

The Limit of Corporate responsibility To Economic, Social, Cultural Rights

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Dear Sefriani,

On behalf of the Center for International Law Studies (CILS) Faculty of Law Universitas Indonesia, I am pleased to inform you that your abstract has been accepted for Oral Presentation at the 7th CILS International Law Conference 2016 on Maritime Affairs.

The Conference will be held at the **Universitas Andalas, Padang, Indonesia** on Monday-Tuesday, 3-4 October 2016. The keynote and plenary session will be on Monday morning and parallel panel sessions will be on Monday afternoon until Tuesday afternoon. This letter may be used for the purpose of applying an entry visa or obtaining funding for expenses for attending the conference.

Thank you for participating in the 7th CILS International Law Conference 2016 on Maritime Affairs. We hope that you could join us to make this conference a success.

Warm Regards, ☐

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THE LIMIT OF CORPORATE RESPONSIBILITY TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

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Abstract

The old paradigm in international human right law is that State is the only one of the duty bearer of international obligations. While the individuals, corporations or other legal entities are the right holder. This paradigm ignores the latest facts that many transnational corporations, either directly or indirectly, involved in human rights violations in developing countries, including the violation on economic, social and cultural rights (ESC rights). The legal problem in this research is how does the limit of corporate responsibility regarding the ESC rights. This research focused on ESC rights because the attention of international society to this right is very small compare with social political rights. The research method applied in this study is library research with a conceptual, comparative and normative approach. The results showed that within certain limits, with the concept of its social responsibility, corporations should be seen as the duty bearer of ESC rights as well as the state and could be claimed for its failure performed its obligation. However, keep in mind that the imposition of obligations and responsibility to corporations is not to shift the obligation and responsibility of the state. The state remains the primary responsibility on ESC rights.

Keywords: *corporate responsibility; economic, social and cultural rights; The duty bearer; the right holder*

Ringkasan

Paradigma lama dalam hukum HAM internasional adalah bahwa negara adalah satu-satunya penyanggah kewajiban HAM (the duty bearer). Adapun individu, perusahaan dan badan hukum yang lain adalah pemegang hak (the right holder). Paradigma ini mengabaikan fakta bahwa banyak perusahaan transnasional terlibat dalam pelanggaran HAM di negara berkembang, khususnya hak ekonomi, sosial, dan budaya (ekosob). Masalah hukum dalam penelitian ini adalah bagaimana batas tanggung jawab perusahaan terhadap hak ekosob, mengingat perusahaan transnasional bukanlah negara? Penelitian ini fokus pada hak ekosob mengingat perhatian masyarakat internasional terhadap hak ini masih sangat kecil dibandingkan hak sipil, padahal hak ini melekat dalam kehidupan manusia sehari-hari. Penelitian ini menggunakan pendekatan perbandingan, pendekatan konsep dan pendekatan normatif. Hasil penelitian menunjukkan bahwa dalam batas tertentu melalui konsep corporate social responsibility (CSR), perusahaan juga merupakan penyanggah kewajiban seperti negara dan dapat diminta pertanggungjawaban atas kegagalannya melaksanakan kewajiban tersebut. Namun demikian kondisi ini tidak berarti memindahkan tanggung jawab ekosob negara pada perusahaan. Negara tetaplah penanggung jawab utama hak ekosob.

Kata kunci: *tanggung jawab perusahaan; hak ekosob; penyanggah kewajiban; pemegang hak*

I. Introduction.

It was understood that under International Human Rights Law, State is the bearer of human rights obligations. States have an obligation to protect, to fulfill, to respect and to promote human rights. While other subjects are the rights holder. This understanding was reaffirmed in the Guiding Principles on Business and Human Rights 2011 (The UN Guiding Principles). According to this instrument, State is not permitted to avoid their obligations by transferring it to the rights holders by reason of its inability to perform its obligation. It is prohibited also for state consider corporation as complementary to perform state obligation to human rights.¹

¹ ITUC CSI IGB, 2012, The United Nations "Protect, Respect, Remedy" Framework for Business and Human Rights and the United Nations Guiding Principles for Business and Human Rights, A Guide for Trade Unionists, Version 1.0, p.5 available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>

On the other hand some legal instruments in Indonesia such as Law number 40 year 2007² on Limited Liability Corporations, Government regulation Number 47 year 2012 on Social and Environmental Responsibilities, as well as Law Number 25 year 2007 on Investment require companies budgeted operational funds for environment and social responsibility (ESR).³ Corporations that do not implement it will be imposed by sanction⁴ ..

The Sanctions in Law 25 year 2007 are written warnings , restrictions on business activities , suspension of business activity and / or investment facility , or revocation of business activities and / or investment facility.

The majority of corporations in Indonesia actually objecting to ESR obligations with sanctions as defined in that Indonesian legal instruments. It appears from their application of judicial review to the Constitutional Court against the article 74 of Limited Liability Corporations Act along with its explanation.⁵

There are three objections delivered by the corporations before constitutional court. Firstly, They consider that the ESR obligation become a financial burden and will reduce their competitiveness. Secondly, ESR obligation accompanied by sanctions is the privatization of state functions in the business world, because the State has transferred its Economic obligations to corporations. Thirdly, the article 74 causing fuzziness between the responsibilities of social character (voluntary) with the obligations of a legal nature (mandatory) which enforceable.⁶

Finally the court dismissed the request of applicant to eliminate article 74. One of argument delivered by the court is that if the ESR regulated in the voluntary basis would not be effective .

Until now formulation of ESR as a mandatory with a sanctions is still causing much confusion. All existing legal instruments do not mention the scope of ESR, the limits of corporate responsibility, also the sanctions and enforcement mechanisms. Previous research indicates that formulated ESR as an mandatory with sanction does not intend to shift responsibility of state to corporations. It is precisely the implementation of the state's responsibility to protect, promote, facilitate, respect and fulfill ESC rights. Nevertheless it would need to be analyzed the limit of ESR of corporations while state remains in its position as the holder of the primary responsibility that can not be replaced by the corporations. As a country that had ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), Indonesia should implemented its legal obligation derived from that instrument. ESC rights is only one of three components which should be integrated into CSR Law⁷

II. Problem Statement

To what extend corporate responsibility to economic, social, cultural rights?

III. Research Method

² See article 74 Act number 40 year 2007 regarding the limited Liability Corporation.

³ The name of that legal instruments in bahasa : *Undang-Undang Nomor 40 tahun 2007 tentang Perseroan Terbatas, Peraturan Pemerintah Nomor 47 Tahun 2012 tentang tanggung Jawab Sosial dan Lingkungan (TJSL) Perseroan Terbatas, juga Undang-Undang Nomor 25 tahun 2007 tentang Penanaman Modal*

⁴ Indonesian constitutional Court Decision number [53/PUU-VI/2008 p.37](#)

⁵ Ibid.

⁶ Ibid.

⁷ Noke Kiroyan., 2011, "Corporate Sosial Responsibility and The Indonesian Mining Industry", presented at *Indonesian Mining Conference and Exhibition*, November 2011, p.2

This is qualitative research. The methodology employed in this research is library-based research. It employed statutory, conceptual, and comparison approaches. While the main research materials use in this research are primary and secondary sources. The primary sources consist of Indonesian law No 24/2003 regarding Indonesian constitutional court, and constitutional court decision no Nomor 21-22/PUU-V/2007, and ICCPR

IV. Results/Findings

A. Corporate Responsibility to Economic, social, and cultural Rights

Classical paradigm on human rights law emphasizes the vertical relationship between state actors and non-state actors. The state is the duty bearer of human rights, while non-state actors are the rights holder. It is quite understandable because the legal subject in classical international law is only State.⁸ Moreover In the classical paradigm, the corporations or other legal entity could not be held liability to respect human rights. This paradigm ignores the latest facts regarding the existence and the strengthening corporations, especially transnational corporations either directly or indirectly, involved in human rights abuses in developing countries⁹

Along with the rapid development of international human rights law, the state is no longer the sole subject of international law. The concept of human rights is no longer in a purely vertical relationship, but also a horizontal relationship that extend the category of human rights violations and the actors were involved.

Increased of privatization, foreign investment, impact on the increased of presence of transnational corporations with all kinds of activities.¹⁰

The existence of these corporations inevitably have an impact in people's lives that often result in reduced enjoyment of human rights. The right to information and the right to participate in development are the examples of the right which is not only a duty of the state, but also the corporations which their activities intersect with community life¹¹

Intersection between the Corporation with the human rights at least related with the right to healthy environment, the right to health, the right to the availability and accessibility of natural resources and the rights of workers. In the broader scope, structures of power in the horizontal relationships between producers also have the potentiality and opportunities for arbitrary acts against their consumers

Thus, human rights violations not only be done by the state. In the Relation pattern of horizontal power chances of human rights violations are wider in the subject and the various of violation. That's why it was time where the obligation and responsibility of protection and promotion of human rights also exist in every individual and corporation.

⁸ Jimly Asshiddiqie, *Demokrasi dan Hak Asasi Manusia*, presented at *studium general*, The 1st National Conference Corporate Forum for Community Development, Jakarta, 19 December 2005, p. 18-19, accessed 12 March 2016 at http://www.jimly.com/makalah/namafile/2/DEMOKRASI_DAN_HAK_ASASI_MANUSIA.doc,

⁹ Idrhal Kasim, 2007, "Implementasi Hak-hak Ekonomi, Sosial dan Budaya Kerangka Normatif dan Standar Internasional", presented at National Seminar and Workshop "Menuju Perlindungan dan Pemantauan yang Efektif Hak-hak Ekonomi, Sosial dan Budaya di Indonesia" held by the Human Rights Centre, Universitas Islam Indonesia, cooperate with Norwegian Centre for Human Rights (NCHR), at Yogyakarta, 16 April 2007, p.3

¹⁰ Danwood Mzkenge Chirwa, (2004), "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights", *5 Melb. J. Int'l L.* 1, p.18

¹¹ Idrhal Kasim, 2010, "Tanggungjawab Perusahaan terhadap Pemenuhan Hak-hak Ekonomi, Sosial dan Budaya" (paper at national workshop held by national commission on human right, not published, , p.19

It has also been stated in “*Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom*” in 1998

Along with the increasing role and political and economic power of big corporations, especially transnational corporations, there is pressure to establish a new paradigm that allows the expansion of the human rights responsibilities to the corporations¹². There are four interrelated factors why corporations be liable to respect for human rights , namely : (1) the economic power of transnational corporations ; (2) The international nature of transnational corporations ; (3) the impact of corporations operations ; (4) the limited ability of states regulate transnational corporations

According this argument: “*The size and power of transnational corporation and the impact of such corporation on human rights equivalent to that of many nation-states. As result, broadening the scope of liability for human rights violations under various international covenant so as encompass transnational corporations [as well as nation-state] should be considered*”¹³

There are some legal instruments concerning human rights obligations of corporations such as the UN Global Compact (GC), the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 2003, as well as the Guiding Principles on Business and Human Rights : Implementing the United Nations Protect, respect and Remedy Framework 2011. That Instruments does not arrange specifically ESC rights. The facts show that the duty and responsibility to ESC rights are becoming increasingly important in view of the major problems facing mankind is no longer a crime against humanity, genocide, or war crimes. The problems facing mankind today is more etchence , namely poverty and underdevelopment. This condition to be recognized as a result of exploitation or at least indifference of other side of the world that receive the wealth and progress, which categorized as the ESC rights. Some important things that exist in these instruments are as follows :

1. The UN Global Compact (GC)

The Global Compact was formally issued on July 2000. The Global Compact contains 10 obligations , known as the ten principle , Addressed to transnational corporations. Those principles cover the areas of human rights, labor , the environment and corruption. Those principles derived from:

- 1) The Universal Declaration of Human Rights
- 2) The International Labour Organization’s Declaration on Fundamental Principles and Rights at Work
- 3) The Rio Declaration on Environment and Development
- 4) The United Nations Convention Against Corruption

The ten principles set out in the Global Compact are as follows

1. Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
2. Principle 2: make sure that they are not complicit in human rights abuses.

¹² ibid.

¹³ Ibid

3. Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
4. Principle 4: the elimination of all forms of forced and compulsory labour;
5. Principle 5: the effective abolition of child labour; and
6. Principle 6: the elimination of discrimination in respect of employment and occupation.
7. Principle 7: Businesses should support a precautionary approach to environmental challenges;
8. Principle 8: undertake initiatives to promote greater environmental responsibility; and
9. Principle 9: encourage the development and diffusion of environmentally friendly technologies
10. Principle 10: Businesses should work against all forms of corruption, including extortion and bribery

Principle 1 regarding Businesses should support and respect the protection of internationally proclaimed human rights. Some examples of how corporations must respect human rights are as follows :

A. In the workplace

1. by providing safe and healthy working conditions
2. by guaranteeing freedom of association
3. by ensuring non-discrimination in personnel practices
4. by ensuring that they do not use directly or indirectly forced labour or child labour, and
5. by providing access to basic health, education and housing for the workers and their families, if these are not provided elsewhere.

B. in society:

1. by preventing the forcible displacement of individuals, groups or communities,
2. by working to protect the economic livelihood of local communities, and
3. by contributing to the public debate. Corporations interact with all levels of government in the countries where they operate. They therefore have the right and responsibility to express their views on matters that affect their operations, employees, customers and the communities of which they are a part.

Principle 2 requires corporations not to be involved in human rights abuses . There are three kinds of involvement of the corporations in question by principle 2, namely :

1. Businesses should make sure they are not complicit in human rights abuses. Complicity Direct Complicity Occurs when a corporations knowingly assists a state in violating human rights. An example of this is in the case where a corporations assists in the forced relocation of peoples in circumstances related to business activity
2. Beneficial Complicity Suggests that a corporations benefits directly from human rights abuses committed by someone else. For example, violations committed by security forces, such as the suppression of a peaceful protest against business activities or the use of repressive measures while guarding corporations facilities, are often cited in this context
3. Silent complicity Describes the way human rights advocates see the failure by a corporations to raise the question of systematic or continuous human rights

violations in its interactions with the appropriate authorities. For example, inaction or acceptance by corporations of systematic discrimination in employment law against particular groups on the grounds of ethnicity or gender could bring accusations of silent complicity

The Global Compact (GC) has a lot of weaknesses such as although the GC requires corporations to submit annual reports to demonstrate their commitment in favor of human rights, however in practice it is no more than a ritual or public relations of the corporations only because there is lack of proper and independent watchdog on the behavior of corporations. Furthermore it is also because the some terms in the GC is unclear, principle 1 who urged leaders of business to "support and respect the protection of international human rights within their sphere of influence. It will be very convenient for corporations to argue that its subsidiary or its contractors are not within their sphere of influence when they commit human rights violations in where they operate¹⁴

GC did not specifically regulate liability corporations or business on ESC rights, but a set of human rights in general. Related with the limit of corporate responsibility for ESCR, GC is indeed still focus on the parent corporations only.

2. UN Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights 2003

This legal instrument including its commentary was adopted by United Nations in 2003.¹⁵ This Document can be said as a landmark step of Accountability arrangements against human rights Violations done by Transnational Corporations. Most of UN Norms 2003 provision contains principles of international law applicable to the transnational corporation in their activities related to human rights law, humanitarian law, labor, environmental law, consumer protection law, as well as anti-corruption law¹⁶

The UN Norm draft prepared by 26 independent international human rights experts after listening to the comments, opinions and input from stakeholders such as governments, NGOs, and the business community.

The UN Norms intended to assist governments identify the types of legislation that should be made and also enforcement mechanisms that should be implemented to ensure that Norms have a positive impact. Moreover, The UN Norm is also intended to encourage corporations to implement these norms become basic standards and binding.¹⁷

Eventhough The UN Norms already step forward than the previous legal istruments, change the voluntary principle become mandatory, but The UN norms still be categorized as soft law. In practice many soft law was failed become hard law such as treaty or convention because lack of consensus.

Compared with some other legal instruments governing transnational corporations, such as the code of conduct prepared by the ILO, OECD, The European Parliament, The UN Global Compact, Trade Groups, Individual Corporations, Unions, NGOs and others, the UN Norms more complete and focus on discussing the issue of corporate responsibility to human rights.

¹⁴ Surya Deva, "Human Right Violations By Multinational Corporations and International Law :Where from Here?", *Connecticut Journal of International Law* Fall 2000, p. 8

¹⁵ Carolin Hillemanns, 2003, UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, *German Law Journal* No 10, European and International Law, p. 1

¹⁶ David Weissbrodt and Maria Kruger, see note 5, p.901

¹⁷ Carolin Hillemanns, see note 15, p. 3

In preparing The UN Norms preamble, there was discussion whether the Non State Actors can be burdened with the responsibility of human rights . Scholars acknowledged that the state has the primary responsibility to implement human rights in its domestic law. Nevertheless, the Universal Declaration of Human Rights year 1948 stipulated that ... a common standard of achievement to the end that Governments and other organs of society , like corporations, shall strive to promote respect for human rights and freedoms. Thus, the scholars conclude that transnational corporations may be burdened with human rights responsibility. What had been stipulated by the UN Norms can be regarded as a huge contribution in the making and developing international law concerning the obligations and responsibilities of transnational corporation to human rights ¹⁸

Furthermore, the preamble of the UN Norms confirms that transnational corporations, its employees, including managers, members of corporate boards or directors and other executives who work for them can also be held accountable as defined by UN Norms . Some legal obligations of transnational corporations under UN Norms are as follows :

a. General obligation

There are six obligations imposed by the UN Norm to transnational corporations as follows :

1. to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses and
2. to ensure that they do not benefit directly or indirectly from those abuses;
3. to refrain from undermining efforts to promote and ensure respect for human rights;
4. to use their influence to promote respect for human rights;
5. to assess their human rights impacts;
6. to avoid complicity in human rights abuses.

General obligation also stipulated that the corporate liabilities should be applied equally in the home state and in the host state. In this paragraph is also declared that corporations legally responsible, ensure that its activities directly or indirectly not encourage violations of human rights, must be aware of or should have been aware that he did not get benefit from a human rights violation. Moreover, enterprises should act accordance with to the law promoting human rights.¹⁹

b. Obligation to ensure Right to equal opportunity and non-discriminatory treatment

In this paragraph transnational corporations are required to treat as equal, respect and dignity for all workers. For example, the corporation is prohibited to discriminate on the basis of health status such as the HIV / AIDS; race, color, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age (except for the greater protection of children), health, marital status, sexual orientation, capacity to bear children , pregnancy and sexual orientation.

No worker can be the object directly or indirectly in violation of human rights such as physical violence, sexual , racial , psychological, verbal or otherwise. No worker can be

¹⁸ Ibid, p.4

¹⁹ *Commentary on the Norms on The Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights year 2003*

treated badly or disciplinary action without fair procedures. Furthermore stated that the corporations are prohibited from doing various discrimination as mentioned earlier in the recruitment process, payroll, termination of employment, training also promotion²⁰

Corporations are required to provide a good working environment especially for woman. treat with respectful all stakeholders such as indigenous people and their community²¹

Commented [S1]:

c. Obligation to ensure Right to security of persons

This Paragraph related to international crimes against the person. The UN Norm stipulated that transnational corporations : "shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law".

This paragraph calls for the transnational corporations which manufacture or supply goods or services for military, security or police to take strict measures and prevent its products used for violations of human rights or humanitarian law. Corporations should not manufacture also trade weapons that have been declared illegal under international law

In the debate of this paragraph could be questioned possibility claim for accountability of a company or other non-state actors. Experts assert that the Decision of The Military Tribunals after World War II in the case „ Zyclon B Gas supplier of gas to kill concentration camp was convicted of aiding did international crimes . Similarly, in I.G. Farben case , corporate leaders convicted of using his company as an instrument to commit violations of humanitarian law²²

d. Obligation to ensure the Rights of workers

In this paragraph it was stated that there is no forced labor, no economic exploitation of children, the fulfillment of the right to health and safety for workers and their family, the fulfillment of the fundamental rights of workers to organize, an open information regarding health standards and safety of workers²³ also compensation for workplace accidents, or right to entitlements or leave for workers,²⁴ wages and other benefits,²⁵ and disputes settlement.²⁶ In addition, the company is expected to pay attention if the country does not fully apply the International standards regarding association rights of workers, as well as the right to organize to improve the bargaining position of workers' rights protection.²⁷

e.The Obligation to Respect National Sovereignty and Human Rights

²⁰ ibid

²¹ ibid

²² Carolin Hillemann, see note 15, p.6

²³ Paragraph 7b UN Norm 2003

²⁴ Paragraph 7 UN Norm 2003

²⁵ Paragraph 8a-e UN Norm 2003

²⁶ Paragraph 9d UN Norm 2003

²⁷ Paragraph 9e UN Norm 2003

Section 5 UN Norm and its commentary expects transnationals:

- a. to recognize and respect applicable norms of both international and national law, regulations and policies, including development objectives.
- b. to encourage social progress and development, especially in poor and developing countries.²⁸
- c. to respect the right to development and contribute to sustainable development²⁹
- d. to take extra precautions regarding the rights and interests of local communities and indigenous peoples³⁰
- e. to use intellectual property rights in a manner that contributes to innovation, transfer of technology and social and economic welfare.

Other issues discussed in this section is corruption and the involvement of transnational corporations in human rights abuses. Unfortunately no commentary regarding this matter, even though this obligation is a foundation in international law³¹ Moreover companies are required to respect human rights, to refrain from things that hinder realization of respect to human rights. The rights which is referred in this section as followed:

- a. the right to development;
- b. adequate food and drinking water
- c. the highest attainable standard of physical and mental health;
- d. adequate housing;
- e. privacy;
- f. education; t
- g. freedom of thought
- h. conscience and religion; as well as freedom of opinion and expression.

f. Consumer Protection Obligation

UN Norm Section 6 deals with international standards and best practices of business competition as well as advertising. Corporations were obliged to ensure the quality of products and services and applying the precautionary principle.³² Corporation should prevent the qualities of products that harmful to consumers health, especially in countries that lack of the special regulation on that matter

g Environmental Protection Obligations

In this section the company is obliged

²⁸ Paragraph 10a UN Norm 2003

²⁹ Paragraph 10b UN Norm 2003

³⁰ Paragraph 10c UN Norm 2003

³¹ Andrew Clapham/ Scott Jerbi, 2001, Categories of Corporate Complicity in Human Rights Abuses, *Hastings Journal of International and Comparative Law Review* p.339 see also William Schabas, Enforcing humanitarian international law: Catching the accomplices, 42 *Revue Internationale de la Croix-Rouge*, p. 439

³² Paragraph 13c UN Norm 2003

- A. to observe national and international law, regulations, policies and standards as to the protection of the environment, public health and safety, bioethics and the precautionary principle.
- B. respect the right to a clean and healthy environment in the light of the relationship between the environment and human rights, and they shall pursue the wider goal of sustainable development.
- C. to assess the impact of their activities and be fully accountable for any negative environmental consequences.

h. Implementation mechanism

The last section of UN norm 2003 is very important because effectiveness of the norms depends on proper implementation mechanism. The mechanism is as follows

- a. transnational corporations and other business enterprises are required to adopt, disseminate and implement their own internal rules of operation in compliance with the Norms.
- b. they must periodically report to all stakeholders on their implementation
- c. they shall incorporate the Norms into all their business dealings or cease doing business with that business partner

Periodic monitoring by the United Nations or other international agencies or existing national mechanisms is very important to make the UN norm more effective. Supervision should be transparent and inclusive, involving all interested parties, especially non-governmental organizations (NGO). The UN Norms obligates the state to establish national legislation, to ensure corporations comply with its human rights obligations .

The UN Norm also oblige the corporation to provide compensation base on the principle of prompt , adequate and effective in people , entities and communities were harmed by the failure of the corporation to implement the obligations set out in the UN Norm . the form of Restitution can be compensation or rehabilitation for any losses incurred also property which is lost / damaged by the activities of the corporation.

UN Norm mentioned that:³³

...To determining damages and criminal sanctions as well as in all other respects, national courts and international tribunals are to apply the Norms pursuant to their respective laws...

Base on that provisions it can be concluded that transnational corporations can be claimed before national and international tribunal. Although it is unclear which international tribunal that has jurisdiction, This provision already changed the old paradigm at classic international law which excludes transnational corporations into the subject of international law.

Alien Tort Claims Act (ATCA), which is a national law of United States³⁴ (28 United States Code § 1350) is still to be the only national law which gives access to the foreigners victim to seek redress for human rights violations suffered. Paragraph 13 c ATCA clearly stipulated that criminal sanctions may be another mechanism for the implementation of UN Norm . The criminal liability of legal persons as well as companies already known in Anglo- Saxon countries and also a number of continental European countries. Applying

³³ Paragraph 13c UN Norm 2003

³⁴ 28 United States Code § 1350: „(t)he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.“

international criminal responsibility to legal persons has also been debated during the preparation of the Rome Statute in 1998 despite ending with rejection by states for various reasons.³⁵ With all its faults The UN Norm has been a step forward compared to previous instruments , particularly in terms of implementation mechanisms³⁶

Furthermore, Base on the statements of concerned parties the UN could invite corporations who reportedly committed human rights violations to be heard defense. If the corporataion does not take account of recommendations granted by the United Nations sub-committee, this organ can conduct suppression such as publishing violations committed by the corporation that can influence public opinion , especially the consumers to boycott the corporation. There are 5 of excellence of The UN Norm compared to other instruments that have been described previously , namely:³⁷

1. The UN Norm displays a complete list of obligations
2. In the Preamble of the UN Norm prominently displayed reference sources such as the UN Charter and human rights treaties which became the reference obligation of the corporation administration. This reinforces basic acceptance corporate accountability for human rights in general and also the basics of jus cogens to human rights.
3. The UN Norm replace the word "should" become "shall" to the obligations of the corporation
4. The UN Norm provides specific provisions on the implementation of human rights norms . Not only periodic supervision through national and international mechanism but also provides an adequate and effective reparation mechanism to individuals or communities harmed by the corporation's failure to perform its obligations
5. The scope was not only limited to transnational corporations but also includes all other business related to the TNCs regardless of legal form and the place of operation

Although it has important advantages compared to previous instruments, but the UN Norm still using the conventional approach, arguing that the state has the primary responsibility to promote, secure the fulfillment of , respect, Ensure respect of and protect human rights . The state have primary responsibility but this does not eliminate the responsibility of the corporation which is now often seen as a State or exercise the functions of the state

Related to limit of corporate responsibility to human rights, UN Norms not only focus on the responsibility of human rights violations committed directly by the parent company, but also human rights violations by third parties in its sphere of influence such as contractors , subcontractors , subsidiaries, distributors, licenses and suppliers . Explicitly, UN Norms stipulated that:

"Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms"³⁸

The obligation of business grup to respect human rights refers to the responsibility attribution mechanism to control the conduct of third parties, such as business partners. This

³⁵ Carolin Hillemanns, see note 15, p.10.

³⁶ ibid

³⁷Surya Deva, see note 12, p.9

³⁸ Paragraph 15 UN Norm 2003

mechanism which perform the allocation of fault to the group as a whole called as strict liability.³⁹

3. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011)

According to this instrument, state is not responsible for human rights abuses by private actors. The state will violate its legal obligations when the offense can be attributable to state, or when the state fails to take appropriate measures to prevent, investigate, punish and make efforts to remedy the human rights violation done by private actors.⁴⁰ State, and not a business which responsible for ensuring that human rights violations do not occur.⁴¹ Ruggie mentioned that Guiding Principles does not seek to privatize the protection of human rights because it is the fundamental duty of the state⁴² The second pillar of the Guiding Principles governing the corporate responsibility to respect human rights. This responsibility covered:

- a. *Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
- b. *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts⁴³*

Although was presented early, UN Norms 2003 is already a step further than the Guiding Principles. UN Norms 2003 do not stop on the obligation to respect human rights who solicit business or the company refrain from actions that harm human rights. UN Norms 2003 asking the company to promote, secure the fulfillment of, respect, Ensure respect of , and protect human rights which recognized in international as well as national law⁴⁴.

The same sentence is found in the first two principles of the Global Compact as follow:

1. *Businesses should support and respect the protection of internationally proclaimed human rights*
2. *make sure that they are not complicit in human rights abuses*

It is clear that all of the above documents put the responsibility on business to avoid human rights violations in their activities either directly or indirectly⁴⁵

Ruggie criticize that the UN Norms 2003 encumber corporation the same obligation with the countries that already approved this obligation by ratification.⁴⁶ This criticism is not

³⁹ Radu Mares, 2009, Defining The Limits of Corporate Responsibilities Against The Concept of Legal Positive Obligations, 40 Geo. Wash. Int'l L. Rev. 1157, hlm. 1166-1167

⁴⁰ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) p.7

⁴¹ See Business and Human Rights: Interview with John Ruggie, Business Ethics (Oct. 30, 2011), available at <http://businessethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>.

⁴² *ibid*

⁴³ The Ten Principles, U.N. Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>, accessed Jan. 6, 2013.

⁴⁴ Sarah Joseph & Adam McBeth, Research Handbook on International Human Rights Law p.153 (2010).

⁴⁵ David Weissbrodt, “Human Rights Standards Concerning Transnational Corporations and Other Business Entities”, Minnesota Journal of International Law, 23 Minn. J. Int'l L. 135, Summer 2014, p.8

really reflected in the first paragraph of the UN Norms, which confirms that it is the state that has the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights.⁴⁷ UN Norms also mentions that there is no provision in this norm may be construed as diminishing, restricting, or may affect the human rights obligations of the State base on national and international law⁴⁸

More proper interpretation of the UN Norms is that the UN Norms drafter put the corporation's obligation to supplement and not replace the obligation of the state.⁴⁹ Finally it can be concluded that the UN Norms provide a stronger obligation on businesses than Guiding Principles even though both instruments are equally put the primary responsibility on human rights remains on the state⁵⁰

Same with the UN Norms, Guiding principles just discussed human rights in general, not address the ESC rights in particular. Related to limit of corporate responsibility on human rights, extended to acts was committed by third party. Through due diligence Guiding Principles explicitly states that corporate have to examine whether they are contributing to an abuse by activity in an employment relationship with business partners, suppliers, state agencies, and other non- state actors⁵¹ Violations of ESC rights done by transnational corporations based on the findings of Harvard University is a violation against the enjoyment of just and favourable conditions of work" , such as : fair wages and equal remuneration for work of equal value" , "safe and healthy working conditions", pay exceedingly low wages; use forced labor, atau force employees to work under hazardous conditions without adequate safeguards. Corporations that dispose of toxic waste into rivers and causing widespread pollution is said violate the right "to the enjoyment of the highest attainable standard of physical and mental health." Similarly, corporations that damage the habitat of the native population is violated the right of all peoples to "freely pursue their economic, social and cultural development," including the right not to be deprived of their own means of subsistence⁵²

B. The nature and scope of corporate obligation on ESC rights

Although not exactly same with the state, in fact the company has an obligation to respect, protect, and fulfill ESC rights through a combination of negative and positive duties.⁵³The fact that the state is the primary duty bearer of human rights does not mean that

⁴⁶ Special Representative of the Secretary-General, Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) p.3

⁴⁷ Paragraph 1 UN Norm 2003

⁴⁸ Paragraph 19 UN Norm 2003

⁴⁹ Menno T. Kamminga, Corporate Obligations under International Law, 71 Int'l L. Assoc. 427 (2004), p.432.

⁵⁰ David Weissbrodt, Human Rights Standards Concerning Transnational Corporations and Other Business Entities, *Minnesota Journal of International Law*, 23 Minn. J. Int'l L. 135, Summer 2014, p.9

⁵¹ Paragraph 57 UN Norm 2003

⁵² Harvard Law School, Corporate Corporate Liability for Violations of International Human Rights Law, dalam *Harvard Law Review* 114 Harv. L. Rev. 2025, May, 2001, pp.3-4

⁵³ Jernej Letnar #erni#, Human Rights Law and Business - Corporate Responsibility for Fundamental Human Rights 53 (2010), sebagaimana dikutip oleh Jernej Letnar #erni#, Fall, 2014, "A Glass Half Full Corporate and State responsibilities under Economic and Social Rights during the on-Going European Financial Crisis" , *South Carolina Journal of International Law & Business*, 11 S.C. J. Int'l L. & Bus. 87, p. 102

only the state has the obligation. Corporations also have an obligation to respect, protect and fulfill human rights as a State.⁵⁴

a. Obligation to protect

The corporate obligation to protect human rights including the ESC rights covered obligation to protect individuals enjoy their human rights by using the expertise and resources of the corporation⁵⁵ It requires doing positive steps to comply with social and economic rights. This obligation was imposed also to business partners and, the entire chain of business activities.⁵⁶

Principles for Guiding Principles do not directly refer to the obligation of corporation to protect; However, they call it indirectly. In particular , the guiding principles notes that corporate responsibility to respect human rights apply to all corporations regardless of their size sector operational context, ownership and structure. Nevertheless, the scale and complexity is a tool to measure corporate responsibility which may vary according to such factors as well as the severity of human rights violations originating from the negative impact of the corporate activities

Principle 13 (b) of the Guiding Principles noted that the corporations should seek to prevent or reduce human rights violations that are directly associated with their activities, products or services by their business relationships, even if they do not contribute to these impacts.⁵⁷ The obligation to protect generally means that the corporation has an obligation to monitor their supply chains in order to ensure that their suppliers, distributors, and other business partners also comply ESC obligation.⁵⁸

b. Obligation to fulfill⁵⁹

This obligation is positive obligation, which is divided into an obligation to facilitate, to provides and to promote. The successful implementation of these obligations is depend on the financial capacity of the company. These obligations require corporations to take active steps to ensure the availability, accessibility, and affordability to ESC rights. Therefore, the corporations must seek to eliminate obstacles to the enjoyment of ESC rights.

Principle 28, the Maastricht Principles on Extraterritorial Obligations of States on ESC rights stipulated : *that "all States must take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially. . . ."*

This obligation can be applied to the corporation. Corporations should contribute an efforts to achieve the fulfillment of human rights of individuals, and seek to eliminate obstacles to enjoy ESC rights. Alternatively, the state may involve the corporate to provide its own financial resources to ensure the fulfillment of minimum requirements reasonable to ESC rights, for example in a particular geographic region or associated with certain social rights . However, a reasonable approach should be used when checking the corporate

⁵⁴ Asbjorn Eide, (1989). "Realization of Social and Economic Rights and the Minimum Threshold Approach, 10 Hum. Rts. L. J. 35, p.37

⁵⁵ Jernej Letnar #emi#, Fall, 2014, see note 50

⁵⁶ ibid

⁵⁷ ibid

⁵⁸ Ibid, p.102

⁵⁹ Ibid, p.155-156

obligation to fulfill ESC rights. It should still be noted that the Corporation is not intended to replace the role of the state, but is expected to do what they could. State should remain have a role as a primary duty bearer on ESC rights fulfillment

The interesting is when a big corporation like Royal Dutch Shell in Ogoniland, Nigeria, become primary duty bearer to fulfill ESC rights in Context Failure of State to do so, in which no Government Control or inefficiency of Nigerian Government authorities protecting human rights, so corporation has been Asked to provide public functions on behalf State⁶⁰ In this cases, we can assume a corporation has been carrying out the role of the state when the state is not present and could no longer guarantee the fulfillment of ESC rights.

The size and the availability of corporate resources will play a major role in the achievement of ESC rights compliance standards to protect human rights. Different conditions may exist in small corporations that do not have the big resources as big as a big company-owned. Nevertheless the corporation was still able to adopt a policy of compliance and protection of human rights by providing the resources they have as much as possible for the fulfillment of reasonable minimum core obligations on ESC rights. The obligation to fulfill ESC rights have broader implications beyond the legal field, namely ethical and moral obligation.⁶¹

c. Obligation to Respect

The corporate obligation to respect requires it to refrain from interference with the enjoyment of human rights⁶² The corporate does not exercise due diligence to ensure obidience of human rights obligations only, but also they have done everything possible to avoid any damage. Respecting human rights is the global standard of behavior which has been expected to the corporation. The nature of this obligation requires the corporation to avoid the violation of the human rights of others and should address the adverse human rights impacts in which they are involved or in the context of their own activities

Companies should avoid becoming a cause or contribute to the emergence of adverse effects that harm others. Furthermore, the Guiding Principles also require companies to conduct due diligence in accordance with the size, nature and context of their activities as well as the level of risk of their activities on the enjoyment of ESC rights of others⁶³

Finally it can be concluded that although the corporation is not intended to replace position and role of the state, but the human rights obligations of corporation is almost equal to the state. The corporation also was imposed with the obligation to protect, to fulfill and to respect Guiding principles just impose the obligation to respect for the corporation, while the UN Norms 2003 impose all these obligations. The obligation to fulfill and to protect of State can be applied to the corporation also, although in a more limited coverage as stakeholders that already described at previous section

C. Limit of corporate responsibility to Economic, Social and Cultural Rights

Basically the violation of ESC rights are not limited done by the corporation directly. There are two important terms regarding the limits of the corporate responsibility on ESC. Two of these terms are a sphere of influence and complicity. What is a sphere of

⁶⁰ Ibid, p.105

⁶¹ Ibid., p.107

⁶² David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law", *44 Va. J. Int'l L.* 931, 963 (2004).

⁶³ Jernej Letnar #erni#, Fall, 2014, see note 50, p.103

influence remains a matter of a debate until now. Does it refer only to areas behind the factory fence, because this is an area where a corporation is fully able to implement the rules and regulations of the corporation, or are the corporation's business partners and suppliers also included in this scope? And how do with the communities where the company operates or from which it recruits employees? Does the home state is also included in the scope of this, because one could argue that he pay taxes in countries where human rights abused, in which the countries supports ECS infringement so that the state should be also responsible. The influence was also related to size, so that larger and more significant strategic or enterprise, tend to be larger sphere of influence⁶⁴

In the end, these questions must be answered by the corporation itself. For a better understanding, the UN Global Compact recommend the company mapping stakeholder groups affected by its business activities and concluded key stakeholder groups that would normally be located in the Sphere of Influence as groups of employees, business partners, suppliers, local communities and customers. The last group is usually the government and the wider society⁶⁵

According to John Ruggie, key stakeholder not near the factory only, but also suppliers, contractors, distributors, and others in the chain of the company's business, including community⁶⁶ Guiding Principles explicitly stipulated that corporate responsibility is expanded to the violations committed by third parties within its sphere of influence. Through the efforts of due diligence against those within its sphere of influences such as business partners, suppliers, State agencies, as well as other non-State actors, corporations must examine whether they may contribute to human rights violations through misuse of their business relationships. Responsibility to respect . . . 'Doing no harm' is not merely a passive responsibility but also includes active measures (positive) from companies such as creating a non-discriminatory workplace, which requires the company to adopt specific regulations on recruitment and training Programs.

Regarding limit of corporate responsibility on ESC rights, the Global Compact states that the corporation must guarantee that they will not engage or complicit in human rights violation. While UNHCHR explained that there are two principles related complicity. The first principle regarding direct actions and omissions of the business entity itself, while the second principle encompasses the relationship between enterprises and third parties

Corporation will be categorized involved in human rights violation if it authorizes, tolerates, or consciously disregarded human rights violation committed by an entity associated with it, or if the corporation deliberately provide practical assistance or support which has a major influence on the human rights violation⁶⁷

Global Compact identifies there are 4 primary conditions of the corporation's complicity. Complicity in point 2-4 is a culpable omission

- a. When corporations are actively assist, directly or indirectly, in human rights violations committed by others. For example, when corporations provide information to the government that he knew if that information would be used to violate human rights
- b. When a corporation in its partnership with the government knew, or should have known before approving a partnership that the government will do the forced relocation or other violation to perform the agreemnt.

⁶⁴ Klaus M. Leisinger, april 2006, "On Corporate Responsibility for Human Rights", *14 Eur. J. Int'l L.* 381, hlm 385

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ Radu Mares, 2009, "Defining The Limits of Corporate Responsibilities Against The Concept of Legal Positive Obligations", *40 Geo. Wash. Int'l L. Rev.* 1157, p.1169

- c. When the corporation's profits derived from human rights violations even though the corporation does not positively assist or cause human rights violations committed by security forces, such as the suppression of the protesters were conducted peacefully protesting against the corporation's activities or use of repressive measures by security forces to secure the corporation's facilities
- d. When corporations are silent or passive in the face of human rights violations which systematic or continuous such as omission or acceptance by the corporations for any systematic discrimination against particular groups

Further more Andrew Clapham & Scott Jerbi divide complicity into 3 categories : direct, indirect (beneficial), and silent.⁶⁸ The scholars mentioned that only the first category which have legal credentials, while the last two are just have the moral obligation regarding the limits of engagement, teach us much about the sense of community and responsibility towards others and the expectations of society to enjoyment ESC rights which were affected by the company's business activities.⁶⁹

Regarding with complicity, Guiding principles explained that :

1. " respecting " human rights includes avoiding complicity
2. Within its framework , complicity is the concept of giving rise to liability for misconduct of third parties. Complicity refers to the indirect involvement of corporation in human rights violations , where its actual harm have been done by other parties , including the government and non- state actors ⁷⁰
3. Complicity has legal and non-legal aspect. complicity can make the cost of reputation. The Trial by a poor public opinion from employees , communities, consumers , civil society , as well as investors were harmed sometimes become the actual court costs⁷¹

Radu Mares dividing complicity of corporate as follows :

1. Companies do their own violations of human rights and understand the true risk of involvement
2. Corporation actively assist other actors violate human rights and the corporation fully understands that these violations will harm third parties
3. Corporations provide the facility to another party violate human rights but did not understand what actually happened
4. the corporation does not committed a direct violation of human rights , does not assist or provide facilities to other parties to violate human rights, but the corporation is passive and continue business as usual while what his business partner committed is violating human rights⁷²

It is also stressed that the corporation must prevent through its policies or regulations that its activities or business partners in its sphere of influence do not violate the ESC rights. Companies also have to undertake appropriate measures to prevent, stop and prosecute those within its sphere of influence which violate ESC rights, and did not take advantage of some human rights violations by the other party

⁶⁸ Andrew Clapham & Scott Jerbi, (2001) *Categories of Corporate Complicity in Human Rights Abuses*, 24 *Hastings Int'l & Comp. L. Rev.* 339, hlm.342

⁶⁹ *Ibid*, p.349

⁷⁰ *Ibid*

⁷¹ UN Guiding principles 2011, p.54

⁷² Radu Mares, 2009, *Defining The Limits of Corporate Responsibilities Against The Concept of Legal Positive Obligations*, 40 *Geo. Wash. Int'l L. Rev.* 1157, hlm. 1160-1161

To complete the analysis related to limit of corporate responsibility to ESC rights, Klaus M. Leisinger write their hierarchy corporate responsibility⁷³



Gambar 1 : The Hierarchy Pyramid of corporate responsibility

According Leisinger It is necessary to distinguish among norms "must", "ought to" and "can" to understand the limits of corporate responsibility. All responsibility in the context of the first generation of human rights is essential and an integral part that must be implemented or adhered to by the corporation to be regarded as a corporation with good management practices. In the hierarchical pyramid of corporate responsibility to the civil and political rights is placed on the most basic position.

While ESC rights as second generation rights, norms that exist in nature ought. The company that got the benefit from a business carried on in the territory of a host state ought to assist that host state to fulfill ESC rights of community

Corporations that produce goods and services employ adult workers, providing working facilities standards, give rewards and social security for its workers so that they can meet the needs of their ESC rights. It is indirectly assist the host state carry out obligations to fulfill ESC right. In this mid-level Klaus call the corporation did enlightened self-interest (ought to)

At the top level, the corporation acts as a good corporate citizen, under his own volition (nice to have / can), the corporation did act of corporate philanthropy and will be categorized as corporate which has excellent corporate responsibility. For example, at these lofty levels, the corporation offers medicines at preferential prices for the poor, the donation program, help for charity, fund research, and contribute to the fulfillment of ESC rights in other ways⁷⁴

⁷³ Klaus M. Leisinger, april 2006, "On Corporate Responsibility for Human Rights", 14 *Eur. J. Int'l L.* 381, hlm 394

⁷⁴ *ibid*

5. Conclusion

The fact that the state is the primary duty bearer of human rights does not mean that only the state has the obligation on ESC rights. Corporations also have an obligation to respect, to protect and to fulfill ESC rights through a combination of negative and positive duties as like as the State, although in a more limited coverage as stakeholders.

However the corporation is not intended to replace position and role of the state. The corporation will responsible if corporation failed to perform its obligation on ESC Rights. Corporate responsibility is expanded to the violations committed by third parties within its sphere of influence when there is complicity of the corporation. UNHCHR explained that there are two principles related complicity. The first principle is direct actions and omissions of the business entity itself, while the second principle encompasses the relationship between enterprises and third parties. the corporation must guarantee that they will not engage or complicit in human rights violation committed by third parties within its sphere of influence.

there are some conditions of the corporation's complicity:

1. corporations are actively assist, directly or indirectly, in human rights violations committed by others
2. a corporation in its partnership with the government knew, or should have known before approving a partnership that the government will do the forced relocation or other violation to perform the agreemnt
3. the corporation's profits derived from human rights violations even though the corporation does not positively assist or cause human rights violations committed by security forces
4. corporations are silent or passive in human rights violations which systematic or continuous
5. Companies do their own violations of human rights and understand the true risk of involvement
6. Corporation actively assist other actors violate human rights and the corporation fully understands that these violations will harm third parties
7. Corporations provide the facility to another party violate human rights but did not understand what actually happened

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