ASYMMETRICAL LEGAL PROTECTIONS FOR HUMAN RIGHTS ABUSES ASSOCIATED WITH CORPORATIONS: THE USE OF LEGAL THREATS AGAINST HUMAN RIGHTS DEFENDERS AND VICTIMS

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INTRODUCTION

Human rights traditionally have been conceived of as a set of norms and practices to protect individuals from threats, attributing to the state the duty to secure the conditions necessary for people to live their lives with dignity.[1] However, many multinational firms whose responsibility to respect human rights according to the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework." are unprepared for the need to manage the risk of possibly causing, or contributing to, human rights abuse and environmental harm through their own activities or business relationships.

Although such responsibility may have been echoed in their commitments and policies, businesses tend to ignore it. This is because the implication for what companies need to do to meet such responsibility had never been spelled out authoritatively.[2] It is difficult to have companies effectively acknowledge and interpret this responsibility in practical ways.

Advocacy groups organize campaigns to raise awareness and call for business accountability among multinational corporations. There have been many attempts to speak out publicly about how development could erode the growth of society when businesses are expected to earn profits to benefit a few while the majority must bear the adverse impacts of their operations. There is growing awareness of corporate complicity in human rights abuses. However, a lawsuit known as SLAPP (Strategic Lawsuits against Public Participation), at the same time, is being responded to threaten the community's rights, as well as those of the victims, defenders, activists, environmentalists, and scholars, and their ability to participate in public debates,

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[1] *John Ruggie, Just Business: Multinational Corporations and Human Rights. EBook. (Thomas J. Dodd Research Center, University of Connecticut, 2013).*

[2] *Ibid.*

meetings, or engage in peaceful demonstrations.[3] Such activities are supposed to be protected by fundamental rights in relation to political and civil rights guaranteed in the constitutions of many countries, but this has not stopped powerful companies that want to silence their opponents.

CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

The United Nations Human Rights Council on June 16, 2011 unanimously endorsed the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework." Those principles establish a means by which it is a corporation's responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of people and address any adverse impacts on human rights in which they might be involved.[4]

Although companies are not subject to international law but to the law of the country where they operate, businesses should ensure that they are not complicit in human rights abuses. The Guiding Principles explain that complicity includes any act or omission by a company that helps (facilitates, legitimizes, assists, encourages, etc.)[5] in some way the carrying out of a human rights abuse. The businesses should avoid causing social strife or harm, and should actually be an engine of hope and change. Companies should see how important the "outside-the-fence" issues are to the company and its workers.

Jonathan Drimmer, a vice president and assistant general counsel for Barrick Gold, a Canadian mining company, described his first day with the company in 2011 when he flew to Papua New Guinea to visit the company's operations there. It should be remembered that domestic violence in that country reportedly affects two-thirds of all families. He wrote:

The problems with the community don't stop at your front gate. They don't stop at your doorstep. The community's problems are your problems if you have extensive violence in the community, you have a serious risk of violence in your operations. Appreciating that you are part of and not distinct from the community, and their problems are your problems, is a mindset I didn't fully have before I went, but very much came away with.

This is a lesson that many companies should understand, or they will become their own worst enemy. Failure to ignore the rights of community members and the impacts of development is going to go against them in the long term for this reason.[6] The long term means that a business must invest in the societies from which it derives its profits to ensure that its customers continue to be loyal and that governments continue to renew its license to operate. A business must be useful to society and be seen as such.[7] However, many corporations ignore this concept. In fact, they fail to build trust and acquire a "social license" from the society. Instead they attack those whom they regard as opponents. That is why their operations in reality are criticized by many adversely affected communities.

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[3] *George W. Pring and Penelope Canan, "'SLAPPs'—'Strategic Lawsuits against Public Participation' in Government—Diagnosis and Treatment of the Newest Civil Rights Abuse,"* in *Civil Rights Litigation and Attorney Fees Annual Handbook (Clark Boardman, 1993): 380; and "2008 IPEN General Assembly & Global Toxics-Free Future Forum Trivandrum," August 12-15, 2008, India, http://ntn.org.au/wp/wp-content/uploads/2010/02/slapps08.pdf.*

[4] *Ruggie, Just Business.*

[5] *John Ruggie, "Clarifying the Concepts of 'Sphere of Influence' and 'Complicity'," Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council, A/HRC/8/16, May 15, 2008.*

[6] *Discussion from Liesel Filgueiras, Human Rights and Indigenous Relation for Vale, extracted from The Evolution of a Corporate Idealist: When Girl Meets Oil [Christine Bader, 2014].*

[7] *Discussion from Groucho Marx extracted from the Evolution of a Corporate Idealist: When Girl Meets Oil [Christine Bader, 2014].*

CORPORATE ASSAULT AGAINST HUMAN RIGHTS VICTIMS THROUGH THE STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION OR "SLAPP" MECHANISM

Introduction and History

In 1986, a woman in Texas was sued by Hill Sand Company for US$ 5 million for using the term "dump" in reference to a landfill; her husband, who had not been involved in the protest, was also sued because he "failed to control his wife." After nearly three years of court appearances and spending thousands of dollars in legal fees, during which time many people withdrew from the campaign in fear, the lawsuit was dropped. Hill Sand closed down and a couple of years later the landfill was investigated by the United States Environmental Protection Agency as a hazardous waste site that needed to be cleaned up.[8]

This is an example of a case in which, while individuals and non-governmental organizations (NGOs) are unable to exercise their political rights (information disclosure, public participation, self-determination, documentation) and access justice directly, the company attempted to find technical legal grounds on which to limit public expression and criticism by means of SLAPP. Such grounds usually include defamation, conspiracy, nuisance, invasion of privacy or interference with business/economic expectancy.[9]

SLAPP is used simply to intimidate people, to literally frighten them into silence on public interest issues. By shifting a dispute into the legal arena, the victim is immediately placed on the defensive for exercising his or her right to complain by being faced with the prospect of having to pay legal costs and face the potential liability of losing the lawsuit.[10] A lawsuit diverts attention from the issue that originally gave rise to the dispute and, through legal delays, allows the filer of the suit to achieve the larger goal of silencing opposition to the disputed issue. Pring and Canan (1993) found that those who file such lawsuits assume that their economic rights are superior to the public interest. The idea is that, because a business has money at stake, the business should receive priority over civic, communal opposition,[11] while on the other hand, legal analysts have suggested that SLAPP infringes on the freedom of expression of one's rights.[12] However, this has not stopped powerful corporations that want to silence their opponents.

Every year, thousands of people in the United States are sued for speaking out against the government and corporations. This trend, noticed by an increasing number of environmentalists who have been named as defendants in large civil damages cases,[13] is now spreading to other countries and regions, including in Southeast Asia. A huge amount of monetary damages are being sought in lawsuits against individual citizens and groups, while judicial responses are not adequate to protect the victims from the damaging effects of SLAPP.

Definition and the nature of SLAPP

SLAPP was first described by two American legal theorists, Canan and Pring, in the late 1980s, with the following definition cited in a lawsuit:

...suits without substantial merit that are brought by private interests to stop citizens from

[8] *Tobi Lippin, "Uncivil Suits," Technology Review 94, no. 3 (1991): 15.*

[9] *Pring and Canan, "'SLAPPs'—'Strategic Lawsuits against Public Participation' in Government—Diagnosis and Treatment of the Newest Civil Rights Abuse," 381-385.*

[10] *Susan Lott, Corporate Retaliation against Consumers: the Status of Strategic Lawsuits against Public Participation (SLAPP) in Canada, Executive Summary (2004).*

[11] *Peter Nye, "Surge of SLAPP Suits Chills Public Debate," Public Citizen (Summer 1994): 15.*

[12] *See "2008 IPEN General Assembly and Global Toxics-Free Future Forum Trivandrum," 3; and Lott, Corporate Retaliation.*

[13] *Katherine Bishop, "New Tool of Developers and Others Quells Private Opposition to Projects," New York Times, April 26, 1991.*

SLAPP

exercising their political rights or to punish them from having done so. SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defence.[14]

The longer the litigation can be stretched out, and the more the litigation can be churned, the greater will be the expense that is inflicted on the defendants and the closer the SLAPP filer will move toward success.[15] The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism.[16]

It should be noted that most such cases seldom win in the courts, and 77 percent of those heard by courts are won by the people being sued. Less than 10 percent of such cases in the United States result in a court victory for the filer of the action.[17] However, companies taking this legal action are not doing so in order to win compensation; their aims are to harass, intimidate and distract their opponents and to justify themselves that legal action is only a means to establish the truth. They will "win" the court cases when their victims "are no longer able to find the financial, emotional, or mental wherewithal to sustain their defense."[18] In other words, they win the political battle, even when they lose the court case, if their victims and those associated with them stop speaking out against the company. In contrast, victims have to face unaffordable legal fees, emotional stress, disillusionment, diversion of their time and energy, and even divisions within their families, communities and groups.[19]

Kelpie Wilson experienced a SLAPP in Oregon that was initiated by Huffman & Wright Logging Company, which sought punitive and actual damages. Despite the fact that the company allegedly destroyed the ecosystem, stole trees, bribed politicians, called her group the "eco-terrorists," and created an atmosphere of hate and violence, it was so unfair that the company could sue her for little actions that barely even slow the company down.[20]

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[14] *Gordon vs. Marrone, 590 N.Y.S. 2s 649 (1992) at 656.*

[15] *Quote in Sharon Beder, The Evolution of a Corporate Idealist: When Girl Meets Oil, 2002.*

[16] *Quote in Pring and Canan, "'SLAPPs'—'Strategic Lawsuits against Public Participation' in Government—Diagnosis and Treatment of the Newest Civil Rights Abuse," 382.*

[17] *Kim Goldberg, "SLAPPs Surge North: Canadian Activists under Attack," The New Catalyst 25 (Winter 1992/3): 2; and Peter Nye, "Surge of SLAPP Suits Chills Public Debate," 15.*

[18] *C. Davis and D. White, "The Unslapped: A Primer for Protecting You and Your Affiliate against SLAPP Suits," National Wildlife Foundation, January 24, 1994.*

[19] *Sharon Beder, Global Spin: The Corporate Assault on Environmentalism. Ebook. (Devon, U.K.: Green Books, 2nd edition, 2002).*

[20] *Extracted from Sharon Beder, Global Spin: The Corporate Assault*

She argued that non-violent civil disobedience, historically a political tool of great importance to this country, was no longer a viable option for many activists....in the future activists would probably have to divide into two camps. Those who take direct action will have to stay "lean, mean and low on the food chain." They cannot keep suing when they do not get anything out of it.[21] This clearly represents asymmetry and an imbalance in legal access between the company and its opponent(s) to challenge justice in international and domestic courts where the parent company is located. Moreover, the failure of the company's responsibility to respect human rights is clearly evident.

An effective response–the "backfire effect" against SLAPP

"McLibel Case"[22]

The hamburger company McDonald's took legal action against two unemployed activists, Dave Morris and Helen Steel. The fact of litigation was begun in 1986. The legal action was initiated in 1990 and finally decided by court in 1997.[23] Despite their lower financial status, they were still willing to fight the action.[24] It may have been the first time that McDonald's had actually gone to court in the United Kingdom after making threats to do so. It has forced apologies from a number of media outlets, including the BBC and Channel 4 in the United Kingdom, a major newspaper such as the *Guardian* and the *Nightline* program in New Zealand.

Morris and Steel are members of London Greenpeace, an anarchist group not affiliated with Greenpeace International, and were distributing pamphlets entitled "What's Wrong with McDonald's." The pamphlets claimed that McDonald's sold food that was unhealthy, exploited its workers, promoted rainforest destruction through cattle ranching, added to the litter problem and targeted advertisements at children. They were served with a libel suit; in the United Kingdom, legal aid is not available for libel cases, so they represented themselves against McDonald's top lawyers. Even before the case went to trial in 1994, they had to participate in several years of pre-trial hearings. It became the longest trial in British history.[25]

British libel laws clearly favor those who bring a case to court. To win the case, Morris and Steel had to prove that every statement in the pamphlet was true, rather than McDonald's having to prove that the statements were untrue, as would have been the case in the United States. The company also did not have to prove that its reputation was damaged so that sales were harmed as a result of the alleged libel.

Morris and Steel were supported by an international "McLibel Support Campaign" which raised money to help defray their legal costs. They called more than 100 witnesses to give evidence against McDonald's practices and products. They also countersued McDonald's in what is termed a "SLAPP-back" for distributing leaflets calling them liars.[26]

When the trial ended in February 1997 after

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on Environmentalism, SLAPP Outside the U.S.A., https://www.uow.edu.au/~sharonb/slappsedo.html.

[21] Kelpie Wilson, "Sapphire Six Sacrificed by Oregon Supreme Court," The Earth First! Journal 13, no. 8 (September 1993): 30.

[22] Extracted from Sharon Beder, Global Spin: The Corporate Assault on Environmentalism, SLAPP Outside the U.S.A.

[23] http://en.wikipedia.org/wiki/McLibel_case.

[24] McDonald's Corporation vs. Steel & Morris, [1997] EWHC QB 366, known as "the McLibel case."

[25] Anon, "McLibel," Chain Reaction 72 (1994); and Background Briefing, Radio 2RN, Australian Broadcasting Corporation, 30/4/95, http://www.bmartin.cc/dissent/documents/Beder_SLAPPS.html#fn50.

[26] Keir Starmer provided the McLibel defendants with free legal support for many years, first as a barrister, then as a QC; later in 2008 he became the Director of Public Prosecutions for England and Wales. Keir Starmer was interviewed in 1997 by One-Off Productions for their television documentary, McLibel: Two Worlds Collide, available at http://www.mcspotlight.org/people/interviews/starmer.html.

two and a half years, it had cost about £10 million (about 481.5 million baht) and generated 40,000 pages of documents and 20,000 pages of transcripts of testimony. The trial judge found that some of the claims were true, such as the poor dietary value of the corporation's hamburgers, the exploitation of children through its advertising, cruel animal practices used in producing meat for the hamburgers and the low wages paid to McDonald's employees. However, the judge also found that other claims were untrue and therefore the pamphlet had harmed the reputation of McDonald's and was thus libelous. He ordered that the defendants pay McDonald's £60,000 (2.9 million baht). Yet McDonald's could never be considered a winner! Given the fact that Morris and Steel lost the case and had to pay damages, they felt they had won a moral victory because McDonald's practices had been put on trial and they had defeated the company's efforts to silence its critics. The pamphlet had been distributed to an estimated 2 million people since the trial began, and an Internet site had been established which was accessed by people from all over the world.[27]

This case reflects a strategy adopted by NGOs and activists in deciding to attack as a result a lawsuit, and not be silenced, that is, the "backfire effect." This strategy uses such cases to generate adverse publicity that far outweighs the benefits for the proponent of a SLAPP lawsuit.[28] However, SLAPP cases continue to exist as not every case can garner huge public attention and assistance from support groups, as the McDonald's case did.

SLAPP in the Southeast Asian region

SLAPP is not new in this region. It has been spreading around and growing without legal protection. Only the Philippines has Anti-SLAPP provisions in Section 43, Rep. Act No. 8749 Clean Air Act[29] Section 53, Rep. Act No. 9003 (2001) Solid Waste Management Act[30] and Rule 6 and 19, Rules

[27] *Sarah Lyall, "Britain's Big 'McLibel Trial' (It's McEndless, Too)," New York Times, November 28, 1996; Carol Midgley, "Trial That's Made A Meal of It," The Times, December 13, 1996; and Daniel Zoll, "Big Mac Attack: A British Trial Puts McDonald's on the Grill," San Francisco Guardian, January 29, 1997.*

[28] *G. Ogle, "Beating a SLAPP Suit," Alternative Law Journal 32, no. 2 (June 2007): 71.*

[29] *Section 43. Suits and Strategic Legal Actions Against, Public Participation and the Enforcement of this, Act.–Where a suit is brought against a person who filed an action as provided in Section 41 of this Act, or against any person, institution or government agency that implements this Act, it shall be the duty of the investigating prosecutor or the court, as the case may be, to immediately make a determination not exceeding thirty (30) days whether said legal action has been filed to harass, vex, exert undue pressure or stifle such legal recourses of the person complaining of or enforcing the provisions of this Act. Upon determination thereof, evidence warranting the same, the court shall dismiss the case and award attorney's fees and double damages. Available at http://www.denr.gov.ph/policy/1999/ra8749.pdf*

[30] *Section 53. Suits and Strategic Legal Action Against Public Participation (SLAPP) and the Enforcement of this Act–Where a suit is brought against a person who filed an action as provided in Sec. 52 of this Act, or against any person, institution or government agency that implements this Act, it shall be the duty of the investigating prosecutor or the Court, as the case may be, to immediately make a determination not exceeding thirty (30) days whether said legal action has been filed to harass, vex, exert undue pressure or stifle such legal recourses of the person complaining of or enforcing the provisions of this Act. Upon determination thereof, evidence warranting the same, the Court shall dismiss the complaint and award*

of Procedure for Environmental Cases.[31] However, it limits only in environmental issue. Human rights violation is not inclusive. This following SLAPP cases have similar components where the publiction was made against corporations by individuals or human-rights-and-environmental-based organizations, and such corporations responded by using a defamation suit to silence these groups. During the suit, their fate was the same as they had to deal with the criminal charge, payments of bailment and lawyer fee, evidence findings, etc.

Thailand

In February 2013, researcher and activist Andy Hall was sued by the Thai company Natural Fruit for defamation and violation of Thailand's Computer Crimes Act for allegedly broadcasting false statements through the public media. If found guilty, he could face years in prison and be fined up to 32.1 million baht. The civil and criminal complaints were reportedly based on a report co-authored by Hall for the Finnish NGO, Finnwatch, that alleged child labor, forced labor, and poor working conditions in a canning factory run by Natural Fruit Co., Ltd., where the workers are mostly migrants from Myanmar.

The judicial proceedings were marked by a series of postponements, the latest one on September 13, 2013, resetting the court date to November 11, 2013.

More recently, another case was filed by the same company against Hall. The third case is for alleged defamation by Finnwatch and Aljazeera for posting videos online. Hall said he was "nearly tricked" into signing a confession, that the allegations he had made against the company were untrue, when he presented himself to the Bangna police station in Thailand for questioning related to the latest complaint. Hall has filed a complaint with the Royal Thai Police accusing the Bangna police of malfeasance in pressuring him to sign a confession.

On April 26, 2013, a communication was sent by five United Nations Special Procedures mandates to the Thai Government, expressing concern that the charges against Hall may be the result of his legitimate and peaceful actions gathering and publishing evidence of facts which, if accurate, would amount to serious human rights violations that warrant investigation by the authorities. They also raised concern that the charges may have a chilling effect on other human rights defenders and civil society activists working to expose human rights violations perpetrated by businesses.

The Permanent Mission of Thailand to the United Nations in Geneva responded, saying that the case is being considered by the Thai judicial system, which gives Natural Fruit the right to file the case, and Hall the right to defend himself.[32]

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the attorney's fees and double damages. This provision shall also apply and benefit public officers who are sued for acts committed in their official capacity, there being no grave abuse of authority, and done in the course of enforcing this Act. Available from http://www.lawphil.net/statutes/repacts/ra2001/ra_9003_2001.html.

[31] *http://philja.judiciary.gov.ph/assets/files/pdf/learning_materials/A.m.No.09-6-8-SC_Rules_of_Procedure_for_Envi_Cases.pdf*

[32] *http://business-humanrights.org/en/reports-and-statements-on-*

On June 18, 2014, Hall was formally detained in a court cell following a meeting with officials at the Prakanong Public Prosecutor's Office, Bangkok, where he went to learn the Public Prosecutor's decision on whether the latest criminal charges filed against him by Natural Fruit would be ordered for prosecution.

The Public Prosecutor was acting on behalf of Thailand's Attorney General, who is now prosecuting the case. The Attorney General and then the Prakanong Court accepted the Natural Fruit vs. Andy Hall case involving charges of criminal defamation. The charge was formally read to Hall who then pleaded not guilty to all charges. The Attorney General's reasons for accepting the case were reportedly that Hall, when interviewing Aljazeera regarding the Finnwatch report on Natural Fruit, foresaw the damage against the injured party in Thailand would occur.

After pleading not guilty to the charge, Hall was then detained for two hours in a cell below the Prakanong courthouse with prisoners on their way to jail, but was then released on bail.

As a condition of bail, Hall's passport was confiscated so he cannot leave Thailand to return home to Myanmar where he resides unless the court approves his departure, the case against him is considered and rejected, or if found guilty, until he has served his sentence.[33]

Malaysia

In February 2011, the Malaysian subsidiary of Japanese machine parts manufacturer, Asahi Kosei, sued Malaysian labor activist Charles Hector Fernandez for defamation for statements that he allegedly had posted on his blog[34] and Twitter page regarding the plight of Burmese workers at the company's factory. The trial was set for June 28-29, 2011. In the intervening period, a number of NGOs criticized the company calling on it to drop the lawsuit and address the concerns that Hector raised.[35]

Fernandez received information from Burmese migrant workers that they were being threatened with termination of their contracts and deportation by Asahi Kosei Company, as they complained about being paid less than what had originally been agreed with their employer. Fernandez contacted the company to confirm this information. As he received no reply, he began to gather information and advocate for the rights of 31 Burmese migrant workers, in particular those who were facing immediate deportation. His findings were based on research he had carried out. The company, which has already obtained an injunction against Fernandez's blog posts, is demanding compensation of US$ 3.3 million (10.7 million baht), in addition to a public apology and the removal of the information Fernandez published.[36]

On June 10, 2011, the High Court judge refused the application filed by Fernandez to join 31 Burmese migrant workers as parties in the defamation case against him. This would protect these workers against possible deportation. Fernandez has appealed this decision at the Court of Appeals, but the court refused to grant a stay of the proceedings until after his appeal has been heard.

Asahi Kosei says that it is not responsible for the workers and all that happened to them because these workers were not the company's "employees," but were workers supplied by an "outsourcing agent" (a labor/manpower supplier). The threat and the suit against this human rights defender resulted in great protest from all quarters, both nationally and internationally. This issue was also raised in the

lawsuits-filed-by-natural-fruit-against-researcher-and-activist-andy-hall-for-alleged-defamation

[33] *http://finnwatch.org/en/news/194-andy-hall-was-formally-detained-and-released-on-bail*

[34] *http://charleshector.blogspot.com/*

[35] *http://business-humanrights.org/en/documents/asahi-kosei-libel-suit-against-malaysian-labour-activist-charles-hector-june-2011*

[36] *http://www.fidh.org/en/asia/malaysia/Concern-about-the-trial-against*

Parliament of the United Kingdom,[37] and the trial was closely monitored by the European Union and many countries.

On August 25, 2011, the case was settled; subsequently Fernandez was nominated in 2011 for the inaugural Human Rights Award of the Human Rights Commission of Malaysia (SUHAKAM).[38]

Indonesia[39]

Yani Saragoa, director of the Indonesian environmental organization, Lembaga Olah Hidup (LOH), based in Sumbawa, began a four-month jail term. In 2005, Yani was found guilty by a Sumbawa court on charges of threatening the reputation of PT Newmont Nusa Tenggara (NNT), a gold and copper mining company owned by the American mining company, Newmont.

At the time, another Newmont-owned mine in Indonesia was at the center of public scrutiny over its contamination of Buyat Bay. Yani issued a press release warning the Sumbawa people of the risks to the environment and the health of the people of Senunu Bay that was associated with Newmont's waste tailings; Newmont was dumping 120,000 tons of tailings each day.

Yani appealed the initial decisions of the Sumbawa Besar State Court and the West Nusa Tenggara High Court that found him guilty of defamation against NNT. On July 24, 2007, the Supreme Court denied Yani's appeal, and he was detained in Lapas Sumbawa jail.

In Sumbawa, LOH is one of the main organizations educating people and carrying out advocacy concerning the impacts of Newmont operations. For some time, this organization defended the environment and those who suffered adverse impacts as a result of the Newmont mine activities. As a result, members and sympathizers of LOH have been harassed, intimidated, threatened and terrorized. They also experienced physical violence while campaigning against the adverse impacts of the Newmont mine. In 2005, Yani decided it was best to move his family from Sumbawa to a village.

"The case against Yani Sagaroa is clearly a case of stifling freedom of expression of opinions– a right that is constitutionally protected. The case also contradicts Act No. 26/2000 on human rights," stated Chairil Syah, the lawyer representing Yani Sagaroa, in response to the decision.

According to the director of the Indonesian Center for Environmental Law, Rino Subagyo, SLAPP lawsuits prevent the community from participating in decisions that affect them. In the case of Yani, he was acting only within his rights as a citizen in his actions to raise awareness about the environmental and social risks of the previously described mining activities.

SLAPP lawsuits have become a tool used by mining companies to restrict environmental activists, human rights activists, citizens and community leaders who are vocal about the problems of mining. There are several cases where SLAPP lawsuits have been used in different parts of Indonesia against those critical of American and Australian companies. Yul Takaliwang and Rignolda Jamaludin in North Sulawesi faced SLAPP lawsuits as did Salamudin Daeng in Sumbawa and Aleta Ba'un in East Nusa Tenggara.

"Big mining is threatening democracy in this country by using supporting government agents to silence any criticism of their activities," stated Siti Maimunah, national coordinator of JATAM (Mining Advocacy Network).

The increasing use of SLAPP lawsuits is very worrisome. At a time when the government is desperate to attract more investment, it is neglecting its duty to ensure the protection of citizens from the kind of legal abuse those lawsuits involve.

There are numerous quasi-SLAPP in other countries, namely in Myanmar, Cambodia, and Laos, among others. Many cases are criminal cases prosecuted by the governments of those countries,

[37] *http://www.parliament.uk/edm/2010-12/1800*

[38] *http://en.wikipedia.org/wiki/Charles_Hector*

[39] *http://www.minesandcommunities.org/article.php?a=8369*

due to the prevalence of the close relationship between those governments and corporations, including politically powerful figures or their cronies who own major companies or companies that are jointly government and privately owned and operated. Certainly, threatening victims with a criminal charge is more perilous and frightening than challenging them with a SLAPP.[40]

SLAPP prevention

For more than a decade, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has noted that civil defamation laws, like criminal defamation laws, can improperly restrict people's freedom of expression. Abid Hussain, the Special Rapporteur in 2000, outlined a list of minimum requirements that civil defamation laws need to satisfy in order to respect the right to freedom of expression. Several of these pertain to lawsuits brought by private parties, as well as by government officials, including:[41]

Sanctions for defamation should not be so large as to exert a chilling effect on the freedom of opinion and expression and the right to seek, receive, and impart information. Damage awards should be strictly proportionate to the actual harm caused.

Defamation laws should reflect the importance of open debate about matters of public interest.

Where publications relate to matters of public interest, it is excessive to require truth in order to avoid liability for defamation; instead, it should be sufficient if the author has made reasonable efforts to ascertain the truth.[42]

In countries where the constitution does not guarantee the right of citizens to petition the government, it is more difficult for state or provincial governments to enact legislation to discourage SLAPP lawsuits.[43] However, it really requires special legislation to deal with the phenomenon of SLAPP in a more integrated and comprehensive way.

Several states in the United States have responded to the epidemic of SLAPP cases with legislation aimed at making it more difficult for developers to sue. California, Florida, Nevada, New York, Texas, Washington and several other states have all introduced anti-SLAPP legislation.[44] In New York, for example, people filing lawsuits have to show that the person being sued acted in malice and with "reckless disregard for the truth."[45] In a Californian Supreme Court case in 1995, the court upheld a ruling that citizens can make comment and give criticism during formal reviews authorized by law, without fear of libel suits, no matter what their

[40] ***Some examples in Myanmar:***
http://business-humanrights.org/Links/Repository/1023042/link_page_view
http://business-humanrights.org/Links/Repository/1024942/link_page_view
http://business-humanrights.org/Links/Repository/1026430/link_page_view
http://business-humanrights.org/Links/Repository/1025188/link_page_view
Some examples in Cambodia:
http://business-humanrights.org/Links/Repository/1024678/link_page_view
http://business-humanrights.org/Links/Repository/1024585/link_page_view
http://business-humanrights.org/Links/Repository/1024584/link_page_view
http://business-humanrights.org/Links/Repository/1024348/link_page_view

[41] *Please see "Joint Declarations of the Representatives of Intergovernmental Bodies to Protect Free Media and Expression," http://www.osce.org/fom/99558?download=true, pp. 22-23.*

[42] *http://www.hrw.org/news/2011/06/22/malaysia-lawsuit-against-rights-defender-impedes-public-debate/*

[43] *Kim Goldberg, "SLAPPs Surge North: Canadian Activists under Attack," 2.*

[44] *Extracted from Sharon Beder, 1997, Global Spin: The Corporate Assault on Environmentalism, Responses to SLAPP.*

[45] *Diana Jean Schemo, "Silencing the Opposition Gets Harder," New York Times, July 2, 1992; and George Pring, Penelope Canan and Vicky Thomas-McGuirk, "SLAPPS: A New Crisis and Opportunity for the Government Attorney," part 1, National Environmental Enforcement Journal, April 1994: 7.*

motivation.[46]

In Canada, the case of Fraser vs. Saanich (District) 1995 [BCJ 3100 BCSC] was judged explicitly to be a case of SLAPP, the first known case to be so described. Justice T.M. Singh found plaintiff's conduct to be "reprehensible and deserving of censure," ordering that he pay "special costs" to compensate the defendant.[47] Also, in Robin Scory vs. Glen Valley Watersheds Society, 2011, a British Columbia court ruled that "an order for special costs acts as a deterrent to litigants whose purpose is to interfere with the democratic process," and that "public participation and dissent is an important part of our democratic system."[48, 49] However, such awards remain rare.[50]

Although there are cases in Canada referred to as SLAPP responses, there is still a need for a legislative response mainly for three reasons: first, because existing court rules are not sufficient to prevent SLAPP from occurring; second, because the purposes behind SLAPP are primarily political;[51] and third, because SLAPP are usually private actions–not involving government actors–defendants of SLAPP cannot invoke the right to free expression found in the Canadian Charter of Rights and Freedoms,[52] because it does not apply to private actions.[53] Therefore, anti-SLAPP legislation has been enacted to fill this gap.

The Canadian and the United States experience with SLAPP suggests that there are key components that need to be contained in anti-SLAPP legislation to protect those who are targeted in a SLAPP: clear identification of a SLAPP; a dismissal mechanism; granting of costs to defendants; and establishing qualified privilege with respect to defamation actions that are SLAPP.[54]

Dismissal mechanism

In order to avoid legal costs, the time and resources required to defend a case, the early identification and dismissal of SLAPP actions are therefore essential parts of a legislative response. Under the "clean hand" doctrine,[55] it should be required that legitimate plaintiffs have fair and appropriate recourse to the legal system. As such, a defendant may file a motion showing that he or she is being sued in connection with activities specifically protected by an anti-SLAPP law. The onus then would be on the plaintiff to establish that the suit has merit and is likely to succeed. If a plaintiff fails to do so, the case should be dismissed.

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[46] *Anon, "Court Gives New Protections to Critics of Development," Los Angeles Times, March 24, 1995.*

[47] *"Strategic Lawsuits Against Public Participation: The British Columbia Experience," RECEIL 19(1) 2010 ISSN 0962 8797: 48.*

[48] *http://www.ecojustice.ca/media-centre/press-releases/b.c.-developer-ordered-to-pay-for-failed-defamation-suit-against-local-conservation-group*

[49] *http://www.ecojustice.ca/media-centre/press-releases/ecojustice-scores-big-victory-for-the-little-guys/?searchterm=glen%20valley*

[50] *http://wcel.org/resources/environmental-law-alert/bc-trails-quebec-ontario-protecting-public-chilling-lawsuits*

[51] *John C. Barker,* "Common-Law and Statutory Solutions to the Problem of SLAPPS," *Loyola of Los Angeles Law Review 26 (1993): 395-454, http://digitalcommons.lmu.edu/llr/vol26/iss2/13*

[52] *The Canadian Charter of Rights and Freedom is limited in scope of application, applying to the decisions and actions of government and government entities only. The Charter does not apply to the actions of private entities (to which provincial human rights legislation applies). Please see http://www.lco-cdo.org/en/older-adults-lco-funded-papers-margaret-hall-sectionIII*

[53] *Craig Jones and Chris Tollefson, "New Law Takes the Starch Out of Attempts to Suppress Critics." British Colombia Civil Liberties Association Newsflash (April 26, 2001).*

[54] *Pring and Canan, "'SLAPPs'—'Strategic Lawsuits against Public Participation' in Government—Diagnosis and Treatment of the Newest Civil Rights Abuse," 57.*

[55] *The clean hands doctrine or the dirty hands doctrine, is an equitable defense in which the defendant argues that the plaintiff is not entitled to obtain an equitable remedy because the plaintiff is acting unethically or has acted in bad faith with respect to the subject of the complaint—that is, with "unclean hands." The defendant has the burden of proof to show the plaintiff is not acting in good faith. The doctrine is often stated as "those seeking equity must do equity" or "equity must come with clean hands." For more information, see http://en.wikipedia.org/wiki/Clean_hands.*

Granting costs to defendants and making SLAPP plaintiffs pay

Some states in the United States allow a defendant who is successful in having a case dismissed as a SLAPP to be completely indemnified by the plaintiff for legal expenses. In some cases, punitive damages may also apply. Such awards should be on a mandatory basis, as in California,[56] while in other states it may be based on the court's discretion. In Canada, the award of legal costs and attorney fees will be full indemnity according to Section 8 of the Protection of Public Participation Act, SBC 2001, Chapter 19.[57]

It is noted that this provision has little or no impact on deterring SLAPP lawsuits anyway. As a matter of fact, the filers are mostly wealthy and not usually concerned about winning a lawsuit or even carrying it forward to completion[58] as long as a defendant is being kept silent concerning the filers' activities.

Establishing qualified privilege for defamation actions

Defamation is often cited in a SLAPP lawsuit, and it imposes a burden of proof on the defendant as it falls into the category of a strict liability tort.[59] SLAPP legislation should address the issue of defamation by providing a clear line between definition and component of defamation and public participation. Once it is deemed as public participation, it would constitute an occasion of qualified privilege dissuading persons from bringing or maintaining legal proceedings or claims for an improper purpose. This would provide courts with discretion to assess the facts of a case in the context of determining the impact of the lawsuit on the defendants' right to express and exercise their democratic rights. A good example can be found in the British Columbia anti-SLAPP statute, sections 1 and 3.[60]

The development of a climate of fear that dissuades citizens from speaking out on matters of public interest and discourages activists from continuing the "honorable tradition" of civil disobedience is a threat to democracy and healthy political debate on issues of importance, but litigation is increasingly used to intimidate people who cannot be influenced in other ways, for example through pressure from employees or professional associations.[61]

SLAPP has been expanding in Southeast Asia, yet there is no legal protection to prevent misconduct of judicial access. The applicable anti-SLAPP legislation in Canada and the United States could be a model for adaption and adoption within the context of Southeast Asia in order to assist those who are suffering from legal intimidation posed by the filer of SLAPP.

REMEDY FRAMEWORK THROUGH JUDICIAL AND NON-JUDICIAL MECHANISMS

The vision of business accountability and remedy in Southeast Asia is not a mirror image of what exists in the West. Perhaps from that perspective, it is believed that profit precedes the principle of accountability, when accountability to the public

[56] *Please see California Code of Civil Procedure section 425.16 (c) (1) from http://codes.lp.findlaw.com/cacode/CCP/3/2/6/2/1/s425.16*

[57] *http://www.bclaws.ca/civix/document/id/complete/statreg/1120369480*

[58] *Chris Tollefson, "Strategic Lawsuits against Public Participation: Developing a Canadian Response," Canadian Bar Review 73 no. 2 (1994): 200-233.*

[59] *Strict liability is the imposition of liability on a party without a finding of fault. The plaintiff need only prove that the tort occurred and that the defendant was responsible. In defamation suit, the focus in the action is not the determination of whether an action is defamatory, but whether there is a defence to defamation. More information is available from http://en.wikipedia.org/wiki/Strict_liability.*

[60] *http://www.ecojustice.ca/media-centre/press-releases/b.c.-developer-ordered-to-pay-for-failed-defamation-suit-against-local-conservation-group*

[61] *For example, see Brian Martin et al., eds, Intellectual Suppression: Australian Case Histories, Analysis and Responses, (Angus and Robertson, North Ryde, 1986); Sharon Beder, "Engineers, Ethics and Etiquette," New Scientist, September 25, 1993: 36-41.*

should be the priority. Although companies are fully aware that they cannot accidentally kill or poison people in their employment–not because it is bad for business, but because it is wrong[62]–seeking profitable gain is still their priority.

Subsequent to the endorsement of the previously mentioned Guiding Principles on business and human rights, the core elements of such principles have been adopted by other international standard-setting bodies, including the Organisation for Economic Co-operation and Development (OECD), the International Standards Organization (ISO), the International Finance Corporation (IFC) and the European Union. Numerous companies and industry associations as well as governments have announced plans or have already begun to align their practices with the Guiding Principles. NGOs and workers' organizations are using them as a tool in their advocacy.[63]

However, such international standard-setting bodies have not achieved their role in human rights protection, because, legally, the parent company and each of its subsidiaries are construed as a "separate legal personality." Therefore, the parent company is not generally liable for a wrong committed by a subsidiary, especially if located in different countries. This makes it extremely difficult for any jurisdiction to regulate the overall activities of a multinational, and it can prevent victims of corporation-related human rights abuses from obtaining adequate remedy.[64] Also, the United Nations Guiding Principles are not totally clear on the extraterritorial application of remedies.[65]

National human rights institutions comprise one promising vehicle for a SLAPP remedy. Within their mandates and obligations, they should ensure that human rights, that is, the right of freedom of public expression, are respected by businesses as they are subject to, apart from public law system, a non-state-based social or civil system grounded in the relations between companies and their external stakeholders.[66] Although the mandate to address business-related human rights grievances is not clearly mentioned, a remedy, as well as fact-finding and reporting, may still be accessible.

Most classic approaches to access justice involve a lawsuit. Apart from a lawsuit between an injured person or community and the violated subsidiary in a domestic court, affected communities have begun to search for different ways in which corporate parents might be held legally accountable for the actions of their subsidiaries. They finally discovered one in the alien tort statute, and brought a case against the parent company with a business presence in the United States for a human rights violation abroad. The path-breaking case for foreign plaintiffs to successfully bring civil action in a United States Federal Court is Doe vs. Unocal in 1997.[67] The reasons behinds the suit perhaps are: (a) a company failed to supervise and monitor its subsidiaries when it had the power to do so; and (b) the parent company had "deeper pockets" than its subsidiaries.[68] However, it should be noted that such a statute has limitations in that it can be applied only in a U.S. court aimed at providing redress for such violations of customary international law, such as privacy, mistreatment of ambassadors, and violation of safe conduct.[69] At least it is a good and

[62] *Speech from Sir Geoffrey Chandler, "Challenges of Globalisation: The Flaw of the Business Case," at the Environment Foundation's Windsor Consultation at St. George's House, Windsor Castle, December 12, 2001.*

[63] *Ruggie, Just Business.*

[64] *Ibid.*

[65] *Please see commentary on the United Nations Guiding Principles.*

[66] *Ruggie, Just Business.*

[67] *Most have been dismissed on various procedural grounds, which in many cases are under appeal. Several have been settled. In the only major corporate case to go to a jury trial thus far, Bowoto vs. Chevron, the company won.*

[68] *Ruggie, Just Business.*

[69] *The statute reads in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed*

applicable leap for an injured person or group who experienced business misconduct to obtain remedy through the international judicial system.

CONCLUSION AND RECOMMENDATIONS

Two of the main reasons that human rights continue to be violated by multinational corporations all over the world are: (a) business and human rights issues rise to the top of a government's agenda only momentarily in the wake of some major event or crisis;[70] and (b) a lack of political will to enforce or implement human rights frameworks, including for companies. Human rights are still violated by companies; SLAPP is a clear example of this.

International law has an important role to play in constructing a better-functioning global regime to govern business and human rights. Therefore, it must and will continue to evolve in order to guide and govern aspects of the business and human rights agenda. However, the desire to achieve that goal through the negotiation of an all-encompassing legally binding framework is at best a long-term proposition. Domestically, the government should have a policy to guide or assist its investors with managing the environmental and human rights risks of their overseas operations or so-called extra-territorial obligations, and to advise or support neighboring countries where investors operate their businesses in coping with the massive impact of an operation.

Because SLAPP ultimately engage people's critically important right of freedom of public expression, a legislative response is warranted. Although this might have an impact on the rights of a legitimate plaintiff to access justice, the rights of citizens as full participants in a country's domestic society should prevail and should be protected as

such rights pose a greater risk for long-run social sustainability than others rights.

Strengthening laws and mechanisms can play a crucial role in human rights promotion and protection; however, external accountability mechanisms for ensuring adherence to either binding obligations or voluntary standards are weak, or do not exist at all. Countries, especially in Southeast Asia, should prevent companies from perpetrating human rights abuses while avoiding accountability for their actions, by establishing and supporting anti-SLAPP legislation and grievance mechanisms.

In this way, SLAPP could no longer be used as a tool to silence and obstruct full public participation in society, as well as establish sincere business operations.

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in violation of the law of nations or a treaty of the United States" (U.S. Code, Title 28, Section 1350).

[70] *Ruggie, J ust Business.*