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Amicus Brief – Human Rights and Climate Change

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Commission on Human Rights of the Philippines
Case No.: CHR-NI-2016-0001

Petition 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

SUBMISSION IN SUPPORT OF PETITIONERS

Submitted by the Asia Pacific Forum of National Human Rights Institutions and Global Alliance of National Human Rights Institutions

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Introduction

STATEMENT OF PURPOSE

The Asia Pacific Forum of National Human Rights Institutions and the Global Alliance of National Human Rights Institutions (GANHRI) makes this submission in support of the petition by Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement requesting an investigation into the responsibility of the ‘Carbon Majors’ for human rights violations or threats of violations resulting from the impacts of climate change. The purpose of this submission is to provide the Philippines Commission on Human Rights with an analysis of arguments concerning its jurisdiction to hear the petitioners’ request, on the basis of both domestic and international law.

Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement (petitioners) requested the Commission on Human Rights of the Philippines (Commission) to investigate ‘the responsibility of the Carbon Majors’ (respondents) for human rights violations or threats of violations resulting from the impacts of climate change.¹ This brief supports the petition, putting forward arguments based on the role of human rights law in addressing climate change impacts, and on the Commission’s jurisdiction² to hear complaints over all human rights violations contended, under both domestic law and international law. The brief firstly analyses in detail the Commission’s jurisdiction to hear the petitioners’ complaint, under both domestic and international law. Secondly, it considers the role of human rights law in addressing the impacts of climate change. Thirdly, it provides fundamental background on the interconnected nature of all human rights, and, fourthly, it addresses the human rights obligations of businesses.

1. Interpreting the scope of the Commission's jurisdiction

1.1. THE SCOPE OF THE COMMISSION'S JURISDICTION IN THE LAW OF THE PHILIPPINES

1. The petitioners submit that the Commission has jurisdiction to consider all human rights violations associated with climate change impacts, arguing that its jurisdiction encompasses not only civil and political, but also economic, social, and cultural rights.³ Conversely, numerous respondents suggest that the Commission's 'power to monitor compliance by the Philippine Government with international treaties is circumscribed by Article XIII, Section 18(7) of the Philippine Constitution'.⁴ Alternatively, the respondents contend that the petition is outside the scope of the Commission's jurisdiction, as it does not allege human rights violations involving 'civil or political rights'.⁵
2. The Commission has a clear explicit mandate to inquire into the responsibility of the Carbon Majors for the human rights violations alleged by the petitioners. The jurisdiction to inquire arises from the following statutory powers and functions of the Commission, either cumulatively or in the alternate:
 - a. To investigate all forms of human rights violations involving civil and political rights (Article XIII section 18(1) of the Philippine Constitution and Executive Order No. 163) 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 (Rule 2 Omnibus Rules of Procedure)⁶
 - b. To recommend to the Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families (Article XIII section 18(6) of the Philippine Constitution and Executive Order No. 163)
 - c. Monitor the Philippine Government's compliance with international treaty obligations on human rights (Article XIII section 18(7) of the Philippine Constitution and Executive Order No. 163)
3. Regarding the scope of the Commission's investigation function, in 2012 the Commission adopted the Omnibus Rules of Procedures to guide the investigation and monitoring of human rights violation and abuses. The Omnibus Rules were enacted pursuant to Article XIII Section 18 (2) of the Constitution and Section 3 (ii) of Executive Order No. 163 which clearly prescribe the Commission's power to "adopt its operational guidelines and rules of procedure in accordance with the Rules of Court". The Omnibus Rules clarify that the monitoring of the Government's compliance with its international obligations:

Includes, but is not limited to, the actions taken by the Government, the manner and/or means of implementation or application of the human rights related laws, principles, norms and standards, in relation to the State obligations to respect, protect and fulfil the human rights of all persons within the Philippines, as well as Filipinos residing abroad... 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.⁷
4. Some respondents have asserted that the Commission's Omnibus Rules (so far as they extend the Commission's jurisdiction to investigate economic, social, and cultural rights) were adopted *ultra vires*. There are at least three counter arguments to this assertion.

- a. 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, specifically the right to life – also invoked in the petition – and the right to property. 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.⁸ Extensive domestic, regional and international practice on the mutual recognition of economic, social, cultural rights and civil and political rights exists. On the one hand, even when economic, social and cultural rights are justiciable at domestic and international levels, they have been linked to civil and political rights (or *vice versa*) reflecting customary acceptance of the human rights' interrelatedness, interdependence, and indivisibility.⁹ On the other hand, 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 international level, this practice has been traditionally utilized to remedy the lack of complaint procedures for economic, social and cultural rights violations,¹⁰ or when a human rights treaty did not include specific economic, social and cultural rights.¹¹ 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, to social security, and indigenous peoples' right to land.¹² The practice is by no means restricted to the much-publicised Indian courts' interpretation of the right to life as a right to livelihood,¹³ but is substantial in quantity and universal in coverage.¹⁴
 - b. In accordance with the well-established doctrine of *compétence de la compétence*, it is for the Commission to determine the scope of its own jurisdiction.¹⁵
 - c. Most compellingly, 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 Philippines law for the purposes of the current Inquiry.
5. Furthermore, the Commission's jurisdiction under the Constitution to consider breaches of economic, social and cultural rights in exercising its functions under B and C listed in paragraph 2 above is beyond dispute. Sections 18(6) and 18(7) give the Commission a very broad mandate to, respectively, recommend to the Congress effective measures to promote human rights and to monitor the Philippine Government's compliance with international treaty obligations on human rights. In exercising both of these functions the Commission is free to determine the manner in which it will inform itself to make such recommendations or to conduct such monitoring, including by conducting a public inquiry.
 6. Significantly too, the Supreme Court of the Philippines has already established a solid jurisprudence regarding the alignment between civil and political and economic, social and cultural rights. The Court has adopted an open approach, whereby international human rights treaties are applied directly, absent incorporation,¹⁶ in as far as they are seen to reflect generally accepted principles of international law.¹⁷ 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.¹⁸ For instance, in *Villar v. TIP*, the Court has annulled the expulsion by a college of students for their participation in protests, relying among others on their right to education enshrined in the UDHR.¹⁹

7. The Supreme Court has also maintained this holistic interpretation of human rights in domestic law, recognizing socio-economic rights as justiciable.²⁰ In *Oposa, et al. v. Factoran, Jr. et al.*, the Supreme Court notably 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’.²¹ The *Oposa* decision put the Philippines at the forefront in the movement towards the interpretation of constitutional rights to require substantive environmental protections.²² 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.²³
8. In sum, the legislative provisions on the Commission’s mandate and their interpretation in line with established Philippine Supreme Court’s case law leave no doubt over the Commission’s jurisdiction to hear the petition pursuant to each, or any, of its investigation, recommendatory or monitoring functions noted in paragraph 2 above.

1.2. THE SCOPE OF THE COMMISSION’S JURISDICTION AND INTERNATIONAL LAW

9. Numerous respondents suggest that the Commission lacks jurisdiction to hear complaints over corporations that do not ‘transact business in the Philippines within the meaning of Philippine law’²⁴ and that ‘it is well settled that the jurisdiction of a state is limited only to the confines of its physical boundaries’.²⁵ As this part of the brief will demonstrate, these and similar assertions are simply inaccurate. Contrary to what the respondents allege, it is a well-established principle of international law that a state may exercise prescriptive and adjudicative jurisdiction over natural or legal persons on its territory or abroad, as long as there is a clear connecting factor between that state and the person or conduct that it seeks to regulate.²⁶
10. As far as jurisdiction in international law is concerned, jurisdiction entails the state legislature’s right to create, amend or repeal legislation (**prescriptive jurisdiction**), the state’s right to enforce this legislation, for example, by using powers of arrest and investigation (**enforcement jurisdiction**) and the ability of national courts, tribunals or other bodies exercising judicial functions to hear and decide on matters (**adjudicative jurisdiction**). States’ prescriptive and adjudicative jurisdiction are not territorially limited to acts occurring within a state, but States’ enforcement jurisdiction is.²⁷ The respondents’ submissions, however, conflate these different forms of jurisdictions, and, on this basis, reach inaccurate conclusions. For example, Cemex and Shell, selectively cite the 1927 *Lotus* case judgement,²⁸ arguing that it is ‘well-settled that the jurisdiction of a state is limited only to the confines of its physical boundaries’.²⁹ The respondents refer to the passage where the Permanent Court of International Justice says:

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State...³⁰

But the respondents’ here fail to distinguish between the different forms of jurisdiction. The passage of the *Lotus* judgement they cite only concerns *enforcement* jurisdiction. On other forms of jurisdiction, 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....³¹

11. The *Lotus* judgement makes it clear that neither *prescriptive* nor *adjudicative* jurisdiction are limited to a state's territorial boundaries. On the contrary, states have wide discretion to extend the reach of their *prescriptive* and *adjudicative* jurisdiction, provided that a clear nexus exists. State practice reflects this interpretation: in an ever more globalized world, states increasingly exercise jurisdiction extraterritorially. As noted by Parrish:

The number of U.S. lawsuits where American laws are applied extraterritorially to solve global problems has grown. This trend, however, is not peculiar to the United States. Increasingly other countries are also applying their laws extraterritorially to exert international influence and solve transboundary challenges.³²

12. Provided a sufficiently close connecting factor – variously referred to as a ‘nexus’, ‘link’, ‘base’ or ‘principle of jurisdiction’ – exists between a state exercising jurisdiction and the conduct or persons it seeks to regulate or adjudicate over, States may extend their *prescriptive* and *adjudicative* jurisdiction to persons, property and acts outside their territory. State practice that is widely accepted is commonly referred to as ‘principles of jurisdiction’. Traditionally, the most widely used principle was that of territoriality. However, as one leading authority notes:

The territorial theory has been refined in light of experience and what amounts to extra-territorial jurisdiction is to some extent a matter of appreciation. If there is one cardinal principle emerging, it is that of a genuine connection between the subject matter of jurisdiction and the territorial base or reasonableness of interest of the state in question.³³

13. The ‘reasonableness’³⁴ (or ‘proportionality’)³⁵ test will be satisfied if the ‘domestic effects are direct, foreseeable and substantial.’³⁶ The petition before the Commission raises the fundamental question of the domestic effects of the respondents’ conduct so far as it has impacted climate change. There is a clear nexus between the Philippines and the climate change impacts that are the object of the petition under consideration.³⁷
14. Contrary to what the respondents allege, therefore, the exercise of the Commission’s jurisdiction over foreign corporations would not constitute an ‘act of interference’ or ‘usurpation’ of other states’ sovereignty.³⁸ 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’.³⁹
15. 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.⁴⁰ 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.⁴¹ Moreover, the *Lotus* case clearly supports the contention that the Commission may exercise adjudicative jurisdiction over acts that occurred outside the Philippines territory: there is therefore no requirement in international law that respondents conduct business in the Philippines. 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.⁴²
16. Accordingly, as long as the Commission’s exercise of jurisdiction falls within one of the established principles, it is in accordance with international law. The following sections review the principles of jurisdiction most relevant for the purposes of the petition: the territorial principle and the protective principle.

The territorial principle

17. Many respondents place great emphasis on the territorial principle, i.e. the authority of a state to exercise legislative or adjudicative jurisdiction over acts that take place in its territory. Shell's response, for example, asserts that the territorial principle is the 'primary basis for a state's jurisdiction'.⁴³ In support of this proposition, Shell cites Vaughan Lowe's *International Law* as follows:

The most obvious basis upon which a State exercises its jurisdiction is the territorial principle, that is, the principle that virtue of its sovereignty over its territory the State has the right to legislate for all persons within its territory.⁴⁴

18. Shell's response, however, omits to cite another crucial passage from the same book, according to which 'Territoriality and nationality are not the only bases of jurisdiction'.⁴⁵ The respondents also omit to mention that the territorial principle does not preclude states from regulating conduct which is wholly or partially carried outside a state's territory. The territorial principle is subdivided into a *subjective* territorial principle, which allows states to exercise jurisdiction over activities committed within that state, even if completed abroad. Conversely, the *objective* territorial principle allows a state to exercise jurisdiction over activities that are completed within its territory, even if initiated abroad.⁴⁶ Both principles therefore allow states to regulate conduct with an extra-territorial element.

19. If the conduct is neither initiated nor completed within their territory, states may assert jurisdiction over conduct that has an 'effect' on their territory. The *effects doctrine* is generally regarded as falling under the territorial principle, rather than as an extraterritorial basis for jurisdiction.⁴⁷ The doctrine 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'.⁴⁸

20. The effects doctrine has been acknowledged in the *Lotus* case⁴⁹ and by judges of the International Court of Justice in the *Arrest Warrant* case.⁵⁰ It is presently widely applied, especially in relation to antitrust, tort, bribery and corruption, security, insolvency and criminal law.⁵¹ The effects doctrine was confirmed by the US Court of Appeals in 1945 in the *Alcoa* case⁵² where a Canadian corporation was charged with a violation of US antitrust law regarding a cartel-type of market allocation agreement reached in Switzerland by aluminium companies of various nationalities. 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.⁵³

21. Accordingly, and contrary to what is suggested by the respondents, the territorial principle does not preclude states from regulating conduct or actors outside their territory. The US, for example, has a long history of regulating conduct outside its territory.⁵⁴ Its unilateral prohibition of imports of shrimp caught in violation of US law protecting endangered sea turtles indirectly regulated conduct carried out outside the US territory. The ensuing dispute famously ended before the World Trade Organisation Appellate Body. In the first *Shrimp-Turtle* case,⁵⁵ the WTO Appellate Body found that there was 'sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)' of the 1994 General Agreement on Tariffs and Trade.⁵⁶ This has been interpreted as a justification for environmental policies with extraterritorial reach.⁵⁷ In a second case, the Appellate Body endorsed unilateral measures to protect the environment when good faith efforts to reach a multilateral agreement have failed.⁵⁸ Today the practice of import restrictions for environmental concerns is widespread, as exemplified by measures concerning the trade in chemicals⁵⁹ and forest products.⁶⁰

22. To conclude, the territorial principle provides ample scope for the Philippines to regulate 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 of its effects within the Philippines.

The protective principle

23. The protective principle (also known as '*competence réelle*') authorises states to protect themselves by regulating and adjudicating over conduct carried out abroad that may damage their essential security interests.⁶¹ The principle applies regardless of the place of commission or 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.⁶²
24. 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. Both the United States and Canada have relied on the protective principle to address instances of pollution in the high seas. In 1970 Canada introduced the Arctic Water Pollution Prevention Act, which extended the reach of Canadian environmental laws outside its territory.⁶³ The protective principle was arguable on the basis of the US Oil Pollution Act of 1990 enacted after the 1989 Exxon Valdez incident⁶⁴ and establishing liability for discharging oil in US navigable waters.
25. In sum, states have relied on the protective principle on several occasions to ensure environmental protection. The Commission could therefore rely on this principle to assert its *adjudicative* jurisdiction. 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.

2. Human rights violations associated with climate change impacts

26. The petitioners maintain that the adverse effects of climate change threaten the enjoyment of a range of internationally protected human rights, most saliently 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. Their contention is supported in numerous Human Rights Council (HRC) resolutions and can therefore be regarded as uncontroversial.⁶⁵ The implementation of states' obligations associated with these rights⁶⁶ depends on constitutional arrangements and other provisions of domestic law and practice. In this connection, leading climate change law expert Rajamani notes how:
- The extent of application and enforcement of protected human rights will, of necessity, differ from state to state depending on national circumstances, constitutional culture, legislative proclivity, judicial creativity and governance mechanisms, but at a minimum, the core human rights treaties set standards and benchmarks in place, and impose process obligations to integrate human rights concerns into [climate] policy planning.⁶⁷
27. At the very minimum, human rights norms clarify how states should respond to climate change.⁶⁸ This core premise is now enshrined in the Preamble to the Paris Agreement, which 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'.⁶⁹ The Paris Agreement's reference to parties' human rights obligations encompasses obligations in treaties they have ratified already, or may ratify in future. By forging an explicit link with human rights instruments, the Paris Agreement's preamble engenders an expectation that parties will take into account their human rights obligations when they adopt measures to tackle climate change. This approach is consistent with the interpretative principle of systemic integration enshrined in Article 31.3(c) of the Vienna Convention on the Law of Treaties.⁷⁰ According to the principle of systemic integration, when undertaking new obligations, states must interpret these new obligations in a way that is mutually supportive, rather than conflicting with their obligations under other instruments. The Paris Agreement's reference to human rights may therefore be viewed as a forceful reminder to practice systemic integration in the interpretation of parties' obligations under that treaty.⁷¹
28. This interplay between climate change and human rights law has increasingly been recognized in the literature,⁷² as well as by human rights bodies. A string of HRC resolutions emphasise 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'.⁷³ The HRC has also encouraged its special procedures mandate holders to consider the issue of climate change and human rights within their respective mandates.⁷⁴ Amongst the most notable outcomes of such engagement are the reports of UN Special Rapporteur on human rights and the environment on the human rights threatened by climate change⁷⁵ and on the human rights obligations relating to climate change.⁷⁶ These reports underscore how human rights bodies can inform and improve climate policy by providing forums to address issues 'that might otherwise be overlooked'.⁷⁷
29. Negotiations on the Paris Agreement have inaugurated a new season in cooperation between international bodies dealing with human rights and climate change. The HRC special procedures mandate-holders successfully petitioned for the inclusion of human rights language in the agreement.⁷⁸

Ever since, on the one hand, human rights bodies have undertaken to make formal submissions on matters under consideration under the climate regime, such as gender, adaptation, and the so-called Sustainable Development Mechanism,⁷⁹ and elaborated recommendations on how to best integrate human rights into climate policy.⁸⁰ On the other hand, standards developed by international bodies dealing with matters such as climate finance and REDD+⁸¹ have increasingly included human rights considerations.⁸² These developments clearly show that states and international organisations acknowledge the relevance of human rights law in the implementation of climate change response measures and increasingly practice systemic integration in the interpretation of their obligations under international climate change and human rights treaties.⁸³ More generally, these developments clearly testify to states' acknowledgement that human rights law has an important role to play in the fight against climate change.

30. Yet, so far, little climate change litigation has been successfully argued on human rights grounds.⁸⁴ As a result, the scope to raise human rights complaints in relation to climate change impacts largely remains to be tested. Qualifying the effects of climate change as human rights violations poses a series of technical obstacles, including disentangling complex causal relationships and projections about future impacts.⁸⁵ Yet, these obstacles are not insurmountable. The suitability of human rights law to address harm caused by climate change depends upon whether a victim can substantiate a claim that a duty bearer has contributed to climate change, in such a way to amount to a human rights violation.⁸⁶ In this regard, Special Rapporteur Knox has persuasively argued that, as scientific knowledge improves, tracing causal connections between particular emissions and resulting harms is less difficult.⁸⁷ Furthermore, states' well-established obligation to address environmental harm that interferes with the full enjoyment of human rights can be interpreted in a way to extend to human rights violations caused by climate change impacts.⁸⁸ As not all parties to the climate regime have ratified the same human rights treaties,⁸⁹ states' obligations in this connection may vary to a certain extent. Yet, the work of the Special Rapporteur demonstrates that it is possible to identify a set of core obligations associated with the protection of human rights in relation to environmental matters.⁹⁰
31. The Special Rapporteur clearly outlines how these core obligations include procedural obligations to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies.⁹¹ Furthermore, states have substantive obligations to adopt legal and institutional frameworks protecting against environmental harm interfering with the enjoyment of human rights. Most saliently for the present purposes, this includes *harm caused by private actors*. The obligation to protect human rights from environmental harm does not require states to prohibit all activities that may cause any environmental degradation. Instead, states have discretion to strike a balance between environmental protection and other legitimate societal interests. The Special Rapporteur has emphasized how this balance cannot be unreasonable, or result in unjustified, *foreseeable infringements of human rights*. In assessing whether a balance is reasonable, national and international health standards may be particularly relevant, with a strong presumption against retrogressive measures. Finally, the Special Rapporteur has specified how, in addition to a general non-discrimination requirement, states may owe specific obligations to members of *groups particularly vulnerable to harm*.⁹²
32. All of the elements above are of clear significance for the petition before the Commission. The petition addresses harm caused by private actors, which is largely foreseeable and that also affects groups particularly vulnerable to harm. In this regard, it is worth emphasising that the Paris Agreement refers for the first time the matter of loss and damage caused by climate change, while the decision adopting it established a process to develop recommendations for approaches to avert, minimise and address human displacement, and facilitate parties' efforts to develop and implement comprehensive risk management strategies.⁹³
33. In sum, human rights law provides means to tackle loss and damage and hold to account human rights duty bearers, including *corporations*, for human rights violations associated with the impacts of climate change. The next section considers how this can happen in practice.

3. Civil and political and economic, social and cultural rights

34. The petitioners have asked the Commission to consider violations of both civil and political rights, as well as social, economic and cultural rights, associated with the impacts of climate change. Several respondents, however, suggested that the latter request falls outside the scope of the Commission's jurisdiction, which only extends to violations of civil and political rights.⁹⁴ As noted in Section A above, the Commission has jurisdiction to consider all human rights violations associated with climate change impacts: its jurisdiction encompasses not only civil and political, but also economic, social, and cultural rights. This section considers the interrelationship of civil and political rights and economic, social and cultural rights and examines further why the Commission has the jurisdiction to consider all human rights violations associated with the impacts of climate change.
35. The UDHR recognizes both civil and political *and* economic, cultural and social rights, affirming interrelatedness, interdependence, and indivisibility as the principles which underpin the human rights regime.⁹⁵ Indeed, the delegates of the Philippines played an essential role in the inclusion of economic, social and cultural rights in the text of the UDHR.⁹⁶
36. Ideological differences dominating the Cold War period and (mis)conceptions relating to the legal nature, enforceability, and justiciability of economic, social and cultural rights, on the one hand, and civil and political rights, on the other,⁹⁷ led to the adoption of two separate international treaties in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁸ During the following decades, this separation of human rights in two categories has been challenged at conceptual, normative and institutional levels. This is evident in the text of more recent human rights treaties, namely the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.⁹⁹ All these treaties include economic, social and cultural rights alongside civil and political rights, reflecting the reality that eliminating discrimination and effectively ensuring the rights of women, children and persons with disabilities, for example, requires a holistic approach to human rights.
37. In the past three decades an intense process of normative clarification has brought about the re-alignment of economic, social and cultural rights and civil and political rights. UN treaty bodies, regional human rights courts and domestic courts, UN special procedures, non-governmental organizations, and scholars have addressed uncertainties and misconceptions relating to the normative content of both economic, social and cultural and civil and political rights and the obligations attaching to them.¹⁰⁰ At the same time, economic, social and cultural rights have been increasingly adjudicated – directly, as well as indirectly through civil and political rights – in domestic and regional courts¹⁰¹, and, since the entry into force in 2013 of the Optional Protocol to the ICESCR, also at international level.¹⁰²
38. Significantly, it is widely accepted that economic, social and cultural rights, while subject to progressive realization to the maximum of a state's available resources, entail a core content that must be immediately realized.¹⁰³ Conversely, only a small number of civil and political rights are absolute; most are qualified rights that can be legitimately limited and balanced against other considerations.¹⁰⁴ Furthermore, the practice of implementation has revealed how both the tripartite obligation 'to respect, protect and fulfil' and the negative/positive typology of obligations apply equally to civil and political and economic, social and cultural rights.¹⁰⁵ For example, the obligation to respect economic, social and cultural rights requires states to refrain from impeding individuals' existing access to these rights – thus essentially a negative obligation.¹⁰⁶ Another illustration is provided by the right to life: long considered to be the paradigmatic negative right, the right to life is in fact premised on a complex web of positive obligations of a substantive and procedural nature.¹⁰⁷

39. States remain the principal actor in monitoring and enforcing businesses' compliance with requirements under international treaties. In particular, in Draft General Comment No. 36, the Human Rights Committee has construed that the right to life encompasses a state 'obligation to take appropriate positive measures in order to protect life from all possible threats, including from *threats emanating from private persons and entities*'.¹⁰⁸ The latter obligation is of particular relevance in the context of the current petition. The obligation to protect also requires states to take positive measures which ensure that companies, groups or powerful individuals do not deprive individuals of their access to economic, social and cultural rights. International jurisprudence has held that 'the measures to give effect to the duty to protect must include legislation, the establishment of an effective regulatory regime, providing access to legal remedies and imposing penalties for non-compliance'.¹⁰⁹ As such, neither economic, social and cultural rights nor civil and political rights offer a single model of positive or negative duties on the State. The traditional distinction that civil and political rights impose only negative duties on States, and economic, social and cultural rights entail only positive duties is patently inaccurate.¹¹⁰
40. In sum, the historical distinction between civil and political rights and economic, social and cultural rights has evolved into a holistic recognition of the inter-relationship between and respective justiciability of these rights at normative level and in practice. States have repeatedly recognized overlaps between violations of economic, social and cultural rights and violations of civil and political rights. In jurisdictions, where the domestic machinery to adjudicate economic, social and cultural rights is limited or unavailable, these rights have been protected "through the judicial application of duties deriving from civil and political rights where those duties are closely interrelated to economic, social and cultural rights obligations."¹¹¹ Importantly, even within the limited remit of civil and political rights, environmental concerns have been linked in numerous ways to the right to life, the right to enjoy one's home and family life, and the right to access to justice and to a remedy.¹¹² Thus any attempts to argue that environmental concerns fall outside of the ambit of the Commission's mandate may be refuted on the basis of the fact that the enjoyment of several civil and political rights requires a healthy environment. In this vein, States must be responsive to evolving interpretations of international human rights law obligations, also with regard to businesses' human rights responsibilities, as the next section explains.

4. The business and human rights regime

41. States have an obligation to protect individuals within their jurisdiction from corporate violations, including by ensuring access to remedy for affected individuals.¹¹³ The Business and Human Rights regime consists of hard and soft rules under international law and domestic law that regulate the relationship between the state, corporate entities and individuals. The regime centres on the state's duty to protect human rights, the corporate responsibility to respect human rights, and the individuals' right to an effective remedy.

The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result...An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.¹¹⁴

As a result, a web of hard and soft international and domestic human rights law norms imposes duties on corporations, including in relation to environmental impacts.

42. International law clearly imposes upon States wide-ranging obligations to protect the human rights of individuals from infringements by third parties, including corporations. As a consequence, states must take measures to 'prevent, punish, investigate or redress the harm caused ... by private persons or entities'.¹¹⁵ The *state duty to protect* the human rights invoked by the petitioners – to life,¹¹⁶ to health,¹¹⁷ to food,¹¹⁸ to water,¹¹⁹ to sanitation,¹²⁰ and to housing¹²¹ – from corporate violations, is well-established in the interpretative work of UN treaty bodies and UN special procedures, and in international jurisprudence.¹²² In addition to the work of Special Rapporteur Knox, other international human rights bodies have identified protective duties in relation to the environmental impacts on human rights.¹²³ States ordinarily prevent, stop, or obtain redress or punishment for third party interference through state regulation of private party conduct, inspection and monitoring of compliance, or administrative and judicial sanctions enforced against non-compliant third parties, such as polluting industries.¹²⁴
43. The existence of corporate obligation to respect must be presumed given the uncontested existence of the state obligation to protect. A different finding would amount to a nonsensical situation, whereby corporate violations could not be prevented, punished, investigated, or redressed – although they must be, under the state duty to protect – because corporations would not, in the first place, have an obligation not to violate human rights. As such, the logical inference must be that the positive obligations of states to protect human rights disclose the scope of the human rights obligations of corporations. There is therefore an inherent link between the positive obligations of states to protect human rights, corporations' human rights obligations, and the obligations of States and corporations to provide individuals with access to remedies for breaches of their human rights.¹²⁵ The state duty to protect, the corporate responsibility to respect, and access to remedy form the three pillars of the Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework¹²⁶. This instrument was drafted by the UN Secretary-General's Special Representative for Business and Human Rights and unanimously endorsed by the HRC in 2011.¹²⁷ The Special Representative explained that

While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law.¹²⁸

44. Subordinate to the State's binding obligation to protect and enforce, the Guiding Principles therefore entail a 'moral responsibility and societal expectation'¹²⁹ that corporations respect human rights 'understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'¹³⁰. At an operational level, the corporate responsibility to respect translates in the duty of human rights due diligence, which requires corporations 'to identify, prevent, mitigate and account for how they address their adverse human rights impacts'.¹³¹ The Special Representative clarified that corporate human rights violations can result from 'environmental impacts—for example, related to water and health', including such impacts that have a 'delayed effect'.¹³² In this connection, corporations should rely on 'established and quite precise international as well as national standards' in undertaking due diligence in relation to these environmental impacts.¹³³
45. The question arises whether, alongside this soft law obligation to respect and the extant binding domestic law provisions,¹³⁴ corporations incur direct obligations under international human rights law and related regimes. A solid body of scholarly works engages with these aspects.¹³⁵ Andrew Clapham has pioneered the capacity approach which extracts the *capacity of non-state actors to carry binding obligations* from treaty and customary international law, international jurisprudence and the interpretative work of UN human rights bodies.¹³⁶
46. By applying Clapham's method, we identify *treaties* in the field of environmental law, energy law, space law, and the law of the sea that stipulate direct international obligations for corporations¹³⁷ – these provisions reveal *prima facie* that it is not at all legally impossible for corporations to acquire obligations under international treaty law and to incur responsibility for violations of these obligations. Indeed, the Malabo Protocol provides the (not yet established) African Court of Justice and Human Rights with the jurisdiction to hear cases involving international crimes committed by corporations.¹³⁸ Even though they do not expressly stipulate corporate obligations, newer human rights treaties entail provisions that explicitly mention 'private entities' and the state duty to protect from abuse by such entities.¹³⁹ This method again ties into the dual requirement of the current business and human rights regime, with corporations acknowledging their obligations and states ensuring compliance.¹⁴⁰
47. Recent *interpretative work of treaty bodies and international jurisprudence* provide strong indications that the corporate responsibility to respect human rights has gained traction as a binding obligation. In its General Comment No. 16 of 2013, the Committee on the Rights of the Child addresses corporate bodies directly, seemingly as duty-bearers under the Convention on the Rights of the Child:
- At this juncture, there is no international legally binding instrument on the business sector's responsibilities vis-à-vis human rights. However, the Committee recognizes that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the Convention and the Optional Protocols thereto.¹⁴¹
48. The 2016 arbitral award in *Urbaser v Argentina* is particularly relevant in this connection.¹⁴² The Tribunal held:
- On a preliminary level, the Tribunal is reluctant to share Claimants' principled position 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 like the Claimants. When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the States' charge exclusively.¹⁴³

After examining international developments in the area of business and human rights, and specifically the UN Guiding Principles,¹⁴⁴ as well as relevant provisions of the UDHR and the ICESCR,¹⁴⁵ 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.*¹⁴⁶

49. Other international courts have relied on the UN Guiding Principles to establish that businesses 'must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities'.¹⁴⁷ The Inter-American Court of Human Rights 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'.¹⁴⁸ The Special Tribunal for Lebanon has found support in the Guiding Principles for the individual's right to access remedy in case of corporate violations. It held that the UN 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.¹⁴⁹

These illustrations from international case law provide solid grounding for the petitioners' argument that the Commission can rely upon the UN Guiding Principles in its considerations, contrary to the respondents' reply.¹⁵⁰

50. *Customary international law* represents another anchor for binding corporate obligations. There is broad support in the literature that corporations have direct international obligations under customary international law not to commit human rights violations that constitute international crimes such as piracy, slavery, war crimes, genocide, crimes against humanity, and torture.¹⁵¹ Furthermore, to the extent that the UDHR, or parts thereof, reflect customary international law, it may be binding on corporations.¹⁵² This submission is based on the reading of the Declaration's preambular provisions 'every individual' and 'organ of society' in conjunction with article 30 which stipulates that

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.¹⁵³

51. This interpretation was embraced in the *Urbaser* award mentioned above¹⁵⁴ and in the Philippines it was corroborated by the Supreme Court, which in *Republic v. Sandiganbayan* found that the UDHR as a *whole* is part of the law of the land.¹⁵⁵ This reading of the Declaration provides specific jurisdictional support for the Commission to hear this petition.

Conclusion

52. This brief has put forward arguments supporting the petition submitted by Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement requesting an investigation into the responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change. These arguments revolve around the role of human rights law in addressing the impacts of climate change, and the interlinkages between human rights and climate change law after the adoption of the Paris Agreement. The brief summarises developments in the practice of states and international human rights bodies concerning the interconnected nature of all human rights, the human rights obligations of corporations, as well as on the exercise of jurisdiction. It concludes that the Commission has authority to investigate the petition, both on the basis of domestic and international law.

Appendix:

Omnibus Rules

RULE 2

SCOPE OF COMMISSION JURISDICTION

Section 1

Pursuant to Sections 17 to 19, Article XIII of the 1987 Philippine Constitution, in relation to Executive Order No. 163, dated 5 May 1987, and relevant international human rights instruments, the 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;
- d) right to respect for one's dignity;
- e) freedom from slavery and involuntary servitude;
- f) freedom from torture, cruel, inhuman or degrading treatment and punishment;
- g) right to protection from enforced disappearance;
- h) freedom from arbitrary interference with one's privacy, family, home, or correspondence;
- i) freedom from arbitrary arrest, detention or exile;
- j) freedom of movement and residence;
- k) freedom of thought, conscience and religion;
- l) freedom of the press, speech, opinion and expression;
- m) freedom from discrimination;
- n) right to marry and to found a family; and
- o) right to own property.

Section 2

The Commission on Human Rights shall monitor the Philippine Government's compliance with international human rights treaties and instruments to which the Philippines is a State party. This includes, but is not limited to, the actions taken by the Government, the manner and/or means of implementation or application of the human rights related laws, principles, norms and standards, in relation to the State obligations to respect, protect and fulfill the human rights of all persons within the Philippines, as well as Filipinos residing abroad.

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

ENDNOTES

- 1 Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, Quezon City, Philippines, 9 May 2016, Case No. CHR-NI-2016-0001.
- 2 It has been noted that since the 'Commission is not a court of law... the term jurisdiction... should not be construed and applied in the current inquiry' (Petitioners Consolidated Reply, at 2.5). The use of the term jurisdiction is not, however, limited to courts of law but is commonly applied to any body that exercises governmental powers, such as a court or administrative authority. See e.g. M. Akehurst, 'Jurisdiction in International Law' (1975) 46 *British Yearbook of International Law* 145, at 178.
- 3 Respondents Consolidated Reply, at 2.46.
- 4 See e.g. ExxonMobil Petroleum & Chemical Holdings, Inc. (Exxon), para. 17.
- 5 See e.g. Exxon, at 20; Cemex S.A.B. de C.V. (Cemex), at b; and Lafarge Holcim, at 6.
- 6 Section 1 states: 'Pursuant to Sections 17 to 19, Article XIII of the 1987 Philippine Constitution, in relation to Executive Order No. 163, dated 5 May 1987, and relevant international human rights instruments, the 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; (...)'. Section 2 states: 'The Commission on Human Rights shall monitor the Philippine Government's compliance with international human rights treaties and instruments to which the Philippines is a State party. This includes, but is not limited to, the actions taken by the Government, the manner and/or means of implementation or application of the human rights related laws, principles, norms and standards, in relation to the State obligations to respect, protect and fulfil the human rights of all persons within the Philippines, as well as Filipinos residing abroad. 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, especially with respect to the conditions of those who are marginalized, disadvantaged, and vulnerable.'
- 7 Omnibus Rules of Procedure of the Commission on Human Rights, 19 April 2012, rule 2, sec. 2.
- 8 The Commission may 'investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights'. Art. VIII, sec. 18.1, Constitution; sec. 3, E.O. 163; Rule 2, sec. 1, Omnibus Rules. The *sua sponte* (or *suo motu*) ability is by no means a unique characteristic of the Commission on Human Rights of the Philippines. See L.C. Reif, 'The Shifting Boundaries of NHRI Definition in the International System', in R. Goodman and T. Pegram (eds.), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2011), 52.
- 9 For an example where civil and political rights are linked to economic, social and cultural rights, see Human Rights Committee, Concluding Observations: Israel, E/C.12/1/Add.90, 2014, para 9.
- 10 See C. Scott, 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', 27 *Osgoode Hall Law Journal* (1989), 769. Since the entry into force in 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, victims of violations of economic, social and cultural rights can now have direct access to a complaint mechanism at international level.
- 11 For example, in 2010 the African Commission on Human and Peoples' Rights found a violation of the right to housing and of the prohibition of forced evictions, despite the fact that the African Charter on Human and Peoples' Rights does not entail explicitly include such a right. The Commission read the right to housing and the prohibition of forced evictions into Article 14 of the African Charter, on the right to property. The Commission also found that the violation of the right to housing amounted to a breach of Article 5, and thus to 'treatment [which] was cruel and inhuman and threatened the very essence of human dignity'. Thus, a hybrid right with economic and political elements was used to imply a ES right, which was then used to find a breach of a civil and political right. *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2010), Communication No. 279/03 and 296/05.
- 12 Cases from domestic and international jurisdictions, as well as scholarship engaging with these cases are discussed in I. Cismas, 'The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights', in E. Riedel, G. Giacca, and C. Golay (eds.), *Economic, Social and Cultural Rights: Contemporary Issues and Challenges* (Oxford University Press, 2014), at 461-465 and 467-468; C. Golay and I. Cismas, *Legal Opinion: The Right to Property from a Human Rights Perspective* (Rights & Democracy, 2010), 1-33, available at <https://ssrn.com/abstract=1635359>.
- 13 See *People's Union for Civil Liberties v Union of India* (2001); *People's Union for Civil Liberties v Union of India* (2004); Delhi High Court *remlata w/o Ram Sagar & Ors v Government of NCT Delhi* (2010). See discussion in C. Golay, 'The Right to Food and the Right to Life', in D. Fraser and G. Almeida Rodrigues (eds.), *Disrespect Today, Conflict Tomorrow: The Politics of Economic, Social and Cultural Rights* (CCC Press, 2009), 151; S. Muralidhar, 'Judicial Enforcement of Economic and Social Rights: the Indian Scenario', in F. Coomans (ed.), *Justiciability of Economic and Social rights: Experiences from Domestic Systems* (Intersentia, 2006), 237.
- 14 More generally, see D.M. Chirwa and L. Chenwi, (eds.) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press, 2016); C. Golay, *Droit à l'alimentation et accès à la justice* (Bruylant, 2011); M. Langford, 'Domestic Adjudication and Economic, Social and Cultural rights: A Socio-Legal Review', 6 *SUR Revista Internacional de Derechos Humanos* 11 (2009), 98; M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press, 2008); F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia, 2006).

- 15 The Commission has the power to interpret its jurisdiction within the boundaries set by the Constitution. Constitution, art. VIII, sec. 18.2. The principle of *la compétence de la compétence* refers to the power of a tribunal or other judicial organ to ascertain its own jurisdiction and is well established also in international law. See e.g. the Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Dusko Tadic*, Case No: IT-94-1-T. Available at www.icty.org/x/cases/tadic/acdec/en/51002.htm.
- 16 The Philippines is party to the ICCPR and the ICESCR, and all group-specific treaties. It has not become party to the protocols establishing communications procedures under the CRC, the CRPD or ICESCR; however, it has ratified the protocols to the ICCPR and the CEDAW.
- 17 See *Republic of the Philippines v. Sandiganbayan, Major General Josephus Q. Ramas and Elizabeth Dimaano*. See also: I. Venzke & L.A. Thio, *The Internal Effects of ASEAN External Relations*. (Cambridge University Press, 2016), at 140-1, and 73-4.
- 18 *Mejoff v. Director of Prisons*, G.R. No. L-4254, (1951) (en banc); *Borovsky v. Commissioner of Immigration*, G.R. No. L- 4352, (1951) (en banc); *Villar v. TIP*, G.R. No. L-69198 (1985) (en banc); *Remoto v. Commission on Elections*, G.R. No. 190582 (2010) (en banc).
- 19 *Villar v. TIP*. See also M.M. Magallona, 'The Supreme Court and International Law: Problems and Approaches in Philippine Practices' 85 *Philippine Law Journal* 1 (2010), 1, at 62.
- 20 See D.A. Desierto, 'Justiciability of socio-economic rights: Comparative powers, roles, and practices in the Philippines and South Africa', 11 *Asian-Pacific Law & Policy Journal* 1 (2009), 117, at 140, footnote 96; M. Langford and A. Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier (Revised)*, (Centre on Housing Rights & Evictions, 2006), at 104. See also Committee on Economic, Social and Cultural Rights, Concluding Observations: The Philippines, E/C.12/PHL/CO/5-6, 2016, para. 5.
- 21 *Oposa, et al. v. Factoran, Jr. et al.*, G.R. No. 101083 (1993) (en banc).
- 22 See for example, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Compilation of good practices, A/HRC/28/61, 3 February 2015, at 75.
- 23 See analysis of cases and the 2010 Rules of Procedure for Environmental Cases in E. Barrett Ristroph, 'The Role of Philippine Judges in Establishing the Environmental Rule of Law', 42 *Environmental Law Reporter* 2 (2012), 1, at 16, footnote 77, available at https://works.bepress.com/elizabeth_ristroph/3/. See also Supreme Court Decision of December 8, 2015 on the consolidated cases *ISAAA v. Greenpeace Southeast Asia (Philippines), et al.*, G.R. No. 209271, *Environmental Management Bureau of the Department of Environment and Natural Resources, Bureau of Plant Industry and Fertilizers and Pesticides Authority of the Department of Agriculture v. Greenpeace Southeast Asia (Philippines) et al.*, G.R. No. 209276; *University of the Philippines Los Banos Foundation, Inc. v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209301; and *University of the Philippines v. Greenpeace Southeast Asia (Philippines)*, G.R. No. 209430.
- 24 Response of Apache Corporation (Apache), at II. Similarly: Marathon Oil Corporation (Marathon) Parts, at II; Peabody Energy Corporation (Peabody), at 5.3; and Repsol SA (Repsol), at 2.
- 25 Cemex, at 11. Similarly, The Shell Company of the Philippines Limited and Royal Dutch Shell Plc (Shell), at F.
- 26 On jurisdiction, see R.Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Year Book of International Law* 146, 146; F.A. Mann, *The Doctrine of Jurisdiction in International Law*, vol 111 (Recueil des Cours 1964); M. Akehurst M, 'Jurisdiction in International Law' (1975) 46 *British Yearbook of International Law* 145; D.W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1983) 53 *British Yearbook of International Law* 1; F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, vol 186 (Recueil des Cours 1984); L. Oppenheim and others, *Oppenheim's International Law*, vol 1 (9th ed, Longman 1996) 456 ff.; R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) chapter 4; H. Ruiz Fabri and J.M. Sorel (eds), *La Saisine Des Juridictions Internationales* (A Pedone 2006); J. Crawford, *Brownlie's Principles of Public International Law* (8th Ed, Oxford University Press 2012) chapter VII; M.N. Shaw, *International Law* (Cambridge University Press 2014) ch 12; and C. Staker, 'Jurisdiction' in M. Evans (ed), *International Law* (4th Edition, Oxford University Press 2014). See also Third US Restatement of Foreign Relations Law, 1987, vol. I, part IV.
- 27 Staker (note 26 above), at 314.
- 28 S.S. *Lotus* (France v Turkey), 1927 P.C.I.J., Series A, No. 10 (*Lotus* case).
- 29 Cemex, at 11; and, similarly, Shell, at F.1
- 30 *Lotus* case, para. 18.
- 31 *Ibid.*, para. 19.
- 32 A.L. Parrish, 'Reclaiming International Law from Extraterritoriality', 93 *Minnesota Law Review* (2009) 818.
- 33 Crawford (note 26 above), at 456–457.
- 34 On reasonableness, see C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008), chapter 5.
- 35 E. Rehbinder, 'Extra-Territoriality of Pollution Control Laws from a European Perspective' in G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012), at 129.
- 36 *Ibid.*

- 37 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 (Report 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, A/HRC/31/52, 1 February 2016, paras 36-37) and by J.R. Nash who notes 'for global air pollutants, it seems possible to claim the every nation might potentially have jurisdiction over all worldwide emissions'. See J.R. Nash, 'The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws' in G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers 2012), at 164–165 (emphasis original).
- 38 Cemex, at 16.
- 39 Shell, at 1.
- 40 See Akehurst (note 3 above) at 187: 'the sanction for an excess of legislative jurisdiction is a protest and/or claim for compensation by the national State of the individual adversely affected'.
- 41 *Lotus* case, paras. 19-20.
- 42 Evans (note 26 above), at 457.
- 43 Shell, at F.1.
- 44 Shell, at F.1, citing AV Lowe, *International Law* (Oxford University Press, 2007). The passage is inaccurately cited as p. 475, but appears on p. 172.
- 45 Crawford (note 26 above), at 456–457.
- 46 *Ibid.*
- 47 See H.L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009). *The American Journal of Comparative Law* Vol 57. 631-676, accessed at www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1132&context=facpub.
- 48 C. Ryngaert, 'Jurisdiction Towards a Reasonableness Test' in M. Langford (ed), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 194.
- 49 *Lotus* case, para. 23.
- 50 Joint separate opinion of Judges Higgins, Kooijmans and Buergerthal, *Case Concerning the Arrest Warrant*, 11 April 2000 (Democratic Republic of the Congo v. Belgium) Judgment of 14 February 2002.
- 51 For an overview, see the International Bar Associations Report of the Task Force on Extraterritorial Jurisdiction (2009), available at: www.ibanet.org/Document/Default.aspx?DocumentUid=ECF39839-A217-4B3D-8106-DAB716B34F1E.
- 52 *U.S. v. Aluminium Company of America* 148 F. 2d 416, 443 (2nd Cir. 1945).
- 53 *Ibid.*, para. 118.
- 54 See e.g. C. Doyle, 'Extraterritorial Application of American Criminal Law' [2016] Congressional Research Service, available at: <https://fas.org/sgp/crs/misc/94-166.pdf>. On environmental law, see e.g. Nash (note 37 above).
- 55 See Reports of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT.DS58/AB/R (12 October 1998) and WT/DS58/AB/RW (22 October 2001).
- 56 Reports of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT.DS58/AB/R (12 October 1998) para. 133.
- 57 P. Sands and J. Peel, *Principles of International Environmental Law* (Cambridge University Press 2012), at 193.
- 58 Reports of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/RW (22 October 2001), para. 134.
- 59 See e.g. J. Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 *American Journal of Comparative Law* 897.
- 60 For a review of national laws on the issue, see e.g.: S. Lawson and L. MacFaul, 'Illegal Logging and Related Trade' (Chatham House 2010).
- 61 Cf. I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth Publisher 1994).
- 62 See e.g. Rehinder (note 35 above), at 127–135; Nash (note 37 above), at 163.
- 63 R.B. Bilder, 'The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea' (1970) 69 *Michigan Law Review* 1.
- 64 M. Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007), at 32.
- 65 Human Rights Council, Resolution 7/23, A/HRC/7/78, 29 March 2008; Human Rights Council, Resolution 10/4, A/HRC/RES/10/4, 25 March 2009; Human Rights Council, Resolution 18/22, A/HRC/RES/18/22, 17 October 2011; and Human Rights Council Resolution 26/27, A/HRC/RES/26/27, 15 July 2014.
- 66 The large majority of UN member and observer states are party to at least four international human rights treaties. See OHCHR, Status of Ratification Interactional Dashboard, Status of Ratification Interactive Dashboard, <http://indicators.ohchr.org>.
- 67 L. Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' 22 *Journal of Environmental Law* (2010) 391, at 412.

- 68 Report of the Special Rapporteur Knox, note 37 above, para. 86.
- 69 Paris Agreement, (adopted 12 December 2015, in force 4 November 2016) yet to be reported in UNTS, preamble.
- 70 Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980) 115 UNTS 331.
- 71 As argued in A. Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages', in S. Duyck, S. Jodoin and A. Johl, *Routledge Handbook of Human Rights and Climate Governance* (Routledge, forthcoming, 2017), available at: <https://ssrn.com/abstract=2902662>, at 7.
- 72 See for example S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2009); Special Issue, 38 *Georgia Journal of International and Comparative Law* (2009); S. McInerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change. A Review of the International Legal Dimensions* (World Bank, 2011); O. Quirico and M. Boumghar (eds.), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, 2016); and Special Issue, 34 *Journal of Energy & Natural Resources Law* (2016).
- 73 Resolution 10/4 (note 65 above), preamble; Resolution 18/22 (note 65 above), preamble; and Resolution 26/27 (note 65 above), preamble.
- 74 Resolution 26/27 (note 65 above), para. 7.
- 75 Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, Focus report on human rights and climate change, June 2014, available at: <http://srenvironment.org/mapping-report-2014-2/>.
- 76 Report of Special Rapporteur John H. Knox (note 37 above).
- 77 *Ibid.*, para. 89.
- 78 Open Letter from Special Procedures Mandate-holders of the Human Rights Council to the State parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn, 17 October 2014, available at: <http://newsroom.unfccc.int/media/127348/human-rights-open-letter.pdf>.
- 79 All submissions are available at: www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/UNFCCC.aspx.
- 80 The OHCHR hosted an expert meeting on climate change and human rights on 6-7 October 2016 in Geneva. The Draft Recommendations elaborated at the meeting are available at: www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/ClimateChange.aspx.
- 81 The acronym is a shorthand to indicate measures adopted under the climate regime to incentivise climate change mitigation in the forest sector in developing countries, namely: reducing emissions from deforestation and forest degradation; conservation and enhancement of forest carbon stocks; and sustainable forest management.
- 82 See e.g. UN-REDD Programme, *Social and Environmental Principles and Criteria* (2012); UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (2012); and UN-REDD Programme, *Legal Companion to the UN-REDD Programme Guidelines on FPIC* (2012). All available at: www.un-redd.org. See also the Adaptation Fund, *Environmental and Social Policy* (2013), at 15; and Green Climate Fund, *Guiding Framework and Procedures for Accrediting National, Regional and International Implementing Entities and Intermediaries, Including the Fund's Fiduciary Principles and Standards and Environmental and Social Safeguards* (2014), at 1.7.
- 83 As argued in Savaresi (note 71 above), at 13-14.
- 84 As noted also in the brief submitted by the Sabin Center for Climate Change Law, Columbia Law School (2016), available at: <http://columbiaclimatelaw.com/files/2016/12/Wentz-and-Burger-2016-12-Submission-Case-No.-CHR-NI-2016-0001.pdf>, at 14.
- 85 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61, 15 January 2009, para. 70.
- 86 Similarly, see M. Faure and A. Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26 *Stanford Journal of International Law* 123, at 130-136 and 177.
- 87 Report of Special Rapporteur Knox (note 37 above), paras 36-37.
- 88 See the compendium of cases cited in Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, A/HRC/22/43, 24 December 2012, at 18-24.
- 89 The United Nations Framework Convention on Climate Change 1771 UNTS 163 (adopted 9 May 1992; entered into force 21 March 1994) ('UNFCCC') has 197 parties. The International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976) ('ICCPR') has 169 parties; the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976) ('ICESCR') has 165 parties; the UN Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (adopted 7 March 1966, entered into force 4 January 1969) ('CERD') has 178 parties; the Convention on the Rights of the Child 1577 UNTS 3 (adopted 20 November 1989, entered into force 2 September 1990) ('CRC') has 196 parties; the Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 18 (adopted 18 December 1979, entered into force 3 September 1981) ('CEDAW') has 189 parties; and Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (adopted 13 December 2006, entered into force 3 May 2008) ('CRPD') has 172 parties. Treaty membership data up to date as of 26 February 2017.
- 90 Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53, 30 December 2013, paras. 79-81.
- 91 *Ibid.*

- 92 Ibid.
- 93 Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/ 10, Add.1, 29 January 2016, at 49.
- 94 Exxon, para 20; Cemex, at b; and LafargeHolcim, at 6.
- 95 Economic, social and cultural rights are enshrined in arts. 22 – 27 of the Universal Declaration of Human Rights, UNGA Res. 217A (III), A/810, (adopted 10 December 1948) ('UDHR'). The core principles of interrelatedness, interdependence, and indivisibility of human rights were reconfirmed after the end of the Cold War in the Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23, para. 5.
- 96 See J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) at 165-6 and 195.
- 97 See discussion in Cismas (note 12 above), at 452-457.
- 98 The preambular paragraphs in the two Covenants (note 89 above) indicate the interdependence and indivisibility of human rights: 'Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'.
- 99 Note 27 above.
- 100 See F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia-Maastricht Centre for Human Rights, 2006); Centre on Housing Rights and Evictions (COHRE), *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (COHRE, 2003); COHRE, "Leading cases in Economic, Social and Cultural Rights: Summaries" (COHRE. Working Papers No 4, 2006); ESCR-Net Case law Database, available at www.escr-net.org/caselaw/; Y. Ghai and J. Cottrell (eds.), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) and M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press, 2008).
- 101 AfCHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2010), Communication No. 279/03 and 296/05.
- 102 The Optional Protocol ICESCR was adopted in 2008 and has, at the time of writing, 22 parties. The Optional Protocol ICCPR was adopted in 1966 and has 112 parties. We note that the Philippines is not currently a party to the Optional Protocol.
- 103 The General Comments of the UN Committee on Economic, Social and Cultural Rights have played an essential role in the process of normative clarification. Those directly relevant to the current petition include: General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant), E/1992/23; General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions, E/1998/22, annex IV; General Comment No. 12: Right to adequate food, E/C.12/1999/5; General Comment No. 14: The right to the highest attainable standard of health (art. 12), E/C.12/2000/4; General Comment No. 15: The right to water, E/C.12/2002/11; Statement on the Right to Sanitation, E/C.12/2010/1. See also the Report of the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, A/HRC/12/24, 1 July 2009.
- 104 See F. Megret, 'The Nature of Obligations' in D. Moeckli, S. Shah, S. Sivakumaran (eds.), *International Human Rights Law* (2nd ed, Oxford University Press, 2014), at 110-114.
- 105 Ibid., at 102-104.
- 106 In relation to the right to food, for example, the forced eviction or displacement of individuals from their land 'especially if the land was their primary means of feeding themselves' would represent a violation of the obligation to respect.' Report of the Special Rapporteur on the right to food, Jean Ziegler, E/CN.4/2006/44, 16 March 2006, para. 22.
- 107 See Human Rights Committee, Draft General Comment No. 36: Article 6: Right to life, CCPR/C/GC/R.36/Rev.2, paras. 23-33. For an overview of case law of the European Courts of Human Rights (ECtHR) relating to the positive obligations attaching to the right to life see: ECtHR, Right to Life, Factsheet, July 2013, available at www.echr.coe.int/Documents/FS_Life_ENG.pdf, at 3-6. More generally on positive obligations, see D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, 2012) and D. Shelton and P.G. Carozza, *Regional Protection of Human Rights*, vol. 1 (2nd ed, Oxford University Press, 2013), at 575-629.
- 108 Draft General Comment No. 36 (note 107 above), paras. 36.
- 109 See Langford and Nolan (note 20 above) at 29-30. Langford and Nolan cite the following cases as illustrations: *The International Commission of Jurists v. Portugal*, Complaint No. 1/1998, European Committee of Social Rights; and African Commission on Human and Peoples' Rights, *SERAC v. Nigeria*, Case No. 155/96. Since 2006, the jurisprudence concerning the obligation to protect has increased substantially, including under the Optional Protocol to the ICESCR. See *IDG v. Spain*, Communication No. 2/2014, E/C.12/55/D/2/2014.
- 110 See International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability' (Geneva, 2008), at 10.
- 111 See International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability' (Geneva, 2008), at 65 and 67. See also the following cases, for example, European Court of Human Rights, *López Ostra v. Spain*, December 9, 1994, paras. 51, 56-58; *Guerra and others v. Italy*, February 19, 1998, para. 60; *Hatton and others v. the United Kingdom*, October 2, 2001, paras. 99-107; *Taskin and others v. Turkey*, November 10, 2004, paras. 115-126; *Moreno Gomez v. Spain*, November 16, 2004, paras. 60-63; *Fadeyeva v. Russia*, June 9, 2005, paras. 94-105, 116-134.

- 112 See e.g. Report of Independent Expert Knox, note 90 above, paras. 79-81; Council of Europe, 'Manual on Human Rights and the Environment' (2012), available at www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf; and Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System' (2010) 35 *American Indian Law Review*.
- 113 African Commission on Human and Peoples' Rights, *SERAC v. Nigeria*, Case No. 155/96.
- 114 Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4.
- 115 Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States parties to the Covenant (2004), CCPR/C/21/Rev.1/Add.13, para. 8.
- 116 Human Rights Committee, General Comment No. 6. Article 6: Right to life, 30 April 1982, paras. 2-5; Draft General Comment No. 36 (note 107 above), paras. 23, 25, 28; Human Rights Committee, Concluding Observations: Germany, CCPR/C/DEU/CO/6, 2012, para.16; Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, paras. 18-20.
- 117 General Comment No. 14 (note 103 above), paras. 42 and 51; Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, paras. 75-77, and 79-83.
- 118 General Comment No. 12 (note 103 above), paras. 15, 19, 20; Report of the Special Rapporteur Ziegler (note 106 above), paras. 23 and 46-51; Report of the Special Rapporteur on the right to food, Olivier De Schutter, *Agribusiness and the right to food*, 2009, A/HRC/13/33; Interim report of the Special Rapporteur on the right to food, Olivier de Schutter, A/68/288, 2013, para. 13.
- 119 General Comment No. 15 (note 103 above), paras. 23-24, 33 and 44.b.
- 120 Report of the Independent Expert Albuquerque (note 103 above).
- 121 General Comment No. 4 (note 103 above), para. 17; General Comment No. 7: (note 103 above); Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, A/HRC/4/18, Annex 1, 2007, paras. 11, 12 and 22.
- 122 For an overview of positive obligations in the case law of the European Court of Human Rights see J.-F. Akandji-Kombe *Positive Obligations under the European Convention on Human Rights* (Council of Europe: Human Rights Handbook no. 7, 2007). In the Inter-American system, the stage for the development of positive obligations was set in the case *Velasquez-Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). In the African system, African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) Case No. 155/96 is particularly relevant. Relevant concluding observations of UN treaty bodies include: Human Rights Committee, Concluding Observations: Germany, CCPR/C/DEU/CO/6, 2012, para. 16; Committee on the Elimination of Racial Discrimination, Concluding Observations: the United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/18-20, 2011, para. 29, and Concluding Observations: Australia, CERD/C/AU.S./CO/15-17, 2010. See also Ineta Zimele, *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies* (EUI Working Papers 2009/8).
- 123 See e.g. General Comment No. 16 (note 116 above), paras. 19-20; Human Rights Committee, Concluding Observations: Democratic People's Republic of Korea (2012), para. 12; Draft General Comment No. 36, (note 107 above), para. 28.
- 124 See International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability' (Geneva, 2008), at 45. See also the cases listed in note 111 above.
- 125 As argued in: A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), at 352 and ff; and I. Cismas, *Religious Actors and International Law* (Oxford University Press, 2014), at 119-120, and chapter 3 for the development of the argument in relation to religious non-state actors.
- 126 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, 2011 (UN Guiding Principles on Business and Human Rights).
- 127 Human Rights Council, Resolution 17/4, A/HRC/RES/17/4, 16 June 2011.
- 128 Office of the High Commissioner on Human Rights, *The Corporate Responsibility to Respect, An Interpretative Guide* (OHCHR, 2012), at 1.
- 129 International Law Association, Committee on Non-State Actors, Washington Conference Report, 2014, at 12, available at www.ila-hq.org/en/committees/index.cfm/cid/1023.
- 130 UN Guiding Principles on Business and Human Rights, Principle 12.
- 131 *Ibid.*, Principle 17.
- 132 Office of the High Commissioner on Human Rights (note 128 above), at 8 and 53.
- 133 *Ibid.*
- 134 Ruggie argued 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.' UN Guiding Principles on Business and Human Rights, at 14 (emphasis added). In 2012, he added: 'It is important to note that national law provisions, and some human rights requirements in contracts, may result from or be heavily influenced by *international human rights treaties*'. Office of the High Commissioner on Human Rights (note 128 above), at 10 (emphasis added).

- 135 Selected works include: L.J. McConnell, *Extracting Accountability from Non-State Actors in International Law: Assessing the Scope for Direct Regulation* (Routledge, 2016); M. Noortmann, A. Reinisch and C. Ryngaert, *Handbook on Non-State Actors in International Law* (Hart, 2015); D. J. Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States*, (Cambridge University Press, 2014); J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, (W.W. Norton, 2013); S. Deva and D. Bilchitz, (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013); A. Clapham (ed.), *Human Rights and Non-State Actors* (Edward Elgar, 2013); A. Bianchi (ed.), *Non-state Actors and International Law*, (Ashgate Publishing, 2009); A. Clapham (note 125 above); and P. Alston, (ed.) *Non-state Actors and Human Rights* (Oxford University Press, 2005).
- 136 Clapham (note 125 above), chapter 6. See also A. Clapham, *Human Rights in the Private Sphere*, (Oxford University Press, 1993).
- 137 See discussion in International Law Association, Committee on Non-State Actors (note 129 above) at 16.
- 138 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted June 27, 2014 (not yet in force), art. 46.C. See also A. Clapham, 'Human Rights Obligations for Non-State-Actors: Where Are We Now?' in F. Lafontaine and F. Larocque, *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, (Intersentia, forthcoming 2017), at 14-15, available at <https://ssrn.com/abstract=2641390>. For a critique of the Protocol on different grounds than corporate criminal liability, see Amnesty International, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, January 22, 2016, available at www.amnesty.org/en/documents/afr01/3063/2016/en/.
- 139 CRPD, arts. 4.e, 9.2.b, 20.d, 21.c; CEDAW, art. 2.e.
- 140 M. Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States' in C. Scott (ed), *Torture as Tort* (Oxford: Hart, 2001)
- 141 General Comment No. 16 (note 116 above), para. 8.
- 142 The company Urbaser was a shareholder in a concession for water and sewage services in the Province of the Greater Buenos Aires. The claimants alleged that Argentina's emergency measures at the time of the 2001-2 economic crisis caused the concession financial loss and ultimately insolvency. Urbaser started arbitration proceedings claiming breaches of the Bilateral Investment Treaty between Argentina and Spain. Argentina raised a counter-claim based on the claimants' 'alleged failure to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water.' *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para. 36.
- 143 *Ibid.*, para. 1993.
- 144 The Tribunal notes that 'international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce'. *Ibid.*, para. 1195.
- 145 *Ibid.*, paras. 1996-8.
- 146 *Ibid.*, para. 1999 (emphasis added).
- 147 *Case of the Kaliña and Lokono Peoples v. Suriname*, Inter-Am.Ct.H.R., Judgment, 25 November 2015 (Merits, Reparations and Costs), para. 224.
- 148 *Ibid.*, para. 223.
- 149 *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, October 2, 2014, para. 46.
- 150 Shell, at 34-55.
- 151 International Law Association (note 129 above), at 12.
- 152 See International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, 2002, at 58 ff, available at http://reliefweb.int/sites/reliefweb.int/files/resources/F7FA1F4A174F76AF8525741F006839D4-ICHRP_Beyond%20Voluntarism.pdf; L. Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets', 25 *Brooklyn Journal of International Law* (1999), 17-25, at 25. *A contrario*, see M. Karavias, *Corporate Obligations under International Law* (Oxford University Press, 2013), at 68-115.
- 153 UDHR, art. 30.
- 154 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, para. 1996.
- 155 *Republic of the Philippines v. Sandiganbayan, Major General Josephus Q. Ramas and Elizabeth Dimaano*, G.R. No. 104768 (2003) (en banc).



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