Is dealing with Climate Change a corporation’s obligation to human rights?

A review of the Landmark human rights investigation by the Commission on Human Rights of the Philippines into corporate responsibility for climate change

By Fabrice Mattei
Partner
Rouse
IP & Climate Change

©Copyright 2018
May, 2018

SUMMARY

The petition against 47 Carbon Major companies for climate change adverse impacts implores the Commission on Human Rights of the Philippines (CHR) to use its investigatory and recommendatory powers to consider the Carbon Majors’ accountability and responsibility for human rights violations or threats thereof, resulting from the impacts of climate change. The petitioners, including Greenpeace Asia, ask the CHR to take official notice of the scientific basis of the petition concerning the human rights implications of climate change and the estimated responsibility of the Carbon Majors. The petition draws on a recent research made by Mr. Richard Heede of the Climate Accountability Institute instead of in-fact/actual evidence. This investigation is a test case for remedies to climate change using the human rights framework. The Carbon Majors’ head offices against which the investigation is carried out are in United States, UK, Germany, France, Italy, Switzerland, Netherlands, Spain, Austria, Canada, Russia, Australia, Japan, Mexico and South Africa and include companies like BP, SHELL, CALTEX, TOTAL etc. Their activities include extraction and energy industries active in the extraction, production and sale of coal, oil, gas, cement, electric power and other raw materials. The decision of the CHR is expected to be rendered in early 2019. Although the CHR can’t impose penalties or judicial remedies against Carbon Majors, any findings of human rights abuse could become a basis for further lawsuits in the Philippines and/or around the world. There is also a strong possibility that this petition will be replicated in some neighboring countries in South-East Asia. Technologies, and intellectual property (IP), are at the center point of the dispute. If the world is to avoid severe climate change carbon, gas emissions must decrease quickly and achieving such cuts, according to the Intergovernmental Panel on Climate Change of the UN, depends in part on the availability of key technologies and innovation, in other words low IP carbon footprint. To what extent can the world depend on technological innovation and IP to address climate change and what promising technologies show most potential to help the world come to terms with global warming may well be the next question following the CHR’s investigation.
INTRODUCTION

In the last decade, laws codifying responses to climate change have grown in number. As these laws have recognized new rights and duties, climate change litigation has remarkably developed. The adoption of the Paris Agreement on Climate Change in 2016 has exacerbated the trend, with test cases mushrooming worldwide not only against governments but also increasingly against corporations. For a time it was assumed that since everyone is responsible for at least some minimal level of CO₂ emissions, nobody could be found liable. A number of new factors now challenge that assumption. Research reveal that over 70 % of human CO₂ emissions are directly traceable and attributable to 90 corporations, some of them would have even known about climate change risk as early as 1970s and intentionally sought to misrepresent it. One of the most noticeable attempts to test the boundaries of corporations’ liabilities for their contribution to climate change is the recent petition filed by Greenpeace, NGOs and individuals against 47 companies ("Carbon Majors") which is being heard by the Commission on Human Rights of the Philippines ("CHR"). The petition is an attempt to seek climate justice and accountability from corporations. The dispute is unusual and novel and it has the potential to change the climate change litigation landscape significantly and rapidly. First, it seeks accountability of Carbon Majors for climate change through the human rights' angle. Second, the CHR can’t impose penalties or judicial remedies however any findings of human rights abuse could become a basis for further lawsuits in the Philippines and/or around the world. This paper reviews the petition, analyses its merits and likely outcomes and concludes that companies need to have effective and credibility climate change strategies to ensure success in a world constrained by carbon, especially in countries heavily suffering from climate change such as the Philippines.

I. Background of the petition

a. The Philippines’s exposure to climate change

The Philippines has long been vulnerable to extreme weather. In recent years the archipelago has suffered from deadly storms like Typhoon Haiyan that killed over 6,000 people. On average, there are approximately 20 tropical cyclones entering Philippines waters yearly and in the past decade, these tropical storms have struck the nation more often and more severely, and most scientists conclude this is due to climate change. The Global Climate Risk Index 2018 lists the Philippines as the number five most affected country by climate change from 1997-2016 together with three other South East-Asian countries; Thailand, Vietnam and Myanmar.

---

2 The Status of Climate Change Litigation, A Global Review 2017, UNEP Environment
7 The Global Climate Risk Index, available at https://germanwatch.org/en/cri
b. The petition

The petition was filed on May 12, 2015 before the CHR by Greenpeace Southeast Asia, 13 Filipino civil society organisations and 18 citizens against 47 companies which are investor-owned oil, natural gas and coal producers and cement manufacturers, referred to in the petition as the "Carbon Majors." This is the first climate change-related complaint to implicate private actors in alleged human rights abuses. The dispute has immediately attracted much attention in local and foreign media and numerous academics and civil society organizations have submitted amicus briefs in support of the petitioners.

The petition requests the CHR to "conduct an investigation into the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines and whether the investor-owner Carbon Majors have breached their responsibilities to respect the rights of the Filipino people." The question the CHR is asked to answer is whether the Carbon Majors must be held accountable for the human rights implications of climate change and ocean acidification? The CHR may complete its investigation in early 2019.

The essence of the petition is that 50 Carbon Majors contributed nearly “21.72%” of the estimated global industrial emissions through 2010. The level of responsibility for each individual carbon major could be determined by identifying the company’s share in the estimated global industrial emissions of carbon. In addition consideration could be given to when a company has allegedly acquires knowledge of its product’s harmful effects, including the impacts on the climate.

---

8 The petition is available on line at https://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf
10 Amicus Curiae briefs submitted in support of the petitioners include briefs from Sabin Center for Climate Change Law, Columbia Law School. All amicus Curiae briefs submitted in support of the petitioners are available at https://www.business-humanrights.org/en/amicus-briefs
11 See Supra note 8.
The chronology and current status of the petition is as follows:

<table>
<thead>
<tr>
<th>Dates</th>
<th>Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td>22 September 2015</td>
<td>Petition filed to the CHR</td>
</tr>
<tr>
<td>January to March 2016</td>
<td>CHR conducted first phase of inquiry, consultative process</td>
</tr>
<tr>
<td>21 July 2016</td>
<td>Petitioners amended the petition</td>
</tr>
<tr>
<td>4 December 2016</td>
<td>CHR announced it will conduct an inquiry on matters raised in the petition</td>
</tr>
<tr>
<td>21 July 2016</td>
<td>CHR issued an order calling on the 47 companies to submit their responses within 45 days from receipt of the petition</td>
</tr>
<tr>
<td>8 December 2016</td>
<td>CHR announced receipt of 14 responses out of 47 Carbon Majors</td>
</tr>
<tr>
<td>14 February 2017</td>
<td>Petitioners submitted a consolidated reply to the Carbon Majors’ responses. The Petitioners requested the Commission to deny the companies' demands for a dismissal</td>
</tr>
<tr>
<td>March 27 &amp; 28, 2018</td>
<td>The CHR hold the first public hearings. The CHR heard testimonies about the impact of severe drought and extreme storms on farmers, fishermen and their families in the Philippines. The CHR listened to scientists who laid out global and Philippines-specific data on climate change and presented research that attributed about 2/3rd of the man-made emissions since the start of the industrial age to 90 oil, gas, coal and cement companies. The Respondents did not speak in front of the CHR. Instead most of them have challenged the CHR's mandate to investigate them and have generally not cooperated in its proceedings.</td>
</tr>
</tbody>
</table>

Not all Carbon Majors have submitted their answers to the petition, however those who filed it have usually challenged the petition based on the following grounds:

- The CHR’s lack of jurisdiction
- the petition’s lack of cause of action;
- the petition’s lack causal element
- the inapplicability of the No-Harm Principle

II. Issues

There are several issues in the petition and in the Carbon Majors’ responses. This paper covers three of them from Philippines and international legal contexts:

i. The CHR’s jurisdiction scope;

ii. Climate Change harms and causal effect; and

iii. Corporations’ liability for human rights violation due to climate change harms.

i) The CHR’s jurisdiction scope

The CHR is an independent National Human Rights Institution ("NHRI") created under the 1987 Philippine Constitution, on 05 May 1987 by virtue of Executive Order No. 163. The CHR must possess both (a) subject matter jurisdiction and (b) in personam or personal jurisdiction in order to consider a case.

a) The CHR’ subject matter jurisdiction

Philippines’ legal context:

According to Rule 2, Omnibus Rules of Procedure of the CHR\textsuperscript{13}, the CHR has a specific mandate to investigate:

\textsuperscript{13} Omnibus Rules of the CHR are available at https://pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf
“all forms of human rights violations involving civil and political rights and to investigate and monitor all economic, social and cultural rights violations and abuses, as well as threats of violations thereof, especially with respect to the conditions of those who are marginalized, disadvantaged, and vulnerable.”

The petitioners claim the adverse effects of climate change threaten the enjoyment of a range of internationally protected human rights, including the rights to life, to the highest attainable standard of physical and mental health, to food, to water, to sanitation, to adequate housing, and to self-determination.

In contrast, most respondents argue that the petition is outside the scope of the CHR’s jurisdiction, since it does not allege human rights violations involving ‘civil or political rights’. They further argue that the CHR’s power to monitor compliance by the Philippines Government with international treaties is circumscribed by Article XIII, Section 18(7) of the Philippine Constitution.

For example, Shell argues that the CHR “unilateral attempt to extend its jurisdiction to socio-economic rights by means of its rules of procedure is invalid and unconstitutional. According to respondent Shell, it is only the Congress that has authority to expand the CHR’s jurisdiction to hear cases other than human rights violations involving civil and political rights.”

The CHR has accepted the petition and commenced its investigation. Amicus briefs submitted by the petitioners promote the acceptance of the CHR’s authority to investigate “environmental rights” which are linked to human rights. The briefs further add that most if not all of the economic, social and cultural rights violations raised by the petitioners can be linked back to civil and political rights, specifically the right to life and the right to property.

*International legal context:*

The interplay between climate change and human rights law has increasingly been recognized at the international level although little climate change litigation has been successfully argued on human rights grounds especially against corporations so far. The Preamble to the Paris Agreement explicitly and officially acknowledges that, whenever states take action to address climate change, they should ‘respect, protect and consider their respective obligations on human rights’ and in particular ‘the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity’.

By forging a clear link between climate change and human rights and their instruments, the Paris Agreement’s preamble engenders an expectation that parties, such as the Philippines, will take into account their human rights obligations when they adopt measures to address climate change including conduct investigations or filing lawsuits against third parties.

At the international level, there have been limited attempts to enforce human rights to address climate change against corporations, for example:

- In M.C. Mehta vs. Union Of India & Ors, The Supreme Court of New Delhi extended the “right to life” in India’s constitution to include environmental rights. It ordered all polluting industries including companies operating in residential areas of Delhi either to be closed or shifted to existing industrial areas.

---

14 Shell’s response to the petition is available at https://www.greenpeace.org/seasia/ph/PageFiles/735291/Corporate_Responses_and_Comments/Shell_Response.pdf
15 Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others, 2005, Nigerian High Court
16 M.C. Mehta vs Union Of India & Ors, Supreme Court decision of December 20, 1986 available at https://indiankanoon.org/doc/1486949/
- In Gbemre vs. Shell Petroleum Development Company Nigeria Ltd and Others, 2005 Jonah Gbemre, a representative of the Iwherekan community in the Niger Delta filed a lawsuit against the Nigerian government and a private company Shell before the Nigerian High Court. The court held that the practice of gas flaring is unconstitutional as it violates the guaranteed fundamental rights of life and dignity of human persons provided in the Constitution of Federal Republic of Nigeria of 1999 reinforced by the African Charter on Human and Peoples Rights Procedure Rules Act\textsuperscript{18}.

b) The CHR’s personal jurisdiction

The question is whether the CHR may exercise its jurisdiction over corporations established outside the Philippines when their activities have past, current and/or future effects on climate change in Philippines?

Philippines’ legal context:

Most respondents argue the CHR lacks jurisdiction to hear complaints over corporations that do not transact business in the Philippines within the meaning of Philippine law and that ‘it is well settled that the jurisdiction of a state is limited only to the confines of its physical boundaries. For example ConocoPhilips response reads as follow “we have made various legal challenges to the Commission’s activity including a challenge to jurisdiction over ConocoPhillips given our lack of operations in the Philippines.”\textsuperscript{19}

Shell cites the 1927 Lotus case judgment\textsuperscript{20}, arguing that it is ‘well-settled that the jurisdiction of a state is limited only to the confines of its physical boundaries’.

In response, the petitioners argue that the CHR is not a court of law. Thus, the term jurisdiction should not be construed and applied in the investigation and should be replaced with the word “authority”.

“At the outset, it must be emphasized that the current inquiry is not judicial, but chiefly investigative in character. Hence, the rigid and exacting construction of the legal concept of “jurisdiction,” as explained, is inapplicable to the Petition” and the Petitioners conclude that “the CHR has authority to investigate businesses, regardless of where they are registered/domiciled or doing/transacting business, if it is believed that human rights harms are occurring in the Philippines.”\textsuperscript{21}

International context:

The Global Climate Risk Index 2018 mentioned earlier lists the Philippines and some other South-East Asian countries as the most affected countries by Climate Change. Why Philippines was selected by the petitioners against Vietnam or Thailand to investigate the Carbon Majors? Constitutions and procedural rules vary between countries. Some provide fertile provisions for climate damage investigation and lawsuits against private corporations. For example research identified that courts in Brazil, India, Colombia, Kenya, and Mexico will hold private corporations liable for violating human rights which is particularly relevant in the context of climate change litigation forum shopping\textsuperscript{22}.


\textsuperscript{20} See Supra note 20

\textsuperscript{21} See Supra note 8

We see three possible scenarios of extra-territoriality competence of jurisdictions in climate change cases summarized below. These scenarios present complex questions of jurisdiction, choice of law, and recognition and enforcement of foreign judgments.

<table>
<thead>
<tr>
<th>Scenarios</th>
<th>Plaintiff’s domicile</th>
<th>Defendant’s domicile</th>
<th>Climate change harm effects</th>
<th>Location of the jurisdiction</th>
<th>Examples of cases &amp; laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scenario 3</td>
<td>Country A</td>
<td>Country A</td>
<td>Country A</td>
<td>Country B</td>
<td>Oruma vs. Royal Dutch Shell Nigerians filed a case in the District Court of The Hague against Royal Dutch Shell (“Shell”) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (“Shell-Nigeria”) for damages arising from an oil spill in Nigeria. The plaintiffs asked the Court to find the two companies jointly and severally liable for tortious conduct. Because Shell-Nigeria is not domiciled in an EU Member State, whether the Dutch court has jurisdiction over the company is governed by Dutch law, which states: “In the event that the Dutch court has jurisdiction over one of the defendants in matters that must be initiated by a writ of summons, the Dutch court also has jurisdiction over other defendants involved in the same proceedings, provided the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing.” The Court found that it had jurisdiction over both Shell and Shell-Nigeria.</td>
</tr>
</tbody>
</table>

---

23 Oruma vs. Royal Dutch Shell, the decision is available at [https://elaw.org/oruma-v-royal-dutch-shell](https://elaw.org/oruma-v-royal-dutch-shell)
In relation to human rights based claims, the scope of US jurisdiction has been narrowed by the Supreme Court, whereas the scope of European jurisdiction has expanded. In Kiobel v Royal Dutch Petroleum decision, the US Supreme Court has refused to apply the Alien Tort Statute on activities that had been committed outside the territory of the United States24.

2) Climate Change harms and causal effect

In the petition, the causal effect between the 47 corporations and their climate change harmful effects in the Philippines rely on two causation principles (i) general causation combined with (ii) market share accountability.

General causation:

General causation is an objective inquiry usually established through statistical and epidemiological studies such as statistical models found in the United Nations’ Intergovernmental Panel on Climate Change (IPCC) to demonstrate that greenhouse gas emissions are the result of human intervention or could have caused a rise in sea-levels and consequent property damage. The petition refers to such studies25.

Market share accountability:

Courts in the US have developed the market share accountability approach in the context of litigation brought by women who claimed to have suffered injuries due to ingestion of diethylstilbestrol (DES) by their mothers during pregnancy, allowing courts to make the defendants liable for harm caused by a product based on their respective share in the manufacture and distribution of DES26. This approach is now applied against greenhouse gas producers to hold them liable for climate damages according to their share of global CO2 emissions. For example, in 2005, the Federal Court for the Southern District of New York, considered the issue of attribution in the context of an allegation that a gasoline additive, MTBE, had contaminated water supplies27.

The statement “no single event can be attributed to climate change” is no longer true. Studies cited in the petition quantifying the relative contribution of Carbon Majors to global greenhouse gas emissions facilitate the use of market share accountability in the climate damages context. Richard Heede’s research found 90 entities responsible for 63 percent of total greenhouse gas emissions to date, and determined the percentages attached to each individual entity specifically28.

To escape liability, a defendant must establish that it did not produce the product that caused the plaintiff’s injury like in Lliuya vs. RWE29 where RWE stated after the grant of the court decision:

“Due to the large number of global emissions of greenhouse gases from natural and anthropogenic sources and the complexity of the climate and its natural variability, RWE believes that it is not possible to legally attribute specific effects of a climate change to a single issuer”30. RWE maintains that there’s no clear evidence that it caused a glacier to melt in another part of the world.

25 See Supra note 8
27 Methyl Tertiary Butyl Ether (MTBE) Prods available at https://www.leagle.com/decision/2005727379fsupp2d3481689
28 See Supra note 4
29 Lliuya vs. RWE AG (Corporation) higher Regional Court, a summary of the case is available at http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/
30 The statement is available at https://www.climateliabilitynews.org/2017/11/14/climate-change-peru-germany-rwe/
3. Corporations’ liability for human rights violation due to climate change harms

While it is officially recognized by the Paris Agreement\(^\text{31}\) that the adverse effects of climate change impact the enjoyment of human rights, and it is widely accepted that companies have a responsibility to respect human rights, the relationship between business responsibilities for human rights and climate change remains uneasy and unclear. The petition relies upon the 2011 U.N. Guiding Principles on Business and Human Rights (“GP”)\(^\text{32}\) and the Oslo Principles on Global Climate Change Obligations\(^\text{33}\) to claim Carbon Majors’ liability for human rights violation. The CHR is likely to face the argument that Carbon Majors do not have direct obligations or duties under international human rights law and therefore can’t be held liable for human rights violation.

In the petition the State duty to protect the human rights invoked by the petitioners from corporate violations, is well-established. The corporate responsibility to respect human rights, defined in the GP as a “global standard of expected conduct” while the GP provide that the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, ‘which remain defined largely by national law provisions in relevant jurisdictions’, corporations are expected ‘at a minimum’ to respect human rights expressed in the International Bill of Human Rights and in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work (Principle 12).

The dispute in Urbaser v Argentina\(^\text{34}\) helps understanding how GP may apply to corporations. The petitioner was a shareholder in a concessionaire that supplied water and sewerage services in Buenos Aires. Argentina’s emergency measures caused the concession financial loss and it eventually became bankrupt. The petitioner commenced International Center for Settlement of Investments Disputes arbitral proceedings against Argentina for violations of the Spain-Argentina Bilateral Investment Treaty. At first, the Tribunal did not agree with the petitioner’s argument that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies. When extended to human rights, this would mean that companies have no obligation for compliance in relation to human rights, unlike States. However, after examining international developments in the area of business and human rights, and specifically the GP, the Tribunal 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”\(^\text{35}\)

A different set of expectations emerge from the OP which claim to “identify and articulate a set of Principles that comprise the essential obligations States and enterprises have to avert the critical level of global warming”. Legal responsibility for climate change is said to rest not only with states, but also with “enterprises”: “while all people, individually and through all the varieties of associations that they form, share the moral duty to avert climate change, the primary legal responsibility rests with States and enterprises”. This responsibility arises from a duty of humanity as “guardians and trustees of the Earth” to “preserve, protect and sustain the biosphere” as part of the “common heritage of humanity”.

The OP claim to reflect existing legal obligations to “respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere.” The OP view climate change as a human rights issue.

According to Principle 27, enterprises must assess the vulnerability of their facilities and properties to climate change and disclose this information to those likely affected including “investors, clients, and securities regulators”.

---

31 See Supra note 16
33 Oslo Principles on Global Climate Change Obligations, available at https://law.yale.edu/system/files/area/center/schell/oslo_principles.pdf
35 See Supra note 34
Although GP and OP are principles only, they are able when combined with supportive domestic laws to engage corporations’ liabilities.

CONCLUSION

The study of the petition and its responses highlight various challenges in establishing the CHR’s jurisdiction; causality between climate change and corporations’ past and present activities and corporations’ liabilities for human rights’ violation. As the loss and damage from climate change increases, victims will more frequently and instinctively turn to the courts to provide justice. Substantive laws, procedural rules and science are evolving to deal with novel and unique categories of harm and liability. Following the adoption of the Paris Agreement climate change infringement is now recognized as a type of human rights violation opening doors for a wider range of climate change lawsuits other than those based on tort, nuisance and negligence. The release of groundbreaking reports such as Richard Heede’s research 36 help establishing the correlation between companies’ activities and climate change effects. With large-scale weather events, attribution research can be a useful tool for measuring how climate risk has changed. Advance in the science of extreme weather has the potential to change the legal landscape, and bolster lawsuits against corporations. Robert Glicksman, a professor of environmental law at the George Washington University Law School 37, warned that when states filed lawsuits against tobacco companies, they relied on a form of correlation similar to that provided by attribution studies in climate change. They couldn’t prove specifically that a particular cancer was caused by smoking, but they could reasonably claim that smoking increased the probability of cancer among their residents, which was translating to higher health care costs that the tobacco companies were liable for. An analogous case is now being made by a growing number of cities and counties around the US. Climate change has made certain disasters more likely, and local governments are bearing the costs explaining the recent tsunami of lawsuits filed by US states, cities and even counties such as New York, Washington, Boulder, Colorado against corporations seeking to recover some of the costs associated with climate change impacts 38.

The decision of the CHR is expected in early 2019. Although the CHR can’t impose penalties or judicial remedies against Carbon Majors, any findings of human rights abuse could become a basis for further lawsuits in the Philippines and/or around the world. There is also the possibility that this petition will be replicated in other neighboring countries in South-East Asia.

36 See Supra note 4
37 Professor Robert Glicksman’s profile is available https://www.law.gwu.edu/robert-l-glicksman