Republic of the Philippines Commission on Human Rights
CHR-NI-2016-0001 In Re: National inquiry on the impact of climate change on the human rights of the Filipino People

Statement of Resource Person: Dr Margaretha Wewerinke-Singh, Assistant Professor, Grotius Centre for International Legal Studies at Leiden University*

I am honored to provide this statement, and to appear via video-link before the Philippine Commission on Human Rights as part of its final public hearing (11-12th December 2018). The petitioners have invited me to serve as an independent resource person to the Commission, and to share my expertise on *a Climate Compensation Act that clarifies the principles of liability for large-scale greenhouse gas emitters, and which could be enacted by countries around the world.* A copy of my Curriculum Vitae is appended to this statement.

The first part of my statement discusses the right to a remedy under international human rights law, drawing on my book *State Responsibility, Climate Change and Human Rights under International Law* (forthcoming with Hart Publishing). In the context of climate change, one way in which States can give effect to the right to a remedy is through a Climate Compensation Act. The second part my statement therefore concerns the possible form and effect of a Climate Compensation Act.

I. The Right to a Remedy

The widespread destruction and loss of life resulting from typhoon Yolanda illustrates the massive implications of climate change for the enjoyment of human rights in the Philippines. International human rights law is *prima facie* relevant to climate change because its impacts, as well as measures to respond to climate change, have consequences for the enjoyment of internationally recognised human rights. Indeed, the link between climate change and human rights has been articulated in multilateral forums, by various human rights treaty bodies,[1] and by the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC).[2] The United Nations Human Rights Council has now

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* I am grateful to Sarah Mead for her assistance with preparing this statement.

[1] See, eg: UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change (UN Doc CEDAW/C/GC/37, 7 February 2018); CEDAW, Statement of the CEDAW Committee on Gender and Climate Change, adopted at 44th Sess held in New York, USA, from 20 July to 7 August 2009; African Commission on Human and Peoples' Rights (ACHPR), 'Climate Change and the Need to Study Its Impacts on Africa', ACHPR/ Res153 (XLVI)09, adopted at the 46th Ordinary Session (25 Nov 2009); ACHPR, 'Climate Change in Africa', ACHPR/ Res271, adopted at the 55th Ordinary Session (12 May 2014); ACHPR, 'Climate Change and Human Rights in Africa', ACHPR/Res342 (LVIII), adopted at the 58th Ordinary Session (20 April 2016); Inter-American Commission for Human Rights, 'IACHR Concludes Its 141st Regular Session' available at www.cidh.oas.org/Comunicados/English/2011/28-11eng.htm.

[2] United Nations Framework Convention on Climate Change (UNFCCC), 'Paris Agreement' (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev.1 (Paris Agreement), preambular para 11 (stating that that Parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development') and UNFCCC, *Decision 1/CP.16*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) preambular

adopted a total of eight resolutions on human rights and climate change[3] and held several seminars and panel discussions on the topic. The Human Rights Council has also encouraged its Special Procedures mandate-holders to consider climate change as part of their respective mandates.[4] Several of them have since published reports on issues relating to climate change, and a group of mandate-holders issued a joint letter, statements and a report to highlight the importance of integrating human rights into climate action.[5]

The increasing engagement of human rights bodies in climate action underscores the importance of States' human rights obligations in the face of climate change. From a doctrinal perspective, these obligations follow from an interpretation of human rights treaties in light of their object and purpose.[6] Taking the object and purpose of human rights treaties into account in the interpretation of their provisions allows a dynamic reading of human rights instruments, so that human rights law retains its relevance in a changing world—and indeed a changing climate.[7]

The technique of purposive interpretation specifically requires that human rights treaties be interpreted and applied in a way that makes its safeguards practical and effective.[8] This is often referred to as the principle of effectiveness (or, in the words of the European Court of Human Rights, *'effet utile'*).[9] In general international law it is known as the principle *ut res magus valet quam pereat*.[10] As noted by commentators, the principle of effectiveness is 'nothing very exotic in international law'[11] and exists as a cross-cutting principle across different fields of law. In international human rights law, however, the principle acquires a specific meaning. Its effect on treaty interpretation is generally that in cases of doubt as to the meaning of a treaty provision, its interpretation should favour the protection of the substantive

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para 7 (quoting from UN HRC Res. 10/4) and ch I, para 8 (stating that 'States should, in all climate change-related actions, fully respect human rights').

3 Human Rights Council Resolutions 7/23, (UN Doc A/HRC/7/78, 14 July 2008); 10/4 (UN Doc A/HRC/10/L.11, 12 May 2009); 18/22 (UN Doc A/HRC/18/22, 28 September 2011); 26/27 (UN Doc A/HRC/26/27, 23 June 2014); 29/15 (UN Doc A/HRC/29/15, 30 June 2015); 32/33 (UN Doc HRC/32/33, 28 June 2016); 35/20 (UN Doc A/HRC/35/20, 19 June 2017) and 38/4 (UN Doc A/HRC/38/4, 2 July 2018), all titled 'Human Rights and Climate Change'.

4 See resolutions 10/4, para 3; 26/27 para 8; 29/15 para 7.

5 These reports, letters and statements are available at www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/ClimateChange.aspx.

6 M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1st edn, NP Engel Publisher 1993), XXIV.

7 See ibid, 65; D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford, Oxford University Press, 2002) 53.

8 N Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002). See also: D Nguyen, P Daillier and A Pellet, *Droit International Public*, 7th edn (Paris, Librairie Générale de Droit et de Jurisprudence, 2002) 264; D Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis' (2010) 79 *Nordic Journal of International Law* 245.

9 See, eg: *Airey v Republic of Ireland* Series A no 32 (1979) 2 EHRR, 305; *Artico v Italy* Series A no 37 (1980) 3 EHRR 1, para 33; *Soering v UK* (1989) Series A no 161, 11 EHRR 439; *Ireland v United Kingdom*, para 239.

10 JP Grant and CJ Barker (eds), *Encyclopaedic Dictionary of International Law*, 3rd edn (New York, Oxford University Press, 2009). See also: *Interpretation of the Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion (Second Phase)* [1950] ICJ Reports 65, 229; and *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Reports 4, 24–26.

11 D Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis' (2010) 79 *Nordic Journal of International Law* 245, 276.

rights protected in the treaty *(in dubio pro libertate et dignitate*).[12] Moreover, the principle of effectiveness reinforces the important maxim *Ubi jus ibi remedium:* where there is a right, there is a remedy[13]—a maxim that appears in Roman and Dutch law and that has also long been recognised in common law systems.[14]

International human rights law accommodates the right to a remedy as a substantive right.[15] The right is protected under customary international law,[16] and expressed in human rights treaties in various forms. Most treaties guarantee both the right of access to procedures through which claims of human rights violations are heard, and a substantive right to redress.[17] The International Covenant on Civil and Political Rights (ICCPR)[18] in particular contains comprehensive provisions on remedies in three separate articles. The broadest of these is Article 2(3) which spells out the obligations of State parties to the Covenant to ensure that any person whose rights are violated shall have an 'accessible, effective and enforceable' remedy.[19] The right to a remedy exists not only *ex post facto* but also when there is a threat of a violation,[20] and is intertwined with the principle of effectiveness. An example of this is the understanding of the African Commission on Human and Peoples' Rights (ACHPR) that "The rights and freedoms of individuals enshrined in the [African Charter on Human and Peoples' Rights] can only be fully realized if governments provide structures which enable them to seek redress if they are violated".[21]

The right to a remedy comprises victims' entitlement to procedural and substantive redress. Where it is not certain whether an individual qualifies as a victim of a human rights violation, uncertainty should be addressed in accordance with the human

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[12] M Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhof 2003) 65–66. See also: A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529, 535.

[13] H Black, *Black's Law Dictionary*, 6th edn (Saint Paul, Springer, 1990) 1294. The entry adds that 'it is said that the rule of primitive law was the reverse: Where there is a remedy, there is a right.' For a discussion on its relation to the principle of effectiveness see Alistair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004) 3, 170, 221.

[14] H Black, *Black's Law Dictionary*, 6th edn (Saint Paul, Springer, 1990) 1120.

[15] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 43; *Ahmadou Sadio Diallo (Guinea v DRC) (Judgment)* [2010] ICJ Reports 639; *Velásquez Radríguez v Honduras* (1988) IACtHR (Ser C) no 4.

[16] See: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, (16 December 2005), Annex, Principles 1(b), 2, 3 and (pertaining to gross violations of international human rights law and international crimes) 11. See also: D Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press , 2005) 103 (noting that '[t]he decision to afford a domestic remedy formerly was left to the discretion of the wrongdoing State, subject to the vague and uncertain doctrine of denial of justice. Today, human rights law requires States to afford an effective remedy for any violation of rights').

[17] For an overview of global and regional human rights treaties that incorporate the right to a remedy see: D Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press , 2005) 113-20. See also: J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, Commentaries* (Cambridge University Press 2002) 95, paras 3-4.

[18] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The Philippines ratified the ICCPR on 23 October 1986.

[19] For a discussion of the evolution of the Human Rights Committee's position on the right to a remedy see generally: M Scheinin, 'The Human Rights Committee's Pronouncements on the Right to an Effective Remedy: An Illustration of the Legal Nature of the Committee's Work under the Optional Protocol' in Nisuke Ando (ed), *Towards Implementing Universal Human Rights* (Leiden, Martinus Nijhoff, 2004) (esp. 101-103). See also: D Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press , 2005) 50.

[20] D Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press , 2005) 104ff.

[21] *Jawara v The Gambia* (Communications 147/95, 149/96 74).

rights principle *in dubio pro libertate et dignitate*. In the face of climate change, it is important to note that States—especially developing States—are unlikely to be able to provide adequate and effective remedies to all victims of climate change. It is therefore crucial to recognise the role of oil, gas, coal and cement companies that have contributed most to anthropogenic climate change and its adverse effects.[22] Extending accountability for human rights violations to private persons or entities is in line with well-established human rights law.[23] The remainder of this statement considers how changes in the domestic laws of the Philippines could enhance victims' access to legal redress from those private actors that have contributed most to anthropogenic climate change and its adverse effects.

II. Climate Compensation Act

One particularly promising way in which States can give effect to the right to a remedy in the context of climate change is through a Climate Compensation Act. The purpose and form of a Climate Compensation Act is canvassed in detail in a report co-authored by Mr. Andrew Gage and myself titled *Taking Climate Justice into our own Hands: A Model Climate Compensation Act* (December 2015). A copy of this report, which includes a draft Model Climate Compensation Act, is appended to this statement. To inform the deliberations of the Philippine Commission on Human Rights regarding the potential utility of a Climate Compensation Act in the Philippines, a summary of that report is included in this part.

a. The national need for a Climate Compensation Act

A Climate Compensation Act would make clear the legal consequences for the failure on the part of major fossil fuel polluters to reduce greenhouse gases. Fossil fuel companies have for some years now knowingly caused hundreds of thousands of deaths and billions of dollars' worth of damages to individuals, communities and governments, with massive and detrimental consequences for the enjoyment of human rights. By establishing the legal rules associated with these consequences, the Act aims to provide an avenue for citizens and/or governments to hold global fossil fuel companies accountable for the harm that their products have caused or are causing through their own courts and tribunals. Such an Act would send a powerful message to fossil fuel corporations around the world by countering the assumption that corporations can continue to profit from greenhouse gas emissions—while shifting the costs to local communities.

The Model Climate Change Compensation Act, depending on one's interpretation of the law, either clarifies the law related to climate change litigation or alters the law to make climate litigation possible. In some countries, existing laws and legal principles may be sufficient to claim compensation for climate change damages. A Climate Compensation Act however would enable such claims to be resolved more

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[22] B Ekwurzel and others, 'The Rise in Global Athmospheric CO2, Surface Temperature, and Sea Level from Emissions traced to Major Carbon Producers' (2017) 144(4) *Climatic Change* 579.

[23] See eg *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (29 March 2004) UN Doc CCPR/C/21/Rev1/Add 13, UNHRC, para 8; *Annakkarage Suranjini Sadamali Pathmini Peiris v Sri Lanka* (2011) UNHRC Communication No 1862/2009, UN Doc CCPR/C/103/D/1862, para 7.2; *Velásquez Radríguez v Honduras* IACtHR Series C no 4 (1988); 95 ILR 232.

quickly and cheaply. A Climate Compensation Act—such as that proposed—could protect the rights of the victims of climate change while providing much-needed clarity to the companies and entities that contributed most to the harm.
The case for a Climate Compensation Act is based on two important concepts. Firstly, it has never been legal to knowingly destroy property, lives, and, indeed, entire nations—either in international law or national law. Secondly, a country has legal authority over harm that occurs within its borders, even if the causes of that harm are global.

Enacting a new law to change the rules of liability and compensation to ensure that the law achieves (in the view of the legislator) a more just, equitable or efficient result is not new. Legislation passed in the 1990s in relation to tobacco companies provides a valuable point of reference. Such legislation, passed in Florida and certain Canadian provinces, sought to change the rules for liability in lawsuits against tobacco companies. The Tobacco Damages Act 1997 passed by British Columbia, for instance, "allowed the government to recover damages on behalf of the health care system, allowed the award of damages where a defendant's actions had increased the risk of an outcome, and dealt with the apportionment of liability between parties".[24] The ability of Canada's provinces to enact this type of legislation, notwithstanding the impacts of such legislation on international companies, was subsequently upheld by the Supreme Court of Canada.[25] Moreover, some jurisdictions have recently passed legislation related to climate-related litigation. Among these is Kenya's 2016 Climate Change Act, which allows citizens to sue private and public entities that frustrate efforts to reduce the impacts of climate change.[26]

Before enacting a Climate Compensation Act, it is necessary to consider the political and economic consequences that might arise as a result, including the consequences for the enjoyment of economic, social and cultural rights. These will vary considerably from country to country. The Philippines, however, would need to seriously consider the potential implications on its economy and the international pressure it might come under were it to seek climate damages from major foreign-based fossil fuel corporations. At the same time, it must be born in mind that the right to a remedy is an inalienable human right of all Filipinos and that the Philippines has undertaken international obligations to ensure this right.

b. Legal basis for a Climate Compensation Act

A Climate Compensation Act raises various complicated legal questions. As will be shown below, however, these can be addressed with reference to existing and well-established legal principles.

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[24] A Gage and M Byers, *Payback Time: What the internalization of climate litigation could mean for Canadian fossil fuel companies* (Vancouver, Canada, West Coast Environmental Law 2014) 35.

[25] *Imperial Tobacco v BC*, 2005 SCC 49. See also the discussion regarding Singapore's 2014 *Transboundary Haze Pollution Act* of A Gage and M Wewerinke, *Taking Climate Justice into our Own Hands: A Model Climate Compensation Act* (December 2015), at 9 (appended).

[26] Climate Change Act (Kenya), No 11 of 2016, available at http://kenyalaw.org/lex/actview.xql?actid=No.%2011%20of%202016 accessed 2 December 2018.

A. Cause of action: On what basis can a claim for climate-related damages be brought?

Key to any climate compensation legislation is the identification of legal rights that can form the basis of a lawsuit for climate-related damages.[27] The Climate Compensation Act provides for lawsuits on the basis of the common law concept of "nuisance". Nuisance is a common law tort (or delict), which is a recognized category of legal wrong for which a court will provide a remedy.[28] A "public nuisance" arises when there is an interference with the rights and interests of the public. In relation to climate change, the right in question is the public right to a healthy atmosphere. International human rights law and human rights protected under the Constitution of the Republic of the Philippines consolidate this right.

Under the Model Climate Compensation Act, interference with the health of the global atmosphere is a nuisance, and an action may be brought where such interference causes harm within the country that has enacted the Act. Specifically, the Act provides that: "The alteration of the health and composition of the global atmosphere to a measurable degree and in a manner that causes or may cause harm in [country] violates the right [to a healthy global atmosphere] and is a significant contribution to Climate Change, and as such constitutes a public nuisance" (s. 4(2)).

B. Jurisdiction: what is the basis for the court to hear a claim for climate-related damages?

In most cases, the question of *where* a tort takes place is straightforward, as both the action giving rise to the harm, and the actual harm, occur in close proximity. However, this is not the case with climate-related harm, where the cause and harm associated with the tort usually cross geographic boundaries—making the location of the tort "both ambiguous and diverse."[29]

In relation to climate-related harm, it is therefore necessary to consider what basis a domestic court, such as a Filipino court, would have to hear a claim for damages arising from climate change. While there is nothing preventing the Philippines from simply declaring its jurisdiction over climate change (subject to constitutional restraints), that broad authority is unlikely to be recognized by other countries. To the extent that the Philippines is going to need help to enforce climate-related orders, it is therefore preferable to ground the jurisdiction on more a broadly recognized legal principles under what is known as "private international law." Private international law—the body of rules used to resolve legal disputes between private individuals who cross international boundaries—thus forms the basis of the jurisdictional provisions of the Model Climate Compensation Act.

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[27] International Bar Association Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association 2014), 128: "identification of actionable rights available to individuals."

[28] A tort has been defined as: "Wrong ; injury; … In modern practice, tort is constantly used as an English word to denote a wrong or wrongful act, for which an action will lie, as distinguished from a contract. A tort is a legal wrong committed upon the person or property independent of contract". http://thelawdictionary.org/tort/, accessed 1 December 2018.

[29] M Keys, 'Substance and procedure in multistate tort litigation', (2010) 18(3) *Torts Law Journal* 205.

Courts are frequently required to consider situations where the tortious act, and the associated harm, occur in different jurisdictions.[30] In such cases, it will be necessary to show that there is a direct connection between the case and the legal system in which it is brought—either by way of the subject of the case (subject matter jurisdiction) or the parties (personal jurisdiction). Generally speaking, in respect of a tort claim against international defendants that are not present within the jurisdiction, a court will have jurisdiction where (a) the tort (legal wrong) occurred in that country; and/or (b) where the tort claim involves harm to real property that is situated in that country.[31]

Drawing on these already established legal principles, the Model Climate Compensation Act explicitly asserts that a national court has jurisdiction over climate-related damages occurring within its national boundaries. Specifically, it provides that the national court has jurisdiction in civil proceedings brought in relation to climate-related damages where "(a) the damages occurred within [country]; (b) the damages were caused in whole or in part by climate change and its impacts; and (c) there is, on its face, a claim that the defendant has committed a climate-related tort under this Act or the common law" (s. 19).

C. Plaintiffs: who can sue for what climate-related damages?

Another question in climate change litigation concerns *who* can bring a claim—or, as the courts put it, who has "standing" to appear before the courts. The basic rule for standing in claims for damages, in most common law countries, is that a person must show some direct interest in the case—usually in the form of the damage that they have suffered to their legal rights.

The Model Climate Compensation Act adopts an inclusive approach to standing, with provisions providing that a climate lawsuit can be brought by governments, local and (where appropriate) indigenous governments, and individuals. To prevent multiple claims being brought against the same defendant, the Act creates a hierarchy between potential claimants, drafted in such a way that a lawsuit on behalf of the public in respect of particular climate damages will preclude other levels of government and individuals from bringing a lawsuit in respect of the same damage.

D. Defendants: who can be sued for climate-related damages?

As for who can be sued, it is necessary to consider what parties it is fair and reasonable to hold legally responsible for causing climate damages. Most people and countries are responsible for contributing to climate change to some extent. Certain private entities have, however, either directly or indirectly caused massive greenhouse gas emissions and have profited considerably from the fact that the costs of the use of their products have not recognized the associated climate impacts—while also actively seeking to prevent national and international regulation of

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[30] For instance, this can arise in cases related to negligent advice given or in a claim for defamation. For further, see A Gage and M Wewerinke, *Taking Climate Justice into our Own Hands: A Model Climate Compensation Act* (December 2015), 12-13 (appended).

[31] A host of examples are provided in the report appended, A Gage and M Wewerinke, *Taking Climate Justice into our Own Hands: A Model Climate Compensation Act* (December 2015), 14-15.

greenhouse gas emissions.[32] Therefore, while we may all be responsible for climate change, some of us are more responsible than others.

In light of this, the Model Climate Compensation Act sets out a wide range of potential defendants that might be responsible for large-scale greenhouse gas emissions, from fossil fuel companies to vehicle manufacturers.[33] To ensure that it is effective in targeting those most responsible for climate change harm, however, the Model Act limits liability to those defendants that are "Major Emitters" in the sense that their impact on the global atmosphere is detectable. Specifically, the Model Act provides that: "An emitter will be considered a Major Emitter when the greenhouse gases for which they are directly or indirectly responsible under any or all of the categories described in subsection (1): (a) are of such a magnitude that they are globally or regionally detectable over a five-year period; or (b) over a five-year period cause a 0.1 ppm rise in global CO2e concentrations" (s. 8(2)).

This approach—which focuses on assigning legal responsibility to those most responsible—is consistent with how common law has previously dealt with multiple polluters.[34]

E. Causation: what rules apply to determining whether a Defendant's actions have caused a particular climate-related damage?

'Causation' is frequently considered one of the most significant barriers to successful climate damages litigation. Causation refers to the rules that determine whether a defendant's actions are sufficiently connected to the alleged harm. In the context of climate change, causation presents difficulties because the relationship between the activity and the harm is not direct. Despite this, the Model Act does not introduce major changes to the common law rules of causation. It provides that "evidence that climate change has doubled the likelihood of that type of event occurring will be sufficient to show on a balance of probabilities, that the event has been caused by climate change" (s 10(1)). Towards determining this, the court can have regard to scientific and statistical information or modelling, historical experience and information derived from relevant studies (s. 10(1)). The Act also confirms that expenses reasonably incurred to adapt to, or prepare for, expected changes resulting from climate change, including costs not yet incurred, are expenses "caused by" climate change (s. 10(3)).

While the Model Act adopts the existing principles of causation in common law, it is ultimately for the legislator to determine the applicable standard. The Kenya Climate Change Act is interesting insofar as it establishes a lenient standard of liability (s 23(3)), based on wrongful conduct rather than proof of actual loss or

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[32] See eg N Oreskes and E Conway, *Merchants of Doubt* (Bloomsbury 2010). Recent revelations that Exxon Mobil's own scientists warned the company as early as 1978 of the threats posed by climate change. See https://insideclimatenews.org/news/23092015/ExxonMobil-May-Face-Heightened-Climate-Litigation-Its-Critics-Say, accessed 1 December 2018.

[33] This is consistent with the approach adopted in the United States *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), 42 U.S. Code § 9607 — Liability.

[34] See A Gage, 'Climate Change Litigation and the Public Right to a Healthy Atmosphere', (July 2013) 24 J Env L & Prac 257, 275-279; see *Wood v Waud*, 3 Exch 748 at 775, per CJ Baron Pollock at 772.

injury.[35] The benefit of adopting the existing law as it relates to causation however is that it ensures a balance between the rights of plaintiffs and defendants at the procedural level, and thereby ensures the credibility of the Act. Moreover, scientific evidence is increasingly able to make at least statistical links between climate change and particular types of weather events and other impacts—making it possible to establish causation between certain activities and harm suffered.

F. Remedies and enforcement: what types of orders for damages or other remedies might a court make, and how can these orders be enforced?

Any Climate Compensation Act must address the types of orders that the court may give in climate damages litigation. In this regard, the Model Climate Compensation Act provides for both the awarding of damages for climate-related harm, along with other remedies that the court may order. Among the options available for a court is an order for compensation to be paid to a Climate Compensation Fund established by the Act—for instance where the order relates to adaptation-related expenses that have not yet been incurred.

Given that the damage caused by climate change is caused by various actors, the Model Climate Compensation Act is also concerned with how damages will be apportioned between multiple possible defendants. Rather than adopting a 'joint and several liability' approach—which may result in one major emitter being held responsible for the full costs of climate change—it adopts a 'proportional contribution' approach. This means that a company which is responsible for 2% of GHG emissions should be responsible for 2% of the damages caused by climate change. Where there is an issue of 'overlapping responsibilities' between major emitters, both can be jointly and severally liable for these emissions (and only such emissions).

For a Climate Compensation Act to have 'teeth', it is necessary that any orders made under it are enforceable. Assuming that the order is made against a fossil fuel company, this will likely require international enforcement, i.e. in the country where the company is based. In many countries around the world, once a judgment for damages has been obtained in a foreign jurisdiction, it is possible to have it recognized as a debt and enforced. While there are exceptions (for instance, where the order is for enforcement for foreign public law or is against public policy), the aim of the Model Climate Compensation Act would be that such orders made under it can be enforced in foreign jurisdictions.

III. Conclusion

International human rights law requires that States' legislative and policy frameworks are designed to provide adequate and effective remedies for human rights violations. In light of the massive human rights consequences of climate change already experienced in the Philippines, the Philippines should consider taking legislative measures to ensure access to redress for human rights violations

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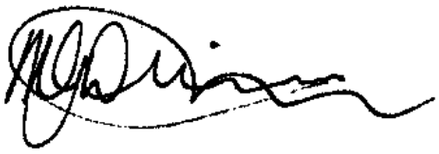
[35] Climate Change Act (Kenya), No. 11 of 2016, available at http://kenyalaw.org/lex/actview.xql?actid=No.%2011%20of%202016 accessed 2 December 2018.

resulting from climate change that occur within its territory. The adoption of a Climate Compensation Act could be one such measure, as its enactment into domestic law in the Philippines could make it easier to hold global fossil fuel companies accountable for the harm that their products have caused or are causing in the Philippines through Filipino courts and tribunals.

Signed:



Margaretha Wewerinke-Singh
Date: 3 December 2018
At: The Hague, the Netherlands