



## **CHALLENGING THE SYSTEM**

### **Using Strategic Human Rights Litigation in Seeking Transnational Remedies in the Context of Business and Human Rights**

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*This work is dedicated to Sentro ng Alternatibong Panligal (SALIGAN).  
The journey that we take may not be the easiest, but it certainly is the  
most fulfilling.*

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## List of Acronyms

ASR	American Sugar Refineries
ATS	Alien Torts Statute
BHRRRC	Business and Human Rights Resource Centre
CLEC	Community Legal Education Center
CSR	Corporate Social Responsibility
EBA	Everything But Arms
EC	European Commission
ECCHR	European Center for Constitutional and Human Rights
EU	European Union
ELCs	Economic Land Concessions
ERI	EarthRights International
ESC	Economic and Social Council
ESCR	Economic, Social, and Cultural Rights
GNP	Gross National Product
GSP	Generalized System of Preferences
IMF	International Monetary Fund
KKP	Koh Kong Sugar Plantation Company Limited
KKS	Koh Kong Sugar Industry Limited
KSL	Khon Kaen Sugar Industry Public Co. Ltd.
LDCs	Least Developed Countries
MFN	Most Favored Nation
NGOs	Non-government Organizations
OECD	Organization for Economic Co-operation and Development
SRSG	Special Representative of the Secretary-General
TANs	Transnational Advocacy Networks
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	UN Conference on Trade and Development
US	United States
WB	World Bank
WEF	World Economic Forum
WTO	World Trade Organization

## **Abstract**

When TNCs' investment in developing countries causes the displacement of people from their land, how do human rights advocates respond? In answering the question, this paper investigates the potential of strategic human rights litigation in seeking transnational remedies within the emerging business and human rights framework. This research shows that tensions between business and human rights arise because global economic market reforms have weakened the power of developing countries to fulfil human rights obligations. I maintain that UN's response to the tension by adopting the Guiding Principles has recognized the power of TNCs but still sustained that human rights obligations remain with the States. As exemplified in the case of Koh Kong sugar plantation, I argue that the use of legal and non-legal means is an epitome of human rights NGOs' continuous efforts to explore means and mechanisms to challenge, and eventually change the system that constrains the enjoyment of human rights. Strategic human right litigation posits that while the system hinders the enjoyment of rights and limit's the remedies to be availed of, it depends upon the right-holders to claim and to work for the realization of their rights.

## **Relevance to Development Studies**

For years now, human rights infringements have been exposed by virtue of TNCs' investments in developing countries. The development of standards and mechanisms within the international realm has long been on the table. However, while the world waits for a "hard" international mechanism, human rights violations continue to proliferate. It is in this thread that examining strategic human rights litigation as a means to seek transnational remedies is relevant for human rights advocates. This study presents a case example that maximizes the present standards and system, as well as challenges it.

## **Keywords**

Strategic human rights litigation, business and human rights, TNCs, Koh Kong sugar plantation

# Chapter 1

## Introduction

Contemporary globalization, which has spread rapidly since the 1980s, is characterized by three interconnected elements: market expansion, assessment of the roles of states and other institutions, and the emergence of new non-state actors (Woods 2000: 3). These three interconnected elements have created tensions between and among themselves in dealing with the policies, regulations, and effects of contemporary economic globalization and human rights. Not only has globalization removed trade barriers and increased international investments, but manners in which interests and policies of different stakeholders are pursued have also evolved.

The power of large corporations has been highlighted by the globalization of the world economy (Clapham 2006: 2) due to the “ever-increasing mobility of capital and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalization” (Alston and Goodman 2012: 1461). These factors have allowed TNCs to expand markets and operate in different countries, specifically putting their investments in developing countries. TNCs have further emerged as an important non-state actor as some even earn profits that exceed the GNP of developing countries (Sahlin-Andersson 2006: 601).

The level of power and influence of TNCs have also brought the attention to its human rights impact. After all, as Alston and Goodman (2012) aptly put it: “Along with greater power comes an enhanced potential to promote and undermine respect for human rights” (1463). The main attribute of TNCs having business operations in several different countries has caused “legal and jurisdictional conflict”, thereby giving rise to the problem of realizing human rights (Guiseé 1998: 2). This is so because States, being the parties to international human rights treaties, have, in principle, assumed the obligations in those instruments and “must strive to ensure full enjoyment of freedoms and rights within their jurisdiction” (Smith 2012: 154). This means that while economic globalization stimulated corporations to operate across borders and territories, the power of the States remained limited by the territorial jurisdiction (Higgott and Payne 2000: ix). Furthermore, corporations and States have different goals. Corporations, which are globally organized, aim to “maximize shareholder returns” while nation-states, which are confined to their territorial jurisdiction, are responsible for and must perform a range of social and economic responsibilities (Letnes 2004: 266). Ruggie (2008) has called this impasse “governance gaps” (3).

Various stakeholders have responded to this tension. Several developing and developed States have initiated mechanisms aimed at regulating the business conduct of TNCs. Most developing countries have undertaken reforms in line with economic liberalization, usually under pressures from TNCs and other institutions, to integrate fully into the world economy. These reforms tend to weaken the capacity of developing countries acting as “host states” of

TNCs to regulate its activities. The role of the TNCs’ “home states”, which are mostly developed countries, therefore, are also changed as they are expected to adopt policies that would regulate the activities of TNCs abroad.

The argument that the power of nation-states, specifically developing countries, is dwarfed by TNCs generated the concept of privatization of human rights obligations (Clapham 2006:1). Simply put, TNCs are urged to contribute to the fulfilment of human rights standards. This implies moving away from what seems to be an “exclusive state-centric approach to human rights protection” and breaking the traditional boundary between the public and the private realms (Clapham 2006: 1). This concept has led to the adoption of companies of CSR standards that aim to regulate their conduct especially abroad (Letnes 2004: 266). Further, global CSR standards and institutions were created to regulate the affairs of TNCs, such as the OECD Guidelines for Multinational Enterprises. The WB, IMF and the WTO also have regulatory authorities (Higgott and Payne 2000: xvii).

Despite the voluntary standards and CSR mechanisms set up by corporations and institutions, it has been argued that both the company and the community are not vindicated by the use of these mechanisms because they “generally lack meaningful forms of accountability and rely instead upon public opinion and corporate altruism” (Alston and Goodman 2012: 1470-1471). A “stronger” international norm and mechanism has always been demanded from the United Nations, as the primary inter-governmental body. The UN have responded to the issue and for the past three decades, have explored various options, from the launching of the UN Global Compact in 2000 until the adoption of the UN Guiding Principles on Business and Human Rights in 2011. The emergence of the international business and human rights framework will be examined in this paper in the context of the responses of the United Nations.

What is more, in the middle of all the tensions, NGOs have been grappling with ways to counter the phenomenon and make TNCs, and to some extent, States, accountable. One of which is the use of strategic human rights litigation. Strategic human rights litigation “aims at setting precedents and advancing policies that strengthens the legal framework of global human rights accountability and achieving greater social justice” (ECCHR 2012: 31). It combines the use of legal and non-legal methods and remedies. While litigation is at the core of this strategy, it is used to set the landmarks and provide precedents that would administer future cases with similar issues. Moreover, litigation is complemented by other advocacy strategies.

In the context of the Koh Kong Sugar Plantation Case in Cambodia, this paper will explore the tensions and examine the use of strategic human rights litigation. Cambodia is one of the developing countries in Southeast Asia which invites and hosts TNCs to invest in their country. To provide an enabling environment for investors, it adopts policies such as allowing ELCs. In the Koh Kong Sugar Plantation Case, the grant of ELCs to TNCs led to the eviction of locals from their lands, exemplifying the tension earlier discussed. As a response, various NGOs have adopted the use of strategic human rights litigation.

## 1.1 Research objective and questions

The main objective of this paper is to analyze the potential of strategic human rights litigation in seeking transnational remedies against TNCs. It studies the tensions created by economic globalization vis-à-vis human rights and examine the emergence of the business and human rights framework, specifically within the UN system. To attain the objective, this paper is guided by one main question and two sub-questions:

In which ways have NGOs, drawing on the business and human rights framework, used strategic human rights litigation?

- a. What were the main tensions between business and human rights brought about by economic globalization and how have the United Nations responded to it?
- b. How have NGOs used strategic human rights litigation to claim rights created by the tensions of economic globalization in the context of Koh Kong sugar plantation case in Cambodia?

## 1.2 Methodology and sources of data

The approach of this research was two-fold. First, I reflected on the tensions between economic globalization vis-s-vis human rights during the past three decades, and the emergence of the business and human rights framework as a response to it. Second and mainly, I analyzed how NGOs have used strategic human rights litigation as a method to address the tensions. The main theory used in analysing the two aspects of this research is Ortner's modern practice theory, which describes the continuous struggle and interaction of various actors to change a societal system that is constraining (Rouse 2006: 506).

The analysis of the business and human rights framework focused on the responses of the United Nations, as an intergovernmental body, to the tensions created by the phenomenon of globalization. I focused my analysis on three main efforts of the United Nations: the UN Global Compact, the Norms on Transnational Corporations and Human Rights, and the UN Business and Human Rights Framework. These documents were chosen because they emerged in the 1990s when the advocacy for greater responsibility and accountability of TNCs in a broader range accelerated due to reports of human rights violations. Moreover, the three illustrated the ways in which the United Nations chose to respond, first, by appealing to the business community, then, by drafting a set of standards which was never adopted, until the present business and human rights framework. Aside from Ortner, the analysis used De Gaay Fortman's "transformational" human rights concept and Clapham's concept of "privatization" of human rights. Further, I employed the hard and soft law debate in international law as method of analysis.

After benchmarking the tensions and the business and human rights framework, the main analysis focused on how NGOs use means – legal and non-legal – collectively referred to as strategic human rights litigation. Willettes' (2002) concept of NGOs and Keck and Sikkink's (1998) views on TANs

are used to contextualize the involvement and use of strategic human rights litigation. The research explored national and transnational remedies. In doing so, the research studied the present standards and mechanisms being used to pursue the claims and analyzed them based on the issues of jurisdiction, types of actions, and options on claims. De Gaay Fortman's human rights approach as being "performative" was used to analyze how NGOs used the available standards and mechanisms, with all its limitations, that enabled them to be accessed and used by communities affected by human rights violations to seek redress.

To best exemplify the tensions and the use of strategic human rights litigation, the case of Koh Kong sugar plantation in Cambodia was explored. This case was chosen for several reasons. First, the case is from Southeast Asia where I am from and the fact that unlike Europe, Africa and the America, Asia has yet to adopt a coordinated regional human rights mechanism that would make it more accessible for locals to seek redress for grievances of human rights violations. Second, the case has used various mechanisms, filing cases and complaints, as well as conducting campaigns, across the globe. Being fairly new, it has also made use of the UN Guiding Principles on Business and Human Rights in seeking redress. For purposes of my analysis of the NGOs involved, I focused on the three leading NGOs who explored all the strategies used in my case example, namely: Community Legal Education Center (CLEC), EarthRights International (ERI), and Equitable Cambodia.

My interest in the topic was brought about by the kind of work that I do in the Philippines. Being a part of a development legal NGO, strategic litigation is at the heart of our work. We call ourselves "alternative lawyers" because we believe that the law can be used as a tool for social change. The decision to focus on the examination of the emergence of the UN Guiding Principles is brought about my organization's participation in a coalition which submitted its comment to the draft "Ruggie Principles" in 2010. My choice of the Koh Kong sugar plantation as a case example is influenced by a former colleague's involvement in the case. Furthermore, I want to explore the possibility of utilizing strategic human rights litigation internationally, because rich as my experience is, it is still constrained to domestic actions in the Philippines. Since seeking transnational remedies is fast becoming a trend, studying its potential will probably influence the actions I might take upon my return. With all these factors, at the beginning of the study, I am biased towards the use of strategic human rights litigation as a method to change the system, and that the emergence of the business and human rights framework within the UN addresses the issues created by the tensions created by economic globalization.

This is a desk research. Hence, I have used secondary data available online and through personal contacts who have the necessary documents, such as, but not limited to: official documents of relevant institutions and organizations, including minutes of proceedings, case files from handling lawyers and civil society organizations, campaign materials, and other relevant data.

## 1.3 Scope and limitations

This research focused on the analysis of the tensions between economic globalization and human rights, the emergence of the business and human rights framework within the United Nations, and the use of strategic human rights litigation within the context of the Koh Kong sugar plantation case in Cambodia. As such, this paper discusses the effect of economic globalization to the rise of TNCs, power of States, and enjoyment of human rights since the 1980s. It critically analyzes the emergence of the UN Guiding Principles on Business and Human Rights. Using the Koh Kong sugar plantation as a case example, this paper presents the effects of EU's EBA initiative and Cambodia's ELC grants to the enjoyment of human rights. As the focus of this research, the use of domestic and transnational remedies under the context of strategic human rights litigation is extensively discussed.

Although I mentioned leading NGOs' involved in the case, the focus of my discussion is on their employment of strategic human rights litigation. Moreover, while various human rights violations were reported in the case of Koh Kong sugar plantation, I narrowed on the displacement of communities from their land since this is the initial effect of the business investment. Furthermore, the documents and case files considered in the research were only those available by August 2013, since this is an ongoing case and other developments may have happened after the gathering of data. Lastly, being a desk research, I mostly relied on secondary data and communicated with key personnel only for further clarifications on data acquired.

## 1.4 Structure of the paper

This paper is organized into six chapters. Chapter 1 presents the background, the research objectives and questions, the methodology and sources of data, and the scope and limitations of the paper. In Chapter 2, the conceptual and analytical framework is presented. Chapter 3 examines the emergence of the business and human rights framework within the United Nations system. Chapters 4 and 5 focuses on the Koh Kong Sugar Plantation case as a case example of the tensions created by globalization with regard market reforms and human rights, and the use of strategic human rights litigation to claim entitlement to rights. Chapter 6 concludes and imparts my personal reflections.

## Chapter 2

### Conceptual and analytical framework

Woods (2000) espoused that there are two aspects of globalization: quantitative and qualitative (1-2). The quantitative aspect of globalization “refers to an increase in trade, capital movements, and people across borders” while the qualitative aspect refers to how stakeholders pursue their interests and adopt policies (Woods 2000: 2). In this Chapter, I will first dwell on the increase in power of TNCs over the years, especially during the 1980s when they have increased their investments in developing countries, as one of the quantitative aspects of globalization, and their impact on human rights, which created a tension. Thereafter, the concept of strategic human rights litigation will be presented as one of the responses to counter the phenomenon.

#### 2.1 The advent of TNCs

The term transnational corporations (TNCs) is not exclusively used to describe what it is. Various institutions and authors would use other terms like multinational enterprises (MNEs) and multinational corporations (MNCs), to describe the same concept. For purposes of this paper, TNCs is used because it is the term adopted by the United Nations.

UNCTAD (2013a) defines TNCs as those “incorporated or unincorporated enterprises comprising of parent enterprises and their foreign affiliates”. The one exercising the control of assets in a foreign country is called the parent enterprise while the one managing it in that foreign country is the affiliate (UNCTAD 2013a). Because of their nature, the OECD (2011), did not adopt an exclusive concept of TNCs, stating otherwise that the coverage of their *Guidelines* are those “companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways” (18). Hadari (1973) has described TNCs using two features: that it is operating in more than one country, and that management decisions are based on “multinational alternatives” (742-743). This implies that TNCs are created to conduct their business across the globe.

For a more comprehensive definition, I am going to use Clapham’s (2006) definition of TNCs as a “single legal corporation operating in more than one country, with headquarters and a legal status incorporated in the national law of a home state” (199). Although the single personality of a corporation is often questioned, as some may be registered in several States-of-operations as a separate entity, Clapham (2006), citing Rigaux, argues that it is the “autonomous corporate system” that gives the corporation the aspect of “transnationality” (199). Stated otherwise, it is the element of control of a “parent company” domiciled in a home state over the operations in host states or the “system of decision-making that permits coherent policies and a common strategy” that entails the treatment of TNCs as a single legal entity (Greer and Singh 2000, Stephens 2002: 47-48, UNCTAD 2013b).

Under that context, the earliest account of TNCs is the trade relations and ventures made by the Dutch and British companies beginning in the 16<sup>th</sup> century with countries from Africa, Asia and America (Greer and Singh 2000, Stephens 2002: 29). But it was actually in the 1980s that the world felt the surge of the growing power of TNCs. One author attributed this to the end of the Cold War era which had the effect of pursuing “capitalism, free markets, privatization and deregulation” (Pegg 2003:9). Ruggie (2004) roughly estimated the number of firms to 63,000 excluding their subsidiaries, suppliers and distributors around the globe (14). This has led to increase in TNCs’ investments in developing countries in the mid-1980s as reforms adopted by international financial institutions such as the IMF, the WB, and the WTO, influenced countries to adopt policies which benefit TNCs (Greer and Singh 2000; Addo 1999: 3). With developing countries struggling to address underdevelopment, poverty and unemployment, TNCs presented possibilities of addressing these issues, as espoused by international financial institutions. This resulted to developing countries’ competing to invite TNCs to invest in their countries, which, most often than not, involved minimizing restrictions on investments and promoting privatization of goods and services (Greer and Singh 2000). In just about two decades, there was tremendous increase in foreign direct investment in developing countries from having between thirty-five to forty percent in 1992-1993 to reaching a record-high investment figure of fifty-two percent in 2012 (Greer and Singh 2000; UNCTAD 2013c: xvii). The creation of free markets, trade deregulation and other pro-investment measures were done with the prospects of enabling developing countries to participate in the growing world economy that would initiate economic development in poor countries. However, evidence suggests that economic inequality between the developed and developing countries has actually increased due to trade liberalization policies (Higgott and Payne 2000: xix; Woods 2000: 8).

## 2.2 The development of the concept of human rights

Although human rights have been a buzzword since the end of the second world war and many states and organizations have put this in their agenda, one cannot find a single encompassing definition of human rights. This is so because human rights concept has evolved since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. It started out as a response to the atrocities committed during the second world war, which further developed to include civil and political rights, and economic, social and cultural rights. It has further evolved to include specific sectors and issues, such as racial discrimination, women, children, refugees, migrants, the environment, and sustainable development. The first trend of international human rights framework, which is collectively called the Bill of Rights comprising of the UDHR and the International Covenants on Civil and Political, and Economic, Social, and Cultural Rights, focused on the responsibilities and actions of States vis-à-vis the individual.

Perhaps the most common understanding of human rights is that used under the international legal framework, stating that human rights are “inalienable fundamental rights to which a person is inherently entitled simply because

he or she is a human being" (Sepulveda, et al. 2004: 3). Under Guiding Principle 12 of the UN (2011), it states that:

"The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at the minimum, as those expressed in the International Bill of Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Right to Work" (13).

Needless to say, human rights are understood to be those set out in standards and instruments of the United Nations, as an intergovernmental body.

### **2.3 Tensions generated between the rise of power of TNCs and the enjoyment of human rights**

Within the context of TNCs, a tension emerged on its effects in developing countries, on the role of States, and on the enjoyment of human rights. Letnes (2004) elaborated on the debate on whether corporations are "engines of development" or "tools of exploitation" (259). For neo-liberal and modernization theorists, who use broader country-level data in their argument, TNCs are "engines of development" (Letnes 2004: 263). On the other hand, those who maintain that TNCs are "tools of exploitation" present empirical case studies in the community level to prove their point (Letnes 2004: 263). So while the former would present figures of growth and development in the countries where TNCs invest and conduct their business, the latter expose infringements to human rights (Letnes 2004: 259).

The tension between the rise of TNCs and human rights emerges because of the view that human rights are and remain state-centric, that is, it is primarily the role of the states to promote, protect and fulfil human rights under international treaties (Clapham 2006: 1). This tension is apparent in two realms: the purpose or goals of their existence, and their scope in terms of territory. In terms of purpose or goals, it is clear that TNCs are created to create profit and revenue to "maximize shareholder returns" (Letnes 2004: 266). Friedman (1962: 133), as cited by Pegg (2003: 7), even argued that the "sole responsibility of business leaders is to generate and maximize profits within the prevailing legal framework". On the other hand, States, as previously stated, are obligated to ensure the "full enjoyment" of human rights (Smith 2012: 154). This obligation includes ensuring that TNCs comply with human rights standards in the conduct of their business (Clapham 2006: 1). Moreover, as governments assume human rights obligations, States are expected to adopt regulations designed to guarantee that actors, including TNCs, operating within their jurisdiction are complying with human rights standards.

At the surface, there seems to be no tension because the conduct of business is, after all, an exercise of internationally guaranteed right. Citing the pronouncement of the UN Committee on ESCR, Clapham (2006) argued that the economic market reforms introduced by globalization such as deregulation and privatization are not the ones creating the tension because they do not, in principle conflict with the States' obligations under the international human rights

framework, but “it is the ways government are responding to these developments” (5).

Since it is within the authority of the national governments to regulate the conduct of business of TNCs within their territorial jurisdiction through the adoption of domestic laws that would implement the international human rights standards, States can, in fact, stop the negative impact of TNCs to human rights, and hold them liable for human rights abuses (Stephens 2002: 60). However, especially in the case of developing countries which hosts these TNCs, the policies adopted are largely influenced by “certain economic models which aim most exclusively to provide the conditions for ‘free markets’ and direct foreign direct investment” (Clapham 2006: 4). These models, often supported by international financial institutions like the WB and the WTO, place the States in unequal bargaining power with the TNCs and have various effects in terms of States’ human rights obligations. A clear manifestation of this is when developing countries adopt the so-called “race-to-the-bottom” strategy where they compete with each other in attracting investments, which leads them to adopt certain policies like tax holidays and lower labor costs (Alston and Goodman 2012: 1467, Greer and Singh 2000). Furthermore, the influence of TNCs is not limited to economic pressure but also on the “willingness and ability to exert leverage directly by employing government officials, participating on important national economic policy making committees, making financial contributions to political parties, and bribery” (Greer and Singh 2000).

It is not only the failure of the host governments to assume human rights obligations through policies that poses a challenge but the proceedings for claiming the entitlement to these rights are also hard in most instances. Instituting proceedings in courts of host countries, even though there are bases for doing so, may be futile because of “lack of independence or expertise of the courts” or the possibility of delay in the proceedings (Allen and Overy 2013).

It is in situations where the host states fail to assume their human rights obligations for reasons already stated that the issue of territoriality is raised. This is so because while the very nature of TNCs is to operate across boundaries because of the global economic system, the power of the States are still limited within their territories. However, recent development show that home states are becoming more and more involved with regard activities of TNCs abroad. The involvement of home states is best justified by the fact that these TNCs are usually incorporated in these countries and the “nationality” of corporations are often defined by the legal systems in these countries (Clapham 2006: 200). Furthermore, TNCs rise in power has also greatly influenced policies of home states in terms of their relationship with developing countries. This is apparent in bilateral investment treaties entered into between a developed and a developing country, where home states would draw out terms in which the relationship between the investors and the host states favor the former (Broecker 2008: 166).

Since one of the effects of the rise of TNCs is to widen the gap between the developed and the developing countries (Higgott and Payne 2000: xix), there is a growing trend to make use of the power of the home states to make TNCs “accountable in their home jurisdiction for damage that has been caused

by, or is related to the operations of one of their foreign subsidiaries abroad” (Allen and Overy 2013). This extraterritorial obligation implies that a “state exercises control, power or authority over people or situations located outside its sovereign territory that could have an impact on the enjoyment of human rights by those people or in such situations” (De Schutter, et al. 2012: 1090). The exercise of extraterritorial obligation of home states over the activities of TNCs abroad may come in two ways: the adoption of policies that would regulate the activities abroad, and the exercise of jurisdiction when claims are filed by “foreign” nationals against TNCs.

Adopting regulations, however, is just as hard as accessing the courts of home states to exercise jurisdiction over human rights violations. Many regulatory measures have been proposed in recent years with regard business conduct of TNCs abroad vis-à-vis human rights. In a study conducted by Broecker (2008), he analyzed proposals made in four countries: the United States, Australia, the United Kingdom, and Sweden. The legislative proposals for Corporate Code of Conduct in the United States and Australia, which would have emphasized home state regulations, disclosures of corporate activities abroad, and access to home state remedies were rejected (Broecker 2008: 202-210). In the case of the United Kingdom and Sweden, which were generally limited to reporting requirements, and, in the case of Sweden, to State-owned corporations, the proposals were approved (Broecker 2008: 210-213). These comparisons would show the acceptability of extraterritorial regulations with home states. While it is within their power to do so, their failure to exercise that power, for one reason or another, affects the ways in which TNCs conduct their business operations. On the second exercise of extraterritoriality, there is also a trend wherein judicial courts of home states exercise jurisdiction over claims of “foreign” nationals on TNCs. Courts in the United States, the United Kingdom, and the Netherlands have tried and decided on cases along this thread.

The rise of TNCs therefore have an effect on the role of States – both host and home states – in their obligation to protect, promote and fulfil human rights. While the power of the nation-states remains the same under the international human rights framework, the transnational nature of corporations is challenging the exercise of that power. For Woods (2000), this phenomenon “requires global rules, regulations, and enforcement at the international level” (9).

## 2.4 Triggering responses from various actors

The tensions brought about by the current system of economic globalization elucidated responses from various actors. Ortner’s triangular model of modern practice theory can best explain the continued struggle of different stakeholders in addressing the ill effects of the system. Ortner argues that “society is a system, system is powerfully constraining, (and) system can be made or unmade through human action and interaction” (Rouse 2006: 506, citing Ortner 1984: 159). Although the concept is an anthropological theory used to explain cultural diversity and struggles in certain communities, it can be very well applied to this study because according to Rouse (2006), “practice theories

recognize the co-existence of alternative practices within the same cultural milieu, differing conceptions of or perspectives on the same practices, and ongoing contestation over the maintenance and reproduction of cultural norms” (506).

Further analysis of the responses would use De Gaay Fortman’s (2006) two-fold human rights-based approach, positing that human rights should be both “transformational” and “performative”. A response is considered “transformational” if it establishes a “normative framework for processes of social change” (41) and “performative” because rights are realized depending on the right-holders (37).

Examining whether the responses are transformational will be related to Clapham’s (2006) concept of human rights “privatization”. Privatization of human rights is one of the policies being pursued by some stakeholders in the realm of business and human rights. Clapham (2006) argued that “privatization” of human rights would imply moving away from what seems to be an “exclusive state-centric approach to human rights protection” and breaking the traditional boundary between the public and private realms (1). Further analysis would dwell on the type of policies adopted to respond to the situation, using the hard and soft law debate in international law. Hard law refers to “legally binding obligations that are precise and delegate authority for interpreting the law”, while soft law are either deviations from the “legalization” framework and may go as far as purely “political arrangements” (Abbott and Snidal 2000: 421-422).

The view that human rights should be performative will be used in relation to Letnes’ concept of “spotlight phenomenon” which espouses the idea that civil society organizations and other stakeholders must continuously demand and claim human rights compliance (2004: 267). This brings me to examining the main concept subject of this paper as a way of claiming rights – strategic human rights litigation.

## 2.5 Strategic human rights litigation

Human rights advocates have been using different strategies to pursue their agenda. Before going into the strategies used, it is important to first understand human rights advocacy in the context of NGOs. For Willets (2002), a strict definition of NGOs is not possible as it has “different connotations in different circumstances” (2). He, however, cites generally accepted attributes of NGOs as follows: must be free from government control, and must neither be a political party nor profit-making nor a criminal group (Willetts 2002: 2). He adds that “NGO’s involvement in global politics *ipso facto* makes it transnational” (Willetts 2002: 3). For purposes of this paper, it is also important to understand human rights advocates in the context of transnational advocacy networks (TANs). This is so because as TNCs operate across borders, building and establishing TANs is an inevitable response. The concept “includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services” (Keck and Sikkink 1998: 2). For Keck and Sikkink (1998), the opera-

tive term for this concept is “advocacy” because these networks are “organized to promote causes, principled ideas, and norms” (8). TANs can have various outcomes, such as “frame” the subject in such a way as to benefit the cause they are pursuing, as well as “promote norm implementation, by pressuring target actors to adopt new policies, and by monitoring compliance with international standards” (Keck and Sikkink 1998: 2-3).

It is in this context that strategic human rights litigation, as used in human rights advocacy, will be discussed. Bukovská (2008) has categorized these into three main human rights methodologies used by advocates: fact-finding and reporting, advocacy, and litigation (9). As a human rights methodology, he calls this type of litigation as “impact” or “strategic” for it aims to attain an objective larger than the outcome of the case under litigation but to “change the law or practice through judicial decisions” Bukovská (2008: 9). More than pursuing cases in formal judicial proceedings, for Barber (2012), strategic litigation is “the use of litigation and other legal and non-legal means and methods to seek legal and social change” (412). The ECCHR (2012) adopts a similar working concept of strategic human rights litigation, which “aims at setting precedents and advancing policies that strengthens the legal framework of global human rights accountability and achieving greater social justice” (31). Barber (2012) describes the non-legal aspect as the “use of traditional advocacy techniques (411), for which, in Bukovská’s (2008) view is related to fact-finding as well (9). Under this definition, it uses, in addition to litigation, the other two human rights methodologies of fact-finding and advocacy. The use of non-legal means is usually complementary to the use of the formal legal procedure. Non-legal in this sense does not mean “illegal”, but entails that the strategy used finds its bases not in the formal written documents such as law, but generally guaranteed under the international human rights framework such as right to freedom of speech and association, such as collecting facts and reports, holding peaceful protests, and using the media to popularize the issue. The use of strategic human rights litigation, therefore, exemplified Ortner’s modern practice theory, wherein the acts, practices, and strategies of those who practice it aims to change the system, which constrains the enjoyment of human rights. “Strategic litigators choose multiple legal and non-legal tools, and domestic, regional and international fora to challenge injustices in an attempt to develop the combination of tactics that is most likely to forward their policy goals” (Barber 2012: 417).

In the breadth of pursuing strategic human rights litigation in the international setting, Keck and Sikkink’s (1998) concept of “boomerang pattern” is specifically applicable. “Boomerang pattern” occurs when local NGOs would seek international institutions and mechanisms in instances where there is an ineffective and inefficient domestic recourse (Keck and Sikkink 1998: 12). While strictly speaking, this practice entails that “domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside” (Keck and Sikkink 1998: 12), in this paper, it will be used even though local NGOs have resorted and explored domestic remedies at the onset.

## Chapter 3

# The emergence of the business and human rights framework in the UN system

In 6 July 2011, the United Nations Human Rights Council<sup>1</sup> endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (hereinafter referred to as the UN Guiding Principles) developed by then Special Representative of the Secretary-General John Ruggie over the course of six years (UN A/HRC/RES/17/4). In his report, SRSG Ruggie (2011) emphasized that “the Guiding Principles are informed by extensive discussion with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities, directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of the law and policy...” (4). Although short of being a binding legal instrument, the UN Guiding Principles has, at the very least, put the issue of business and human rights into the international legal framework. Putting the matter into the agenda have been a daunting task for various stakeholders, as the spread of globalization especially during the 1990s have created the tension between business and human rights. With the growth of the power of TNCs making investments across the world, human rights concerns, especially in developing countries are being exposed.

### 3.1 Setting the motion: exposure of human rights impacts of business activities of TNCs

Among the factors that led to the clamour to put human rights agenda into business are the high profile cases exposed by various groups which implicate corporations in human rights violations. The rise of information technology has made it easier to increase public and consumers’ awareness, such that attention to it has been increased (UN OHCHR 2000). Human rights impacts of TNCs vary across industry and countries of operations (Alston and Goodman 2012: 1464). As corporations invest in communities, in the conduct of their business, they would have impact, whether directly or indirectly, intentional or unintentional, in the lives of the people. Whether such impact is positive or negative depends at how one looks at it. Being “engines of development” according to some, they can claim to have provided jobs and increase the country’s revenue. However, they can also be confronted with various human rights issues like forced eviction and displacement of locals from lands, exploitative labor, and environmental degradation or destruction. These community-level based studies turn the view about TNCs from being “engines of development” to “tools of exploitation”. Some of the high-profile

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<sup>1</sup> The UN Human Rights Council was instituted by the UN GA Resolution No. 60/251 (3 April 2006). The Council effectively replaced the Commission on Human Rights.

cases worth mentioning are the Yadana Pipeline Project in Myanmar (formerly Burma) and the Shell Exploration Project in Nigeria.

These two significant cases were based on human rights violations attributed to two different TNCs operating in two different continents. However, these two cases present a trend in the effects of TNCs' operations in developing countries, such as, among others, displacing locals from their lands as a consequence of their investments (ERI 2012a, ERI n.d.). Furthermore, both cases present two important issues: (1) extraterritorial jurisdiction; and (2) company's complicity to human rights abuses. In both cases, the claims were made in the United States using the Alien Torts Statute (ATS), which gives jurisdiction or the power to hear and decide cases to federal courts for torts committed against a foreigner in violation of international human rights law or US treaty (Alston and Goodman 2012: 1144). This law enables the US courts to exercise extraterritorial jurisdiction even if the cases are committed abroad and the alleged victim is a foreigner, and recognizes that human rights violations are not to be bounded by territoriality because of its enormous impact. The two cases, however, differed in their outcomes. In the *Unocal Case*, the court took jurisdiction of the case (ERI 2012a), while in the *Shell Case*, although still on appeal, it pronounced that the law cannot apply to corporations (ERI n.d.). These cases thus showed that the law can be used either way, through judicial interpretations.

The second significant impact concerns whether or not a corporation can be held accountable for human rights violations although its participation is indirect. In both cases, the acts were directly attributed to government forces. However, these acts were either supported by or that the corporation benefited from them, such that the acts were committed for the implementation or completion of the business. In both cases, it was argued that if a corporation is complicit to human rights abuses, they can be accountable. (ERI 2012a, ERI n.d.)

### **3.2 Instituting the business and human rights framework: responses of the United Nations**

With the adoption of the Universal Declaration of Human Rights in 1948, the United Nations has brought human rights into the international legal framework. Being an international organization of States, who has the responsibility under the UN treaties and instruments to promote, protect and fulfil human rights, various responses were made by the UN in the formulation of the international business and human rights framework. The responses of the UN are an important aspect of this study because "intergovernmental cooperation" in one of the ways in which States have responded to economic globalization (Woods 2002: 29).

In this section, I will examine how the responses of the UN had evolved, as the power of the TNCs continue to rise, and the issue of human rights violations in relation to it are being reported. The examination will focus on the significant milestones on business and human rights initiated by the UN at the start of the new millennium: the launching of the Global Compact, the pro-

posed Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (hereinafter referred to as “The Norms”), and the UN Guiding Principles on Business and Human Rights.

I would argue that these measures are the qualitative aspects of globalization, as espoused by Woods (2000), and these responses are recognition of the growing power of TNCs. Moreover, these measures were crafted building on the quantitative aspect of globalization such as free trade, privatization and deregulation. Furthermore, these responses do not aim to change the “capitalist” system, but aims to regulate it by encouraging business enterprises to consider and include the human rights framework in the conduct of business.

### ***3.2.1 The UN Global Compact: an appeal to the business community***

The UN Global Compact is considered to be one of the significant initiatives of the UN at the end of the 20<sup>th</sup> century. The proposal for the compact was made by then UN Secretary-General Kofi Annan at the World Economic Forum in Davos, Switzerland in 1999. The World Economic Forum is an international organization whose members are the top global enterprises with a turnover of more than US\$5 billion (World Economic Forum, n.d.). At the time the proposal was made, the business community and the UN are both feeling the pressure from various groups on the need to regulate the actions of corporations and oblige them to comply with human rights standards and principles. This can be gleaned from the theme of the Annual Meeting in 1999: “Responsible Globality: Managing the Impact of Globality”.

Speaking before the world’s top business enterprises, Annan (1999) as the face of the UN, has acknowledged the tension created by economic globalization, in stating that: “spread of market outpaces the ability of societies and their political systems to adjust to them”. He further acknowledged the advocacy from various groups to regulate the business conduct of these enterprises. However, Annan (1999) made it explicit that adopting a regulatory measure on the part of the UN is not the best option at that time, as “restrictions on trade and investment are not the right means to use when tackling them”. What he proposed, in my view, was a clear validation of the power of corporations.

As a first option, Annan (1999) recognized that the power of the UN to regulate the affairs of the TNCs emanates from the States, thereby asking the corporations to “encourage” States to give the UN the “resources and the authority” to address the concern. Asking these from corporations brings us back to reconciling the different goals between the profit-oriented corporate agenda and the States’ responsibilities to provide economic and social services. Furthermore, it is rather odd for corporations to advocate for measures that would curtail the conduct of their business through regulatory measures from the UN. This reality was recognized by Annan (1999), as his second option was purely voluntary on the part of corporations. He encouraged corporations to adopt their own policies in addressing the issues presented, recognizing the corporations’ power, authority and resources to do so. This is the gist of the

compact he proposed, further offering the expertise of the UN in assisting the companies in drafting their own regulations. Instead of being “confrontational” to economic globalization, the UN, through the proposal chose to collaborate.

In the initial proposal by Annan (1999), the compact involves three issues: human rights, employment and the environment. The three areas were justified because of the already existing standards and mechanisms within the UN, which would make it easier to provide assistance to business enterprises. Annan (1999) also added that the failure to address these issues now could threaten the “open global market” and the “multilateral trade regime”. This statement sent a strong message to the business community that the movement to regulate the conduct of their business and make them accountable to some extent is rather strong, and that it is still within their power to adopt an internal voluntary mechanism that would put human rights in their agenda. In effect, Annan was saying that failure to do so will be detrimental as States and the UN may finally adopt a regulatory measure that may curtail the present system of economic globalization.

The response of the World Economic Forum was resounding as the UN Global Compact was formally adopted and launched in 2000, and it is “the largest voluntary corporate initiative in the world” with over 10,000 business participants (UN Global Compact 2013). Aside from the principles based on the three issues raised by Annan in 1999, it eventually added an anti-corruption principle. The UN Global Compact emphasized “voluntarism as a complement to regulation” and that participating companies are not obliged by some law or measure to participate (Latham and Watkins LLP 2009: 1). However, participation in the Global Compact alone is not a guarantee that the corporations are actually implementing its core principles (W. Mwangi, et al. in Alston and Goodman 2012: 1468-1469). The reporting mechanism established for the Global Compact is unilateral on the part of the corporation and the Annual Review conducted is only an assessment of “participation outcomes” (Alston and Goodman 2012: 1468).

### ***3.2.2 The Norms: coming out strong but failing in the end***

Prior to Kofi Annan’s address before the World Economic Forum in 1999, a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights was convened in 1998 “to examine the working methods and activities of transnational corporations” (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2). This may be one of the defining factors that the business community opted to accept Annan’s challenge of voluntarily regulating, otherwise, if they continue to ignore the issue, the clamour for a sterner regulatory mechanism from the United Nations will not cede. However, despite the UN Global Compact and other voluntary mechanisms being implemented across the globe, there is still a need for a legally binding set of standards. As pronounced by then Secretary-General of the International Commission of Jurists in 2005, although voluntary initiatives “are important steps on the road to accountability”, these has to be combined with legally binding rules and regulations (Alston and Goodman 2012: 1476).

After a six-year tenure of the UN Sub-Commission, it submitted, in 2003, the proposed Norms on the Responsibilities of the Responsibilities of Trans-national Corporations and Other Business Enterprises with Regard to Human Rights. The Norms find its bases on various international human rights instruments and treaties as well as on various submissions and reports by UN bodies, States, NGOs and other agencies. In the background document prepared by the Secretary-General (SG) in 1995, which extensively discussed the “relationship between the enjoyment of human rights” and the “working methods and activities of transnational corporations”, it recognized the growing power of the TNCs brought about by economic globalization and trade liberalization and its effect on the exercise of power by the developing countries (24). In said report, the SG (1995), most importantly, explicitly acknowledged the presence of a “regulatory deficit”. (24). The background document submitted by the SG was sent to Governments and various groups for comment, to which he reported back in 1996, in which he further emphasized that despite other international voluntary mechanisms, there is a need for a regulatory framework, citing two reasons: (1) existing rules of international financial institutions do not deal with the “social aspects” of business enterprises, and (2) voluntary mechanisms are not enforceable. (21). Although the proposed Norms maintains that States have the “primary responsibility” to protect, promote and fulfil human rights in all realms, it also recognized the human rights obligations of TNCs “within their respective spheres and influence” ((U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2)). The Norms provided implementation mechanism through the submission of periodic reports by the TNCs to be monitored and verified by the UN and its organs, further directing the States to adopt regulations and framework that would execute the Norms.

Although the drafting of the Norms were based on reports and undergone various consultations, it was never adopted by the UN as a regulatory measure. In a Decision of the UN Commission on Human Rights in 2004, while it recognized that the Norms “contain useful ideas and information for consideration”, it only went as far as making recommendations to the Economic and Social Council to continue its efforts in conducting further studies and consultations and reiterated that the Norms have no “legal standing” (Omotosho 2004: 81-82). The business sector opposed the Norms, while human rights advocates were generally supportive (UN 2010). Furthermore, the Norms did not get the support of States, as developing countries viewed it as an “intrusive regulation” while developed countries considered it “unnecessary and over-reaching” (Alston and Goodman 2012: 1477).

### ***3.2.3 The UN Guiding Principles: setting an acceptable framework***

To better understand the reasons for the non-adoption of the Norms as a regulatory measure for TNCs’ conduct of business in relation to human rights, it is important to analyse the subsequent actions of the United Nations. In 2005, acting on a request by the Commission on Human Rights, the UN Secretary General appointed Harvard Professor John Ruggie to, among others, clarify the “roles and responsibilities of states, companies and other social actors in the business and human rights sphere” (UN 2010). This mandate is significant

because one of the primary criticisms of the proposed Norms is that it “essentially sought to impose as binding obligations on companies directly under international human rights law the same range of duties that states have accepted for themselves” (UN 2010). Ruggie (2008), in his first report to the UN, has recognized that markets have to be regulated by laws (3). However, he reiterated that business enterprises cannot be expected to do the human rights obligations of States. Instead, he suggested a framework wherein States, business enterprises and other social actors “must learn to do things differently” but it must be coherent and cumulative (4). Thus, he proposed the “Protect, Respect and Remedy” framework, putting each social actor within their own “spheres of influence”, summarized as:

“...the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial” (UN 2010).

The above report was welcomed by the UN Human Rights Council, noting further that this is the first time a “substantive policy position” on the issue of business and human rights was taken, resolving further to extend his mandate to operationalize and promote the framework (UN 2010). Ruggie adopted an extensive consultative approach during the entire period of his mandate. Together with a team of advisors and researchers, he embarked into a highly daunting task of conducting regional consultations, multi-stakeholders’ meetings and site visits. In addition, there has been correspondence and submissions made by legal experts, members of the academic community, civil society, business community, NGOs, and Governments (BHRRC 2013a). The team also took advantage of modern technology by opening up an online forum for over three months before the SRSG’s final report to the UN, which “attracted 3,576 unique visitors from 120 countries and territories, with an average of 88 visits per day” (BHRRC 2013b). These efforts have created venue for all stakeholders, using both formal and informal means, which placed Ruggie’s work and progress “at the center of most discussions about corporate human rights responsibilities” (Alston and Goodman 2012: 1478).

### **3.3 The implications of the UN responses**

Ortner’s triangular model of modern practice theory as discussed in Chapter 2 is exemplified by the development of the UN Guiding Principles on Business and Human Rights, espousing the “Protect, Respect and Remedy” Framework. This theory is applicable to analyzing the responses of the UN since “operational activities of international organizations occur in the context of a diffuse normative process where claims and arguments are made, challenged, defended and elaborated in the course of interactions among international organizations, governments and affected peoples” (Johnstone 2008: 121).

The system of globalization which established trade liberalization and market deregulation, among others, led to the rise of power of TNCs. This principle is not vicious in principle, as this power can be used to generate economic growth, contribute in poverty reduction by creating jobs and other sources of income, and further contributing to the realization of human rights (Ruggie 2008). However, this system has constrained, to some extent, the enjoyment of human rights, as well as the States' exercise of its human rights obligations especially with regard developing countries. The reports of human rights violations and the continuing rise of poverty across the globe called for the formulation of regulations in the realm of business and human rights. As Guiseé stated in his submission to the UN Commission on Human Rights in 1998: "Since the expansion of transnational corporations has become the rule, international law needs constant adaptation in order to deal with problems arising from their operation" (3).

Despite all the negotiations and consultations leading to the adoption of the UN Guiding Principles however, the "Protect, Respect and Remedy" Framework did not, using the words of Ortner, "unmade" the system of globalization, but merely attempts to manage its impact on human rights. Stated otherwise, the present UN Guiding Principles has put the human rights framework into the business agenda of TNCs and other business enterprises. This intention is clear from the statement of Ruggie on his 2008 Report to the Commission on Human Rights:

"The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge." (3)

In bridging that "gap", Ruggie's process of consultation would show that the aim is to work within the existing system, and to clarify the roles each stakeholder has to play to attain the goal. The SRSG's team first embarked into exploring the existing international treaties and other instruments, thereinafter conducting consultations across the globe (BHRRC 2013a). In fact, what Ruggie did is to explore the practices of States, corporations and other stakeholders to develop the UN Guiding Principles. While he has recognized that the "spheres of influence" of corporations are broad as, aside from adopting measure regarding its internal affairs such as workers' rights, it can adopt measures concerning the community and even influence the policies of States with regard human rights (Parrioti 2009: 151, citing Frankental 2002: 131-132), it moves away from actually transforming the system by making corporations actually take human rights responsibilities through an international hard law instrument (Nolan and Taylor 2009: 442).

The UN Guiding Principles, therefore, is merely a complement of the UN Global Compact, which encourages corporations to adopt voluntary mechanisms that would make them adopt and comply to international human rights

standards and principles. While using the background papers and some principle of the proposed Norms, the UN Guiding Principles did not propose that corporations assume the same human rights obligations of States. The UN Guiding Principles does not transform the system, which is in contrast to De Gaay Fortman's argument that human rights has to be transformational – that is should have established a “normative framework for processes of social change” (2006: 41).

Furthermore, using Clapham's concept of human rights privatization illustrates that the UN Guiding Principles is not transformational. Business enterprises taking human rights responsibilities and accountability are some of the policies being pursued by stakeholders in the realm of business and human rights. This policy development would have been a clear response to the increase in the power of TNCs, thereby affecting the power of the States to perform human rights obligations, as exemplified in my previous discussion. The development is important for “establishing equitable, just and non-protectionist systems of multi-lateral trade, adequate flow of financial assistance, and for ensuring that the poor have a stake in the development process in this globalising world” (Alston and Goodman 2012: 104). However, limiting the responsibility of corporations to simply “respect” human rights in the conduct of their business does not change the paradigm that human rights obligations remain state-centric. Their obligation is still within the realm of voluntary corporate social responsibility by providing internal standards to regulate their conduct of business especially abroad (Letnes 2004: 266).

Parrioti (2009) clearly stated the difference between the “protect” and “respect” spheres: “Respecting a right means to do or refrain from doing what the norms containing the right prescribe or prohibit” while “protecting a right means taking steps so that the other subjects respect the right” (142). The UN Guiding Principles, therefore, did not address the core issue: the imbalance in the power relations between TNCs and States, especially developing countries (Simons 2012: 17, as cited in Alston and Goodman 2012: 1490). It is evident from the UN response that despite the apparent incapacity of States to deal with the human rights issues arising out of the conducts of business of TNCs, States consider “privatization” of human rights as an intrusion into the exercise of their power, as shown in their rejection of the proposed Norms (UN 2010). On the part of the TNCs and other business enterprises, they still support the traditional view that human rights remain the responsibility of States (Sullivan 2003: 309). I agree with Winston in stating that the present trend “means, in effect, that the only paths toward democratization and human rights that are now available are the ones that also embrace market liberalization” (1999: 829, as cited in Meyer 2003: 50).

This also explains why, despite the numerous corporate voluntary mechanisms and guidelines adopted, the UN still responded to the issue by adopting a soft rather than a hard law mechanism. Clearly, being an endorsement of the Human Rights Council, the UN Guiding Principles falls within the ambit of the soft law. The adoption of the UN Guiding Principles clearly shows that the States are not yet prepared to divest their powers and responsibilities to companies by a legally binding instrument. Furthermore, it also manifests the influence of corporations towards States. The preference to soft law instru-

ments in the realm of business and human rights is therefore appealing because they are statements of “inspirational goals and aspirations” (Nolan and Taylor 2009: 434). While loads of soft law and voluntary corporate responsibility instruments have been adopted and recognized, which has, at the maximum, the effect of “legitimizing” the inclusion of human rights within the “sphere of responsibility” of corporations, violations thereof still results to limited accountability (Nolan and Taylor 2009: 446).

The tensions, and the limitations of the present system dealing with business and human rights, through the responses of corporations, States, and institutions such as the United Nations however, do not stop human rights advocates from challenging the system. The tensions and the ways of how NGOs challenge the system as exemplified by the Koh Kong sugar plantation case in Cambodia are discussed in the succeeding sections.

## Chapter 4

### The Koh Kong sugar plantation: epitomizing the tension

When the business conducts of TNCs cause, directly or indirectly, human rights violations, affected persons would usually seek redress. In this Chapter, the tensions created by economic globalization into the presence of TNCs in developing countries and its human rights impact will be exemplified by the case of Koh Kong sugar plantation in Cambodia. My discussion will revolve around the international economic policies adopted paving the way for investments in developing economies, and its impact on the enjoyment of human rights of its locals.

#### **4.1 The EU’s EBA initiative and the Cambodia’s ELC policy: creating an enabling environment for TNCs’ investments in developing countries**

European Union’s “Everything But Arms” Initiative (hereinafter referred to as the EBA) was adopted in 2001 as one of the ways to hit the targets of the Millennium Development Goals, with one specifically appealing to developed countries to extend assistance to least developed countries (EC and IDI 2013: 20). The EBA broadened the European Union’s Generalized System of Preferences (GSP), a “scheme consists of a series of unilateral concessions offered to developing countries”, which began its implementation in 1971. (Yu and Jensen 2005: 378, 379). The GSP was adopted in 1978 by the UNCTAD during its 1978 Conference with the goal to “increase developing countries’ export earnings, promote their industrialization and accelerate their rates of economic growth” (EC and IDI 2013: 20). The scheme is effectively an exemption to the WTO’s Most Favored Nation (MFN) principle, which requires members to ensure the equal treatment of imports from other members because preferential treatment to developing countries is given under the GSP (EC and IDI 2013: 20). The European Commission (2013) describes the EBA as the “most generous form of preferential treatment to LDCs globally” as, save for arms and armaments, LDCs are given “full duty free and quota-free access to the EU” for all exports.

To benefit from policies such as the EBA, developing countries would adopt policies to create an enabling environment in their countries that will be in line with the economic scheme of developed countries. In the case of Cambodia, it enacted the 2001 Land Law which includes the granting of economic land concessions (ELC). Through land concession agreements, the government grants to another, usually a corporation, certain rights for the conduct of activities in a specified duration of time (Subedi 2012: 7). One of the purposes of ELCs is “agro-industry” and they are “granted in exchange for certain investments, fees and land rental” (Subedi 2012: 7). The law also provides that the maximum area to be granted to each person or company is ten-thousand hectares on a period not exceeding ninety-nine years. The EBA scheme and

the ELC policy paved the way for the growth of the sugar plantations in Cambodia, specially strengthened by the full liberalization of the market access for sugar produced in developing countries in 2009 (EC 2006: 22, as cited in EC and ED 2013: 20).

In principle, these schemes and policies are instituted for economic development. In fact, the aim of the EBA is to provide an opportunity for developing economies like Cambodia to gain full access to the markets of developed countries, in this case, Europe. Needless to say, EU has claimed that it has actually attained the objectives of the EBA. In a statement of the EU Ambassador to Cambodia Jean-Francois Cautain featured in Cambodia Daily on April 2013, he said that: “Cambodia is a prime example of the Everything But Arms scheme’s power as an engine of growth. In the last 10 years, the duty free and quota free access to the E.U. market has allowed Cambodia to more than double its exports...” (EC and IDI 2013: 20). This is akin to the view that the investments of TNCs, generated by international market reforms, are “engines of development”.

Despite the good intentions and the claims that the scheme and the policies are beneficial, they have, however, caused negative impact on the enjoyment of human rights of communities in Cambodia. Applying Clapham’s argument as discussed in Chapter 2, the economic market reforms are not the ones creating human rights violations, but the way in which Cambodia is responding to these developments, for while it set the environment for economic policies, it fails to address human rights issues, which will be elaborated in the succeeding sections.

## **4.2 Taking advantage of an enabling environment for investments: the companies involved in the Koh Kong sugar plantation**

The scheme and policies set the trend for the investment and presence of TNCs in Cambodia. On 2 August 2006, two companies were granted ELCs: the Koh Kong Sugar Industry Limited (KKS) and the Koh Kong Sugar Plantation Company Limited (KKP) in Botom Sakor and Sre Ambel Districts (Legal Memo<sup>2</sup> 2010: 11) KKS was granted nine thousand seven-hundred hectares while KKP was granted nine thousand four-hundred hectares (SRSG Cambodia 2007: 9). KKS and KKP are registered in Cambodia as distinct from each other. However, evidence shows that these two companies are one and the

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<sup>2</sup> The ‘Legal Memo’, as far as those documents retrieved by the author is concerned, was first mentioned as an attachment to the ‘Complaint’ filed by CLEC at the NNHRC of Thailand on 6 January 2010. The ‘Legal Memo’ used by the author as reference in this paper is the one attached to the letter of CLEC to Viviane Reding (European Commission Vice President) ‘Re: Illegal Economic Land Concessions for Sugar Production in the Province of Koh Kong, Cambodia’ dated 12 July 2010. Said letter with the ‘Legal Memo’ was sent to the author as an email attachment from a confidential source on 27 August 2013. The document will be referred to and cited in this paper as ‘Legal Memo 2010’.

same. In the legal memo prepared and submitted by CLEC to various institutions, it presented evidence to show that the two companies are, indeed, the same, like similarities in address, phone numbers and banks. Other factual findings would also entail, being more coincidental, that they are operated by similar persons, as the application and approval process of the two ELCs are the same. (11) Furthermore, a very powerful Cambodian politician is “reliably reported” to own stocks in both corporations (SRSG Cambodia 2007: 11). Having been granted ELCs on adjoining lands strengthens the allegation that the two companies are the same (SRSG Cambodia 2007: 11). The alleged reason for this seemingly deceitful act is to circumvent the limiting provision of the Land Law of 2001 to ten thousand hectares per ELC grant. This reinforces the argument by Greer and Singh (2000) discussed in Chapter 2 that the influence of TNCs transcend economic aspect, but employs tactics that involve powerful political figures.

These two companies are “70% owned and controlled by Thai company Khon Kaen Sugar Industry Public Co. Ltd. (KSL), with the remaining 30% being owned by Taiwanese company Vewong Corporation (ERI and CLEC 2013: 3). This brings us back to the very nature of TNCs as having operations and/or subsidiaries in other countries, in addition to that which it is domiciled. Aside from the relationship of the three entities to each other, the chain also includes other corporations in other countries. Citing reports from various sources, ERI and CLEC (2013) contend that the sugar being produced in Cambodia is being supplied to Tate & Lyle PLC, a United Kingdom company, which was later on acquired, in 2010, by American Sugar Refineries, Inc. (ASR), a company registered in the United States (3). Further, the exportation of sugar to Europe is under the EU’s EBA initiative previously discussed. Aside from being duty and import quota-free, sugar is guaranteed a minimum price under the scheme (Clean Sugar Campaign, n.d.). ERI and CLEC (2013) concluded that: “Both the ownership structure and the business operations of the Cambodian companies therefore involve considerable control and influence by Thai and U.S. registered business enterprise” (3).

It is this very element of control which sets TNCs apart from all other independents incorporated business enterprises, as discussed in Chapter 2, so while, the Tate & Lyle and ASR may not directly own stocks in KSL, it effectively controls the ways in which the product is being produced. Further, it benefits from the business conduct of KSL. As reported, Tate & Lyle received 48,000 tons of sugar produced in Cambodia since 2010, in an estimated amount of 24 million in Euros (EC and IDI 2013: 25).

### **4.3 Eviction and displacement of local communities: a necessary consequence of TNCs’ investments?**

In the report of Special Rapporteur Surya P. Subedi with regard the human rights impact of economic land concessions in Cambodia submitted to the United Nations Human Rights Council on 24 September 2012, he assessed that although “some cases of land concessions seem to have had positive impacts for the people of Cambodia in terms of job creation, stimulation of the local economy, generation of revenue to finance public services, and overall

contribution to national growth”, it also generated high cost for the enjoyment of human rights (2). This emphasizes the Letnes’ (2004) debate on whether TNCs are “engines of development” or “tools of exploitation”, depending from which perspective one is taking.

Human rights violations were, in fact, committed in the implementation of the ELCs granted to KKS and KKP. Evidence even shows that even prior to the signing of the ELCs, on 19 May 2006, the companies commenced their clearing operations in the areas and began setting up their office (SRSG Cambodia 2007: 9). These lands subject of the ELCs were being occupied by villagers who were occupants of the land subject of the ELCs since 1979, and “have maintained traditional lifestyle subsisting on the land through agriculture and gathering from the forest” (Legal Memo 2010: 4). They were forcibly evicted, among others, from the land they lawfully occupy due to the operations of the companies. The investments have thus far affected over four hundred families by forcibly evicting them from their lands leaving them with no livelihood and other alternatives (SRSG Cambodia 2007: 12). CLEC reports that “approximately 2,879 villagers reported complaints about the companies’ encroachment on their land” by January 2007 (Legal Memo 2010: 4).

The forced eviction, demolition and displacement of occupants of the land subject of the ELCs to make way for its implementation is a violation of internationally recognized human right. As clearly explained in a study conducted by EC and IDI (2013):

“The UN Human Rights Commission has affirmed in two resolutions (1993/77 and 2004/28) that the practice of forced evictions constitutes ‘a gross violation of human rights’. These include the right to housing, right to adequate food, as well as the rights to security of person, freedom of movement and choice of residence, privacy and security of the home, health, education, work and due process, amongst others. When the actions of companies and private actors lead to forced evictions, the State is failing in its duty to protect from interference with these rights.” (41)

Accounts and reports of human rights violations as an effect of TNCs’ presence and investments in developing countries generated by reports of human rights advocates and institutions establish that TNCs are “tools of exploitation”. However, the indifference of TNCs in complying with human rights obligations lies in the fact that human rights’ compliance, or at least making sure that certain projects comply with human rights standards, is still within the realm of the States, in this case, Cambodian government. Accordingly, since Cambodia wanted to benefit from the EBA, it has provided an environment that is more favorable to the conduct of business of TNCs rather than the promotion, protection and fulfilment of the rights of its own citizens.

The situation, therefore, created a system that constrained the full enjoyment of human rights. So while the TNCs took advantage of the environment which enabled them to invest and conduct their business operations in Cambodia, it is up to the affected communities to claim their entitlements to rights. It is within this breadth that the NGOs would use strategic human rights litigation.

# Chapter 5

## Strategic human rights litigation as a way to challenge the system

### 5.1 Building networks as a key to strategic human rights litigation

In situations like the Koh Kong sugar plantation project, various groups come forward to assist the communities to seek redress for their grievances. As Bukovská (2008) described, these human rights advocates would use various tools such as fact-finding, advocacy and litigation (9). In my subsequent analysis below, I will focus on the employment of strategic human rights litigation in this respect. Since strategic human rights litigation combines legal and non-legal methods in various jurisdictions, collaborative efforts of various NGOs are key factors to the case. In the case of Koh Kong sugar plantation case, a number of NGOs having different expertise and having presence in the different countries to which the corporations involved are registered or operating coordinate with each other. Not counting individual volunteers, there are at least eleven NGOs involved in all the countries where the corporations connected or relevant to Koh Kong sugar plantation are based and/or present: Cambodia<sup>3</sup>, Thailand<sup>4</sup>, the United States<sup>5</sup>, and the United Kingdom<sup>6,7</sup>.

For purposes of my analysis of the NGOs involved, I will focus on the three leading NGOs involved in all the strategies used in my case example, namely: CLEC, ERI, and Equitable Cambodia. CLEC is a Cambodia-based “legal resource center”. Established in 1996, it aims to “promote the rule of law, justice and democracy” through various activities such as conducting legal awareness, providing legal aid, and advocacy. (CLEC 2012) Similarly, Earthrights International has the same nature of work as CLEC. However, it is an international NGO who has presence in several territories, such as Southeast Asia, Peru and the United States, among others (ERI 2012b). Equitable Cambodia, which was formerly known as BABC, is also based in Cambodia whose focus is “land and housing rights” (Equitable Cambodia 2012). These organizations fall within Willets’ (2002) internationally-accepted attributes of NGOs, primarily being independent from government and performing legitimate activities (2).

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<sup>3</sup> Community Legal Education Center (CLEC), Community Peacebuilding Network (CPN), Cambodian League for the Promotion and Defense of Human Rights (LICADHO), Equitable Cambodia (formerly Bridges Across Borders Cambodia).

<sup>4</sup> Earthrights International (ERI), Towards Ecological Recovery and Regional Alliance (TERRA), Focus on the Global South.

<sup>5</sup> ERI and other individuals.

<sup>6</sup> Jones Day

<sup>7</sup> The statement is based on an email dated 10 September 2010 sent to the stakeholders. The author was able to retrieve a copy of the email from a confidential source.

The initial collaboration of NGOs took place in preparation for the filing of cases in Cambodia in early 2007, immediately after the initial operations of the corporations took place (Legal Memo 2010: 4). The strategies employed also depend on whether or not these organizations are present, or can collaborate with individuals or other organizations present in the country or jurisdiction they would want to pursue the case. By presence here, I do not mean necessarily having an office or being registered in that country, but having the resources as well to sustain the legal and non-legal methods employed. These organizations, together with some individuals, are considered to have formed a TAN, since they share the same cause and purpose, which are advocated internationally, as will be later on discussed (Keck and Sikkink 1998: 3, Willets 2002: 3).

## 5.2 Putting legal strategies at the core

In determining which mechanisms and under what jurisdiction will the remedies be availed of, the option as to whom the actions will be directed is also important. In cases of human rights infringements attributed to the conduct of business of TNCs, options are available in pursuing the claims of the affected communities. The case or complaint might be directed against (1) subsidiary company which operates locally, in this case, KKS and KKP; (2) parent company directing the operations of the subsidiary, in this case KSL; and (3) companies getting their supplies or raw materials from the company operating locally, in this case Tate & Lyle and ASR. Under international human rights law, States can also be held accountable for they have the responsibility to protect human rights (ECCHR 2012: 17). Furthermore, parties have the option of pursuing their claims based on national or domestic laws, voluntary standards of corporations, or mechanisms established by inter-governmental bodies.

### 5.2.1 *Exhausting remedies under domestic laws: the host and home states*

In using domestic or national laws to pursue the claims of affected communities, the difference in the responses of host and home states as discussed in Chapter 2 is apparent. This is especially true in the case of the Koh Kong sugar plantation. The parties brought their case before the domestic courts in Cambodia where the actual operations are taking place, and the United Kingdom where the company receiving the supplies from the Cambodian operations are based. Although Tate & Lyle is not the principal company of KKS and KKP, it is still being sued for benefiting from the operations thereof. In pursuing the cases in Cambodia and the United Kingdom, the parties used the already existing mechanisms for other actions. Using the concept of strategic human rights litigation, filing cases using the already existing mechanisms is not only about getting the remedies that the parties want but also explore whether or not the present policies and mechanisms available is enough to address the issue, in this case, business and human rights. Discovering the limitations of the existing domestic standards and mechanisms may shift the strategy into policy advocacy. In case the present standards and mechanisms actually work, the case will set precedent for future cases.

As the project is being implemented in Cambodia, it was expected that the parties would seek redress in their own jurisdiction. This is because in cases like this where the project is ongoing thereby evicting the communities despite protests, it is important for the parties to put a stop to the development. Otherwise, any relief the affected communities might get after a long period of time may be futile. This is the reason why in February 2007, criminal and civil cases for cancellation of the concession contracts were filed against KKS and KKP in the provincial government (BHRRC 2013c). The cases were based on several grounds, primarily: (1) that the lands covered by the ELCs are not a proper subject thereof; (2) granted that it is covered, it exceeded the limit set by law, alleging that the two companies are one and the same; and (3) criminal acts were allegedly committed in the process of commencing and continuing the operations of the companies (Legal Memo 2010: 6-9). In addition to that, in order to ensure that pending the outcome of the cases, the company will refrain from further implementing the project, the villagers also filed a motion for injunction (Legal Memo 2010: 4-5). The criminal case was dismissed (ERI and CLEC 2013: 9). With regard the civil case, it was only in 2012 that the provincial court decided that it does not have jurisdiction of the case, and transferred the same to the Cadastral Commission to decide on the ownership of the lands subject of the ELCs (BHRRC 2013c).

The indifference and the delay of the Cambodian system to address the issues have led the villagers and the NGOs to seek redress in other jurisdictions. Asserting that they are the owners of the land being used by KKS and KKP for the plantation and processing of sugar being supplied to Tate & Lyle, some two hundred villagers are claiming compensation from the company for the profits they earned from the sugar produced from the land (BHRRC 2013c). They have filed the claim in March 2013. The villagers are being represented in the UK court by Jones Day, a firm which claims to be a “global legal institution” having “principles that have social purpose and permanence, that transcend individual interests” (Jones Day, n.d.). In their “Defence and Counter-claim” filed in May 2013, Tate & Lyle raised the issue of ownership of the land which is still pending in Cambodia, in effect, stating that the claimants do not have the right to be compensated. Further and interestingly, the company justified their supply access to sugar produced by KSL (KKS and KKP) in Cambodia as part of the EBA Initiative of the EU (3). As of July 2013, the case is still pending in the UK Court.

The two cases would show how claims are framed and have evolved depending on the circumstances, as these are dependent on the right-holders. At the time following the commencement of the operations of the plantation, the claimants assailed to discontinue its operations for reasons already stated. However, as the case dragged for five years, and also working within the limits of the law of the United Kingdom, they turned to claim compensation for the use of their land. This is the effect of an ineffective system in the host state for protecting the rights of those affected by investments of TNCs. Turning into home states of TNCs and asking for compensation may be the most accessible remedy, but at the end of the day, the villagers may not be able to get back their land, hence succumbing to the reality that the system still favors foreign investments at their expense.

### ***5.2.2 From adversarial action to negotiation: exploring mediation as a strategy***

As court litigation takes time, strategies would include exploring other mechanisms, which although voluntary and “soft”, would provide a remedy just the same. In the case of Koh Kong, the claimants availed of the mechanism under the OECD Guidelines for Multinational Enterprises in the US and the proceedings of a responsible sugar initiative in UK, the Bonsucro.

The complaint filed in the National Contact Point in the U.S. under the OECD mechanism was against the ASR, which is based in New York. It was filed in October 2012 and was terminated in June 2013. Represented by CLEC and ERI, the villagers brought the case before the U.S. government because it is one of their obligations when they indorsed the OECD Guidelines for Multinational Enterprises. The complainants assailed that “ASR has not acted consistently with the OECD Guidelines because, as the buyer of all of the sugar produced at the Koh Kong plantation and factory, it is expected to exercise due diligence and use the leverage it has with its business partners to prevent, mitigate, and remedy negative human rights impacts”. (CLEC and ERI 2012) Although initially, the parties were willing to undergo the mediation proceedings, ASR has communicated its unwillingness to continue with the process citing that the complainants filed a civil suit against the company in the U.K., thus, would make whatever settlement they would reach futile. Although the complainants insisted that it is a different proceeding, still, ASR held their ground. Since by its very nature, the proceeding under the OECD mechanism is voluntary, the case was terminated when it became clear that the parties will not reach an agreement. (U.S. Department of State 2013)

While the company participated in the OECD proceedings, they did not do so in the Bonsucro proceedings in the U.K. Bonsucro is a “responsible sugar initiative”. Tate & Lyle, being a member of Bonsucro, is expected to comply with its standards, for which the complaint assailed that they did not. Because Tate & Lyle did not cooperate in the process, Bonsucro issued the suspension of the company’s membership in 2013. (ERI 2013) Among others, Tate & Lyle, while suspended, cannot be issued the Bonsucro certification (Bonsucro 2013a). As the certification system provides guide for producers and buyers that the sugar produced is in compliance with its standards for sustainability, one of which is respect for human rights, said suspension can hurt Tate & Lyle’s profits (Bonsucro 2013b).

In contrast to cases filed in courts, mediation proceedings in mechanisms such as that established by the OECD and Bonsucro are more cost-effective and time-efficient. However, it involves the consent of parties to arrive at an agreement. In both cases, the companies refused to move forward with the proceedings, so the cases were terminated. More than anything else though, the NGOs handling the complaints admit that certain developments, such as the suspension issued by Bonsucro puts pressure in the companies to “provide justice to affected communities” (ERI 2013). Under the concept of strategic human rights litigation, this is also one of the gains aimed at.

Aside from these mechanisms, the documentations and legal memorandum prepared by NGOs were also sent to the European Commission for further investigation (ERI 2013). This initiative sets the tone for policy-change since the EBA program was a project of the EU. Furthermore, the reports and documentations were also relied upon by the UN Human Rights Commission in their assessment of the human rights impact of ELCs in Cambodia (Subedi 2012: 2) A benchmark was however made when a Complaint was filed before the National Human Rights Commission in Thailand, using the UN Business and Human Rights Framework.

### ***5.2.3 Testing the UN Guiding Principles: establishing precedents***

One of the goals of strategic human rights litigation, as discussed, is setting standards for future instances. Hence, this method would explore and test new developments that would pursue its interest. In this case, the human rights advocates looked into the potential of the recent adoption of the UN Guiding Principles on Business and Human Rights by filing a complaint in the National Human Rights Commission (NHRC) of Thailand where KSL is based. Although the initial complaint was filed in 2010, prior to the adoption of the Guiding Principles in 2011, supplemental documents were filed in 2011 to make room, among others, for citing certain provisions of the UN Guiding Principles.<sup>8</sup> This also entails that in strategic human rights litigation, where there are continuing developments both in policies and strategies, concerned parties should always be on the lookout for new opportunities to pursue their case.

In July 2012, the NHRC released its findings. The most significant pronouncement of the NHRC is establishing its power to investigate the affairs of KSL although the activities being presented and the alleged violations were committed elsewhere. In its words, NHRC stated that:

“The NHRC has mandate to ensure that the Thai State and private companies comply with human rights principles. The power and duties of the NHRC do not limit the types of stakeholder involved (whether public or private) or site of violations (whether inside or outside of Thailand)... As long as the relevant stakeholder is bound by Thailand’s laws and human rights obligations, the NHRC is committed to serving the interest of justice through human rights promotion and protection.” (NHRC Thailand 2012: 2).

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<sup>8</sup> Both documents were sent to the author as an email attachment from a confidential source on 27 August 2013. Both were prepared by CLEC and sent to Dr. Niran Pitakwatchara (Commissioner, National Human Rights Commission of Thailand). The initial complaint entitled “Re: Complaint against Thai company involvement in Human Rights violations in Cambodia” was dated 6 January 2010. The supplemental document entitled “Subject: Supplemental facts on the business of Khon Kaen Sugar Industry Public Company Limited in Koh Kong, Sre Ambel, Cambodia, and notes on the jurisdiction of the National Human Rights Commission of Thailand to hear the Community Legal Education Center complaint dated July 6, 2010” was dated 2 September 2011.

Although the extent of the authority of the NHRC to extract accountability from KSL is not the same as those made by courts, still, the exercise of its investigative authority in the case of Koh Kong is a manifestation of a serious commitment of the Thai government to exercise extraterritoriality over the affairs of Thai companies. This is an example of home states stepping up when host states fail to do so. This is so because in the complaint, CLEC has to establish first that “remedies in Cambodia are unavailable and ineffective”.<sup>9</sup> Furthermore, NHRC has cited the UN Guiding Principles in justifying its investigation of KSL’s activities in Cambodia, stating that the company has “to respect human rights obligations in their business enterprise operations through subsidiaries in Cambodia, independent of the Cambodian government’s obligations to protect human rights” (NHRC Thailand 12: 2). This is important because although as discussed in Chapter 3, the UN Guiding Principles did not actually “privatize” human rights by demanding the same obligation from companies, States can actually find ways to ensure that corporations also perform those obligations. In this case, however, it is the home states exercising such powers, not host states.

Furthermore, in the same document released by the Thailand NHRC (2012), it reiterated the necessity for the adoption of an ASEAN “regional approach to responding to human rights issues and an intensified effort to monitor the activities of corporations abroad, especially when it has been proved that no effective and prompt domestic remedies and protections for violations are available” (2). As stated, TANs using strategic human rights litigation aims to establish mechanisms that would provide an enabling environment for remedial measures on human rights issues.

### **5.3 Non-legal strategies as a complement to legal strategies**

As discussed in Chapter 2, what sets strategic human right litigation apart is the use of the complementary tool of non-legal methods. Non-legal strategies are those not formally sanctioned but nonetheless guaranteed under the basic principles of international human rights law. Since the onset of the case, and to complement the filing of the initial civil and criminal cases in Cambodia, protests and demonstrations were held by the villagers, with one reportedly involving some violent acts committed against the demonstrators (Legal Memo 2010: 4). As the case progresses, the foremost non-legal strategy used is maximizing the possibilities of the internet by putting up an online campaign dubbed as “Clean Sugar Campaign” – the [www.boycottbloodsugar.net](http://www.boycottbloodsugar.net). The site features updates on the cases, videos, blogs, and links to the site of NGOs involved in the case. This online campaign is important in several ways. First, it puts a “face” to the villagers and an actual “picture” of the situations in the land subject of the ELCs. Second, it reaches the stakeholders who may not have been parties to the case, specifically the consumers. This is in consonance with projecting that that presence of TNCs in Cambodia is causing

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<sup>9</sup> CLEC supplemental document to the NHRC Thailand dated 2 September 2011.

negative impacts in human rights, using the idea that TNCs are in fact “tools of exploitation” (Letnes 2006: 263). Furthermore, it shows how the right-holders frame their claims.

Other mechanisms to complement the formal complaints filed involve sending communications to the Presidents and Board Members of the companies involved. These communications, sent in different periods to the three companies: KSL, Tate & Lyle and ASR, contained detailed account of the evictions, displacements and other violations occurring as a consequence of the business conduct of Koh Kong plantation. Save for Tate & Lyle, no response were given as of September 2013. (EC and IDI 2013: 31-35) Although a clear response from the companies may be the goal of the communications, it was also crucial that copies of the letters are being posted in the Clean Sugar Campaign website and the NGOs concerned. Media presence by way of granting interviews and providing press releases is also one of the strategies employed in the case. In all developments of the case, there is always an accompanying press statement to be released. This led to the case being featured in various media articles.<sup>10</sup> More than anything, this strategy brings pressure to the companies.

## **5.4 Strategic human rights litigation: a method of countless possibilities**

The present system of economic globalization, the constraints within the laws and mechanisms of States and institutions, and the limitations of the UN Guiding Principles on Business and Human Rights, called for a broader action to claim rights, which in the case of Koh Kong sugar plantation case, strategic human rights litigation. This method is a practice in itself, which, taking off from Ortner, completes the triangular model of modern practice (Rouse 2006: 506). When a system constrains the enjoyment of a right, people will find ways to challenge and/or change it. Since the system is continuously changing itself, there is also a continuous evolution in the ways people claim rights, and strategic human rights litigation is a method to continuously claim the entitlement to rights. In the case of Koh Kong, the NGOs, in representation of the claimants, worked within the limitations provided for by the “formal” standards and mechanisms. This means that within the ambit of the domestic laws of Cambodia, the civil law of the United Kingdom, and the mechanisms within the OECD and Bonsucro, they have presented their claims. Furthermore, when they filed the complaint with the NHRC of Thailand, subsequently using the emerging UN Guiding Principles, they have attained one of the ultimate goals of strategic human rights litigation – precedent-setting that influences policy changes and future case outcomes (ECCHR 2012: 31). Filing of multiple cases

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<sup>10</sup> These various press releases and media articles can be found in the website of the Clean Sugar Campaign ([www.boycottbloodsugar.net](http://www.boycottbloodsugar.net)) and the website of the NGOs involved in the case of Koh Kong sugar plantation, specifically those of CLEC and ERI. The Business and Human Rights Resource Centre also posts updates on the case.

in different jurisdictions is also at the heart of the strategy since it puts more pressure on the respondents. However, it also has its backlogs, as in the case of Koh Kong. The mediation proceeding before the NCP in the US, as an OECD mechanism, was terminated because ASR refused to participate anymore by virtue of the filing of the civil suit in the UK against ASR-acquired Tate & Lyle. Although the remedies in the UK civil suit may be more solid as it is based on a “hard” domestic law, it is more tedious and costly, compared to mediation.

The use of fact-finding (Bukovská 2008: 9) and advocacy (Barber 2012: 411) as non-legal strategies are necessary complements to attain the goals of strategic human rights litigation. Since the goal of TNCs is, as presented in Chapter 2, to generate more profit (Letnes 2004: 266), public image is important. The suspension of the Bonsucro certificates and the various campaigns and press releases exposing the human rights infringements of the Koh Kong plantation is an effective strategy for public awareness. Although this may be more of a trial in “court of public opinion”, it is a practice that is aimed at “unmaking” the system of business conduct of the corporations involved, again, using Ortner’s modern practice theory.

While strategic human rights litigation does not actually change the system in the strictest sense, for it works within the system: accessing mechanisms created by the very system itself, to some extent, it contributed to modify some policies in Cambodia. The documentation of human rights violations by the NGOs involved has been widely used by Special Rapporteur Surya Subedi in his report to the UN Human Rights Council on in 2012 which analyses reports received from 2009 to 2012 (2). The mere presence of a representative of the UN in Cambodia assessing the human rights impact of economic land concessions granted has put pressure in the government to look into its policies. Subedi (2012) therefore notes that:

“During my most recent mission, on 7 May 2012, the Prime Minister announced a Government initiative relating to economic land concessions, including the institution of a moratorium on the granting of new concessions and a review of the compliance of existing concessions with contractual and legal obligations of the concessioners. He subsequently announced a rapid land titling initiative relating to the people near the concessions.” (7)

While this development is far from transforming the present system which favors investments of TNCs in Cambodia, still it provides an opportunity for the government to ease the tension created by market reforms by re-viewing its own policies. This development can be taken in the context of the “boomerang pattern” introduced by Keck and Sikkink (1998: 2). The appeal of the NGOs to the United Nations has worked to put pressure on Cambodia to revisit their policies.

All these developments in pursuing the promotion, protection and fulfilment of human rights within the system, and even in the attempt to transform it, depends upon the right-holders, as enunciated by De Gaay Fortman, hence the term “performative” (2004: 267). The villagers and the NGOs could have

stopped claiming their rights at the moment the Cambodian government failed to respond and simply accept the situation as part of the system. After all, as of this writing, they have already been displaced from their land for more than six years. Their houses have already been demolished and the use of the land has already been converted to suit a sugarcane plantation and processing plant. But under the very nature of strategic human rights litigation, that is, looking beyond their own case, but on the broader scale, advocates would continue to explore and test ways to pursue their interests. This is what is happening in the Koh Kong sugar plantation case.

In sum, the use of strategic human rights litigation in pursuing the claims of those displaced and evicted by the Koh Kong sugar plantation in Cambodia in a transnational setting attained the outcomes discussed by Keck and Sikkink (1998: 2-3). Foremost of which is the fact that the human rights advocates were able to frame the view that TNC's investments in developing countries are "tools of exploitation" rather than "engines of development". Moreover, they have set the tone for UN to monitor Cambodia's compliance to their human rights obligations, promote the implementation of the emerging business and human rights framework, and appealed to various stakeholders to revisit their economic policies and business practices.

## Chapter 6

### Conclusion

This paper was guided by the question: *In which ways have NGOs, drawing on the business and human rights framework, used strategic human rights litigation?* I began by presenting the tensions created by globalization as it enunciated market reforms leading to the proliferation of investment of TNCs in developing countries and its impact on human rights. This is one of the quantitative aspects of globalization discussed by Woods (2000: 2). The presence of TNCs in developing countries has impacted on the enjoyment of human rights. I maintain, as supported by the work of the ESCR (Clapham 2006: 5), that it is not the presence of TNCs which creates the tension between market reforms and human rights but the ways in which the States, who are under obligation to ensure human rights are being complied with and protected, are responding. Under the rationale that TNCs are “engines of development”, developing States would oftentimes create policies that would ensure an enabling environment for investors. This tension was exemplified in Cambodia. The EBA initiative of the European Union has opened an opportunity for developing States to access its markets. This led the Cambodian government to grant ELCs to private corporations, thereby affecting land security for its own inhabitants.

The system which therefore allowed the rise of TNCs has constrained the enjoyment of human rights. Using Ortner’s modern practice theory, I examined the responses to the tension particularly within the UN system as an intergovernmental body. The need for the UN to adopt a measure on business and human rights is brought about by legal and jurisdictional conflict between TNCs and States. In looking into the evolution of the UN response, I deduce that, contrary to De Gaay Fortman’s human rights approach criteria that reforms should be “transformational”, UN did not in fact adopt a set of norms that would have eased the tension. The UN Guiding Principles, while recognizing the power of the TNCs, did not go as far as giving the same obligation to TNCs as that of the states. This could have been more reasonable since there was already recognition that developing countries’ power has been dwarfed by TNCs, especially its power to bargain with them. Furthermore, the adoption of the UN Guiding Principles also showed that soft law is more appealing to States to adopt than hard regulations.

Using Ortner’s modern practice theory, I have explored the use of the concept of strategic human rights litigation as used by NGOs in the case of Koh Kong sugar plantation case in Cambodia. Strategic human rights litigation has been used within the available standards and mechanisms of States, other institutions and the United Nations. Further, since this method involves the use of non-legal strategies to complement the legal actions, it has capitalized on the basic rights enunciated in international human rights instruments such as freedom of speech. Strategic human rights litigation exemplifies Ortner’s modern practice theory, such that when a system is constraining, stakeholders will find all sorts of ways to challenge and to some extent change it.

Based on the findings of this research, I construe that, as espoused by De Gaay Fortman, the enjoyment of human rights depends upon the right-holders. Meaning, it is the continuing claims made that would make the realization of rights plausible. The multiple filing of cases, continuous exploration of avenues and jurisdictions, and maximization of the use of media and internet technology in the case of Koh Kong sugar plantation is what the very concept of strategic human rights litigation is – the combination of litigation, fact-finding and advocacy. What is crucial, however, in strategic human rights litigation as shown in Koh Kong, is creating networks across the globe, or at least in the States where the TNCs are present. Moreover, sustaining actions is also important, as such cases take time and resources.

Although not the focus of the research, along the course of analysis, I was able to draw out some of the gains of the use of strategic human rights litigation in the case of Koh Kong. First, it was able to highlight the human right impacts of the EBA initiative in developing countries, such that, at the minimum, the European Union has commissioned NGOs to conduct a comprehensive human rights impact study, which was published in September 2013. Second, emphasis was put on the crucial roles the mechanisms of home states play especially in cases when the host states are unable to fulfil its human rights obligations. Thirdly, fact-finding and advocacy strategies generated the response of the UN in sending its representatives to report and assess the situation in Cambodia.

As a matter of personal reflection, being an advocate of the use of strategic human rights litigation, I was able to assess it in a manner that allowed me to take a step back and see the broader picture. For one, while the practice is aimed at changing the system, at the core of the strategy is still litigation, which works within the present system, hence, remains limited. By way of working within the system, the method, in fact, reinforces the system. For example, when the proceeding before the judicial system of Cambodia is failing, the strategy was to file the cases in the U.K. However, the U.K. civil law only allows for compensation. In effect, there is the recognition that the presence of the investment of the TNC in their land is inevitable, and the only recourse is to demand compensation thereof.

The outcome of this research also strengthened my bias that to change the system, you need more than actual litigation. And this is how strategic human rights litigation work. Actual experience in the limitations of the law and judicial system makes an advocate more passionate and credible to push forward a policy change that will serve the interest of the communities it is representing. The challenge is to translate the lessons, specifically within the business and human rights framework, into advocacy for a strengthened mechanism.

In this thread, it is my view that NGOs use strategic human rights litigation as a way to challenge the system. It may not change it at once, or may not even change it at all. However, as Ortner puts it, people have the urge to continuously look for ways to make or unmake a system that is constraining. On a personal vein, as an “alternative lawyer” who believes that the law can be a tool for social change, our work is defined by continuously seeking out means to challenge the system and establish laws and legal institutions that would benefit

those who are disadvantaged by the present order. As gleaned in the Koh Kong case, this includes exploring transnational standards and remedies through strategic human rights litigation. Needless to say, strategic human rights litigation will continue to develop and evolve as long as the system continues to impede the enjoyment of human rights. Until the full realization of human rights is accomplished, “alternative lawyers” like me will continue to challenge the system with the aim of finally putting an end to the struggle.

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