

**To: Commissioners, Commission on Human Rights of the Philippines**

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**Re: Amicus Submission, 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**

**From: Associate Professor Sara L Seck, Faculty of Law, Western University, Ontario, Canada  
(in my personal capacity)**

**Date: November 12, 2016**

Dear Honourable Commissioners:

I am an Associate Professor at the Faculty of Law, Western University, in London, Ontario, Canada, with expertise in the areas of international environmental law, business responsibilities for human rights, and extractive industries. In 2015, I was the recipient of the Emerging Scholarship Award from the Academy of Environmental Law of the International Union for the Conservation of Nature (IUCN), in recognition of my research contributions in these areas. I am also a Senior Fellow with the International Law Research Program of the Centre for International Governance Innovation in Waterloo, Canada.

I am writing in my personal capacity to provide my expert opinion with regard to the jurisdictional issues confronting the Commission on Human Rights of the Philippines in the *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*.

The petitioners rely upon the United Nations Guiding Principles for Business and Human Rights<sup>1</sup> in order to ground the jurisdiction of Commission on Human Rights, and in order to ground the claim that the respondent Carbon Majors must be held to account. I will consider both of these aspects in turn.

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<sup>1</sup> Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, John Ruggie, 21 March 2011, A/HRC/17/31 [UNGPs], available at: <https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

## 1. Jurisdiction of the Philippine Commission on Human Rights at International Law

The petitioners correctly note that the 2011 United Nations Guiding Principles on Business and Human Rights (Guiding Principles) were unanimously endorsed by the United Nations Human Rights Council.<sup>2</sup> The Guiding Principles were developed through extensive global multi-stakeholder consultations in which businesses and business lawyers were actively engaged.<sup>3</sup> They have since been embedded into many international corporate social responsibility standards, including those promoted by member States of the OECD.<sup>4</sup>

The Guiding Principles are comprised of three interrelated pillars that create a “dynamic system of preventative and remedial measures.”<sup>5</sup> These are: the state duty to protect human rights against abuses by business enterprises, the corporate responsibility to respect human rights, and the need for effective remedies for victims of human rights abuses.

The state duty to protect as elaborated in the Guiding Principles reflects existing international human rights law.<sup>6</sup> Two foundational principles underlie this first pillar. The petitioners reference Principle 2 of the Guiding Principles, according to which “[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”<sup>7</sup> However, more relevant to the jurisdiction of the Philippines Human Rights Commission is Principle 1: “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, *investigate*, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” [emphasis added]<sup>8</sup> As the abuse of human rights in the form of climate harms is clearly experienced within the territory and/or jurisdiction of the Philippines, Principle 1 of the Guiding Principles supports the mandatory exercise of jurisdiction by the Commission on the facts of this case.

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<sup>2</sup> 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 [Petition] at 9. See Human Rights Council, *Resolution Adopted by the Human Rights Council: Human Rights and Transnational Corporations and Other Business Enterprises*, 16 June 2011, A/HRC/RES/17/4, available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>

<sup>3</sup> Sara L Seck, “Corporate Law Tools and the Guiding Principles for Business and Human Rights” in Manoj Kumar Sinha, ed., *Business and Human Rights* (Sage Publishers, 2013) 93-130.

<sup>4</sup> See for example *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011) at Chapter IV Human Rights.

<sup>5</sup> UNGPs at para 6 (p4). See further Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011), 49 *Can YB Intl L* 51 at 94-113.

<sup>6</sup> UNGPs at p6.

<sup>7</sup> Petition at 9, citing UNGPs Principle 2.

<sup>8</sup> UNGPs at p6.

Principle 25 of the third pillar on access to remedy is also relevant to the jurisdiction of the Philippines Commission on Human Rights: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” Again, as the experience of climate harms by Filipino people is clearly within the territory of the Philippines, the Philippines is where the abuses occur. National human rights mechanisms, like the Philippine Commission, are specifically contemplated in the Commentary.<sup>9</sup> Furthermore, according to Principle 26: “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”<sup>10</sup> Among the barriers identified in the Commentary to Principle 26 that can prevent legitimate redress is “[t]he way in which legal responsibility is attributed among members of a corporate group ...[which] ... facilitates the avoidance of appropriate accountability.”<sup>11</sup>

The climate harms at issue in the Philippine petition were experienced by Filipinos in the Philippines or will be experienced there in the future. The petitioners request an investigation of the identified investor-owned Carbon Majors, many of whom do business in the Philippines, whether directly or through affiliates or other business relationships. The UN Guiding Principles contemplate the importance of access to remedy, and the important role that State human rights commissions must play in the quest for remedy, irrespective of the corporate form of the business enterprise. While it is true that the physical location from which emissions of greenhouse gases linked to the products of many of the Carbon Majors were and are released is not within the territory of the Philippines, this is irrelevant. The harm and therefore abuse has been and will be experienced in the Philippines, and therefore the Commission of Human Rights of the Philippines has jurisdiction to consider the request for an investigation.

It is important to distinguish the permissive exercise of jurisdiction by a State under rules of public international law, from the obligation to exercise jurisdiction which may or may not exist as a primary rule of international human rights law. The petitioners make reference to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights<sup>12</sup> and assert that the Philippines has an obligation to “respect, protect and fulfil human rights abroad.” That may very well be, but is not relevant to the jurisdiction of the Philippines Commission on Human Rights on the facts before the Commission. There is no issue of extraterritoriality here. The harm is clearly felt within the Philippines. Therefore, as part of the State duty to protect the rights of Filipinos, the Commission is entitled if not obligated to exercise jurisdiction over this request for an investigation into harms linked to the products of the investor-owned Carbon Majors. In order to effectively complete the investigation, the

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<sup>9</sup> UNGPs at p22.

<sup>10</sup> UNGPs at p23.

<sup>11</sup> UNGPs at p23.

<sup>12</sup> UNGPs at p9.

Commission may need to seek cooperation from the States in which the head offices of some investor-owned Carbon Majors are physically located or where the parent company of a Carbon Major enterprise is incorporated. However, this is no different from any other multi-jurisdictional investigation, a common occurrence in an economically interconnected world. International law is clear that there is a permissive rule with regard to the exercise of jurisdiction in cases like this, with concern arising only in the cases of conflicting, not concurrent, jurisdiction.<sup>13</sup> While other States may choose to exercise concurrent jurisdiction over the investor-owned Carbon Majors, there is no conflict here, absent another State legislating to block the investigation of the Philippines Human Rights Commission, which would arguably be a violation of the duty to cooperate that is essential to addressing the climate change problem.<sup>14</sup>

Beyond the UN Guiding Principles, there is recent United States precedent in which the federal comprehensive environmental clean-up statute was applied to emissions from a smelter physically located in Canada. The emissions flowed across the border from Canada into the United States, causing harm within the territory of the United States.<sup>15</sup> While initially this action was challenged as an extraterritorial application of the statute, on appeal, the US Circuit Court concluded that it was better understood as a domestic application of the statute.<sup>16</sup> The case is important not only as an example, but because the smelter at issue is the same as that of the 1930s Trail Smelter arbitration which is often credited with contributing to the customary legal

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<sup>13</sup> See discussion of jurisdictional conflicts in Sara L Seck, “Home State Responsibility and Local Communities: The Case of Global Mining” (2008) 11 Yale Human Rights & Development Law Journal 177-206 at 192-196; *Reprinted in* C. Sri Krishna, ed., *Global Mining Experiences* (Amicus Books, Icfai Press, India, 2009); see also Sara L Seck, “Conceptualizing the Home State Duty to Protect Human Rights”, in Karin Buhman, Mette Morsing, & Lynn Roseberry, eds., *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives*, (Palgrave Macmillan, 2011) 25-51.

<sup>14</sup> Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: climate change*, John Knox, 1 February 2016, A/HRC/31/52 (2016), online: SSRN <<http://ssrn.com/abstract=2729611>> [Knox, *Climate 2016*] at paras 42-46. Moreover, the Petition asks that the States of incorporation of the Carbon Majors be notified by the Philippines of their duty to protect the human rights of Filipinos, and to cooperate with the Commission in its investigation. Petition at 27-28.

<sup>15</sup> *Pakootas v Teck Cominco Metals, Ltd*, 452 F 3d 1066 (9<sup>th</sup> Cir 2006) at 1068 [“We hold that because CERCLA liability is triggered by an actual threatened release of hazardous substances; and – because a release of hazardous substances took place within the United States; – this suit involves a domestic application of CERCLA.”] The litigation arose as a result of a petition brought by the Colville Tribes to the Environmental Protection Agency requesting that the contamination of the area in which they live be studied and cleaned up.

<sup>16</sup> The case turned on statutory interpretation, with the interpretation informed by the fact that the legislation was designed to address remediation of harm – that is, clean-up of pollution physically located in the United States.

status of the “do no harm” principle of International Environmental Law.<sup>17</sup> The exercise of jurisdiction by the Philippines Commission on Human Rights over the Carbon Majors would be no different from the exercise of jurisdiction by the United States over emissions from Canada’s Trail Smelter.

## 2. Relevance and Application of the Business Responsibility to Respect Rights

As the petitioners correctly note, the corporate responsibility to respect rights is described in the Commentary to Principle 11 of the Guiding Principles as a “global standard of expected conduct” that “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations” and is “above compliance with national laws and regulations protecting human rights.”<sup>18</sup> The Guiding Principles are clear that the responsibility arises in relation to all internationally recognized human rights.<sup>19</sup> As the UN independent expert and now special rapporteur on environmental rights has clarified in recent reports, there is agreement among states that environmental and climate harms interfere with the enjoyment of many internationally recognized human rights.<sup>20</sup> Moreover, while the focus of the reports by the Special Rapporteur is upon the duty of States, he nevertheless reminds us that under the UN Guiding Principles, “corporations themselves have a responsibility to respect human rights” and all pillars of the “normative framework for business and human rights apply to all environmental human rights abuses, including impairments of human rights in relation to climate change.”<sup>21</sup> It

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<sup>17</sup> See for example Malcolm N Shaw, *International Law*, 7th edition, (Cambridge University Press, 2014) at 618-619, quoting the *Trail Smelter Arbitration*, (1941) 35 AJIL at p716 “no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein ...”.

<sup>18</sup> UNGPs at p13.

<sup>19</sup> UNGPs at p13 (Commentary to Principle 12).

<sup>20</sup> Knox, *Climate 2016*.

<sup>21</sup> Knox, *Climate 2016* at para 66. See also *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, John H. Knox: *Mapping Report*, UNOHCHR, 25th Sess, UN Doc A/HRC/25/53, (2014), online: United Nations Mandate on Human Rights and the Environment <<http://srenvironment.org/wp-content/uploads/2014/03/A-HRC-25-53-clean-final-version-1.doc>> at para 59; John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UNHRC, 31st Session, UN Doc A/HRC/31/53 (28 December 2015); John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, John H Knox: *Compilation of Good Practices*, UNHRC, 28th Session, UN Doc A/HRC/28/61 (3 February 2015), online: United Nations Mandate on Human Rights and the Environment <<http://srenvironment.org/2015/03/02/annual-report-to-the-human-rights-council-2/>> at para 79 [Knox, *Compilation of Good Practices*] (stating that the business responsibility to respect rights extends to “human rights abuses caused by pollution or other environmental harm.”) On the implications of the business responsibility to respect environmental rights for extractive companies, see Sara L Seck, “Human Rights and

is important to note that on the facts before the Commission, which include the deaths of many Filipinos, there can be no doubt that violations of civil and political rights, notably the right to life, are implicated here.

The petitioners appropriately rely upon the business responsibility to respect rights in the UN Guiding Principles to claim that the investor-owned Carbon Majors have breached their responsibilities to the people and communities of the Philippines 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>22</sup> Here reference is made to Principle 13 which provides that businesses are to:

- “(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and]
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to these impacts.”

The petitioners then turn, appropriately, to Principle 17 of the Guiding Principles, which provides that businesses should “carry out human rights due diligence” in order to “identify, prevent, mitigate and account for how they address their adverse human rights impacts.”<sup>23</sup> Here, the petitioners claim that the Carbon Majors have breached their responsibility to respect rights by “failing to prevent human rights impacts that are directly linked to their operations, products, or services by its business relationships.”

While the importance of human rights due diligence has been recognized by the oil and gas industry with regard to respect for local community and indigenous rights, tools for the assessment of human rights impacts associated with climate change do not yet appear to have been incorporated into industry guidance.<sup>24</sup> In light of existing knowledge about fossil fuels and climate change, a business as usual approach appears entirely inconsistent with the identification and prevention of human rights impacts following an effective due diligence process as contemplated by the UN Guiding Principles. As noted by the petitioners, the conduct of the Carbon Majors risks further human rights violations due to “long-term investments based on a scenario in which global consumption of fossil fuels continues to grow, thus warming the earth

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Extractive Industries: Environmental Law and Standards” *Human Rights Law and the Extractive Industries*, Paper No. 12, Page No. 12-1 – 12-42 (Rocky Mt. Min. L. Fdn. 2016).

<sup>22</sup> Petition at 19.

<sup>23</sup> Petition at 21.

<sup>24</sup> See for example the human rights due diligence guidance of the industry association IPIECA, online: <http://www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies> ; see also OECD Secretariat, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, (2016), online: <https://mneguidelines.oecd.org/OECD-Guidance-Extractives-Sector-Stakeholder-Engagement.pdf>

to levels that will lead to dangerous anthropogenic interference with the climate system resulting in human rights impacts.”<sup>25</sup>

The petitioners again, appropriately, rely on the UN Guiding Principles to support the claim that “responsibility is not contingent on a company being the sole cause of a human rights impact;” thus, when combined with the Carbon Majors study, they conclude that it is now feasible to assign responsibility both collectively and individually to Carbon Majors.<sup>26</sup>

### Conclusion

In conclusion, in my opinion, the exercise of jurisdiction by the Commission over this Petition would be in keeping with the duty of the Philippines to protect the human rights of its peoples from climate harms, by investigating whether the investor-owned Carbon Majors have breached their own independent responsibility to respect human rights. Moreover, the remedies sought by the petitioners are entirely appropriate, including the request that the investor-owned Carbon Majors submit plans indicating how these violations or threat of violations will be “eliminated and remedied and prevented in the future.” The request that other States, including the States of incorporation of the investor-owned Carbon Majors, be called upon to “take steps to prevent, remedy, or eliminate human rights violations or threats of violations resulting from the impact of climate change” is also entirely reasonable. Indeed, it is in keeping with the duty of international cooperation that is essential to solving the climate crisis.

Sincerely,

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<sup>25</sup> Petition at 22.

<sup>26</sup> Petition at 23.