



SOFT LAW AS A METHOD FOR ENHANCING HUMAN  
RIGHTS COMPLIANCE BY MULTINATIONAL  
CORPORATIONS: A SPECIAL REFERENCE TO  
MALAYSIA

BY

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## ABSTRACT

The recent trend of economic globalisation has resulted in massive emergence of profit-oriented international business corporations such as the multinational corporations (MNCs). With minimum emphasis on social and human rights elements, MNCs' business operations are always associated with corporate-related human rights violations. This phenomenon has prompted the global communities to call for the extension of human rights responsibilities and duties on business entities. Malaysia, as a developing economy, is not spared from this phenomenon where various human rights violations have taken place in the name of development. Among the problems that have contributed to the continued existence of corporate human rights violations are the inadequacies in legal regulation of human rights violations by MNCs. International law does not create concrete and direct legal obligations on non-state actors as they are not subjects of international law. In addition, at the domestic level, there is reluctance of governments to apply human rights laws and regulations against MNCs due to the economic benefits that MNCs bring to the State. There have also been no specific bodies or regulations in Malaysia which cater the issues of human rights violations by MNCs. Thus, this study aims to address these problems by exploring the use of soft law proposed in the form of business-human rights model as a method for enhancing human rights compliance by MNCs operating in Malaysia. This research is qualitative in nature and in achieving its objectives, the research has obtained information from primary and secondary data. Primary data was obtained through semi-structured interviews with a Commissioner at the National Human Rights Commission of Malaysia (SUHAKAM) and a senior officer in Sime Darby Berhad, a Malaysia-based MNC. Secondary data, on the other hand, was gathered through document analyses which involve resources such as textbooks, journals articles, internet-based information, case law, court judgments and commentaries to the judgments on human rights cases in Malaysia. Secondary data was also obtained from binding and non-binding legal instruments such as treaties, guidelines and soft law frameworks developed by various international organisations, in particular the UN. The UN Guiding Principles on Business and Human Rights and the National Action Plan on Business and Human Rights for Malaysia proposed by SUHAKAM will be looked upon to provide further insights on the topic being discussed. The findings from this study, among others, include (1) soft law can provide alternative solution to the insufficient human rights standards to enhance MNCs' human rights compliance and to help addressing the issues of corporate human rights violations; (2) there is a need for policy and legal empowerment in Malaysia to take MNCs responsible for their human rights violations, and finally; (3) it is useful and vital for MNCs to adopt sustainable and human rights-based business approach as this will keep their good brand image and business sustainability. A success in harmonising economic growth and protecting human rights principles will harness the great power of economic development to align with the great principle of human dignity.

## ملخص البحث

وقد أدى الاتجاه الأخير للعولمة الاقتصادية في ظهور أعداد كبيرة من الشركات التجارية الدولية القائمة على أساس الربح مثل الشركات المتعددة الجنسيات. الانتهاكات السلبية لحقوق الإنسان التي ترتكبها الشركات المتعددة الجنسيات في جميع أنحاء العالم أصبحت خطيرة وخاصة بعد ظهور الدعاوى المتصاعدة من قبل المجتمعات العالمية لتحقيق حقوق الإنسان وواجباته وجعلها بيد الشركات والمنظمات الأهلية الخاصة. ماليزيا ، كالدولة النامية، لم تنج من هذه الظاهرة التي شهدت انتهاكات مختلفة لحقوق الإنسان من قبل تلك الشركات والمنظمات باسم التنمية. وقد أدت قلة النظم القانونية الدولية والمحلية، -بالإضافة إلى عدم وجود الوعي بالمسؤوليات وحقوق الإنسان بين قادة الأعمال- إلى استمرار وجود انتهاكات الشركات لحقوق الإنسان. وبالتالي تهدف هذه الدراسة إلى أن تحل المشكلة المذكورة أعلاه باستكشاف النموذج لحقوق الإنسان والأعمال التجارية القائمة على استخدام القانون اللين كوسيلة لتعزيز الامتثال لحقوق الإنسان من قبل الشركات المتعددة الجنسيات العاملة في ماليزيا. هذه الدراسة استخدمت الأساليب النوعية. ولتحقيق أهداف الدراسة، لقد استخدم الباحث مصدرين أساسيين للدراسة هما البيانات الأولية و البيانات الثانوية . وقد تم الحصول على البيانات الأولية من خلال مقابلات شبه منظم مع ممثلي سام داربي بيرهاد ولجنة حقوق الإنسان الماليزية (سوهاكام). وقد تم الحصول على البيانات الثانوية من خلال تحليل الوثائق التي تنطوي على الموارد مثل الكتب والمقالات الصحفية و المعلومات من شبكة الإنترنت ، السوابق القضائية ، الحكم الصادر عن المحكمة، و صك قانوني ملزم و غير ملزم مثل المعاهدات والمبادئ التوجيهية و القانون غير الملزم الذي وضعه مختلف المنظمات، ولا سيما الأمم المتحدة (UN). وسيتم النظر في المبادئ التوجيهية للأمم المتحدة بشأن الأعمال التجارية وحقوق الإنسان وخطة عمل وطنية بشأن الأعمال التجارية وحقوق الإنسان لماليزيا التي اقترحتها سوهاكام إلى تقديم مزيد من الإيضاحات حول موضوع المناقشة. وتشمل نتائج هذه الدراسة ، منها ، (1) يمكن قانون غير الملزم توفير البديل لمعايير حقوق الإنسان وقوانينها التي لا تكفي لتعزيز الامتثال لحقوق الإنسان والمساعدة في معالجة قضايا انتهاكات الشركات لتلك الحقوق؛ (2) هناك حاجة ماسة لتعزيز تلك المبادئ القانونية في تطبيقها في ماليزيا لكي تأخذ الشركات المتعددة الجنسيات المسؤولة عن انتهاكات في مجال حقوق الإنسان ، وأخيرا ؛ (3) يكون من المفيد و الضروري للشركات متعددة الجنسيات لتبني نهج الأعمال المستدامة والبشرية القائم على الحقوق لأن هذا سوف تبقي صورة العلامة التجارية الجيدة والأعمال التجارية الناجحة والنجاح في التوفيق بين النمو الاقتصادي وحماية مبادئ حقوق الإنسان سيسخر القوة الكبيرة للتنمية الاقتصادية لتتماشى مع المبدأ الكبير من الكرامة الإنسانية.

## ABSTRAK

Trend terkini dalam globalisasi ekonomi telah menyaksikan kemunculan besar-besaran entiti perdagangan antarabangsa berasaskan keuntungan seperti syarikat multinasional. Keseriusan isu pelanggaran hak asasi manusia oleh entiti korporat di seluruh dunia diterjemahkan oleh peningkatan kecenderungan dan desakan masyarakat global yang inginkan tanggungjawab khusus diletakkan ke atas entiti korporat untuk memastikan prinsip hak asasi dihormati dan dipertahankan ketika mereka menjalankan aktiviti perniagaan. Malaysia, sebagai sebuah negara membangun, tidak terkecuali dari isu ini di mana terdapat banyak kes pelanggaran hak asasi oleh syarikat korporat yang berlaku di atas nama 'pembangunan'. Ketidacukupan undang-undang antarabangsa dan domestik berkaitan tanggungjawab hak asasi syarikat korporat serta kurangnya kefahaman di kalangan pentadbiran syarikat telah menyebabkan isu pelanggaran hak asasi manusia oleh syarikat korporat terus berlaku dan berleluasa. Justeru, kajian ini dijalankan bertujuan untuk menyelesaikan permasalahan di atas dengan meneroka penggunaan model hak asasi dan perniagaan berasaskan 'soft law' sebagai metod untuk meningkatkan pematuhan prinsip hak asasi manusia oleh syarikat multinasional yang beroperasi di Malaysia. Kajian ini menggunakan kaedah kualitatif. Bagi mencapai objektif kajian, penyelidik menggunakan dua sumber maklumat sebagai asas kepada kajian iaitu data primer dan data sekunder. Data primer diperolehi melalui kaedah temubual separa berstruktur dengan wakil-wakil dari Sime Darby Berhad dan Suruhanjaya Hak Asasi Malaysia (SUHAKAM). Data sekunder pula telah diperolehi melalui kaedah analisis dokumen yang melibatkan sumber-sumber seperti buku teks, artikel jurnal, maklumat dari internet, kes perundangan, penghakiman mahkamah, instrument perundangan yang mengikat dan tidak mengikat seperti treati, garis panduan dan soft law yang dibangunkan oleh pelbagai organisasi terutamanya Pertubuhan Bangsa-bangsa Bersatu (PBB). Prinsip Panduan berkaitan Hak Asasi dan Bisnes dan Pelan Tindakan Kebangsaan berkaitan Hak Asasi dan Bisnes yang dicadangkan SUHAKAM akan diambil pertimbangan untuk menyediakan input penting berkaitan topik kajian. Hasil kajian ini, antara lain termasuk, (1) 'soft law' boleh menyediakan penyelesaian alternatif kepada ketidacukupan undang-undang berkaitan hak asasi dan perniagaan untuk meningkatkan tahap pematuhan hak asasi oleh syarikat multinasional seterusnya membantu menangani isu-isu pelanggaran hak asasi oleh syarikat korporat; (2) adalah suatu keperluan untuk polisi dan undang-undang berkaitan diperkasakan untuk memastikan syarikat multinasional bertanggungjawab terhadap pelanggaran hak asasi yang dilakukan mereka, dan; (3) untuk kekal relevan dan mapan di mata masyarakat, syarikat multinasional harus mengadaptasi pendekatan perniagaan yang memberi perhatian terhadap kepentingan hak asasi dan tanggungjawab sosial. Kejayaan dalam mengharmonikan tuntutan pembangunan ekonomi dan memelihara prinsip hak asasi akan menatijahkan kuasa pembangunan ekonomi yang berpaksikan prinsip dan maruah manusiawi.

## **APPROVAL PAGE**

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## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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*To my beloved father - Ahmad Yusuf, wife – Nooraini, and children - Naiemullah,  
Najihah, Najwan and Naufal*



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## LIST OF CASES

- Adong Kuwau & Ors v Kerajaan Negeri Johor* [1997] 1 MLJ 418  
*American Express Bank Ltd v Mohamed Toufic Al-Ozier & Anor* [1995] 1 MLJ 160  
*Anglo-Iranian Oil Co. (United Kingdom v Iran)*, ICJ 1952  
*Bank of China v Asiaweek Ltd.* [1991] 2 MLJ 505  
*Bank Utama (M) Bhd v Perkapalan Dai Zhun Sdn Bhd* [2003] 5 MLJ 40.  
*Barcelona Traction, Light and Power Co (Second Phase) (Belg. v Spain)* [1970] ICJ Rep. 3 (Feb. 5)  
*Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors.* [2005] 3 MLJ 681  
*Cheah Kim Tong & anor v Taro Kaur* [1989] 3 MLJ 252  
*Doe v Unocal 963 F.Supp.* 880 US Dist Ct, C.D. Cal, 25 March 1997  
*Gan Soh Eng & Ors v Guppy Plastic Industries Sdn. Bhd.* [2008] 3 ILR 414  
*Hew Sook Ying v Hiew Tin Hee* [1992] 2 SCR 257  
*In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *affld*, 809 F.2d 195 (2d Cir. 1987).  
*Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLRH  
*Kajing Tubek & Ors v Ekran Bhd. & Ors.* [1996] 2 MLJ 388  
*Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013)  
*Kok Wah Kuan v Pengarah Penjara Kajang* [2004] 5 MLJ 193  
*Madeli Salleh v Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697  
*Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356  
*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449  
*Noorfadilla bt Ahmad Saikin v Chayed bin Basiran & Ors* [2012] 1 MLJ 832  
*Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors.* [2001] 6 MLJ 241  
*Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep. 1949.  
*Sagong bin Tasi & 6 Ors v Kerajaan Negeri Selangor & 3 Ors.* [2002] 2 AMR. 2028  
*Salomon v A Salomon & Co Ltd.* [1897] AC22 (House of Lords)  
*Sim v F Robinow* (1892) 19 R (Ct of Sess) 665.  
*Spiliada Maritime Corp v Cansulax Ltd* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972  
*Texaco v Libya* [1977] 53 ILR 389.  
*Wiwa v Royal Dutch Petroleum Co.* 226 F.3d 88 (2nd Cir. 2000)  
*Woon Tan Kan (deceased) & Seven Ors v Asian rare Earth Sdn Bhd* [1992] 4 CLJ2299.  
*Yee Teck Fah (T/A Yee Teck Fah & Co) v Lim Soo Chooi* [2012] 6 CLJ 901 [HC]

## LIST OF STATUTES

Aarhus Convention 1998  
Alien Tort Claims Act (ATCA)  
Alien Tort Statute (ATS)  
Brussels Conventions on jurisdiction and the enforcement of judgments in civil and commercial matters  
Child Act 2001 (Act 611)  
Civil Law Act 1956 (Act 67)  
Companies Act 1965 (Act 125)  
Contracts Act 1950 (136)  
Convention of the Rights of the Child (CRC) 1989 (UN)  
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (UN)  
Customs Act 1967 (Act 235)  
Elections Offences Act 1954 (Act 5)  
Employees Provident Fund Act 1991 (Act 452)  
Employees Social Security Act 1969 (ESSA) (Act 4)  
Employment Act 1955 (Act 265)  
Environment Quality (Prescribed Premises) (Waste Incineration Facilities) Order of 1995  
Environmental Quality Act (EQA) 1974 (Act 127)  
Factories and Machinery Act 1967 (Act 139)  
Federal Constitution 1957  
Fisheries Act of 1963 (Act 210)  
Forest Enactment of 1934  
Human Rights Commission of Malaysia Act 1999 (Act 597)  
ILO Declaration on Fundamental Principles and Rights at Work (1998) (ILO)  
Immigration Act 1959/63 (Act 155)  
Industrial Relation Act 1967 (IRA) (Act 177)  
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1966 (UN)  
International Covenant on Civil and Political Rights (ICCPR) 1966 (UN)  
International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 (UN)  
Irrigation Areas Ordinance of 1953 and the Drainage Works Ordinance of 1954  
Land Conversation Act 1960 (Act 385)  
Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009) (Act 694)  
Malaysian Code on Corporate Governance 2012 (MCCG 2012)  
National Land Code 1965 (Act 56)  
Occupational Safety and Health Act 1994 (OSHA) (Act 514)  
Penal Code (Act 574)  
Persons with Disabilities Act 2008 (Act 685)  
Petroleum Mining Act and the Continental Shelf Act 1966 (Act 95)  
Principles relating to the Status of National Institutions (Paris Principles) 1992 (UN)  
Rio Declaration on Environment and Development 1992 (UN)  
The Mining Code of 1895



Trade Union Act 1959 (Act 262)  
United Nations Convention against Corruption (UNCAC) (2003) (UN)  
United Nations Declaration on the Rights of Indigenous People (UNDRIP) 2007 (UN)  
Universal Declaration of Human Rights (UDHR) 1948 (UN)  
Vienna Declaration and Programme of Action 1993  
Water Enactment 1920,  
Whistleblower Protection Act 2010 (Act 711)  
Workmen's Compensation Act 1952 (Act 273)

## LIST OF ABBREVIATIONS

APF	-	Asia Pacific Forum
ASEAN	-	Association of South East Asia Nations
BHP	-	Bakun Hydroelectric Project
BITs	-	Bilateral Investment Treaties
BLIH	-	Business Leaders Initiative on Human Rights
CCM	-	Companies Commission of Malaysia
CSR	-	Corporate Social Responsibility
CUEPACS	-	Congress of Unions of Employees in the Public and Civil Service
DOE	-	Department of the Environment
DOSH	-	Department of Occupational Safety and Health
EIA	-	Environmental Impact Assessment
EU	-	European Union
FDI	-	Foreign Direct Investment
FPIC	-	Free, Prior and Informed Consent
FTAs	-	Free Trade Agreements
GBI	-	Global Business Initiative on Human Rights
GNI	-	Gross National Income
GNP	-	Gross National Product
ICJ	-	International Court of Justice
IGOs	-	Inter-governmental Organisations
IHRB	-	Institute for Human Rights and Business
IAs	-	International Investment Agreements
ILC	-	International Law Commission
IMF	-	International Monetary Fund
IRDA	-	Iskandar Regional Development Authority
JAKOA	-	Department of Orang Asli Development
MACC	-	Malaysian Anti-Corruption Commission
MDGs	-	Millennium Development Goals
MHP	-	Murum Hydroelectric Project
MITI	-	Ministry of International Trade and Industry
MNCs	-	Multinational Corporations
MNE	-	Multinational Enterprise
MSPO	-	Malaysian Sustainable Palm Oil
MTUC	-	Malaysian Trades Union Congress
NAFTA	-	North American Free Trade Agreement
NCR	-	Native Customary Rights
NGOs	-	Non-Governmental Organisations
OECD	-	Organisation for Economic Co-operation and Development
OHCHR	-	Office of the High Commission on Human Rights
RSPO	-	Roundtable on Sustainable Palm Oil
SEB	-	Sarawak Energy Berhad
SMEs	-	Small and Medium Enterprises
SOCSSO	-	Social Security Organisation
SRSG	-	Special Representative of the UN Secretary-General

SUHAKAM	-	Human Rights Commission of Malaysia
TCSR	-	Technical Committee on Social Responsibility
TI-M	-	Transparency International-Malaysia
TNCs	-	Transnational Corporations
UN	-	United Nation (UN)
UNCTAD	-	United Nations Conference on Trade and Development
UNCTC	-	United Nations Centre on Transnational Corporations
WBCSD	-	World Business Council for Sustainable Development

# CHAPTER ONE

## INTRODUCTION

### 1.1 BACKGROUND OF THE STUDY

The rapid economic development that is featuring the current's globalisation era has resulted in the emergence of international business entities such as the multinational corporations (MNCs). The globalisation aura, generated mainly by business activities, has incredibly absorbed deep into our daily life, sweeping the globe with its unresolved issues of good and bad impacts on unprecedented scale. It looks like that in the same way that colonisation was the trend one hundred years ago, globalisation is, today. Today's global corporations have replaced the colonial powers.<sup>1</sup> These non-State actors have taken over the roles traditionally played by States actors such as in providing facilities, utilities and infrastructure to the people to help them enjoy their highest attainable standard of living.

Nevertheless, this is not without controversies. Despite the fact that MNCs have the ability to promote and generate economic growth and development of the country, and thereby enhance enjoyment of human rights, there is also no doubt that MNCs can and do violate people's human rights. Some MNCs, particularly those operating in third world countries have manipulated the lax and insufficient legal structure in the host states to optimise their companies' business agenda. As the result, basic human rights of the local people have been violated and compromised. For example, in countries such as Burma, Colombia, Nigeria and Sudan, the resource

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<sup>1</sup> George Mathews Chunakara, "Globalisations and its Impact on Human Rights" in *Globalisations and its Impacts on Human Rights*, edited by George Mathews Chunakara, Tiruvalla, India, Christava Sahitya Samithy, 2000, at 186.

extraction companies have been accused of providing logistical and financial assistance to repressive state security forces and relying on those forces for protection from the local people.<sup>2</sup>

In addition, similar occasions also happened in Bhopal, India and Niger Delta, Nigeria, where massive human rights violations have taken place. In Bhopal, thousands of people died due to the releases of toxic waste whereas in Niger Delta, the Ogoni people have been denied to freely enjoy their basic rights. In fact, there have been cases where the leaders of the local people's movement have been unfairly arrested, tortured and jailed by the military who act on behalf of the oil companies operating in the area.<sup>3</sup> In Malaysia, corporate human rights violations are normally associated with economic, social and cultural rights. The dismissal of seven Guppy Plastic Industries Sdn. Bhd. workers in 1998 for setting up a union, the sacking of flight attendant Beatrice Fernandez by Malaysia Airlines in 1991 after she got pregnant, and the death of 5,116 workers in workplace accidents between 2006 and 2008 are among the best examples to explain how business entities in Malaysia have violated their rights of their stakeholders, in particular their employees.<sup>4</sup>

In addition, the Bakun and Murum Dams hydro-electric power and oil palm plantation projects in Sarawak state have been the nucleus of numerous human rights violations, most of which the susceptibility of the indigenous peoples' traditional lands (Native Customary Rights – NCR) to encroachment as they had not been recognized by the authorities. *Kajing Tubek & Ors v Ekran Bhd & Ors* is considered a

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<sup>2</sup> Scott Pegg, "An Emerging Market for the New Millennium: Transnational Corporation and Human Rights" in *Transnational Corporation and Human Rights*, edited by Jędrzej George Frynas and Scott Pegg, Hampshire, UK, Palgrave Macmillan, 2003, at 1.

<sup>3</sup> Amnesty International, "Union carbide Corporation (UCC) DOW Chemical and the Bhopal Communities in India" (General Article) (2005) AI Index: ASA 20/005/2005

<sup>4</sup> S. Koshy, "Suhakam to draft human rights policy specific to business", *The Star Online*, 3rd September 2010. <<http://thestar.com.my/news/story.asp?file=/2010/9/3/nation/6972167&sec=nation>> (accessed 1st November 2011).

landmark case in this issue as it argues whether the Environmental Quality Act (EQA) is applicable in the hydro-electric projects. Apart from that, the displacement of local and indigenous communities, the reduction of water quality and the mass death of fish due to the high rate of erosion and siltation, flash floods resulting from the massive logging of rainforests.<sup>5</sup> There have also been allegations of Penan women and girls being raped by employees or associates of timber companies operating nearby their settlement. Despite being urged to set up a Royal Commission to investigate the complaints over the issues, the Government however rejected this on the basis that the matter is not urgent.<sup>6</sup>

Indeed, economic development of the country and the human rights protection of the people both equally importance for any country including Malaysia. In boosting the country's economic agenda, as part of Vision 2020's target, the implementation of privatisation policies have somewhat been liberalised to attract foreign investors. Foreign investors are also welcome to participate in these and other privatisation efforts. With relatively loose and lenient trade policies, including in certain issues like fulfilling the Environmental Impact Assessment (EIA) requirement, major human rights violations by companies have taken place in the name of 'developmental' agenda. While many tycoons from the concerned companies and MNCs may get ample benefits out of such lucrative developmental projects, the people at large are suffering with the violations of their basic human rights.<sup>7</sup>

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<sup>5</sup> Mark Bendeich, Malaysia Secures Soft Japan Loan for Water Project, Planet Ark World Environment News <<http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=30235>> (accessed 23 November 2007).

<sup>6</sup> See generally Human Rights Commission of Malaysia (SUHAKAM). *2010 Annual Report.*, Kuala Lumpur: SUHAKAM, 2011.

<sup>7</sup> M. Suppermaniam, Globalisation and Economic Liberalisation-Implications on the Public Service. *Seminar Paper, Langkawi, Malaysia*, November 1999. <[http://www.jpa.gov.my/buletinjpa/bil2/globalisation\\_and\\_economic\\_liber.htm](http://www.jpa.gov.my/buletinjpa/bil2/globalisation_and_economic_liber.htm)> (accessed 11 December 2007).

It is a matter of fact that many companies and business entities have come under fire for their alleged human rights violations affecting the community within their sphere of influences. There have been escalating calls from the global community to hold MNCs accountable for their alleged human rights violations. This characteristic of business-human rights interface is actually not new but, in many regards, particularly challenging. Given the intricate relationships between governments and businesses which manifest in the reluctance on the part of governments to take action against big businesses, it is rather difficult to see strict legal enforcement being used by the government to control the companies' behaviour.

As the results, soft laws and voluntary-based principles such as the adoption of Corporate Social Responsibility (CSR) has since become popular among MNCs as their drive to 'humanise' their companies thus bridging the gap between them and the society. In the same vein, the United Nation has introduced Global Compact initiative in 1999 as a collective platform for companies to embed social values and common objectives of all segments of world population.<sup>8</sup> Similarly, the UN has introduced the Guiding Principles on Business and Human Rights which aims, among others, to help companies and MNCs embracing human rights initiatives within their business operations.<sup>9</sup> As such, it is believed that, in the absent of international mechanism to hold MNCs accountable coupled with insufficient and weak legal apparatus at state level, incorporation of soft law principles by the MNCs could be seen as a vehicle

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<sup>8</sup> Susanne Soederberg, "Taming Corporation or Buttressing Market-Led Development? A Critical Assessment of the Global Compact", vol. 4, no. 4 (December 2007) *Globalisations*, 502.

<sup>9</sup> UN, Human Rights Council. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and remedy" Framework*. (21 March, 2011). Report of the Special representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UN. Doc. A/HRC/17/31.

towards enhancing their compliance with the internationally-proclaimed human rights standards.<sup>10</sup>

As far as the human rights practice in Malaysian business environment is concerned, the general literature is very limited and no specific research undertaken to discover the extent of human rights violations by MNCs and business entities, let alone any specific mechanism to be used to address such violations. It was the National Human Rights Commission of Malaysia (SUHAKAM) which has been at the forefront in efforts related to the interplay between business and human rights. Since 2010, various activities were carried out by the Commission such as undertaking research exercises, national inquiries, investigations and a series of forums, roundtable discussions with stakeholders on business and human rights. In March 2015, the Commission has managed to submit a Strategic Framework for a National Action Plan on Business and Human Rights to the government. The Framework sets a key milestone in the country's initiatives to ensure that the business activities are undertaken in a more sustainable and socially-responsible manner with greater respect for human rights.<sup>11</sup>

Indeed, as discussed above, the involvement of corporate entities, mainly the MNCs in human rights violations has prompted a need to rethink the corporate's agenda which should not only limited to profit-making, but also to include social and human rights perspectives. Based on this premise, this study seeks to analyse the use of soft law and voluntary-based human rights approaches as a method to enhance human rights compliance by MNCs in particular in Malaysia. Based on various

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<sup>10</sup> See generally Iman Prihandono, "Barriers to Transnational Human Rights Litigation against Transnational Corporations (TNCs): The Need for Cooperation between Home and Host Countries", vol. 3, no. 6 (2011) *Journal of Law and Conflict Resolution*, at 89–103.

<sup>11</sup> Human Rights Commission of Malaysia (SUHAKAM). *Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia*, Kuala Lumpur, SUHAKAM, March 2015, at i.