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Recommended Citation
DOI: 10.7454/global.v23i2.542
Available at: https://scholarhub.ui.ac.id/global/vol23/iss2/6

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TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

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Submitted: 11 September 2021; accepted: 6 October 2021

Abstract
International trade has introduced many features in its classical or contemporary practice wherein peoples respectfully exchanged goods and ideas. Unfortunately, the legacy of large multinational corporations, concerning human rights, has generally been dismal. It is recognised that states are the primary bearers of responsibility to respect, protect, fulfill, and promote human rights and freedoms. Current developments in the field of international human rights law, however, designated transnational corporations (hereafter TNCs), organisations, and individuals in a diagonal and/or horizontal responsibility on the respect and protection of human rights. The need to make these non-state actors, especially TNCs, responsible under international law is originated from their ever-increasing influence on state actors and their impact on the individuals' enjoyment of their social, political, and economic rights. This article deals with the multidimensional influence of TNCs on the respect, protection, and fulfilment of fundamental human rights and demonstrates the possibilities of building legal obligation over them by reviewing existing literature.

Keywords:
Multinational Corporations, Human Rights, Direct Obligation, Host States
INTRODUCTION

International business has had many faces, including ancient and contemporary routes wherein peoples respectfully traded goods and ideas. However, the legacy of large multinational corporations on human rights has generally been dismal. Native populations have generally been dismissed as ignorant, sub-humans whose only value was their labour. Land claims through colonisation have largely focused on the extraction of natural resources versus the need-based acquisition of additional space for crowded populations. In short, it is a history full of publicly and privately funded entities overseeing quasi-governmental functions for the benefit of a few at the expense of the human rights of the many. Fortunately, the social obligations of doing business are progressively more recognised and valued, at least in some parts of the world.

For so long, International human rights law had placed the responsibility to respect, protect, fulfil, and protect human rights and fundamental freedoms primarily over states. However, current developments in the field reveal that non-state actors are also set under a diagonal and/or horizontal responsibility. The rationale behind this development is their inevitable influence for the protection and promotion as well as violations of human rights during the course of their activities. As non-state actors, transnational corporations (TNCs) may have both positive and destructive effects on human rights while performing their operations. According to UNHCR (2011), the responsible operations of TNCs can contribute to the respect, protection, promotion, and fulfilment of human rights through proper regulation and guidance, including national legislation. They can also channel the benefit of business towards contributing to the enjoyment of human rights and fundamental freedoms (UNHCR, 2011). TNCs indeed operate throughout the world, chasing comparative advantages to serve their purpose, mainly profitable business. In pursuing their interest, states may fear that TNCs may abuse the structure of the state and interfere in political matters. States feared hostile reactions from host states because of interference of TNCs and their complexity and difficulty of operations and policies in the home or the host countries, or in both was a challenging issue. Because of that, as of the 1970s, codes of conduct, guidelines, and declarations to impose human rights obligations and setting the standard of treatments to control their activities had become the concern at the level of the United Nations (UN) and its agencies (Schutter, 2006).

Track records of TNCs depict human rights violations of affected communities, including indigenous peoples, women, children, and the elderly, due to, among others,
the extractive nature of operations (Bekele, 2008). Their operations, of course, have both positive and negative sides from human rights and development standpoints. However, human rights should not be substituted at any cost. This paper focuses on the human rights obligations of TNCs under international human rights instruments and enforcement mechanisms. Before dealing with TNCs human rights obligation, their bearing both in the protection and violations of human rights are addressed.

**DISCUSSION**

**Human Rights Impacts of TNCs**

Indisputably, TNCs are the main driving forces in national and international economic development spheres. TNCs are the central actors in the world economy and are a driving force of economic growth. They have a widespread impact on states' economic and social welfare by linking foreign direct investment, trade, technology, and finance (Dunning, 1993). The transfer of technology involves physical goods and tacit knowledge. Physical goods primarily focus on the transfer of capital goods in the forms of machinery and equipment, whereas technological knowledge includes managerial and technical skills and expertise (Giroud, 2003). When off-shored to least developed countries, they knowingly or unknowingly function as educational systems transferring knowledge including management techniques, innovation technology, technical expertise, job skills, and production methods as well as research and development capabilities to local institutions. Under certain circumstances, they accelerate those countries up the learning and development curves (Hanson, 2008). Overall, TNCs are non-state business actors with their operations spanning the globe and, in some cases, matching the capacities and networks of governments. They are also becoming the dominant players in shaping the global economic and development agendas that play a role in helping to spread globalisation and in mitigation of some of the risks (Caprara & Nelson, 2007). The general recommendation is that intending to benefit from the world economy, TNCs serve as engines of development that should support the development of developing countries, including the development of human capital to become successful in the new global economy (Aggarwal, 2012). Therefore, the constructive engagement of TNC can allow the steady development of democratic culture, the spread of new technologies, and the adherence of human rights in those regions (Schaub, 2004). These would allow more positive benefits to be realised over time. Such contribution by the TNCs has a positive
correlation with the rights-based approaches to development, thereby fulfilling the progressive realisation of socio-economic rights in-home or host countries or both.

So much that TNCs have positive implications for the home states' economic development, they also have enormous undesirable implications, mainly in developing countries. It is argued that their operation has adverse effects on state structures and citizen rights in those countries. The overriding goal of TNCs is doing good businesses to make maximum profit across countries in the global economy. However, in their endeavour of profit maximisation, TNCs have been the force behind violations of human rights. They are implicated in many human rights violations such as environmental degradation, child labour, torture and inhuman treatments, forced labour, unfair wages and unequal remuneration for work of equal value, and unhealthy working conditions (Paust, 2002).

For instance, three TNCs, namely Caterpillar Inc., diesel and natural gas engines, and industrial gas turbines, were blamed for contributing to the suffering of Palestinians. They were accused of intentionally selling D9 bulldozers to the Israeli defence force that were used to destroy homes, injure and kill citizens, uproot olive trees, and build the apartheid wall. While engaged in oil operations in Southern Sudan, Talisman Energy Inc., the international oil industry, was also accused of helping to prolong the civil war in Sudan. This company was condemned for conspiring to commit human rights violations, including war crimes. It was accused of allowing the military to use the airstrip supposed to be used only for oil-related air traffic and for taking no notice of the situation in the country.

In many underdeveloped nations, which are severely affected by the humanitarian crisis, TNCs rekindle the crisis further in the pursuit of profit. These nations become vulnerable to the TNCs manoeuvring and fail in their trap. These poor nations fail under the clemency of the TNCs to fulfil the demand of the ever-increasing consumer markets. These create conditions that lead to a renewed flare-up of conflicts, social turmoil, or the perpetual dependence of people. This condition challenges the determining principles of the United Nations (UN)—maintenance of international peace and security, friendly relations based on equal rights and self-determination of peoples and international cooperation, and the bill of human rights. Besides, the practice affects the notion of the Declaration on the Rights to Development, which emphasis on the continuous development of the wellbeing of the whole population and individuals centred on their active, free and meaningful participation in development and the just dissemination of
welfares as the main goal of development (UN Declaration on The Right to Development, 1986).

TNCs are mindful of the opportunity cost of maximising profits and minimising costs with insignificant attention and adherence to human rights issues. In this case, it is perhaps likely to find out the extent of violations of human rights with particular reference to socio-economic rights such as the rights of workers. While investors, corporations, executives, and governments challenge demands to respect human and labour rights claims, the former seeking to pursue profit, resisted and tended to see human rights implementation as a matter of only government officials (Compa & Hinchliffe-Darricarrere, 1995). However, TNCs cannot escape being responsible for violations that occur on their behalf. Section D article 5-9 of the UN resolution 2003/16 enshrines the responsibilities of TNCs under the relevant international instruments and national legislation as well as international human rights and humanitarian law regarding rights of workers. These include non-use of compulsory labour, protection of children from economic exploitation, a safe and healthy working environment, providing remuneration that ensures worker and their families an adequate standard of living, as well ensuring freedom of association and the effective recognition of the right to collective bargaining (UN Sub-Commission Resolution, 2003).

**Human Rights Obligations of TNCs**

For so long, the focus of human rights movements had been on the traditional state-centred approach to international law that was primarily concerned with curbing human rights abuses and violations by states and their leaders. Subsequently, in the human rights arena, international laws have established responsibilities that oblige states to protect individuals’ rights from their own actions and other actors. Hence, the activities of non-state actors had been out of the normative foundation of human rights. However, recently, the issue is being brought to the forefront in legal and political debates. There is growing interest among international law scholars to bypass states and make non-state actors subjects to international law. De Brabandere (2010) explained the historical exploration of numerous avenues for increasing the accountability of these non-state actors in the legal literature, especially since the beginning of the 21st century. He stated that since then, several international instruments have been adopted to regulate the conduct of non-state actors, particularly the TNCs, in the human rights sphere. International organisations, including the UN, strongly support this effort. The growing international
concern over the influence of TNCs and their potential impact on human rights can be understood from the appointment of a Special Representative on the issue of human rights and transnational corporations and other business enterprises in July 2005 by former UN Secretary-General Kofi Annan (UN Human Rights Council Resolution, 2011).

The need to make non-state actors, especially TNCs, responsible under international law is originated from their ever-increasing influence on state actors and their impact on the individuals’ enjoyment of their social, political, and economic rights. Ogutuga (2007) observed how the rise of globalisation and transnational markets had altered global production and consumption patterns in the past few decades. Globalisation and the rise of transnational markets created incredibly powerful corporate actors with major impacts on human rights, and often their impact is negative (Ogutuga, 2007). There is an increasing implicit, and explicit role and influence of TNCs globally and their influence is much stronger on poor states and their people. The degree of power or influence these TNCs have helped them to change their role in the social, political, and economic spheres. Literature indicated that there are about 82,000 TNCs with over 810,000 foreign subsidiaries functioning in the world today. The assets of some of these TNCs eclipse the aggregate money supply and Gross Domestic Product (GDP) of 182 countries in a world of 191 nations (Shah, 2002). Therefore, the necessity of undertaking an inquiry into the human rights responsibilities of transnational corporations is mainly inspired by the changing role of non-state actors in the international sphere and an alleged lack of accountability for human rights violations by these non-state actors (De Brabandere, 2010).

Whether non-state actors, including transnational corporations, have an obligation under international law is still a matter of debate. On the issue of non-state actors’ obligation for human rights, there are two conflicting perspectives. The first is the state-centric approach. It is a more traditional point of view that makes states at the centre of analysis and considers the activities of non-state actors concerning human rights violations as the responsibility of sovereign nations. The second approach is the newly emerging one that proclaims the multiple obligations of human rights. According to the latter view, international law has implicitly or explicitly put a legal obligation on non-state actors, but states are still the primary duty bearers. It asserts that both state and non-state actors do not enjoy all the privileges and rights that individuals enjoy under international law. Instead, rights and duties in international law depend on the actor's competence to enjoy those rights and bear those obligations. Though states are taken as
the primarily responsible actor in protecting and reseciong individual rights, it does not mean that non-state actors are free of these obligations under international law. The responsibility of business corporations under international human rights law is nearer than it is usually imagined (De Brabandere, 2010). It is a crucial development taking the significant position human rights violations hold in the current debates on non-state actors and human rights. It also underscores the significant role corporations play in the changing world order.

So it is very necessary and important to articulate means to regulate the actions and the behaviours of non-state actors, such as TNCs, especially concerning their human rights approach. Often, the mechanisms to impose international legal obligation straightforwardly on TNCs to regulate their conduct is more important than any state-level remedy at both the host states and the home states. The reasons that TNCs enjoy impunity from their human rights violations in foreign countries can either be the inability or unwillingness of the governments to protect human rights effectively. As mentioned above, certain TNCs are much more financially powerful than some states, especially those developing countries. Under those circumstances, according to Stephens (2002), these developing nations often lack the economic capability to respect the human rights of their citizens voluntarily, especially in the areas of labour rights, environmental law, and other rights protecting the physical and mental health of individuals. In such states, corporations are also more interested and willing to invest. Obviously, if the states are unwilling to solve the human rights issues or allied with the specific TNCs, their internal machinery for human rights protections is also ineffective. There has to be an alternative means of addressing the issue of human rights violations of individuals and groups living under such states in addition to reminding states of their legal obligations to safeguard human rights within their territories.

In the next part, the potential obligations of TNCs under international law especially their responsibility for human rights violations are explored. Scholars tried to make the international obligations of TNCs visible through different approaches. There are two common approaches followed by scholars to make TNCs responsible for human rights. The indirect approach is derived from the direct obligations of home and host states of the TNCs and the direct responsibilities of TNCs derived from the international human rights instruments.

**Indirect Obligations**
In international law, the acts of TNCs, as non-state actors, are not directly attributable to the states per se to entail international obligation unless there is a direct relation between the state and TNCs. That is where the former delegate the latter to exercise public authority, or the violation of any human rights is performed under the state's direct supervision, or if the state has whole or partial control of the TNCs. In the above circumstance, the act of the TNCs can be considered as the act of the state and responsible for the violations under international law. But even though the above condition has less probable to occur and has less probable to create direct implications on states because of the TNCs behaviour, it can still implicate states indirectly under international law. This indirect approach is directly connected with the legal responsibility of states. Under international human rights law, states have obligations in three dimensions. These are the duty to respect, protect, and fulfil. In the indirect approach, states’ obligation to protect human rights has been given prominent attention by scholars to pursue a strong argument. It is conventionally understood that international law imposes direct responsibility on states to regulate private actors, including TNCs, not to violate the human rights of their people. It is the direct implication of the responsibility to protect. This approach suggests the means to regulate TNC’s human rights behaviours through the international obligations of home and host states.

**Host State Obligations**

States have an international legal obligation to protect individual rights from any violation that occurred in the territory. The host state has a dual obligation concerning human rights. The first is the responsibility to respect the rights of the individuals living within its territory. The other is a duty to ensure human rights are respected by other non-state actors operating in its territory. Therefore under international human rights law states have the responsibility to respect, protect, and fulfil the human rights of every individual within their territory and bring private organs, including TNCs, under their jurisdiction for any violation. States also take this obligation explicitly by ratifying different human rights conventions and taking apolitical commitment by enforcing declarations and other soft laws. As most treaty bodies require the establishment of monitoring, regulatory and adjective mechanism, host states that ratify international human right treaties like ICCPR, ICESCR, CERD, CRC, and other binding treaties have the responsibility to safeguard individuals from the arbitrary action of other non-state actors such as TNCs, through these mechanisms. The Maastricht Guidelines on Violations of Economic, Social and Cultural
Rights, for instance, states that “states are responsible for violations of economic, social and cultural rights that result from the failure to exercise in controlling the behaviour of non-state actors” (Akyesilm, 2008).

In addition to the above international human rights instruments, other regional human rights instruments also set out obligations on member states to protect their citizens from third parties’ human rights breaches like TNCs action. African Charter on human rights and peoples' rights, for instance, has set the obligation of the member states clearly in the charter. The charter has set up a human rights commission, a body responsible for controlling the actions of the member states and warranting the protection of people’s rights. Its resolution in October 2001 concerning violations committed against the Ogoni people by the Nigerian national oil company and the TNC Shell with the complicity of the Nigerian government is taken as one important instance of the commission’s role regarding the TNCs activities (Shelton, 2002). The Commission accentuated the point that the government of Nigeria should stop allowing private companies to destroy or pollute food sources, and prevent peoples' efforts to feed themselves. It also alleged that the oil consortium had misused oil reserves in Ogoniland, disposing toxic wastes into the environment and local waterways with no regard for the health or environment of the local communities in violation of applicable international environmental standards. The commission concluded the Nigerian government has the responsibility to protect the people’s rights and ensure redress for the victims. Another important regional instrument that obliges member states to protect their citizens from TNCs' human rights violations is the European Court of Human Rights. The court unanimously condemned Turkey for having authorised the corporation E.M. Eurogold Madencilik to use cyanide processing in gold extraction in Bergama on the grounds of non-respect of the right to private and family life (The European Court of Human Rights, 2004).

Host states also have a voluntary obligation to take necessary measures when a peremptory norm or jus cojens or a general principle applicable in the international legal order is breached. 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 legislation, adjudication through judicial remedies, and compensation where appropriate (Ruggie, 2007). Failure to address this issue will make the host states accountable for the violations committed by TNCs. Because TNCs are assumed to be the subject of the law of the state they operate in, any
human rights violations committed by a company are directed to the state. The first
reaction would be to look at the regulatory failure of the jurisdiction within which the
violation takes place. Therefore, it can be declared that the host state is liable for the
failure to protect individuals against the actions of corporations (Engström, 2002). A
similar position is advocated by the Special Representative of the Secretary-General on
the issue of human rights and transnational corporations and other business enterprises
affirming host states’ primary responsibility in such circumstances. It also adopted “the
state duty to protect as the first principle of the framework designed to address the
responsibility of corporations in human rights violations” (UN Human Rights Council,
2009).

Home State Obligations

The question of whether home states have the responsibility to regulate the actions and
behaviours of transnational corporations headquartered on their territory operating abroad
is still a matter of debate. Some scholars believe that current international law is plain on
home state liability on the actions of transnational corporations as far as the state has no
direct control over the TNCs. They argued that until now there is no such international
obligation implicitly or explicitly implied to the home state to control their corporations
operating overseas.

However, other scholars argue that, in principle, states have obligations to control
the activities of their nationals or legal entities not to violate internationally accepted
human rights norms. This argument is supported by both the committee on ECSCR and
the committee on the elimination of discriminations against women. Both committees
required state parties to take appropriate actions to hold accountable their corporations

The same argument is held by the UN Secretary General’s Special Representative
on human rights and business. The Special Representative’s report affirmed that the
activities of non-state actors, including TNCs should be overseen by the home states. It
argued that home states are expected to hold non-state actors answerable to any human
rights violations wherever irrespective of wherever commit it (Van, et al, 2010). There is
also possible responsibility of home states in controlling the activities of the corporations
functioning abroad by extending its jurisdiction over TNCs based on the nationality
principle. This is the principle that allows the home states to take extra-territorial actions
based on the nationality of the actors. One of the known examples of national legislation
concerning transnational human rights abuse is the Alien Tort Claim Act (ATCA) of the United States. It is a unique claims act that opens the US courts’ doors to victims of human rights violations committed by TNCs irrespective of the nationality of the companies or the victims (Pak, et al, 2009).

**Direct Obligations**

As is already mentioned above, there is an ever-increasing influence of non-state actors in the international social, political, and economic sphere that has shaken the foundation of the traditional conception of human rights. The debate whether TNCs as non-state actors have legal personality under international law lacks credentials because of the changing global position on them. However, as Engström (2002) stated, even though international human rights instruments are not primarily designed to hold private business corporations responsible, they are not free from the obligation to respect human rights standards.

Albeit the existing international human rights instruments primarily deal with the responsibility of the state, some human rights principles, however, could be contracted within the existing human rights instruments to non-state actors such as TNCs (Hanakova, 2005). There are important human rights instruments that put obligations on TNCs concerning human rights. The Universal Declaration of Human Rights (UDHR), in its preamble, states that human rights in the declaration are common standards of achievement for all peoples and all nations. Every individual and every organ of the society shall strive to promote respect for these rights and freedoms and secure their universal and effective recognition and observance (UDHR, 1948). The declaration indicates that TNCs, as the organ of society, have the responsibility to protect and respect human rights. Concerning its legal effect, although UDHR has provided neither legally binding force nor enforcement mechanism, it is often accepted that it has embodied a part of customary international law (Hanakova, 2005).

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, And Cultural Rights (ICESCR) include in their preambles ideas that indicate the obligation of individuals to other individuals and to the community to which they belong. They are under the responsibility to strive for the promotion and observance of the rights recognised under both covenants (Hanakova, 2005). Moreover, some of the general comments issued by the Committee on Economic, Social, And Cultural Rights (CESCR) reinforce this possibility. Regarding the right to
adequate food, the CESCR asserted that though states parties to the ICESCR are ultimately accountable for compliance with it, all members of society, individuals as well as the private business sector also have responsibilities in the realisation of the right to adequate food. Both national and transnational private business sectors should pursue their activities within the framework of a code of conduct conducive to respect of the right to adequate food agreed (Mares. Anal, 2019).

Another important human rights instrument that has a direct obligation on the non-state actor is the Convention on the Prevention and Punishment of the Crime of Genocide. The convention advocates for the punishment of persons committing genocide whether they are constitutionally responsible rulers, public officials, or private individuals (Convention on the Prevention and Punishment on the Crime of Genocide, 1948). International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention against Torture and Other Cruel, Inhuman, Or Degrading Treatment or Punishment can also be applied on TNCs no matter how they are addressed to states (Hanakova, 2005).

There are also international instruments regulating transnational corporations at different levels. The WHO Framework Convention on Tobacco Control that strives for controlling companies producing tobacco to protect human health and to prevent negative social, environmental, and economic consequences of tobacco consumption and exposure to tobacco smoke is one of them. The other is the WHO International Code of Marketing of Breast-Milk Substitutes (Hanakova, 2005). Both regulate the behaviour of corporations at a narrow scope and work only for specific kinds of corporations. ILOs regulations, labour and different environmental standards and consumer protections, like the UN Guidelines for Consumer Protection, are considered international instruments covering and regulating all types of transnational corporations (Hanakova, 2005). Finally, other important international instruments have a universal applicability in regulating TNCs. These are the UN Global Compact, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises concerning Human Rights (UN norms), and the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines). Among non-legal mechanisms promoting corporate human rights responsibility, the OECD Guidelines stands out as they lay out a precise code of conduct that is universally applied by corporations from all member states (Pak, et al, 2009).
Enforcement Mechanisms

For each of the main treaty-based human rights instruments, the enforcement of the obligations is controlled by a committee that is created to monitor member states’ adherence to the convention obligations concerning the compliance of TNCs on human rights. The committees have several instruments and procedures for examining the member states' adherence to their international commitments like general comments, state reports, inter-state complaints, individual complaints, inquiries or visits, and referral to the United Nations General Assembly (Van, et al, 2010). Even though treaty-based human rights instruments are legally enforceable against the states parties that have ratified it, it is not directly enforceable against TNCs because only state actors have legal personality under such convention. Consequently, State actors are the only device to ensure the compliance of TNCs using particular instrument. However, Hanakova (2005) indicated that it is very problematic to state actors given the fact that some TNCs, in fact, operate with more powers than the states that seek to regulate them.

The ILO also has a means to regularly examine the application of labour standards in the member states. In this regard, the ILO has developed two kinds of supervisory mechanisms. The regular system of supervision involves the examination of the periodic reports submitted by the member states detailing the measures they have taken to implement the provisions of the ratified conventions and the special procedure of supervision involves a representations’ procedure and a complaints’ procedure, together with a special procedure for freedom of association (Politakis, 2006). The guidelines constitute recommendations addressed to companies by the OECD member countries and other states that have signed up to the principles. They are intended to act only as a “benchmark” for multinational enterprises. Compliance is not, therefore, obligatory (Dimitrieva, 2009). The enforcement of the OECD guidelines, the Global Compact, and the UN norms depend on states' interest. They were adopted as a set of voluntary recommendations that are not legally enforceable, and thus, do not guarantee compliance of all TNCs (Hanakova, 2005).

CONCLUSION

Transnational corporations are a driving force in the realisation and/or violation of human rights as they are often as powerful as developing countries. The benefit of the actions of TNCs, whether in technology transfer or employment opportunity in the country in which they are operating, is much less than the harm resulting from their economic practices.
Human rights violations by TNCs are much worse to host states, mainly developing countries, than home states where they have the leverage to operate to serve their interest. The goal in their operations is maximum profit through gradually controlling valuable resources. Controlling and managing the behaviour and action of TNCs has been a concern of both states and international organisations. The long-held state-centric international law that positioned states at the centre of international obligations faces strong resistance from different directions to make TNCS accountable for their human rights violations. The most powerful pressure comes from human rights activists and some developing countries that need to regulate the action of TNCs. Even though transnational corporations are an important driving force for economic and social development throughout the world, they have a significant impact on the daily life of people. Hence making TNCs legally bound under international law cannot be a matter of dispute as far as their action affects the dignity of human rights. In the current understanding, home states are expected to put maximum effort to regulate legal operations of TNCs in relation to fundamental human rights of the people. As far as the interdependence of human rights and development puts human wellbeing at the centre, home states should be capable in a position to guarantee zero tolerance for TNCs that perceive respect, protection, and fulfilment of human rights as separate matters, let alone violations. Moreover, host states are expected to take measure for human rights violations arising from the influence by home states under the international law as the case arise.

ACKNOWLEDGEMENTS
I would also like to express my gratitude to my friend Mr. Tesfay Alemu (non-authorship contributors) for his kind technical/consultative assistance.

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