

Climate change litigation—Philippines investigates carbon majors' responsibility for human rights breaches

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Environment analysis: Legal proceedings have been launched in the Philippines to investigate the responsibility of a group of carbon majors for human rights violations or threats of violations resulting from the impacts of climate change. Lawyers and project leaders at ClientEarth and Greenpeace discuss this case in the context of climate change litigation and say it would be a grave injustice for the courts to deny remedies to the victims of climate change whose nations and communities have often made the smallest contribution to global greenhouse gas emissions.

Briefly, what is this case about?

In September 2015, Greenpeace Southeast Asia (together with 13 Filipino civil society organisations and 18 individuals) submitted a petition to the Commission on Human Rights of the Philippines (Commission), requesting an investigation of the 'responsibility of the Carbon Majors for human rights violations or threats of violations resulting from the impacts of climate change'.

The 47 respondents to the petition are investor-owned oil, natural gas and coal producers and cement manufacturers, referred to in the petition as the carbon majors. These companies are part of a group of 90 investor-owned, state-owned or government-run entities found to be the largest producers of greenhouse gas emitting products since the industrial revolution, according to peer-reviewed research undertaken by Richard Heede of the Climate Accountability Institute and published first in 2013 (Heede, R, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010' *Climatic Change*, (2014) 122: 229). The petitioners requested the Commission to prioritise the investor-owned fossil fuel producers, including Chevron, ExxonMobil, BP, Shell and ConocoPhillips in any investigation.

The petitioners claim that as a result of their contribution to global climate change and their failure to reduce greenhouse gas emissions from their activities and their products, despite the capacity to do so, and their knowledge of the harms posed by climate change, as well as their potential involvement in activities that have been or may be undermining climate science and action, the carbon majors are violating or threaten to violate the human rights of all Filipinos as contained in the 1987 Constitution of the Philippines (Constitution), as well as the various international human rights treaties to which the Philippines is a signatory.

In addition, the petitioners claim violations or threats of violations to the rights to health and a balanced and healthful ecology—rights derived from those contained in the Constitution. The petition asks the Commission to take note of the fact that climate change and ocean acidification have harmed or increased the risk of harm to the Filipino people generally, including increased risk of extreme weather events such as super-typhoon Yolanda (also called Haiyan) that killed more than 6,000 people in 2013. It also provides evidence of specific harms suffered by individual petitioners from Alabat Island, Quezon Province, who have had to relocate their homes due to rising sea levels and have experienced declining fishing catches and reduced agricultural productivity.

The petitioners acknowledge that while it is not possible to attribute a specific harm to the carbon dioxide produced by a single carbon major, they argue that there is a substantial probability that climate impacts in the Philippines are made significantly worse as a result of the carbon majors' past and current activities. The petition calls on the Commission to use the concept of responsibility as set out in the UN's Guiding Principles on Business and Human Rights (Guiding Principles), under which a company may be taken to be responsible for a human rights impact if it has contributed to, is involved in, or has failed to prevent those impacts, even if it is one among many responsible parties.

The petition also cites recent reports by the *Los Angeles Times*, the *New York Times*, *InsideClimate News* and the Center for International Environmental Law that Exxon, one of the respondents, was aware of the risks of climate change decades ago, which would suggest that the company carried out a disinformation campaign aimed at confusing the public and others about the risks posed by climate change. Relying on these reports the petitioners say that the company, together with the other carbon majors, have breached their 'moral and legal responsibility to the Philippines, Filipinos, and to the world, to conduct business in a manner that will keep global temperature rise this century well below 2° Celsius.'

The Commission resolved to conduct an investigation in response to the petition in December 2015. The investigation will take the form of a national inquiry. The Commission, a body established by the Constitution, has a mandate to investigate and monitor all forms of human rights violations and abuses, as well as threats of violations, involving civil and political rights and economic, social and cultural rights. Although the Commission is not a judicial body, its finding of fact is generally accorded great respect by courts, as well as by Congress and the Executive Department. It has the power to compel persons accused of human rights violations to attend and testify at hearing or public inquiry or to produce relevant documentation. The Commission can also recommend that a claim be filed with a competent court.

On 27 July 2016, the Commission sent the petition and an order to all 47 companies. The order enjoins each company to submit a comment or answer to the Commission, within 45 days from receipt of the petition. As a part of the national inquiry process, hearings in the matter are expected to be held at the end of 2016, after which time the Commission may issue a resolution with its findings and recommendations to the Government of the Philippines. It may also request the respondent corporations to take steps to address the human rights implications of their production and operation. The petition requests that the Commission take the following actions:

- issue a finding on the responsibility of the investor-owned carbon majors for human rights threats and/or violations in the Philippines, resulting from climate change and ocean acidification
- monitor people and communities acutely vulnerable to the impacts of climate change
- request the carbon majors to submit plans on how such violations or threats of violations resulting from the impacts of climate change will be eliminated, remedied or prevented in the future
- issue a recommendation to policymakers and legislators concerning the development and adoption of clear and implementable objective standards for corporate reporting of human rights issues in relation to the environment, with special regard for current and future climate change impacts and GHGs associated with fossil fuel products
- issue a recommendation to policymakers and legislators concerning the development and adoption of effective accountability mechanisms that victims can easily access in instances of violations or threats of violations in the context of climate change, and
- issue a recommendation that governments, including the Philippines and other countries where the investor-owned carbon majors are domiciled and/or operate, enhance, strengthen or explore new ways to fulfil the international duty of cooperation to ensure the carbon majors take steps to address the human rights implications of climate change

Greenpeace Southeast Asia considers that the investigation presents an opportunity for international cooperation between the Philippines and other countries where the carbon majors are domiciled and operate to ensure the adequate regulation of fossil fuel producers and minimise the global and trans-boundary impacts of the operations.

Is it the first challenge/case of this sort?

This is the first climate change-related complaint submitted to a national human rights institution. Also, it is the first to be fully accepted by a human rights commission and the first to implicate private actors in alleged human rights abuses.

Two climate-related petitions have been brought before the Inter-American Commission on Human Rights (IACHR), an autonomous organ of the Organisation of American States. In 2005, the Inuit Circumpolar Conference submitted a petition requesting an investigation into whether the greenhouse gas emissions of the US had violated their human rights. The IACHR declined to consider the petition, although it did hold a hearing at which the petitioners presented their claims. In 2013, the Arctic Athabaskan Council filed a petition concerning black carbon emissions in Canada, which is accelerating Arctic warming. This proceeding is on-going (see case overview).

The Commission's national inquiry is therefore unprecedented and could influence international human rights law, as well as human rights bodies in other jurisdictions. There is also the possibility that this initiative will be replicated in other countries and adverse findings against the carbon majors could provide the grounds for civil claims by people affected by climate change in the Philippines.

Generally, what are the legal avenues for those that have suffered from catastrophic climate change?

The Intergovernmental Panel on Climate Change (IPCC) (constituted by the United Nations Environment Programme and the World Meteorological Association) has warned that the effects of climate change, such as higher temperatures, sea level rise and increasing extreme weather events will cause widespread loss, damage and harm to human health, property, infrastructure and the economy. Curbing future climate change requires deep and immediate cuts to greenhouse gas emissions.

The way in which the law deals with the effects of climate change is still developing. However, it is clear that individuals, communities and businesses that have suffered or are likely to suffer losses as a result of climate change will be likely to submit novel claims to courts and administrative bodies to seek redress. Claimants may be able to seek relief from state or private parties under a range of national laws, including those regulating impacts on the environment, human or constitutional rights or under other public or private causes of action.

The past few years has seen an increase in these types of cases (often referred to as 'climate change litigation') being brought to courts, administrative bodies and human rights institutions around the world, with mixed results. Some claims may seek mitigation of climate impacts or prevention of harm (eg reductions in greenhouse gas emissions or other activities that cause or contribute to climate change and potentially cause harm), while others relate to adaptation or just transition efforts (activities that aim to curb the negative effects on ecosystems, communities and infrastructure), compensation for specific property damage and vindication of rights.

Future claimants may be property owners, municipalities, states or provinces, insurers, shareholders or public interest organisations who may bring actions against states or corporations. Climate change litigation may involve tort (nuisance, negligence) consumer law, product liability laws, company or financial laws as well as human rights.

Important recent examples include an action brought against the Netherlands, by the Urgenda Foundation, an NGO whose purpose is to 'stimulate and accelerate the transition processes to a more sustainable society'. As a result of the action, in June 2015, the District Court of the Hague ordered the Dutch Government to increase the ambition of its national emission reduction targets in order to prevent a breach of the duty of care owed by the state to its citizens under the doctrine of hazardous negligence (*Urgenda Foundation v the State of the Netherlands*, C/09/456689/HA ZA 13-1396, judgment of 24 June 2015). The decision is currently under appeal.

In the ongoing US case of *Kelsey Cascade Rose Juliana v United States* (for further information, see Clientearth blog), a number of young US citizens allege that increasing CO2 emissions are infringing their constitutional rights to life, liberty and property (*Juliana et al v United States of America, Order and Findings and Recommendation*, 6:15-cv-1517-TC, 8 April 2016, at 2). The youth claimants are seeking injunctive relief requiring the US Federal Government to implement a national remedial plan to phase out fossil fuel emissions. Three fossil fuel and energy trade associations have been joined to the action as intervenor-defendants. In April 2016, a US federal magistrate judge recommended refusal of the defendants' motion to dismiss on the basis of a lack of standing, stating that:

'[t]he intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.'

To date, claimants in the US have not been successful in holding corporations liable using tort law (see for example *Native Village of Kivalina v ExxonMobil Corp*, 696 F.3d 849, 854 (9th Cir. 2012)). However, new approaches are being explored. For example, the Conservation Law Foundation has put Exxon Mobil on notice of its intent to file suit under the Resource Conservation and Recovery Act and the Clean Water Act (Conservation Law Foundation, Notice Letter). A Peruvian farmer is suing RWE (also a carbon major) in the German courts, seeking US\$21,000 financial contribution related to the costs of preventing harm from glacial lake flooding.

What are the biggest legal hurdles in relation to bringing cases/seeking compensation for climate change-related events, loss and suffering? Are our current laws equipped to deal with this?

The complex, trans-boundary and diffuse nature of climate change as an environmental problem poses unique barriers for claimants who suffer loss and damage as a result of its effects. These challenges arise from the fact that climate change is occurring primarily as a result of the accumulation of greenhouse gases in the earth's atmosphere produced by a large number of sources over a long period of time.

Generally, claimants often face hurdles in establishing standing in climate change cases. Although the US Supreme Court granted standing to the state of Massachusetts in *Massachusetts v Environmental Protection Agency* (549 U.S. 497 (2007)), the decision has been interpreted by lower courts in the US as an exception to the usual strict standing test applicable to individuals and community groups (*Washington Environmental Council v Bellon* 732 F.3d 1131 (9th Cir. 2013), reh'g en banc denied, 741 F.3d 1075 (9th Cir. 2014)).

In the Philippines, the Supreme Court liberalised the requirements of legal standing by adopting the principle of inter-generational responsibility in *Oposa v Factoran* (G.R. No. 101083, July 30, 1993, 224 SCRA 792) and the Rules of Procedure for Environmental Cases in 2010. It also explained the application of the precautionary principle in weighing evidence in environmental litigation in the recent landmark case, *ISAAA v Greenpeace SEA (Philippines), et al.*, G.R. Nos. 209271, 8 December 2015. (Note: Supreme Court's resolution of the motions for reconsideration is not yet officially available.) The human rights claimants argued in their petition that the few, successful environmental cases in the Philippines, and climate change cases in other countries, show that current laws and principles are adequate and effective in exacting climate accountability. Although new and specific climate change laws and rules would definitely improve the success of climate change cases, the claimants further argued that the inadequacy of laws could not justify exoneration of accountability or inaction because their basic rights need not even be written in the constitution and statutes 'for they are assumed to exist from the inception of humankind' (see discussion under the section 'Jurisdiction of the Commission' of the petition, at pp 10–17).

There may also be difficulties in establishing causation between a particular claimant's loss or damage and the actions of a particular defendant, given the global and slow acting effects of greenhouse gases on the physical environment. Nevertheless, in 2015 a Dutch court accepted the link between the emissions of the Dutch state and the impacts of climate change in the Netherlands in the groundbreaking *Urgenda* decision.

Despite these challenges, the law is capable of evolving to deal with novel and unique categories of harm and liability. As the loss and damage from climate change increases, victims will increasingly turn to the courts to provide justice, and the courts will have to adapt to respond to these emerging issues.

For more on this, please see News Analysis Climate change litigation is heating up.

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