

Joint Summary of the Amicus Curiae

IN RE: NATIONAL INQUIRY ON THE IMPACT OF CLIMATE CHANGE ON THE
HUMAN RIGHTS OF THE FILIPINO PEOPLE

CHR-NI-2016-0001

19 March 2018

The following summarizes the *amicus curiae* briefs and submissions filed in Support of Petitioners Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement's Petition Requesting Investigation of the responsibility of the Carbon Majors for human rights violations and threats of violations resulting from the impacts of climate change to the Commission on the Human Rights of the Philippines filed in November 2016. It also contains relevant updates.

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INTRODUCTION

On May 9, 2016, Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement along with other individuals and non-governmental organizations in the Philippines filed a petition with the Commission on Human Rights of the Philippines requesting an investigation of the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change. The legal scholars, experts, and human rights practitioners listed hereunder submitted *amicus curiae* briefs in support of the Petitioners in this critical and globally significant proceeding.

These briefs addressed an array of issues relevant to the proceeding, and drew on a wide range of sources and authorities, including the best available science, emerging evidence of corporate conduct and knowledge, the international law of human rights, and established principles of common law, international law, and norms. The present submission summarizes those original *amicus* briefs to assist the Commission in its deliberations.

The summary is organized into the following sections: Jurisdiction, Human Rights Impacts, Science, State Responsibility, and Corporate Accountability. The *amici* who contributed to each of the following sections are noted therein. In addition to summarizing the original *amicus* briefs, it also includes important relevant updates that the Commission may find useful for its investigation. This summary does not replace the underlying original *amicus* briefs, which provide more detailed analysis than what is contained in this summary. Further, the recommendations contained in this joint summary do not represent the views of all individual *amici*.

This *joint summary amicus* was compiled by the following *amici*, with individual contributors who contributed to this joint summary from each *amicus* group listed where relevant:

- Center for International Environmental Law (CIEL) (Erika Lennon, Carroll Muffett, Sébastien Duyck, Steven Feit & Lisa Hamilton)
- ClientEarth (Sophie Marjanac)
- Environmental Law Alliance Worldwide (ELAW) (Killian Doherty & Jennifer Gleason)
- Maastricht Principles Drafting Group (Kristine Perry)
- Our Children's Trust (Elizabeth Brown & Danny Noonan)
- Plan B (Tim Crosland)
- Sabin Center for Climate Change Law, Columbia Law School (Michael Burger & Jessica Wentz)
- Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions (Dr. Annalisa Savaresi & Dr. Ioana Cismas)
- Dr. James E. Hansen (Dan Galpern)
- Dr. Kevin E. Trenberth

The original *amicus* briefs can be found here: <https://www.business-humanrights.org/en/amicus-briefs/>.

DESCRIPTION OF *AMICI*

Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions (contributing authors to this compilation: Dr. Annalisa Savaresi & Dr. Ioana Cismas)

The Asia Pacific Forum (APF) is a coalition of 24 national human rights institutions (NHRIs) that works together and shares expertise to help make its vision of an Asia Pacific where everyone enjoys human rights a reality. The Global Alliance of National Human Rights Institutions (GANHRI) works to promote and strengthen NHRIs to be in accordance with the Paris Principles and provides leadership in the promotion and protection of human rights. The APF & GANHRI submission was prepared by Dr. Annalisa Savaresi (Lecturer in Law, University of Stirling, UK), Dr. Ioana Cismas (Senior Lecturer in Law, University of York, UK), and Dr. Jacques Hartmann (Senior Lecturer in Law, University of Dundee, UK) with the assistance of Tim Tabuteau (APF Legal Intern) and Jenni Whelan (APF Legal Counsel).

Center for International Environmental Law (CIEL)

CIEL is a not for profit organization, with offices in Washington, D.C. and Geneva, Switzerland, that uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. Since 1989, CIEL has conducted legal research, education, and advocacy in international environmental and human rights law, with a particular focus on providing assistance to vulnerable and marginalized communities and promoting accountability for violations of human and environmental rights. As a critical part of this mission, CIEL has been active in addressing the environmental and human rights implications of climate change for more than a quarter century.

ClientEarth

ClientEarth is Europe's leading non-profit environmental law organisation. ClientEarth is comprised of lawyers committed to securing a healthy planet. ClientEarth believes that strong law, properly enforced, is the best tool we have to protect the environment. Using the power of the law, ClientEarth develops innovative strategies and tools to address major environmental issues. ClientEarth was founded in 2007 and primarily operates in Europe through three offices based in London, Brussels, and Warsaw, with approximately 100 members of staff in total. ClientEarth has developed specialist expertise in public interest environmental litigation, successfully bringing proceedings against the UK and other Member State governments for violations of European Union law regulating air quality, bringing complaints against the European Commission for compliance with the UNECE Aarhus Convention, and undertaking successful litigation in respect of coal fired power across Europe.

Environmental Law Alliance Worldwide (ELAW)

The U.S. office of the Environmental Law Alliance Worldwide (ELAW) is a nonprofit corporation based in the U.S. state of Oregon. ELAW serves as the Secretariat of a global network of public interest environmental lawyers. For more than 25 years, ELAW has been a leader in global environmental legal issues. ELAW, which advises a global network of public interest lawyers, has been researching legal issues related to climate justice for years.

James E. Hansen

Dr. James Hansen, formerly Director of the NASA Goddard Institute for Space Studies, is an Adjunct Professor at Columbia University's Earth Institute, where he directs a program in Climate Science, Awareness, and Solutions. He was trained in physics and astronomy in the space science program of Dr. James Van Allen at the University of Iowa. His early research on the clouds of Venus helped identify their composition as sulfuric acid. Since the late 1970s, he has focused his research on Earth's climate, especially human-made climate change. Dr. Hansen is best known for his testimony on climate change to congressional committees in the 1980s that helped raise broad awareness of the global warming issue. He was elected to the National Academy of Sciences in 1995 and was designated by Time Magazine in 2006 as one of the 100 most influential people on Earth. He has received numerous awards including the Carl-Gustaf Rossby and Roger Revelle Research Medals, the Sophie Prize, and the Blue Planet Prize. Dr. Hansen is recognized for speaking truth to power, for identifying ineffectual policies as greenwash, and for outlining actions that the public must take to protect the future of young people and other life on our planet.

Maastricht Principles Drafting Group

The Maastricht Principles Drafting Group included the following international legal experts who submitted their original letter in their personal capacities: Olivier De Schutter, former United Nations Special Rapporteur on the right to food and professor at the University of Louvain, Belgium; Asbjørn Eide, former Director and presently Professor Emeritus at the Norwegian Center for Human Rights at the University of Oslo; Ashfaq Khalfan, Director of Law and Policy Programme Amnesty International - International Secretariat; Dr. Marcos A. Orellana; Ian Seiderman, Legal and Policy Director of the International Commission of Jurists; Rolf Künemann, Human Rights Director, FIAN International Secretariat; Jernej Letnar Černič, Associate Professor of Human Rights Law, Graduate School of Government and European Studies, Slovenia; and Bret Thiele, Co-Executive Director, Global Initiative for Economic, Social and Cultural Rights. The first five individuals mentioned above were part of a drafting group that led the drafting process and elaborated the commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, a restatement and interpretation of legally binding standards in international law by 40 international experts, including current and former UN Special Procedures and human rights treaty body members. Kristine Perry assisted in the drafting of the underlying letter and was the person responsible for compiling their contribution on this joint summary.

Our Children's Trust

Our Children's Trust is a U.S.-based nonprofit organization leading a global human rights and environmental justice campaign to secure the legal right to a healthy atmosphere and stable climate on behalf of present and future generations. All of the work of Our Children's Trust is guided by three core principles. *First*, Our Children's Trust advocates for and elevates the voice of youth and future generations in the struggle for climate justice. Climate change affects all sectors of society to varying degrees. However, children and future generations are among the most vulnerable to climate change impacts, will live with the consequences of climate change longer than any other group, and often have the least amount of political power to effect change

through more conventional processes. *Second*, Our Children’s Trust seeks science-based and legally enforceable remedies. Our Children’s Trust supports a global network of youth and lawyers in litigating comprehensive climate change cases seeking systemic climate recovery actions from governments. These cases rely on what leading climate scientists and the best available science indicate is required to preserve a habitable climate system; redress unacceptable impacts to and impairments of human rights; and protect the lives, liberties, and equal protection of young people and future generations. The best available science indicates that the concentration of atmospheric carbon dioxide must be stabilized below 350 parts per million by 2100, equivalent to limiting the long-term temperature increase to below 1°C above pre-industrial levels—a more stringent standard of protection than that contained in existing international agreements. *Third*, Our Children’s Trust’s legal work is rooted in the fundamental and inalienable human rights of citizens and future generations, including rights under the Public Trust Doctrine, to have vital natural resources protected for their use. In executing its global campaign, Our Children’s Trust has developed a specialized legal expertise in the duty of care that governments around the world owe to their people and to future generations to protect and preserve the stability of the climate system. Our Children’s Trust possesses significant legal expertise in the inherent public trust obligation of sovereign governments and the corresponding rights of citizens that together protect our core interest in survival and survival resources, like air, water, oceans, shorelines, and climate. Our Children’s Trust also holds relevant expertise in the science of climate recovery and works closely with world renowned climate scientists and experts.

Plan B

Plan B is a charitable incorporated organization (CIO), registered in the UK, and regulated by the UK Charity Commission. Its charitable purposes include to promote human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) in so far as they are threatened or adversely affected by the impacts of climate change and other environmental degradation, in particular by: (i) preventing infringements of such rights; (ii) obtaining redress for victims where such rights are infringed; (iii) promoting respect for such rights among individuals, investors, and corporations; and (iv) providing technical advice to governments and others on relevant matters of human rights. Plan B’s principle objective is to support judicial and other processes, which advance accountability for climate change (and consequently enhance the prospects of avoiding ‘looming catastrophe’). Recognising the scientific, legal, and economic complexities that risk obscuring the attribution of responsibility, Plan B, develops analysis and resources to assist lawyers, courts, and others.

Sabin Center for Climate Change Law, Columbia Law School

The Sabin Center for Climate Change Law, located at Columbia Law School, develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the public with up-to-date resources on key topics in climate law and regulation. The core mission of the Sabin Center is to develop and promulgate legal techniques to address climate change, and to train the next generation of lawyers who will be leaders in the field. The Sabin Center is both a partner to and resource for public interest legal institutions engaged in climate change work. Further, the center addresses a critical need for the systematic development of legal techniques to fight climate change outside of the realm of judicial litigation, and the compilation and

dissemination of information for lawyers in the public, private, and NGO sectors. The Sabin Center, which is led by Michael Gerrard, Director of the Sabin Center and Andrew Sabin Professor of Professional Practice at Columbia Law School, and Michael Burger, Executive Director of the Sabin Center, works closely with the scientists at Columbia University's Earth Institute and with governmental, nongovernmental, and academic organizations.

Kevin E. Trenberth

Kevin E. Trenberth is a distinguished senior scientist in the Climate Analysis Section at the National Center for Atmospheric Research (NCAR). He has authored over 540 publications in the area of climate and given hundreds of talks on the subject, and is one of the most highly cited researchers in geophysics. Further, he has extensively investigated global-scale climate dynamics, the observations, processes, and modeling of climate changes from interannual to centennial time scales. He also has particular expertise in El Niño, the hydrological and energy cycles, hurricanes and storms, and climate change. Trenberth has served on many national and international committees including National Research Council/National Academy of Science committees, panels and/or boards; co-chairing the international Climate Variability and Predictability (CLIVAR) Scientific Steering Group of the World Climate Research Programme (WCRP) from 1996 to 1999 and serving as a member and officer of the Joint Scientific Committee that oversees the WCRP as a whole from 1998 to 2006; chairing the WCRP Observations and Assimilation Panel from 2004 to 2010; and chairing the Scientific Steering Group of GEWEX: the Global Energy and Water Exchanges Project of WCRP from 2010 to 2014. Trenberth has been involved in global warming science and extensively involved in the Intergovernmental Panel on Climate Change (IPCC) scientific assessment activity as a lead author of individual chapters, the Technical Summary, and Summary for Policy Makers (SPM) of Working Group (WG) I for the Second, Third and Fourth Assessment Reports (SAR, TAR and AR4; IPCC 1996, 2001, 2007). He was a Coordinating Lead Author for the SAR and AR4, and in the latter led Chapter 3 that dealt with observations of the surface and atmospheric climate change. He was also a Review Editor of the Fifth IPCC Assessment Report (AR5) in 2013.

OVERARCHING KEY FINDINGS AND MESSAGES

The following represent the key findings and messages from all sections of this joint summary *amicus* brief.

Key Findings on Jurisdiction (APF & GANHRI, ClientEarth, ELAW, Plan B)

- The Commission’s mandate to investigate the claims raised in the Petition is well-founded, both in national law as well as in international law practice.
- Both the *effects* doctrine and the protective principle establish a clear nexus between the Philippines and the human rights violations raised in the Petition; and
- States’ human rights obligations demand effective investigations into the human rights violations alleged by the Petitioners.

Key Findings on the Human Rights Impacts of Climate Change (CIEL, ClientEarth, ELAW, Our Children’s Trust, Sabin Center for Climate Change Law)

- The harmful effects of climate change pose an enormous threat to human rights in the Philippines and abroad. Increases in the severity and frequency of sudden-onset disasters such as hurricanes and floods already have and will continue to cause deaths, injuries, property destruction, and human displacement, while more gradual forms of environmental degradation will undermine access to clean water, food, and other key resources.
- All of these impacts will impair fundamental rights including the rights to life, health, clean water and sanitation, food, adequate housing, self-determination and development, and equality and non-discrimination. These impacts will disproportionately affect certain countries and individuals, including those who are disadvantaged due to poverty, gender, age, disability, cultural or ethnic background, and other factors, as well as children and future generations who will experience increasingly severe impacts over time. This is not merely an abstract future possibility: the Philippines and many other countries are already experiencing adverse effects on human rights as a result of climate change.

Key Findings on the Science of Climate Change Impacts, Attribution, and Recovery (Hansen, Our Children’s Trust, Plan B, Sabin Center for Climate Change Law, Trenberth)

- Reputable international and domestic scientific bodies, as well as an extensive body of peer-reviewed science, indicate that climate change is causing severe environmental, economic, and social impacts at current levels of planetary warming, and that these impacts will intensify with any additional warming. The occurrence and severity of these impacts is, to varying degrees, attributable to planetary warming above pre-industrial levels.
- The activities of the respondents to the Petition have materially contributed to a large percentage of this warming.
- Rapid, large-scale emissions reductions and natural carbon sequestration are needed in order to meet either the Paris Agreement’s temperature goals or more stringent science-based climate recovery targets.

- In addition, adaptation to the climate change already underway and expected is essential and requires assessing vulnerability and possible impacts, building resilience, and planning for the consequences.

Key Findings on the Obligations of States (APF & GANHRI, CIEL, ClientEarth, ELAW, Maastricht Principles Drafting Group, Our Children’s Trust, Plan B)

- Human rights norms clarify how States should respond to climate change.
- Human rights law imposes wide-ranging obligations upon States to protect the human rights of individuals from infringements by third parties, including corporations.
- States’ obligation to address environmental harm that interferes with the full enjoyment of human rights extends to harm caused by climate change impacts.
- International law requires States to protect persons within their jurisdiction against human rights abuses as a result of the conduct of corporate actors headquartered outside of their territory.

Key Findings on Responsibility/Accountability of Companies (APF & GANHRI, CIEL, ClientEarth, Plan B)

- Corporations have the responsibility to respect human rights, as described in the United Nations Guiding Principles on Business and Human Rights (UNGPs).
- The UNGPs require enterprises to assess, address, and take responsibility for the climate-related human rights impacts of their products and operations.
- Consistent with this obligation, corporations have a duty to reduce their greenhouse gas emissions:
 - at a minimum, in line with the temperature goals of the Paris Agreement (ClientEarth); and/or
 - to a level that avoids or minimizes dangerous anthropogenic interference with the climate system as evidenced by the best available science (CIEL, Hansen).
- The Commission should take a purposive and holistic approach to applying human rights standards in its investigation.
- In assessing the Carbon Majors’ responsibility for the impacts of climate change on the people of the Philippines, the Commission should take into account fundamental principles of legal and moral responsibility, including respondents’ knowledge or notice of potential harms, including whether it was reasonably foreseeable, the opportunity to avoid or reduce those harms, and whether the harm was caused by their actions.
- The Carbon Majors have long known that the production and use of their products contribute substantially to climate change, which continues to have significant impacts and adverse consequences for people, especially vulnerable populations.
- The Carbon Majors knowingly advanced or promoted deliberately misleading information, casting doubt on the connection between fossil fuels and climate change.
- The “Polluter Pays” Principle is widely accepted and should be applied to the Carbon Majors who reap vast profits from their polluting activities.

SUMMARY OF *AMICI* EXPERT CONTRIBUTIONS ON JURISDICTION¹

Key Findings and Messages

- The Commission's mandate to investigate the claims raised in the Petition is well-founded, both in national law as well as in international law practice.

Summary Argument

I. The scope of the Commission's mandate in the law of the Philippines

The human rights violations alleged in the Petition fall within the scope of the mandate of the Commission, as provided for in the Constitution of the Republic of the Philippines.

The Constitution grants the Commission authority to:

1. Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights; ...
3. Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection; [and] ...
6. Recommend to Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families[.]²

The Commission's mandate is further elucidated in the Omnibus Rules of Procedure of the Commission on Human Rights:

[T]he Commission on Human Rights shall take cognizance of and investigate, on its own or on complaint by any party, all forms of human rights violations and abuses involving civil and political rights, to include but not limited to the following:

- a) right to life;
- b) right to liberty;
- c) right to security ...

Rule 2(2): ... Corollary thereto, the Commission on Human Rights, in line with its role as a national human rights institution, shall also investigate and monitor all economic, social and cultural rights violations and abuses, as well as threats of violations thereof,

¹ This summary was compiled with inputs from Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions [hereinafter APF & GANHRI] (Annalisa Savaresi, Stirling University), ClientEarth (Sophie Marjanac), Environmental Law Alliance Worldwide [hereinafter ELAW] (Jennifer Gleason & Killian Doherty), and Plan B (Tim Crosland) and is based on their previously submitted underlying *amicus curiae* briefs.

² The Constitution of the Republic of the Philippines, Feb. 2, 1987, Art. XIII, §18.

especially with respect to the conditions of those who are marginalized, disadvantaged, and vulnerable.

Rule 3(2): To determine whether civil and political rights have been violated, are being violated ... by ... private person or entity.

The objectives of investigation and monitoring of economic, social and cultural rights violations or situations are: to determine the rights violated by State or non-state actors, including private entities and individuals³

The following additional arguments are presented by ClientEarth:

-- As the Commission's constitutional mandate expressly includes investigating matters affecting the human rights of Filipinos abroad, its investigative function should not be read to only include matters affecting human rights violations or threats of violations that originate inside the Philippines.⁴ The Philippines has acknowledged that climate change will affect civil and political rights in the Philippines,⁵ and the Omnibus Rules of Procedure provide the Commission with the power to address "threats of violations," including those arising from the expected impacts of climate change.⁶

-- The separation of powers in the Philippines Constitution prevents the Commission from exercising judicial power.⁷ Article 13(18) clearly limits the Commission's powers to administrative functions including investigating and monitoring human rights and making recommendations (*inter alia*).⁸ The Commission's constitutionally limited role is reflected in the Omnibus Rules of Procedure of the Commission.⁹ The Commission's power to conduct the investigation is therefore not limited by rules governing the exercise of judicial power such as the principle of territoriality.¹⁰

-- It should be noted that the Petition does not ask the Commission to exceed the bounds of its constitutional mandate, and requests that it only make factual findings and issue recommendations to the Congress of the Philippines.¹¹

In addition, APF and GANHRI note in their brief that some respondents have asserted that the Omnibus Rules explicitly extending the Commission's jurisdiction to investigate

³ COMM'N ON HUMAN RIGHTS OF THE PHILIPPINES, GUIDELINES AND PROCEDURES IN THE INVESTIGATION AND MONITORING OF HUMAN RIGHTS VIOLATIONS AND ABUSES, AND THE PROVISION OF CHR ASSISTANCE, Rule 2, § 1-2, Rule 3, § 2-3, i-ii, iv-v, available at https://pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf (emphasis added) [hereinafter Omnibus Rules].

⁴ *Amicus Curiae* Brief submitted by ClientEarth, ¶¶ 23-24, <https://business-humanrights.org/sites/default/files/documents/ClientEarth.pdf> [hereinafter ClientEarth brief].

⁵ *Id.* at ¶¶ 33-34.

⁶ *Id.* at ¶¶ 35-36.

⁷ *Id.* at ¶¶ 19-20.

⁸ *Id.* at ¶¶ 17-18.

⁹ *Id.* at ¶¶ 20-21.

¹⁰ *Id.* at ¶ 23.

¹¹ *Id.* at ¶¶ 38-39.

economic, social, and cultural rights were adopted ultra vires. There are at least three counter arguments to this assertion:¹²

- i. The Commission has the power to determine whether the Petition raises claims that fall within its remit as discussed in section II below.
- ii. As noted elsewhere, most if not all of the economic, social, and cultural rights violations invoked by the Petitioners can be linked back to civil and political rights,¹³ specifically the right to life – also invoked in the Petition – and the right to property.¹⁴
- iii. The Commission’s jurisdiction to adopt its Omnibus Rules of Procedure has not been the subject of domestic legal challenge. Accordingly, the Omnibus Rules in their current form are demonstrably *intra vires* as a matter of the law of the Philippines for the purposes of the current inquiry.¹⁵

II. The Commission has the competence to determine whether the claims raised in the Petition fall within its own remit

The Commission has the power to interpret the scope of its mandate within the boundaries set by the Philippines Constitution, article VIII, section 18.2. Furthermore, APF and GANHRI note how the well-established doctrine of *compétence de la compétence* enables the Commission to ascertain its own jurisdiction and further note that this doctrine is well established both in domestic and international law.¹⁶

III. The Commission has authority to investigate violations of all the rights mentioned in the Petition

The Petition invokes civil and political rights enshrined in the Constitution, the Omnibus Rules, and the International Covenant on Civil and Political Rights (ICCPR).¹⁷ ELAW’s brief

¹² *Amicus curiae* brief submitted by APF & GANHRI, ¶ 4, http://www.asiapacificforum.net/media/resource_file/APF_Paper_Amicus_Brief_HR_Climate_Change.pdf [hereinafter APF & GANHRI brief].

¹³ Extensive domestic, regional, and international practice on the mutual recognition of economic, social, and cultural rights, and civil and political rights exists. The linking has been employed to protect economic, social, and cultural rights when the domestic legislative framework does not permit their direct judicial enforcement, for example, in cases where they are enshrined in the constitution as aspirational goals. At the international level, this practice has been traditionally utilized to remedy the lack of complaint procedures for economic, social, and cultural rights violations, or when a human rights treaty did not include specific economic, social, and cultural rights. In particular, the right to life and the right to property have become “intersectional” devices for the protection of numerous economic, social, and cultural rights, including the rights to health, to food, to water, to housing (and specifically the prohibition of forced eviction), to education, and to social security, and indigenous peoples’ right to land. The practice is substantial in quantity and universal in coverage. See APF & GANHRI brief, at ¶ 4 (for references to case law and commentaries on this).

¹⁴ The APF & GANHRI brief explains that while the Petitioners have not alleged violations of the constitutional right to property resulting from climate change impacts, the Commission’s mandate affords it the option to *sua sponte* consider violations of this right alone and in conjunction with other rights. See *id.* at ¶ 4.

¹⁵ See *id.* at ¶ 6.

¹⁶ See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Oct. 2, 1995), available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. See APF & GANHRI brief, at ¶ 4.

¹⁷ See *amicus curiae* brief submitted by Environmental Law Alliance Worldwide (ELAW), at p. 6, <https://business-humanrights.org/sites/default/files/documents/ELaw.pdf> [hereinafter ELAW brief].

notes that, in case there is any question that the rights mentioned by the Petitioners are not all civil and political rights, courts around the world as well as international human rights bodies have determined that the right to life encompasses many of the rights invoked by the Petitioners, including the right to live in a healthy environment.¹⁸

In addition, APF and GANHRI note that the Commission's mandate to investigate violations of social, cultural, and economic rights is corroborated by the case law of the Supreme Court of the Philippines.¹⁹ The Court has applied the Universal Declaration of Human Rights (UDHR) as "generally accepted principles of international law as part of the law of the Nation" to investigate violations of a range of rights enshrined in the Declaration, including economic, social, and cultural rights.²⁰ For instance, in *Villar v. TIP*, the Court annulled a college's expulsion of students for their participation in protests, relying among others on their right to education enshrined in the UDHR.²¹ The Supreme Court has also maintained this holistic interpretation of human rights in domestic law, recognizing socio-economic rights as justiciable.²² In *Oposa v. Factoran, Jr.*, the Supreme Court held that the constitutional right to a balanced and healthful ecology "unites" with the right to health (art. II, secs.16 and 15 of the Constitution) imposing "the correlative duty to refrain from impairing the environment," whereas its "denial or violation ... by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action."²³ Subsequent jurisprudence has maintained both the self-executing character of the right to a balanced and healthful ecology and the correlative obligations to which this right attaches.²⁴

IV. The Commission has authority to investigate human rights violations committed by the respondents, even though they are headquartered outside the Philippines

ClientEarth and ELAW note that the Commission is not starting a formal adjudicative proceeding, but merely opening an *investigation* and granting respondents *an opportunity to be heard*. Therefore, questions about whether the Commission has jurisdiction over the respondents are misplaced.²⁵ However, both briefs also explain that if there is any question, the

¹⁸ See *id.* at pgs. 7-13.

¹⁹ See APF & GANHRI brief, at ¶ 6.

²⁰ *Mejoff v. Dir. of Prisons*, G.R. No. L-4254 (S.C. Sept. 26, 1951) (Phil.) (en banc); *Borovsky v. Comm'r of Immigration*, G.R. No. L-4352 (S.C. Sept. 28, 1951) (Phil.) (en banc); *Villar v. Tech. Inst. of the Philippines*, G.R. No. L-69198 (S.C. Apr. 17, 1985) (Phil.) (en banc); *Remoto v. Comm'n on Elections*, G.R. No. 190582 (S.C. Apr. 8, 2010) (Phil.) (en banc). See APF & GANHRI brief, at ¶ 6.

²¹ *Villar*, G.R. No. L-69198. See APF & GANHRI brief, at ¶ 6. See also Merlin M. Magallona, *The Supreme Court and International Law: Problems and Approaches in Philippine Practices*, 85 PHIL. L. J. 1, 1, 62 (2010).

²² See APF & GANHRI brief, at ¶ 7.

²³ *Oposa v. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A. 792 (S.C. July 30, 1993) (Phil.) (en banc).

²⁴ See Elizabeth Barrett Ristroph, *The Role of Philippine Judges in Establishing the Environmental Rule of Law*, 42 ENVTL. L. REP. 2 (2012), 1, at 16, n. 77, available at https://works.bepress.com/elizabeth_ristroph/3/; see also Supreme Court Decision of December 8, 2015 on the consolidated cases *Int'l Serv. for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209271, *Envtl. Mgmt. Bureau of the Dep't of Env't v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209276; *Univ. of the Philippines Los Baños Foundation, Inc. v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209301; *Univ. of the Philippines v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209430 (S.C. Dec. 8, 2015) (Phil.) (en banc), <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/december2015/209271.pdf>; see APF & GANHRI brief, at ¶ 7.

²⁵ See ClientEarth brief, at ¶ 23.

Commission’s mandate and international law make it clear that the Commission does have jurisdiction to investigate actions by the respondents.

APF and GANHRI’s brief explains that the use of the term jurisdiction is not limited to courts of law but instead it is commonly applied to any body that exercises governmental powers, such as courts or administrative authorities.²⁶ Their brief further asserts that it is a well-established principle of international law that a state may exercise jurisdiction over natural or legal persons in its territory or abroad, as long as there is a clear “connecting factor” or “nexus” between that state and the person or conduct.²⁷

APF and GANHRI’s brief notes how States’ prescriptive (i.e. the power to create, amend, or repeal legislation) and adjudicative (i.e. the ability of national courts, tribunals, or other bodies exercising judicial functions to hear and decide on matters) jurisdiction are not territorially limited to acts occurring within a state, whereas States’ enforcement (i.e. the state’s right to enforce legislation, for example, by using powers of arrest and investigation) jurisdiction typically is.²⁸ The respondents’ submissions erroneously conflate these different forms of jurisdictions, and, on this basis, reach inaccurate conclusions. For example, Cemex and Shell, selectively cite the Permanent Court of International Justice’s 1927 *Lotus* case judgement, referring solely to *enforcement* jurisdiction. On other forms of jurisdiction, however, the *Lotus* judgement says:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States....²⁹

APF and GANHRI’s brief notes how the *Lotus* judgement makes it clear that states have wide discretion to extend the reach of their *prescriptive* and *adjudicative* jurisdiction, provided that a clear nexus exists. It further notes that State practice reflects this interpretation: in an ever more globalized world, states increasingly exercise jurisdiction extraterritorially.³⁰

APF and GANHRI emphasize that even the **territorial principle** does not preclude States from regulating or adjudicating over conduct that is wholly or partially carried outside their territory.³¹ The *subjective* territorial principle allows States to exercise jurisdiction over activities committed within that State, even if completed abroad. The *objective* territorial principle allows a State to exercise jurisdiction over activities that are completed within its

²⁶ See, e.g., Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y. B. INT’L L. 145, 178 (1975). See APF & GANHRI brief, at ¶ 4 n. 2.

²⁷ See APF & GANHRI brief, at ¶ 9 (and references cited therein).

²⁸ See *id.*, at ¶ 10.

²⁹ *The Case of the S.S. Lotus (France v Turkey)*, Judgment, 1927 P.C.I.J., (Ser. A) No. 10, para. 19 (Sept. 1927) [hereinafter *S.S. Lotus case*].

³⁰ Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818 (2009).

³¹ See APF & GANHRI brief, at ¶¶ 17-22.

territory, even if initiated abroad.³² Both principles therefore allow States to regulate conduct with an extra-territorial element. If the conduct is neither initiated nor completed within their territory, States may assert jurisdiction over conduct that has an “effect” on their territory.

APF and GANHRI point out how the *effects doctrine*³³ was developed to give States “more leeway to unilaterally stretch the arm of their domestic laws in order to clamp down on harmful acts arising beyond their borders.”³⁴ The effects doctrine has been acknowledged in the *Lotus case*³⁵ and by judges of the International Court of Justice in the *Arrest Warrant case*.³⁶ It is presently widely applied, especially in relation to antitrust, tort, bribery and corruption, security, insolvency, and criminal law.³⁷ The US has a long history of regulating conduct outside its territory.³⁸ The effects doctrine has been corroborated by the US Court of Appeals for the Second Circuit in 1945 in the *Alcoa case*, where 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.³⁹

Plan B’s brief argues that the principle is the logical counterpart of the “no harm principle” in public international law,⁴⁰ which is specifically referenced in the preamble to the United Nations Framework Convention on Climate Change (UNFCCC):

Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Plan B notes that it follows that where States fail to prevent activities within their jurisdiction damaging the environment beyond their borders, the affected States should have jurisdiction over the relevant conduct. Such an extension of jurisdiction is also consistent with

³² *Id.*

³³ See H.L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. OF COMP. L. 631 (2009), available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1132&context=facpub>.

³⁴ Cedric Ryngaert, *Jurisdiction Towards a Reasonableness Test*, in GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW, 194 (Malcolm Langford ed. 2013).

³⁵ *S.S. Lotus Case*, 1927 P.C.I.J. (ser. A) No. 10, at 23; see also ELAW brief, at pgs. 4-5.

³⁶ *Arrest Warrant 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 I.C.J. Rep. 3, 63 (Joint Separate Opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.).

³⁷ See INT’L BAR ASSOC. REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION (2009), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E> (providing an overview).

³⁸ See, e.g., CHARLES DOYLE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW, Congressional Research Service, 2016, <https://fas.org/sgp/crs/misc/94-166.pdf>; APF & GANHRI brief, at ¶ 21.

³⁹ APF & GANHRI brief, at ¶ 20 (quoting *U.S. v. Aluminum Co. of America*, 148 F. 2d 416, 443 (2d Cir. 1945)).

⁴⁰ See *amicus curiae* brief submitted by Plan B, at § 2.1, <https://business-humanrights.org/sites/default/files/documents/Plan%20B.pdf> [hereinafter Plan B brief].

the fundamental duty of States to protect their people. Ultimately people will reject a government that abandons them on the basis that it “lacks the jurisdiction” to protect them from harm.⁴¹

APF and GANHRI further note that, contrary to what is suggested by the respondents, the mainstream interpretation of the territorial principle does not preclude states from regulating conduct or actors outside their territory. Quite the opposite is true: the territorial principle provides ample scope for the Philippines to exercise jurisdiction over conduct outside its territory, and for the Commission to exercise its jurisdiction to consider complaints for human rights violations carried out by corporations headquartered outside the Philippines, as long as it is satisfied that the relevant conduct is either initiated or completed within the Philippines, or because it has effects within the Philippines.⁴²

In addition to the territorial principle, APF and GANHRI suggest that the protective principle (also known as “*competence réelle*”) authorizes States to protect themselves by regulating and adjudicating over conduct carried out abroad that may damage their essential security interests.⁴³ The principle applies regardless of the place of the conduct or the nationality of the alleged offender or victim. The principle was initially applied only in the context of criminal law, but since the 1980s numerous States have applied it beyond the criminal law sphere. It is generally accepted that the application of the protective principle can only be justified by the need to protect “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 relied on the protective principle to address instances of pollution in the high seas.⁴⁴

The Commission’s investigation over foreign corporations does not constitute an “act of interference” or “usurpation” of other States’ sovereignty.⁴⁵ Neither would it “be tantamount to an undue encroachment on the territorial jurisdiction and sovereignty of such other states where Respondents are domiciled and operate.”⁴⁶ The Petition before the Commission raises questions over the *effects* of the respondents’ conduct on the Philippines. There is therefore a clear nexus between the Philippines and the climate change impacts that are the object of the Petition under consideration.⁴⁷ On this basis, APF and GANHRI conclude that the Commission could rely both on the protective principle and on the effects doctrine to assert its *adjudicative* jurisdiction to

⁴¹ *Id.*

⁴² See APF & GANHRI brief, at ¶ 22.

⁴³ Cf. IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION (1994); APF & GANHRI brief, at ¶ 23.

⁴⁴ Richard B. Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1 (1970); MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA, 32 (2007); APF & GANHRI brief, at ¶ 24.

⁴⁵ Cemex Motion to Dismiss, p. 16.

⁴⁶ Shell Motion to Dismiss *Ex Abundanti Ad Cautelam*, p. 1.

⁴⁷ This is supported by arguments of Special Rapporteur Knox that as scientific knowledge improves, tracing causal connections between particular emissions and resulting harms is possible. Rep. of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, ¶¶ 36-37, U.N. Doc. A/HRC/31/52 (2016). It is also supported by Jonathan Remy Nash who notes “for global air pollutants, it seems possible to claim the *every* nation might potentially have jurisdiction over all worldwide emissions.” See Jonathan Remy Nash, *The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws* in BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 164-65 (Gunther Handl, Joachim Zekoll and Peer Zumbansen eds. 2012) (emphasis original).

investigate the Petition. In this connection, it is irrelevant whether any of the major emitters do business in the Philippines, as long as the effects of their activities may be regarded as a threat to essential or vital interests of the Philippines.

APF and GANHRI note that in any event, it is not up to the respondents to protest against breaches of sovereignty and abuses of jurisdiction; such protests are the sole prerogative of States.⁴⁸ In the *Lotus* case, the Permanent Court of International Justice specifically considered whether the burden of proof lies with the State that claims it is entitled to exercise legislative and adjudicative jurisdiction, or whether it lies with the State claiming that such jurisdiction is illegal, and opined that it fell on the latter.⁴⁹ There is, moreover, no assumption in international law that individuals or corporations will be regulated only once, and situations of multiple jurisdictional competence occur frequently. In such situations there is no “natural” regulator and the consequences of multiple laws applying to the same transactions are managed, rather than avoided.⁵⁰

V. The broad scope of the Commission’s mandate is reinforced by the Principles relating to the Status of National Institutions

The Principles relating to the Status of National Institutions, known as the Paris Principles, adopted by the UN General Assembly in 1993, state that National Human Rights Institutions (NHRIs) “shall be given as broad a mandate as possible.”⁵¹ The Sub-Committee on Accreditation’s General Observations, which aim to guide the interpretation and implementation of the Paris Principles, further instruct:

A National Institution’s mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights. Specifically, the mandate should: extend to the acts and omissions of both the public and private sectors; . . . provide the authority to address recommendations to public authorities, to analyse the human rights situation in the country, and to obtain statements or documents in order to assess situations raising human rights issues.⁵²

VI. Human rights law practice

Plan B’s brief asserts that it is the responsibility of governments to take measures to protect the fundamental rights of their citizens, regardless of the source of threat.⁵³ For example, Article 1 of the European Convention on Human Rights states: “The High Contracting Parties *shall secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention (...)” (emphasis added).

⁴⁸ See APF & GANHRI brief, at ¶ 15 (and sources cited therein).

⁴⁹ *S.S. Lotus Case*, 1927 P.C.I.J. (ser. A) No. 10, at 19-20.

⁵⁰ MALCOLM EVANS, ED., *INTERNATIONAL LAW*, 457 (4th ed. 2014).

⁵¹ G.A. Res. 134, U.N. Doc. A/RES/48/134, Principle 2 (Dec. 20, 1993); see ELAW brief, at pgs. 13-14.

⁵² INT’L COORDINATING COMM. OF NAT’L INST. FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, ICC SUB-COMMITTEE ON ACCREDITATION GENERAL OBSERVATIONS AS ADOPTED IN MAY 2013, G.O. 1.2, 13 (2013).

⁵³ See Plan B brief, at § 2.2 (p. 5).

Further, Plan B notes that in *Soering v. United Kingdom*,⁵⁴ the European Court of Human Rights, held that the UK government had a responsibility to uphold the rights of an individual in the UK under Article 3 (the prohibition on inhuman and degrading treatment), even where the threat to those rights came *from outside the jurisdiction* of either the UK or the European Court of Human Rights. In the circumstances of the case this prevented the UK from extraditing Soering to the US for as long as there remained a substantial risk that extradition would culminate in his detention on “death row.”

Additionally, Plan B references the Council of Europe, Manual on Human Rights and the Environment, which states:

(a) The right to life is protected under Article 2 of the Convention: This Article does not solely concern deaths resulting directly from the actions of the agents of a State, but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. This means that public authorities have a duty to take steps to guarantee the rights of the Convention even when they are threatened by other (private) persons or activities that are not directly connected with the State ...⁵⁵

Plan B also explains how the procedural aspect of the right to life demands an effective investigation into loss of life to determine accountability for violations, as emphasized by the European Court of Human Rights:

The State’s positive obligation [to uphold the right to life] also requires an effective independent judicial system to be set up so as to secure legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim ...⁵⁶

ClientEarth’s brief notes that the Philippines has obligations under various human rights treaties to provide access to a remedy for citizens affected by human rights violations. The Office of the High Commissioner for Human Rights (OHCHR) has articulated that the obligation of states to provide effective access to a remedy to those who are subject of human rights violations:

Extend to all rights-holders and to harm that occurs both inside and beyond boundaries. States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur.⁵⁷

⁵⁴ *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989); *see also* Plan B brief, at § 2.2.

⁵⁵ COUNCIL OF EUROPE, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT, Pt. II, Ch. 1, 33-43 (2012), https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf.

⁵⁶ *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, Admissibility, Merits and Just Satisfaction Judgment, App. No. 19986/06, IHRL 2035 (Eur. Ct. H. R. Apr. 10, 2012).

⁵⁷ *See* ClientEarth brief, at ¶¶ 37, 43 (citing U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, SUBMISSION OF THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS TO THE 21ST CONFERENCE OF THE PARTIES TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, 3 (2015)).

Plan B concludes that under human rights law, the authority of the Commission is determined by the location (or citizenship) of the victims, and the Commission's responsibility to uphold the rights of the Petitioners, rather than the identity or whereabouts of those allegedly responsible for the violations.⁵⁸

Summary Conclusions

- The Commission's mandate under national law clearly includes powers to investigate the claims raised in the Petition;
- The exercise of authority by the Commission in investigating the Petition is aligned with international law practice;
- Both the effects doctrine and the protective principle establish a clear nexus between the Philippines and the human rights violations raised in the Petition; and
- States' human rights obligations demand effective investigations into the human rights violations alleged by the Petitioners.

⁵⁸ See Plan B brief, at § 2.2 (pgs. 5-6).

SUMMARY OF *AMICI* EXPERT CONTRIBUTIONS REGARDING THE HUMAN RIGHTS IMPACTS OF CLIMATE CHANGE⁵⁹

Key Findings and Messages

The harmful effects of climate change pose an enormous threat to human rights in the Philippines and abroad. Increases in the severity and frequency of sudden-onset disasters such as hurricanes and floods will cause deaths, injuries, property destruction, and human displacement, while more gradual forms of environmental degradation will undermine access to clean water, food, and other key resources. All of these impacts will impair fundamental rights including the rights to life, health, clean water and sanitation, food, adequate housing, self-determination and development, and equality and non-discrimination. These impacts will disproportionately affect certain countries and individuals, including those who are disadvantaged due to poverty, gender, age, disability, cultural or ethnic background, and other factors, as well as children and future generations who will experience increasingly severe impacts over time. This is not merely an abstract future possibility: the Philippines and many other countries are already experiencing adverse effects on human rights as a result of climate change.

Summary Argument⁶⁰

It is well-understood that climate change poses a serious threat to the full enjoyment of human rights enshrined in the Philippines Constitution, the UDHR, the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and other human rights instruments. The United Nations Human Rights Council (HRC) has issued seven resolutions recognizing the harmful effects of climate change on human rights and the obligations of states to take action to address these harmful effects.⁶¹ The OHCHR, the UN Special Rapporteur on

⁵⁹ This summary was compiled with inputs from the Sabin Center for Climate Change Law (Michael Burger & Jessica Wentz), the Center for International Environmental Law (CIEL) (Sébastien Duyck, Erika Lennon & Carroll Muffett), Environmental Law Alliance Worldwide (ELAW) (Jennifer Gleason & Killian Doherty), Our Children's Trust (Elizabeth Brown & Danny Noonan), and ClientEarth (Sophie Marjanac) and is based on their previously submitted underlying *amicus curiae* briefs as well as relevant updates.

⁶⁰ For a more detailed summary of these impacts, please refer to the *amicus* briefs submitted by the Sabin Center for Climate Change Law (general impacts) and Our Children's Trust (impacts on children and future generations). *Amicus curiae* brief submitted by the Sabin Center for Climate Change Law, <https://business-humanrights.org/sites/default/files/documents/Wentz-and-Burger-2016-12-Submission-Case-No.-CHR-NI-2016-0001.pdf> [hereinafter Sabin Center brief]; *amicus curiae* brief submitted by Our Children's Trust, <https://business-humanrights.org/sites/default/files/documents/OCT%20Amicus%20Submission.pdf> [hereinafter Our Children's Trust brief]. For a recent synthesis of authoritative statements, see CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL) AND GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (GIESCR), STATE HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF CLIMATE CHANGE: SYNTHESIS NOTE ON THE CONCLUDING OBSERVATIONS AND RECOMMENDATIONS ON CLIMATE CHANGE ADOPTED BY UN HUMAN RIGHTS TREATY BODIES (Jan. 2018), <http://www.ciel.org/wp-content/uploads/2018/01/HRTBs-synthesis-report.pdf>.

⁶¹ United Nations Human Rights Council Res. 7/23, *Human Rights and Climate Change*, A/HRC/Res/7/23 (Mar. 2008); United Nations Human Rights Council Res. 10/4, *Human Rights and Climate Change*, A/HRC/Res/10/4 (Mar. 25, 2009); United Nations Human Rights Council Res. 18/22, *Human Rights and Climate Change*, A/HRC/Res/18/22 (Oct. 17, 2011); United Nations Human Rights Council Res. 26/27, *Human Rights and Climate Change*, A/HRC/Res/26/27 (July 15, 2014); United Nations Human Rights Council Res. 29/15, *Human Rights and Climate Change*, A/HRC/Res/29/15 (July 2, 2015); United Nations Human Rights Council Res. 32/33, *Human Rights and Climate Change*, A/HRC/RES/32/33 (July 18, 2016); United Nations Human Rights Council Res. 35/20, A/HRC/35/20 (July 7, 2017).

Human Rights and the Environment,⁶² and other UN subsidiary bodies and affiliated organizations have also issued numerous reports detailing the linkages between climate change and human rights law.⁶³ Most recently, the Inter-American Court of Human Rights (IACtHR) reiterated that protecting the environment is critical to the enjoyment of other human rights and “has recognized the existence of an undeniable relationship between the protection of the environment and the fulfillment of other human rights, in that environmental degradation and the adverse effects of climate change affect the effective enjoyment of human rights.”⁶⁴

Below are the relevant findings of UN bodies and other legal and technical experts detailing precisely how the impacts of climate change will affect specific rights, including the right to life, right to health, right to clean water and sanitation, right to food, right to adequate housing, right to self-determination and development, and right to equality and non-discrimination. A chart summarizing the relationship between climate impacts, human impacts, and human rights protections is attached as **Chart A**.

I. Right to Life

The UDHR and the ICCPR recognize that every human being has an inherent right to life, liberty, and security of person.⁶⁵ OHCHR has recognized that climate change “clearly poses a threat to human life” due to the higher incidence of mortality associated with extreme weather events, increased heat, drought, and expanding disease vectors, among other things.⁶⁶ Other expert bodies and domestic tribunals have issued similar findings.⁶⁷

These findings are supported by a substantial body of evidence about the life-threatening effects of climate change. According to the World Health Organization (WHO), climate change

⁶² Rep. 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).

⁶³ For a detailed list of statements issued by UN bodies on this topic, see Sabin Center brief, at n. 52. See also UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Norway*, UN Doc. CEDAW/C/NOR/CO/9 (Nov. 17, 2017) (expressing concern about the climate impacts of oil and gas extraction in the Arctic and the adverse consequences for women’s rights); UN Committee on Economic, Social and Cultural Rights, *List of Issues in Relation to the Fourth Periodic Report of Argentina*, UN Doc. E/C.12/ARG/Q/4 (Oct. 13, 2017) (noting that fossil fuel exploration has human rights implications); UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, UN Doc. E/C.12/AUS/CO/5 (July 11, 2017) (recommending that Australia revise its climate change and energy policies in order to address the human rights impacts of climate change).

⁶⁴ Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, Opinión Consultiva OC-23/17 Inter-Am. Ct. H.R., ¶ 47 (internal citation omitted) (dated Nov. 15, 2017, published Feb. 7, 2018), available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf (unofficial translation) (Original: “Esta Corte ha reconocido la existencia de una relación innegable entre la protección del medio ambiente y la realización de otros derechos humanos, en tanto la degradación ambiental y los efectos adversos del cambio climático afectan el goce efectivo de los derechos humanos.”). The Inter-American Court of Human Rights’s official English summary is provided as an Appendix to this joint summary.

⁶⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 3 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Arts. 6, 9, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁶⁶ UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 57, at 13-14.

⁶⁷ See, e.g., *Urgenda Foundation v. Kingdom of the Netherlands*, Judgment: Regarding the failure of the Dutch State to take sufficient actions to prevent dangerous climate change, ¶ 4.74 (District Court of the Hague 2015); *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (Lahore High Court Green Bench, Sept. 15, 2015).

is expected to cause approximately 250,000 additional deaths per year between 2030 and 2050 due to increases in malnutrition, malaria, dengue, diarrhea, and heat stress alone.⁶⁸ A broader study commissioned by the Climate Vulnerable Forum found that climate change is already responsible for approximately 400,000 deaths per year and that number is expected to rise to 700,000 deaths per year by 2030.⁶⁹ These mortality estimates are based on the direct effects of climate change, such as extreme weather events, flooding, heat waves, disease, water shortages, and food shortages. Climate change can also affect mortality in other ways that are more difficult to quantify – for example, by undermining livelihoods and displacing people from their homes.

In the Philippines, the most significant climate-related threats to life include observed and projected increases in storm intensity, extreme rainfall, flooding, and landslides, the effects of which will be exacerbated by sea level rise in coastal areas, as well as increased maximum temperatures and heat waves. Severe storms like Typhoon Haiyan have already claimed tens of thousands of lives in the past decade.⁷⁰ The possibility of more severe or prolonged droughts is also a major concern in many parts of the country.⁷¹

II. Right to Health

The ICESCR enshrines “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”⁷² The UDHR also recognizes a right to health as part of the right to an adequate standard of living.⁷³ Citing studies from the Intergovernmental Panel on Climate Change (IPCC), WHO, and other expert bodies, OHCHR has concluded that climate change negatively affects the right to health.⁷⁴

The key impacts of climate change on health include: increases in the incidence of heat-related mortality as well as heat-related respiratory and cardiovascular disease; extreme weather events and natural disasters; expanding disease vectors; nutrition deficits linked to food shortages and loss of livelihoods; violent conflict associated with resource scarcity and displacement of people due to climate change; and adverse impacts on mental health owing to the physical and mental stress caused by various climate-related phenomena (e.g., displacement from homes due to sea level rise).⁷⁵ Recognizing that these negative health impacts “will increase exponentially with every incremental increase in warming,” OHCHR has stated that “[l]imiting global

⁶⁸ WORLD HEALTH ORGANIZATION, QUANTITATIVE RISK ASSESSMENT OF THE EFFECTS OF CLIMATE CHANGE ON SELECTED CAUSES OF DEATH, 2030S AND 2050S (2014).

⁶⁹ DARA AND CLIMATE VULNERABLE FORUM, A GUIDE TO THE COLD CALCULUS OF A HOT PLANET, 17 (2d ed. 2012).

⁷⁰ Gwen de la Cruz, *Worst Natural Disasters in the Philippines*, RAPPLER, Aug. 1, 2014, <https://www.rappler.com/move-ph/issues/disasters/64916-worst-natural-disasters-philippines>.

⁷¹ For more on this, please refer to the discussion of the “right to water” below.

⁷² International Covenant on Economic, Social and Cultural Rights, Art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁷³ UDHR, *supra* note 65, Art. 25.

⁷⁴ U.N. Human Rights Office of the High Commissioner, *Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 45, UN Doc. A/HRC/32/23 (May 6, 2016).

⁷⁵ *Id.* at ¶¶ 5-8, 12-22 (citing WORLD HEALTH ORGANIZATION, CLIMATE CHANGE AND HEALTH, FACT SHEET NO. 266; INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, CONTRIBUTION OF THE WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 713 (Christopher Field et al. eds. 2014) [hereinafter IPCC WGII]).

warming to the greatest extent possible and achieving the target of 1.5°C above pre-industrial levels should... be the objective of all climate action.”⁷⁶ But as discussed in Section III of this joint summary *amicus* brief, even the 1.5°C target may be too high to avoid serious adverse effects on health.

Pacific island nations are particularly vulnerable to these types of health impacts. This is due in large part to the tropical climate, which means that these countries experience greater risks from more severe tropical cyclones, more intense monsoons, expanding disease vectors, and heat waves. Indeed, there have already been observed increases in the frequency of severe typhoons, flooding events, and heat waves in the Philippines.⁷⁷ Another key concern in the Philippines is malnutrition due to disruptions in food supply caused by rising temperatures, drought, and extreme weather events.⁷⁸ There is evidence that climate change has contributed to severe droughts in the Philippines over the past three decades, which have in turn contributed to increases in food scarcity as well as rural unrest and mass migration and the corresponding impacts on public health.⁷⁹

III. Right to Clean Water and Sanitation

The UN General Assembly has recognized that all persons have a “right to safe and clean drinking water and sanitation that is essential for the full enjoyment of life and all human rights.”⁸⁰ Climate change will seriously affect the availability of freshwater through reductions in precipitation and snowpack; increased evapotranspiration resulting from higher temperatures; sea level rise, which will contribute to saltwater intrusion into freshwater aquifers; and more intense storms, rainfall, and flooding, which can lead to contamination of freshwater sources. Freshwater scarcity, flooding, and sea level rise can also adversely affect sanitation systems (e.g., when wastewater treatment plants flood or when sufficient water is not available for hygienic needs).

The higher incidence of drought is a major concern for the Philippines. Previous droughts have caused massive crop failures and water shortages.⁸¹ In April 2016, it was reported that 42% of the country was experiencing drought or dry spells and 39 provinces, cities, municipalities, and villages had declared a state of emergency as a result.⁸² As noted above, scientists have linked climate change to changes in the hydrological cycle, increased evapotranspiration, and exacerbated droughts in the Philippines and elsewhere. Going forward, the Philippines and many

⁷⁶ *Id.* at ¶ 55.

⁷⁷ Xerxes T. Seposo et al., *Evaluating the Effects of Temperature on Mortality in Manila City (Philippines) from 2006-2010 Using a Distributed Lag Nonlinear Model*, 12(6) INT’L J. ENVIRON. RES. PUBLIC HEALTH 6842 (2015); de la Cruz (2014), *supra* note 70.

⁷⁸ PHILIPPINES ATMOSPHERIC, GEOPHYSICAL, AND ASTRONOMICAL SERVICES ADMINISTRATION, CLIMATE CHANGE IN THE PHILIPPINES, 51 (2011) [hereinafter PAGASA].

⁷⁹ JAMES WARREN, CLIMATE CHANGE ON THE IMPACT OF DROUGHT ON HUMAN AFFAIRS AND HUMAN HISTORY IN THE PHILIPPINES, 1582 TO 2009 (2013), <https://www.murdoch.edu.au/Research-capabilities/Asia-Research-Centre/document/Warren-drought-paper--final-version-copy-3-3.pdf>.

⁸⁰ G.A. Res. 64/292, The Human Right to Water and Sanitation, ¶ 1 (July 29, 2010).

⁸¹ WORLD BANK, GETTING A GRIP ON CLIMATE CHANGE IN THE PHILIPPINES, 12 (2013).

⁸² INT’L FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES (IFRC), PHILIPPINES: DROUGHT AND DRY SPELLS, INFORMATION BULLETIN NO. 1 (Apr. 29, 2016) [hereinafter IFRC].

other countries will almost certainly experience further decreases in dry season rainfall and increases in drought conditions.⁸³

IV. Right to Food

The right to adequate food is enshrined in both the UDHR and the ICESCR.⁸⁴ Drawing on expert reports, OHCHR has recognized that climate change is adversely affecting food production in many parts of the world.⁸⁵ According to the IPCC, changes in temperature and precipitation have negatively affected terrestrial crop production (wheat and maize)⁸⁶ as well as fishery productivity (as fish migrate to cooler and deeper waters in response to warming ocean temperatures).⁸⁷ These impacts will become more widespread and severe in the coming years.⁸⁸ Even in the near term, the impacts on global food security could be devastating—for example, 10% of the projected impacts on food security under a 2°C warming scenario showed yield losses of more than 25% for the period 2030-2049.⁸⁹ Greater losses are expected after 2050.⁹⁰ The food security risk will be greatest in low-latitude countries, where there is high confidence that crop production will be “consistently and negatively” affected by climate change in a 2°C warming scenario (and fishery production will also decline).⁹¹

Scientists have found that agriculture in the Philippines could be “severely affected by temperature changes coupled with changes in rain regimes and patterns.”⁹² Historically, crop yields in the Philippines have declined whenever temperatures have exceeded certain threshold values, which have been and will be increasingly exceeded as a result of climate change.⁹³ Drier conditions during the dry seasons have also led to declines in crop yields over the past few decades.⁹⁴ Going forward, the effect of rising temperatures and decreased rainfall on crop production could be devastating: one study found that 2 degrees Celsius of warming would reduce rice yield in the Philippines by 22%;⁹⁵ another study found that climate change may reduce rice yield in the Philippines by up to 75% in 2100 as compared with 1990 levels.⁹⁶ Climate change may also affect food production in the Philippines through increases in the

⁸³ PAGASA (2011), *supra* note 78.

⁸⁴ UDHR, *supra* note 65, Art. 25; ICESCR, *supra* note 72, Art. 11.

⁸⁵ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THE RIGHT TO ADEQUATE FOOD, FACT SHEET NO. 34, 22 (2010).

⁸⁶ IPCC WGII, *supra* note 75, at 491.

⁸⁷ *Id.* at 493.

⁸⁸ *Id.* at 488.

⁸⁹ *Id.* at 504.

⁹⁰ *Id.* at 488, 504.

⁹¹ *Id.*

⁹² PAGASA, *supra* note 78, at 50.

⁹³ *Id.*

⁹⁴ Warren, *supra* note 79; IFRC, *supra* note 82.

⁹⁵ C.R. Escaño & L. V. Buendia, *Climate Impact Assessment for Agriculture in the Philippines: Simulation of Rice Yield Under Climate Change Scenarios*, in IMPLICATIONS OF CLIMATE CHANGE FOR INTERNATIONAL AGRICULTURE: CROP MODELING STUDIES (U.S. EPA 1994).

⁹⁶ ASIAN DEVELOPMENT BANK (ADB), THE ECONOMICS OF CLIMATE CHANGE IN SOUTHEAST ASIA: A REGIONAL REVIEW (2009).

incidence and outbreaks of pests and diseases,⁹⁷ increases in extreme weather events and flooding,⁹⁸ and declines in fishery productivity.⁹⁹

V. Right to Adequate Housing

The UDHR and the ICESCR recognize that all persons have a right to adequate housing, as part of the right to an adequate standard of living.¹⁰⁰ OHCHR has noted that the right to adequate housing entails the right to be free from arbitrary interference with one's home, privacy and family, and the right to choose one's residence, to determine where to live, and to have freedom of movement.¹⁰¹ Sea level rise, extreme weather events, and other climate-related harms will arbitrarily deprive many individuals of their homes.¹⁰² Without adaptation, the IPCC projects with high confidence that "hundreds of millions of people will be affected by coastal flooding and will be displaced due to land loss by year 2100."¹⁰³ Drought and desertification could lead to the displacement of millions more. Many people may also migrate due to adverse impacts on their livelihoods associated with declining agricultural yields, the destruction of ecosystem services, and resource shortages caused by climate change.

In the Philippines, more severe storms and flooding events linked to climate change have already displaced millions of people from their homes. Typhoon Haiyan alone displaced more than four million people and damaged or destroyed more than one million homes.¹⁰⁴ Displacement due to sea level rise is another major concern in the Philippines, due to the rapid increase in sea levels (which is five times the global average from 1992-2014) and the number of people who live on the coast.¹⁰⁵ Decreased agricultural yields and inadequate job opportunities in the agricultural sector may also result in migration from rural to urban areas in the Philippines, putting additional pressure on already depressed urban areas and mega cities.¹⁰⁶

VI. Right to Self-Determination and Development

The ICESCR and ICCPR recognize that "[a]ll peoples have the right to self-determination" and "[b]y virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."¹⁰⁷ The UN General Assembly affirmed this principle when it adopted the 1986 Declaration on the Right to Development, which stated that the "right to development is an inalienable human right by virtue of which every human

⁹⁷ *Id.*

⁹⁸ PAGASA, *supra* note 78, at 50.

⁹⁹ *Id.*

¹⁰⁰ UDHR, *supra* note 65, Art. 25; ICESCR, *supra* note 72, Art. 11(1).

¹⁰¹ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, THE RIGHT TO ADEQUATE HOUSING, FACT SHEET NO. 21/Rev.1, 3 (2009).

¹⁰² INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE (2009).

¹⁰³ IPCC WGII, *supra* note 75, at 364.

¹⁰⁴ ANGELA SHERWOOD ET AL., RESOLVING POST-DISASTER DISPLACEMENT: INSIGHTS FROM THE PHILIPPINES AFTER TYPHOON HAIYAN, 1 (2014), <https://www.brookings.edu/wp-content/uploads/2016/06/Resolving-PostDisaster-DisplacementInsights-from-the-Philippines-after-Typhoon-Haiyan-June-2015.pdf>.

¹⁰⁵ Henrike Brecht et al., *Sea-level rise and storm surges: High stakes for a small number of developing countries*, 21(1) J. OF ENV'T DEV. 120 (2012).

¹⁰⁶ PAGASA, *supra* note 78, at 50.

¹⁰⁷ ICESCR, *supra* note 72, Art. 1(1); ICCPR, *supra* note 65, Art. 1(1).

person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”¹⁰⁸ The Declaration also recognized that the right of peoples to self-determination includes “the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”¹⁰⁹

The impacts of climate change will make it considerably more difficult for governments and people to pursue forms of development in which all human rights and fundamental freedoms can be fully realized. They will interfere with key economic sectors and government services, including energy, water services, transport, agriculture and livestock, forestry, fisheries, and tourism, and degrade the natural resource base that many people depend on for their lives and livelihoods. Access to food, water, and housing will all be impaired. And countries will not enjoy full sovereignty over the management of their natural resources, insofar as these resources will be impaired by climate change.

Climate change thus poses a serious barrier to sustainable development, particularly in countries like the Philippines that will experience the brunt of its negative impacts.¹¹⁰ The costs of climate change impacts will be enormous in the Philippines, both in terms of monetary damages and damages to human lives and livelihoods. The Philippines has already suffered major economic losses as a result of severe typhoons over the past decade (e.g., Typhoon Haiyan caused approximately \$2 billion in damages).¹¹¹ The Asian Development Bank (ADB) estimates that, under a business-as-usual emissions trajectory, the Philippines will suffer a mean loss of 2.2% of gross domestic product (GDP) by 2100 when market impacts only (mainly related to agriculture and coastal zones) are considered, a 5.7% loss if non-market impacts (mainly related to health and ecosystems) are included, and a 6.7% loss if catastrophic risks are considered.¹¹²

VII. Right to Equality and Non-Discrimination

The UDHR recognizes that “[a]ll human beings are born free and equal in dignity and rights” and that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind.”¹¹³ The ICCPR and ICESCR similarly recognize that the rights enumerated therein must be exercised and protected without discrimination of any kind.¹¹⁴ Recognizing that certain groups are more likely to endure violations of their human rights (e.g., women, children, and indigenous peoples), the UN has established more detailed frameworks for the protection of these groups – specifically: the Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities, and the UN Declaration on the Rights of Indigenous Peoples.

¹⁰⁸ G.A. Res. 41/128, Declaration on the Right to Development, Art. 1(1) (Dec. 4, 1986).

¹⁰⁹ *Id.* Art. 1(2).

¹¹⁰ Press Release, World Bank, Philippines: Climate Change a Fundamental Threat to Development (May 23, 2014), <http://www.worldbank.org/en/news/press-release/2014/05/23/climate-change-a-fundamental-threat-to-development-world-bank>.

¹¹¹ PHILIPPINES NATIONAL DISASTER RISK REDUCTION AND MANAGEMENT COUNCIL, FINAL REPORT ON EFFECTS OF TYPHOON “YOLANDA” (HAIYAN) (2014).

¹¹² ADB, *supra* note 96, at 82.

¹¹³ UDHR, *supra* note 65, Arts. 1 and 2.

¹¹⁴ ICESCR, *supra* note 72, Art 2(2); ICCPR, *supra* note 65, Art. 2(1).

The OHCHR has recognized that the negative impacts of climate change “will disproportionately affect individuals, groups and peoples in vulnerable situations, including women, children, older persons, indigenous peoples, minorities, migrants, rural workers, persons with disabilities, the poor, and those living in vulnerable areas (e.g., small islands, riparian and low-lying coastal zones, arid regions, and the poles).”¹¹⁵ The IPCC has similarly found that “people who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable to climate change.”¹¹⁶ The vulnerability of these groups is a product of both heightened exposure to climate change impacts as well as limited capacity to adapt to those impacts.

In the Philippines, farmers and fishermen – some of the poorest groups (with poverty incidences of 45% and 50% respectively) – are particularly vulnerable to the impacts of climate change due to their high dependence on natural resources that are affected by climate change and their lack of resources to adapt (e.g., by finding new livelihoods).¹¹⁷ These groups have already been disproportionately affected by disasters such as Typhoon Haiyan,¹¹⁸ as well as more gradual changes brought about by climate change (e.g., reductions in precipitation and rising ocean temperatures).¹¹⁹ People living in informal urban settlements are also among the most vulnerable to climate change, due both to the direct impacts of climate change and the additional pressure placed on urban systems and livelihoods.¹²⁰ As the world gets warmer, it will become increasingly difficult for the government of the Philippines to fulfill its human rights obligations with respect to these people.

Children and future generations will also be disproportionately affected by climate change as harmful impacts become more severe overtime.¹²¹ In June 2017, the UN Human Rights Council observed that “children [...] are among the groups most vulnerable to the adverse impacts of climate change, which may seriously affect their enjoyment of the highest attainable standard of physical and mental health, access to education, adequate food, adequate housing, safe drinking water and sanitation.”¹²² The IPCC has also recognized that age is a differentiating

¹¹⁵ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *THE RIGHTS OF THOSE DISPROPORTIONATELY IMPACTED BY CLIMATE CHANGE*, 1 (2016).

¹¹⁶ IPCC WGII, *supra* note 75, at 6.

¹¹⁷ GETTING A GRIP ON CLIMATE CHANGE IN THE PHILIPPINES, *supra* note 81, at 13.

¹¹⁸ See Food and Agric. Org. of the United Nations, *Severe Damage to Agriculture and Fisheries After Haiyan*, Nov. 12, 2013, <http://www.fao.org/news/story/en/item/204327/icode/>; OXFAM & NFR, *REBUILDING FISHING COMMUNITIES AND FISHERIES: POST-HAIYAN RECONSTRUCTION IN THE PHILIPPINES* (Feb. 12, 2014).

¹¹⁹ See Dennis Jay Santos, *El Niño hits Philippines Farmers with Drought, Rats*, IRIN (Feb. 19, 2016); GREENPEACE, *PHILIPPINES SEAS IN CRISIS: IMMINENT THREATS FROM CLIMATE CHANGE, POLLUTION AND OVERFISHING* (Oct. 25, 2012); Pierre Fidenci, *Colossal Coral Bleaching Kills up to 95% of Corals in the Philippines*, MONAGABAY, Sept. 23, 2010.

¹²⁰ *Id.*

¹²¹ See generally United Nations General Assembly, *Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child*, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/35/13 (May 4, 2017). See also CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW and GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *STATES’ OBLIGATIONS UNDER THE CONVENTION ON THE RIGHTS OF THE CHILD, IN THE CONTEXT OF CLIMATE CHANGE* (Jan. 2018), <http://www.ciel.org/wp-content/uploads/2018/01/HRTBs-synthesis-report-CRC.pdf> (providing a recent summary of authoritative statements).

¹²² U.N. General Assembly, Human Rights Council Res. 35/20, Human rights and climate change, ¶ 15 (June 19, 2017).

factor in climate-related hazards.¹²³ Accordingly, the Committee on the Rights of the Child has called on States “to ensure that the special vulnerabilities and requirements of children, as well as their views, are taken into account when developing policies and programmes addressing the issues of climate change and disaster risk management.”¹²⁴

In a 2013 report to the UN General Assembly, the UN Secretary General noted the necessity of interpreting human rights instruments in the context of intergenerational equity, observing that our moral obligations to future generations arise from “the equal concern and respect we owe to all humans, regardless of where and when they may have been born.”¹²⁵ More recently in an Advisory Opinion, the IACtHR acknowledged that the right to a healthy environment is an individual and a collective right stating that “in its collective dimension, the right to a healthy environment constitutes a universal interest, which is owed to present as well as future generations.”¹²⁶ Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) has recognized that certain enumerated rights, including the rights to food and water, must be protected for both present and future generations.¹²⁷

As noted in the *amicus* brief submitted by Our Children’s Trust, “the current generation of children are developing into adults as States fail to address the causes of climate change; they live their lives in a time of increasing climate instability under threat of increasingly frequent and severe extreme weather events, increasing ocean acidification, loss of coastline and even entire geographic regions to rising sea levels, rising rates of epidemiological disease, dislocation, and social disruption.”¹²⁸ These threats will be even more pronounced for future generations in the Philippines and around the world.

Summary Conclusions

There is no question that climate change poses a substantial threat to human rights in the Philippines and abroad. The OHCHR and other expert bodies have issued numerous reports detailing both current and future threats to life, health, clean water and sanitation, food, housing, self-determination and development, and equality and non-discrimination. As detailed in the science section, the causal linkages between the emissions generated by the companies named in this investigation and these harmful impacts are well established. It is therefore appropriate and necessary to hold these companies accountable for the ways in which their actions have interfered and will continue to interfere with the full enjoyment of human rights.

¹²³ IPCC WGII, *supra* note 75, 1066.

¹²⁴ Committee on the Rights of the Child, Concluding Observations for Bhutan 2017, Antigua and Barbuda 2017, Mauritius 2015, New Zealand 2016, Samoa 2016, Saint Vincent and the Grenadines 2017.

¹²⁵ United Nations General Assembly Report, *Intergenerational solidarity and the needs of future generations Report of the Secretary-General*, A/68/322 (Aug. 2013).

¹²⁶ Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, Opinión Consultiva OC-23/17 Inter-Am. Ct. H.R., at ¶ 55 (internal citation omitted) (unofficial translation) (Original: “En su dimensión colectiva, el derecho a un medio ambiente sano constituye un interés universal, que se debe tanto a las generaciones presentes y futuras.”)

¹²⁷ Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 12: The Right to Adequate Food (Art. 11)*, E/C.12/1999/5 (May 12, 1999); Committee on Economic, Social and Cultural Rights, *CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, E/C.12/2002/11 (Jan. 20, 2003).

¹²⁸ Our Children’s Trust brief, at p. 10.

Chart A: Climate Impacts, Human Impacts, & Threatened Rights¹²⁹

CLIMATE IMPACTS	HUMAN IMPACTS	RIGHTS THREATENED
<p>Glacier Melt & Sea Level Rise</p> <ul style="list-style-type: none"> • Flooding • Storm surges • Erosion • Salinization of land and water • Species extinction 	<ul style="list-style-type: none"> • Loss of agricultural land and beaches • Damage to coastal infrastructure, homes, and property • Population displacement • Social disruption, civil unrest, and exploitation • Threat to economy, culture, and tourism • Drowning and injury • Lack of clean water • Increased disease and psychological distress • Disruption of educational services • Loss of biological diversity 	<ul style="list-style-type: none"> • Self-determination [ICCPR; ICESCR, 1] • Life [ICCPR, 6; CRC, 6] • Health [ICESCR, 12; CRC, 24] • Water [CEDAW, 14; CRC, 24] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12; CRC, 27] • Adequate housing [ICESCR, 12] • Culture [ICCPR, 27; CRC, 30, 31] • Property [UDHR, 17] • Education [ICESCR, 13; CRC, 28] • Parental [CRC, 7, 9] • Freedom from exploitation [CRC, 34, 36, 37]
<p>Ocean Warming & Acidification</p> <ul style="list-style-type: none"> • Coral bleaching • Fisheries decline • Species extinction 	<ul style="list-style-type: none"> • Food shortages and civil unrest • Threat to economy, culture, and tourism • Loss of biological diversity 	<ul style="list-style-type: none"> • Life [ICCPR, 6; CRC, 6] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12; CRC, 27]
<p>Temperature Increase, Changes in Precipitation, & Extreme Weather</p> <ul style="list-style-type: none"> • Heat Waves • Droughts • Wildfire • Flooding • Higher intensity storms • Storm surges • Species extinction 	<ul style="list-style-type: none"> • Population displacement • Food and water shortages • Social disruption, civil unrest, and exploitation • Damage to infrastructure, homes, and property • Damage to agricultural lands • Threat to economy, culture, and tourism • Contamination of water supply • Delays in medical 	<ul style="list-style-type: none"> • Life [ICCPR, 6; CRC, 6] • Health [ICESCR, 12; CRC, 24] • Water [CEDAW, 14; CRC, 24] • Means of subsistence [ICESCR, 1] • Adequate standard of living [ICESCR, 12; CRC, 27] • Adequate and secure housing [ICESCR, 12] • Education [ICESCR, 13] • Property [UDHR, 17]

¹²⁹ Material from Our Children’s Trust brief.

<ul style="list-style-type: none"> • Change in disease vectors • Increased allergens 	<p>treatment</p> <ul style="list-style-type: none"> • Outbreak and increased spread of disease • Increased respiratory illnesses and mortality rates • Increased psychological distress • Disruption of educational services • Loss of biological diversity 	<ul style="list-style-type: none"> • Education [ICESCR, 13; CRC, 28] • Parental [CRC, 7, 9] • Freedom from exploitation [CRC, 34, 36, 37]
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SUMMARY OF *AMICI* EXPERT CONTRIBUTIONS REGARDING THE SCIENCE OF CLIMATE CHANGE IMPACTS, ATTRIBUTION, AND RECOVERY¹³⁰

Key Findings and Messages

Reputable international and domestic scientific bodies, as well as an extensive body of peer-reviewed science, indicate that climate change is causing severe environmental, economic, and social impacts at current levels of planetary warming, and that these impacts will intensify with any additional warming. The occurrence and severity of these impacts is, to varying degrees, attributable to planetary warming above pre-industrial levels. The activities of the respondents to the Petition have materially contributed to a large percentage of this warming. Rapid, large-scale emissions reductions and carbon sequestration are needed in order to meet either the Paris Agreement’s temperature goals or more stringent science-based climate recovery targets. In addition, adaptation to the climate change already underway and expected is essential and requires assessing vulnerability and possible impacts, building resilience, and planning for the consequences.

The Commission is to note that each section or sub-section of this consolidated section reflects the position of *only those amici* indicated in parentheses at the end of the heading for that section or sub-section.

Summary Argument

I. Climate Change Impacts Globally

A. *Findings from the IPCC’s Fifth Assessment Report (ClientEarth, Sabin Center, Plan B)*

The IPCC was established in 1988. The IPCC “assess[es] on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation.”¹³¹ Expert scientists from every nation are involved in the drafting of IPCC reports, which are subject to significant scrutiny, debate, and contestation, with input of scientists from around the world.¹³² The IPCC’s findings as to climate change impacts are also supported by, and largely consistent with, individual government assessments.¹³³

The most recent report, the Fifth Assessment Report, found that warming of the climate system “is unequivocal,” that present atmospheric concentrations of CO₂, CH₄, and NO are

¹³⁰ This summary was compiled with inputs from Our Children’s Trust (Elizabeth Brown & Danny Noonan), ClientEarth (Sophie Marjanac), the Sabin Center for Climate Change Law (Michael Burger & Jessica Wentz), Plan B (Tim Crosland), James E. Hansen (Dan Galpern), and Kevin E. Trenberth and is based on their previously submitted underlying *amicus curiae* briefs and letters as well as relevant updates.

¹³¹ Intergovernmental Panel on Climate Change (IPCC), *History* (2017), https://www.ipcc.ch/organization/organization_history.shtml.

¹³² See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC FACTSHEET: HOW DOES THE IPCC APPROVE REPORTS?, (2013), https://www.ipcc.ch/news_and_events/docs/factsheets/FS_review_process.pdf (providing details of the review process).

¹³³ Sabin Center brief, at p. 4-5; Plan B brief, at § 5.1 (p. 14-16).

“unprecedented in at least the last 800,000 years,” and that these anthropogenic greenhouse gas (GHG) emissions “are *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century.”¹³⁴ The report summarizes the projected impacts of anthropogenic climate change as follows:

Temperature Increase: Global average surface temperatures are likely to increase 1.5°C to 2.3°C above the 1850–1900 period by 2050, and temperatures could increase by more than 4°C by 2081–2100 if governments and business do not undertake concerted efforts to mitigate GHG emissions.¹³⁵ There will be substantial increases in temperature extremes by the end of the twenty-first century, resulting in increasingly frequent unusually hot days and heat waves.¹³⁶

Precipitation and Water Resources: Precipitation will increase in intensity in particular regions, resulting in a projected increase in flood hazards in these regions. Climate change is likely to increase the frequency of meteorological, agricultural, and short hydrological droughts.¹³⁷ There will be significant reductions in surface water and groundwater resources in most dry subtropical regions, thus intensifying competition for water and affecting regional water, energy, and food security.¹³⁸ This will be driven by, *inter alia*: (i) reduced rainfall, (ii) reduced snowpack, resulting in less snowmelt supplying rivers and streams; and (iii) increased evapotranspiration and higher temperatures, which in turn further increase the atmospheric demand for moisture from surface water and soils. Sea level rise will also threaten freshwater supply in coastal areas by causing saltwater inundation of surface and ground water.

Sea Level Rise: The IPCC projects global mean sea levels to rise by 0.17–0.38 meters by the mid-century (2046–2065) and by 0.26–0.82 meters by the end of the century (2081–2100), as compared with a 1986–2005 baseline.¹³⁹ Coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, flooding, erosion, and saltwater intrusion as a result. Increases in precipitation and coastal storms will contribute to these harmful impacts.

Impaired Ecosystems: Even under intermediate emissions scenarios, there is a “high risk” that climate change will cause “abrupt and irreversible regional-scale change in the composition, structure, and function of terrestrial and freshwater ecosystems” in this century.¹⁴⁰ Many plant and animal species will be unable to migrate or otherwise adapt quickly enough to changing climactic conditions.¹⁴¹ Climate change will “reduce the populations, vigor, and viability” of many species, especially those with spatially restricted populations, and will increase the extinction risk for many species.¹⁴² Climate change-driven “forest dieback,” which has already

¹³⁴ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Rajendra K. Pachauri and Leo A. Meyer eds. 2014).

¹³⁵ IPCC WGII, *supra* note 75, at 187.

¹³⁶ *Id.*

¹³⁷ *Id.* at 232.

¹³⁸ *Id.*

¹³⁹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE TECHNICAL SCIENCE BASIS, WORKING GROUP I CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 90 (Thomas Stocker et al. eds. 2013) [hereinafter IPCC WGI].

¹⁴⁰ IPCC WGII, *supra* note 75, at 276.

¹⁴¹ *Id.* at 275.

¹⁴² *Id.*

been observed in many regions globally, will have potentially significant impacts on climate, biodiversity, water quality, wood production, and livelihoods.¹⁴³ The composition of coastal and estuarine ecosystems will be altered by sea level rise, changes in precipitation and river flow, increased water temperatures, and ocean acidification, and this will contribute to a decline in biodiversity and ecosystem productivity along coastlines.¹⁴⁴ Climate change is already altering the physical, chemical, and biological properties of marine ecosystems, with the shift in distribution of many fish and invertebrates poleward and/or toward deeper, cooler waters, carrying serious implications for marine productivity and food security in tropical areas.¹⁴⁵

Effects on Buildings, Infrastructure, and Services: Climate change “will have profound impacts on a broad spectrum of city functions, infrastructures, and services and will interact with and may exacerbate many existing stresses.”¹⁴⁶ For example, extreme weather events and sea level rise will damage and destroy buildings and infrastructure, particularly on coastlines. Rising temperatures and heavy precipitation will adversely affect critical transportation, water, and electric infrastructure in many areas. Decreases in precipitation and freshwater resources will pose a major challenge for the management of water supply, irrigation systems, and hydroelectric dams.

Expanding Disease Vectors: Increases in heavy rain and temperature will increase the risk of vector-borne diseases, such as malaria and dengue, in many parts of the world.¹⁴⁷

B. Peer-reviewed findings of impacts above 1°C of warming (Our Children’s Trust, Hansen)

The best climate science indicates that, to protect the earth’s systems, the *long-term* increase in the average global surface temperature of the Earth above preindustrial temperatures must stay below 1°C.¹⁴⁸ The best climate science further indicates that allowing global average surface temperatures to approach 2°C for any length of time would be highly dangerous.¹⁴⁹ Peer-reviewed research shows that populations around the world are already experiencing significant and varied impacts from the 1°C warming that has occurred.¹⁵⁰ These impacts constitute

¹⁴³ *Id.* at 275-76.

¹⁴⁴ *Id.* at 368.

¹⁴⁵ *Id.* at 414-15.

¹⁴⁶ IPCC WGII, *supra* note 75, at 556.

¹⁴⁷ *Id.* at 725-26.

¹⁴⁸ Given the long-term effects of CO₂ in the atmosphere, past emissions may result in a 1.5°C peak in global surface heating for a period; however, emissions must be reduced to ensure that long-term temperatures, after peaking, eventually stabilize at no more than 1°C above preindustrial levels. To stabilize at 1°C requires a mean atmospheric concentration of CO₂ of no more than 350 ppm. See Our Children’s Trust brief, at p. 2, n. 2.

¹⁴⁹ James Hansen et al., *Assessing “Dangerous Climate Change”: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8(12) PLOS ONE 81648, 15 [hereinafter *Assessing “Dangerous Climate Change”*] (noting that a 2°C increase would result in an “unacceptably high risk of global catastrophe”); Our Children’s Trust brief, Exhibit A, *Declaration of Dr. James E. Hansen in Support of Our Children’s Trust et al.’s Submission to the UN Committee on the Rights of the Child Regarding State Obligations, Children’s Rights and Climate Change* (Aug. 19, 2016) [hereinafter Our Children’s Trust brief, Exhibit A (Hansen Declaration)]; Our Children’s Trust brief, Exhibit B.

¹⁵⁰ For a list of global impacts felt in 2015, see, e.g., WORLD METEOROLOGICAL ORGANIZATION, WMO STATEMENT ON THE STATUS OF THE GLOBAL CLIMATE IN 2015, WMO No. 1167, 11-20 (2016), <http://www.cma.gov.cn/en2014/news/News/201603/P020160322334697539255.pdf> [hereinafter WMO STATUS

harbingers of far more dangerous, irreversible, and uncontrollable changes to come, as climate and biological systems pass critical tipping points.¹⁵¹

As just one example, both the paleoclimate record, and observed nonlinear ice mass losses from Greenland, West Antarctica, and parts of East Antarctica indicates that current levels of warming are sufficient to produce nonlinear major ice sheet disintegration and sea level rise.¹⁵² Consequently, “if GHG emissions continue to grow... [a] multi-meter sea level rise would become practically unavoidable, probably within 50-150 years.”¹⁵³

II. Climate Change Impacts Specific to the Philippines (*Sabin Center, Plan B*)

A number of reputable studies have also assessed the projected impact of climate change on the Philippines specifically. The findings of these studies are as follows:

Temperature Increase: The Philippines Atmospheric, Geophysical, and Astronomical Services Administration (PAGASA) found that, between 1951 and 2010, the Philippines experienced a 0.65°C increase in average temperature and a 1.0°C increase in maximum temperature.¹⁵⁴ The Philippines also saw a significant increase in the number of hot days and a decrease in the number of cool nights from 1951 through 2010.¹⁵⁵ PAGASA predicts that annual mean temperatures in the Philippines are expected to rise by 0.9–1.1°C by 2020 and by 1.8–2.2°C by 2050, relative to a 1971-2000 baseline.¹⁵⁶ In 2016, the Philippines experienced a heat wave during which the heat index reached a dangerous 51°C (surpassing the previous record of 49.4°C, also set in 2016).¹⁵⁷

Precipitation and Water Resources: In the Philippines, there has been an observed increase in the number of heavy rainfall days as well as in the number of “no rain” days, which has likely contributed to severe floods and landslides as well as droughts.¹⁵⁸ In the future, most areas in the Philippines will likely experience a reduction in rainfall during the summer season,

GLOBAL CLIMATE 2015]; see also Our Children’s Trust brief, Exhibit A (Hansen Declaration); Our Children’s Trust brief, Exhibit B; Anthony J. McMichael, *Globalization, Climate Change, and Human Health*. 368 N. ENGL. J. MED. 1335, 1340 (2013) [hereinafter *Climate Change and Human Health*]; see also Mark C. Urban, *Accelerating Extinction Risk from Climate Change*, 348 SCI. 571, 572 (2015) [hereinafter *Accelerating Extinction*].

¹⁵¹ Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶¶ 17, 69; see also *Assessing “Dangerous Climate Change,” supra* note 149, at 15.

¹⁵² Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶¶ 35-38.

¹⁵³ James Hansen et al., *Ice Melt, Sea Level Rise and Superstorms; Evidence from Paleoclimate Data, Climate Modelling, and Modern Observations that 2°C Global Warming Could be Dangerous*. 16 ATMOS. CHEM. PHYS., 3761, 3799 (2015); Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶ 42.

¹⁵⁴ PAGASA, *supra* note 78, at 16.

¹⁵⁵ *Id.* at 20.

¹⁵⁶ *Id.* at 25.

¹⁵⁷ Dona Z. Passbugan, *Heat Index Soars to Record 51°C*, Philippines Daily Inquirer (Apr. 13, 2016), <http://newsinfo.inquirer.net/779281/heat-index-soars-to-record-51c>.

¹⁵⁸ F.T. Cruz et al., *A Climatological Analysis of the Southwest Monsoon Rainfall in the Philippines*, 122 ATMOSPHERIC RES. 609 (2013); Warren, *supra* note 79; Intergovernmental Panel on Climate Change, *Climate Change 2007: Observed Changes in Extreme Climatic Events*, https://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch10s10-2-3.html (noting that increased occurrence of extreme rains likely caused landslides and floods in 1990 and 2004 in the Philippines, as well as droughts in 1997-98 which caused massive crop failures and water shortages and forest fires in various parts of the Philippines).

making the usually dry season drier and increasing the risk of drought.¹⁵⁹ Some areas are also projected to experience an increase in rainfall during the southwest monsoon season and the transition from the southwest to northeast monsoon season, increasing the risk of flooding and landslides in these areas.¹⁶⁰ Throughout the country, there are projected increases in both heavy rainfall days (days with rainfall exceeding 300 mm) and dry days (less than 2.5 mm rainfall).¹⁶¹ The intensity of these extreme weather events is also projected to increase, resulting in an increased risk of both floods and droughts.¹⁶²

Tropical Storms: Tropical storms pose a significant threat to the Philippines due to its exposed location, large number of islands, extensive coastline, and large coastal population. Climate warming increases the intensity of heavy rains and typhoons, as well as their size and duration. Five of the ten deadliest typhoons to hit the country since 1947 occurred in the past decade, killing tens of thousands of people and causing extensive economic and physical damages.¹⁶³ The most devastating was Typhoon Haiyan in November 2013, which was the strongest tropical cyclone in recorded history; it claimed more than 7,000 lives and displaced more than four million people.¹⁶⁴ Scientists have determined that a combination of climate change-related factors (warmer ocean temperatures and sea level rise) contributed to the increased intensity and damage of the storm.¹⁶⁵ The Philippines will likely experience even more severe tropical cyclones as temperatures increase,¹⁶⁶ the damages of which will be exacerbated by sea level rise and heavy rains and flooding.

Impaired Ecosystems: Ecosystems in the Philippines are already being impacted by climate change. For example, it is apparent that ocean warming and acidification have contributed to the degradation of coral reefs near the Philippines coastline and the fisheries they support.¹⁶⁷ Prolonged dry periods in Philippine forest ecosystems may threaten the livelihoods and health of forest-dependent communities.¹⁶⁸

¹⁵⁹ PAGASA, *supra* note 78, at 25.

¹⁶⁰ *Id.* at 25, 27; *see also* ARIEF ANSHORY YUSUF & HERMINIA FRANCISCO, HOTSPOTS! MAPPING CLIMATE CHANGE VULNERABILITY IN SOUTHEAST ASIA (2010) (finding that the Philippines is particularly vulnerable to floods and landslides).

¹⁶¹ PAGASA, *supra* note 78, at 27.

¹⁶² Juan M. Pulhin et al, *Integrating Disaster Risk Reduction and Climate Change Adaptation: Initiatives and Challenges in the Philippines*, in CLIMATE CHANGE ADAPTATION AND DISASTER RISK REDUCTION: AN ASIAN PERSPECTIVE (Rajib Shaw et al. eds., 2010).

¹⁶³ *How is Climate Change Affecting the Philippines?*, THE CLIMATE REALITY PROJECT (Jan. 19, 2016, 10:02 AM), <https://www.climaterealityproject.org/blog/how-climate-change-affecting-philippines>.

¹⁶⁴ SHERWOOD ET AL., *supra* note 104, at 1.

¹⁶⁵ Kevin Trenberth et al., *Attribution of Climate Extreme Events*, 5 NATURE CLIMATE CHANGE 725 (2015); *see also* Science Section III: Attribution of Impacts to Climate Change and Greenhouse Gases (*Trenberth, Plan B, ClientEarth*) *infra*; *Amicus Curiae* Brief submitted by Kevin E. Trenberth, 4, <https://business-humanrights.org/sites/default/files/documents/Kevin%20E%20Trenberth.pdf> [hereinafter Trenberth brief].

¹⁶⁶ Nobuhito Mori & Tetsuya Takemi, *Impact Assessment of Coastal Hazards Due to Future Changes of Tropical Cyclones in the North Pacific Ocean*, 11 WEATHER & CLIMATE EXTREMES 53 (2016).

¹⁶⁷ GETTING A GRIP ON CLIMATE CHANGE IN THE PHILIPPINES, *supra* note 81, at 12-13.

¹⁶⁸ PAGASA, *supra* note 78, at 49.

Effects on Buildings, Infrastructure, and Services: In the Philippines, climate change impacts are expected to accelerate the structural fatigue and failure of physical infrastructure.¹⁶⁹ Extreme weather events have and will continue to cause severe damage to critical infrastructure,¹⁷⁰ including most notably the national road network, Manila light rail transit system, port facilities, and power transmission systems.¹⁷¹ Flooding events could also severely impact schools, hospitals, and evacuation centers.¹⁷² Decreased rainfall results in prolonged dry periods, which also adversely impact irrigation systems, water supply systems, and hydroelectric facilities, making water management a critical issue.¹⁷³

III. Attribution of Impacts to Climate Change and Greenhouse Gases (*Trenberth, Plan B, ClientEarth*)

The conventional approach to attribution of climate events is to characterize the event and ask (i) whether the likelihood or strength of such events has changed in the observational record, and (ii) whether this change is consistent with the anthropogenic influence as found in one or more climate models. This approach has had considerable success with extremes that are strongly governed by thermodynamic aspects of climate change, especially those related to temperature, each providing another independent line of evidence that anthropogenic climate change is affecting climate extremes.¹⁷⁴

The conventional approach, however, is severely challenged when it comes to climate extremes that are strongly governed by atmospheric circulation, including local aspects of precipitation. It is inherently conservative and prone to false negatives, which underestimate the true likelihood of the human influence. In contrast to thermodynamic aspects of climate, forced circulation changes in climate models can be very non-robust, and physical understanding of the causes of these changes is generally lacking.¹⁷⁵

An approach that separates out the thermodynamic from dynamic effects may therefore be a fruitful way forward. This approach regards the circulation regime or weather event as a conditional state (whose change in likelihood is not assessed) and asks whether the impact of the particular event was affected by known changes in the climate system's thermodynamic state (for example sea level, sea surface temperature, or atmospheric moisture content), concerning which there is a reasonably high level of confidence.¹⁷⁶

¹⁶⁹ PHILIPPINES DEPARTMENT OF ENVIRONMENTAL AND NATURAL RESOURCES, THE PHILIPPINE STRATEGY ON CLIMATE CHANGE ADAPTATION 2010-2022 (2010).

¹⁷⁰ See, e.g., WORLD BANK, PHILIPPINES TYPHOONS ONDOY AND PEPENG: POST-DISASTER NEEDS ASSESSMENT (2009) (finding that the damage to physical assets caused by the 2009 Ondoy and Pepeng typhoons reached Php 68.2 billion); WORLD BANK, CLIMATE RISKS AND ADAPTATION IN ASIAN COASTAL MEGACITIES: A SYNTHESIS REPORT (2010) (finding that the costs of future flooding in Manila, as exacerbated by climate change, could range from Php 5 billion to Php 112 billion).

¹⁷¹ GETTING A GRIP ON CLIMATE CHANGE IN THE PHILIPPINES, *supra* note 81, at 13.

¹⁷² PAGASA, *supra* note 78, at 49.

¹⁷³ *Id.*

¹⁷⁴ Trenberth brief, at pgs. 2-3; ClientEarth brief, at pgs. 38-39, n. 62.

¹⁷⁵ Trenberth brief, at p. 3.

¹⁷⁶ *Id.* at pgs. 3-4.

There are several events whose attribution has not been addressed but that received an enormous amount of media attention, one example being Super Typhoon Haiyan/Yolanda. The ocean heat content (OHC) and sea level in the region had increased a great deal since 1993 and especially since 1998. Consequently, as the typhoon approached the Philippines, it was riding on very high sea surface temperatures (SSTs) with very deep support through the high OHC, and the strong winds and ocean mixing did not cause as much cooling as would normally be experienced, probably helping the storm to maintain its tremendous strength. Moreover, the storm surge was without a doubt exacerbated considerably by the sea levels, which were some 30 cm above 1993 values. Although natural variability played a major role, there was also a global component through increased OHC from the Earth's energy imbalance. Observations of the 2010 Russian heat wave and the recent California drought, among others, are also consistent with the view that it is the combination of natural variability (weather, El Niño, etc.) and climate change when they go in the same direction that causes record-breaking extreme weather.¹⁷⁷

The changes in extremes have huge environmental, economic, and social costs. However, there is no clean separation as to how much should be ascribed to human influences. In one sense, the extreme event would not have happened without global warming, because otherwise the impacts of the event would have been well within previous experience. If this is accepted, then the whole cost of an extreme event might be so assigned.¹⁷⁸

IV. Attribution of Climate Change Impacts to the Carbon Majors (*ClientEarth, Plan B*)

The Commission has before it detailed evidence of the previous activities of the Carbon Majors, in the form of the thorough expert evidence of Richard Heede of the Carbon Accountability Institute. This work is the only example of research linking anthropogenic greenhouse gas emissions since 1850 to the operations and products of private actors.

The key finding of the research is that GHG emissions totaling 914.3 Gt of CO₂ equivalent (CO₂e) produced between 1854 and 2010 (equivalent to 63% of estimated global industrial CO₂ and methane emissions between 1751 and 2010) can be traced to the operations and products of the 90 Carbon Major groups of companies included in the analysis.¹⁷⁹ Of the 90 Carbon Majors included in the original study, 51 of those privately-owned groups of companies have been included in the scope of the Petition. Based on Heede's research, these 51 companies contributed around one fifth of all global greenhouse gas emissions since 1854.

The operations and products of the Carbon Majors named in the Petition continue to be significant contributors to global greenhouse gas emissions.¹⁸⁰ For example, Chevron disclosed

¹⁷⁷ *Id.* at p. 4.

¹⁷⁸ *Id.*

¹⁷⁹ Richard Heede, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010*, 122 CLIMATIC CHANGE 229 (2013) (in Annex D3 to the Petition); *see also* Annex D to the Greenpeace Petition, *Updated Details of Carbon Majors Publications*. A 2017 update to this research demonstrated that over half of global industrial emissions since 1988 can be traced to just 25 corporate or state producers. *See* CDO, THE CARBON MAJORS DATABASE (2017), <https://www.cdp.net/en/reports/downloads/2327>.

¹⁸⁰ Based on information disclosed both voluntarily to organizations such as CDP and under mandatory reporting laws in various jurisdictions, for example, *see* Chevron's CDP 2015 Response, <https://www.chevron.com/-/media/chevron/corporate-responsibility/documents/CDP-2015.pdf>.

to the carbon accounting NGO CDP that it emitted approximately 418.4 Mt of CO₂e during the reporting period 1 January 2014 - 31 December 2014. This is more than the total national emissions of most individual nation-states in 2012.¹⁸¹

V. Prescriptions for Achieving International Commitments and Climate Recovery

A. Prescription to achieve the Paris Agreement's long-term temperature goals (*ClientEarth, Plan B*)

Under the Paris Agreement, parties have agreed to hold the increase in global average temperature to “well below” 2°C above pre-industrial levels, and “pursue efforts” to limit this increase to 1.5°C above pre-industrial levels.¹⁸² These temperature goals imply that there is a finite quantity of GHGs that may be emitted into the atmosphere, above which the temperature goal(s) will be exceeded. “Carbon budget” is the established terminology used to refer to the calculation of the total (i.e., not country or emitter-specific) quantity of GHGs (in carbon dioxide equivalent) the atmosphere can accommodate before exceeding these temperature goals.

In order to achieve these temperature goals, the Paris Agreement commits countries to the submission and implementation¹⁸³ of nationally determined emissions reduction targets (known as NDCs).¹⁸⁴ However, the Parties to the Paris Agreement have acknowledged that their intended NDCs were insufficient in the aggregate to meet either the 2 or 1.5°C temperature goal,¹⁸⁵ and a June 2016 article in *Nature* found that current NDCs will result in median warming of 2.6–3.1°C by 2100.¹⁸⁶

There are a number of approaches to determining each country's remaining carbon budget, so as to allow countries to ramp up their existing NDCs under the Paris Agreement to meet the temperature goals in Article 2 of the Agreement. One approach would be to distribute the *remaining* budget on the basis of per capita shares (on the principle that no one person has a right to consume a greater share of the atmosphere's storage capacity than any other). Such a division produces an equalizing effect of “contraction and convergence.”¹⁸⁷

There are two obvious objections to this approach. First, developing countries may argue that an even distribution of the remaining carbon budget fails to account for or reflect historic

¹⁸¹ Calculated by reference to the CAIT Climate Data Explorer. See Historical Emissions, CAIT CLIMATE DATA EXPLORER, [HTTP://CAIT.WRI.ORG/HISTORICAL/COUNTRY%20GHG%20EMISSIONS?INDICATOR\[\]=TOTAL%20GHG%20EMISSIONS%20EXCLUDING%20LAND-USE%20CHANGE%20AND%20FORESTRY&INDICATOR\[\]=TOTAL%20GHG%20EMISSIONS%20INCLUDING%20LAND-USE%20CHANGE%20AND%20FORESTRY&YEAR\[\]=2012&SORTIDX=NAN&CHARTTYPE=GEO](http://cait.wri.org/historical/country%20GHG%20emissions?indicator[]=TOTAL%20GHG%20emissions%20excluding%20land-use%20change%20and%20forestry&indicator[]=TOTAL%20GHG%20emissions%20including%20land-use%20change%20and%20forestry&year[]=2012&sortidx=NAN&charttype=GEO).

¹⁸² ClientEarth brief, at ¶¶ 58-60.

¹⁸³ Arguably implied under Article 4(2). Paris Agreement, Art. 4(2), Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹⁸⁴ ClientEarth brief, at ¶57.

¹⁸⁵ UN Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session, Decision 1/CP.21: Adoption of the Paris Agreement*, ¶17 (Dec. 12, 2015); ClientEarth brief, at ¶ 62.

¹⁸⁶ Joeri Rogelj et al., *Paris Agreement climate proposals need a boost to keep warming well below 2°C*, 534 NATURE 631–639 (2016), <http://www.nature.com/nature/journal/v534/n7609/abs/nature18307.html>; ClientEarth brief, at ¶ 65.

¹⁸⁷ Plan B brief, at § 7 (pgs. 50-51).

responsibility for excess greenhouse gas emissions. Second, developed countries may argue that it is simply impractical to divide even the final third of the pie on a per-capita basis, as the much larger per-capita emissions of developed countries cannot suddenly be reversed.¹⁸⁸ Both arguments have merit. Nevertheless, it may be possible to develop a hybrid approach that addresses both sets of concerns, and ensures that pragmatism does not come at the expense of equity (and *vice versa*).¹⁸⁹

The carbon budgets and the Paris Agreement also have clear implications for the future activities and operations of the Carbon Majors named in the Petition. Detailed economic research on “stranded assets” has been developed in detail by, among others, the think tank Carbon Tracker. This research identifies those fossil fuel reserves held by the Carbon Majors that will become unburnable if States act to limit climate change in accordance with the Paris Agreement.¹⁹⁰

B. Prescription for stabilizing atmospheric concentration of CO₂ at < 350 ppm by 2100 (Hansen, Our Children’s Trust)

Best-available climate science indicates that even the most ambitious of the Paris Agreement’s politically-negotiated temperature targets, 1.5°C, is dangerously high. Rather, to prevent catastrophic ecological harm, warming must be limited to a long-term maximum of 1°C above preindustrial temperatures.¹⁹¹ To meet this 1°C scientific standard, atmospheric CO₂ must be reduced from its current level of over 400 ppm to less than 350 ppm by the end of this century (the < 350 ppm target).¹⁹² Leading scientists have identified a two-step prescription for stabilizing the climate system, which requires a phase out of CO₂ emissions worldwide within decades, combined with a drawdown of excess CO₂ from the atmosphere so as to reduce atmospheric CO₂ to < 350ppm by 2100.¹⁹³

Reductions of emissions must begin promptly and must occur at a significant rate on an annual basis, i.e., leisurely reductions of one or two percent per year will not suffice.¹⁹⁴ States, including the Philippines, must immediately cease actions supporting fossil fuels and the fossil

¹⁸⁸ *Id.*

¹⁸⁹ For an example of such an approach, see Plan B brief, at § 7 (pgs. 51-53).

¹⁹⁰ CARBON TRACKER INSTITUTE, UNBURNABLE CARBON 2013: WASTED CAPITAL AND STRANDED ASSETS (2013), <http://www.carbontracker.org/report/unburnable-carbon-wasted-capital-and-stranded-assets/>; ClientEarth brief, at ¶ 68.

¹⁹¹ *Assessing “Dangerous Climate Change,” supra* note 149, at 15; Our Children’s Trust brief, at p. 2, n. 2; Our Children’s Trust brief, Exhibit A (Hansen Declaration); Our Children’s Trust brief, Exhibit B.

¹⁹² *Assessing “Dangerous Climate Change,” supra* note 149; Facts, *Carbon Dioxide*, NASA, <http://climate.nasa.gov/vital-signs/carbon-dioxide/> (last visited July 10, 2016).

¹⁹³ *Assessing “Dangerous Climate Change,” supra* note 149, at 10; *Amicus curiae* brief submitted by James E. Hansen, at 2-3, https://business-humanrights.org/sites/default/files/documents/2017.08.28_Jim.Hansen.Amicus_Comm_Human%20Rights_0.pdf [hereinafter Hansen brief]; Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶ 68; Our Children’s Trust brief, Exhibit B, at p. 1, 6.

¹⁹⁴ Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶¶ 68-69.

fuel industry, and implement comprehensive climate recovery policies to rapidly reduce GHG emissions in line with the scientific prescription for climate recovery.¹⁹⁵

These actions to reduce emissions on the prescribed trajectory must be coupled with programs to “drawdown” an additional 100 gigatons of carbon (GtC) through natural sequestration, such as reforestation and improved agricultural and forestry practices.¹⁹⁶ The Philippines has “great potential” for natural carbon sequestration projects, “primarily due to its biophysical condition and the presence of land areas that could and should be reforested,”¹⁹⁷ and well-designed carbon sequestration projects will provide significant co-benefits to the Filipino people.¹⁹⁸ The < 350 ppm scientific target cannot be accomplished without this significant drawdown of atmospheric carbon, which is distinct from reducing emissions. It is vital that any such projects safeguard ecosystems and respect, protect, and promote human rights.

The emissions reductions and natural sequestration required to achieve the < 350 ppm target, and their associated costs, are contingent on how much longer current emissions, temperature, and climate forcing trends continue.¹⁹⁹ To illustrate: had global emission reductions commenced in 2005, emissions reductions of only 3.5% per year would have been required, alongside 100 GtC natural sequestration, to achieve the < 350 ppm target. Similarly, if emissions reductions had commenced in 2013, 6% annual reductions alongside 100 GtC natural sequestration would have been required.²⁰⁰ Consequently, any delay in emissions reductions will inevitably burden future generations with a combination of increased emissions reductions, increased and prohibitively-expensive sequestration, and runaway climate change impacts.²⁰¹

There is therefore only a small window of opportunity for States and Carbon Majors to take the urgent science-based action needed to protect human rights, mitigate catastrophic climate change, avoid surpassing critical climate tipping points, and prevent effectively irreversible, survival-threatening changes to current and future generations of Filipinos.²⁰² It is essential that the Commission declare this scientific standard underpinning the obligations of Carbon Majors identified by the Petition to fulfill their human rights obligations and to remedy the human rights violations suffered by Petitioners,

¹⁹⁵ See Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶¶ 97-98; Our Children’s Trust brief, Exhibit B, at pgs. 6-7. For an outline of an approach for States to take to successfully reduce emissions, see Mark Jacobson et al., *100% Clean and Renewable Wind, Water, and Sunlight All-Sector Energy Roadmaps for 139 Countries of the World*. 1 JOULE 108 (2017); Mark Jacobson et al., *Matching demand with supply at low cost in 139 countries among 20 world regions with 100% intermittent wind, water, and sunlight (WWS) for all purposes*, 123 RENEWABLE ENERGY 236 (2018).

¹⁹⁶ *Assessing “Dangerous Climate Change,” supra* note 149, at 10; Our Children’s Trust brief, at p. 3, n. 17.

¹⁹⁷ RODEL D. LASCO ET AL., POTENTIAL CARBON SEQUESTRATION PROJECTS IN THE PHILIPPINES, 131 (2005), <http://www.worldagroforestry.org/downloads/Publications/PDFS/PP05318.pdf>.

¹⁹⁸ Depending on the type of carbon sequestration project pursued, these benefits could include 1) flood control and/or soil stability; 2) improved ecosystem services; 3) enhanced food production; and 4) local economic benefits from ecotourism and other activities promoted by restored landscapes. Our Children’s Trust brief, at p. 9, n. 45; Hansen brief, at p. 4; *Assessing “Dangerous Climate Change,” supra* note 149, at 10; James Hansen et al., *Young People’s Burden: Requirement of Negative CO2 Emissions*. 8 EARTH SYST. DYNAM. 577, 590 (2017) [hereinafter *Young People’s Burden*].

¹⁹⁹ Hansen brief, at pgs. 5-6; Our Children’s Trust brief, Exhibit A (Hansen Declaration), at ¶70.

²⁰⁰ *Id.* at p. 3.

²⁰¹ *Young People’s Burden, supra* note 198, at 595-96; Hansen brief, at p. 6.

²⁰² Our Children’s Trust brief, at p. 4, n. 19.

Filipino children, and future generations of Filipinos. By establishing a scientific standard for climate stability and the protection of the rights of Filipinos, this Commission will not only clarify the human rights obligations owed to the Filipino people by the Carbon Majors, but will also assist the government of the Philippines in fulfilling its constitutional public trust obligations to the Filipino people.

SUMMARY OF *AMICI* EXPERT CONTRIBUTIONS REGARDING OBLIGATIONS OF STATES²⁰³

Key Findings and Messages

- Human rights norms clarify how States should respond to climate change.
- Human rights law imposes wide-ranging obligations upon States to protect the human rights of individuals from infringements by third parties, including corporations.
- States' obligation to address environmental harm that interferes with the full enjoyment of human rights extends to harm caused by climate change impacts.
- International law requires States to protect persons within their jurisdiction against human rights abuses as a result of the conduct of corporate actors headquartered outside of their territory.

Summary Argument

I. State Duties and Obligations arising from International Human Rights Law

A. *States have obligations under international human rights law to address the causes of climate change and other environmental harm that affects human rights*

The Philippines has ratified each of the major human rights treaties from which legal obligations arise, and has consistently supported the adoption of a human rights approach to climate change in international climate negotiations and at the Human Rights Council.²⁰⁴

The responsibilities of States in respect of the human rights impacts of climate change are clearly set out in the UNEP report, *Climate Change and Human Rights* (2013). That report notes that there are three types of obligations imposed on States by international human rights treaties:

- a) The duty to **respect** human rights, a negative obligation, which requires States to refrain from taking actions that would interfere with or curtail the enjoyment of human rights.
- b) The duty to **protect** human rights against violations by third parties.
- c) The duty to **fulfill** human rights, a positive obligation, which requires States to undertake measures to ensure the realization of rights for all members of society.²⁰⁵

²⁰³ This summary was compiled with inputs by Client Earth (Sophie Marjanac), Center for International Environmental Law (CIEL) (Sébastien Duyck, Erika Lennon & Carroll Muffett), Environmental Law Alliance Worldwide (ELAW) (Jennifer Gleason & Killian Doherty), Our Children's Trust (Elizabeth Brown & Danny Noonan), Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions (APF & GANHRI) (Annalisa Savaresi), Maastricht Principles Drafting Group (compiled by Kristine Perry), and Plan B (Tim Crosland) and based on their previously submitted *amicus curiae* briefs as well as relevant updates.

²⁰⁴ ClientEarth brief, at ¶¶ 48-49.

²⁰⁵ UNITED NATIONS ENVIRONMENT PROGRAMME, HUMAN RIGHTS AND CLIMATE CHANGE, 15 (2015) [hereinafter UNEP HUMAN RIGHTS AND CLIMATE CHANGE].

A string of HRC resolutions emphasize the potential of human rights obligations, standards, and principles to “inform and strengthen” climate change law- and policy-making, by “promoting policy coherence, legitimacy and sustainable outcomes.”²⁰⁶ The HRC has also issued resolutions “calling upon States to integrate, as appropriate, human rights in their climate actions at all levels.”²⁰⁷ States’ well-established obligation to address environmental harm that interferes with the full enjoyment of human rights extends to human rights violations caused by climate change impacts.²⁰⁸

State obligations can be divided into substantive and procedural obligations and, in summary, include:

- a) **Procedural Obligations** - States must:
 - i. ensure access to information and conduct environmental impact assessments;
 - ii. ensure public participation in environmental, including climate-related, decision making; and
 - iii. ensure access to effective administrative, judicial, and other remedies.²⁰⁹
- b) **Substantive Obligations** - States have obligations to enact legal and institutional frameworks to protect against and respond to the impacts of environmental harm on human rights, including *harm caused by private actors*.²¹⁰ They accordingly have the following obligations in that context:
 - i. domestic climate change mitigation obligations, requiring States to regulate effectively the sources of GHG emissions within their territory and under their control;
 - ii. international cooperation obligations, requiring States to participate in international negotiations for an effective global climate agreement (including the UNFCCC process);
 - iii. transboundary obligations, requiring States to mitigate the effect of their activities, and activities under their jurisdiction, on the human rights of persons both within and outside of their jurisdiction;
 - iv. domestic and international cooperation obligations to ensure that mitigation and adaptation activities do not themselves contribute to human rights violations; and

²⁰⁶ See United Nations Human Rights Council, Res. 10/4, *supra* note 61, preamble; United Nations Human Rights Council, Res. 18/22, *supra* note 61, preamble; United Nations Human Rights Council, Res. 26/27, *supra* note 61, preamble.

²⁰⁷ United Nations Human Rights Council, Res. 32/33, *supra* note 61; United Nations Human Rights Council, Res. 35/20, *supra* note 61.

²⁰⁸ APF & GANHRI brief, at ¶ 30; see also CIEL & GIESCR, STATE HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF CLIMATE CHANGE: SYNTHESIS NOTE ON THE CONCLUDING OBSERVATIONS AND RECOMMENDATIONS ON CLIMATE CHANGE ADOPTED BY UN HUMAN RIGHTS TREATY BODIES, *supra* note 60.

²⁰⁹ ClientEarth brief, at ¶ 44 (citing UNEP HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 205, at 16-18).

²¹⁰ Rep. of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, ¶¶ 79-81, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013).

- v. adaptation obligations, requiring States to enact legal and institutional frameworks for protecting people against environmental harm interfering with the enjoyment of human rights.²¹¹

The OHCHR has found that, in relation to the human rights impacts of climate change, States' human rights obligations mean that they must:

- a) Mitigation - act to limit anthropogenic emissions of greenhouse gases and protect natural carbon sinks (e.g. mitigate climate change), including through regulatory measures, in order to prevent to the greatest extent possible the current and future negative human rights impacts of climate change;
- b) Adaptation - ensure that appropriate adaptation measures are taken to protect and fulfil the rights of all persons, particularly those most endangered by the negative impacts of climate change such as those living in vulnerable areas (e.g. small islands, riparian and low-lying coastal zones, arid regions, and the Arctic);
- c) Accountability and Remedies - guarantee effective remedies for human rights violations;
- d) Business harms - States must take adequate measures to protect all persons from human rights harms caused by businesses; to ensure that their own activities, including activities conducted in partnership with the private sector or by companies under their control, respect and protect human rights; and where such harms do occur, to ensure effective remedies.²¹²

States have discretion to strike a balance between environmental protection and other legitimate societal interests. As noted by UN Special Rapporteur John Knox in his 2018 report, the environmental standard applied by a State “must not strike an unjustifiable or unreasonable balance between environmental protection and other social goals in light of its effects on the full enjoyment of human rights.”²¹³ 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*.²¹⁴

²¹¹ See ClientEarth brief, at ¶ 44 (citing the substantive obligations of states in respect of climate change in UNEP HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 205, at 19). See also APF & GANHRI brief, at ¶ 27.

²¹² UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 57 (cited in ClientEarth brief). This matter is also addressed earlier in this joint summary *amicus* brief in Section I on Jurisdiction, *supra*, as it is relevant to the Commission's jurisdiction to conduct an inquiry.

²¹³ Rep. of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, ¶ 33(e), U.N. Doc. A/HRC/37/59 (Jan. 24, 2018), <http://legal.un.org/docs/?symbol=A/HRC/37/59>.

²¹⁴ Rep. of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/25/53, *supra* note 210, at ¶¶ 79-81 (cited in APF & GANHRI brief, at ¶¶ 30-31); see also Rep. 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/37/59, *supra* note 213, at principles 14-15.

B. States have obligations under international human rights law to address threats to the right to life²¹⁵

States have an affirmative duty to protect the right to life and the environmental conditions upon which life depends. The Human Rights Committee is drafting a new General Comment that states that the right to life requires positive measures “to protect life from all possible threats, including from threats emanating from private persons and entities.”²¹⁶ The draft mentions the duty of States to take affirmative action:

The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant . . . as well as from the specific duty to protect the right to life by law State parties are thus required to undertake positive measures in response to foreseeable threats to life originating from private persons and entities, which do not impose on them unreasonable or disproportionate burdens . . .²¹⁷

The African Commission on Human and Peoples’ Rights recently issued a General Comment echoing a broad interpretation of the right to life under the African Charter of Human and Peoples’ Rights. General Comment No. 3 states in part: “The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties. . . . Such actions include, *inter alia*, preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies.”²¹⁸

Similarly, the IACtHR has asserted that the right to life “includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.”²¹⁹ The IACtHR explained:

²¹⁵ This sub-section is a summary of the ELAW brief and has additional input from the Center for International Environmental Law (CIEL).

²¹⁶ United Nations Human Rights Committee, *Draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (2017), <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> (available in “outcome” section).

²¹⁷ *Id.* at ¶ 28 (internal citations omitted). The document further states: “The duty to protect life also imposes on States parties a due diligence obligation to take long-term measures to address the general conditions in society that may eventually give rise to direct threats to life. . . . States parties should also take adequate measures to protect the environment against life-threatening pollution, and work to mitigate other risks associated with natural catastrophes, such as droughts. When adopting long-term measures designed to ensure the enjoyment of the right to life, States parties should aim to facilitate and promote adequate conditions for a dignified existence for all individuals. Long-term measures required for ensuring the right to life may include facilitating access by individuals to basic goods and services such as food, health-care, electricity, water sanitation, and [others]. Furthermore, States parties should adopt action plans for attaining long-term goals designed to realize more fully the right to life of all individuals States parties should also develop contingency plans designed to increase preparedness for natural and man-made disasters, which may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, industrial pollution, radio-active accidents and cyber-attacks.”

²¹⁸ African Commission on Human and Peoples’ Rights, *General Comment No. 3 on the African Charter of Human and Peoples’ Rights*, ¶¶ 41-43 (2015).

²¹⁹ *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, and Costs), Inter-Am. Ct. H.R. ¶ 161 (June 17, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf.

One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.²²⁰

Like the other regional bodies, the European Court of Human Rights (ECtHR) recognizes that States, under article 2.1 of the European Convention on Human Rights (ECHR), have a positive obligation “not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”²²¹ In *Öneryildiz v. Turkey*, the ECtHR stressed that this obligation “entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”²²² It further clarified that this duty included an obligation for the State to “govern the licensing, setting up, operation, security and supervision” of the dangerous and hazardous activities and to adopt or establish procedures to guarantee this regulation is effective.²²³

Domestic courts’ decisions also *imply* that States have an affirmative responsibility to protect citizens. For example, in *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, the High Court of Andhra Pradesh held that constructing houses in a designated recreational area was contrary to the right to life protected under Article 21 of India's Constitution:

There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 . . .²²⁴

“[I]t is clear that protection of the environment is not only the duty of the citizen but it is also the obligation of the State and all other State organs including Courts.... It, therefore, becomes the legitimate duty of the Courts as the enforcing organs of Constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance.”²²⁵

C. International law requires states to protect human rights from abuse by private actors and to exercise jurisdiction over the conduct of businesses that constitutes human rights abuse²²⁶

Human rights law imposes upon States wide-ranging obligations to protect the human rights of individuals from infringements by third parties, including corporations. As a

²²⁰ *Id.* at ¶ 162 (internal footnote omitted).

²²¹ *L.C.B. v. the United Kingdom*, App. No. 23413/94, Eur. Ct. H. R., at §36 (1998).

²²² *Öneryildiz v. Turkey* [GC], App. No. 48939/99, Eur. Ct. H. R., at §89 (2004).

²²³ *Id.* at § 90.

²²⁴ *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, 1987 A.I.R (AP) 171, ¶ 24.

²²⁵ *Id.* at ¶¶ 24-25.

²²⁶ This matter is also addressed early in this joint summary *amicus* brief in Section I on Jurisdiction, *supra*, as it is relevant to the Commission’s jurisdiction to conduct an inquiry.

consequence, States must take measures to “prevent, punish, investigate or redress the harm caused ... by private persons or entities.”²²⁷ The *State duty to protect* the human rights invoked by the Petitioners – to life, to health, to food, to water, to sanitation, and to housing – from corporate violations, is well-established in the interpretative work of UN treaty bodies and UN special procedures, and in international jurisprudence.²²⁸

International Covenant on Civil and Political Rights (ICCPR): The ICCPR Article 2 requires States to “respect and to ensure ... the rights recognized” in the ICCPR, and to “take the necessary steps, in accordance with its constitutional processes ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the ... Covenant.”²²⁹ The UN Human Rights Committee has clarified that State Parties to the ICCPR must protect individuals from acts committed by private persons or entities which would impair the enjoyment of rights contained in the ICCPR, including, among other measures, to investigate or redress the harm caused by such acts by private persons or entities.²³⁰

International Covenant on Economic, Social and Cultural Rights (ICESCR): The ICESCR, in Article 2(1), requires States to recognize the rights found within the convention by all appropriate means, particularly through the adoption of legislative measures. Article 11 of the ICESCR articulates a State’s duties in regards to protecting an adequate standard of living for its people. It provides that “States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”²³¹ The language in Article 11(1) particularizes for the rights to food, clothing, housing, among others, the general obligation found in the above-referenced Article 2(1) of the ICESCR. The CESCR articulated and expanded on the duty to protect, including its general comments on the right to food, and the right to water. Regarding the right to food and the duty to protect, the CESCR affirmed the obligation of the State to respect, protect, and fulfill this right. This duty to protect includes the duty to protect against abuses by third parties, which includes businesses. States have a positive obligation to protect against human rights abuses by private actors occurring within their territories under international treaty law.²³²

Convention on the Rights of the Child (CRC): State Parties to the CRC have an obligation to safeguard the rights of children under their jurisdiction.²³³ The Committee on the Rights of the Child has elaborated on State obligations under the CRC to regulate the private

²²⁷ United Nations Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 8 (2004).

²²⁸ See APF & GANHRI brief, at ¶ 42, n. 2.

²²⁹ *Amicus curiae* brief submitted by Maastricht Principles Drafting Group, p. 3, https://business-humanrights.org/sites/default/files/documents/Submission_Maastricht%20Principles%20drafting%20group.docx [hereinafter Maastricht Principles Drafting Group brief] (citing ICCPR, *supra* note 65).

²³⁰ Maastricht Principles Drafting Group, at p. 3 (citing UN Human Rights Committee, General Comment 31: nature of the general legal obligation imposed on states parties to the covenant, U.N. Doc. CCPR/C/21/Rev1/Add.13, ¶ 8 (May 26, 2004)).

²³¹ Maastricht Principles Drafting Group brief, at p. 4 (citing ICESCR, *supra* note 72, at Art. 11).

²³² Maastricht Principles Drafting Group brief, at p. 4 (citing ICESCR, *supra* note 72; UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The right to adequate food (Article 11)*, U.N. Doc. E/C.12/1999/5, ¶ 15 (May 12, 1999); UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The right to water (articles 11 and 12)*, U.N. Doc. E/C.12/2002/11, ¶¶ 23-24 (Jan. 20, 2003).

²³³ Maastricht Principles Drafting Group brief, at pgs. 7-8 (citing Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]).

sector and business enterprises in its General Comment 16. The Committee referred to the disadvantages children face in ensuring the enforcement of their rights found in the CRC against businesses' abuses; it emphasizes that all businesses must meet their responsibilities concerning children's rights and that the State must see that they do. Specifically in regards to Article 6 of the CRC, the Committee stressed in General Comment 16 that business activities impact the rights contained in this Article. One such impact is environmental degradation, which impacts a child's right to food, etc. The Committee emphasized the importance of both preventative measures and monitoring the impact businesses have on the environment. The Committee's observations on both Colombia and Chile touch upon abuses by businesses and the States' lack of plan and/or precaution.²³⁴

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): The primary objective of the CEDAW is the prohibition of all forms of discrimination against women (Article 2). The State parties have the obligation to take all appropriate measures, including legislation, to ensure the full development and advancement of women in all fields, in particular in the political, social, economic, and cultural fields (Article 3). In addition, the CEDAW requires States to take into account the particular problems faced by rural women and to guarantee that they enjoy the right to adequate living conditions, including in relation to housing, sanitation, and water (Article 14). In its *General Recommendation on gender-related dimensions of disaster risk reduction in the context of climate change*, the Committee on the Elimination of Discrimination against Women stresses that "limiting fossil fuel use and greenhouse gas emissions and the harmful environmental effects of extractive industries such as mining and fracking, as well as the allocation of climate financing, are regarded as crucial steps in mitigating the negative human rights impact of climate change and disasters."²³⁵ The Committee further emphasizes that "any measures to mitigate and adapt to climate change should be designed and implemented in accordance with the human rights principles of participation, accountability, non-discrimination, empowerment, transparency and rule of law."²³⁶

UN Guiding Principles on Business and Human Rights (UNGPs): Principle 1 recognizes an obligation on the part of the State to protect against abuses committed by businesses that negatively affect people within its territory and/or jurisdiction.²³⁷

²³⁴ Maastricht Principles Drafting Group brief, at pgs. 7-8 (citing General comment No. 16 (2013): State obligations regarding the impact of the business sector on children's rights, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013); UN CRC, UN Committee on the Rights of the Child, Concluding Observations, Chile, ¶ 20, U.N. Doc. CRC/C/CHL/CO/4-5 (Oct. 30, 2015); UN CRC, UN Committee on the Rights of the Child: Concluding Observations, Colombia, ¶¶ 17-18, CRC/C/COL/CO/4-5 (Mar. 6, 2015)).

²³⁵ Committee on the Elimination of Discrimination against Women, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, ¶ 14, U.N. Doc. CEDAW/C/GC/37 (Feb. 7, 2018),

http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_37_8642_E.pdf.

²³⁶ *Id.*

²³⁷ Maastricht Principles Drafting Group brief, at pgs. 4-5 (citing United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011,

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [hereinafter UN Guiding Principles on Business and Human Rights]). This is also mentioned in Section I on Jurisdiction, *supra*.

Regional Jurisprudence: In *Velásquez-Rodríguez v. Honduras*, the IACtHR held that the State has the duty to take reasonable steps to prevent human rights violations and to conduct a serious investigation of those that occur within its jurisdiction. The Court also emphasized that “[a]n illegal act which violates human rights and which is initially not directly imputable to a state ... can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the convention.”²³⁸ In *SERAC and CESR v. Nigeria*, the African Commission on Human and Peoples’ Rights held that States have a duty to protect right holders by the use of legislation and other measures against potential abuses committed by others.²³⁹ There is a duty to create a framework in which right holders can realize their rights against abuses by third parties. In *SERAP v. Federal Republic of Nigeria*, the Court of Justice of the Economic Community of West African States found that Nigeria had a duty to protect the human rights of its most vulnerable rights holders that were affected by oil companies’ abuses.²⁴⁰ In *Kalender v. Turkey*, the ECtHR found that Turkey had not put in place the appropriate safety measures and also had failed to investigate a corporation for potential liability in causing the death of an individual in connection to the lack of safety standards.²⁴¹

D. States in which a business is domiciled, as well as States in which the victims reside have obligations to prevent a business from abusing or impairing human rights

There is wide-ranging recognition by international human rights treaty monitoring bodies and by courts that a State’s human rights obligations may extend beyond its borders. These are set out in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, which provide:

- a) Principle 3: “[a]ll States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.”
- b) Principle 4: “[e]ach State has the obligation to realize economic, social and cultural rights, for all persons within its territory, to the maximum of its ability ...”
- c) Principle 25(a)(d): “States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances: a) the harm or threat of harm originates or occurs on its territory... d) there is a reasonable link between the State concerned and the conduct it seeks to regulate.”

²³⁸ Maastricht Principles Drafting Group brief, at pgs. 5-6 (citing *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No.4, ¶ 174 (July 29, 1988)).

²³⁹ Maastricht Principles Drafting Group brief, at pgs. 5-6 (citing *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, App No.155/96, ¶ 46 (Oct. 27, 2001)).

²⁴⁰ Maastricht Principles Drafting Group brief, at pgs. 5-6 (citing *SERAP v. Federal Republic of Nigeria*, The Court of Justice of the Economic Community of West African States (ECOWAS), Judgment, N° ECW/CCJ/JUD/18/12 (Dec. 14, 2012)).

²⁴¹ Maastricht Principles Drafting Group brief, at pgs. 5-6 (citing *Kalender v. Turkey*, App. No.4314/02, Eur. Ct. H. R. (Dec. 15, 2009)).

- d) Principle 26: As described in Principle 26, States should influence non-state actors where they are in a position to do so to take measures towards the realization of human rights.
- e) Principle 37: “States must ensure the enjoyment of the right to a prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of economic, social and cultural rights. Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any state concerned must provide remedies to the victim.”²⁴²

Plan B additionally notes that Principle 13 of the Rio Declaration says, “States shall develop national law regarding liability and compensation for victims of pollution and other environmental damage.”²⁴³ Relatedly, the IACtHR recently explained that a component of a State’s duty to protect the right to life includes that States should “establish an effective judicial system capable of investigating, punishing and repairing any deprivation of life by state agents of private actors.”²⁴⁴

II. State duties and obligations arising from International Climate Change Law

In its recent Advisory Opinion, the IACtHR, explained that recognizing the right to a healthy environment as a human right, creates an obligation for States to protect the human rights impacted by a degraded environment. In doing so it explained that “another consequence of the interdependence and indivisibility between human rights and environmental protection is that, in the determination of these State obligations, the Court can make use of the principles, rights and obligations of international environmental law, which as part of the international *corpus iuris* contribute decisively to set the scope of the obligations derived from the American Convention in this area[.]”²⁴⁵

The UNFCCC has near-universal membership, and entered into force in March 1994. Its overall objective, as set forth in Article 2, is to “achieve stabilization of greenhouse gas

²⁴² Maastricht Principles Drafting Group brief, at pgs. 8-11 (citing ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Principles 3, 4, 25, 26, 37, available at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23).

²⁴³ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, principle 13, U.N. Doc. A/Conf.151/26/Rev.1 (Vol. 1), annex I (Aug. 12, 1992).

²⁴⁴ Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, Opinión Consultiva OC-23/17 Inter-Am. Ct. H.R., *supra* note 64, at ¶ 109 (internal citation omitted) (unofficial translation) (original: “Asimismo, los Estados deben adoptar las medidas necesarias para crear un marco normativo adecuado que disuada cualquier amenaza al derecho a la vida; establecer un sistema de justicia efectivo capaz de investigar, castigar y reparar toda privación de la vida por parte de agentes estatales o particulares; y salvaguardar el derecho a que no se impida el acceso a las condiciones que garanticen una vida digna, lo que incluye la adopción de medidas positivas para prevenir la violación de este derecho.”).

²⁴⁵ *Id.* at ¶ 55 (internal citation omitted) (unofficial translation) (original: “otra consecuencia de la interdependencia e indivisibilidad entre los derechos humanos y la protección del medio ambiente es que, en la determinación de estas obligaciones estatales, la Corte puede hacer uso de los principios, derechos y obligaciones del derecho ambiental internacional, los cuales como parte del *corpus iuris* internacional contribuyen en forma decisiva a fijar el alcance de las obligaciones derivadas de la Convención Americana en esta materia[.]”).

concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference in the climate system.”²⁴⁶

In 2010, the parties to the UNFCCC, including the Philippines, formally adopted the goal of limiting global average temperature rise to no more than 2 degrees Celsius above pre-industrial levels, while recognizing the necessity to review the adequacy of such a temperature goal in the light of the ultimate objective of the UNFCCC to avoid dangerous anthropogenic climate change.²⁴⁷

On 4 November 2016, the Paris Agreement entered into force, with the Philippines formally ratifying the agreement on 23 March 2017. The main temperature objective as set forth in Article 2 of the Paris Agreement is to “hold[] the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.”²⁴⁸

The IPCC has stressed that “rising rates and magnitudes of warming and other changes in the climate system, accompanied by ocean acidification, increase the risk of severe, pervasive and in some cases irreversible detrimental impacts.”²⁴⁹ Building on this assessment, five UN Special Procedures have highlighted that “such incremental increases in impacts and risks adversely affect the full enjoyment of a wide range of human rights, and make it correspondingly more difficult for States to fulfill their obligations under international law to respect, protect and promote human rights.”²⁵⁰ Consequently, the OHCHR has noted that “therefore, States must act to limit anthropogenic emissions of greenhouse gases (e.g. mitigate climate change), including through regulatory measures, in order to prevent to the greatest extent possible the current and future negative human rights impacts of climate change.”²⁵¹

National and regional courts have recognized that, in matters related to the environment, international environmental and health standards can inform the determination of whether a State has contravened its human rights obligations. The CESCRC has for instance referred to obligations under the UNFCCC to suggest that a State party must do more to comply with its obligation under the ICESCR.²⁵² The ratification or endorsement of the Paris Agreement by all UN Member States and in particular the crucial temperature goals in Article 2 thereby indicates that almost all States have recognized that, as a matter of international law, they should collectively pursue efforts to limit the temperature increase to 1.5°C and hold the temperature increase well below

²⁴⁶ ClientEarth brief, at ¶¶ 54-55.

²⁴⁷ UN Framework Convention on Climate Change, COP Decision, 1/CP.16, FCCC/CP/2010/7/Add.1, ¶ 4 (2010).

²⁴⁸ ClientEarth brief, at ¶¶ 57-58 (citing Paris Agreement, *supra* note 183, at Art. 2(1)(a)).

²⁴⁹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Rajendra K. Pachauri et al, eds. 2014).

²⁵⁰ CATALINA DEVANDAS AGUILAR, JOHN H. KNOX, PHILIP ALSTON, LÉO HELLER, & VIRGINIA DANDAN, THE EFFECTS OF CLIMATE CHANGE ON THE FULL ENJOYMENT OF HUMAN RIGHTS (2015) (Report for the Climate Vulnerable Forum).

²⁵¹ U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, KEY MESSAGES ON HUMAN RIGHTS AND CLIMATE CHANGE, http://www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf.

²⁵² U.N. Committee on Economic, Social and Cultural Rights, Concluding Observations on the fifth periodic report of Australia, U.N. Doc. E/C.12/AUS/CO/5 (July 11, 2017).

2°C. The temperature goals provided in the Paris Agreement however do not supersede fundamental human rights obligations to reduce emissions to the greatest possible extent especially in light of the fact that significant human rights impacts are occurring at current levels of global temperature rise.

The Preamble to the Paris Agreement acknowledges that, whenever States take action to address climate change, they should “respect, protect and consider their respective obligations on human rights.”²⁵³ The Paris Agreement’s reference to Parties’ human rights obligations encompasses obligations in treaties they have ratified already, or may ratify in the future, the UN Charter, and customary principles of law as they relate to human rights. By forging an overt link with human rights instruments, the Paris Agreement’s preamble makes explicit and reaffirms States’ duty to respect, promote, and take into consideration their existing human rights obligations in all climate policies, including as they implement the Paris Agreement.²⁵⁴ Additionally, compliance with human rights obligations requires States to pursue climate policies that “are consistent with the best available science and relevant international health and safety standards.”²⁵⁵

III. Obligations of States under the Public Trust Doctrine - Additional input from Our Children’s Trust

Both the public trust doctrine and the fundamental human rights of Filipinos require the Philippine government to protect the atmosphere and climate system according to the best available climate science, and to hold carbon majors liable for funding atmospheric recovery.

The public trust doctrine is an ancient, fundamental legal principle, under which citizen beneficiaries of vital natural resources held in trust by governments have reserved and inalienable rights to “a sustained natural endowment.”²⁵⁶ The doctrine is central to many legal systems around the world, including that of the Philippines, such that the doctrine can be regarded as a fundamental attribute of sovereignty that governments cannot discard.²⁵⁷

²⁵³ Paris Agreement, *supra* note 183, preamble.

²⁵⁴ See APF & GANHRI brief, at ¶ 27.

²⁵⁵ See Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, ¶¶ 58, 72, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018), <http://legal.un.org/docs/?symbol=A/HRC/37/58>; see also Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/37/59, *supra* note 213, at ¶ 33(c).

²⁵⁶ Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENVTL. L. 259, 272 (2015), available at https://www.ourchildrenstrust.org/s/2015_Wood_Atmospheric-Recovery-Litigation-Making-Fossil-Fuel-Industry-Pay-to-Restore-Viable-Climate.pdf [hereinafter *Atmospheric Recovery Litigation*].

²⁵⁷ Mary Christina Wood & Gordon Levitt, *The Public Trust Doctrine in Environmental Decision Making*, 2 (2016), https://law.uoregon.edu/images/uploads/entries/FINAL_PDF_For_DISTRIBUTION_Encyclopedia_Public_Trust1.pdf (This paper can also be found as a chapter in LEROY C. PADDOCK, ROBERT L. GLICKSMAN & NICHOLAS S. BRYNER EDS., *DECISION MAKING IN ENVIRONMENTAL LAW* (2016)).

Government trustees hold two core fiduciary duties: 1) protect trust resources from damage and substantial impairment, and 2) recover natural resource damages from third parties that damage trust resources.²⁵⁸

The sovereign public trust obligation of the Philippine government is articulated in the 1987 Philippine Constitution (“Constitution”). Under the Constitution, the Filipino people have a right to health, equal protection of the laws, and a “balanced and healthful ecology in accord with the rhythm and harmony of Nature.”²⁵⁹ In *Oposa*, the Philippine Supreme Court found that this right “concern[ed] nothing less than self-preservation and self-perpetuation.”²⁶⁰ The Court also ruled that “every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology.”²⁶¹

The Philippines’ public trust obligations were reinforced by the *Metro Manila* case in 2008,²⁶² which found that the Philippine government has the authority to protect Filipinos’ “right to a balanced and healthful ecology,” because it is the owner of all natural resources.²⁶³ The Court also found that purposes of the public trust doctrine in the Philippines “extend not only to the management and conservation of natural resources, but also to their equitable distribution among generations.”²⁶⁴

The Philippines is not alone in this interpretation of the scope of the public trust and constitutional rights protecting the interests of future generations.²⁶⁵ As one example, U.S. District Court Judge Ann Aiken’s November 2016 decision in *Juliana v. United States of America* found both that the U.S. Constitution provides a fundamental right to a stable climate system and that the public trust doctrine is an inherent aspect of sovereignty that cannot be “legislated away.”²⁶⁶ This Commission should follow in the courageous footsteps of Judge Aiken by affirming the public trust rights of current and future generations of Filipinos to a stable climate system.

In addition to the duty to protect *domestic* public trust resources, States have responsibilities to safeguard resources shared in common with other nations, including the atmosphere, oceans, and the climate system. The Philippines is a co-tenant and co-trustee of these *global trust* resources, and has a shared sovereign obligation to manage these resources in a

²⁵⁸ *Atmospheric Recovery Litigation*, *supra* note 256, at 289-91.

²⁵⁹ Our Children’s Trust brief, at p. 5, n. 24.

²⁶⁰ *Oposa v. Factoran Jr.*, G.R. No. 101083, 224 S.C.R.A. 792 (S.C., July 30, 1993) (Phil.).

²⁶¹ *Id.*

²⁶² *Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay (Metro Manila)*, G.R. No. 171947-48, 574 S.C.R.A. 661 (S.C., Dec. 18, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm>.

²⁶³ See Petition for Writ of Kalikasan and Writ of Continuing Mandamus, *Segovia, et. al. v. The Climate Change Commission, et. al.*, 23 (2014), <https://www.ourchildrenstrust.org/s/Philippines-Petition.pdf>; see also The Constitution of the Republic of the Philippines, Feb. 2, 1987, Art. XII, § 2.

²⁶⁴ Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 775 (2012) [hereinafter *Internationalizing the Public Trust Doctrine*].

²⁶⁵ Our Children’s Trust brief, at p. 6, n. 30.

²⁶⁶ Order and Opinion Denying Motions to Dismiss, *Juliana, et al. v. United States of America, et al.*, Case No. 6:15-cv-01517-TC, 29-32 (D. Or. Nov. 10, 2016), <https://www.ourchildrenstrust.org/s/Order-MTDAiken.pdf>; see also Our Children’s Trust brief, at p. 7, n. 31-35.

manner that avoids waste and destruction.²⁶⁷ Pursuant to the jurisprudence in the Philippines and abroad, as well as the broad tenets of the public trust doctrine and international law, the Philippine State is obligated to act to help reduce atmospheric CO₂ to below 350 ppm by 2100 in order to avoid continued violations of fundamental human rights and to preserve a stable climate system.²⁶⁸

As part of its sovereign public trust obligations, the Philippine government should seek natural resource damages from the Carbon Majors for damages to the atmosphere and climate system. The core tenets of the public trust doctrine allow sovereign governments to recover natural resource damages from third parties for impairment to, and to fund restoration of, public trust resources.²⁶⁹ This Commission's investigation can aid in a global atmospheric and climate recovery effort by providing the Philippine government and other States with the necessary information to pursue natural resource damages from the Carbon Majors.

Recovery of atmospheric and climate system natural resource damages from the Carbon Majors would fund carbon sequestration programs that satisfy the Philippines' "proportionate share" of the carbon drawdown necessary to return to 350 ppm of CO₂ by the end of this century.²⁷⁰ Such programs may also have the added co-benefits that limit the climate harm and human rights infringements experienced by Filipinos due to the actions of the Carbon Majors.²⁷¹ Although recovery of other types of damages is also important, natural resource damages are conceptually distinct from, e.g., damages owed to the people for the violation of human rights or damages for climate adaptation costs.²⁷² Achieving long-term atmospheric recovery and climate stability is necessary to prevent continued threats to and violations of Filipinos' human rights.

There are three steps that the Philippine government could follow to seek natural resource damages from the Carbon Majors. First, carbon sequestration projects need to be identified in the Philippines.²⁷³ Second, the Philippines would sue the Carbon Majors for natural resource damages to the atmosphere and climate system in order to fund these carbon sequestration projects. Amounts recovered from any Carbon Major would be deducted from that Carbon Major's overall proportionate liability for atmospheric restoration and climate recovery.²⁷⁴ Third, the amounts recovered would fund the implementation of the carbon sequestration projects identified in the Philippines.²⁷⁵ Each of these projects must have accurate carbon and financial accounting, be carried out transparently and effectively, and be implemented in a way that respects, promotes, and considers human rights. If other sovereign co-trustees seek natural

²⁶⁷ Our Children's Trust brief, at p. 7, n. 36-37; *see also id.* at p. 2-4 (scientific standard for climate stability).

²⁶⁸ *Id.* at p. 7-8, n. 38-40.

²⁶⁹ *Atmospheric Recovery Litigation*, *supra* note 256, at 292; *see also* Our Children's Trust brief, at p. 8.

²⁷⁰ Our Children's Trust brief, at p. 9, n. 44; *see also id.* at p. 2-4 (scientific standard for climate stability and protection of human rights).

²⁷¹ For example, in addition to the global and local benefits of atmospheric and climate recovery, well-designed carbon sequestration projects will provide significant co-benefits to the Filipino people. Depending on the type of carbon sequestration project pursued, these benefits could include 1) flood control and/or soil stability; 2) improved ecosystem services; 3) enhanced food production; and 4) local economic benefits from ecotourism and other activities promoted by restored landscapes. *See* Our Children's Trust brief, at p. 9, n. 45.

²⁷² *Id.* at p. 9, n. 46.

²⁷³ *Id.* at p. 9, n. 47-48.

²⁷⁴ *Id.* at p. 10, n. 49.

²⁷⁵ *Id.* at p. 10, n. 50.

resource damages for climate recovery then the Philippines should consider taking a leadership role in the implementation of a Planetary Atmospheric Recovery Plan to efficiently coordinate the recovery and effective utilization of natural resource damages.²⁷⁶

IV. Obligations of States in respect of emissions arising under the “no harm principle” of customary international law - Additional input from Plan B²⁷⁷

States have the sovereign right to exploit their own resources. They have a corresponding responsibility to ensure activities within their control do not cause substantial damage to other States or areas beyond the limits of national jurisdiction (such as the high seas or outer space). This is described as the “principle of prevention” or the “no-harm rule.” In 2010, the International Court of Justice held that “A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”²⁷⁸

The UNFCCC directly invokes the principle in its Preamble, removing all doubt regarding its application to climate change:

Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²⁷⁹

States, therefore, have an obligation to take all appropriate measures to anticipate, prevent, or minimize the causes of climate change, in particular through effective measures to reduce greenhouse gas emissions to a level consistent with the temperature goal. The principle itself is straightforward. It is the apparent complexity of quantifying the scope of the obligation for any individual country that has caused some to question its practical applicability.

In practical terms, and in accordance with the UNFCCC and the Paris Agreement, the duty to prevent harm implies liability for climate change loss and damage, including the costs of adaptation arising out of past breaches of the duty and, in relation to future prevention measures, the duty implies distinct obligations to:

- reduce GHG emissions in line with the global target; and
- on the part of countries which have used more than their share of the carbon budget, to support financially the implementation of mitigation measures on the part of those who have used less.

²⁷⁶ *Id.* at p. 10, 9, n. 48.

²⁷⁷ Plan B’s original *amicus* brief addresses “State Accountability” at p. 48. This summary, however, reflects updated research conducted by Plan B in this area, which is published in *Environmental Liability, Law, Policy and Practice, Vol 24, Issue 3, 2016*. See Tim Crosland, Aubrey Meyer & Margaretha Wewerinke-Singh, *The Paris Agreement Implementation Blueprint: a practical guide to bridging the gap between actions and goal and closing the accountability deficit (Part I)*, 24(3) ENVIRONMENTAL LIABILITY, LAW, POLICY AND PRACTICE 114 (2016), available at <http://www.lawtext.com/pdfs/sampleArticles/EL243Crosland.pdf>.

²⁷⁸ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20).

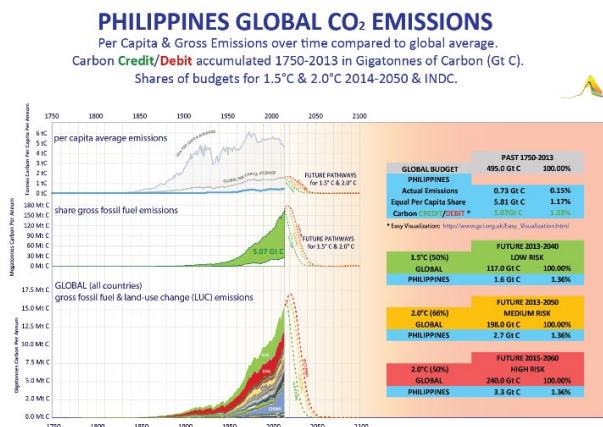
²⁷⁹ United Nations Framework Convention on Climate Change, preamble, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

Given that all States emit greenhouse gases,²⁸⁰ courts will need a framework to assess what is reasonable and equitable. If, on balance, a State is found to have committed an international legal wrong it is obliged to discontinue the wrongful act,²⁸¹ offer guarantees of non-repetition,²⁸² and provide full reparation for the consequences.²⁸³ The purpose of reparation is to wipe out, as far as possible, all the consequences of the illegal act and re-establish the situation, which would have existed if the act had not been committed.²⁸⁴ Reparation must therefore include compensation for the costs of necessary prevention measures incurred by the victim (i.e. the costs of adaptation).

Working in collaboration with the Global Commons Institute, and the University of the South Pacific, Plan B has prepared charts for all countries revealing:²⁸⁵

- i) their historic responsibility for climate change; and
- ii) their share of the remaining global carbon budget consistent with the Paris Agreement goal of limiting warming to 1.5°C and “well below” 2°C.

The chart for the Philippines is reproduced below,²⁸⁶ revealing that its emissions are just a small fraction of the global average, resulting in a significant “carbon credit.”



Summary Conclusions

- States should live up to their obligations to protect the human rights of individuals from infringements by third parties, including corporations.

²⁸⁰ However, Bhutan is in fact net negative when forestry sequestration is taken into account.

²⁸¹ Int'l Law Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, art. 30(a), *reprinted in* [2001] Y.B. Int'l L. Comm'n, Vol. II, pt. 2, *available at* http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf.

²⁸² *Id.* at art. 30(b).

²⁸³ *Id.* at art. 31(1).

²⁸⁴ *Factory at Chorzow* (Ger. v. Pol.), Merits, 1927 P.C.I.J. (ser. A) No. 9, p. 47 (July 26).

²⁸⁵ Crosland, Meyer & Wawerinke-Singh, *supra* note 277.

²⁸⁶ This chart is an updated version of the one included in Plan B's original *amicus* brief. See Plan B brief, at p. 49.

- States should address environmental harm that interferes with the full enjoyment of human rights, including harm caused by climate change impacts.
- State obligations include remedial measures, as well as preventive measures.
- International law requires the Philippines to respond when human rights abuses occur within its territory, including with respect to abuses caused by businesses located outside its territory. States in which a corporate actor is domiciled, as well as States in which the victims reside, have obligations to prevent that business from abusing human rights. The Philippines therefore has positive obligations to assess these abuses and to provide access to a remedy for the victims of climate change.

SUMMARY OF *AMICI* EXPERT CONTRIBUTIONS REGARDING RESPONSIBILITY/ACCOUNTABILITY OF COMPANIES²⁸⁷

Key Findings and Messages

- Corporations have the responsibility to respect human rights, as described in the United Nations Guiding Principles on Business and Human Rights (UNGPs).²⁸⁸
- The UNGPs require enterprises to assess, address, and take responsibility for the climate-related human rights impacts of their products and operations.
- Consistent with this obligation, corporations have a duty to reduce their greenhouse gas emissions:
 - at a minimum, in line with the temperature goals of the Paris Agreement (ClientEarth); and/or
 - to a level that avoids or minimizes dangerous anthropogenic interference with the climate system as evidenced by the best available science (CIEL, Hansen).
- The Commission should take a purposive and holistic approach to applying human rights standards in its investigation.
- In assessing the Carbon Majors' responsibility for the impacts of climate change on the people of the Philippines, the Commission should take into account fundamental principles of legal and moral responsibility, including respondents' knowledge or notice of potential harms, including whether it was reasonably foreseeable, the opportunity to avoid or reduce those harms, and whether the harm was caused by their actions.
- The Carbon Majors have long known that the production and use of their products contribute substantially to climate change, which continues to have significant impacts and adverse consequences for people, especially vulnerable populations.
- The Carbon Majors knowingly advanced or promoted deliberately misleading information, casting doubt on the connection between fossil fuels and climate change.
- The "Polluter Pays" Principle²⁸⁹ is widely accepted and should be applied to the Carbon Majors who reap vast profits from their polluting activities.

Summary Argument

The submissions of the *amici* experts examine three separate and interwoven foundations for the Commission's inquiry into the responsibility and accountability of the Carbon Major companies with respect to human rights impacts in the Philippines. These foundations include the UNGPs; fundamental principles of legal responsibility as reflected in the law of human rights, tort, and civil responsibility; and the polluter pays principle. A summary of these

²⁸⁷ This summary was compiled with inputs by the Center for International Environmental Law (CIEL) (Steven Feit, Erika Lennon & Carroll Muffett), Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions (APF & GANHRI) (Ioana Cismas), ClientEarth (Sophie Marjanac), and Plan B (Tim Crosland) and is based on their previously submitted *amicus curiae* briefs as well as relevant updates.

²⁸⁸ See generally UN Guiding Principles on Business and Human Rights, *supra* note 237, at ¶ 11 (stating "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.").

²⁸⁹ See Plan B brief, at § 6.3; see also Rio Declaration on Environment and Development, *supra* note 243, principle 16; U.N. Conference on the Human Environment, *Stockholm Declaration*, principle 22, 11 I.L.M. 1416 (1972).

foundations, and of relevant factual findings, follows. The *amici* experts contributing to and endorsing each heading are identified therein.

Based on the evidence and analysis herein, the *amici* are in agreement that the Carbon Majors had and have substantial responsibilities to ensure their products and operations do not contribute to human rights violations arising from climate change and to provide remedy and redress where such violations occur. The *amici* further conclude that the Carbon Majors have repeatedly failed to fulfill these duties, and that these failures have contributed to climate-related human rights violations in the Philippines and beyond. They are in further agreement that the extent and severity of these human rights violations will continue to grow unless and until the respondent Carbon Majors implement remedial measures consistent with the UNGPs and other applicable norms.

I. UNGPs (ClientEarth, CIEL, APF-GANHRI, Plan B)

The international community has explicitly and repeatedly recognized the obligation on companies to respect human rights norms in their operations.²⁹⁰ As do the Philippines' Omnibus Rules, which explicitly recognize that private entities may commit human rights violations.²⁹¹

A. *The UNGPs crystallize baseline standards of corporate responsibility in the context of human rights*

The core international human rights instruments do not explicitly address the human rights obligations of private enterprises and were historically interpreted to establish binding obligations only among States. Over the past decade, however, a growing body of jurisprudence, scholarship, and authoritative statements has clarified that private actors, including corporations, have significant responsibilities with respect to human rights, and that it is incumbent upon States to ensure corporate compliance with these responsibilities and provide for corporate accountability and access to justice when standards are not met.²⁹² These global standards of corporate responsibility in the context of human rights were crystallized and codified in the UNGPs, endorsed by the Human Rights Council in 2011.²⁹³ The UNGPs do not purport to create new obligations, but rather encapsulate existing and established international human rights law relevant to private actors. As such, they may be used to guide the Commission's factual investigation in this national inquiry.²⁹⁴

²⁹⁰ See UN Guiding Principles on Business and Human Rights, *supra* note 237. While the Guiding Principles were adopted only in 2011, the fundamental human rights instruments that it encompasses, and which business enterprises must respect date to the very beginnings of the modern system of human rights—the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). The rights themselves are older still, arising from the basic moral precepts and social contract which bind humans together into society.

²⁹¹ Plan B brief, at § 6.1; *see also* Section I on Jurisdiction, *supra*.

²⁹² MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 242, at ¶¶ 9, 24, 25, 37.

²⁹³ ClientEarth brief, at ¶ 50.

²⁹⁴ ClientEarth brief, at ¶ 52.

Such a course of action by the Commission would find strong support in international jurisprudence.²⁹⁵ International courts have relied on the UNGPs 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.”²⁹⁶ The IACtHR reached this conclusion in a case involving mining activities that resulted “in the adverse impact on the environment and, consequently, on the rights of the indigenous peoples.”²⁹⁷

Similarly, after examining international developments in the area of business and human rights, and specifically the UNGPs, as well as provisions of the ICESCR and the UDHR, the Tribunal in *Urbaser v. Argentina* 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.*”²⁹⁸

The Special Tribunal for Lebanon found that the individual’s right to access remedy in case of corporate violations was supported by the UNGPs on the grounds that the Guiding Principles and their endorsement by the HRC:

represent a concrete movement on an international level backed by the United Nations for, *inter alia*, corporate accountability. Although we are wary that such instruments are non-binding, in light of the fact that corporations have been considered subjects of international law [citing the *Barcelona Traction* case] the possibility of proceeding against a corporation through criminal prosecution cannot be discarded but rather *criminal regimes are regarded as an available remedy*. The Appeals Panel considers these factors to be evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights.²⁹⁹

Finally, the Working Group on the issue of human rights and transnational corporations and other business enterprises has submitted letters of allegations and urgent appeals to both States *and* companies by relying on the UNGPs.³⁰⁰

²⁹⁵ See APF & GANHRI brief, at ¶¶ 47-49.

²⁹⁶ *Kaliña and Lokono Peoples v. Suriname*, Inter-Am. Ct. H. R., Judgment (Merits, Reparations, and Costs), ¶ 224 (Nov. 25, 2015), http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf.

²⁹⁷ *Id.* at ¶ 223.

²⁹⁸ *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1999 (Dec. 8, 2016).

²⁹⁹ *Case against New TV S.A.L. and Karma Mohamed Tahsin al Khayat*, STL-14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Special Tribunal for Lebanon, ¶ 46 (Oct. 2, 2014).

³⁰⁰ See Ioana Cismas & Sarah Macrory, *The Business and Human Rights Regime under International Law: Remedy Without Law?* (forthcoming 2018) (on file with Cismas).

B. *In applying the UNGPs and other relevant standards, the Commission should consider the impacts of the Carbon Majors’ products and apply an Enterprise Approach*

In the context of this national inquiry, the Commission should take a purposive approach and apply Principles 11 and 13 of the UNGPs, which provide that business enterprises must avoid “causing or contributing to adverse human rights impacts through their own activities,” as well as those that are “directly linked to their operations, products or services,” as directed by the Interpretive Guidance of the UNGPs.³⁰¹ The Interpretive Guidance confirms that an enterprise can contribute to an adverse human rights impact through the legal sale of its products.³⁰² The evidence demonstrates that the respondents have, through their operations and products, caused the emissions of greenhouse gases in such significant quantities as to have contributed to climate change, and to impose on them specific and particular obligations in respect of the human rights impacts of climate change.³⁰³

The Commission should accept that a reference in the Petition to the Carbon Majors or a particular corporate group should be taken as a reference to the parent entity or entities in whose name the accounts of the group are consolidated in accordance with the rules of the jurisdiction in which the parent is incorporated or listed for trading on a stock exchange.³⁰⁴ This is the intent of the Petition and is also because the Guiding Principles apply to “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”³⁰⁵

For the purposes of this fact-finding investigation, the Commission should adopt an enterprise theory of corporate personhood, meaning that the activities of the whole group of companies (and specifically the greenhouse gas emissions attributable to the group as a whole) should be aggregated and attributed to the parent entity. This approach should be adopted on the following grounds:

1. It provides a practical way to assess the activities of multinational corporations whose operations and products produce greenhouse gas emissions across multiple jurisdictions, and reflects the manner in which these organizations in fact operate;
2. It is the accepted approach in the context of human rights violations resulting from the activity of multinational entities, and is adopted by the United Nations (in the Guiding Principles) and the OECD in its Guidelines for Multinational Enterprises;³⁰⁶
3. It overcomes the formalism of an entity theory which “ignores the economic reality of the relationship between parent corporations and their subsidiaries” and better aligns with the expectations of the public;

³⁰¹ ClientEarth brief, at ¶ 88.

³⁰² *Id.* at ¶¶ 90-91.

³⁰³ *Id.* at ¶ 92.

³⁰⁴ *Id.* at ¶ 96.

³⁰⁵ *Id.* at ¶ 97.

³⁰⁶ The OECD Guidelines for Multinational Enterprises state that the Guidelines “extend to enterprise groups...Compliance and control systems should extend where possible to these subsidiaries.” Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, II, General Policies, Commentaries, ¶ 9 (OECD Publishing, 2011), <http://dx.doi.org/10.1787/9789264115415-en>.

4. It provides a logical way to assess the causation of climate change, which is a global problem on a global scale caused by greenhouse gas emissions from a wide number of actors over a long period of time;
5. It is generally only at the level of the parent company where top line strategic decisions regarding the emissions intensity of products, capital allocation and the mix of energy sources in a company's portfolio can be made; and
6. Most of the respondent companies named in Annex C to the Petition report (either voluntarily or under national regulation) their greenhouse gas emissions on a group-wide basis, consistent with the practice of consolidating the company's financial accounts (and in accordance with the Greenhouse Gas Protocol).³⁰⁷ It is therefore appropriate to impute control over the emissions of subsidiaries, and their consequent climatic impacts, to the parent company.³⁰⁸

C. In applying the UNGPs, the Commission should pay particular regard to Principles 11-17 and Principle 22

The UNGPs provide that enterprises have responsibilities to respect human rights in all of their operations, and set forth both foundational and operational principles for the fulfillment of these responsibilities. For purposes of the present inquiry, *Amici* ClientEarth, CIEL, Plan B, and APF-GANHRI call the Commission's attention to the principles below, and offer specific recommendations in the application of these principles.

- ***Principle 11*** - Businesses “should respect human rights” by “avoid[ing] infringing on the human rights of others and” addressing any “adverse human rights impacts with which they are involved.” Principle 11 should be read as imposing a responsibility over and above compliance with national laws and regulations, such as those governing the permitting of industrial facilities (in accordance with the commentary accompanying the Principle).³⁰⁹ The Commission may offer insights and recommendations regarding what may constitute “adequate measures” for the prevention of the human rights impacts of climate change, as required by principle 11.³¹⁰
- ***Principle 12*** - Rights that must be respected by all businesses include, at minimum, the rights recognized in the International Bill of Rights (UDHR, ICCPR, ICESCR) and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.
- ***Principle 13*** – “The responsibility to respect human rights requires that business enterprises:
 - avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and

³⁰⁷ The Greenhouse Gas Protocol is the international standard by which most companies calculate and report on greenhouse gas emissions from their operations and products. The Protocol divides emissions into three categories, scope 1, being direct emissions from activities; scope 2, being emissions from electricity used by corporate operations; and scope 3, being the full emissions of the company's products throughout their life-cycle. For more details see the Greenhouse Gas Protocol, <http://www.ghgprotocol.org/>.

³⁰⁸ ClientEarth brief, at ¶¶ 98-100.

³⁰⁹ *Id.* at ¶ 108.

³¹⁰ *Id.* at ¶ 108.

- 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 those impacts.”

Principle 13 should be interpreted to require that the respondent companies use appropriate means equivalent to the scale of the risks to human rights from climate change in order to reduce their emissions in order to meet their responsibility to respect human rights.

- **Principle 14** - “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.”
- **Principles 15 & 16** - To meet their human rights responsibilities, businesses should implement policies and processes appropriate for their size and circumstances, so as to safeguard human rights in all aspects of their operation.
- **Principle 17** - Businesses should also carry out human rights due diligence, which includes “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”
- **Principle 22** - Where businesses “identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”³¹¹

Principles 15 through 17 of the UNGPs require enterprises to have policy commitments to reducing their impacts on human rights, a due diligence process, and processes to enable remediation. *Amici* emphasize that conducting due diligence is not merely a mechanical process. The due diligence process fuses two conceptually distinct processes, one is an investigation of facts, and the other is an evaluation of the facts in light of the relevant standards of care. Properly conducted due diligence requires the investigator to use his or her informed and reasoned judgement to actively investigate, assess, and respond to areas of known or potential risk.³¹² “Because the hard and soft laws governing corporate human rights responsibilities are evolving, respecting the letter and spirit of international human rights is the appropriate standard of care to apply in human rights due diligence.”³¹³

Principles 16 to 22 set out the operational requirements and, in the context of climate change, mean that companies should:

- a) Acknowledge, in their statement of policy created under Principle 16, the effect of climate change on the exercise of human rights now and in the future;
- b) Include climate change as a human rights issue in human rights due diligence undertaken in accordance with Principle 17;
- c) Identify and assess the specific human rights impacts of climate change arising from their operations and products, drawing on human rights expertise, and

³¹¹ ClientEarth brief at ¶ 51.

³¹² *Amicus Curiae* Brief submitted by Center for International Environmental Law (CIEL), at pgs. 9-10, <https://business-humanrights.org/sites/default/files/documents/CHR-NI-2016-0001%20CIEL%20Opinion%2010.2.17.R.pdf> [hereinafter CIEL brief].

³¹³ CIEL brief, at pgs. 8-9. *See also* Mark Taylor, Luc Zandvliet & Mitra Forouhar, *Due Diligence for Human Rights: A Risk-Based Approach* 3 (Corporate Social Responsibility Initiative, Working Paper No. 53, Oct. 2009).

- involving meaningful consultation with potentially affected groups and other relevant stakeholders (Principle 18);
- d) Take appropriate action to mitigate the greenhouse gas emissions from their operations *and* products, which may (or may not) constitute a crucial relationship as defined in Principle 19, for some of the Carbon Majors; and
 - e) Track the effectiveness of their response by fully and adequately reporting on their total greenhouse gas emissions (including across the full life-cycle of their products), as well as proposed actions to mitigate their emissions into the future including appropriate emissions reduction targets, and diversification of energy sources. This should be transparently produced and documented, in order to fully comply with Principles 20-21.

The UNGPs are intended “to prevent business enterprises from escaping responsibility through the outsourcing of potentially harmful activities to others through their business relationships.”³¹⁴ Therefore, the scope of due diligence includes addressing adverse human rights impacts that the business may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships. This includes being held accountable for climate impacts.³¹⁵

D. The UNGPs should be interpreted in light of and in accordance with international environmental law and the international law governing climate change

In this investigation, compliance with the UNGPs should be interpreted by the Commission *in light of, and in accordance with*, international law governing climate change, including the UNFCCC, and other norms of international environmental law, including the precautionary principle and the polluter pays principle.

First adopted more than a quarter century ago, the UNFCCC has been ratified by 197 Parties, representing near universal adherence by the global community. The ultimate objective of the UNFCCC, as set forth in Article 2, “is to achieve...stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”³¹⁶ In 2015, the UNFCCC Parties adopted the Paris Agreement to enhance implementation of the Convention, including its ultimate objective. To this end, the 175 Parties to the Paris Agreement have agreed to hold the global average temperature increase to well below 2 degrees Celsius and to pursue efforts to limit warming to no more than 1.5 degrees Celsius.³¹⁷ The Paris Agreement further calls on Parties to respect, promote, and consider their human rights obligations when taking actions to address climate change. Significantly for purposes of the present inquiry, the OHCHR has affirmed that businesses, as human rights duty bearers, “must be accountable for their climate impacts and

³¹⁴ See Mark B. Taylor (ICAR), *Human Rights Due Diligence: The Role of the States* 13 (2013 Update), available at www.bhrinlaw.org/icar-human-rights-due-diligence-2013-update-final.pdf.

³¹⁵ See UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 57.

³¹⁶ UNFCCC, *supra* note 279, at art. 2.

³¹⁷ The number of Parties who have ratified the Paris Agreement is based on the number who have ratified on the date of filing of this joint summary *amicus* brief. Paris Agreement - Status of Ratification, http://unfccc.int/paris_agreement/items/9444.php (last visited on Mar. 18, 2018).

participate in climate change mitigation and adaptation efforts with full respect for human rights.”³¹⁸

In light of the foregoing, *Amicus* ClientEarth recommends that the Commission find that the text of the Paris Agreement implies that, at a minimum, global warming above the globally agreed temperature goal of 1.5 and well below 2 degrees Celsius (and associated Carbon Budget) constitutes “dangerous climate change” that is likely to unacceptably interfere with the exercise of human rights for people around the globe. This textual interpretation is made in light of the fact that, at the current temperature increase, we are already seeing serious impacts on the exercise of human rights. ClientEarth considers the temperature goal and global Carbon Budget to represent an appropriate and agreed-upon maximum upper threshold, or ceiling, for continued emissions within which all actors (including States and private parties) should be expected to operate by the UNGPs.³¹⁹

Amicus ClientEarth further recommends that the Commission should find that compliance with the Guiding Principles requires that (*inter alia*) the Carbon Majors prepare (in consultation with relevant stakeholders) and publish, detailed business plans describing how they will adjust their operations and activities so as to avoid violating human rights including by, at a minimum, aligning their operations with internationally agreed upon warming goals. ClientEarth considers that such a business plan would satisfy the UNGPs’ policy, due diligence and process requirements, and be consistent with current international human rights norms.³²⁰

Amici CIEL, ClientEarth, and Plan B recommend that, in considering the responsibilities of the Carbon Majors, the Commission take into consideration not only the temperature targets adopted in the Paris Agreement, but also the Convention’s ultimate objective of avoiding dangerous anthropogenic interference with the climate. They call the Commission’s attention to the compelling evidence set forth in the preceding sections of this joint summary *amicus* brief that climate change has already caused or contributed to significant impairment of human rights in the Philippines even at the present 1 degree Celsius of accumulated warming and emphasize that these impacts will be dramatically exacerbated as warming increases. *Amicus* Our Children’s Trust emphasizes that the best available science indicates that present levels of warming and concentrations of greenhouse gases already constitute dangerous climate change and dangerous anthropogenic interference with the climate system, which has caused and continues to cause unacceptable impacts to and infringements of human rights. Our Children’s Trust therefore recommends that the Commission declare a scientific standard – stabilization of atmospheric carbon dioxide to below 350 ppm by 2100, equivalent to a long-term temperature rise of less than 1 degree Celsius above pre-industrial temperatures – in order for the Carbon Majors (and States) to fulfill their human rights obligations and redress continuing violations of human rights.³²¹

³¹⁸ See UNDERSTANDING HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 57; see also CIEL brief, at pgs. 8-9.

³¹⁹ ClientEarth brief, at ¶¶ 114-115.

³²⁰ ClientEarth brief, at ¶ 116.

³²¹ See Summary of *Amici* Expert Contributions regarding the Science of Climate Change Impacts, Attribution and Recovery, §§ I.B., V.B., *supra*; Summary of *Amici* Contributions regarding State Responsibility, § III, *supra*.

II. Fundamental Principles of Legal and Moral Responsibility (CIEL, Plan B)

As noted in the preceding section, the UNGPs embody and elucidate underlying principles of corporate responsibility drawn from decades of human rights instruments and jurisprudence. In assessing the role and responsibilities of Carbon Majors with respect to climate change and human rights, the Commission can and should draw on that larger body of human rights law and fundamental principles of legal and moral responsibility that apply across legal domains. CIEL and Plan B addressed these principles in their respective briefs.

While establishing causal links between a respondent's actions and a petitioner's harms is a necessary condition of legal responsibility in most circumstances, judicial bodies and human rights institutions alike routinely seek evidence that a respondent not only caused or contributed to a petitioner's harm, but that the respondent was culpable for that harm in some way. Common elements for evaluating that culpability have emerged in multiple domains of law, including the laws of human rights, tort, and civil liability.³²²

Jurists and legal scholars have frequently observed that reasonable foreseeability of harm and ability to avoid it are core tenets of determining responsibility. Jurisprudence regarding the right to life, discussed in greater detail in Sections II and IV of this joint summary *amicus* brief, is instructive in this regard. While formulations vary slightly among jurisdictions, the test for breach generally consists of three common elements:

- (i) Was the person/entity aware of the risk to life or would a reasonable person/entity in similar circumstances have been so aware?
- (ii) Was the risk real and substantial?
- (iii) Did the person/entity take reasonable and proportionate steps to prevent the loss of life?³²³

In a case involving State responsibility for human rights violations, for example, the European Court of Justice has held that where national authorities were aware of serious risks of a methane explosion from a waste facility, but failed to act to avoid or minimize that risk, the State defendant violated its obligations under applicable human rights instruments.³²⁴ More recently, and in the context of climate change, a Dutch court held that, in the face of clear evidence that the Netherlands was aware of climate risks, the State had a concomitant duty to act on and address those risks:

The court also takes account of the fact that the State has known since 1992, and certainly since 2007, about global warming and the associated risks. These factors lead the court to

³²² For a detailed discussion, including relevant scholarship, see CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING OIL COMPANIES ACCOUNTABLE FOR CLIMATE CHANGE, 5 (Nov. 2017), <http://www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf>.

³²³ Plan B brief, at § 6.1.2.

³²⁴ *Öneryıldız v. Turkey* [GC], App. no. 48939/99, Eur. Ct. H. R., at § 71 (2004) (stating “The Court considers that this obligation [i.e to take positive steps to uphold the right to life] must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous ...”); see also Plan B brief, at § 6.1.2.

the opinion that, given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it.³²⁵

Similarly, in addressing responsibility for common law torts, for example, Justice Oliver Wendell Holmes of the US Supreme Court observed that liability may be properly imposed when the harm in question was both reasonably foreseeable and avoidable.³²⁶ Numerous scholars have reiterated and expanded upon Justice Holmes' analysis.³²⁷

In its treatise on "Corporate Complicity & Legal Accountability," the International Commission of Jurists explicitly addressed the fundamental tenets of responsibility underlying the laws of tort in common law jurisdictions, of non-contractual obligations in civil law countries, and the law of human rights. Recognizing the growing importance of civil liability in assuring corporations are held accountable for their role in human rights violations, and further recognizing that laws of civil liability and human rights protect similar fundamental interests, the International Commission of Jurists undertook a comparative analysis of laws of tort and civil liability across countries, and explored "the ways in which, across jurisdictions, civil liability may arise for companies and/or their officials when they are complicit in gross human rights abuses."³²⁸

The International Commission of Jurists distilled the principles of civil liability (i.e. responsibility) into four basic questions, which it found equally applicable to determining whether companies were complicit in gross human rights abuses, and which the Commission may find instructive in this instance:

1. Was harm inflicted to an interest of the victim that is protected by law?
2. Did the company's conduct contribute to the infliction of the harm?
3. Did the company know or would a prudent company in the same circumstances have known that its conduct posed a risk of harm to the victim?
4. Considering this risk, did the company take the precautionary measures a prudent company would have taken in order to prevent the risk from materializing?³²⁹

³²⁵ *Urgenda Foundation v. Kingdom of the Netherlands*, Judgment: Regarding the failure of the Dutch State to take sufficient actions to prevent dangerous climate change (District Court of the Hague 2015); *see also* Plan B brief, at § 6.2.

³²⁶ CIEL, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING OIL COMPANIES ACCOUNTABLE FOR CLIMATE CHANGE, *supra* note 323, at 5.

³²⁷ *See id.* (for a discussion of additional scholarship, including from HLA Hart, Stephen Perry, John C. P. Goldberg, and Benjamin Zipursky).

³²⁸ *Id.* at 5-6 (citing INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY, VOLUME 3: CIVIL REMEDIES (2008), available at <http://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf>).

³²⁹ CIEL, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING OIL COMPANIES ACCOUNTABLE FOR CLIMATE CHANGE, *supra* note 323, at 6.

A. For decades, Carbon Majors Companies knew or should have known of potential climate risks associated with their productions and operations

As documented in the Petition, recent investigations have uncovered extensive evidence regarding the companies' research into climate change, their knowledge regarding the risks, and their behavior in light of that knowledge.

The "greenhouse effect" was first evidenced by John Tyndall in 1859 and received wide attention in works by Svante Arrhenius in the late 19th and early 20th centuries. In 1917 Alexander Graham Bell wrote "[The unchecked burning of fossil fuels] would have a sort of greenhouse effect," and proposed the use of alternative energy forms, such as solar. After Guy Callendar published a series of papers on fossil fuel combustion and observed temperature increases beginning in the late 1930s, scientific discussion of the topic steadily grew. In 1956, a New York Times headline stated, "Warmer Climate on Earth May be due to More Carbon Dioxide in the Air."³³⁰ These developments were discussed in public and in the scientific literature, and it is reasonable to expect the Carbon Majors knew or should have known about them.

Documentary evidence demonstrates that no later than 1957, at least one of the Carbon Majors - Humble Oil, now ExxonMobil - was aware of and actively investigating climate change.³³¹ Industry records indicate that by no later than 1958, the oil and gas industry was funding research into fossil carbon in the atmosphere as part of a coordinated industry research program.³³² By no later than 1968, and repeatedly thereafter, oil industry leaders were explicitly warned by their own scientists of potentially severe climate risks, and of the fossil fuel industries' contribution to those risks.³³³

Between 1977 and 1982, scientists at Exxon repeatedly confirmed the scientific consensus that climate change was occurring and that fossil fuel combustion was the primary cause, and communicated those findings to top management.³³⁴ By 1986, internal reports produced by another Carbon Major, Royal Dutch Shell, acknowledged the risk of climate change, noting that "the changes may be the greatest in recorded history."³³⁵

B. Despite Notice of the Potential Climate Risks Associated with their Products and Operations, Carbon Majors Companies Repeatedly Failed to Adequately Inform the Public of those Risks or to Take Measures to Address Them

In light of the foregoing evidence, and extensive additional documentary evidence submitted by Petitioners and *amici*, the Commission may reasonably conclude that the Carbon

³³⁰ Plan B brief, at § 6.4.

³³¹ Annex to *Amicus Curiae* brief submitted by CIEL, at p. 5, <https://business-humanrights.org/sites/default/files/documents/CHR-NI-2016-0001%20CIEL%20ANNEX%2010.2.17.R.pdf> [hereinafter CIEL brief, Annex].

³³² CIEL brief, Annex, at p. 5.

³³³ *Id.* at p. 9.

³³⁴ *Id.* at pgs. 10-12.

³³⁵ CIEL, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING OIL COMPANIES ACCOUNTABLE FOR CLIMATE CHANGE, *supra* note 323, at 15.

Majors have been on notice of the significant climate risks associated with their products for many decades. Should the Commission so conclude, it may then reasonably consider whether the Carbon Majors acted appropriately in light of their state of knowledge:

- What steps did the respondent companies take to make people aware of the dangers?
- What steps did they take and could they have taken to reduce the risks of their products?
- What steps did they take to advance or obstruct appropriate technical, process, or policy solutions?
- What steps have they taken to prevent violations of the rights of the people of the Philippines?

Of particular relevance in this regard are those cases highlighting the importance of adequate information in allowing the public to identify, assess, and respond to risks.³³⁶ In light of significant evidence in the Petition and *amicus curiae* briefs that some Carbon Majors have supported the deliberate dissemination of misinformation regarding the existence, causes, and severity of climate risks, legitimate and significant questions exist with respect to the respondent companies' failure to warn the public of the risks inherent in the production, sale, and use of their fossil fuel products.

By no later than the 1980s, at least two of the Carbon Majors - Exxon and Shell - were taking the risk of climate change so seriously that they were incorporating climate change into their business operations. In 1986, an Exxon subsidiary sent a team of researchers to “determine how global warming could affect Exxon’s Arctic operations and its bottom line.”³³⁷ In 1991, the leader of that expedition reported that “[c]ertainly any major development with a life span of say 30-40 years will need to assess the impacts of potential global warming,” and that “[t]his is particularly true of Arctic and offshore projects in Canada, where warming will clearly affect sea ice, icebergs, permafrost, and sea levels.”³³⁸ Similarly, in 1989, Shell Oil announced that it was redesigning a \$3 billion natural gas platform, raising its height one to two meters to account for rising sea levels as a result of global warming.³³⁹

As detailed in the Petition, and in the Annex to CIEL’s initial brief, however, the Carbon Majors companies failed for decades to adequately warn consumers, investors, and others

³³⁶ *Öneryıldız v. Turkey* [GC], App. no. 48939/99, Eur. Ct. H. R., at § 71 (2004) (stating in ¶¶ 90, 108 that “Among these preventive measures, particular emphasis should be placed on the public’s right to information, as established in the case-law of the Convention institutions ...

... The Court will next assess the weight to be attached to the issue of respect for the public’s right to information ... It observes in this connection that the Government have not shown that any measures were taken in the instant case to provide the inhabitants of the Ümraniye slums with information enabling them to assess the risks they might run as a result of the choices they had made. In any event, the Court considers that in the absence of more practical measures to avoid the risks to the lives of the inhabitants of the Ümraniye slums, even the fact of having respected the right to information would not have been sufficient to absolve the State of its responsibilities.”); see also Plan B brief, at § 6.1.2.

³³⁷ CIEL brief, Annex, at p. 12.

³³⁸ *Id.*

³³⁹ *Id.*

regarding the existence, causation, and severity of climate risks associated with fossil fuel production and use. To the contrary, Carbon Majors companies engaged in active, well-resourced, and ongoing efforts to undermine public confidence in climate science, public concern about climate risks, and public support for action to address those risks. By the 1990s, despite acknowledging the consensus surrounding climate change internally, many of the Carbon Majors were coordinating, either directly or through industry groups, to spread disinformation and sow doubt about the certainty and legitimacy of climate science.³⁴⁰ These campaigns persisted through the 2000s³⁴¹ and into the current decade,³⁴² and are likely continuing at present.³⁴³

More fundamentally, any assessment of the Carbon Majors' actions and omissions with respect to climate change must take into account that more than half of atmospheric greenhouse gases have been emitted since 1988, by which point all or nearly all Carbon Majors companies - as experts in their products - knew or should have known the potential risks of those products.

C. Causation (Plan B)

Plan B offered the following additional comments with respect to the question of causation. The standard test for causation in tort law is the “but for” test, i.e. can the claimant prove that the alleged damage would not have occurred but for the defendant's acts or omissions? The strict application of this test would present a claimant with two major hurdles in the context of climate change litigation:

- 1) Can the claimant show that damage would not have occurred but for man-made climate change? If yes,
- 2) Can they show that the relevant degree of climate change would not have occurred but for the actions/omissions of the defendant?

The law, however, is concerned with both substantive justice and the fair allocation of cost. Where rigid application of the “but for” test is inconsistent with these objectives, courts around the world have adopted more flexible approaches. In circumstances of scientific complexity, for example, or where multiple causes are present, courts have adopted alternative tests, such as whether a defendant's acts or omissions made a material contribution to the harm, or materially increased the risk of the harm occurring. More specifically, in the context of pollution from different sources, they have developed the commingled product theory of causation.

Such approaches translate well to the context of climate accountability. Demonstrating that the actions of a particular defendant have, for example, “materially increased the risk” of climate change damage occurring has been made significantly easier by:

- i) developments in the science allowing for the probabilistic attribution of specific climatic patterns and weather events to climate change;

³⁴⁰ *Id.* at pgs. 13-14.

³⁴¹ *Id.* at pgs. 14-15.

³⁴² *Id.* at pgs. 15-16.

³⁴³ See CIEL, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING OIL COMPANIES ACCOUNTABLE FOR CLIMATE CHANGE, *supra* note 323, at 18.

- ii) the work of Rick Heede, showing that the majority of greenhouse gases can be attributed to just 90 “Carbon Majors”;
- iii) recent peer reviewed research quantifying the individual and collective contributions of the Carbon Majors to global atmospheric temperature increase, to global sea level rise, and to the increased impacts from individual extreme weather events;³⁴⁴ and
- iv) the work of investigative journalists which appears to show that certain companies deliberately set out to undermine the scientific consensus regarding climate change, with the specific purpose of obstructing the development of appropriate policy responses.³⁴⁵

Plan B recommends that, in assessing the question of causation in the present inquiry, the Commission consider the approach employed by the UK House of Lords in another case involving complex causation. In *Fairchild v. Glenhaven Funeral Services [2002]*, the UK House of Lords addressed the issue of causation in the context of asbestos mesothelioma. Recognizing the difficulty of precise attribution between cause and effect, Lord Bingham stated that policy suggests that it is most important to compensate for the harm stemming from a failure of duty to protect.³⁴⁶

Similarly, in *Urgenda*, the Dutch government’s annual contribution to aggregate emissions of 0.42% was not considered to be *de minimis* and the court rejected the government’s submissions that its actions were not a cause of climate change loss and damage.³⁴⁷ As noted in Section III of this joint summary *amicus* brief regarding the Science of Climate Change Impacts, Attribution, and Recovery, Rick Heede’s work demonstrates that all of the Respondent Carbon Majors have contributed to the increased atmospheric concentration of greenhouse gases at a

³⁴⁴ Brenda Ekwurzel, et al., *The Rise in Global Atmospheric CO₂, Surface Temperature, and Sea Level From Emissions Traced to Major Carbon Producers*, 144(4) CLIMATIC CHANGE 579 (2017), available at <https://link.springer.com/article/10.1007/s10584-017-1978-0>. By disaggregating the Carbon Majors’ individual emissions by year and constructing emissions profiles for each company over time, the researchers were able to attribute fractions of total atmospheric CO₂ concentration, accumulated global temperature increase, and sea level rise to individual companies and to the Carbon Majors as a group. Significantly, the research team also demonstrated how excess deaths from a specific extreme weather event could be attributed to the Carbon Majors. For a detailed discussion, see CIEL, SMOKE AND FUMES: THE LEGAL AND EVIDENTIARY BASIS FOR HOLDING OIL COMPANIES ACCOUNTABLE FOR CLIMATE CHANGE, *supra* note 323, at 4.

³⁴⁵ Plan B brief, at § 6.6.1.

³⁴⁶ *Id.* at § 6.6.2 (p. 40-41) (quoting *Fairchild v. Glenhaven Funeral Services [2002]* UKHL 22, [2003] 1 AC (HL) 32 (June 20, 2002) “... there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim.”).

³⁴⁷ *Urgenda Foundation v. Kingdom of the Netherlands*, Judgment: Regarding the failure of the Dutch State to take sufficient actions to prevent dangerous climate change, (District Court of the Hague 2015) (“From the above considerations ... it follows that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emissions contribute to climate change. The court has taken into consideration in this respect as well that the Dutch greenhouse emissions have contributed to climate change and by their nature will also continue to contribute to climate change.”); see also Plan B brief, at § 6.6.2 (pgs. 46, 48).

level beyond that which might be regarded as *de minimis*. Therefore, the Commission could look to *Urgenda* and other case law involving environmental harm and finding a causal link between the actions of defendants and the harm alleged.

III. Polluter Pays (Plan B)³⁴⁸

The Commission should also take into account the widely recognized principle of “the polluter pays.”³⁴⁹ Legal responsibility for harm caused to others is one of the mainstays of public and commercial life. The potential for legal liability instills a measure of confidence that the medicines we take will not harm us and that the transport we use complies with appropriate safety procedures, etc. Making businesses accountable for the social costs of the products they profit from, steers the market towards socially beneficial activity. The “polluter pays” is therefore an economic principle as much as a legal one. Fossil fuels companies should not be exempt from this principle and should not be allowed to displace the social and environmental costs of their products onto the poor and the vulnerable.

The international community has long recognized the importance of implementing the principle as critical to environmental protection. In 1972, the OECD asserted that “the polluter pays” was the principle for encouraging “rational use of scarce environmental resources.”³⁵⁰ In the same year, Principle 22 of the Stockholm Declaration committed states to further developing international law “regarding liability and compensation for the victims of pollution and other environmental damage.”³⁵¹ Since then it has been widely referenced as a general principle of law that was reaffirmed when States adopted the Rio Declaration in 1992, which included Principle 16 stating that: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution.”³⁵²

This does not mean that because everyone has a “carbon footprint,” everyone is a “polluter who should pay.” In order to function as an economic tool, polluters should be identified as the principal economic operators profiting from the polluting activities. Such an approach is supported by the OECD Recommendations of 1992, 1(2):

On grounds of economic efficiency and administrative convenience, it is occasionally appropriate to identify the polluter as the economic agent playing a decisive role in the pollution, rather than the agent actually originating it. Hence a vehicle manufacturer could be deemed the polluter, although pollution results from the vehicle’s use by its owner. Similarly, a pesticide producer could be the polluter, even though the pollution is the outcome of proper or improper use of pesticides.³⁵³

Our political and economic system is founded on obedience to the economic incentive. For as long as polluters can profit from polluting, while displacing the social and environmental

³⁴⁸ This section is drawn from the *amicus curiae* brief submitted by Plan B.

³⁴⁹ See Plan B brief, at § 6.3; Rio Declaration on Environment and Development, *supra* note 243, at principle 16.

³⁵⁰ Plan B brief, at § 6.3.

³⁵¹ *Stockholm Declaration*, *supra* note 289, at principle 22; see Plan B brief, at § 6.3.

³⁵² Rio Declaration on Environment and Development, *supra* note 243, at principle 16; see Plan B brief, at § 6.3.

³⁵³ Plan B brief, at § 6.3.

costs onto others, market forces all but guarantee a disregard for human rights. Making the polluter pay is critical to changing course

Summary Conclusions

The Commission should look to numerous sources, including the UNGPs, tort law, and international human rights law, in assessing the responsibility of the Carbon Majors for the harms suffered by the people of the Philippines due to climate change. The Carbon Majors have long known that the use of their products substantially contribute to climate change, which, in turn, has significant impact on and adverse consequences for people, especially vulnerable populations. Moreover, the Carbon Majors knowingly advanced or promoted deliberately misleading information, casting doubt on the connection between fossil fuels and climate change, in order to deter regulation adversely impacting on their profits. As such, they should be seen as responsible for the harms in this instance.

RECOMMENDATIONS OF INDIVIDUAL *AMICI*

Several *amici* contributing to this joint summary *amicus* brief have included specific recommendations for the Commission. This section includes these recommendations in alphabetical order by *amicus* organization. Each set of recommendations indicates which *amicus* organization submitted them. These do not represent the recommendations or views of all *amici*.

ClientEarth: Suggested Factual Findings

The Commission can, and should, confidently make the following findings of fact in this national inquiry:

- 1) in relation to the science of climate change:
 - conclusions contained in the reports of the IPCC expressed as being ‘likely’ or ‘very likely’, may be relied upon as fact (for the purposes of satisfying the civil standard of proof) in court proceedings, and for the purposes of this investigation;
 - it is unequivocal that anthropogenic forcings have been the dominant cause of the observed warming of the planet since mid-century;
 - there is a linear and causal relationship between the concentrations of greenhouse gasses in the atmosphere and the median surface global temperatures, as well as ocean acidification; and
 - continued greenhouse gas emissions are likely to have continued and increasing adverse effects on all natural systems and processes, through rising temperatures, varied precipitation patterns, sea level rise, increased ocean acidification and increased extreme weather events;
- 2) in relation to climate change and human rights:
 - the physical effects of climate change and ocean acidification will have adverse and significant impacts on the enjoyment of human rights in the Philippines;
 - climate change is a human rights issue and must be addressed in order to permit the full enjoyment of all other fundamental human rights in the Philippines;
- 3) in relation to the Carbon Majors:
 - the greenhouse gas emissions from the operations and products of the Carbon Majors have contributed to the observed global warming to date;
 - continued emissions of greenhouse gasses will continue to contribute to climate change, causing increased environmental harm in the future; and
 - such environmental harm will severely impact the Filipino people’s effective enjoyment of their internationally protected human rights.

ClientEarth’s Suggested Recommendations

The Government of the Philippines should fulfil its legal obligations to protect the human rights of the Filipino people by:

- ensuring that its NDC remains compatible with the global temperature goal of keeping global warming well below 2 degrees Celsius (beyond which the human rights impacts of climate change will be severe);

- complying with its obligations under the Paris Agreement, including by implementing domestic policies and regulation to meet its national emissions reductions target of 70% below BAU by 2030; and
- continuing to participate in the global process to mitigate climate change as established by the UNFCCC and the Paris Agreement.³⁵⁴

The Carbon Majors listed in the Petition must respect the human rights of the Filipino people in accordance with the United Nations Guiding Principles on Business and Human Rights (Guiding Principles) by (*inter alia*):

- recognising the adverse human rights impacts of their past and current greenhouse gas emissions, which have contributed to climate change;
- applying the requirements of the Guiding Principles to those impacts; and
- preparing (in consultation with relevant stakeholders) and publishing detailed business plans describing their operations and activities in a world in which warming is kept well below 2 degrees Celsius.

³⁵⁴ Note that these have been amended since the original *Amicus Brief* was submitted by ClientEarth, to reflect the ratification of the Paris Agreement by the Government of the Philippines in 2017.

Our Children’s Trust Recommendations

It is essential that the Commission establish the standard for protecting current and future generations of Filipino children from the dangerous threats posed, both now and in the future, to their human rights and wellbeing by unabated climate destabilization. This standard must be based on the best-available climate science, and not on political negotiation and compromise.

The Commission should therefore clearly state the scientific standard States and Carbon Majors must meet to protect public trust and fundamental human rights: **reduce dangerous levels of atmospheric CO₂ to below 350 ppm by 2100 in order to limit the long-term average global temperature increase to less than 1°C above preindustrial temperatures.** Adopting less stringent standards, such as those contained within the Paris Agreement, would deny all Filipinos the opportunity to fully vindicate their fundamental rights in the context of climate change.

In light of the scientific standard above, the Commission should also state that the actions and inactions of the Carbon Majors that result in the continuing dangerous increase of atmospheric CO₂ levels and further destabilization of the climate system are a violation of the public trust and fundamental human rights of Filipino children and future generations.

After completing its investigation, the Commission should also state in its findings that in order for the government of the Philippines to meet its obligations to current and future generations of Filipinos under the Constitution, public trust doctrine, and international law, it must:

1. Prepare an accounting and inventory of each and every substantial source of GHG emissions within the Philippines’ borders, the emissions embedded in imported goods, and the emissions from extraterritorial activities over which the Philippines has control;
2. Prepare quantifiable targets or a “carbon budget,” based on the above scientific standard, for the total amount of CO₂ emissions that can be released until 2050—ensuring that the Philippines and each State does its share as a responsible member of the global community to achieve global climate stabilization and reduce atmospheric CO₂ to below 350 ppm by 2100, limiting the long-term average global temperature increase to less than 1°C;
3. Create and implement a national climate recovery plan with: (a) interim CO₂ reduction targets and mitigation actions tiered to achieving the Philippines’ carbon budget; (b) priority actions aimed at (i) reducing greenhouse gas emissions by transitioning away from the development and use of fossil fuels, and (ii) drawing down atmospheric CO₂ by protecting forests, peatlands, grasslands, soil, mangroves, and other natural resources that store carbon and engaging in other methods of natural carbon sequestration, including reforestation and improved agricultural and forestry practices; and (c) safeguards to ensure the protection of human rights throughout the implementation of the plan;
4. Keep all untapped fossil fuel reserves in the ground;
5. Take immediate steps to transition power generation to non-CO₂ emitting energy sources, such as wind, solar, and geothermal; and
6. Seek all possible means of financial, technological and capacity-building support to enhance the implementation of the Philippines’ mitigation efforts—including the

recovery of Natural Resource Damages from the Carbon Majors for natural sequestration programs.³⁵⁵

³⁵⁵ See, e.g., *OCT Amicus Brief*, at 3 note 17.

Plan B: Recommendations

Since the Honourable Commission commenced its investigation, there have been some significant developments relating to the legal responsibility of the Carbon Majors for the impacts of climate change.

Most recently the Mayor of New York City, Bill de Blasio, announced the City's intention to sue 5 of the companies - BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell, stating:

They are some of the very biggest companies in the fossil fuel industry. That industry knowingly exacerbated climate change. They had all the evidence in the world of the damage that their products were causing, and they continued nonetheless to poison the Earth ...

We're saying simply that this city — which suffered so deeply after Hurricane Sandy — has literally experienced billions and billions of dollars of damage as a result of climate change that these specific companies aided and abetted, and they should pay damages for that, very much the same way that tobacco companies were forced to pay damages for the horrible impact that they had knowingly on public health for so many years.³⁵⁶

It is one thing, however, for New York City to commence proceedings against some of the best resourced companies on the planet, another for a citizen of the Republic of the Philippines to do so.

It is respectfully submitted that the Honourable Commission might provide for the citizens of the Philippines to have access to justice and appropriate compensation by recommending the implementation of a *Climate Change Liability Act*. Such an Act could make it practical and affordable for citizens of the Philippines to sue the companies for loss and damage they have suffered as a result of anthropogenic climate change. It might for example:

1. Provide costs protection for claimants in appropriate cases
2. Provide for class actions
3. Stipulate that a Court may take into account the findings of the Honourable Commission in determining claims under the Act
4. Stipulate that where any company can be shown to have acted dishonestly it may be held to be jointly and severally liable for all loss and damage arising.

In considering this Recommendation the Honourable Commission may have regard to the Model Law as set out in the paper: *Taking Climate Justice Into Our Own Hands: A Model Climate Compensation Act*.³⁵⁷

³⁵⁶ WUNC, *Mayor Bill De Blasio ON Why New York City is Suing 5 Major Oil Companies* (Jan. 11, 2018), <http://wunc.org/post/mayor-bill-de-blasio-why-new-york-city-suing-5-major-oil-companies#stream/0>.

³⁵⁷ ANDREW GAGE & MARGARETHA WEWERINKE, *TAKING CLIMATE JUSTICE INTO OUR OWN HANDS: A MODEL CLIMATE COMPENSATION ACT* (Dec. 2015), https://www.wcel.org/sites/default/files/publications/2015_takingclimatejusticeintoourhands_web.pdf.

APPENDIX A: SUMMARY OF THE INTER-AMERICAN COURT ADVISORY OPINION

On November, 15, 2017, the Inter-American Court of Human Rights issued Advisory Opinion OC-23/17 on “Environment and Human Rights” in response to a request made by Colombia.³⁵⁸ The full text of the Advisory Opinion is only available in Spanish, however, in February 2018, the IACtHR released an Official Summary in English. References to this Advisory Opinion are made throughout this joint summary *amicus* brief. Given its relevance to the proceedings before the Commission, the Official Summary is included herein.

³⁵⁸ Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, Opinión Consultiva OC-23/17 Inter-Am. Ct. H.R., (dated Nov. 15, 2017, published Feb. 7, 2018), *available at* http://www.corteidh.or.cr/docs/opiniones/serica_23_esp.pdf.