

## **Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry**

Annalisa Savaresi and Jacques Hartmann \*

### **Abstract**

The quest for remedies to address harm associated with the impacts of climate change has recently seen a surge in complaints based on human rights arguments. The use of human rights law as a tool to redress harm caused by climate change depends upon whether a victim can substantiate a claim that a duty bearer has contributed to climate change, in such a way as to amount to a human rights violation. Qualifying the effects of climate change as human rights violations, however, poses technical obstacles concerning causality, retrospectivity, attribution, as well as the provision of an adequate remedy. Yet, these obstacles are not insurmountable. As scientific knowledge improves, tracing causal connections between particular emissions and resultant harms is becoming less difficult. These arguments are being tested in the context of the so-called ‘Carbon Majors’ inquiry by the Human Rights Commission of the Philippines. The inquiry concerns the responsibility of a group of global corporations – dubbed the ‘Carbon Majors’ and including the likes of BP, Chevron, Exxon and Shell – for human rights violations or threats thereof resulting from the impacts of climate change. This paper looks at the Carbon Majors inquiry to critically appraise the role of human rights law in solving complex questions associated with responsibility for the impacts of climate change, until other areas of law raise to this challenge. The paper builds on the authors’ experience providing expert advice in the context of the Carbon Majors inquiry. The inquiry will therefore be used as a point of departure to unpack the questions concerning jurisdiction, causality, retrospectivity, and attribution associated with harm for the impacts of climate change.

---

\* Dr Annalisa Savaresi, Lecturer in Environmental Law, University of Stirling, UK. Email: [annalisa.savaresi@stir.ac.uk](mailto:annalisa.savaresi@stir.ac.uk). Dr Jacques Hartmann, Reader in Law, University of Dundee, UK. Email: [jhartmann@dundee.ac.uk](mailto:jhartmann@dundee.ac.uk). The authors gratefully acknowledge the inputs provided by Dr Ioana Cismas, Centre for Applied Human Rights, University of York, UK. The authors are grateful to Lisa Benjamin, Jolene Lin and to the participants of the workshop on *Climate Change Litigation in the Asia Pacific* held at the University of Singapore in June 2018 for comments on this draft. The usual disclaimers apply.

## 1. Introduction

With increasingly strong storms, droughts and wildfires, harm to persons, property and the environment associated with climate change has started to become manifest all around the world. The 2015 Paris Agreement acknowledges the need to tackle so-called ‘loss and damage’—encompassing various forms of permanent and irreversible impacts of human-induced climate change<sup>1</sup> – but has not delivered any concrete means to address this enormous problem, so far.<sup>2</sup> Yet, climate change is predicted to cause unprecedented damage, which is not adequately covered by extant liability and insurance schemes.

In 2007, Faure and Nollkaemper noted how it was unlikely that litigation would lead to decisions ‘whereby plaintiffs would be directly compensated for climate change damage suffered’.<sup>3</sup> More than a decade later, no court has found that particular emissions relate causally to adverse climate change impacts for the purpose of establishing liability. Still, recent years have witnessed a surge in climate change litigation all over the world,<sup>4</sup> including requests for compensation for harm associated with the impacts of climate change.<sup>5</sup> Through these test cases, litigants are pushing the boundaries of private, public, and administrative law to obtain redress for damage to persons, property and/or the environment associated with climate change. So far, only a few such cases have been argued on the basis of human rights law.<sup>6</sup> But, this paper maintains, human rights may be used as a ‘gap filler’ until other areas of law satisfactorily address the harm associated with the adverse impact of climate change.

The use of human rights law as a gap filler to provide remedies where other areas of the law do not is not new, especially in the environmental context.<sup>7</sup> Human rights remedies are not designed to redress environmental damage. They have, nevertheless, historically been used as an avenue to redress personal and property damage associated with pollution, especially where no other remedies are available. The issue is therefore to establish when they can be used in relation to the impacts of climate change, and how.

These questions are at the core of the so-called Carbon Majors inquiry by the Human Rights Commission of the Philippines. The inquiry was initiated at the request of a group of Filipino citizens and non-governmental organisations. The petitioners asked the Commission to investigate for the first time the responsibility of global corporations for human rights

---

<sup>1</sup> Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740, Art 8.

<sup>2</sup> MJ Mace and R Verheyen, ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ (2016) 25 *Review of European, Comparative & International Environmental Law* 197, 205–207.

<sup>3</sup> MG Faure and A Nollkaemper, ‘International Liability as an Instrument to Prevent and Compensate for Climate Change’ (2007) 26 *Stanford Journal of International Law* 123, 179.

<sup>4</sup> See the litigation database curated by the Sabin Centre at Columbia Law School: <<http://climatecasechart.com/>>.

<sup>5</sup> See e.g. *Sàul Luciano Lliuya v RWE AG*, pending in Germany. Lawsuits against the Carbon Majors have been lodged in the US, France and the Netherlands. See the reportage in <<https://www.climateliabilitynews.org/>>

<sup>6</sup> See the analysis in Annalisa Savaresi and Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries* 9 *Climate Law* 3 (forthcoming, 2019)

<sup>7</sup> The practice in this area has been the subject of much scholarly interest. See for example: AE Boyle and MR Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press 1998); AE Boyle, ‘Human Rights or Environmental Rights? A Reassessment’ (2007) 18 *Fordham Environmental Law Review* 471; D Shelton, *Human Rights and the Environment* (Edward Elgar 2011); AE Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 *European Journal of International Law* 613; DK Anton and D Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2012).

violations, or threats thereof, resulting from the impacts of climate change in the Philippines.<sup>8</sup> The petitioners lamented widespread human rights violations associated with the increasingly violent typhoons striking the Philippines, and drew on recent climate change attribution studies<sup>9</sup> to singles out 47 corporations – dubbed the ‘Carbon Majors’ and including the likes of BP, Chevron, Exxon and Shell – none of which is headquartered in the Philippines.

The inquiry differs from ongoing climate change litigation against corporate actors for two main reasons. First, it is being conducted by a national human rights commission –a quasi-judicial body normally tasked to look into domestic, rather than transnational, breaches of human rights. Second, the remedies that the Commission can offer to the petitioners are constrained by its limited capability to affect the behaviour of the Carbon Majors.

The fact that the Commission has decided to proceed with the inquiry is in and of itself groundbreaking, and has already demonstrated the potential to use human rights remedies available at the national level to give a voice and address the grievances of those affected by the impacts of climate change.<sup>10</sup> When the Commission issues its recommendations in 2019, the acknowledgment of the responsibility of the Carbon Majors for the impacts of climate change will be a primer, and could potentially engender domino effects, including, eventually, the provision of compensation by domestic courts.

This paper looks at the Carbon Majors inquiry to critically appraise the role of human rights law in solving complex questions associated with responsibility for the impacts of climate change. Building on the authors’ experience providing expert advice to the Philippines Human Rights Commission,<sup>11</sup> the paper uses the inquiry as a point of departure to unpack the questions concerning jurisdiction, causality, retrospectivity, attribution and the provision of an adequate remedy. The conclusion provides some reflections on the potential of and limits to the use of human rights remedies as a means to address the harm associated with the impacts of climate change.

---

<sup>8</sup> Republic of the Philippines Commission on Human Rights, Case No: CHR-NI-2016-0001, Petition requesting for investigation of the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change (2015).

<<http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf>> accessed 2 November 2018.

<sup>9</sup> The Carbon Majors petition relies on R Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010’ (2014) 122 *Climatic Change* 229. Subsequent studies have furthered Heede’s research. See: PC Frumhoff, R Heede and N Oreskes, ‘The Climate Responsibilities of Industrial Carbon Producers’ (2015) 132 *Climatic Change* 157; and B Ekwurzel and others, ‘The Rise in Global Atmospheric CO<sub>2</sub>, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers’ (2017) 144 *Climatic Change* 579.

<sup>10</sup> As argued in A Savaresi, I Cismas and J Hartmann, ‘EJIL: Talk! – The Philippines Human Rights Commission and the “Carbon Majors” Petition’ (22 December 2018) <<https://www.ejiltalk.org/the-philippines-human-rights-commission-and-the-carbon-majors-petition/>> accessed 2 November 2018.

<sup>11</sup> See A Savaresi, I Cismas and J Hartmann, ‘Amicus Curiae Brief: Human Rights and Climate Change’ (Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions 2017).

<[http://www.asiapacificforum.net/media/resource\\_file/APF\\_Paper\\_Amicus\\_Brief\\_HR\\_Climate\\_Change.pdf](http://www.asiapacificforum.net/media/resource_file/APF_Paper_Amicus_Brief_HR_Climate_Change.pdf)> accessed 2 November 2018.

## 2. Translating harm associated with the impacts of climate change into human rights grievances

In the last decade, the special relationship between climate change and human rights obligations has increasingly been recognised in the literature,<sup>12</sup> by the Parties to the climate regime,<sup>13</sup> and by human rights bodies.<sup>14</sup> A series of Human Rights Council (HRC) resolutions have stressed the potential of human rights obligations to ‘inform and strengthen’ climate change law- and policy-making by ‘promoting policy coherence, legitimacy and sustainable outcomes’.<sup>15</sup> John Knox, who served as the first UN Special Rapporteur on human rights and the environment between 2012 and 2018,<sup>16</sup> prepared a dedicated report on climate change, which clarified the framework of human rights obligation relating to climate change, mapping existing state practice.<sup>17</sup>

These developments clearly show that states and international mechanisms acknowledge the relevance of human rights law in the fight against climate change and in the implementation of climate change response measures,<sup>18</sup> and increasingly practice systemic integration in the interpretation of obligations under international climate change and human rights treaties.<sup>19</sup>

---

<sup>12</sup> See e.g. S Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2009); ‘Symposium: International Human Rights and Climate Change’ (2010) 38 Georgia J Intl & Comp L 511; L Rajamani, ‘The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change’, (2010) 22 JEL 391; S McInerney-Lankford, Mac Darrow and Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank 2011); O Quirico and M Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge 2015); S Duyck, S Jodoin and A Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018).

<sup>13</sup> Decision 1/CP.16, Cancun Agreements, FCCC/CP/2010/7/Add.1 (2011), Appendix I, 2 (a). Decision 1/CP.16, Cancun Agreements, FCCC/CP/2010/7/Add.1 (2011), Appendix I, 2 (a); and Paris Agreement, Preamble.

<sup>14</sup> HRC Res. 7/23, Human Rights and Climate Change, A/HRC/Res/7/23 (2008); Res. 10/4, Human Rights and Climate Change, A/HRC/Res/10/4 (2009); Res. 18/22, Human Rights and Climate Change, A/HRC/Res/18/22 (2011); Res. 26/27, Human Rights and Climate Change, A/HRC/Res/26/27 (2014); Res. 29/15, Human Rights and Climate Change, A/HRC/Res/29/15 (2015); Res. 32/33, Human Rights and Climate Change, A/HRC/RES/32/33 (2016); Res. 34/20, Human Rights and the Environment A/HRC/34/20 (2017).

<sup>15</sup> See HRC Res. 7/23, Human Rights and Climate Change, A/HRC/Res/7/23 (2008); Res. 10/4, Human Rights and Climate Change, A/HRC/Res/10/4 (2009); Res. 18/22, Human Rights and Climate Change, A/HRC/Res/18/22 (2011); Res. 26/27, Human Rights and Climate Change, A/HRC/Res/26/27 (2014); Res. 29/15, Human Rights and Climate Change, A/HRC/Res/29/15 (2015); Res. 32/33, Human Rights and Climate Change, A/HRC/RES/32/33 (2016); Res. 34/20, Human Rights and the Environment A/HRC/34/20 (2017).

<sup>16</sup> John Knox was initially appointed to serve as the Independent Expert (2012-2015) and subsequently as Special Rapporteur (2015-2018).

<sup>17</sup> OHCHR, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Focus report on human rights and climate change (2014); and OHCHR, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/31/52 (2016).

<sup>18</sup> For arguments concerning a rights-based approach to the implementation of the climate treaties, see S Duyck and others, ‘Human Rights and the Paris Agreement’s Implementation Guidelines: Opportunities to Develop a Rights-Based Approach’ (2018) 12 Carbon & Climate Law Review 191.

<sup>19</sup> As argued in A Savaresi, ‘Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages’ in S Duyck, S Jodoin and A Johl (12), 42; and A Savaresi ‘Human Rights and Climate Change’ in Tuula Honkonen and Seita Romppanen (eds): *International Environmental Law-making and Diplomacy Review 2018* (University of Eastern Finland, 2019) (forthcoming, 2019).

Human rights arguments have been successfully made in litigation concerning states' failure to mitigate climate change.<sup>20</sup> The scope to make human rights complaints in relation to the impacts of climate change, however, largely remains to be tested.

A 2009 report by the Office of the High Commissioner of Human Rights (OHCHR) cautioned that qualifying the effects of climate change as human rights violations poses a series of technical obstacles, concerning the jurisdiction to adjudicate human rights complaints associated with the impacts of climate change; how to attribute responsibility in terms of causality, retrospectivity, and apportionment; and what may be regarded as adequate remedies for human rights violations associated with the impacts of climate change.<sup>21</sup> Yet, recent litigation seemingly indicates that these obstacles may not be insurmountable. The historical contribution of state and non-state actors to greenhouse gas emissions causing climate change is increasingly well documented, and advances in scientific knowledge are making it easier to trace causal connections between particular emissions and the resulting harms.<sup>22</sup>

Even though conventionally greenhouse emissions are attributed to states, it is non-state actors that are largely responsible for causing emissions. Recent studies suggest that a group of global corporations are historically responsible for the lion's share of global greenhouse gas emissions.<sup>23</sup> These studies have prompted a surge in climate litigation against corporate actors, within and outside the US.<sup>24</sup> The responsibility of corporations for human rights breaches associated with climate change has also increasingly come under the spotlight, as a result.

As the grim judicial saga associated with the Bhopal disaster well exemplifies, however, it is often difficult to obtain redress for damage to persons, property or the environment caused by foreign corporate actors.<sup>25</sup> This is in spite of the fact that the 'polluter pays' principle is widely accepted in both international and national law,<sup>26</sup> that the law of several countries provides joint and several liability regimes, a reduced standard of proof,<sup>27</sup> and even regimes of absolute liability for ultra-hazardous activities, and of strict liability for professional activities.<sup>28</sup>

---

<sup>20</sup> See Savaresi and Auz (n 6).

<sup>21</sup> OHCHR, Report on the Relationship between Climate Change and Human Rights, A/HRC/10/61 (2009), 69-70.

<sup>22</sup> As argued also in: Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, JH Knox, A/HRC/31/52, 1 February 2016, paras 36-37.

<sup>23</sup> See R Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 *Climatic Change* 229; PC Frumhoff, R Heede and N Oreskes, 'The Climate Responsibilities of Industrial Carbon Producers' (2015) 132 *Climatic Change* 157; and B Ekwurzel and others, 'The Rise in Global Atmospheric CO<sub>2</sub>, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' (2017) 144 *Climatic Change* 579.

<sup>24</sup> In May 2019, the database of Sabin Centre database listed 22 such cases outside the US, but does not systematically report information concerning law suits within the US, which are instead widely reported in the press. See for example: <https://www.climateliabilitynews.org/category/exxon-climate-investigation/>.

<sup>25</sup> See U Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law*, 276 *Rec Des Cours* 297, 354-55 (1999).

<sup>26</sup> J Adshead, 'The Application and Development of the Polluter-Pays Principle across Jurisdictions in Liability for Marine Oil Pollution: The Tales of the "Erika" and the "Prestige"' 30 *Journal of Environmental Law* 1.

<sup>27</sup> E Feess, G Muehlheusser and A Wohlschlegel, 'Environmental Liability Under Uncertain Causation' (2009) 28 *European Journal of Law and Economics* 133, 137.

<sup>28</sup> Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, [2004] OJ L 143/56.

In all events, existing liability schemes scarcely seem fit to address harm associated with the impacts of climate change. As a matter of scale, climate change is predicted to cause unprecedented damage to property, persons and the environment.<sup>29</sup> This damage is predictable, but only to the extent that we know it will happen, not where and when. Thus, extant liability and insurance schemes need to be adapted in order to address the complex restorative and distributive justice considerations associated with the impacts of climate change.<sup>30</sup> Before this happens, human rights arguments may be used on an interim basis to fill in the gap.

Human rights are helpful in dealing with environmental matters, because they are widely recognised in both international and national law, as a set of basic rights and freedoms that belong to every person.<sup>31</sup> The obligations associated with the protection of human rights may be enforced both nationally and internationally against states and – to some extent - non-state actors,<sup>32</sup> and, in certain circumstances, in an extraterritorial context.<sup>33</sup> Some states and companies have resisted this understanding of the reach of human rights law, maintaining that states are the *sole* bearers of human rights obligations, which only protect those within a state's territory, or in another territory under its effective control.<sup>34</sup>

---

<sup>29</sup> Hoegh-Guldberg, O., et al. 'Impacts of 1.5°C Global Warming on Natural and Human Systems'. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Masson-Delmotte, V., et al (eds.) (IPCC, 2018)

<sup>30</sup> As argued e.g. in S Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change' (2005) 18 *Leiden Journal of International Law* 747; M Lee, 'Climate Change Tort' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2695107 <<https://papers.ssrn.com/abstract=2695107>> accessed 2 November 2018.

<sup>31</sup> The core international instruments include: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. Additional specialised international instruments include: International Convention on the Elimination of All Forms of Racial Discrimination (Adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 022 September 1990) 1577 UNTS 3.; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008). Finally, there are regional human rights treaties: African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; American Convention on Human Rights, (22 November 1969 into force 18 July 1978) 1144 UNTS 123; European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entered into force 3 September 1953) 2889 UNTS 221.

<sup>32</sup> See for example the arguments put forward in A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006). See also A Clapham, 'Human Rights Obligations for Non-State-Actors: Where Are We Now?' in F. Lafontaine and F. Larocque, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, (Intersentia, 2018). Available at <https://ssrn.com/abstract=2641390>.

<sup>33</sup> See e.g. M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011); K da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff, 2013); M Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, 2013).

<sup>34</sup> See e.g. Supplemental Amicus Briefs in Support of Neither Party (Kiobel II) in *Kiobel v. Royal Dutch Shell Petroleum Co, et al*, 621 F.3d 11 (2d Cir Sept 17, 2010) 12.

Recent developments in international,<sup>35</sup> regional<sup>36</sup> and national<sup>37</sup> law, however, clearly show that states are starting to hold companies accountable for human rights violations.<sup>38</sup> National and international judges are increasingly interpreting the law in a way to impose at least some human right obligations upon corporate actors.<sup>39</sup> Ongoing negotiations concerning transnational corporations and other business enterprises with respect to human rights may furthermore soon deliver the first international treaty explicitly recognising corporate obligations in this connection.<sup>40</sup>

The Carbon Majors inquiry provides an opportunity to see whether this evolving understanding of corporate human rights responsibility extends to the impacts of climate change. As a quasi-judicial body, the Philippines Human Rights Commission has no power to provide compensation to victims of human rights violations. Its inquiry is nevertheless faced with the same key questions concerning liability for the impacts of climate change, namely: causality, retrospectivity, attribution, as well as the provision of an adequate remedy. The next sections therefore look at how these matters have been addressed in the context of the Carbon Majors inquiry, thereby translating the complex liability questions associated with the impacts of climate change into human rights language.

### 3. Overcoming the hurdles

The suitability of human rights law to address harm caused by climate change depends upon whether a victim can substantiate a claim that a duty bearer has contributed to climate change, in such a way as to amount to a human rights violation. In the Carbon Majors inquiry, the petitioners must prove that they have suffered human rights violations, which are imputable to the Carbon Majors.

---

<sup>35</sup> See UNHRC Res 26/9 (2014) ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ A/HRC/RES/26/9, establishing the mandate of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. See also Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31, 2011 (UN Guiding Principles on Business and Human Rights).

<sup>36</sup> Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance OJ L330/1. See also Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (known as the ‘Malabo Protocol’) (adopted 27 June 2014, not yet entered into force), Art. 46.

<sup>37</sup> See e.g. *Décret n° 2012-557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale*. See the review of this and similar national laws in: Methven O’Brien C and Dhanarajan S, ‘The Corporate Responsibility to Respect Human Rights: A Status Review’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2607888 <<https://papers.ssrn.com/abstract=2607888>> accessed 15 May 2019

<sup>38</sup> A Clapham, Human Rights Obligations for Non-State Actors (n 32).

<sup>39</sup> See e.g. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No ARB/07/26, Award (2016); *Vedanta Resources PLC and another v Lungowe and others* (2019) UKSC 20.

<sup>40</sup> Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft, 16 July 2018, available at: <[www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf)> accessed 2 November 2018.

### 3.1 Attributing Responsibility

Determining a *prima facie* human rights violation associated with the impacts of climate change in the Philippines is relatively straightforward. Citing damage to property and persons associated with increasingly frequent mega-typhoons, the Carbon Mayors petitioners maintain that they have suffered violations of a range of human rights, most saliently the rights to life; the highest attainable standard of physical and mental health; food; water; sanitation; adequate housing; and self-determination.<sup>41</sup> Their contention that there is a link between the impacts of climate change and violations of these human rights is supported by numerous HRC resolutions and can be regarded as fairly uncontroversial.<sup>42</sup>

Determining *who* is to be held responsible for these human rights violations, however, is much more complex. Human rights law hinges on the obligations of states, as primary duty holders. While a body of human rights obligations relating to the environment certainly exists,<sup>43</sup> the obligation to protect human rights does not require states to prohibit all activities that may cause all instances of environmental degradation. Instead, states have discretion to strike a balance between environmental protection and other legitimate societal interests. However, as noted by Knox, states ‘must not strike an unjustifiable or unreasonable balance between environmental protection and other social goals.’<sup>44</sup> In assessing whether a balance is reasonable, national and international health standards may be particularly relevant, with a strong presumption against retrogressive measures. In addition to a general non-discrimination requirement, states owe specific obligations to members of groups particularly vulnerable to harm.<sup>45</sup>

States’ obligation to address environmental harm that interferes with the full enjoyment of human rights arguably extends to human rights violations caused by climate change impacts.<sup>46</sup> As not all states have ratified the same human rights treaties, their obligations may vary to a certain extent. Yet, the work of the UN Special Rapporteur has demonstrated that states have a set of core obligations in this connection. First, states have *procedural obligations* to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies.<sup>47</sup> Second, states have *substantive obligations* to adopt legal and institutional frameworks that protect against environmental harm interfering with the enjoyment of human rights.<sup>48</sup> Most

---

<sup>41</sup> Petition (n 9), p 7.

<sup>42</sup> See UNHRC Res 7/23, A/HRC/7/78, 29 March 2008; UNHRC Res 10/4, A/HRC/RES/10/4, 25 March 2009; UNHRC Res 18/22, A/HRC/RES/18/22, 17 October 2011; and UNHRC Res 26/27, A/HRC/RES/26/27, 15 July 2014.

<sup>43</sup> These obligations were recently compiled by the UN Special Rapporteur JH Knox in UNHRC ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2018) UN Doc A/HRC/37/59, ‘Annex: Framework principles on human rights and the environment’ para 33(c), available at <<http://legal.un.org/docs/?symbol=A/HRC/37/59>> accessed 2 November 2018.

<sup>44</sup> *ibid.*, para 33(e).

<sup>45</sup> UNHRC ‘Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2013) UN Doc A/HRC/25/53, paras 53 and 80.

<sup>46</sup> UNHRC ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2016) UN Doc, A/HRC/31/52, paras 50-54 and 72-73.

<sup>47</sup> UNHRC ‘Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2012) UN Doc A/HRC/22/43, paras 29-43.

<sup>48</sup> ‘Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (n 38), paras 44-68.



saliently for the present purposes, states must take measures to ‘prevent, punish, investigate or redress the harm caused [...] by private persons or entities’.<sup>49</sup> This state duty to protect the human rights of individuals and groups from corporate violations is well-established in the interpretative work of UN treaty bodies and UN special procedures, and in international case law.<sup>50</sup> Indeed, states ordinarily prevent, stop, obtain redress for, or punish third party interference through state regulation of private party conduct, inspection and monitoring of compliance, or administrative and judicial sanctions.<sup>51</sup>

Furthermore, the so-called business and human rights regime<sup>52</sup> consists of hard and soft rules under international and domestic law that regulate the relationship between the state, corporate entities and individuals. The regime hinges on the state duty to protect, the corporate responsibility to respect, and access to remedy – which form the three pillars of the UN Guiding Principles on Business and Human Rights,<sup>53</sup> unanimously endorsed by the Human Rights Council in 2011. Subordinate to the state’s binding obligation to protect and enforce, the Guiding Principles entail a ‘moral responsibility and societal expectation’<sup>54</sup> that corporations respect human rights ‘understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work’.<sup>55</sup>

Although they do not expressly stipulate corporate obligations, newer human rights treaties entail provisions that explicitly mention ‘private entities’ and the state duty to protect peoples from abuse by such entities.<sup>56</sup> These treaty provisions tie in to the dual requirement of the

<sup>49</sup> *ibid.*, paras 58-61. See also ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (n 43) para 3; and UNHRC ‘General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on states parties to the Covenant’ (2004), UN Doc CCPR/C/21/Rev.1/Add.13, para 8.

<sup>50</sup> For an overview of positive obligations in the case law of the European Court of Human Rights see J-F Akandji-Kombe *Positive Obligations under the European Convention on Human Rights* (Council of Europe: Human Rights Handbook no 7, 2007). In the Inter-American system, the stage for the development of positive obligations was set in the case *Velasquez-Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-AmCtHR (Ser C) No 4 (1988). In the African system, African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) Case No 155/96 is particularly relevant. Relevant concluding observations of UN treaty bodies include: UNHRC ‘Concluding Observations: Germany’ (2012) UN Doc CCPR/C/DEU/CO/6, para 16; Committee on the Elimination of Racial Discrimination, ‘Concluding Observations: The United Kingdom of Great Britain and Northern Ireland’ (2011) UN Doc CERD/C/GBR/CO/18-20, para 29, and ‘Concluding Observations: Australia’ (2010) UN Doc CERD/C/AU.S./CO/15-17. See also I Ziemele, *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies* (EUI Working Papers 2009/8).

<sup>51</sup> See International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (Geneva 2008), 45.

<sup>52</sup> This section of the paper draws on the reflections in: A Savaresi, I Cismas and J Hartmann, ‘Amicus Curiae Brief’ (n 11).

<sup>53</sup> UN Guiding Principles on Business and Human Rights (n 35).

<sup>54</sup> International Law Association, *Committee on Non-State Actors, Washington Conference Report* (2014), 12, available at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1023>> accessed 2 November 2018.

<sup>55</sup> UN Guiding Principles on Business and Human Rights (n 35) Principle 12.

<sup>56</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, Arts 4.e, 9.2.b, 20.d, 21.c; Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, Art 2.e.

business and human rights regime, with corporations acknowledging their corporate responsibilities and states ensuring compliance.<sup>57</sup>

This understanding is confirmed by recent interpretative work of treaty bodies and international jurisprudence.<sup>58</sup> For example, in General Comment No. 16, the Committee on the Rights of the Child addresses corporate bodies directly, seemingly as duty-bearers under the Convention on the Rights of the Child.<sup>59</sup> Equally, the 2016 arbitral award in *Urbaser v Argentina*<sup>60</sup> concluded:

At this juncture, it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by *an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights*.<sup>61</sup>

Other international courts have relied on the UN Guiding Principles to establish that businesses 'must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities'.<sup>62</sup>

Building on this basis, applicants in the Carbon Majors petition have asked the Philippines National Human Rights Commission to find that corporate actors are responsible for human rights violations associated with the impacts of climate change in the Philippines. In particular, the petitioners argued that the Carbon Majors have breached their responsibilities to respect the rights of Filipino 'by directly or indirectly contributing to current or future adverse human rights impacts through the extraction and sale of fossil fuels and activities undermining climate action'.<sup>63</sup>

### 3.2 Causation and retrospectivity

Under human rights law, victims are saddled with a less stringent burden of proof, when compared, for example, with tort law.<sup>64</sup> In this regard, the UN High Commissioner for Human Rights has specifically recommended that all States strike an appropriate balance between 'evidential burdens of proof between the claimant and the defendant company'.<sup>65</sup> Similarly,

---

<sup>57</sup> M Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States' in C Scott (ed), *Torture as Tort* (Hart 2001).

<sup>58</sup> See discussion in I Cismas and S Macrory, 'The Business and Human Rights Regime under International Law: Remedy without Law?' in J Summers and A Gough (eds) *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill 2018) 224-260.

<sup>59</sup> Committee on the Rights of the Child 'General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights' (2013) UN Doc CRC/C/GC/16, para 8.

<sup>60</sup> The company Urbaser was a shareholder in a concession for water and sewage services in the Province of the Greater Buenos Aires. The claimants alleged that Argentina's emergency measures at the time of the 2001-2 economic crisis caused the concession financial loss and ultimately insolvency. Urbaser started arbitration proceedings claiming breaches of the 1991 Bilateral Investment Treaty between Argentina and Spain. Argentina raised a counter-claim based on the claimants' 'alleged failure to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water.' *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) para 36.

<sup>61</sup> *ibid.*, para 1999 (emphasis added).

<sup>62</sup> *Case of the Kaliña and Lokono Peoples v. Suriname*, Inter-AmCt HR, Judgment, 25 November 2015 (Merits, Reparations and Costs), para 224. [emphasis added].

<sup>63</sup> Carbon Majors Petition (n 5 above) p .21.

<sup>64</sup> J Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (Martinus Nijhoff Publishers 1998) 182. See e.g. *Tatar C. v Roumanie*, App No 67021/01, (ECtHR 5 July 2007) paras 107-24.

<sup>65</sup> Report of the United Nations High Commissioner for Human Rights, Improving accountability and access to remedy for victims of business-related human rights abuse (10 May 2016), UN Doc. A/HRC/32/19, policy

the Committee on Economic, Social and Cultural Rights has noted how ‘shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant’.<sup>66</sup>

At the operational level, the corporate responsibility to respect translates into a duty of due diligence, which requires corporations ‘to identify, prevent, mitigate and account for how they address their adverse human rights impacts’.<sup>67</sup> Corporate human rights violations can result from environmental impacts, for example, related to health, including such impacts that have a ‘delayed effect’.<sup>68</sup> Corporations should in this connection rely on ‘established and quite precise international as well as national standards’ in undertaking due diligence in relation to these environmental impacts.<sup>69</sup>

When applied to the Carbon Majors, the corporate obligation of due diligence has two crucial elements. First, a growing body of research attributes the lion’s share of global emissions to the Carbon Majors.<sup>70</sup> Second, recent studies suggest that these corporations have long known that the production and use of their products contributes substantially to climate change, and to the related impacts.<sup>71</sup> Indeed, these studies allege that corporations knowingly advanced or deliberately promoted misleading information, casting doubt on the connection between fossil fuels and climate change.<sup>72</sup> It is therefore possible to argue, as the petitioners did, that, on the one hand, corporate actors had an obligation of due diligence, and, on the other, that they did not attend to this obligation, thus contributing to climate-related human rights violations in the Philippines and beyond.<sup>73</sup>

The issue of so-called retrospectivity does not seem to pose particular challenges in this connection. The fact that emissions took place, or at least started, at a time when corporations were unaware of their impacts is not in and of itself an obstacle to liability arguments.<sup>74</sup> In principle, it is possible to argue for responsibility for climate change ever since when widespread scientific consensus emerged, and certainly since the establishment of the Intergovernmental Panel on Climate Change and the adoption of the United Nations Framework Convention on Climate Change.<sup>75</sup> Similar to the tobacco industry, the Carbon Majors have long been aware of the risks associated with their actions, failed to inform the public of these risks, and to adopt measures to stop further harm and remedy harm already

---

objective 12.5. See also the Opinion from the European Union Agency for Fundamental Rights: <http://fra.europa.eu/en/news/2017/more-justice-victims-business-related-human-rights-abuses>. Accessed 2 November 2018.

<sup>66</sup> Committee on Economic, Social and Cultural Rights, ‘General Comment 24’ (2017) UN Doc E/C.12/GC/24.

<sup>67</sup> *ibid.*, Principle 17.

<sup>68</sup> UN Guiding Principles on Business and Human Rights (n 35) 8 and 53.

<sup>69</sup> *ibid.*

<sup>70</sup> See above (n 9).

<sup>71</sup> *Ibid.*

<sup>72</sup> This matter is currently being investigated in the US, in the context of the so-called Exxon climate investigation: <<https://www.climateliabilitynews.org/category/exxon-climate-investigation/>> accessed 2 November 2018.

<sup>73</sup> ‘Joint Summary of the Amicus Curiae Briefs to the Philippines Commission on Human Rights’ (Philippines Commission on Human Rights 2018) 59–60 <[www.ciel.org/reports/philippines-joint-amicus/](http://www.ciel.org/reports/philippines-joint-amicus/)> accessed 2 November 2018.

<sup>74</sup> Faure and Nollkaemper (n 3) 172.

<sup>75</sup> See e.g. RSJ Tol and R Verheyen, ‘State Responsibility and Compensation for Climate Change Damages – A Legal and Economic Assessment’ (2004) 32 Energy Policy 1109; Faure and Nollkaemper (n 3) 174.

caused.<sup>76</sup> The applicants in the Carbon Majors petition have asked the Philippines National Human Rights Commission to regard these elements as an indicator of reprehensibility, and to establish responsibility.<sup>77</sup> Similar arguments are being made against in ongoing investigation for fraud in the US against Exxon.<sup>78</sup>

### 3.3 Extraterritoriality

The Carbon Majors inquiry was initiated to ‘help establish a processes for hearing human rights victims especially with regard to transboundary harm, clarify standards for corporate reporting and help identify basic rights and duties relative to climate change.’<sup>79</sup> The decision to investigate human rights violations allegedly perpetrated by actors headquartered outside the Philippines, however, was not uncontroversial.

Some of the respondents challenged the Commission’s jurisdiction to hear the petition, arguing that ‘the jurisdiction of a state is limited only to the confines of its physical boundaries’.<sup>80</sup> They further suggested that the exercise of jurisdiction over foreign corporations is an ‘act of interference’ or ‘usurpation’ of other states’ sovereignty,<sup>81</sup> and ‘tantamount to an undue encroachment on the territorial jurisdiction and sovereignty of such other states where Respondents are domiciled and operate’.<sup>82</sup>

The petitioners tried to brush these objections aside, asserting that, since the Commission is not a court of law, the term jurisdiction ‘should not be construed and applied in the current inquiry’.<sup>83</sup> In practice, however, the use of the term ‘jurisdiction’ is not limited to courts of law, but is commonly applied to any body that exercises governmental powers, such as a court or administrative authority,<sup>84</sup> or indeed, as in the case of the inquiry, a quasi-judicial body, like the Commission.

---

<sup>76</sup> See also Martin Olszynski, Sharon Mascher and Meinhard Doelle, ‘From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability’ (2017) SSRN Scholarly Paper <<https://papers.ssrn.com/abstract=2957921>> accessed 30 January 2019.

<sup>77</sup> Carbon Majors Petition (n 5 above) p. 23. ‘Joint Summary of the Amicus Curiae Briefs (n 73) paras 59–60.

<sup>78</sup> As reported on 24 October 2018, <[www.climateliabilitynews.org/2018/10/24/new-york-attorney-general-exxon-climate-fraud/](http://www.climateliabilitynews.org/2018/10/24/new-york-attorney-general-exxon-climate-fraud/)> accessed 2 November 2018.

<sup>79</sup> Roberto Cadiz, ‘New Approaches to Climate Justice: Framing Climate Change as a Human Rights Issue in a Global Dialogue – Institute of Environmental Science for Social Change’ <<http://essc.org.ph/content/new-approaches-to-climate-justice-framing-climate-change-as-a-human-rights-issue-in-a-global-dialogue>> accessed 2 November 2018.

<sup>80</sup> See for the motion to dismiss filed by CEMEX in:

<[http://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate\\_Responses\\_and\\_Comments/Cemex\\_Response.pdf](http://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate_Responses_and_Comments/Cemex_Response.pdf)> accessed 2 November 2018, at 11.

<sup>81</sup> *ibid.*, 16.

<sup>82</sup> See for example the motion to dismiss filed by Shell in 2016, available at:

<[http://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate\\_Responses\\_and\\_Comments/Shell\\_Response.pdf](http://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate_Responses_and_Comments/Shell_Response.pdf)> accessed 2 November 2018, at 1.

<sup>83</sup> Petitioners’ consolidated reply to the respondent Carbon Majors in the National Public Inquiry being conducted by Commission on Human Rights of the Philippines, para 2.5, available at <[https://secured-static.greenpeace.org/seasia/ph/PageFiles/735291/Human\\_Rights\\_and\\_Climate\\_Change\\_Consolidated\\_Reply\\_2\\_10\\_17.pdf](https://secured-static.greenpeace.org/seasia/ph/PageFiles/735291/Human_Rights_and_Climate_Change_Consolidated_Reply_2_10_17.pdf)> accessed 2 November 2018.

<sup>84</sup> See e.g. M Akehurst, ‘Jurisdiction in International Law’ (1975) 46 *British Yearbook of International Law* 145, 178.

When announcing its decision to go ahead with the inquiry, the Commission was careful to specify that it was within ‘its constitutional mandate to investigate allegations of violations of human rights of the Filipino people’.<sup>85</sup>

The arguments concerning the Commission’s powers to look into the Carbon Majors’ responsibility for human rights violations in the Philippines merit further consideration.

States exercise jurisdiction over persons or events outside their territory as a matter of course.<sup>86</sup> The exercise of jurisdiction is generally accepted, as long as there is a clear connecting factor between the state exercising jurisdiction and the person or conduct that it seeks to regulate.<sup>87</sup> More specifically, neither prescriptive jurisdiction (i.e. the power to create, amend, or repeal legislation), nor adjudicative jurisdiction (i.e. the ability of national courts, tribunals, or other bodies exercising judicial functions to hear and decide on matters) is territorially limited to acts occurring within a state, whereas enforcement jurisdiction (i.e. the state’s right to enforce legislation, for example, by using powers of arrest and investigation) is.<sup>88</sup>

The Carbon Majors inquiry needs to fall within one of the established principles of jurisdiction, to be in accordance with international law. As we argued elsewhere, the most relevant principles in this connection are the territorial and the protective principles.<sup>89</sup>

The authority of states to exercise legislative or adjudicative jurisdiction over acts that take place in their own territory - also known as the *territorial principle*- is generally uncontested. In particular, the subjective territorial principle allows states to exercise jurisdiction over activities committed within that state, even if completed abroad. Conversely, the objective territorial principle allows a state to exercise jurisdiction over activities that are completed within its territory, even if initiated abroad. Both principles therefore allow states to regulate conduct with an extra-territorial element.

The territorial principle also allows states to exercise prescriptive and adjudicative jurisdiction whenever the effects of the relevant conduct occur in their territory. The so-called effects

---

<sup>85</sup> *ibid.*

<sup>86</sup> This section of the paper draws on the arguments made in Savaresi, Cismas and Hartmann (n 7) paras 9–22.

<sup>87</sup> See for example R Y Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’ (1957) 33 *British Year Book of International Law* 146, 146; FA Mann *The Doctrine of Jurisdiction in International Law*, vol 111 (Recueil des Cours 1964); M Akehurst, ‘Jurisdiction in International Law’ (n 84); DW Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’ (1983) 53 *British Yearbook of International Law* 1; FA Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, vol 186 (Recueil des Cours 1984); L Oppenheim and others, *Oppenheim’s International Law*, vol 1 (9th edn, Longman 1996) 456 ff.; R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) chapter 4; H Ruiz Fabri and J M Sorel (eds), *La Saisine Des Juridictions Internationales* (A Pedone 2006); J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, Oxford University Press 2012) chapter VII; M N Shaw, *International Law* (Cambridge University Press 2014) ch 12; and C Staker, ‘Jurisdiction’ in M Evans (ed), *International Law* (4th edn, Oxford University Press 2014). See also Third US Restatement of Foreign Relations Law, 1987, vol I, part IV.

<sup>88</sup> At times, states will nonetheless exercise enforcement jurisdiction extraterritorially, this is especially true during military operations. See e.g. J Hartmann, ‘Detention in International Military Operations: Problems and Process’ (2013) 52 *The Military Law and the Law of War Review* 304.

<sup>89</sup> See Savaresi, Cismas and Hartmann (n 11), 17–25.

doctrine gives states ‘leeway to unilaterally stretch the arm of their domestic laws in order to clamp down on harmful acts arising beyond their borders’.<sup>90</sup>

Already in 1945, in the *Alcoa* case, Judge Learned Hand noted:

It is settled law...that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders, which the state reprehends.<sup>91</sup>

The effects doctrine has been acknowledged by international tribunals in the *Lotus*<sup>92</sup> and in the *Arrest Warrant* case.<sup>93</sup> Currently, it finds wide application especially in relation to antitrust, tort, bribery and corruption, security, insolvency, and criminal law.<sup>94</sup> Accordingly, and contrary to what was suggested by some of the Carbon Majors, the territorial principle does not preclude states from regulating conduct or adjudicating in relation to actors outside their territory. Quite the opposite is true. The territorial principle provides ample scope for the Philippines authorities to exercise jurisdiction over conduct outside the territory of the Philippines. On this basis, the Commission could legitimately investigate complaints regarding human rights violations carried out by the Carbon Majors, as long as it is satisfied that the relevant conduct is either initiated, completed, or has effects in the Philippines.

Finally, the *protective principle* (also known as ‘competence réelle’) authorizes states to protect themselves by regulating and adjudicating in relation to conduct carried out abroad that may damage their essential security interests.<sup>95</sup> The principle applies regardless of the place of the conduct or the nationality of the alleged offender or victim. It was initially applied only in the context of criminal law, but since the 1980s numerous states have applied it more broadly.<sup>96</sup> It is generally accepted that the application of the protective principle can only be justified by the need to protect the essential or vital interests of the state, but there is little consensus on how these should be defined. States have relied on the protective principle on several occasions to ensure environmental protection. Both the United States and Canada have, for example, relied on the protective principle to exercise their prescriptive jurisdiction over instances of pollution in the high seas, through the 1970 Arctic Water Pollution Prevention Act and the 1990 Oil Pollution Act, respectively.<sup>97</sup> Accordingly, the protective principle provides scope for the exercise of jurisdiction over conduct outside its territory, and for the Commission to assert its

---

<sup>90</sup> C Ryngaert, ‘Jurisdiction Towards a Reasonableness Test’ in M Langford (ed), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 194.

<sup>91</sup> *US v. Aluminium Co of America*, 148 F 2d 416, 443 (2d Cir 1945), para 118.

<sup>92</sup> *SS Lotus Case*, 1927 PCIJ (ser A) No 10, 23.

<sup>93</sup> *Arrest Warrant* 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, 2002 ICJ Rep 3, 63, Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal.

<sup>94</sup> See International Bar Association, Report of the Task Force on Extraterritorial Jurisdiction (2009).

<sup>95</sup> I Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth 1994).

<sup>96</sup> See e.g. E Rehinder, ‘Extra-Territoriality of Pollution Control Laws from a European Perspective’ in G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 127–135 and J R Nash, ‘The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws’ in G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012) 163.

<sup>97</sup> RB Bilder ‘The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea’ (1970) *Sea*, 69 Mich L Rev 1; Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Cambridge University Press, (Cambridge University Press P 2007), 32.

jurisdiction to consider complaints related to human rights violations carried out by foreign corporations, as long as it is necessary to protect essential or vital interests of the Philippines.

To conclude, even though the Commission did not elaborate on which jurisdiction principles it relied on – and indeed did not need to, as, in accordance with the well-established doctrine of *compétence de la compétence*, it is for the Commission to determine the scope of its own mandate<sup>98</sup> – its decision to carry out the Carbon Majors inquiry implicitly relied on one or the other. In this connection, the very fact that the inquiry is taking place has already marked an important milestone, by demonstrating that national human rights institutions may look at the responsibilities of corporations, even when these are not headquartered in the territory of the state where the investigation takes place, as long as the exercise of their powers can be justified under one of the principles of jurisdiction.<sup>99</sup>

#### 4. Conclusion

The Paris Agreement set out to address the matter of loss and damage caused by climate change, but, at least for the time being, its Parties have excluded using it as a means to establish liability for climate change impacts.<sup>100</sup> Even though no inter-state litigation has taken place, or is likely to take place for the foreseeable future, there has been a marked intensification of litigation concerning the impacts of climate change at the domestic and at the transnational level.

This paper has shown that human rights law arguments are playing a small but not insignificant role in this litigation, and potentially lend themselves to holding to account corporations for the impacts of climate change. Historically human rights law has on several occasions been used as a gap filler to supply remedies where none are available. In this connection human rights remedies may be used to supplement regulatory action to change behaviour, and to help address restorative and distributive justice questions associated with climate change impacts.

Should the Philippines Human Rights Commission acknowledge that the Carbon Majors are responsible for the impacts of climate change, it would mark a milestone in the history of climate change litigation worldwide. The Commission's findings may furthermore help to set the contours of corporate due diligence obligations in relation to climate change, including in the extraterritorial context.

This is however an area where human rights law also presents clear limitations. Even when the matters of causation and attribution are resolved, human rights remedies are often merely declaratory in nature and rarely provide avenues to claim for compensatory damages. Human rights law typically provides declaratory relief to name and shame human rights abusers, but offers limited, if any, compensatory relief, or means to deter further harm. The Philippines Human Rights Commission is a case in point. Its powers are largely limited to declaratory relief and rest with the domestic authorities' limited capability to affect the future behaviour of the Carbon Majors.

In conclusion, human rights law remedies are no replacement for a dedicated form of liability

---

<sup>98</sup> As argued also in Savaresi, Cismas and Hartmann (n **Error! Bookmark not defined.**), 4.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid., para 51.

for climate change impacts. Yet, past experience shows that successful human rights complaints can help to bring about a change in attitude by courts and lawmakers.<sup>101</sup> In this connection, the use of human rights law remedies can contribute to engendering a shift in legal culture to deal with one of the most intractable challenges facing humankind. The fact that this has not happened yet, does not mean that it cannot happen in future. In this, as well as in many other such instances before, where there is a will there is a way.

---

<sup>101</sup> As suggested for example in Boyle, 'Human Rights and the Environment' (n 7) 642.