



9 February 2017

Hon. Jose Luis Martin C. Gascon, Chairman
Hon. Roberto Eugenio T. Cadiz, Commissioner
Hon. Karen S. Gomez Dumpit, Commissioner
Hon. Gwendolyn LI. Pimentel-Gana, Commissioner
Hon. Leach C. Tanodra-Armamentto, Commissioner
Commission on Human Rights
SAAC Bldg., UP Complex
Commonwealth Avenue
Diliman, Quezon City
Philippines

In re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility of Therefore, if any, of the “Carbon Majors” (CHR-NI-2016-0001)

*Opinion of the Center for International Environmental Law
In Support of Petitioners*

Dear Chairman Gascon and Honorable Commissioners:

The Center for International Environmental Law (CIEL) respectfully submits this Opinion in Support of Petitioners in the above-referenced matter. CIEL previously submitted a compilation of industry reports, correspondences, and legislative testimony among other documents as Exhibit C to Petitioners’ original filing.

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

Through this Opinion and its accompanying report (included as an Annex hereto), CIEL seeks to address two distinct but related matters of relevance to the Commission’s inquiry into the responsibility of the Carbon Majors, if any, for human rights violations in the Philippines.

First, the accompanying report offers a brief synthesis of knowledge available to major carbon producers, the early opportunities that knowledge created to reduce or mitigate the climate risks arising from their products, services, and business operations, and how individual companies and the Carbon Majors as a group responded to those opportunities. A description of the sources and limitations of this evidence is set forth in the report at *Appendix I--A Note on Sources*.

Second, and relatedly, the present Opinion addresses the significance of those findings to the question of the responsibility of the Carbon Majors for the violations or threatened violations of human rights in the Philippines alleged by the Petitioners and extensively documented and supported in the numerous briefs submitted by *amici curiae*. As the Petitioners have emphasized, the exercise of authority requested of the Commission is investigative, rather than judicial in nature. Accordingly, this Opinion does not venture conclusions regarding the legal culpability or potential liability of all or any Carbon Majors. At the same time, however, we recognize that a critical and well-established function of human rights commissions in carrying out investigations is to seek “accountability through truth and acknowledgement.”¹ Such investigations help meet the State’s responsibility to respect, protect, and promote human rights in several ways. By exploring the past, an investigation may identify and evaluate patterns of abuses over time and examine both the cause and consequences of those patterns. In so doing, the Commission may create an authoritative record that both documents past abuses and contributes to accountability and justice, while simultaneously informing recommendations for the future. Identifying those who have caused or contributed violations, where such identification is possible, is a valuable step in this process.²

An evaluation of the historic aspects of the Carbon Majors’ knowledge and their conduct in light of that knowledge is particularly important into the present inquiry.

As Documented throughout the Record, the Impacts of Climate Change have Already Resulted in Significant Human Rights Violations within and beyond the Philippines

As the record before the Commission in the present matter attests, and as the briefs before the Commission document extensively, the human rights implications of climate change are at once diverse and profound.³ In the Philippines, and around the world, anthropogenic climate change is altering hydrological cycles and the spread of disease vectors; increasing the frequency and

¹ Steven R. Ratner et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 259 (3d ed. Oxford Univ. Press, New York 2009).

²² *Id.* at 259-65 (surveying investigatory commissions and other non-prosecutorial options for accountability with respect to human rights abuses).

³ See Olivier De Schutter et al., *Amicus Curiae Submission by Maastricht Principles Drafting Group* at 3-8 (5 December 2016) (CIEL notes that Dr. Marcos Orellana, a CIEL Attorney and a member of the Maastricht Drafting Group, is an amicus on this submission); *Amicus Curiae Brief of Client Earth*, *passim* (21 November 2016); *Amicus Curiae Brief of Environmental Law Alliance Worldwide (ELAW)*, at 15-16 (7 November 2016); *Amicus Curiae Brief of Plan B* at §§3-5.

severity of droughts, heat waves, and floods; driving sea level rise that threatens infrastructure and aquifers in coastal regions; and increasing the intensity and impacts of catastrophic hurricanes and cyclones. In so doing, climate change is having devastating impacts on fundamental human rights, including the rights to food, water, sanitation, health, housing, and an adequate standard of living. Most fundamentally, and for millions of people worldwide, climate change impacts the right to life for this and future generations and jeopardizes the right to a balanced and healthful ecology that is our intrinsic right as human beings. Although climate change affects people from all walks of life, its impacts fall disproportionately and grievously on women, children, and marginalized populations,

Potentially Profound Consequences on Human Lives and Human Populations were a Foreseeable Risk of Fossil Fuel Combustion for Many Decades

While these impacts are tragic and regrettable, they were not unexpected. The role of human activities generally, and fossil fuel combustion specifically, in causing climate change and its resulting impacts has been theorized for more than a century, and has been actively studied and intensively documented for many decades. The possibility that fossil fuel combustion might significantly raise planetary temperatures was theorized in 1896, and remained the subject of debate in scientific and popular literature in the ensuing decades.⁴ By 1938, credible research, supported by historical data on fossil fuel combustion and weather records, suggested that carbon dioxide (CO₂) from fossil fuel combustion was already accumulating in the atmosphere and theorized that rising CO₂ might already be affecting atmospheric temperatures.⁵

By the late 1950s, leading scientists were warning that humanity was conducting a vast and unprecedented experiment on the global climate;⁶ climate theories were reported in national magazines in the United States;⁷ and the possibility that climate change might submerge entire cities was the subject of educational filmstrips on television.⁸ In 1965, buttressed by the first of many high scientific committees that would synthesize the state of science on the issue the President of the United States, in a special message to the U.S. Congress, warned that humankind was already “altering the atmosphere on a global scale through ... a steady increase in carbon dioxide from the burning of fossil fuels.”⁹ And by the end of that decade, a growing body of scientific research not only supported and substantiated climate theories, but raised increasingly dire alarms about the potentially catastrophic if still uncertain impacts on agriculture, rainfall

⁴ Center for International Environmental Law (CIEL), [Oil Industry Knowledge of and Responses to Carbon Risk and its Relevance to the Responsibilities of the Carbon Majors under Human Rights and Other Regimes](#) 4 (February 2016) [hereinafter “Synthesis Report”].

⁵ See [id.](#) at 5.

⁶ See [id.](#) at 6.

⁷ See Science, [One Big Greenhouse](#), Time Magazine, May 28, 1956, available at <http://content.time.com/time/magazine/article/0,9171,937403,00.html>.

⁸ The Unchained Goddess (Bell Laboratory Science Series 1958) (climate segment available at <http://climate.nasa.gov/blog/447/>).

⁹ See Revelle et al., [Atmospheric Carbon Dioxide](#), in [Restoring the Quality of Our Environment](#) 111-33 (President’s Science Advisory Committee, Washington, D.C. 1965), available at <https://dgc.carnegiescience.edu/labs/caldeiralab/Caldeira%20downloads/PSAC.%201965.%20Restoring%20the%20Quality%20of%20Our%20Environment.pdf>.

patterns and severe weather events, sea levels, and populations living in coastal zones or other vulnerable regions.

In June 1988, amidst then record heat waves, Dr. James Hansen of the NASA Goddard Institute testified to the U.S. Congress and the world that the signal of humanity's impact on climate change had emerged unmistakably from the background of natural climate variation, and that scientists could state "with 99 percent confidence" that long-term warming was underway.¹⁰ Days later, more than 300 experts—including scientists, business leaders, and government ministers from 46 countries—meeting in Toronto, Canada called for an immediate Action Plan for the Protection of the Atmosphere to reduce global CO₂ emissions by 50%. Significantly, and amidst many other action points, the Conference called on governments and industry to seek immediate ways to reduce fossil fuel combustion, deploy new and existing emissions reduction technologies, and to label products "to allow consumers to judge the extent and nature of the atmospheric contamination that arises from the manufacture and use of the product."¹¹

In the following weeks, 42 legislators called on the President of the United States to immediately begin negotiations on a climate treaty and proposed a National Energy Policy to Reduce Global Warming. At a Congressional hearing on the bill, a leading U.S. Senator observed:

"Little debate remains in the scientific community about the increased levels of carbon dioxide in the atmosphere. Global atmospheric concentrations of CO₂ have been steadily increasing since the advent of the industrial age.

...

We have been told that the earth is already committed to warming of as much as five degrees Fahrenheit. Is it too early to act to try to slow down global warming?

I hope we will not hear further calls for delay. Instead, I hope that we will receive recommendations for how working alone and in concert with countries all around the globe, we can slow the rate of emissions of the greenhouse gases and work to stabilize our climate before it gets away from us.¹²

The events of 1988 are significant for their recognition, based on what was even then decades of mounting evidence and growing scientific consensus, that climate change was almost certainly occurring, that humans were very likely the cause, and that the problem demanded urgent and dramatic action. They are significant for another reason as well. Despite this strong scientific consensus, despite the urgency, and notwithstanding the clear warnings to government and to industry actors that they must take action to reduce climate risks while actively working to warn

¹⁰ Spencer Weart, The Discovery of Global Warming 150 (Rev. ed. 2008).

¹¹ Toronto Conference on the Changing Atmosphere: Implications for Global Security (27-30 June, 1988), reported in Dean Edwin Abrahamson (ed.), The Challenge of Global Warming 53 (Island Press, Wash. D.C., 1989).

¹² U.S. Senate Committee on Environment and Natural Resources, Hearing to Establish and National Energy Policy to Reduce Global Warming, 100th Cong. 2d Sess. (Aug. 11, 1988), S. Hrg. 100-923 at 2-3 (Statement of Senator Timothy Wirth).

the public of those risks, global greenhouse emissions only accelerated. In fact, more than 50% of all historic emissions have occurred since 1988.

It is against this decades long history of evolving scientific understanding, increasing warnings and growing public urgency on climate change that the Carbon Majors awareness of and action on climate change is best evaluated.

As Leading Producers and Marketers of Fossil Fuels, the Carbon Majors Had the Early Opportunity and Capacity to Identify and Act on the Risks of Climate Change

In evaluating the salience of industry knowledge and actions on climate change for the Carbon Majors' responsibility for the ensuing violations of human rights, it is equally important to note the Carbon Majors' unique role with respect to climate.

As Petitioners note, the 48 Respondents to the Petition comprise the largest historic producers of crude oil, natural gas, coal, and cement among all investor-owned and state owned corporations. Collectively, their production and its embedded greenhouse emissions account for one third of all industrial CO₂ and methane emitted globally since the dawn of the industrial revolution.¹³ As upstream producers and marketers of fossil fuels and cement, the Respondents sat—and continue to sit—in a uniquely privileged position with respect to global greenhouse gas emissions: but for the sale of their products and services, and but for activities substantially within the control of the Respondents and their corporate predecessors in interest, a significant portion of global greenhouse gases as measured over historic time might never have been emitted.

As the synthesis report documents, a growing body of evidence demonstrates that many corporations responsible for producing and marketing fossil fuels were aware of climate risks decades earlier than previously recognized. More specifically, CIEL's assessment of the evidence currently available to the public suggests the following conclusions:

- *Theories regarding the potential link between fossil fuel combustion at atmospheric temperature increase were widely reported in scientific literature and academic texts relevant to the oil and gas industry from the early decades of the 20th Century.*¹⁴
- *The Oil and Gas Industry had incentives, opportunity and relevant expertise to investigate and understand climate science.*¹⁵
- *Documentary Evidence demonstrates that at least one of the Identified Carbon Majors was aware of and actively investigating climate change by no later 1957.*¹⁶

¹³ See Richard Heede, Carbon Major Entities Cumulative Emission to 2013 Ranked (Climate Accountability Institute Feb. 2015). Heede's landmark research in tracing producer's embedded emissions throughout the industrial era was originally published in the peer-reviewed journal Climatic Change in 2014. Richard Heede, Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers 1854-2010, Climatic Change 122- 229 (2014). A complete description of the methodology used is available at <http://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf>. (Note that CIEL President Carroll Muffett, who contributed to the present Opinion, serves as a volunteer member of the Board of Directors of the Climate Accountability Institute.)

¹⁴ Synthesis Report, supra note 4, at 3.

¹⁵ Id.

¹⁶ See id. at 6.

- *Industry Records indicate that the oil and gas industry was funding research into fossil carbon in the atmosphere, as part of a coordinated industry research program, by no later than 1958.*¹⁷
- *Industry Records and Other Sources strongly suggest that this industry research program was designed and utilized to mobilize public opposition to regulation of air pollutants by sowing doubt regarding air pollution science, and document that all five of the largest Carbon Majors or their corporate predecessors participated actively in that program.*¹⁸
- *By no later than 1968, and repeatedly thereafter, oil industry leaders were explicitly warned by their own scientists of potentially severe climate risks, and of the fossil fuel industries' contribution to those risks.*¹⁹
- *The Oil and Gas industry, including Carbon Majors identified in the petition, held early patents on numerous technologies that might have reduced climate change risk.*²⁰
- *Notwithstanding its own best information, the Oil and Gas Industry, including several of the Carbon Majors identified in the petition, produced, funded, and/or disseminated climate misinformation for decades.*²¹
- *At least three US coal companies identified among the Carbon Majors have been recently implicated in the same or similar misinformation efforts.*
- *Even while blocking public action to address climate change, oil companies took steps to protect their own assets from climate risks.*

In sum, based on the evidence presently available in the public sphere, CIEL concludes that the major fossil fuel producers—among whom the Carbon Majors are the largest and most significant contributors by far—failed to take meaningful action to address or reduce climate risks, either by reducing their production, changing their product streams to emphasize lower carbon sources, warning consumers and the public regarding the intrinsic and potentially catastrophic risks of their products, or advising people in climate vulnerable countries to take early action to reduce their exposure to long-term climate risks. To the contrary, fossil fuel producers—including, notably, several of the Carbon Majors identified in the petition—undertook active and coordinated campaigns spanning many years to reduce public concern and obstruct governmental action on climate change.

Documents suggesting coordinated action of this kind within the oil and gas industry date to as early as 1958; are strongly implied by oil industry responses to the Robinson report of 1968; and are clearly in existence by the time of the Global Climate Coalition in the 1980s. Within the last year, bankruptcy filings spurred reports that three respondents from the U.S. coal industry continued funding climate misinformation efforts up to the present.²² Whether, when, and to what degree other Carbon Majors ended their involvement in such efforts remains unclear.

¹⁷ See *id.* at 7.

¹⁸ *Id.*

¹⁹ See *id.* at 11.

²⁰ See *id.* at 20 (discussing industry patents relevant to emissions reduction and renewable energy technologies).

²¹ See *id.* at 14 (discussing Smoke and Fumes Committee, Global Climate Coalition, and other misinformation efforts).

²² See *id.* at 15. (noting reports of misinformation funding by Peabody Coal, Arch Coal, and Alpha Natural Resources).

This raises the related and important question, of which Carbon Majors specifically are encompassed by the petition generally, and the present report and Opinion specifically. Both the synthesis report and this Opinion focus disproportionately on Carbon Majors from the oil and gas industries and on companies headquartered in or with substantial operations in the United States. This emphasis arises from the greater availability of public information regarding industry research activities and engagement on denial efforts in the United States and the historically smaller number of very large actors in the oil and gas industry as compared to coal or cement industries. Nonetheless the synthesis report does encompass documented science and other activities by non-U.S. oil majors with significant U.S. operations; some international operations by U.S. oil majors; and three U.S.-based coal companies. A brief discussion of these factors and their implications for the present Opinion is set forth in the Report at Appendix 2--*Companies and Industries Addressed*.

To what extent global greenhouse emissions might have been reduced—and their associated and inexorable impacts on human lives and human rights averted or minimized—by a different course of conduct is and will likely remain unknown. What is clear beyond any reasonable doubt is that, since 1988, in the face of compelling evidence that the planet was warming and urgent action was required, the Carbon Majors, individually and collectively, have dramatically increased their production and marketing of fossil fuels and cement. In so doing, they contributed substantially to the doubling in atmospheric concentrations of greenhouse gases; matching in just three decades the cumulative emissions generated by humanity in the preceding 130 years. They did so amidst ever greater scientific certainty that fossil fuel combustion would cause massive human rights impacts, and in defiance of increasingly urgent evidence that those impacts were materializing worldwide, including for the people of the Philippines.

The Laws and Procedures of the Philippines Empowers the Commission to Investigate and Provide Recommendations to Address the Substantial Evidence that Implicates the Carbon Majors for their Contributions to Climate Change

The Constitution of the Republic of the Philippines, the Commission’s Rules of Procedure, and the International Covenant on Civil and Political Rights (ICCPR) empower the Commission to conduct investigative and inquiry proceedings of all forms of human rights violations. Thus the Commission has the power to address Petitioners’ allegations of violations of civil and political rights with broad authority to provide the appropriate legal recommendations for the protection of human rights including those rights that are violated by the devastating impacts of climate change.²³ As articulated in the Petition and in the Amici Curiae briefs submitted, the Commission’s Constitutional mandate compels an investigation into the infringement of the Filipino people’s human rights. Emissions research predicted catastrophic weather events like super-typhoon Yolanda. These extreme weather events, if unchecked, will continue to kill thousands and deprive the Filipino people of their human rights including the rights (a) to life; (b) to the highest attainable standard of physical and mental health; (c) to food; (d) to water; (e)

²³ See Constitution, Art. XIII, secs. 18(1)(3), 18(2); The Omnibus Rules of Procedure of the Commission on Human Rights. See also International Covenant on Civil and Political Rights (ICCPR), art. 2(1) Dec. 19, 1966, 999 U.N.T.S. 171, 61 I.L.M. 360 (stating “Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”).

to sanitation; (f) to adequate housing; and (g) to self-determination.²⁴ Climate impacts that could cause death and devastation, not unlike the suffering imposed upon millions of Filipinos, was predicted by research scientists that were funded by the Carbon Majors.

Decades of correspondences exchanged amongst scientists include increasingly dire alarms about the potentially catastrophic, if uncertain, impacts on agriculture, rainfall patterns, severe weather events, and populations living in coastal zones or other vulnerable regions.²⁵ These scientific studies and resulting conclusions were funded by and disseminated among the Carbon Majors, but largely withheld from public entities, like this Commission, that are responsible for protecting persons, property, and the environment from harm.

Access to these scientific studies would have enabled public entities charged with protecting human rights in vulnerable communities to access information and execute their Constitutional responsibilities decades ago. We echo the question presented by the Amicus Curiae Brief submitted by ELAW and similarly ask, if the Commission does not undertake this investigation, who will?²⁶ We are concerned that if the Commission fails to conduct an investigation the Filipino people will be denied the human rights protections that the Carbon Majors have knowingly ignored and denied. Furthermore, if the Commission rejects the Petitioners' request for inquiry, there is a strong likelihood that the Filipino people will be denied human rights protections in the future despite the Constitutional and international human rights authorities committed to such protections.

An Investigation by the Commission Appropriately Ensures that the Human Rights of the Philippine People are Monitored for Human Rights Abuses

We support the Petitioners' analysis that the Guiding Principles on Business and Human Rights ("Guiding Principles") and relevant commentary provide the Commission with the widely accepted norms and standards by which to assess the conduct of business enterprises to respect human rights.²⁷ Guiding Principle 1 describes the duty of States to protect against human rights abuses by businesses as including "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."²⁸ As a State actor the Commission can assert that conducting this investigation fulfills this duty.

As the need to address the threat of the humanitarian crisis caused by climate change becomes more urgent, the legal discourse acknowledging the connection between human rights, climate

²⁴ See Petition at 60.

²⁵ See Synthesis Report, *supra* note 4, at 12.

²⁶ See Amicus Curiae Brief of ELAW, *supra* note 3.

²⁷ In applying the UN Guiding Principles on Business and Human Rights in the present circumstances, it bears note that the Guiding Principles provide only a framework and an entry point to that analysis. While the Guiding Principles were adopted only in 2011, the fundamental human rights instruments that it encompasses, and which business enterprises must respect date to the very beginnings of the modern system of human rights—the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). The rights themselves are older still, arising from the basic moral precepts and social contract which bind humans together into society. See Office of the United Nations High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights* (2011). [hereinafter *Guiding Principles*].

²⁸ See *Guiding Principles*, *supra* note 27, at Principle 1. ICAR Human Rights Due Dilligence, 2013.

change, and accountability has become more robust. For example, the Office of the United Nations High Commissioner for Human Rights (OHCHR) affirmed that businesses, as human rights duty bearers, “must be accountable for their climate impacts and participate in climate change mitigation and adaptation efforts with full respect for human rights.”²⁹ Furthermore, the recommendations that this Commission should make will direct the appropriate State Actor to fulfill its obligation to ensure that private actors do not violate the human rights of the Filipino people.

International Laws, Norms, and Standards Support an Investigation Process by the Commission that Produces Recommendations to Prevent Future Human Rights Violations

CIEL supports the Petitioners’ arguments that it is appropriate and within the Commission’s constitutional and procedural powers to apply the Guiding Principles to assess whether the conduct by the Carbon Majors satisfies a test of contributory causation to the human rights violations at issue. Here again, the Guiding Principles provide a standard. We agree with Amici Curiae’ Client Earth’s analysis that applying a test of contributory causation balanced by a standard of reasonableness is supported by the Interpretive Guide to the Guiding Principles.³⁰ Decades of research illustrates that the Carbon Majors’ contributions to increasing concentrations of greenhouse gas emissions in the atmosphere has been so substantial as to alter the condition of the global atmosphere, and, under the Guiding Principles, that would likely impose an obligation. Further, we support the Petitioners’ assertion that the Carbon Majors have failed to respect human rights where their contributions to climate change have infringed and are infringing on the human rights of others with continued and accelerated greenhouse gas emissions.³¹

By Failing to Disclose the Business Activities that Violate Human Rights, the Evidence Suggests that the Carbon Majors Have Acted and Continue to Act in a Manner Contrary to Due Diligence Obligations

Further, CIEL supports the Petitioners’ and the Amici Curiae’s assertion that the Guiding Principles offer an appropriate standard to balance and assess the business enterprises of the Carbon Majors. Specifically, the Guiding Principles state that in order for business enterprises to meet its responsibility to respect human rights, a business should engage in a process or due diligence, to ensure that it does not infringe upon the rights of others.³² The due diligence process fuses two conceptually distinct processes, one is an investigation of facts, and the other is an

²⁹ See Office of the High Commission for Human Rights (OHCHR), Discussion Paper: Understanding Human Rights and Climate Change, Submission of the OHCHR to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (2015); see also Amicus Curiae Brief of Sabin Center for Climate Change Law, Columbia Law School (citing OHCHR, Discussion Paper: The Rights of Those Disproportionately Impacted by Climate Change (2016)).

³⁰ See Amicus Curiae Brief, Client Earth at 60; (discussing the Interpretive Guide to the Guiding Principles included as Annex D).

³¹ Guiding Principles, supra note 27, at Part II: The Corporate Responsibility to Respect Human Rights.

³² See infra note 33 (interpreting the Protect, Respect and Remedy: A Framework for Business and Human Rights,” UN Doc A/HRC/8/5, para 24 and para. 56.

evaluation of the facts in light of the relevant standards of care. Conducting due diligence is not a mechanical process and it requires exercise of informed and seasoned judgement by the investigator. “Because the hard and soft laws governing corporate human rights responsibilities are evolving, respecting the letter and spirit of international human rights is the appropriate standard of care to apply in human rights due diligence.”³³

The duty to respect and protect human rights obligates business enterprises to exercise due diligence processes including (1) assessing actual and potential impacts of business activities on human rights; (2) acting on the findings of the assessment, including by integrating appropriate measures to address impacts into company policies and practices; and (3) communicating to the outside world about the due diligence process and results.³⁴ These processes are not unlike the “reasonable steps” that business enterprises are commonly expected to take to comply with various national legal regimes. As a result, many business enterprises, particularly those with longevity and global reach already operationalize due diligence processes as a matter of corporate management.³⁵ Additionally, the scope of due diligence includes addressing adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships. Further, this process should be on-going and involve meaningful consultation with potentially affected groups and other relevant stakeholders.³⁶ The Guiding Principles are intended “to prevent business enterprises from escaping responsibility through the outsourcing of potentially harmful activities to others through their business relationships.”³⁷ As noted above, this includes being held accountable for climate impacts.³⁸

As early as 1968, the American Petroleum Institute (API) funded research in atmospheric science to study the causes and impacts of rising carbon dioxide concentrations in the atmosphere. The Robinson Report, released in 1968 and then supplemented in 1969, cautioned that “rising levels of CO₂ would likely result in rising global temperatures and warned that if temperatures increased significantly, the result could be melting ice caps, rising sea levels, warming oceans and serious environmental damage on a global scale.”³⁹ It further acknowledged that “melting ice caps, if they occurred, would obviously result in inundation of coastal areas.”⁴⁰ The report also acknowledged that fossil fuel burning provided the best explanation for rising CO₂.⁴¹ By the late 1970s and 1980s, reports exchanged between the oil industry and the Department of Energy demonstrate that the oil industry was on notice about climate change, what was causing it, and

³³ See Mark Taylor, Luc Zandvliet & Mitra Forouhar, Due Diligence for Human Rights: A Risk-Based Approach 3 (Oct. 2009).

³⁴ See supra note 27, at 18 (citing the Human Rights Due Diligence Report (2012)).

³⁵ The process for business enterprises to conduct Human Rights due diligence under the Guiding Principles is not unlike well-established actions under risk assessment and management methodologies applied in corporate finance and infrastructure development among other industries and sectors.

³⁶ See Petition GP at pdf 35; United Nations Commission on Sustainable Development, Rio Declaration, Fifth Session, April 25, 1997 at Principle 17.

³⁷ See Mark B. Taylor (ICAR), Human Rights Due Diligence: The Role of the States 13 (2013 Update), available at <http://icar.ngo/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL1.pdf>.

³⁸ See OHCHR, Discussion Paper: Understanding Human Rights and Climate Change, supra note 29.

³⁹ See Synthesis Report supra note 4.

⁴⁰ E. Robinson & R.C. Robbins, Supplemental Report (1969) (on file with CIEL).

⁴¹ Id.

what the risks were.⁴² For example records show that Exxon continued to conduct research into climate science, as demonstrated by internal company documents from 1977 through 1982. However, Exxon did not even acknowledge climate change in Securities and Exchange Commission (SEC) filings until 1991.⁴³ Moreover, as indicated by an American Petroleum Institute memo from 1998, the industry sought to sow doubt about the scientific consensus surrounding climate change instead of actively warn the public.⁴⁴

Not only did the oil industry know a great deal more about climate change, oil industry scientists even recognized the seriousness of climate change.

As the Petitioners and Amici Curiae make clear, if the Commission accepts that climate change interferes with human rights, then this Commission is bound by its Constitutional mandates, its Procedural human rights obligations, and the Guiding Principles to investigate the Carbon Majors contributions to climate change that threaten the human rights of the Filipino people.

Furthermore, human rights due diligence requires a business enterprise to actively seek information about the negative human rights impacts of its activities, as well as about the risk that negative human rights impacts may occur in the future. Once a company identifies such impacts, this triggers a responsibility to prevent and mitigate potential or existing violations, and to remediate any violations that have previously occurred.⁴⁵ “The legal systems of most countries provide for civil liability for a business enterprise that causes a victim to suffer harm or prejudice, including by failing to act with due diligence. As described in the Human Rights Due Diligence Report (HRDD) Report (2012), such a failure is usually defined as not taking all the precautionary measures that could reasonably have been taken in order to reduce the risk of the harm occurring.”⁴⁶ Nowhere is this more apparent than in the Right to Life: “It is the supreme right from which no derogation is permitted.”⁴⁷ It is a right, moreover, “which should not be interpreted narrowly.”⁴⁸ A right, finally, embedded within every system of law, and enforceable within domestic systems not only against governments, but against private individuals—whether through constitutions, through criminal law, or through the law of tort and negligence.⁴⁹

State Investigations about the Sufficiency of the Oil Industry’s Disclosures about Climate Change Suggest that the Members of the Carbon Majors May Have Breached Obligations to Conduct Due Diligence and to Ensure Transparency

The procedural elements to identify impacts, account for them, and respond to those impacts are common components of the various due diligence regimes established under national systems to

⁴² See Synthesis Report supra note 4. .

⁴³ See InsideClimateNews, ICN Staff, “The Long Tale of Exxon and Climate Change,”(July 2015).

⁴⁴ See, Kathy Mulvey and Seth Shulman, Union of Concerned Scientists, The Climate Deception Dossiers: Internal Fossil Fuel Memos Reveal Decades of Corporate Disinformation (2015),

⁴⁵ See supra note.

⁴⁶ Id.

⁴⁷ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

⁴⁸ Id.

⁴⁹ Id.

comply with legal and regulatory mandates.⁵⁰ Due diligence processes are commonly used to assess businesses' compliance and practices related to labor, consumer protection, environmental, and securities laws, among other national legal regimes. In the United States, businesses must comply with disclosure requirements under securities laws as enforced by the Securities and Exchange Commission on the federal level and enforced by the State's Attorneys General at the state level. ExxonMobil, one of the largest companies among the Carbon Majors, is currently being investigated by attorneys general from the Commonwealth of Massachusetts and the State of New York for concerns arising about what Exxon Mobil knew about climate change and when that information was disclosed to investors and consumers.⁵¹ These allegations are supported by documents collected by CIEL and others.

Conclusion

This Opinion and the Synthesis Report summarize an extensive collection of correspondences, scientific research, and other documents that describe the development of climate change knowledge and expertise since the early 1900s. The documents provide evidence that demonstrates that the oil industry had knowledge of the harms caused by climate. These documents also demonstrate that the oil industry experts acted in ways contrary to principles of due diligence under international law and guidance. First, the oil industry continued to invest in technologies that would both expand fossil fuel exploration with full knowledge that accelerating the rate at which carbon dioxide concentrations would accumulate in the atmosphere would also accelerate the frequency and intensity of harms to the environment, human health, and ultimately human rights.⁵² Secondly, rather than taking action to mitigate the harms caused by industry operations, the oil industry engaged in a well-funded campaign of deception to avoid accountability and to avoid regulations that would have restricted profitable exploration and drilling operations. For these reasons, and the reasons provided in supplemental and amici briefs, we urge the Commission to conduct an investigation of the Carbon Majors as to their infringement of the human rights of the citizens of the Philippines.

CIEL respectfully requests that the Commission accept this Opinion to assist in its National inquiry into the responsibility of the Carbon Majors for their contributions to climate change and human rights violations.

⁵⁰ Id.

⁵¹ On April 19, 2016, Attorney General Healey opened an investigation by issuing a civil investigative demand to ExxonMobil Corporation concerning violations of the Massachusetts consumer protection statute, M.G.L. c. 93A, Section 2 and its implementing regulations arising from Exxon's (1) marketing and/or sale of energy and other fossil fuel derived products to consumers in the Commonwealth of Massachusetts, and (2) the marketing and or sale of securities as defined in M.G.L. c. 110A, Section 401(k), to investors in the Commonwealth. Specifically, the investigation seeks information regarding whether Exxon may have misled consumers and/or investors with respect to the impact of fossil fuels on climate change, and climate change-driven risks to Exxon business. Relevant filings are available at <http://www.mass.gov/ago/bureaus/eeb/the-environmental-protection-division/exxon-investigation.html>; see also Jackie Wattles, SEC is latest regulator to investigate Exxon Mobil's Accounting Practices, CNN Money, Sept. 20, 2016, available at <http://money.cnn.com/2016/09/20/news/companies/exxon-mobil-sec-investigation/> (reporting that the U.S. Securities and Exchange Commission has asked for documents from Exxon and PricewaterhouseCoopers which audits the company's financial documents).

⁵² See Synthesis Report, supra note 4.