations” to be invoked by the defendant(s).²⁷⁷

Two substantive defenses are available for defendants in an unjust enrichment claim, namely, to deny the existence of enrichment or to argue against any injustice in the enrichment.²⁷⁸ It is up to the indigenous plaintiffs, thus, to tackle such formidable defense by establishing the nexus between defendant TNC’s enrichments at the expense of their

²⁷⁵ See Fagen. 2001. 626-664

²⁷⁶ See the detail in Fagan. 2001: 642-649

²⁷⁷ Fagan. 2001: 641

²⁷⁸ See Fagan. 2001: 649-657

rights and its unjust nature. Proving the fact that a TNC has accrued benefits at the expense of indigenous peoples human rights is very tricky task. In some instances, such as the case of Texaco which claimed to accrue about 3\$ per barrel by dumping off toxic in the *oriente* indigenous land and water of Ecuador rather than using the technology to re-inject it into the ground,²⁷⁹ it could be easy to establish enrichments accrued from injustice. However, in many cases it is difficult and sometimes impossible to establish the direct link between accrued profit of TNCs and indigenous human rights violations.

Moreover, it leaves the open debate about which court has authority to exercise jurisdiction or literally where to file such claims; and which state law should get applicability. TNCs being international actors challenge the traditional law enforcement mechanisms of adjudicating cases at domestic courts by applying domestic laws. Whether the home state law/court where the TNCs incorporated or the host state law/court where the plaintiffs reside should get preference is not clear; and acting in both ways could raise the issue of extraterritorial application of laws

The unjust enrichment approach, however, may serve as an alternative legal base to establish TNCs liability in situations where it is possible to prove the accrued benefit from alleged human rights violations and to measure it in monetary terms. It also pursue the immediate goal of indigenous plaintiffs in that of imposing direct accountability on TNCs; minimizing the power asymmetry and establishing balanced relations between the defendant and indigenous plaintiffs which gives them some form of legal recognition of their equal standing; and it has deterrence rational that coincides with indigenous peoples' aspirations to protect their lands.²⁸⁰ Nevertheless, due to the inherent limitations of monetary scales to most of the losses sustained by indigenous peoples, and practical difficulties to meet the standards of unjust enrichment claims by indigenous plaintiffs; this approach remains less attractive and inefficient.

4.4. Private Law Approach

In the absence of effective and efficient public law, private law is advocated as an alternative basis of TNCs human rights liability. Host states are capable of protecting the

²⁷⁹ See Fielding. 2001: 133

²⁸⁰ Fagan. 2001: 657-660

interest and human rights of their peoples through injecting human rights clauses in their foreign bilateral or multilateral investment contracts or other agreements of similar nature is the idea here. States can include human rights clauses in such agreements that might provide for “either a financial penalty of the company or allow the state to sue the company in the event of violation, or which, at a minimum, require an international arbitrator to take human rights consideration in to account as part of their assessment.”²⁸¹

The private laws approach can best serve those prudent TNCs who wish to contract for compliance with basic human rights standards, and as Alford – Associate Professor of Law at Pepperdine University School of Law, California – argued it can “... create opportunities to impose human rights obligation on contractors, vendors and suppliers.”²⁸² However, it extremely relies upon host states’ ability to enforce obligations through contracts and for doing so bring back all the limitations of states-based approach discussed under this chapter 4.1. It is also embedded with other legal obstacles that:

First, the very theory of contract presumes equal status of parties in the contract so that the terms and conditions may not be influenced by. Nevertheless, host states and TNCs/home states are in asymmetrical economic power relationship that the terms and conditions of contracts often happened to favor the interest of TNCs. For instance, in the Chad-Cameron pipeline project there was a “Convention of Establishment” which intended to serve as a legal base of the project and provided the list of inapplicable laws. However, it has been criticized that: “it imposes very little, if any, legal responsibility [on the TNCs] for any impact their activity may have on the people and living environments of Chad and Cameroon.”²⁸³

Second, with regard to human rights of indigenous peoples where most states have shown little incentive/less political interest to recognize such rights and/or even in some cases deny the very existence of the people; it is hard to considered states as diligent guardians of indigenous peoples human rights;

²⁸¹ Ruggie. 2006b: 11

²⁸² Alford. 2007: 3

²⁸³ International Lawyer Saman Zia Zarifi quoted in Horta et al. 2002: 23

Third, as is often the case, most host states in the developing world are implicated themselves in alleged violations,²⁸⁴ and it would be absurd to look for contractual remedies from the same complicit states;

Fourth, contrary to the very domain of human rights under public law, the contractual approach will bring human rights to the category of private law and would left it to the bargaining power of interest groups, i.e., states and TNCs. Besides, by leaving human rights to compete with other economic interests such as the high demand for FDI, profit maximization or at least cost minimization factors; this approach, in practical terms, commoditized human rights and goes contrary to their inalienable nature;

Last but not least, the very binding nature of such investment agreements is limited to the contracting parties. Hence, indigenous people claimants cannot invoke any of the human rights obligations from the agreement unless they are initially included as parties to the contracts or mentioned as third party beneficiaries. Due to these and other limitations,²⁸⁵ these approach also remains far from effective.

To conclude, the long years of injustice in indigenous peoples history has proven that states are not as such trustworthy as far as the protection of indigenous peoples human rights is concerned. States' not only lack the political will but their capability to regulate the human rights impact of TNCs is also in question. The increased attention of the UN treaty bodies and regional mechanisms on regulating corporate impact on human rights is a proof of the growing concern that "states either do not fully understand or are not always able or willing to fulfill this duty."²⁸⁶ Hence, indirect approach of liability does not work and there is no direct human rights obligation on TNCs under international law. On the other hand, the existing alternative ways of achieving TNCs liability through extraterritorial legislations such as ATCA, unjust enrichment claims or private law approach have series impediments which keep them far away from being effective and efficient.

²⁸⁴ Almost all states in which indigenous peoples live maintain discriminatory laws, principles and practices that undermine the exercise and enjoyment of indigenous peoples human rights. See Forest People & Tebtebba Foundation. 2006: 9

²⁸⁵ See, for instance, a detail analysis on the impact of bilateral treaties on human rights by Suda. 2006: 73-160

²⁸⁶ Ruggie. 2007b: 16

CHAPTER 5. EMERGING REGULATORY REGIMES

The increasing risk of violations in the absence of effective and efficient mechanism of establishing TNCs liability will apparently spark a question that what the international community is doing to close this loop hole of the existing international law. It is in this issue this chapter centered.

Since the 1970s, numerous soft-laws, voluntary and self-regulations, and social initiatives have developed by corporations, NGOs, and in some cases by governments and international organizations concerned on the issue of TNCs international human rights obligations. It is not the purpose of this chapter to examine in detail the whole emerging regulatory regimes and initiatives. However, as different regulatory mechanisms proposed at different levels and by different stakeholders, the situation of indigenous peoples who disproportionately sustain TNCs human rights damages left behind. This chapter, thus, briefly analyzes the most remarkable emerging regulatory regimes primarily to indicate the missing link between indigenous peoples human rights and TNCs human rights liability in these growing legal frameworks, second, to identify the notable weaknesses of such regulatory regimes, and then it will indicate the general inadequacy of the existing mechanisms in imposing human rights liability on TNCs.

5.1. Soft-Law Developments

5.1.1. The OECD Guidelines

The OECD – a body of thirty relatively affluent nations which include most of the home states of the major TNCs²⁸⁷ – has come up with its own Guidelines for Multinational Enterprises [hereinafter OECD Guidelines] in 1976 since then modified several times until 2000.²⁸⁸ The guidelines were intended to facilitate trade and FDI among member countries, and hence human rights protection was not in their very purpose.²⁸⁹ However, the Revised Guidelines stipulate general human rights obligations on TNCs to “[r]espect the human rights of those affected by their activities consistent with the host

²⁸⁷ OECD is also adopted by non-affluent states such as Argentina, Brazil, Chile, Estonia, Israel, Latvia and Slovakia. See De Schutter. 2006: 4

²⁸⁸ OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarification. 2001.

²⁸⁹ See De Schutter. 2006: 3-6; see also OECD Guidelines. 2000. Preamble

governments' international obligations and commitments.”²⁹⁰ The Guidelines reference to international human rights obligations of host states is criticized as leaving a tremendous gap in human rights protection because “not all countries have adopted all human rights treaties and even if they have may be unable or unwilling to enforce them.”²⁹¹ The Guidelines also give a general recommendation that “[e]nterprises should [...] engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.”²⁹² While indigenous peoples can benefit from this provision, it has minimized their rights to communication and consultation rather than free prior and informed consent which gives the people the right to say no.

Even if the Guidelines revised many times until 2000, they remained general referring to the human rights of affected peoples, and hence failed to provide specific protection to indigenous peoples human rights. Moreover, while the Revised Guidelines have expanded their jurisdiction to all enterprises incorporated in OECD countries wherever they operate, they explicitly mention their voluntary and not legally enforceable nature on either OECD governments or OECD-based corporations. The Guidelines, thus, merely represent OECD governments' political commitment to support corporate conduct and reflect their aspirations and values.²⁹³

The Guidelines have also no formal enforcement mechanisms to ensure compliance. However, it is possible to bring a complaint to the attention of a National Contact Point or the Committee on International Investment and Multinational Enterprises for non-judicial review – advisory, consultative and clarification procedures.²⁹⁴ The Guidelines praised by some as “the most successful multilateral instruments to date.”²⁹⁵ Nevertheless, despite their lack of sensitivity to indigenous peoples human rights, some

²⁹⁰ See OECD Guidelines. 2000. Parag.2 of the chapter on ‘General Policies’

²⁹¹ Ruggie. 2007b: 21

²⁹² See OECD Guidelines. 2000. Parag.2 (b) of the chapter on ‘Environment’

²⁹³ Murphy. 2004 -2005: 410

²⁹⁴ See Ruggie. 2007b: 22 & Deva. 2003-2004: 11

²⁹⁵ Murphy. 2004-2005: 410-411

legal scholars like Deva criticized the Guidelines as “really only moral requests and are no better than the Codes of conduct adopted by many MNCs.”²⁹⁶

5.1.2. The ILO Tripartite Declaration

The ILO has a tradition of pursuing consensus between business, labor rights and indigenous people human rights. Almost simultaneously with OECD, ILO has adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy [hereinafter the Tripartite Declaration] in 1976 and later revised in 2000. As stipulated in its preamble the Tripartite Declaration intended to “encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise.”²⁹⁷

The ILO has developed a system of questioner and survey to monitor implementation of the Tripartite Declaration by governments, employees, workers and TNCs.²⁹⁸ Enforcement is, thus, more a matter of discrete persuasion by the officials of both bodies or of public embarrassment through the media. However, as argued by De Schutter – Prof. of human rights law at University of Louvain, Belgium, and at the College of Europe, Natolin – the Tripartite Declaration has high moral value due its adoption by consensus.²⁹⁹ It has also a structured complaint procedure, involving a standing committee on multinational enterprise empowered to investigate and make specific findings of code violation by corporations but with no power of sanction or monitoring process.³⁰⁰ The Tripartite Declaration has specific references to the UDHR and other ILO Declaration on Fundamental Principles and Rights at Work (1998).³⁰¹ However, it failed to address other areas of human rights including its convention on indigenous peoples (ILO-169). Hence, like the OECD guidelines the ILO Tripartite Declaration remains less

²⁹⁶ Deva Surya is Ass. Prof. at the City University of Hong Kong School of Law. Deva. 2003-2004: 11

²⁹⁷ ILO Tripartite Declaration. 2000. Preamble

²⁹⁸ Genugten. 2000: 74

²⁹⁹ De Schutter. 2006: 6

³⁰⁰ Deva. 2003-2004: 12-13

³⁰¹ ILO Tripartite Declaration. 2000. Parag. 8

concerned on the special situation of indigenous peoples human rights, and tend to be inspirational with no legal force or even power of market coercion.³⁰²

5.1.3. The Draft UN Code of Conduct on TNCs

The Draft UN Code of Conduct on Transnational Corporations [hereinafter the Draft Code of Conduct] was introduced in 1990 to govern TNCs activity in host states. It however, has failed to be adopted or otherwise put into effect for lack of agreement between developed and developing countries, particularly, on reference to international law and the standards of treatment for TNCs included in it.³⁰³

The Draft Code of Conduct provided obligations *inter alia* that TNCs shall respect the human rights and fundamental freedoms in states where they operate. It also put general rules including respect to human rights, and respect for local laws and traditions which may include respect for indigenous peoples customs and culture. The draft code, however, has been criticized in its generality.³⁰⁴ Its shortcoming is also emphasized by failing to provide any enforcement mechanisms to ensure compliance.

5.1.4. The UN Norms on the Responsibilities of TNCs

In August 2003 the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the UN Norms. The Norms require TNCs to “promote, secure the fulfillment of, respect, ensure respect and protect” human rights “[w]ithin their respective spheres of activity and influence.”³⁰⁵ While the phrase “sphere of activity and influence” was intended to be expression of limitations of TNCs human rights liability to their capacity and competence; the norms seem to impose equal standards of human rights expectation with that of states. The SRSG, thus, criticized such standards as “a burden it cannot sustain on its own”, and he commented that “the Norms end up by imposing higher obligations on corporations than states.”³⁰⁶

³⁰² Deva. 2003-2004: 13

³⁰³ In large part, the resistance was from the developing states being afraid of ‘economic neo-colonialism.’ See Murphy. 2004-2005: 403-404

³⁰⁴ See Muchlinski. 2003: 130

³⁰⁵ UN Norms. 2003. Art. 1

³⁰⁶ Ruggie. 2006a. Parag. 66-67

The UN Norms are non-binding developments but with improved status from the earlier similar soft-law initiatives such as the ILO Tripartite Declaration, and the OECD Guidelines due to *inter alia* its intention of imposing human rights obligation on both states and TNCs, and inclusion of implementation provisions. The Norms require TNCs to adopt the provisions into their contracts with suppliers, distributors, licensees and others.³⁰⁷ They also envisage enforceability of the norms by “national and/or international tribunals, pursuant to national and international laws.”³⁰⁸

Moreover, the Norms are considered as comprehensive list of obligations drawn with reference to the UN Charter, UDHR and other international treaties which give them more accepted basis of human rights in general, and a *jus cogens* status for some human rights.³⁰⁹ The Norms set forth six basic categories of rights or duties, i.e., the right to equal opportunity and non-discriminatory treatment; the right to security of persons; the rights of workers; respect for national sovereignty and human rights; consumer protection duties; and environmental protection obligations.³¹⁰

While the Norms are remarkable steps in the effort towards TNCs human rights liability; the Norms being drafted in similar fashion with the former soft-law initiatives failed to address the special situation of indigenous peoples human rights and the TNCs business operation in indigenous land and territory. The UN Norms being intended to be binding, or in its current soft-law status and aspiration of comprehensivity, their lack of concern for indigenous human rights shows how far these rights are forgotten in the international agenda of corporate human rights liability.

5.2. Voluntary Initiatives

Besides international and intergovernmental efforts to develop soft laws, other voluntary initiatives and self-regulations are also developed at different levels. Apparently these initiatives have no legal status; nevertheless, as commented by Ruggie, “they may have legal consequences.”³¹¹

³⁰⁷ UN Norms. 2003. Parag. 15

³⁰⁸ UN Norms. 2003. Parag. 16-17

³⁰⁹ Deva. 2003-2004: 16

³¹⁰ See the UN Norms. 2003. Points B-G

³¹¹ Ruggie. 2007a: 23

5.2.1. The UN Global Compact

At the 1999 World Economic Forum Conference, held in Davos, Switzerland, the former UN Secretary-General Kofi Annan introduced the UN Global Compact [hereafter the Compact]. The Compact consists of ten (initially nine) principles derived from the UDHR, ILO's Declaration on Fundamental Principles and Rights at work (1998), the Rio Declaration on Environment and Development (1992), and the UN Convention Against Corruption (2003).³¹² The Compact states that businesses should (1) "support and respect the protection of internationally proclaimed human rights [...] within their sphere of influence", (2) "make sure they are not complicit in human rights abuses", (3) "uphold the freedom of association and the effective recognition of the right to collective bargaining", (4) eliminate "all forms of forced and compulsory labor", (5) abolish child labor, (6) eliminate "discrimination in respect to employment and occupation", (8) "undertake initiatives to promote greater environmental responsibility", (9) "encourage the development and diffusion of environmentally friendly technologies", and (10) "work against all forms of corruption, including extortion and bribery."³¹³

As of 12 December 2007, 1890 companies – with 250 and more full-time employees – have acceded to the Global Compact.³¹⁴ Being a pure voluntary initiative, however, TNCs who acceded to the Compact have only moral obligations to embrace, support and enact within their spheres of influence the ten principles and they have to report annually on the initiatives they have taken to operationalize these principles which will be shared in public.³¹⁵ Thus, some companies may have acceded merely for public relations purposes and their participation may not mean any real commitment to the compact nor a change in their human rights behaviors.

The Compact also lacks sensitivity towards indigenous peoples human rights. While the scope of the obligation under Principle 1 is explained as to include *inter alia* the obligation to "prevent the forcible displacement of individuals, groups or communities" and "protect the economic livelihood of local communities",³¹⁶ the actual ten principles

³¹² See www.unglobalcompact.org

³¹³ See www.unglobalcompact.org.

³¹⁴ See www.unglobalcompact.org.

³¹⁵ See www.unglobalcompact.org

³¹⁶ Clapham. 2006: 218-219

do not specifically address the human rights of indigenous peoples, nor do they emphasize general human rights principles as affected communities. The Secretary General has simply asked world business signatories to “support and respect the protection of internationally proclaimed human rights within their sphere of influence.”³¹⁷ Such statements are too vague to adequately protect indigenous peoples human rights or the rights of other affected groups.

5.2.2. Corporate Self-regulations

A number of TNCs have developed codes of conduct as a response to responsible business move advocated since the 1970s. Not only TNCs other non-state actors including business entities, trade groups and NGOs have also adopted codes of conduct. Codes of conduct are voluntary standards set to serve as basis of self-commitment and hence there is no exposure for legal penalties in the event of failure to abide by such codes.³¹⁸ From the general trend, the codes of conduct cover eight broad areas of labor, environment, consumer protection, bribery, competition, information disclosure, science and technology, and taxation.³¹⁹ However, labor rights and environmental standards are the most common issues covered by codes.³²⁰

Due to the moral obligation or ethical approach taken by companies, the rapid expansion of codes of conduct does not show remarkable progress in incorporating human rights phrases. Until 2008 only 152 companies have taken steps in adopting formal company policy statements explicitly referring to human rights.³²¹ The findings of a study made on Transnational Oil Companies (TNOCs) involved in upstream exploration and production activities in developing countries to measure the move towards the human rights agenda showed that only one-fourths of the TNOCs are concerned with ‘Corporate Social Responsibility’ (CSR) in general terms.³²² CSR being a vague concept cannot always connected to human rights concerns. For this reason a specific data analysis made to find

³¹⁷ See Global Compact. 1999. Principle I

³¹⁸ See McLeay. 2005: 8

³¹⁹ McLeay. 2005: 9

³²⁰ McLeay. 2005: 9

³²¹ Business and Human Rights Resource Center. On-line available at: www.business-humanrights.org Visited 25 Mar. 2008.

³²² Nordskog & Ruud. 2000: 139-159

how many TNOCs in the sample has explicit mention of human rights in their policies revealed as small as 11 %.³²³

It is also interesting to note the regional disparity on human rights sensitivity of TNOCs based on their country of incorporation. Accordingly, only 15 % of US based TNOCs have explicit human rights agenda in their policies which makes them less concerned compared to the 28 % representation of their European fellows until 2000.³²⁴ Despite the lack of comprehensivity and enough regional or even country level numerical representations, the sample of TNOCs covered in the study include big leading companies in terms of their revenue, capital investment and business reputation, and even expected to play a role model if they adopt CSR policies.³²⁵ Hence, despite its limitation the sample gives some evidence that there is very slow response/high tolerance of big TNCs, engaged in the oil industry sector operating in the south, for the human rights initiatives in the corporate sphere.

On the other hand, due to companies 'make-up' the inclusion of the general human rights clauses in TNCs' codes of conduct may not reveal a real change in behavior. TNCs may make-up human rights in their policies but at the same time avoid any commitment by avoiding specific reference to international human rights instruments such as UDHR, ICCPR, ICESCR, ILO Conventions and the like. Moreover, as is often the case the phrase 'human rights' in codes of conduct refers to labor rights.³²⁶ Hence, TNCs' codes of conduct are not so promising to be basis of TNCs human rights liability. Besides, codes being voluntary, self-regulatory, little transparent and highly inconsistent; the influence they will put on corporations to respect human rights is questionable.³²⁷ It will also invoke a problem of 'free-riders' which will disadvantage 'rights-friendly' TNCs.³²⁸

³²³ See Nordskog & Ruud. 2000: 145

³²⁴ See Nordskog & Ruud. 2000: 146-147

³²⁵ For instance, based on the information before 2000 – the time of study, Chevron is one of the largest oil companies in the world operating in more than 90 countries having more than 90,000 employees and earning a revenue of US \$42 billion per year (1997); Total has been the world's fifth and European's third largest company in 1999, with a yearly turnover about us \$36 billion in 1998, employed more than 69,000 workers and operating in more than 100 countries; Statoil is one of the world largest producer of crude oil, employed more than 18000 and accruing a revenue of US \$13.5 billion in 1998. See Nordskog & Ruud. 2000: 149

³²⁶ See McLeay. 2005: 11

³²⁷ See Kinley & Tadaki. 2003-2004: 21-22

³²⁸ See Wawryk. 2003: 59-78

These being common problems in the general human rights agenda, indigenous human rights have got the least attention in companies' codes of conduct. While many TNCs have no mention of indigenous human rights in their codes, some just mention indigenous people without mention of the word 'right'.³²⁹

Despite the voluntary nature of the codes, there are two lines of arguments developed in their enforceability. First, it is not possible to say that codes are entirely unenforceable in law and their development is irrelevant; and second, codes might contribute to the development of quasi-binding norms which may lead to their legal manifestations.³³⁰ The codes may have some advantages of imposing positive impact on the promotion, protection and realization of human rights in TNCs' spheres of influence, influencing host states to adopt human rights policies and bringing companies' cultural change for human rights.³³¹ The lack of specific concern for indigenous peoples human rights and less reflection in companies codes of conduct, thus, would bring no change of behavior in this regard.

5.3. Social Initiatives

It is beyond the scope of this study to discuss social developments. However, it would be wise to acknowledge the continued effort of several human rights NGOs, consumers, workers, investors and the media. These social groups can influence TNCs through product boycotts, selective purchasing, protests, naming and shaming etc.³³² NGOs often employ different strategies including encouraging standard setting through state action; influencing TNCs human rights behaviors through certification; raising awareness; targeting campaigns; marshalling shame and so on. Still these too are inadequate and largely restricted in scope to labor and environmental practices,³³³ rather than indigenous human rights issues. The media can also play a significant role in exposing human rights abusive TNCs for the general public and consumers; but its effectiveness is limited to free-press countries where journalists are not at high risk of death or detention.

³²⁹ Forest People Programme & Tebtebba Foundation. 2006: 12-13

³³⁰ See the detail in Kinley & Tadaki. 2003-2004: 956-95

³³¹ See McLeay. 2005: 20-21 & 27

³³² See Kinley & Tadaki. 2003-2004: 934

³³³ See Social Accountability International. www.cepa.org Visited 30 Mar. 2008.

To conclude, to date while a number of efforts have been made ranging from soft-laws to voluntary initiatives evoked by big intergovernmental organization such as the UN to individual TNC's codes of conduct and social initiatives by NGOs; none of them can be served as effective and efficient tools to bring TNCs liability neither to the general human rights violations nor to the specific case of indigenous peoples human rights abuses for at least three basic reasons.

First the human rights obligations of TNCs are expressed in such general terms with no significant reference to specific human rights instruments. Second, they all are voluntary initiatives subject to moral values for their enforceability. The regulatory regimes, in fact, have (more or less) little legal value as they impose moral (because they are non-binding) and political (because of governments' involvement) duties which are not directly enforceable before any court of law or legal tribunal.³³⁴ Third, they have failed to provide implementation and monitoring mechanisms. Even if some of the international regulatory mechanisms such as the OECD Guideline and the ILO Tripartite Declaration have enforcement mechanisms, their monitoring bodies do not have either judicial or quasi-judicial capacity.³³⁵ The codes of conduct would have got enforceability, at least at the national level, indirectly as a failure to meet industry standards of conduct or breach of contract or as abuse of certification schemes etc where they had implied or expressed terms of obedience to international legal instruments.³³⁶ Still it will depend on the willingness and capability of host states.

It should, nevertheless, be noted that neither the fact of non-enforceability nor their lack/lowest degree of sensitivity to indigenous peoples human rights render these instruments worthless. Rather as highlighted by Joseph - Director for the Castan Centre for Human Rights Law - "... the standards therein can be useful points of reference for national governments that wish to impose binding domestic duties on TNCs, for NGOs seeking ammunition to campaign against certain TNCs, and for corporations adopting and implementing internal codes of conduct."³³⁷ These norms are also the elaborations of

³³⁴ Genugten. 2000: 74 –75

³³⁵ See Kinley & Tadaki. 2003-2004: 950

³³⁶ See Muchlinski.2003: 129.

³³⁷ Joseph. 2004: 10

the newly growing international human rights paradigm and the expansion of already recognized basic human rights norms. Hence, as suggested by Stephens, Professor of Law at Rutgers - Camden, the fact that the obligations are illustrated in voluntary codes of conduct would not undermine the legally obligatory foundations of the norms.³³⁸

Moreover, despite the soft law nature of the whole initiatives, “it is difficult to imagine a corporation arguing that it is not obliged to respect human rights.”³³⁹ On the other hand, according to the law-making trend within the system of the UN, moral obligations could be transferred to binding legal norms by developing consciences grown through long years of international practices and *opinio juris*. Hence, today’s soft-laws could be strengthened to hard-laws through customary international law as is the case in most provisions of the UDHR.

Nonetheless, unlike the general case of human rights situations where the whole problem is about voluntarism, efficiency and enforceability of existing regulatory mechanisms, the issue on indigenous peoples human rights is on the very absence of adequate consideration in the regulatory frameworks. Hence, the current international law is overwhelmed for lack of sensitivity to situations of indigenous peoples human rights violations by TNCs.

³³⁸ Stephens. 2002: 80

³³⁹ Stephens. 2002: 80

CHAPTER 6. CONCLUSION AND POLICY IMPLICATIONS

I have been analyzing so far the status of indigenous peoples human rights under the existing system of international human rights law, the violations of such rights by TNCs and the regulatory challenge that states alone are not capable of protecting the human rights of their people from being infringed by TNCs and the absence of direct liability of TNCs under international law. Despite such situations, the newly emerged regulatory regimes remain non-sensitive to indigenous peoples human rights, minimized to voluntarism and also lack the relevant enforcement mechanisms.

Taking into account all these problematic situations this chapter draws conclusions and moves in questioning what can be done or what is the appropriate legal regime in this regard. To this end the chapter attempts to give recommendations based on different levels of time. First it proposes general policy considerations which need to be taken in the long run and then indicates provisional measures that need to be done in the mean time.

6.1. Conclusion

Human rights being inherent rights of all humans expressed in general terms addressing to all individuals regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁴⁰ However, through time, these general human rights considerations proved to be insufficient and ineffective to protect the rights of certain groups of peoples such as women and children. Hence, human rights addressing to specific groups developed, but remained individual rights. The long years of injustice, dispossession and discrimination faced by indigenous peoples across the world invoke the need to go beyond individual human rights protection to collective entitlements of human rights.

Indigenous peoples used the top-bottom approach for their human rights recognition. Accordingly, many international human rights instruments including those milestone twin covenants (ICCPR & ICESCR) have happened to have some fundamental human rights

³⁴⁰ UDHR. 1948. Art.2

phrases that are particularly relevant to indigenous peoples as collective beings. The common article I on the rights to self-determination is the point here.

Moreover, indigenous peoples rights to land and cultural rights are well protected by very significant, due to its legally binding nature and alleged customary international law status, international human rights convention No. 169 of ILO. Very recently, the adoption of the UNDRIP has further proved the need for the special protection of such peoples because of their 'indignity' and clarifies their claims under international law. Despite their diversity, thus, indigenous peoples of the world are protected in international law under the umbrella of 'indigenous peoples human rights' as a single identity.

This 21st century is the era of globalization. Boundaries have less values, many states have opened their door for investment and the global arm of TNCs has stretched long enough to reach the global southern nations including the forest and jungles of indigenous peoples. Numerous TNCs have implicated in human rights violations and accused of increasing the vulnerability of some groups including children, women and indigenous peoples.

Indigenous people happened to carry the disproportionate cost of human rights due to their special attachment to their environment and their lack of recognition within the majority state system. Particularly those TNCs engaged in the extractive sector have posed a particular human right treat on indigenous peoples. Often TNCs pursue their projects up on the grant of a concession or contract of similar nature from host states' governments without seeking the free prior and informed consent of indigenous peoples living in the area nor do they make any impact assessments. On the other hand, even if impact assessments are made they failed to analyze indigenous ways of life as was the case in IPP which was meant to improve indigenous peoples life of the Bagali but failed to consider their mobile way of life and resulted in dispossession.³⁴¹

TNCs often raise their policy of 'non-interference' in the internal affairs of a government as a defence for failure to act against human rights abuses.³⁴² Nonetheless, they implicated in dispossession and displacement of indigenous peoples from their ancestral

³⁴¹ See the discussion in chapter 3 of this thesis, pp. 44-45

³⁴² See, for instance, the case of Shell and BP inaction in Chandler. 2000: 10-12

lands, disturb their traditional way of life which is often the only means of subsistence and the basis of their culture, disturb their spiritual attachments, and disrespect their sacred sites. These all lead to indigenous cultural extinction and often threatened their very well being. TNCs even accrue benefit out of their implication in human rights violations through using low technological standards or by avoiding the use of necessary technologies as was the case by Texaco in its operation in the *Oriente*, Ecuador.³⁴³

The situation has different face in the context of developing nations where let alone the concern for indigenous peoples human rights the general human rights agenda itself has got little weight due to other detrimental factors such as debit crisis and poor governance. Irrespective of the existence of legislative recognitions of their indignity including their rights, indigenous peoples in the developing world has passed through tremendous human rights violations by TNCs. The case of the Subanon in Phillipness who are constitutionally recognized as indigenous peoples and their land right has recognition in a separate Act can be a good example here.³⁴⁴

Despite the growing power and global reach of TNCs and their complicity in human rights violations the current international law remains handicapped. The existing international law failed to provide effective and efficient mechanism of imposing human rights liability on TNCs. Even if some arguments have developed on the basis of UDHR, ICCPR & ICESCR, TNCs have neither direct human rights liability under international law nor their acts are attributable to states. Rather they are further protected under the corporate law doctrines of legal personality and limited liability which served as additional legal grounds for parent TNCs to escape liability for any acts of their subsidiaries or affiliates.

The classical international law mechanism of regulating non-state actors indirectly through states-based regulatory regime also remained ineffective not only because most host states are implicated in such alleged human rights violations but also lack the capability to control TNCs which are relatively powerful, at least economically speaking, than most host states which often fail under the category of ‘weak governance zones’ -

³⁴³ See the discussion on chapter 3 of this thesis, pp. 35

³⁴⁴ See the discussion on chapter 3 of this thesis, pp. 37-38

“areas in which the territorial (or host) state is unwilling or unable to exercise its authority.”³⁴⁵

On the other hand, while the only strong and judicial rich extraterritorial legislation from home states is ATCA, it has suffered from series procedural impediments including ‘forum non-conveniense’. ATCA has also logistic impediments such as the cost of traveling abroad for indigenous plaintiffs and their witnesses, staying abroad or going back to attend hearings, finding advocates, and so on. ATCA is a relevant legislation which currently lights a little hope of redress for human rights victims of TNCs, but even putting aside its limitations ATCA alone can not fill the corporate human rights liability vacuum left by international law.

Other alternative basis of legal liability such as the private law approach relies on host states capability to negotiate their peoples’ human rights in their investment contracts, and it undermines the very domain of human rights. Taking into account the lack of political interest to give recognition to indigenous peoples, it would not be sound to rely on host states’ to give priority for indigenous peoples rights with the risk of chilling TNCs investment. The unjust enrichment claims approach also remains less attractive and inefficient due to *inter alia* the inherent limitations of monetary scales to most of the losses sustained by indigenous peoples, and practical difficulties to meet the standards of unjust enrichment claims by indigenous plaintiffs.

Different regulatory regime and voluntary initiatives have developed at different levels of stakeholders from intergovernmental organizations as big as the UN including the OECD and ILO to individual TNCs. These all efforts are positive steps in reflecting the growing consensus that TNCs human rights behaviour must be regulated, and in highlighting both the possibility and urgency of regulating the human rights behaviour of TNCs. However, they all remain aspirational with no legally binding status and effective power of enforcement. Furthermore, regarding indigenous peoples human rights, they all are infected with the same disease of forgetting these people from their agenda.

Traditionally, since states were the only powerful actors, human rights obligations were presumed in such power asymmetry. The existing international law, thus, could not find

³⁴⁵ Ruggie. 2006b: 3

enough room to accommodate the new powerful transnational actors and to give adequate and effective legal means of redress for human rights victims of TNCs. It puts a contemporary challenge on the essence of the international human rights framework which aimed at protecting the potential victim from the powerful offender. On the other hand, for lack of specific consideration of indigenous peoples human rights in attempted regulatory mechanisms, the contemporary international law left indigenous peoples with little means of redress.

6.2. Policy Implications

It has been indicated that TNCs not only are free from direct human rights obligations under international law, but the indirect state-based mechanisms are also failed to effectively regulate the human rights detrimental acts of TNCs. Hence, any policy implication should follow a couple of approaches. On the one hand it should focus on sharpening existing international laws and other regulatory regimes which include pressing governments to hold TNCs accountable when they implicated in human rights violations. On the other hand, a means of holding TNCs directly liable for their complicity in serious human rights violations should be sought. Both approaches are considered as follows.

6.2.1. General Considerations

6.2.1.1. Binding International Human Rights Law on TNCs

The alarming rate of human rights violations, including indigenous and community rights, followed by TNCs business activities despite all the regulatory and voluntary efforts made in all possible areas is a current challenge for the whole international human rights framework. It is time to weight the devastating human rights impacts of TNCs and to ensure the observance of the existing international human rights norms by TNCs. To this end, based on existing standards of basic human rights, labor rights, consumer protection, environmental concern, rights of local communities, and indigenous peoples human rights strengthening TNCs human rights liability into binding obligations is necessary.

The legal status of TNCs under international law is a notable obstacle in this approach as direct human rights liability on corporations is considered as a change in the very foundation of international law.³⁴⁶ Nevertheless, it is possible to raise the following decisive arguments. First, as a clear reflection of the UDHR that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;”³⁴⁷ human rights are protected in such a way regardless of the identity of the actor whether states, natural persons or juridical persons. Hence, the very purpose of international human rights law is protection of victims irrespective of the identity of the actors from which the rights have to be protected. This will lead to the threshold questions that whether TNCs are capable of violating international law.

Until Nuremberg Tribunal states were considered as the only entities that are capable of violating human rights. The Nuremberg Tribunal, however, for the first time established corporations’ capability to uphold and violate international law by declaring I.G. Farben, a German Industry, had committed international war crime even if it failed prosecution merely for lack of jurisdiction on legal persons.³⁴⁸ Later in 1998, the Rome Statute establishing the International Criminal Court (ICC) incorporated provisions which entitle ICC to assume jurisdiction over legal persons (including TNCs) “when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.”³⁴⁹ Nonetheless, for time constraint, it fails to be adopted and the revised version has limited the court’s jurisdiction to natural persons.³⁵⁰

Thus, taking into consideration the very purpose of international law which is protecting human rights from those who have power and TNCs being new powerful global actors capable of violating international human rights, putting aside TNCs from the realm of international human rights liability would not make sense. Rather it would affect the very creditability and relevancy of international law in the current context of changing global world.

³⁴⁶ See Vázquez. 2004-2005: 46-54; see also the theory of legal personality and the legal status of TNCs in Jägers. 1999: 259-270

³⁴⁷ UDHR. 1948. Art. 5

³⁴⁸ See Bratspies. pp.13-16

³⁴⁹ Draft Statute for the International Criminal Court. 1994. Art. 23 (5) quoted in Wilson. 2006: 49

³⁵⁰ See Bratspies. pp. 22; see also Clapham. 2006: 245-246

Second, law is basically a reflection of society values and hence elastic to accommodate new actors and new values. For instance, those international conventions dealing with women rights, rights of homosexuals are deviations from the traditional values of society and are reflections of modern theory of ‘equality’ and ‘diversity’. On the other hand the idea of ‘indigenous peoples human rights’ is also a new approach under international law which primarily shares sovereignty among states. Hence, international law has been and should be evolutionary reflecting societies’ present values and needs with regard to human rights.

Third, there are some international conventions that impose direct duties on TNCs in their current status as private actors such as the Convention on Civil Liability for Oil Pollution Damages (1975) and the Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment (1993). Recently some criminal conventions have also emerged imposing direct criminal liability on corporations such as International Convention for the Suppression of the Financing of Terrorism (2000) and Basel Convention on the Control of Trans-boundary Movements of Hazardous Waste and their Disposal (2004).³⁵¹ Besides, some international and special tribunals such as the Seabed Dispute Chamber, the Iran-United States Claims Tribunals, and the United Nations Claims Commission have allowed TNCs to bring claims.³⁵² Some regional human rights instruments such as the European Convention on Human Rights, on the other hand protect the rights to the ‘peaceful enjoyment of their possession’, ‘rights to free speech’, ‘rights to fair trial’ and ‘rights to privacy’ of corporations under Protocol I, Art 1, 10, 6 & 8, respectively.³⁵³

These all instances of growing legislations and jurisprudence indicate the possible extension of direct international human rights responsibility on TNCs, if and when states consent to it, for limited purposes without the need of changing the current international law status of TNCs. As pointed out by the SRSG “there are no inherent conceptual barriers to states deciding to hold corporations directly responsible.”³⁵⁴ In my view, the question is a matter of clarifying borders of human rights responsibly of states and TNCs,

³⁵¹ See the detail in Bratspies. pp.30-31

³⁵² See the detail in Kinley & Tadaki, 2003-2004:946-947

³⁵³ See the general approach on corporations as human right victims in Addo. 2006: 187-196

³⁵⁴ Ruggie. 2006a. Parag. 65

while both are subject to it. If I endorse Kinley & Tadaki here “it is neither necessary nor desirable for TNCs to possess full legal personality on a par with states.”³⁵⁵ Hence, while states remain key players under international law as “a party to intergovernmental forums or international instruments”; TNCs can assume limited international entity status to exercise some rights such as “the right to sue and be sued, the ability to assert a right”, and to assume some human rights obligations and to stand in some judicial forums.³⁵⁶

Thus, there is no inherent limitation on international law in imposing direct human rights obligation on TNCs. Rather the obstacle is in achieving the political will of states who are afraid of losing their power of sovereignty. It should be clear that, even if TNCs assume direct human rights liability under international, their liability would not be equated with that of states, and the latter will remain primary actors. Hence, while direct human rights liability on TNCs is desirable, it will not significantly undermine the legal sovereignty of states under international law. Neither this would shift the legal status of TNCs under international law from private business actors to public institutions.

6.2.1.2. Reconsidering Existing Regulatory Regimes

As has been indicated under chapter five, lack of sensitivity to indigenous peoples human rights is one of the main weaknesses of emerging regulatory regimes from the UN Norms to TNCs codes of conduct. Hence, such regulatory and voluntary initiatives need to be reconsidered in line with the human rights concern of indigenous peoples incorporated in international legal instruments. They all need to include human rights clauses specifically addressing to indigenous peoples and need to make reference to certain international legal instruments relevant to indigenous peoples including the recently adopted UNDRIP.

In this regard, the move of the UN Norms was very remarkable. Nonetheless, it remained in commentary and failed to reflect in the body of the Norms. The commentary is quoted here to serve as a model of indigenous peoples human rights safeguarding clauses that need to be included in any up-coming binding international law or revised version of existing norms. The Commentary on Art. 10 of the UN Norms states that:

³⁵⁵ See Kinley & Tadaki. 2003-2004: 945

³⁵⁶ See Kinley & Tadaki. 2003-2004: 946; see also the possibility of limiting legal personality to certain purposes in Jägers. 1999:261-263

(c) Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of [I]ndigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention. 1989 (No. 169). They shall particularly respect the rights of [I]ndigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property.

They shall also respect the principle of free, prior and informed consent of the [I]ndigenous peoples and communities to be affected by their development projects.

Indigenous peoples and communities shall not be deprived of their own means of subsistence, nor shall they be removed from lands which they occupy in a manner inconsistent with Convention No. 169.

Further, they shall avoid endangering the health, environment, culture and institutions of [I]ndigenous peoples and communities in the context of projects, including road building in or near [I]ndigenous peoples and communities.

Transnational corporations and other business enterprises shall use particular care in situation in which [I]ndigenous lands, resources, or rights thereto have not been adequately demarcated or defined.³⁵⁷

These all are existing rights already recognized by different international human rights instruments as discussed under chapter of two of these thesis and need to be respected by all actors including states and any non-state entities including TNCs. Hence, any legal instrument which attempts to impose human rights liability on TNCs need to consider such human rights of indigenous peoples.

6.2.1.3. A comprehensive List of Minimum Human Rights Standards

Despite the on-going debate on whether TNCs human rights responsibility can best be achieved through regulatory regime or voluntarism,³⁵⁸ the whole package of trends since the 1970s proves the need to combine both. Besides, it might take years until states reach consensus on the provisions of binding regulations.³⁵⁹ Hence, complementary to developing binding regulations, a comprehensive list of minimum human rights standards that TNCs need to observe should be developed even if at the level of voluntarism.

Currently despite the soft-law standards and individual TNCs codes of conduct, there are also a number of voluntary guidelines such as Social Accountability 8000 on labor related standards,³⁶⁰ the Ethical Trading Initiatives on environment, social and economic

³⁵⁷ Commentary on the UN Norms. 2003. Point E, Art. 10

³⁵⁸ See, for instance, Wawryk. 2003: 53-78

³⁵⁹ Wawryk. 2003: 56

³⁶⁰ Social Accountability 8000. On-line available at: www.sa-intl.org

concerns,³⁶¹ the Global Sullivan Principles,³⁶² and others. Despite their lack of comprehensivity, the number of existing guidelines might confuse TNCs which guidelines to follow and difficult for civil society organizations to point out non-observance.

Hence, comprehensive human rights standard settings including indigenous peoples human rights clauses can help in defining human rights expectations that TNCs need to observe and hence will contribute significantly to the development of consistent practice in this regard. It can also ease enforcement through public disclosure in case of failure. How to develop such instrument? Who is capable to come up with such instrument, i.e., whether it should be the responsibility of the UN, WB, or the WTO,³⁶³ and which human rights standards should be included are open debates which need further analysis beyond the scope of this thesis.

In spite of such a debate, it would be practically relevant and will have high authentic value if it can be developed within the system of the UN. First the UN has been working on the issue of TNCs liability for human rights since the 1970s and has already tried to come up with some regulatory mechanisms even if they failed to be successful. It has also mandated the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, who has already gone far in analyzing such issues and TNCs expectations. Second, while human rights protection are one of the primary goals of the UN; indigenous issues have already get attention in the UN framework through WGIP, UNPFII and also the special rapporteur on the issue of indigenous peoples human rights. Hence, despite their normative value, for deep understanding, practice and trend it would be more effective if such standards develop within the UN system.

The SRSG very recently reflected that:

... when the challenge we face is imposing human rights obligations on states there is no “higher” expression of authority than international legal norms and instruments that we can turn to. Hence, our options are limited. In contrast, corporations are subject to multiple sources of authority higher than

³⁶¹ See Ethical Trading Initiatives. On-line available at: www.ethicaltrade.org

³⁶² See Global Sullivan Principles. On-line available at: www.thesullivanfoundation.org

³⁶³ See, for instance, Kinley & Tadaki. 2003-2004: 999-1019

themselves, including home and host states, shareholders, broader market forces, and their more informal social licenses to operate. All can and need to be mobilized in devising an effective response to business-related human rights challenges.³⁶⁴

Hence, it is essential to consider alternative mechanisms of achieving TNCs compliance to human rights in general or indigenous peoples human rights in particular at less international law reform level within the multiple sources of authority that TNCs may abide to. This would serve as transitional measures answering the question that what can be done in the mean time until international human right norms or uniform standards developed.

6.2.2. Transitional Measures

6.2.2.1. Sharpening Indirect Liability

Even if the debate on TNCs human rights liability has moved beyond the responsibility of the sates involved, states still remain viable sources of liability. Neither the lack of political will nor capability to regulate TNCs will undermine states' obligation to protect the rights of their people from being infringed by any state/non-state actors including TNCs. Host states are primarily responsible to safeguard the human rights of their people including indigenous peoples human rights in their jurisdictions. In this regard, there are three possible areas where the human rights liability of TNCs can be sharpened under the jurisdiction of host states.

Primarily host states should refrain themselves from being implicated in human rights violations of their people in collision with TNCs. Second, host should negotiate the human rights terms under which TNCs can operate in the country, put minimum standards of expected human rights behaviors of TNCs and include safeguarding clauses in cases of breach of such terms. Third, host states should strengthen the domestic regulatory regimes in terms of protective legislations, access to justice system in case of abuses and build effective enforcement mechanisms. Here it will be very significant to give recognition to indigenous peoples human rights in domestic legislations to increase their viability in the state system which will help them to invoke their rights in case of violations.

³⁶⁴ Statement of John Ruggie. 2007: 4

While all these potential measures can be weakened by host states', particularly in the developing nation, high economic demand, lack of political will and some elites benefits from unregulated human rights behaviors of TNCs and other factors; home states most of which are from the developed countries possess greater potential. First, home states can effectively negotiate human rights terms with their TNCs operating abroad through standard settings. In this regard, imposing equal human rights standards both at 'home and Rome', i.e., in home and host states is advocated.³⁶⁵ However, taking into consideration the alternative market for TNCs and developing countries competition to attract such investments; the Rome approach can have negative impacts on the economy of host states and will ultimately affect the protection of human rights. Hence, minimum standards that take into account the basic needs of human rights would be more functional in the current situation.

Second, home states have no resource limitation to develop judicial forums for victims of their TNCs to satisfy their claims abroad. One should not forget that home states' financial and more significantly political support have tremendous contribution in enabling TNCs over-seas operations.³⁶⁶ Home states should take initiatives in regulating TNCs, hence, not merely for the purpose of serving justice and human rights but also for the sake of sharing responsibility. Thus, strengthening extra-territorial legislations similar to ATCA which assume jurisdiction based on international law can be a viable alternative.

6.2.2.2. Contractual Empowerment of Indigenous Peoples

Since most of the contractual agreements are between States and TNCs, tort laws or unjust enrichment claims are the legal options left for indigenous peoples claimants who are victims of TNCs operation. To widen indigenous peoples legal basis for claim of justice host states can incorporate arbitration clauses in their contracts specifically mentioning indigenous peoples or communities who would be affected by the project as third party beneficiaries. In this case since arbitration can be invoked by a third party

³⁶⁵ See the discussion in Deva. 2004b: 502

³⁶⁶ Home states support their TNC operating abroad in a variety of ways such as through negotiating bilateral and multilateral investment treaties, providing political assurance through government export credit agencies; private sector financial offers through regional and national financial institutions etc. see Suda. 2006: 73-160

beneficiary,³⁶⁷ indigenous peoples who are not initially parties to the contract can invoke alleged violations of contractual terms against TNCs as third party beneficiaries.

6.2.2.3. Importing Human Rights Clauses in Codes of Conduct

The current growing TNCs codes of conduct are valuable first step and potential complements to other mechanism of accountability. While they are reflections of TNCs' awareness that their human rights behaviors need to be regulated; as argued by Kinley & Tadick the codes have also important normative impacts on the development of domestic and international laws.³⁶⁸ It is, thus, very important that TNCs codes of conduct include clear and adequate reference to indigenous peoples human rights and become specific in undertaking human rights obligations through referring to relevant international human rights instruments such as the UDHR, ICCPR, ISCESR, ILO-169 or the UNDRIP. The reference to specific legal documents has the benefit of strengthening their normative power and observance, increased enforceability and help for the development of consistent and uniform practice of codes. A clear reference to human rights clauses can also help TNCs to negotiate human rights terms in their business dealings with contractors, subsidiaries, suppliers, and so on.³⁶⁹ Hence, it would lead towards creating conducive business environment where corporations can grow their profits in the long run.

6.2.2.4. Transparent Impact Assessment & Consultation

In general terms, TNCs must carry out a transparent analysis of political and socio-economic environments, and human rights dimensions of their investment in paying particular regard to the human rights situations of local peoples and distinct culture of indigenous peoples. As envisaged by the Interim Report of the SRSR, “only four out of ten firms indicated that they ‘routinely’ conduct human rights impact assessments of their project, and a slightly higher number that they do so ‘occasionally’.”³⁷⁰ Hence, TNCs must be encouraged to make such assessments in transparent manner in cooperation with civil society organizations’. Prior to the commencement of projects, TNCs should also

³⁶⁷ See in detail the benefits of third party beneficiary in arbitration in Alford. 2007: 35-43

³⁶⁸ Kinley & Tadick. 2003-2004: 936

³⁶⁹ Alford. 2007: 29

³⁷⁰ Ruggie. 2006a. Parag. 35

seek consultation with potentially affected communities including indigenous peoples with a view of obtaining free, prior and informed consent as envisaged under ILO-169 and UNDRIP.

6.2.2.5. New Insight to NGOs and Human Rights Advocates

NGOs can play crucial role as watchdogs and whistle-blowers in protecting indigenous peoples human rights from being infringed by TNCs. NGOs as watchdogs can bring to the for the particular threat that TNCs have posed on indigenous peoples human rights through documenting abuses. Here NGOs need to act as representatives of community voice and hence need to refrain from ‘commercializing’ human rights violations.

NGOs can also help to ensure compliance of both states and TNCs for human rights standards through documenting and reporting abuses, engaging in responsible business dialogues with TNCs, and sharing the experience of TNCs compliance with human rights. They can also put significant input in developing minimum standards of behavior that TNCs should observe. Some NGOs such as Amnesty International and the Workers Rights Consortium have already drafted codes on “Human Rights Principles of Companies” and “Model Codes of Conduct”, respectively.³⁷¹

To sum up, the issue of TNCs human rights liability is so complex and connected with economic powers, political interest and theoretical obstacles, not to mention practical impediments. Many actors from state to international institutions, academia, media, civil society organizations, and few prudent corporations are engaged in looking for effective and efficient regulatory framework to establish human rights liability of TNCs. As mentioned in its very beginning, this thesis has primarily intended to problematize the indigenous peoples human rights and TNCs business operation, and then to indicate the existing legal gap in the existing system of international law and to show the missing link of indigenous peoples human rights in the newly developed initiatives.

Finding a clear-cut solution for this kind of issue is not an easy task as implementation might involve political, economical, social and theoretical considerations. Despite such admitted difficulties, the aforementioned policy considerations need to be taken and

³⁷¹ See www.amnesty.org & www.workersrights.org

implemented through time at the various levels of stakeholders in cooperation and dialogue with indigenous peoples.

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The Ethical Trading Initiatives Web Page at: www.ethicaltrade.org

International Working Group on Indigenous Affairs Web Page at: www.iwgia.org.

UN High Commissioner for Human Rights Web Page at: www.ohchr.org

Resource Center for the Rights of Indigenous Peoples Web Page at: www.galdu.org

Social Accountability International Web Page at: www.sa-intl.org

Survival International Web Page at: www.survival-international.org

Workers Rights Consortium Web Page at: www.workersrights.org