

# Philippine Remedies in Climate Damages Litigation: A Focus on Claims of Victims of Extreme Weather Events Against Fossil Fuels Companies

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## I. CLIMATE DAMAGES LITIGATION INVOLVING FOSSIL FUELS

Climate change is regarded in international law as a “common concern of humanity.”<sup>1</sup> Many States have declared a climate emergency in their jurisdictions in an effort towards large-scale action to address the negative impacts of climate change to their populations.<sup>2</sup> Decades ago, before it was deemed an emergency, several countries gathered using the United Nations (UN) structure to address the problem. Climate change was then defined in the United Nations Framework Convention on Climate Change (UNFCCC) as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”<sup>3</sup> Such human activity consists of the emission of greenhouse gases (GHGs)<sup>4</sup> that trap heat to the atmosphere causing global warming. It is undeniable that among the human activities that affect climate change, fossil fuel burning is the major contributor, accounting for more than 70% of global GHGs.<sup>5</sup> Scientists are in consensus that the adverse effects of climate change can be disastrous for humanity.<sup>6</sup> These effects include extreme weather events,

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1. United Nations Framework Convention on Climate Change, pmbl., *opened for signature* June 20, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC] (entered into force Mar. 21, 1994).
  2. Such States include Scotland, Japan, Singapore, Canada, and Spain, among others. Climate Emergency Declaration, Climate Emergency Declarations in 2,043 Jurisdictions and Local Governments Cover 1 Billion Citizens, Nov. 11, 2021, *available at* <https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/#nationalgovernments> (last accessed July 31, 2022) [<http://perma.cc/P59A-J8GH>].
  3. UNFCCC, *supra* note 1, art. 1 (2).
  4. An Act Mainstreaming Climate Change Into Government Policy Formulations, Establishing the Framework Strategy and Program on Climate Change, Creating for this Purpose the Climate Change Commission and for Other Purposes [Climate Change Act], Republic Act No. 9729, § 3 (1) (2009) (as amended). The definition of GHG in the Climate Change Act of 2009 shall be used. It “refers to constituents of the atmosphere that contribute to the greenhouse effect including, but not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.” *Id.*
  5. UN Human Rights Council, Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment, ¶ 76, U.N. Doc. A/74/161 (July 15, 2019).
  6. *Id.* The term “adverse effects of climate change” is defined in the UNFCCC, art. 1 (1) as “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience

among others.<sup>7</sup> These impacts can affect livelihoods,<sup>8</sup> cause displacement of people,<sup>9</sup> or result to damage to properties,<sup>10</sup> injuries,<sup>11</sup> and even death of thousands.<sup>12</sup>

Given that these adverse impacts can be attributed to human activity,<sup>13</sup> conflicts inevitably arise when harm is caused, necessitating adequate legal remedies to address the same.<sup>14</sup> At present, there exists a growing database of climate change-related litigation worldwide,<sup>15</sup> and it is not expected to slow down as populations grapple with the physical manifestations of climate change in daily life. Some litigations focus on fossil fuel companies because of the latter's perceived accountability for their GHG emissions.<sup>16</sup> Added to this is the reality that fossil fuel is a trillion-dollar industry<sup>17</sup> which has access not just to wealth but also to political power, technology, knowledge, and expertise such that if only decided upon, it would be in the best position to mitigate emissions and lead the transition towards decarbonization.<sup>18</sup> Also notable is the fact that the fossil fuel business

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or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.” UNFCCC, *supra* note 1, art. 1 (1).

7. Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *supra* note 5, ¶ 6.
8. *Id.*
9. *Id.* ¶ 7 (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2014) & INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C (2018)).
10. *Id.* ¶ 9.
11. *Id.* ¶ 31.
12. *Id.* ¶¶ 1 & 9.
13. Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *supra* note 5, ¶ 1.
14. *Id.* ¶ 48.
15. Climate Change Litigation Databases, Global Climate Change Litigation, *available at* <http://climatecasechart.com/non-us-climate-change-litigation> (last accessed July 31, 2022) [<https://perma.cc/C4ST-Q8NJJ>].
16. *See id.*
17. David Carlin, A 5 Trillion Dollar Subsidy: How We All Pay For Fossil Fuels, *available at* <https://www.forbes.com/sites/davidcarlin/2020/06/02/a-5-trillion-dollar-subsidy-how-we-all-pay-for-fossil-fuels> (last accessed July 31, 2022) [<https://perma.cc/SWU6-PFZ7>].
18. *See* Matthew H. Goldberg, et al., *Oil and Gas Companies Invest in Legislators That Vote Against the Environment*, 117 PNAS 5111 (2020).

model, which maximizes profit, does not take into account the costs of the climate change that they heavily contribute to, thereby externalizing such cost to be consequently absorbed by the public.<sup>19</sup> They are reportedly sticking to such business model, with no real intention, nor meaningful action, to change the same.<sup>20</sup> It has been said that “[c]limate change is a particularly intractable problem for these types of corporations as efforts to reduce or internalize the costs of GHG emissions undermine[ ] their business models.”<sup>21</sup> At the same time, the industry has received government subsidy in order to lower the price of fossil fuels.<sup>22</sup> Fossil fuels are therefore under scrutiny because of their importance and necessary role in addressing climate change.<sup>23</sup>

Thus, in drawing up responsibility for climate change, it cannot be ignored that major emitting industries such as the fossil fuel industry had contributed significantly to climate change. In Richard Heede’s ground-breaking study, it was found that a small number of the world’s major fossil fuel companies contributed to a huge quantity and majority of the GHG emissions.<sup>24</sup> Specifically, 90 corporate investor-owned and State-owned producers, 83 of which produce fossil fuels and seven of which produce cement,<sup>25</sup> collectively referred to as the Carbon Majors,<sup>26</sup> contributed to almost two-thirds of all known industrial GHG emissions.<sup>27</sup> Conflicts are generated by past and present behavior of fossil fuel companies which are argued to have caused harmful climate change impacts through their historical

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19. Julie-Anne Richards & Keely Boom, Carbon Majors Funding Loss and Damage, at 13, available at [https://ke.boell.org/sites/default/files/carbon\\_majors\\_funding\\_loss\\_and\\_damage\\_kommentierbar.pdf](https://ke.boell.org/sites/default/files/carbon_majors_funding_loss_and_damage_kommentierbar.pdf) (last accessed July 31, 2022) [<https://perma.cc/8FKQ-S3XB>].

20. *Id.* at 20 (citing Sophie Yeo, Exxon Mobil Dismisses Climate Change Risks to Future Growth, available at <https://www.climatechangenews.com/2014/04/01/exxon-mobil-dismisses-climate-change-risks-to-future-growth> (last accessed July 31, 2022) [<https://perma.cc/U688-RJ4G>]).

21. Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors’ Duties*, 2020 UTAH L. REV. 313, 324 (2020).

22. Carlin, *supra* note 17.

23. Richards & Boom, *supra* note 19, at 10.

24. Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers*, 1854–2010, 122 CLIM. CHANGE 229, 238 (2014).

25. *Id.* at 235, tbl. 2.

26. *Id.* at 237, tbl. 3.

27. *Id.* at 238.

emissions, which in turn are shown to be higher than many States, with victims seeking restoration and compensation.<sup>28</sup>

In the Philippines, the lower house of Congress (called the House of Representatives) approved a country-wide climate emergency in 2020.<sup>29</sup> Undoubtedly, the country is highly susceptible to the dangers caused by climate change.<sup>30</sup> As a matter of fact, in many reports, it is always ranked as among the most vulnerable countries.<sup>31</sup> The energy sector is the largest contributor in the country's GHG emissions, i.e., around 60% of emissions in 2017.<sup>32</sup> The GHG emissions in the energy sector are caused primarily by fuel combustion.<sup>33</sup> Fossil fuels (e.g., coal, oil, and gas) dominate the energy mix, with the power and transport sectors relying heavily thereon.<sup>34</sup> The country is highly dependent on coal, but a coal moratorium on new projects has been announced in 2020.<sup>35</sup> Nevertheless, new coal-fired power plants that had already been planned will remain.<sup>36</sup> More than half of the country's total predominant energy supply is imported coal and oil.<sup>37</sup>

## II. EXTREME WEATHER EVENTS

Compared to what had happened in the past, extreme weather events consist of unusually severe weather or climate conditions that cause unprecedented

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28. *See id.* at 235-36.

29. Filane Mikee Cervantes, House Panel Approves Climate Emergency Declaration, *available at* <https://www.pna.gov.ph/articles/1122807> (last accessed July 31, 2022) [<https://perma.cc/EHQ8-9EDC>].

30. Climate Links, Philippines, *available at* <https://www.climatelinks.org/countries/philippines> (last accessed July 31, 2022) [<https://perma.cc/M3Q5-TFZX>].

31. Institute for Economics & Peace, Global Peace Index 2019, at 48, fig. 2.35, *available at* <https://www.visionofhumanity.org/wp-content/uploads/2020/10/GPI-2019web.pdf> (last accessed July 31, 2022) [<https://perma.cc/KK38-57CP>].

32. Climate Analytics, National 1.5°C Compatible Emissions Pathways and Consistent Power Sector Benchmarks: Indonesia, Viet Nam, Philippines, India and Japan, at 20, *available at* [https://climateanalytics.org/media/105p\\_ecw\\_power\\_5\\_countries\\_4.pdf](https://climateanalytics.org/media/105p_ecw_power_5_countries_4.pdf) (last accessed July 31, 2022) [<https://perma.cc/Z35H-FZQ3>].

33. *Id.*

34. *Id.*

35. *Id.* at 21.

36. *Id.*

37. *Id.* at 20.

destruction.<sup>38</sup> Typical extreme weather events in the Philippines include typhoons or tropical storms.<sup>39</sup> As a developing country located in the Tropical Cyclone belt<sup>40</sup> and being an archipelago composed of more than 7,000 islands,<sup>41</sup> the country is extremely prone to climate-related hazards that include an average of 20 tropical cyclones every year.<sup>42</sup> Because of back-to-back disasters, it is one of the countries most affected by impacts of weather-related events (e.g., storms, floods, and heatwaves) according to the Global Climate Risk Index 2020.<sup>43</sup> In the Southwest Pacific region, 75% of all deaths caused by weather, climate, and water hazards in the 50-year period 1970–2019,<sup>44</sup>

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38. An extreme weather event is considered rare for the place where it occurs and historically, it happens once in several years, such as once in a generation or once in a lifetime of a person, before it happens again. Scientists say that some climate or weather conditions that were extraordinary in the past have become more and more frequent and common occurrences. See UNITED NATIONS OFFICE FOR DISASTER RISK REDUCTION, *THE HUMAN COST OF DISASTERS: AN OVERVIEW OF THE LAST 20 YEARS (2000–2019)* (2020) & Intergovernmental Panel on Climate Change, *Weather and Climate Extreme Events in a Changing Climate*, at 1522, available at [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_Chapter11.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter11.pdf) (last accessed July 31, 2022) [<https://perma.cc/R8V4-NVG9>].
  39. Amnesty International UK, *Philippines Country Most at Risk from Climate Crisis*, available at <https://www.amnesty.org.uk/philippines-country-most-risk-climate-crisis> (last accessed July 31, 2022) [<https://perma.cc/U86V-WRC8>].
  40. Habitat For Humanity, *Responses to Typhoons in the Philippines*, available at <https://www.habitatforhumanity.org.uk/what-we-do/natural-disaster-response/response-to-typhoons-philippines> (last accessed July 31, 2022) [<https://perma.cc/G7ZA-XU8P>].
  41. Britannica, *Philippines*, available at <https://www.britannica.com/place/Philippines> (last accessed July 31, 2022) [<https://perma.cc/SMU6-NSDA>].
  42. Republic of the Philippines, *Nationally Determined Contribution Communicated to the UNFCCC*, at 3, available at <https://unfccc.int/sites/default/files/NDC/2022-06/Philippines%20-%20NDC.pdf> (last accessed July 31, 2022) [<https://perma.cc/2G2H-BGYF>] [hereinafter Republic of the Philippines NDC].
  43. David Eckstein, et al., *Who Suffers Most from Extreme Weather Events? Weather-Related Loss Events in 2018 and 1999 to 2018 (Global Climate Risk Index 2021, Germanwatch Briefing Paper)*, at 14, available at [https://germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021\\_1.pdf](https://germanwatch.org/sites/default/files/Global%20Climate%20Risk%20Index%202021_1.pdf) (last accessed July 31, 2022) [<https://perma.cc/W2VH-BQ4W>].
  44. World Meteorological Organization, *Atlas of Mortality and Economic Losses from Weather, Climate and Water Extremes (1970–2019)*, at 48, available at

numbering 48,950 deaths recorded, occurred in the Philippines mainly due to storms.<sup>45</sup> Typhoons and heavy rainfall cause floods and landslides, which in turn result to death and damage to property. For super typhoon Haiyan alone, “[a] total of 6[,]245 individuals were reported dead, 28,626 injured, and 1[,]039 [missing].”<sup>46</sup>

Climate change is expected to intensify and increase the hazards, as well as the impacts of extreme weather events, that lead to physical harm to persons and destruction of property (e.g., houses, crops, and livelihood implements), as well as environmental degradation over time.<sup>47</sup> Much of the country’s rapidly growing population, which was at 108.7 million in 2020,<sup>48</sup> live along the coastline and are dependent on natural resources for livelihood, making them vulnerable to both sudden on-set events (e.g., typhoons, storm surges, floods, droughts, and heatwaves) and slow on-set events (e.g., changes in temperature and rainfall, rising seas, erosion, and land degradation).<sup>49</sup> The high reliance of Filipinos on agriculture and fishing as livelihood expose them to the risk of loss of income due to the impacts of extreme weather events.<sup>50</sup> The poorest who depend on natural resources, such as the land, sea, and forest, for their livelihood and survival are the most vulnerable as they do not have the social security that would allow them to cope with disasters and environmental degradation.<sup>51</sup>

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[https://library.wmo.int/doc\\_num.php?explnum\\_id=10769](https://library.wmo.int/doc_num.php?explnum_id=10769) (last accessed July 31, 2022) [<https://perma.cc/JZ3G-VWQR>].

45. *Id.*

46. Hiroshi Takagi & Miguel Esteban, *Statistics of Tropical Cyclone Landfalls in the Philippines: Unusual Characteristics of 2013 Typhoon Haiyan*, 80 NATURAL HAZARDS 211, 211 (citing National Disaster Risk Reduction and Management Council, Effects of Typhoon “YOLANDA” (HAIYAN), Situation Report No. 107 [NDRRMC SitRep no. 107], at 1 (March 6, 2014)).

47. United States Environmental Protection Agency, Climate Impacts on Human Health, available at <https://climatechange.chicago.gov/climate-impacts/climate-impacts-human-health> (last accessed July 31, 2022) [<https://perma.cc/UU9U-NHHW>].

48. Franz Lewin Embudo, *PH Population to Reach 108.7M by Mid-2020*, MANILA TIMES, Feb. 15, 2020, available at <https://www.manilatimes.net/2020/02/15/news/top-stories/ph-population-to-reach108-7m-by-mid-2020/685969> (last accessed July 31, 2022) [<https://perma.cc/X6SK-2EPF>].

49. See Republic of the Philippines NDC, *supra* note 42, at 3.

50. *Id.*

51. *Id.*

### III. CONCEPTUAL BASIS FOR LIABILITY

#### A. *Climate Justice*

Climate justice has been referred to as a “concept that recogni[z]es that climate change will disproportionately affect people who have less ability to prevent, adapt[,] or otherwise respond”<sup>52</sup> to its impacts, specifically vulnerable groups (e.g., indigenous peoples and people living in poverty), despite being the least responsible for the same as they contributed the least to cause it.<sup>53</sup> This is climate injustice as they are the most affected and suffer the costs of climate-related disasters.<sup>54</sup> The whole country contributes negligibly to global levels of GHG emissions, yet remains highly vulnerable to the severe impacts of climate change.<sup>55</sup> Losses and damages from extreme weather events are rising, reaching as high as four percent of the country’s Gross Domestic Product in 2013 as mentioned in the country’s Nationally Determined Contribution (communicated to the UNFCCC on 15 April 2021).<sup>56</sup> This was caused by Super Typhoon Haiyan, the “world’s strongest storm recorded at landfall.”<sup>57</sup>

#### B. *Compensatory Justice*

The principle of compensatory (rectificatory or corrective) justice<sup>58</sup> can be used in framing legal responsibility in private claims wherein the party who

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52. International Bar Association Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption*, at 2, available at <https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04> (last accessed July 31, 2022) [<https://perma.cc/3Y75-6EYD>].

53. *Id.* at 46.

54. *Id.*

55. Asian Development Bank, *Pathways to Low-Carbon Development for the Philippines*, at viii, available at <https://www.adb.org/sites/default/files/publication/389806/pathways-low-carbon-devt-philippines.pdf> (last accessed July 31, 2022) [<https://perma.cc/BTS6-43A5>].

56. Republic of the Philippines NDC, *supra* note 42, at 3.

57. Lilibeth A. Acosta, et al., *Loss and Damage from Typhoon-Induced Floods and Landslides in the Philippines: Community Perceptions on Climate Impacts and Adaptation Options*, 9 INT’L. J. GLOBAL WARMING 33, 37 (2016).

58. “The principle of compensatory justice is that, in order to restore the balance of justice when an injustice has been committed to a group of persons, some form of compensation or reparation must be made to that group.” Paul W. Taylor, *Reverse Discrimination and Compensatory Justice*, in *THE AFFIRMATIVE ACTION DEBATE* 13 (Steven M. Cahn ed., 2002).



caused the harm is being made liable to the one who suffered the same, so as to make the victim whole again.<sup>59</sup> This is necessary because the harm was undeserved and it creates a situation which places the parties in unequal positions wherein the wrongdoer gets an unwarranted benefit at the expense and detriment of the victim.<sup>60</sup> The compensation places the victims in their original state, before the harm was caused and as if the same did not happen.<sup>61</sup> In the context of climate change, those who are historically responsible for accumulated emissions are the big emitters.<sup>62</sup> Under the corrective justice paradigm, such emitters must be held liable to those damaged as a result of their emissions.<sup>63</sup> The duty to rectify is with respect to anthropogenic climate change harms.<sup>64</sup>

#### IV. PHILIPPINE REMEDIES FOR CLIMATE DAMAGES

Recognizing its vulnerability to climate change and its resulting conflicts, the country has developed a progressive legal framework for environmental protection, despite its considerably poor implementation.<sup>65</sup> However, environmental cases are not equivalent to climate change cases. The absence of express violation of environmental laws does not necessarily mean that there is no responsibility for climate change impacts that cause injuries. Aside from the Climate Change Act of 2009,<sup>66</sup> which created the Climate Change Commission, and its amendment which created the People's Survival Fund,<sup>67</sup> the country has no climate change laws per se, so disputes will be situated within environmental laws, climate policies, civil law, human rights law, and other areas of law.<sup>68</sup> Even in other parts of the world, there is no successful

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59. *See id.*

60. *See id.*

61. *See id.*

62. Carbon Brief, Analysis: Which Countries Are Historically Responsible For Climate Change?, available at <https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change> (last accessed July 31, 2022) [<https://perma.cc/XL83-Q4CQ>].

63. *See Taylor, supra* note 58.

64. Climate Change Act of 2009, § 3 (c). Anthropogenic climate change refers to human-caused emissions that contribute to climate change. *Id.*

65. *See* Department of Environment and Natural Resources, Major Environmental Laws, available at [https://ecac.emb.gov.ph/?page\\_id=43](https://ecac.emb.gov.ph/?page_id=43) (last accessed July 31, 2022) [<https://perma.cc/2WCK-DLRK>].

66. Climate Change Act of 2009, § 4.

67. *Id.* § 18.

68. *See* Department of Environment and Natural Resources, *supra* note 65.

case yet wherein a large emitter had been held liable for damages to climate change victims.<sup>69</sup>

This Article focuses on lawsuits that can be filed seeking to make fossil fuel companies, like those in the list of Carbon Majors in Heede's study,<sup>70</sup> accountable for their conduct (whether action or inaction) that contributed to climate change. Considering the absence of a domestic substantive law that provides for a right of action of a private party against an emitter for its contribution to climate change,<sup>71</sup> plaintiffs who are victims of climate change-related extreme weather events can only draw from existing general laws and legal principles in arguing for the legal duty owed to them.<sup>72</sup> Two avenues in setting up civil actions for damages will be delved into: Human rights law and tort law.

#### *A. Rights-Based Approach*

The first wave of climate change actions worldwide had been based on statutory and administrative law. But there is a nascent trend to use the human rights regime as another tool for climate change cases wherein the focus is not on whether the duty holder violated an environmental or climate change statute or regulation.<sup>73</sup> Under this approach, the emphasis is on accountability mechanisms and the most vulnerable are prioritized.<sup>74</sup> This is important because the less fortunate are in need most of the remedies as compared to the well-off who are capable of adapting to the detrimental consequences of climate change.<sup>75</sup> Commentators have stated that human rights law can fill the gap in existing legal regimes and can provide a

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69. Commission on Human Rights Philippines, National Inquiry on Climate Change Report (2022), at 2, available at <https://chr.gov.ph/wp-content/uploads/2022/05/CHRP-NICC-Report-2022.pdf> (last accessed July 31, 2022) [<https://perma.cc/M5N7-LV42>] [hereinafter NICC Report].

70. Heede, *supra* note 24, at 237, tbl. 3.

71. See Department of Environment and Natural Resources, *supra* note 65.

72. See *id.*

73. See Anne Kling, Climate Change and Human Rights – Can the Courts Fix It?, available at <https://reliefweb.int/report/world/climate-change-and-human-rights-can-courts-fix-it> (last accessed July 31, 2022) [<https://perma.cc/REH7-H7MS>].

74. See Office of the United Nations High Commissioner for Human Rights, Understanding Human Rights and Climate Change, at 2, available at <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf> (last accessed July 31, 2022) [<https://perma.cc/37UG-24WT>].

75. See *id.*

remedy to victims of specific rights violations.<sup>76</sup> Due to its novelty, climate change litigation that use human rights law is a small percentage of the total, i.e., 112 out of 1,841 as of May 2021.<sup>77</sup> Out of this number, only 16 had been filed against corporations by non-government organizations and individuals.<sup>78</sup>

The human rights approach can be employed by plaintiffs to show that their human rights were infringed upon by defendants who are duty-bound to respect the same and comply with their human rights obligations.<sup>79</sup> Defendants' activities may be the cause of the harm, is contributory to it, and thus, making it worse, or the defendants failed to prevent the same, and such harm negatively impacted human rights. Even if the carbon emitter's conduct cannot be characterized as a human rights violation, the human rights approach can still be useful as a mechanism to prove some other actionable wrong. It may be used as an interpretative tool in applying legislation that affects rights and in weighing interests, or a supplement to bolster primary arguments.

Such approach to climate litigation was first tested in the National Human Rights Institution investigation in the country involving fossil fuels.<sup>80</sup> This is the Commission on Human Rights (CHR) investigation, also called the National Inquiry on Climate Change, in connection with the alleged human rights violations of the Carbon Majors.<sup>81</sup> Relying on Heede, they are alleged

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76. Annalisa Savaresi & Joana Setzer, Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation, at 7, *available at* <https://ssrn.com/abstract=3787963> (last accessed July 31, 2022) [<https://perma.cc/J8SE-EK44>] & Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL L. REV. 439, 455 (2009).

77. Savaresi & Setzer, *supra* note 76, at 2 (citing Sabin Centre for Climate Change Law at Colombia Law School, U.S. Climate Change Litigation, *available at* <https://web.archive.org/web/20220119004342/http://climatecasechart.com/climate-change-litigation/us-climate-change-litigation> & Grantham Research Institute on Climate Change and the Environment at the London School of Economics, List of Litigation Cases, *available at* [https://www.climate-laws.org/litigation\\_cases](https://www.climate-laws.org/litigation_cases) (last accessed July 31, 2022) [<https://perma.cc/3HE4-GK7X>]).

78. Savaresi & Setzer, *supra* note 76, at 6.

79. *See id.* at 10.

80. NICC Report, *supra* note 69, at 2.

81. Lea B. Guerrero, *When Communities Uphold Climate Justice*, PHIL. DAILY INQ. Dec. 15, 2019, *available at* <https://opinion.inquirer.net/125889/when-communities-uphold-climate-justice> (last accessed July 31, 2022) [<https://perma.cc/GC9J-6CK8>] (This case started from a petition filed by Greenpeace, a non-government organization, together with 13 other non-

to have produced fossil fuel products and cement that have been responsible for the biggest portions of carbon emissions.<sup>82</sup> Petitioners sought to hold the Carbon Majors accountable for impairment of human rights due to climate-related disasters and shifts in ecosystems linked to climate change, to which the business of the Carbon Majors allegedly contributed to.<sup>83</sup> The CHR recently issued its formal resolution finding, among others, that climate change is a human rights issue and the Carbon Majors have the duty to respect human rights such that they may be held legally liable for their willful obfuscation and obstruction of climate science to prevent meaningful climate action.<sup>84</sup>

### 1. Climate-related Rights in the Constitution

The Philippines has a particular right in relation to the environment — Article II, Section 16 of the Constitution provides that “the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”<sup>85</sup> This constitutional right has been upheld in *Oposa v. Factoran*<sup>86</sup> and is strengthened in subsequent Supreme Court decisions.<sup>87</sup> Even if it is not found in the Bill of Rights, it is part of human rights and interdependent with other fundamental rights.<sup>88</sup> Given the status of

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government organizations and 18 individuals (including farmers, fisherfolks, workers, typhoon survivors and other concerned Filipino citizens who bear the brunt of the impacts of climate change) in September 2015. Named as respondents were 47 investor-owned coal, oil, gas, and cement companies, including Chevron, ExxonMobil, BP, Shell, Total, BHP Billiton, Suncor, and ConocoPhillips). See generally 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, available at <https://essc.org.ph/content/wp-content/uploads/2018/09/Philippines-Climate-Change-and-Human-Rights-Petition.pdf> (last accessed July 31, 2022) [<https://perma.cc/3KEK-J3CR>] [hereinafter Carbon Majors Petition].

82. NICC Report, *supra* note 69, at 1.

83. *Id.*

84. NICC Report, *supra* note 69, at 33.

85. PHIL. CONST. art II, § 16.

86. *Oposa v. Factoran*, G.R. No. 101803, 224 SCRA 792, 805 (1993).

87. See e.g., *Dela Cruz v. Parumog*, G.R. No. 192692, 938 SCRA 253, 271 n. 24 (2020) & *Dela Cruz v. Manila Electric Company*, G.R. No. 197878, Nov. 10, 2020, at 17, available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68140> (last accessed July 31, 2022).

88. Philippine Judicial Academy, Rationale to the Rules of Procedure for Environmental Cases, at 59–60, available at [https://philja.judiciary.gov.ph/files/learning\\_materials/A.m.No.09-6-8-](https://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-)

the right to a healthy environment, the violation of such right can be the basis of litigation in the same way as civil and socio-economic rights are used in a rights-based approach.<sup>89</sup> Climate change is usually seen as an issue that falls under environmental law, since the environment is and will be directly affected by climate change.<sup>90</sup>

The writ of *kalikasan* is the remedy applicable for the enforcement of the constitutional right to a balanced and healthful ecology as well as directly related to causes of action for violation of environmental laws.<sup>91</sup> But as an extraordinary writ, it has limitations such that it cannot be utilized in claims for damages against the violator as stated in the Court-issued Rules of Procedure for Environmental Cases (RPEC).<sup>92</sup> In *West Tower Condominium Corp v. First Philippine Industrial Corporation*,<sup>93</sup> the Court reiterated that the RPEC, Rule 7, Section 15 (e) expressly prohibits granting damages as relief in a petition for the issuance of a writ of *kalikasan*, indicating that separate actions for civil liability or damages should be resorted to.<sup>94</sup>

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SC\_rationale.pdf (last accessed July 31, 2022) [hereinafter Rationale to the Rules of Procedure for Environmental Cases].

89. *Id.* at 49.

90. Intergovernmental Panel on Climate Change, Climate Change: A Threat to Human Wellbeing and Health of the Planet. Taking Action Now Can Secure Our Future, available at <https://www.ipcc.ch/2022/02/28/pr-wgii-ar6> (last accessed July 31, 2022) [<https://perma.cc/XEB6-57JZ>].

91. See RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 08-6-8-SC, rule 7, § 1 (Apr. 13, 2010).

92. *Id.* Rule 7, § 15 provides —

Sec. 15. Judgment. — Within sixty (60) days from the time the petition is submitted for decision, the court shall render judgment granting or denying the privilege of the writ of *kalikasan*.

The reliefs that may be granted under the writ are the following:

...

Such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation or restoration of the environment, except the award of damages to individual petitioners.

*Id.*

93. *West Tower Condominium Corporation v. First Philippine Industrial Corporation*, G.R. No. 194239, 758 SCRA 292 (2015).

94. *Id.* at 324.

The Philippine Clean Air Act of 1999 seeks, among others, to protect the right of the people to a balanced and healthful ecology, specifically the right to breath clean air by reducing pollution.<sup>95</sup> It made direct reference to GHG emissions which it defined and stated that such ought to be reduced.<sup>96</sup> However, air pollution does not include GHG emissions, and, in fact, carbon dioxide, which is a major GHG emission, is not listed as an air pollutant.<sup>97</sup> Hence, although under Section 4 (h) of the Philippine Clean Air Act of 1999, the right of citizens to “bring action in court for compensation of personal damages resulting from the adverse environmental and public health impact of a project or activity” through a citizen suit was recognized, the Clean Air Act does not provide any substantive right as basis of cause of action for climate victims in an action for damages against GHG emitters.<sup>98</sup>

Other than the specific constitutional right to a healthy environment, general constitutional human rights can be invoked. The protection of human rights is in the state policies in Article II of the Constitution, which expressly provides for “full respect for human rights.”<sup>99</sup> The Bill of Rights in Article III of the Constitution lists and guarantees several fundamental liberties of

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95. An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes [Philippine Clean Air Act of 1999], Republic Act No. 8749, §§ 2 & 4 (a) (1999).

96. *Id.* § 5 (i). “Sec. 5 (i) ‘Greenhouse gases’ mean those gases that can potentially or can reasonably be expected to induce global warming, which include carbon dioxide, methane, oxides of nitrogen, chlorofluorocarbons, and the like[.]” *Id.*

97. *Id.* § 5 (a) provides —

Sec. 5 (a) ‘Air pollutant’ means any matter found in the atmosphere *other than* oxygen, nitrogen, water vapor, *carbon dioxide*, and the inert gases in their natural or normal concentrations, that is detrimental to health or the environment, which includes but not limited to smoke, dust, soot, cinders, fly ash, solid particles of any kind, gases, fumes, chemical mists, steam[,] and radio-active substances; ... . (emphases supplied).

*Id.* § 5 (i) & (a).

98. Philippine Clean Air Act of 1999, § 4I (a). According to this provision —

Sec. 4I. Citizen Suit – For purposes of enforcing the provisions of this Act or its implementing rules and regulations, any citizen may file an appropriate civil, criminal[,] or administrative action in the proper courts against a) Any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations; ... .

*Id.*

99. PHIL. CONST. art II, § 11.

persons.<sup>100</sup> The most basic human right is the right to life, as all the other rights and the enjoyment thereof, depend on one being alive.<sup>101</sup> It is enshrined in Article III, Section 1, which states that “[no] person shall be deprived of life ... without due process of law.”<sup>102</sup> The right to life also includes the right to health and bodily integrity, which covers death, sickness, and physical injury.<sup>103</sup> Under the Constitution, the State shall “protect and promote the right to health of the people.”<sup>104</sup>

## 2. International Human Rights Law

The link and relationship between climate change and human rights, as well as the relevance of one to the other, had already been extensively discoursed and explained in the international sphere.<sup>105</sup> It is evident, and now beyond dispute, that the adverse effects of climate change would bear upon the full enjoyment of human rights.<sup>106</sup> Conversely, having a healthy environment unharmed by climate change is indispensable for the fulfilment of human rights.<sup>107</sup>

The sources of obligations and other legal bases for an action for climate damages under human rights law can be found in human rights multilateral treaties, the Paris Agreement, and soft laws from UN documents.

### *a. Human Rights Treaties*

As a State party which ratified the core human rights treaties, the Philippines and entities under its jurisdiction are obligated to respect human rights enumerated thereunder.<sup>108</sup> Besides, many of these treaty rights are already

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100. PHIL. CONST. art III.

101. Secretary of National Defense v. Manalo, G.R. No. 180906, 568 SCRA 1, 52 (2008).

102. PHIL. CONST. art III, § 1.

103. Spouses Imbong v. Ochoa, Jr., G.R. No. 204819, 721 SCRA 146, 313 (2014).

104. PHIL. CONST. art II, § 15.

105. Annalisa Savaresi, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions*, 11 OÑATI SOCIO-LEGAL SERIES: CLIMATE JUSTICE IN THE ANTHROPOCENE 231, 235 (2021).

106. See generally Office of the United Nations High Commissioner for Human Rights, *supra* note 74.

107. See *id.*

108. PHIL. CONST. art. II, § 2. (Pursuant to the doctrine of transformation, a treaty is ratified by Senate concurrence. These core treaties are the UN Universal

considered as part of customary international law. Under the doctrine of incorporation, customary law automatically forms part of Philippine law by operation of the Constitution;<sup>109</sup> thus, no domestic law is necessary to make it applicable.<sup>110</sup> Nonetheless, the 1987 Constitution, particularly Article III on the Bill of Rights, enumerates these human rights.<sup>111</sup> Thus, human rights are protected internationally and domestically.

These universal human rights treaties do not contain a specific human right to a healthy environment and climate.<sup>112</sup> Even if everyone is exhorted to recognize and respect human rights,<sup>113</sup> these core treaties do not explicitly provide for specific human rights obligations of private entities.<sup>114</sup> But the

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Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), and their Optional Protocols.). PHIL. CONST. art. VII, § 21.

109. PHIL. CONST. art. II, § 2.

110. *Pharmaceutical and Health Care Association of the Philippines v. Duque III*, G.R. No. 173034, 535 SCRA 265, 289 (2007).

111. PHIL. CONST. art. III.

112. *See generally* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/RES/217 (III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1996, 999 U.N.T.S. 171; & International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 3.

113. Universal Declaration of Human Rights, *supra* note 112, art. 29. This article provides —

Everyone has duties to the community in which alone the free and full development of his personality is possible.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order[,] and the general welfare in a democratic society.

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

*Id.*

114. International Human Rights Internships Program, Module 9: Obligations of State and Nonstate Actors, *available at* <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module9.htm> (last accessed July 31, 2022) [<https://perma.cc/N7UK-QFZ6>]. “International human rights law thus does not oblige private actors (whether corporations or others) to act in particular ways,



links and interdependence between recognized human rights, the environment and later on, climate change, are now the subject of many reports considered as soft law.

*b. Paris Agreement*

The Preamble to the Paris Agreement explicitly validated the human rights dimension of climate change.<sup>115</sup> The Preamble does not impose binding obligations, but it is a guide in specifying the object, context, and interpretation of the agreement.<sup>116</sup> While the Paris Agreement acknowledges that climate change results to loss and damage,<sup>117</sup> it does not have any provisions for redress and compensation and explicitly states that it does “not involve or provide a basis for any liability or compensation.”<sup>118</sup> As such, it merely reiterated the international cooperation machinery by continuing the Warsaw International Mechanism for Loss and Damage.<sup>119</sup>

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and therefore they cannot be brought to account directly through human rights law.” *Id.*

115. Paris Agreement, *opened for signature* Apr. 22, 2016, 3156 U.N.T.S. 1. The preamble states —

Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, 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.

*Id.* pmb1.

116. Alan Boyle, Climate Change, *The Paris Agreement and Human Rights*, 67 INT’L & COMP. L. Q. 759, 769 (2018).

117. Ivo Wallimann-Helmer, et al., *The Ethical Challenges in the Context of Climate Loss and Damage*, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS 41 (Reinhard Mechler, et al. eds., 2019). Loss and damage refer “to actions dealing with the residual, adverse impacts of climate change which remain after mitigation and adaptation measures have been adopted.” *Id.*

118. Paris Agreement, *supra* note 115, art. 8, ¶ 1. The UNFCCC, in its adoption of the Paris Agreement, expressly stated that it “[a]grees that Article 8 does not provide for a basis for any liability or compensation.” United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 26, 2016).

119. Paris Agreement, *supra* note 115, art. 8, ¶ 5.

*c. Soft Law*

There is “soft law” on human rights in relation to the environment and climate change, such as declarations and resolutions of the UN General Assembly, as well as reports of the Office of the High Commissioner for Human Rights,<sup>120</sup> Human Rights Council, and Special Rapporteur on Human Rights and the Environment.<sup>121</sup> These do not fall under categories of international law that can bind States.<sup>122</sup> However, although these are at most merely soft law, they can be recognized by courts.<sup>123</sup> The Court has characterized soft law as “non-binding norms, principles, and practices that influence state behavior.”<sup>124</sup>

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120. See, e.g., Office of the United Nations High Commissioner for Human Rights, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, ¶ 83, U.N. Doc. A/HRC/10/61 (2009).

121. Kristian Høyer Toft, *Climate Change as a Business and Human Rights Issue: A Proposal for a Moral Typology*, 5 BUS. HUM. RIGHTS J. 1, 2 n. 2. (2020) (In the Resolution adopted by the HRC on Oct. 8, 2021 [A/76/53/Add.1], the following were cited as reports of the Special Rapporteur: A/73/188, A/74/161, A/75/161, A/76/179, A/HRC/22/43, A/HRC/25/53, A/HRC/28/61, A/HRC/31/52, A/HRC/31/53, A/HRC/34/49, A/HRC/37/58, A/HRC/37/59, A/HRC/40/55, A/HRC/43/53, A/HRC/43/54, and A/HRC/46/28). U.N. Secretary-General, *Report of the Human Rights Council, 31st special session (24 August 2021), 48th session (13 September-11 October 2021), 76th Session of the General Assembly*, U.N. Doc. A/76/53/Add.1 (2021); The Human Right to a Clean, Healthy, and Sustainable Environment Res. 48/13, at 2, n. 3, U.N. Doc. A/HRC/RES/48/13 (Oct. 8, 2021); & U.N. Human Rights Council, *Report of the Human Rights Council on 2021*, n. 3, U.N. Doc. A/76/53/Add.1 (2021) (The latter source contains U.N. resolutions that explicitly address human rights as a climate change issue in 2018, such as: 7/23 in 2008; 10/4 in 2009; 18/22 in 2011; 26/27 in 2014; 29/15 in 2015; & 38/4 in 2018).

122. See United Nations, *How Decisions Are Made at the UN*, available at <https://www.un.org/en/model-united-nations/how-decisions-are-made-un> (last accessed July 31, 2022) [<https://perma.cc/RZ97-KAX5>]. “In other words, resolutions adopted by the GA on agenda items are considered to be recommendations and are not legally binding on the Member States. The only resolutions that have the potential to be legally binding are those that are adopted by the Security Council.” *Id.*

123. See *Pharmaceutical and Health Care Association of the Philippines*, 535 SCRA at 297.

124. *Pharmaceutical and Health Care Association of the Philippines*, 535 SCRA at 297.

A guide in laying out the standard of care by businesses in relation to human rights is the UN Guiding Principles on Business and Human Rights,<sup>125</sup> which draws from current and internationally endorsed insights. This is considered as soft law which can be persuasive in emerging rights-based climate change litigation. These guidelines do not per se give rise to legal liability (which still has to draw from legislation), but it can provide courts with basis to determine whether business entities had negligently or willfully disregarded their human rights responsibilities directly in their operations or indirectly in their business activities and relationships.<sup>126</sup>

### 3. Climate-related Human Rights Violations

The idea is to frame the personal injury and property damage as a human rights violation.<sup>127</sup> The human rights obligation of the duty-bearer, whether positive (commission) or negative (omission), must be specified.<sup>128</sup> Defendants can be held liable for climate change impacts only when it can be determined that it has, in fact, breached a human rights obligation owed to plaintiffs.<sup>129</sup> The duty of defendant, or the scope thereof, is interpreted in the context of the human rights regime.<sup>130</sup>

In actions for damages against private entities, the most obvious remedy on the basis of human rights is through a tort complaint.<sup>131</sup> This process entails translating human rights abuses into tort harms.<sup>132</sup> In this approach, human rights law merges with torts law.<sup>133</sup> Under established human rights law, corporations are not duty-holders, but it still offers possibilities in framing

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125. U.N. Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, *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*, annex, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

126. *See id.*

127. *See generally* Savaresi & Setzer, *supra* note 76.

128. Annalisa Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, 9 CLIMATE L. 244, 248 (2019).

129. *Id.*

130. Savaresi & Setzer, *supra* note 76, at 8.

131. *See* Savaresi & Auz, *supra* note 128, at 12.

132. *Id.*

133. *Id.*

innovative legal reasoning particularly for suits based on the links of human rights to climate change.<sup>134</sup>

Under the Revised Corporation Code of the Philippines, the conduct of corporations, both domestic and foreign corporations doing business in the country, is governed by Philippine law.<sup>135</sup> Since there is no domestic standard, the guidelines provided by the International Commission of Jurists, a well-respected international non-governmental organization which promotes human rights, on the matter of corporate responsibility for human rights violations can be useful.<sup>136</sup> It posits that a corporation is responsible if: (1) there was a harm to the interest of the victim that is protected by law; (2) the corporation's conduct contributed to the harm; (3) the corporation knew and should have foreseen that its conduct can contribute to the harm to the victim; and (4) the corporation did not take reasonable measures to avoid or minimize the harm.<sup>137</sup> These suggested requisites resemble the elements of a tort cause of action. Torts will be discussed more in the subsequent Section, which will at the same time, shed light as to what this action for damages based on human rights will require.

#### 4. Horizontal Application of Human Rights

In the rights-based approach, an issue is that corporations have no established human rights obligations, as these are only drawn from soft law presently.<sup>138</sup>

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134. Savaresi & Auz, *supra* note 128, at 3.

135. An Act Providing for the Revised Corporation Code of the Philippines [REV. CORP. CODE], Republic Act No. 11232, § 146 (2018). The pertinent portion of Section 146 reads —

Sec. 146. Law Applicable. — A foreign corporation lawfully doing business in the Philippines shall be bound by all laws, rules[,] and regulations applicable to domestic corporations of the same class, except those which provide for the creation, formation, organization[,] or dissolution of corporations or those which fix the relations, liabilities, responsibilities, or duties of stockholders, members, or officers of corporations to each other or to the corporation.

*Id.*

136. International Commission of Jurists, About, *available at* <https://www.icj.org/about> (last accessed July 31, 2022) [<https://perma.cc/P8L7-6WNP>].

137. INTERNATIONAL COMMISSION OF JURISTS, 3 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES 7 (2008).

138. Savaresi & Auz, *supra* note 128, at 12 (citing Ioana Cismas & Sarah Macrory, *The Business and Human Rights Regime under International Law: Remedy Without Law?*,

Climate-related rights are found in the Constitution and international human rights treaties where States are the duty-bearers, not private entities.<sup>139</sup> Furthermore, even when obligations can be cited, the human rights violation is framed into a tort, which has conceptual differences from the human rights regime.<sup>140</sup>

The direct major contributors to emissions this Article is focused on are private corporations, and the human rights regime is not straightforward in this realm of holding private entities liable for human rights violations associated with climate change, much less for damages caused by extreme weather events.<sup>141</sup> In the application of rights and duties, a vertical relationship exists between the State and the individual.<sup>142</sup> The vertical application of international human rights is due to the fact that States had originally been the subject of international law.<sup>143</sup> States are primarily responsible to secure human rights, hence the human rights legal regime is State-centric.<sup>144</sup>

The Court had already ruled that the Bill of Rights of the Constitution cannot be invoked against acts of private individuals and entities.<sup>145</sup> The exception is if they acted under the “color of a [S]tate-related function.”<sup>146</sup> It is hard to claim that the business of fossil fuel companies is a State-related function. The situation is not that of a corporation being complicit in state actions that violate human rights. Instead, it is a matter of the corporation’s own activities affecting human rights.

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*in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT 224-260 (James Summers & Alex Gough ed., 2018).

139. See Savaresi & Auz, *supra* note 128, at 12.

140. *Id.*

141. *Id.*

142. Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)discovering Duties: Individual Responsibility in the Age of Rights*, 259 MINNESOTA J. INT’L L. 189, 205 (2017).

143. TIMO KOIVUROVA, INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW 54 (2012).

144. Council of Europe, Legal Protection of Human Rights, *available at* <https://www.coe.int/en/web/compass/legal-protection-of-human-rights> (last accessed July 31, 2022) [<https://perma.cc/68NR-RFYH>]. “The duty of the State to respect, promote, protect[,] and fulfil rights is therefore primary, and that of regional or international tribunals subsidiary, coming into play mainly where the state is deliberately or consistently violating rights.” *Id.*

145. *People v. Marti*, G.R. No. 81561, 193 SCRA 57, 67 (1991).

146. *Id.*

In *People v. Marti*,<sup>147</sup> the Court ruled that the Bill of Rights can be invoked only against the government and not against private actors.<sup>148</sup> This case involved the constitutional right against unreasonable searches and seizures,<sup>149</sup> and discussed the exclusion of evidence obtained by a private actor in a private capacity.<sup>150</sup> The Court declared that “[in] the absence of governmental interference, the liberties guaranteed by the Constitution cannot be invoked against the State.”<sup>151</sup> If the private actors acted with the color of State-related functions, they are deemed agents of government and the constitutional rights may be invoked even against them.<sup>152</sup> Even so, this does not mean that there is no recourse against private entities when they violate constitutional rights. The remedies may be found in statute, such as the Civil Code of the Philippines<sup>153</sup> for civil claims and Revised Penal Code<sup>154</sup> for crimes.<sup>155</sup> Under Article 32 of the Civil Code, an action for damages can be brought against a private individual “who directly or indirectly obstructs, defeats, violates[,] or in any manner impedes or impairs rights and

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147. *Marti*, 193 SCRA at 64. To explain the rationale, it cited Commissioner Bernas in his sponsorship speech in the Bill of Rights —

First, the general reflections. The protection of fundamental liberties in the essence of constitutional democracy. Protection against whom? Protection against the state. The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder.

*Id.*

148. *Id.*

149. PHIL. CONST. art. III, § 2.

150. *Marti*, 193 SCRA at 64.

151. *Id.*

152. *Dela Cruz v. People*, G.R. No. 209387, 779 SCRA 34, 61 (2016) & *Miguel v. People*, G.R. No. 227038, 833 SCRA 440, 451 (2017). *See also* *People v. Malngan*, G.R. No. 170470, 503 SCRA 294, 324 (2006) & *People v. Lauga*, G.R. No. 186228, 615 SCRA 548, 556 (2010).

153. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1949).

154. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815 (1930).

155. *Waterous Drug Corporation v. National Labor Relations Commission*, G.R. No. 113271, 280 SCRA 735, 747 (1997). *See also* *Silahis International Hotel, Inc. v. Soluta*, G.R. No. 163087, 482 SCRA 660, 667 (2006).

liberties.”<sup>156</sup> Though the rights affected by climate change are not enumerated therein, the existence of this provision in the Civil Code indicates that there is no inherent problem in framing human rights violations into torts.<sup>157</sup>

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156. CIVIL CODE, art. 32. Article 32 reads —

Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

1. Freedom of religion;
2. Freedom of speech;
3. Freedom to write for the press or to maintain a periodical publication;
4. Freedom from arbitrary or illegal detention;
5. Freedom of suffrage;
6. The right against deprivation of property without due process of law;
7. The right to a just compensation when private property is taken for public use;
8. The right to the equal protection of the laws;
9. The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;
10. The liberty of abode and of changing the same;
11. The privacy of communication and correspondence;
12. The right to become a member of associations or societies for purposes not contrary to law;
13. The right to take part in a peaceable assembly to petition the Government for redress of grievances;
14. The right to be a free from involuntary servitude in any form;
15. The right of the accused against excessive bail;
16. The right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witness in his behalf;
17. Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness;

The Court has not yet recognized the so-called horizontal application of human rights as enunciated in other jurisdictions.<sup>158</sup> It had seldom accepted

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18. Freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional; and

19. Freedom of access to the courts.

In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.

The indemnity shall include moral damages. Exemplary damages may also be adjudicated.

The responsibility herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

*Id.*

157. *See id.*

158. Jernej Letnar Cernic, *Corporate Obligations Under the Human Right to Water*, 39 DENV. J. INT'L L. & POL'Y 303, 333 (2011). *See also* Margaretha Wewerinke-Singh, *Litigating Human Rights Violations Related to the Adverse Effects of Climate Change in the Pacific Islands*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 101-02 (Jolene Lin & Douglas A. Kaysar eds., 2020). A pertinent portion of the Article reads —

For example, Vanuatu's Constitution provides that '[a]nyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.' The Supreme Court is in turn mandated to 'make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right'. The broad phrasing of both provisions suggests that individuals could enforce their rights even if the infringement is committed by non-State actors—an interpretation that appears to be supported by case law. The situation is similar in the Solomon Islands, Western Samoa and Tonga, where the [C]onstitution leaves open the possibility that fundamental rights have a horizontal as well as a vertical effect, with case law confirming that there may be a horizontal effect in some cases. In Tuvalu, the section of its constitution relating to the scope of fundamental rights states expressly that it applies 'between individuals as well as between governmental bodies and individuals' and 'to and in relation to corporations and



the invocation of constitutional rights against private actors, but it had done so.<sup>159</sup> Though it had not yet used the horizontal application, there is no reason why it cannot as the final arbiter of the Constitution. It is not so farfetched to rule that human rights can be invoked against private actors which have to respect and not violate the same. In case of private entities-multinational corporations, the argument is that such private actors wield as much, or even more power than States over individuals which the host State cannot properly control or regulate. A corporation has economic resources that the government may not have. Thus, they should have human rights obligations that if violated would give rise to responsibility.

### B. Tort Law

Even if there is no specific environmental law or climate change statute or regulation which victims of climate harms can use as basis to bring suit for damages, tort law had been resorted to as an existing legal tool to do so.<sup>160</sup> The Philippines inherited a civil law system, being a former colony of Spain, wherein fundamental laws are found in comprehensive codes.<sup>161</sup> Accordingly, the country adopted the common law concept of tort and incorporated it into the Civil Code.<sup>162</sup> The word “tort” is not found in the Code, but it has counterparts such as the provisions on abuse of right, nuisance, quasi-delict, and unjust enrichment.<sup>163</sup> Quasi-delicts are usually considered under Philippine jurisprudence as the concept that corresponds to torts, and the others are special kinds of torts.<sup>164</sup> Hence, this Article shall focus on quasi-delict. Climate torts using the provisions on quasi-delict focus on the liability of emitters which contribute to climate change that causes injury or damage

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associations (other than governmental bodies) in the same way as it applies to and in relation to individuals, except where, or to the extent that, the context requires otherwise.’

Wewerinke-Singh, *supra* note 158.

159. *Zulueta v. Court of Appeals*, G.R. No. 107383, 253 SCRA 699, 703 (1996). In this case, private correspondences were ruled as inadmissible in evidence for having been obtained by the wife in violation of the constitutional right to privacy of her husband. *Id.*

160. *See Savaresi & Auz, supra* note 128, at 12.

161. Ruben F. Balane, *The Spanish Roots of Philippine Law*, 66 ESTUDIOS DE DEUSTO 23, 28 (2018).

162. JOAN S. LARGO, LAWS AND JURISPRUDENCE ON TORTS AND DAMAGES 1-2 (2007).

163. *See* CIVIL CODE, arts. 19-21, 27, & 2176.

164. *See* MYRNA S. FELICIANO PHILIPPINE LEGAL SYSTEM 109 (2015).

to another. In climate torts, the one made liable is the one responsible for wrongful emissions.

### I. Concept of Quasi-delict

Quasi-delict is a more limited concept compared to the common law concept of tort,<sup>165</sup> since the former relates only to negligent acts, and excludes the notion of malice, willfulness, or intent.<sup>166</sup> The definition is found in Article 2176 of the Civil Code which reads —

Article 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this chapter.<sup>167</sup>

Just like tort law, the “law on quasi-delicts seeks to reduce the risks and burdens of living in society and to allocate them among its members.”<sup>168</sup>

To claim liability under quasi-delict, the following requisites must be present: “(a) damages suffered by the plaintiff; (b) fault or negligence of the defendant, or some other person for whose acts he [or] she must respond [to]; and (c) the connection of cause and effect between the fault or negligence of the defendant and the damages incurred by the plaintiff.”<sup>169</sup> The Civil Code defines fault or negligence as —

Article 1173. The fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place.

...

If the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required.<sup>170</sup>

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165. *Baksh v. Court of Appeals*, G.R. No. 97336, 219 SCRA 115, 127 (1993).

166. *See* CIVIL CODE, art. 2176.

167. CIVIL CODE, art. 2176.

168. *Tiu v. Arriegasado*, G.R. No. 138060, 437 SCRA 426, 446 (2004).

169. *Sps. Dalen v. Mitsui O.S.K. Lines*, G.R. No. 194403, 910 SCRA 130, 140 (2019) (citing *Indophil Textile Mills, Inc. v. Adviento*, G.R. No. 171212, 731 SCRA 558, 572 (2014)).

170. CIVIL CODE, art. 1173.

Under Philippine jurisprudence, negligence is defined as “failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.”<sup>171</sup> It is a relative term that is “to be decided in accordance with the peculiar circumstances that present themselves. There can be no hard and fast rule.”<sup>172</sup> The test to determine whether conduct is negligent is that of ordinary reasonable care of a prudent person.<sup>173</sup> This is related to foreseeability of the harm, such that the prudent person is put on alert in order to take precautions against the harm, and such ability to foresee depends on the facts of the case and human experience.<sup>174</sup>

Damages are compensation for an injury and intended to restore the injured party in the position in which the party was before the injury.<sup>175</sup> Under Article 2202, for quasi-delicts, “the defendant shall be liable for all damages which are the natural and probable consequences of the act or omission complained of.”<sup>176</sup> Thus, “[it] is not necessary that such damages have been foreseen or could have reasonably been foreseen by the defendant.”<sup>177</sup>

To be liable, the negligent act or omission of defendant must be the proximate cause of plaintiff’s loss, damage, or injury. “Proximate cause has been defined as that which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.”<sup>178</sup> These provisions and jurisprudence are illustrated in the following cases.

In *Agusan Del Norte Electric Cooperative, Inc. (ANECO) v. Balen*.<sup>179</sup> ANECO, a cooperative engaged in supplying electricity, was the defendant in an action for damages wherein it was alleged that ANECO’s negligence was

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171. *Abrogar v. Cosmos Bottling Company*, G.R. No. 164749, 820 SCRA 301, 331 (2017).

172. *Corliss v. Manila Railroad Co.*, G.R. No. L-21291, 27 SCRA 674, 685 (1969).

173. *Picart v. Smith* G.R. No. L-12219, 37 Phil. 809, 813 (1918).

174. *Id.*

175. *Yamauchi v. Suñiga*, G.R. No. 199513, 861 SCRA 583, 596 (2018) (citing *Filipinas Systems, Inc. v. MRT Development Corporation*, G.R. Nos. 167829-30, 537 SCRA 609, 639-40 (2007)).

176. CIVIL CODE, art. 2202.

177. *Id.*

178. *Abrogar*, 820 SCRA at 322.

179. *Agusan Del Norte Electric Cooperative, Inc. (ANECO) v. Balen*, G.R. No. 173146, 605 SCRA 469 (2009).

the proximate cause of the injuries of plaintiffs Balen, et al.<sup>180</sup> ANECO's main distribution line passed Balen's residence such that Balen and others were electrocuted while in the process of removing a television antenna which touched the high-tension wires of this distribution line, causing them to sustain third degree burns.<sup>181</sup> The Court agreed that although ANECO followed the clearance requirements under the law, it should have reasonably foreseen that there was risk of electrocution considering they installed open wires of high voltage and failed to make proper precautions by insulating such wires.<sup>182</sup> The victims did not know about and could not have reasonably foreseen the danger or peril posed by such wires.

In *Navida v. Dizon*,<sup>183</sup> plaintiff workers and residents sought damages for injuries and illnesses (particularly related to their reproductive system) they allegedly sustained from their exposure to dibromochloropropane, a chemical found in products "manufactured, produced, sold, distributed, used, and/or made available in commerce" by defendant foreign companies and used to kill nematodes (roundworms), while they were residing in the Philippines or employed in farms located in the country.<sup>184</sup> It was alleged that these acts and omissions were committed "without informing the users of [the products'] hazardous effects on health and/or without instructions on [their] proper use and application."<sup>185</sup> The trial court dismissed the complaint for lack of jurisdiction over the subject matter and stated among others that activities of defendants took place abroad and had occurred outside Philippine territory.<sup>186</sup> The Court ruled that based on the conduct attributed to the defendants as manufacturers and the place where the cause of action accrued, the courts have jurisdiction over the quasi-delict which was the basis for the claim for damages.<sup>187</sup>

The Civil Code provisions on quasi-delict are broad enough to cover climate torts and the courts can have an extensive role in interpreting such provisions in the context of climate change. Plaintiffs will argue that a GHG emitter acted negligently by engaging in behavior that contributed to climate change by emitting excessive amounts of GHG emissions. They will prove

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180. *Id.* at 470-71.

181. *Id.*

182. *Id.* at 475-76.

183. *Navida v. Dizon*, G.R. No. 125078, 649 SCRA 33 (2011).

184. *Id.* at 64.

185. *Id.* at 76.

186. *Id.* at 64-66.

187. *Id.* at 74.

that this negligence consisted in doing nothing to reduce their GHG emissions despite foreseeing their negative effects on climate change, thereby creating an unreasonable risk of harm which ultimately led to injury to plaintiffs. It is argued that the starting point of the negligence can be pinned during the establishment of 1992 UNFCCC because from this time, the risks were already foreseeable.<sup>188</sup> The level of confidence regarding the adverse effects of anthropogenic climate change and the consensus of scientists regarding the research are also factors to consider in evaluating foreseeability. Beyond this point, it can be alleged that it was negligent for the defendants not to take action to reduce their emissions. Plaintiffs can also charge defendants with failure to warn the public regarding the foreseeable harmful impacts of fossil fuel products on the climate. The standard of foreseeability in the case of fossil fuel companies is in proving that they had knowledge about the emissions caused by their business and products and their effects on climate change and possible resulting harms of the same.

## 2. Causation

In the context of climate change wherein the human contribution of GHG emissions to the climate and the relation of climate change to causing the climate hazard are studied scientifically, climate victims must show that the harms they suffered are traceable to defendants' action or inaction. Because an action for damages, whether invoking human rights or tort, seeks to make the defendant liable to the plaintiff, causation provides the relationship that connects them, i.e., the link between the behavior of the defendant and the subsequent harm to plaintiff.<sup>189</sup> As previously discussed, in an action for damages because of climate harms presented as human rights violations, the possible basis of liability is also tort.

For a cause of action in an action for damages, the determination of causation is both factual and legal.<sup>190</sup> In climate litigation, plaintiffs must show that anthropogenic GHG emissions contribute to climate change (general causation). This is then linked to the extreme weather event that caused specific harms suffered (specific causation). While it can be easy to establish the first causal link which is the well-accepted finding that anthropogenic climate change causes climate impacts, it is harder to prove the next part of the causal chain which is that defendants' conduct caused the concrete harms caused by climate change. Defendants can dispute that there is available science capable of identifying, measuring, or evaluating the connection between the

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188. UNFCCC, *supra* note 1.

189. *Abrogar*, 820 SCRA at 328.

190. *See id.*

GHG emissions of a particular emitter and the localized or discrete climate impacts in a particular place and time. Indeed, courts in other jurisdictions had already called this causal link as tenuous or speculative.<sup>191</sup>

It is clear that the only way to prove causation in any climate damage claim is through robust scientific evidence.<sup>192</sup> Attribution science<sup>193</sup> becomes necessary in the three causal links that have to be established by plaintiffs: (1) linking a specific change or event to human-induced climate change (i.e., climate change and extreme event attribution); (2) linking a specific harm to that change or event (i.e., impact attribution<sup>194</sup>); and (3) linking the defendant's conduct (i.e., release of GHG emissions) to anthropogenic climate change and pointing out the defendant's proportionate contribution to the harm incurred by the plaintiff, i.e., source attribution.<sup>195</sup> To demonstrate, plaintiffs should prove that defendants' emissions contributed to climate change which then caused the extreme weather event such as a super typhoon that caused a storm surge and flooding. Thereafter, the floods and storm surge

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191. See, e.g., *Smith v. Fonterra Co-Operative Group Limited*, Case No. CIV-2019-404-001730 [2020] NZHC 419, para. 67 (2020) (N.Z.).

192. See *id.*

193. Rachel A. James, et al., *Attribution: How Is it Relevant for Loss and Damage Policy and Practice?*, in *LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS* 127 (Reinhard Mechler & Laurens M. Bouwer, et al., eds. 2019). “Attribution is defined as ‘the process of evaluating the relative contributions of multiple causal factors to a change or event with an assignment of statistical confidence.’” *Id.*

194. Michael Burger, et al., *The Law and Science of Climate Change Attribution*, 45 *COLUM. J. ENVTL. L.* 60, 111 (2020) (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 9, at 124). The IPCC defined impacts, thus —

In this report, the term impacts is used primarily to refer to the effects on natural and human systems of extreme weather and climate events and of climate change. Impacts generally refer to effects on lives, livelihoods, health, ecosystems, economies, societies, cultures, services[,] and infrastructure due to the interaction of climate changes or hazardous climate events occurring within a specific time period and the vulnerability of an exposed society or system. Impacts are also referred to as consequences and outcomes. The impacts of climate change on geophysical systems, including floods, droughts[,] and sea level rise, are a subset of impacts called physical impacts.

*Id.*

195. *Id.* at 205.

caused death, injuries, and damage to property. To simplify, such damages should be shown to be caused by the defendants' emissions.

In order for the act of the defendant to be established as the proximate cause of the injury to make such defendant liable to plaintiff, the "but for test" is used in Philippine jurisprudence, wherein the harm would not have occurred without the negligent conduct of the defendant.<sup>196</sup>

*a. Precautionary Principle*

In terms of causation, the precautionary principle can be useful. The precautionary principle is expressly recognized in the RPEC, providing that "when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat."<sup>197</sup> It is used for assessing evidence to "aid plaintiffs in establishing cases that would be, under most circumstances, difficult[,] if not impossible to prove."<sup>198</sup> This only applies when the link between the cause, that is the human activity, and the effect that is the environmental damage, cannot be established with full scientific certainty.<sup>199</sup> The use of this principle is still controversial as the burden of proof is transferred to the one conducting the alleged harmful activity, the defendant in the suit.<sup>200</sup> The Court stated that the principle is an evidentiary rule that must be applied only as a last resort.<sup>201</sup> If the constitutional right to a balanced and healthful ecology can be protected without its application, then the courts should avoid using it.<sup>202</sup>

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196. Rommel J. Casis, *Blame Game: Determining Contributory Negligence*, 63 ATENEO L.J. 955, 963 (2019).

197. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 1, § 4 (f).

198. Rationale to the Rules of Procedure for Environmental Cases, *supra* note 88, at 87.

199. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 20, § 1. The pertinent portion of Section 1 reads "[w]hen there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it." *Id.*

200. *See* Rationale to the Rules of Procedure for Environmental Cases, *supra* note 88, at 87.

201. *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia, G.R. No. 209271, 776 SCRA 434, 606 (2015)* (This decision was reconsidered but only on the ground of mootness.).

202. *Id.* at 637.

For climate cases, the precautionary principle finds application where there is lack of full scientific certainty in establishing the causal link, such as when there is proof of defendants' knowledge that their emissions increase the likelihood of harm, but they raise the defense that it is still uncertain how climate impacts are actually caused.<sup>203</sup> It does not intend to fill in the gaps in the evidence when it is difficult to obtain as the plaintiffs are still burdened to prove their allegations.<sup>204</sup> The plaintiffs should prove the injury they suffered and the act or omission of the defendant then "whether the act is known to have caused the injury may be remedied by the precautionary principle should there be a lack of scientific data to support it."<sup>205</sup>

*b. Climate Science*

Many aspects of a climate suit rely on climate science, such as the quantification of contribution to emissions, causal links, and foreseeability of the climate risks of harm.<sup>206</sup> The conclusion in the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)<sup>207</sup> that "[it] is unequivocal that human influence has warmed the atmosphere, ocean[,] and land"<sup>208</sup> shows the progression in terms of certainty that human activities were

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203. See RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 20, § 1.

204. See *Paje v. Casiño*, G.R. No. 207257, 749 SCRA 39, 84-85 (2015).

205. Gilyen Ezra Marie L. Li, *Filling in the Gaps: Strengthening Environmental Tort Law in the Philippines*, 63 ATENEO L.J. 1156, 1198 (2019).

206. See Asian Development Bank, *Climate Change, Coming Soon to a Court Near You: Climate Litigation in Asia and the Pacific and Beyond*, at 14, available at <https://www.adb.org/sites/default/files/publication/659631/climate-litigation-asia-pacific.pdf> (last accessed July 31, 2022) [<https://perma.cc/HDU3-39UU>].

207. The IPCC is the leading global authority on climate change science. The UN General Assembly endorsed the creation of the IPCC, which is both a scientific body composed of thousands of scientists around the world and an intergovernmental body that was envisioned to provide the world with regular and comprehensive assessments on the scientific, technical and socio-economic information, and policy challenges related to climate change. Intergovernmental Panel on Climate Change, *About the IPCC*, available at <https://www.ipcc.ch/about> (last accessed July 31, 2022) [<https://perma.cc/CD48-NUPP>].

208. Intergovernmental Panel on Climate Change, 2021 Summary for Policymakers in *Climate Change 2021: The Physical Science Basis (Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change)*, at 4, available at [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf) (last accessed July 31, 2022) [<https://perma.cc/NB56-UZ4V>].



causing climate change and that the science is becoming more and more robust as time progresses.<sup>209</sup> In climate litigation in other jurisdictions, defendants do not anymore deny the climate science that shows climate change is happening, that anthropogenic GHG emissions (including their own) are main contributors and these are contributing to climate events that cause harms.<sup>210</sup> However, they contest the quantification of their contribution to a specific climate harm and reject the contention that they should be liable for these harms.<sup>211</sup>

There are some facts that the court may take judicial notice of (such as the “laws of nature”), meaning, the same need not be proved under Rule 129 of the Rules of Court.<sup>212</sup> But the bulk of factual circumstances of the causation has to be proven.<sup>213</sup> Therefore, it is necessary to discuss basic climate science before making a case for climate change liability. Climate change law, as a legal regime, developed from the science which determined that a disastrous climate change was happening brought about by anthropogenic causes.<sup>214</sup>

IPCC reports and the methodologies used therein are considered as the most well-established, comprehensive, and updated consensus view on climate science.<sup>215</sup> Defendants, however, can challenge that such IPCC reports alone could not provide basis for the causation for plaintiffs’ particular injuries. When applied to the specific parties and other circumstances of the court case, they can highlight the uncertainties and inaccuracies in the findings and fallibility of the conclusions in the reports in order to cast doubt.<sup>216</sup> There is still the need for scientific studies which are more specifically applicable to local circumstances of the climate impact. This is relevant especially since the strength of the evidence depends on the parameters and strength of particular study, i.e., the research question and methodology used in the climate model

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209. *See id.*

210. MARIA L. BANDA, CLIMATE SCIENCE IN THE COURTS: A REVIEW OF U.S. AND INTERNATIONAL JUDICIAL PRONOUNCEMENTS 78 (2020).

211. *Id.*

212. RULES OF COURT, rule 129.

213. *See Paje*, 749 SCRA at 84-85.

214. *See Asian Development Bank*, *supra* note 206, at 5.

215. Intergovernmental Panel on Climate Change, History of the IPCC, *available at* <https://www.ipcc.ch/about/history> (last accessed July 31, 2022) [<https://perma.cc/74FE-LYXU>].

216. Fred K. Morrison, et al., *Climate Change Science and the Daubert Standard*, 44 WM. & MARY ENVTL. L. & POL'Y REV. 391, 406 (2020).

simulation.<sup>217</sup> Still, there remains the difficult task of proving that “defendants’ contributions to anthropogenic climate change caused any particular incidence of a phenomenon.”<sup>218</sup>

i. Extreme Event Attribution

In relation to climate tort, the state of climate science is such that scientists cannot prove that a certain event was caused by human-induced climate change.<sup>219</sup> However, the science can quantify the probability of extreme weather events which then allows causal inferences to be made.<sup>220</sup> Attribution science looks at a “counterfactual” climate wherein there was no anthropogenic GHG emissions, to measure the effect on a climate-related event<sup>221</sup> and then to compare it to the “real” world of what actually happened so that the anthropogenic aspect can be isolated and analyzed.<sup>222</sup> In causation, this translates to the question of whether the harm would have happened in the absence of defendant’s conduct, or if the event was caused, at least in part, by the same.<sup>223</sup>

As defined, extreme event attribution assesses how human GHG emitting activities can cause changes in the global climate system, affecting the likelihood, frequency, severity, and other features of extreme events. In order to connect the GHG emission to the event which led to the harm, the event would need to be unique and never would have happened naturally.<sup>224</sup> It may be impossible, even in the future, to conclude that a single event would not

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217. See Robert F. Blomquist, *Comparative Climate Change Torts*, 46 VAL. U. L. REV. 1053, 1057 (2012) (citing David A. Grossman, *Tort-Based Climate Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 217 (William C.G. Burns & Hari M. Osofsky eds., 2009)).

218. *Id.*

219. James Wang & Bil Chameides, *Are Humans Responsible for Global Warming? A Review of the Facts*, at 4-6, available at [https://www.edf.org/sites/default/files/5279\\_GlobalwarmingAttributuion.pdf](https://www.edf.org/sites/default/files/5279_GlobalwarmingAttributuion.pdf) (last accessed July 31, 2022) [<https://perma.cc/837C-HRBE>].

220. Petra Minnerop & Friederike Otto, *Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic*, 27 BUFF. ENVTL. L. J. 49, 50 (2020).

221. *Id.* at 83.

222. See *id.* at 84.

223. See *id.* at 55-56.

224. Louis Charles Chambers, *Tort Law, Climate Change, and Private Nuisance*, at 18 (Oct. 2012) (unpublished LL.B. (Hons) dissertation, University of Otago) (on file with the University of Otago Law Library).

have occurred if not for the human-induced emissions. However, it is possible to illustrate that an extreme event was made more likely (and how much more likely percentage wise) by human-made emissions. One kind of climate science called probabilistic event attribution looks at the probability that an event becoming more likely to occur or more intense because of anthropogenic climate change, in addition to the effects of natural climatic variability.<sup>225</sup> Scientific findings are expressed “in probabilistic terms, as scientists reject the notion that deterministic attribution of weather events is ever possible — because it is impossible to say that the event would ‘never’ have occurred in the ‘counterfactual’ world.”<sup>226</sup>

The usual extreme events in the Philippines are typhoons or tropical storms.<sup>227</sup> Because of the location of the country, typhoons that form in the ocean often enter the country.<sup>228</sup> In fact, the finding of the IPCC is that the average number of typhoons in the Western North Pacific is expected to decrease but the increased frequency of super typhoons is likely.<sup>229</sup> For typhoon Haiyan/Yolanda, there are some studies<sup>230</sup> seeking to check if the increased intensity of Haiyan can be attributed to human influence —

We conducted ensemble simulations with very high resolution regional climate models and a surge model, and reproduced well the pressure depression, wind speed[,] and surge level of Typhoon Haiyan, as an example of a worst case scenario. Furthermore, we compared these results with the

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225. Minnerop & Otto, *supra* note 220, at 53.

226. Sophie Marjanac, et al., *Acts of God, Human Influence, and Litigation*, in *NATURE GEOSCIENCE* 616 (2017).

227. Amnesty International UK, *supra* note 39.

228. Habitat for Humanity, *Response to Typhoons in the Philippines*, available at <https://www.habitatforhumanity.org.uk/what-we-do/natural-disaster-response/response-to-typhoons-philippines> (last accessed July 31, 2022) [<https://perma.cc/GZS5-PGYM>]. “The Philippines straddles the typhoon belt, an area in the western Pacific Ocean where nearly one-third of the world’s tropical cyclones form.” *Id.*

229. Intergovernmental Panel on Climate Change, *Summary for Policymakers in Climate Change 2013: The Physical Science Basis (Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change)*, at 7 tbl. 1, available at [https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5\\_SPM\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WG1AR5_SPM_FINAL.pdf) (last accessed July 31, 2022) [<https://perma.cc/28BA-ZY7G>].

230. Janneli Lea A. Soria, et al., *Repeat Storm Surge Disasters of Typhoon Haiyan and Its 1897 Predecessor in the Philippines*, 97 *BULL. OF AM. METEOROLOGICAL SOC’Y* 31, 45 (2016) & Izuru Takayabu, et al., *Climate Change Effects on the Worst-Case Storm Surge: A Case Study of Typhoon Haiyan*, 10 *ENVTL. RES. LETT.* 1, 8 (2015).

results of ensemble simulations of a hypothetical natural event, one without human influences, and found that the simulated worst case typhoon and the accompanying storm surge in the real condition became worse than those in the hypothetical natural climate without anthropogenic forcing. In 15 [out] of 16 ensemble simulations, the typhoon became stronger than it did in the hypothetical natural cases, and the height of the storm surge around Tacloban increased by around 20%.<sup>231</sup>

This field of science is new, having a first study come out in the early 2000s, but it is quickly developing.<sup>232</sup> Because of its novelty, the courts have not yet had the chance to use it as a source of evidence that will serve as a basis for its findings in assessing causation.<sup>233</sup> Its use in litigation depends on the scope and scale of the study and its applicability to the specific event under consideration and whether assessment of the causation will align with the framing of the study. Courts will probably be more inclined to look favorably on evidence that shows quantitative estimate of the influence of climate change on the event's intensity or likelihood.

#### ii. Expert Testimony

Considering that climate change, its causes, and impacts involve scientific findings, their presentation in courts would be in the form of expert testimony.<sup>234</sup> Under the Rules of Court, expert testimony may be received in evidence on matters requiring the expert's special knowledge, skill, experience, or training.<sup>235</sup> Both parties can submit their scientific evidence which can be contested through cross-examination.<sup>236</sup> Such experts usually testify on a report which they prepared and interpret the scientific data in support of the fact that the party is seeking to establish.<sup>237</sup> The court can also determine the necessity of engaging the services of a qualified expert as *amicus*

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231. Takayabu, et al., *supra* note 230, at 8.

232. *See id.* at 2 (citing Pardeep Pal, et al., *Anthropogenic Greenhouse Gas Contribution to Flood Risk in England and Wales in Autumn 2000*, 470 NATURE 382, 384 (2011)).

233. *See generally* Takayabu, *supra* note 230, at 8.

234. *See* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, §§ 46 & 49.

235. 2019 AMENDMENTS TO THE REVISED RULES ON EVIDENCE, rule 130, § 49.

236. *Id.* rule 132, § 6.

237. *Id.* rule 130, § 46.

*curiae*.<sup>238</sup> These judicially appointed experts, who are non-partisan, can assist the court in its assessment.<sup>239</sup>

Under Rule 130, Section 52 of the Rules of Court, the opinion of a climate scientist qualified to be an expert is admissible.<sup>240</sup> In providing for guidelines in the use of scientific evidence, the United States (U.S.) case, *Daubert v. Merrell Dow*,<sup>241</sup> was used by the Court in *People v. Yatar*<sup>242</sup> which dealt with the issue of deoxyribonucleic acid evidence.<sup>243</sup> It was ruled that the tests for admissibility of scientific evidence are its relevance and reliability, based on the discretion of the trial court judge.<sup>244</sup> Evidence is relevant when it relates directly to a fact in issue as to “induce belief in its existence or non-existence.”<sup>245</sup> It is reliable if reasonably based on scientifically valid reasoning and robust methodology.<sup>246</sup> Evidence is admissible when it is relevant to the fact in issue and competent, i.e., it is not otherwise excluded by Constitution, law, or the Rules of Court.<sup>247</sup> In *Herrera v. Alba*,<sup>248</sup> the Court ruled that *Daubert* is persuasive jurisprudence in Philippine jurisdiction.<sup>249</sup>

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238. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 3, § 6 (I). This rule provides “[i]f there is no full settlement, the judge shall ... [d]etermine the necessity of engaging the services of a qualified expert as a friend of the court (*amicus curiae*); ... ” *Id.*

239. RULES OF COURT, rule 138, § 36 defines *amicus curiae* as “experienced and impartial attorneys [who] may be invited by the Court to appear as *amici curiae* to help in the disposition of issues submitted to it.” *Id.*

240. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 52. According to this provision, “[t]he opinion of a witness on a matter requiring special knowledge, skill, experience, training[,] or education, which he or she is shown to possess, may be received in evidence.” *Id.*

241. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 598 (1993).

242. *People v. Yatar*, G.R. No. 150224, 428 SCRA 504 (2004).

243. *Id.* at 516-17.

244. *Id.* at 519.

245. 2019 AMENDMENTS TO THE REVISED RULES ON EVIDENCE, rule 128, § 4.

246. *See Yatar*, 428 SCRA at 517.

247. 2019 AMENDMENTS TO THE REVISED RULES ON EVIDENCE, rule 128, § 3.

248. *Herrera v. Alba*, G.R. No. 148220, 460 SCRA 197 (2005).

249. *Id.* at 216.

Though expert testimony is not binding in courts, it can be assigned weight under guidelines provided in Rule 133 of the Rules of Court.<sup>250</sup> This usually leads to giving weight to opinion on scientific information which is widely undisputed in the scientific community.<sup>251</sup> The wide acceptance of IPCC's various reports gives them legitimacy, making them a credible source and can be argued as having high evidentiary value.<sup>252</sup> Even if not an IPCC report, other attribution studies can be given weight if shown that the methods used are reliable. In exercising discretion,

[judges] may place whatever weight they choose upon such testimonies in accordance with the facts of the case. The relative weight and sufficiency of expert testimony is peculiarly within the province of the trial court to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, and any other matters which serve to illuminate his statements. The opinion of an expert should be considered by the court in view of all the facts and circumstances of the case. The problem of the evaluation of expert testimony is left to the discretion of the trial court whose ruling thereupon is not reviewable in the absence of an abuse of that discretion.<sup>253</sup>

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250. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 133, § 5.

This pertinent section incorporated the tests of admissibility in *Daubert* which reads —

Sec. 5. Weight to be given opinion of expert witness, how determined.

— In any case where the opinion of an expert witness is received in evidence, the court has a wide latitude of discretion in determining the weight to be given to such opinion, and for that purpose may consider the following:

- (a) Whether the opinion is based upon sufficient facts or data;
- (b) Whether it is the product of reliable principles and methods;
- (c) Whether the witness has applied the principles and methods reliably to the facts of the case; and
- (d) Such other factors as the court may deem helpful to make such determination.

*Id.*

251. *Id.* § 5 (1).

252. See Imke Hoppe & Simone Rödder, *Speaking with One Voice for Climate Science — Climate Researchers' Opinion on the Consensus Policy of the IPCC*, JCOM 2019, at 12.

253. *Ilao-Quianay v. Mapile*, G.R. No. 154087, 474 SCRA 246, 255 (2005).

Attribution studies are usually presented in terms of confidence levels in the certainty of the results (e.g., high or medium confidence).<sup>254</sup> Judges will have to rely on their own discretion in the threshold or standard they will accept in giving weight to the study and assessing its application to the facts before them. Judges will usually look at the thoroughness and definiteness of the study, and whether the same is too general or had been refuted.<sup>255</sup>

In *Tortona v. Gregorio*,<sup>256</sup> the Court again cited *Daubert*, wherein the U.S. Supreme Court placed on the judge the duty to act as “gatekeeper” when faced with a proffer of expert scientific testimony — “Thus, the judge must make a preliminary determination of whether or not the offered testimony is scientific knowledge and whether or not it will assist the trier of fact to understand or determine a fact in issue.”<sup>257</sup>

The judge, in exercising discretion, is duty-bound to ascertain the legitimacy and preciseness of the science that is presented as evidence. This includes the task of excluding unreliable science. *Tortona*, relying on *Daubert*, enumerated some standards that should be considered by the judge, to wit —

Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.

However, the standards are not exclusive [—]

The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules.<sup>258</sup>

Part of the role of the judge as gatekeeper is to be able to verify if the science presented reaches the standard of the best available science or respected scientific opinion.<sup>259</sup> If presented with different (or even conflicting) views

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254. Climate Centre, Top 10 Things to Know About Extreme Event Attribution, available at <https://www.climatecentre.org/wp-content/uploads/Top-10-Things-to-know-about-extreme-event-attribution.pdf> (last accessed July 31, 2022) [<https://perma.cc/3BDQ-JN28>].

255. Burger, et al., *supra* note 194, at 170–71.

256. *Tortona v. Gregorio*, G.R. No. 202612, 851 SCRA 448 (2018).

257. *Id.* at 472.

258. *Tortona*, 851 SCRA at 472 (citing *Daubert*, 509 U.S. at 595).

259. Paris Agreement, *supra* note 115, arts. 4 (1), 7 (5), & 14 (1). In the Paris Agreement, the Preamble and in other parts mentioned the

within the scientific community (both private sector or government agencies), the judge has discretion to pick what is acceptable, e.g., rejecting what is arbitrary, incomplete, or outdated.<sup>260</sup> Ultimately, it is the court's duty to rule on the relevance and admissibility of evidence, assessment of its weight, and draw conclusions from them in resolving the issues of the case.<sup>261</sup>

## V. PRELIMINARY AND PROCEDURAL ISSUES

Climate change cases are besieged by many issues, both in the preliminary stages, some of which this Article examines, such as jurisdiction, justiciability, and prescription, and on the merits, such as the sufficiency of the cause of action, attribution, and causation. Still, interest in filing them remains strong because of the slow progress in the international negotiations and lack of domestic climate damages legislation.

### A. *Jurisdiction*

#### I. Jurisdiction over Subject Matter

Subject matter jurisdiction “pertains to the power and authority of the court or tribunal to hear, try, and decide a case. ... [Jurisdiction] over the nature and the subject matter of the case is conferred by the law, and is determined by the allegations in the complaint.”<sup>262</sup> It does not depend upon the defenses set up by the defendants.<sup>263</sup> Once jurisdiction over the subject matter or nature of the action is vested in the court, it generally cannot be removed.<sup>264</sup>

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standard of the “best available scientific knowledge” in the different actions necessary to address climate change. *Id.* pmbl. & arts. 4 (1), 7 (5), & 14 (1).

260. *Tortona*, 851 SCRA at 472 (citing *Daubert*, 509 U.S. at 595).

261. *Id.*

262. *Almazan v. Bacolod*, G.R. No. 227529, June 16, 2021, at 7, available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67520> (last accessed July 31, 2022).

263. *Id.*

264. *Id.*



The first<sup>265</sup> and second<sup>266</sup> level courts would initially have jurisdiction over actions for damages.<sup>267</sup> The threshold amount for the jurisdiction of the first level courts had recently been increased to ₱2 million.<sup>268</sup> Beyond this amount, second level courts have jurisdiction under R.A. No. 11576.<sup>269</sup> Majority of the Carbon Majors included in Heede's study are headquartered abroad<sup>270</sup> but there are multinational corporations that have local subsidiaries in the Philippines.<sup>271</sup> The question that arises is if Philippine courts have jurisdiction over the action since the GHGs will be argued to have been emitted where the defendants are located. In *Navida*,<sup>272</sup> the Court upheld the jurisdiction of the trial court over a complaint for damages under quasi-delict against foreign defendant companies.<sup>273</sup> This can be used as basis to argue that Philippine courts have authority to resolve cases brought by victims of harms,

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265. First level courts include Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, Municipal Circuit Trial Courts, and Shari'a Circuit Courts. See generally An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes [The Judiciary Reorganization Act], Batas Pambansa Blg. 129 (1980) (as amended).

266. Second level courts include Regional Trial Courts and Shari'a District Courts. See *id.*

267. See An Act Further Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, and Municipal Circuit Trial Courts, Amending for the Purpose Batas Pambansa Blg. 129, Otherwise Known as "The Judiciary Reorganization Act of 1980" As Amended, Republic Act No. 11576, § 1 (2021) (This provision amended Section 19 of the Judiciary Reorganization Act.).

268. *Id.*

269. *Id.*

270. Richards & Boom, *supra* note 19, at 17-19.

271. See, e.g., Greenpeace Philippines, Petitioners' Consolidated Reply to the Respondent Carbon Majors in the National Public Inquiry Being Conducted by Commission on Human Rights of the Philippines, available at <https://www.greenpeace.org/philippines/press/1183/petitioners-consolidated-reply-to-the-respondent-carbon-majors-in-the-national-public-inquiry-being-conducted-by-commission-on-human-rights-of-the-philippines> (last accessed July 31, 2022) [<https://perma.cc/F7TK-55QQ>] (Some of the corporations that responded in the National Inquiry on Climate Change are ExxonMobil Petroleum & Chemical Holdings, Inc. Philippine Branch and Shell Company of the Philippines, Ltd.). *Id.*

272. *Navida*, 649 SCRA at 59.

273. *Id.*

i.e., extreme weather events that caused injuries and damages, that happened or were experienced within the country.

## 2. Jurisdiction over Parties

In civil cases, jurisdiction of the court over the person of the defendant is acquired either by its voluntary appearance in court and submission to its authority or by service of summons.<sup>274</sup> Service of summons on foreign corporations may be done in several ways.<sup>275</sup> A foreign corporation may be the subject of legal action when it is doing business in the country with or without a license.<sup>276</sup> The complex layers of ownership of corporate entities may make the determination of who to sue difficult.<sup>277</sup> But even if this is not

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274. *Meat Packing Corporation of the Philippines v. Sandiganbayan*, G.R. No. 103068, 359 SCRA 409, 425 (2001) (citing *Ang Ping v. Court of Appeals*, G.R. No. 126947, 310 SCRA 343, 349 (1999)) & 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 14, § 23.

275. 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 14, § 14.

Sec. 14. Service upon foreign private juridical entities. — When the defendant is a foreign private juridical entity which has transacted or is doing business in the Philippines, as defined by law, service may be made on its resident agent designated in accordance with law for that purpose, or, if there be no such agent, on the government official designated by law to that effect, or on any of its officers, agents, directors or trustees within the Philippines.

If the foreign private juridical entity is not registered in the Philippines, or has no resident agent but has transacted or is doing business in it, as defined by law, such service may, with leave of court, be effected outside of the Philippines through any of the following means:

- (a) By personal service coursed through the appropriate court in the foreign country with the assistance of the department of foreign affairs;
- (b) By publication once in a newspaper of general circulation in the country where the defendant may be found and by serving a copy of the summons and the court order by registered mail at the last known address of the defendant;
- (c) By facsimile;
- (d) By electronic means with the prescribed proof of service; or
- (e) By such other means as the court, in its discretion, may direct.

*Id.*

276. REV. CORP. CODE, § 150.

277. See generally *Gamboa v. Teves*, G.R. No. 176579, 652 SCRA 690 (2011).

the case, there are difficulties attached to suing foreign corporations which are domiciled abroad, so local subsidiaries may be made defendants.

The general rule is that corporations have a separate juridical personality, which means that a corporation has a legal personality separate and distinct from its stockholders, officers, or any other associated legal entity.<sup>278</sup> Subsidiaries may raise the defense that the business policies they follow, which may have been complained to be violative of human rights or tortious, were decided by the foreign parent company. It may also be reasoned that parent companies cannot be held liable because of lack of jurisdiction and separate corporate personality of these business entities.<sup>279</sup> However, as an equitable remedy, courts can pierce the corporate veil in certain circumstances wherein subsidiaries can be considered as mere adjuncts of their parent company and therefore treat them as merged in a single entity for purposes of determining liability.<sup>280</sup>

The United Kingdom Supreme Court 2021 ruling in *Okpabi & Others v. Royal Dutch Shell Plc & Another*<sup>281</sup> gives support to the argument that the corporate veil can be pierced, if it can be shown that the parent company had control and considerable influence over the processes of their subsidiaries,<sup>282</sup> such that parent companies may be held accountable for the actions and GHG emissions of their subsidiaries.

### 3. *Forum Non Conveniens*

The general principle is that a court which has jurisdiction over a case is obligated to exercise that jurisdiction.<sup>283</sup> Jurisdiction over the subject matter

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278. CIVIL CODE, art. 44. “Corporations, partnerships[,] and associations for private interest or purpose to which the law grants a juridical personality, separate and distinct from that of each shareholder, partner[,] or member.” *Id.*

279. *See id.*

280. *Pantranco Employees Association v. National Labor Relations Commission*, G.R. No. 170689, 581 SCRA 598, 613 (2009).

281. *Okpabi & Others v. Royal Dutch Shell Plc & Another*, [2021] UKSC 3 (2021) (U.K.).

282. *Id.* ¶ 147.

283. *See Home Guaranty Corporation v. R-II Builders, Inc.*, G.R. No. 192649, 645 SCRA 219, 230 (2011) (citing *Union Bank of the Philippines v. Securities and Exchange Commission*, G.R. No. 165382, 499 SCRA 253, 263 (2006)). “Jurisdiction is defined as the authority to hear and determine a cause or the right to act in a case.” *Id.*

of an action is conferred by the Constitution and laws.<sup>284</sup> This, however, is qualified by the doctrine of *forum non conveniens*. Under this doctrine, the court having jurisdiction, may exercise its discretion to decline to exercise jurisdiction if a better forum is available and suited to hear the case, resulting to the claim being dismissed.<sup>285</sup> Defendants-foreign corporations may contend that the foreign elements of the dispute necessitate the application of the doctrine. In the judicial resolution of conflicts of law problems, three consecutive phases are involved: jurisdiction, choice of law, and recognition and enforcement of judgments. For the local courts to assume jurisdiction, it must be shown that: (1) the Philippine court is one to which the parties may conveniently resort; (2) the Philippine court is in a position to make an intelligent decision as to the law and the facts; and (3) the Philippine court has or is likely to have the power to enforce its decision.<sup>286</sup> Citing *Navida*, plaintiffs-victims of extreme weather events can endeavor to show that they should litigate in the court of their residence which is also where they suffered the damage and where their witnesses, records, and other evidence can be found.<sup>287</sup> They can assert that the court has authority to resolve disputes in relation to harm which happens within its territorial jurisdiction.<sup>288</sup>

### B. Parties

At the outset, defendants may question whether the impleaded parties are real parties in interest. Under the Rules of Court, only a real party in interest can bring or defend a civil action, to wit —

A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these rules, every action must be prosecuted or defended in the name of the real party in interest.<sup>289</sup>

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284. *Government Service Insurance System v. Daymiel*, G.R. No. 218097, 895 SCRA 516, 524 (2019).

285. *Saudi Arabian Airlines (Saudia) v. Rebesencio*, G.R. No. 198587, 746 SCRA 140, 165 (2015) (citing *First Philippine International Bank v. Court of Appeals*, G.R. No. 115849, 252 SCRA 259, 281 (1996)).

286. *Raytheon International, Inc. v. Stockton W. Rouzie, Jr.*, G.R. No. 162894, 546 SCRA 555, 562 (2008) (citing *The Manila Hotel Corp. v. National Labor Relations Commission*, G.R. No. 120077, 343 SCRA 1, 13 (2000)).

287. *Navida*, 649 SCRA at 59.

288. *See id.* at 81.

289. 1997 RULES OF CIVIL PROCEDURE, rule 3, § 2.

As has been shown by the statistics on extreme weather events, victims thereof can properly demonstrate the injuries and losses they suffered.<sup>290</sup> As for the defendants, the fossil fuel companies are selected for their large share in anthropogenic GHG emissions.<sup>291</sup>

### 1. Justiciability

For the court to exercise its judicial power, there must be an actual case or justiciable controversy.<sup>292</sup> Otherwise, the court may decline to do so and the case will be dismissed. A justiciable controversy “involves a definite and concrete dispute touching on the legal relations of parties having adverse legal interests.”<sup>293</sup>

An aspect of justiciability is that plaintiffs must be able to demonstrate *locus standi* or standing to sue so that only one with a personal and substantial interest (not merely generalized or incidental), or one who suffers a direct or concrete injury (whether actual or threatened), can file a case. *Locus standi* is “a right of appearance in a court of justice on a given question.”<sup>294</sup> Victims of extreme weather events already suffered harm; thus, the standing requirement is easily overcome. The injury they are alleging must be actual, concrete, and particularized.<sup>295</sup>

The court may decline to decide the issue because of the political question doctrine, as it is beyond the competence of the judiciary under the separation of powers set up in the Constitution.<sup>296</sup> Political questions refer to those “questions, which under the [C]onstitution, are to be decided by the people in their sovereign capacity, ... delegated to the legislative or executive branch of the government.”<sup>297</sup> In the U.S., climate actions have been unsuccessful because courts deem that they involve a determination of what should be an acceptable threshold of GHGs for defendants and who should be liable for the cost of global warming considering that everyone contributes to it and all are

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290. *See generally* Carbon Majors Petition, *supra* note 81.

291. *Id.*

292. PHIL CONST. art. VIII, § 1.

293. *Guingona Jr. v. Court of Appeals*, G.R. No. 125532, 292 SCRA 402, 413 (1998).

294. *Arigo v. Swift*, G.R. No. 206510, 735 SCRA 102, 127 (2014) & *Bayan Muna v. Romulo*, G.R. No. 159618, 641 SCRA 244, 254 (2011) (citing *David v. Macapagal-Arroyo*, G.R. No. 171396, 489 SCRA 160, 216 (2006)).

295. *Lozano v. Nograls*, G.R. No. 187883, 589 SCRA 356, 359 (2009).

296. *Tañada v. Cuenco*, G.R. No. L-10520, 103 Phil. 1051, 1067 (1957).

297. *Id.*

harmed.<sup>298</sup> *Oposa* is an environmental protection case where the Court ruled on the question of justiciability.<sup>299</sup> Defendants argued that the issue of not renewing or granting timber license agreements is a political question which the executive or legislative branches of government should address, not the judiciary.<sup>300</sup> The Court rejected such argument and stated that government policy was not put squarely in issue as “[w]hat is principally involved [was] the enforcement of a right vis-à-vis policies already formulated and expressed in legislation.”<sup>301</sup> Hence, it is important that the action be framed as a question of whether defendants violated the rights of plaintiffs, which is within the competence of the judiciary to determine even if it involves a political matter.

Another argument that affects the justiciability of the issue is what some authors have called the “omnipresent plaintiff” problem.<sup>302</sup> If all are responsible, it can be proposed that in the end, no one should be accountable for the harm and the fossil fuel companies can debate that their industry should not be singled out.<sup>303</sup> Otherwise stated, everyone should just bear the burden of the effects of climate change.<sup>304</sup> It can lead courts to the conclusion that it is a matter best left to the legislature as to who has the clear duty regarding their climate change contributions.<sup>305</sup> This argument can also be employed to contest causation.<sup>306</sup>

In the same way, it can also be asserted that there is an omnipresent defendant problem as fossil fuels are combusted universally. There is a need to convince the court that there is a legally relevant contribution to GHG emissions. One test is to dwell on the amount of contribution in comparison with others.<sup>307</sup> All are emitters, but some contribute significantly more than

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298. See Ina Ebert, *Climate Change and Liability: An Overview of Legal Issues*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE 860 (Oliver C. Ruppel, et al. eds., 2013).

299. *Oposa*, 224 SCRA at 795.

300. *Id.* at 800.

301. *Id.* at 809.

302. David Hunter & James Salzman, *The Duty of Care in Climate Change Litigation*, 155 U. PAC. L. REV. 1741, 1781 (2007) & Kimberly Barnes, *Democratizing Climate Change: Litigation for the Era of Extreme Weather*, 50 U. PAC. L. REV. 651, 679 (2019).

303. *Id.*

304. See *id.*

305. *Id.* at 1782.

306. See *id.*

307. See Heede, *supra* note 24, at 237, tbl. 3.

the others.<sup>308</sup> Plaintiffs would argue that defendants are singled out to have a legal duty to compensate because of their substantial emissions or material contribution to climate change.<sup>309</sup> Stated differently, defendants' emissions are contended to be wrongful when they exceed their "fair shares."<sup>310</sup> Defendants can question what this baseline is and what can be considered as reasonable amount of emissions. Since not all emitters are being held liable, the controversy relates to the level of emissions that tips the scales in favor of liability. This level is tantamount to a substantial contribution to global climate change, which standard has to be determined by the court in the absence of legislative standards.

## 2. Class Suit

It may seem that given the magnitude of climate change which affects many people, a class suit under Section 12, Rule 3 of the Rules of Court<sup>311</sup> is appropriate to gather all the claimants into one action. However, in the Philippine context, a complaint for damages usually cannot be brought as a class suit even if the various harms arose from one incident.<sup>312</sup> For example, in the cases in relation to the *Doña Paz* maritime disaster,<sup>313</sup> the Court said that there was no common interest to many persons in a class but instead there were separate and distinct individuals whose rights were separate from and

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308. *Id.*

309. Wallimann-Helmer, et al., *supra* note 117, at 46.

310. *Id.*

311. 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 3, § 12 provides —

[W]hen the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them[,] which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned[,] may sue or defend for the benefit of all.

*Id.*

312. *See* Re: Request of the Heirs of the Passengers of Doña Paz, A.M. No. 88-1-646-0, 159 SCRA 623, 629 (1988).

313. Miriam Desacada, *Dona Paz Survivors, Heirs Get Compensation*, PHIL. STAR, Mar. 5, 2017, available at <https://www.philstar.com/nation/2017/03/05/1676695/doa-paz-survivors-heirs-get-compensation> (last accessed July 31, 2022) [<https://perma.cc/8PJZ-CJ8A>] (The Doña Paz sinking that happened in 1987 resulted from the collision of M/V Doña Paz and an oil tanker M/T Vector. It was considered as the deadliest maritime accident in history wherein 4,386 people died.).

independent of those affecting the others.<sup>314</sup> The class suit is not appropriate in an action for damages because of the individual assessment necessary to prove the injury, loss, or damage.<sup>315</sup> The proper remedy for such circumstances is permissive joinder of plaintiffs against the same defendant.<sup>316</sup> According to the Court, the rule on consolidation<sup>317</sup> can address some of the difficulties encountered when the questions at issue and parties are the same.<sup>318</sup>

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314. *Re: Request of the Heirs of the Passengers of Doña Paz*, 159 SCRA at 629.

315. *Id.* at 630.

316. *Id.* at 625. See 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 3, § 6.

Section. 6. Permissive joinder of parties. — All persons in whom or against whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may, except as otherwise provided in these Rules, join as plaintiffs or be joined as defendants in one complaint, where any question of law or fact common to all such plaintiffs or to all such defendants may arise in the action; but the court may make such orders as may be just to prevent any plaintiff or defendant from being embarrassed or put to expense in connection with any proceedings in which he may have no interest.

*Id.*

317. 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 31, § 1 —

Section 1. Consolidation. — When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

*Id.*

318. *Bulig-Bulig Kita Kamag-Anak Association v. Sulpicio Lines, Inc.*, G.R. No. 84750, 173 SCRA 514, 517 (1989).

From another aspect, the simplificatory alternatives offered by the rule on consolidation of actions (Section 1, Rule 31, Rules of Court) should also in great part relieve petitioners' apprehensions about the difficulties and complications attendant upon hundreds of individual cases being brought in numerous courts throughout the country. As held in *Salazar v. Court of First Instance of Laguna*, 64 Phil. 785, 791-792 —

There are three ways of consolidating actions or special proceedings where the questions at issue and the parties in interest are the same. The first consists in recasting the cases already constituted, conducting only



*C. Prescription and Laches*

Defendants can take issue with the interval of time before plaintiffs took legal action to assert their rights and suggest that such delay for an unreasonable length of time amounts to prescription and/or laches. Prescription (also known as statute of limitations) is an express ground for dismissing a complaint under the Rules of Court.<sup>319</sup> In extinctive prescription, the right to bring actions is lost by the lapse of time under Article 1106, Paragraph 2 of the Civil Code.<sup>320</sup> For quasi-delict, under Article 1146 of the Civil Code, the action for damages prescribes in four years.<sup>321</sup> This can be considered too short of a period for victims of extreme weather events to be able to mount a complaint with complicated allegations that are supported by sufficient evidence. Connecting this weather event to climate change, then to GHG emissions of defendants, would necessarily be time consuming. Therefore, when it becomes apparent that the injury is due to climate change which defendants contributed to, the action may have already prescribed.

Laches is the failure or neglect for an unreasonable and unexplained length of time to do or assert a right that which by exercising due diligence, could or should have been done earlier.<sup>322</sup> When laches sets in, the claim is deemed waived or abandoned as plaintiffs are considered to have slept on their rights.<sup>323</sup> Laches is a doctrine of equity which should not be used as a shield for fraud or wrongdoing by the responsible party, or to perpetuate injustice.<sup>324</sup>

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one hearing and rendering only one decision; the second takes place when the existing cases are consolidated, only one hearing held and only one decision rendered; and the third takes place when, without recasting or consolidating the cases, the principal one is heard, the hearing on the others being suspended until judgment has been rendered in the first case. The court, in the exercise of its sound discretion, may adopt any of these three forms of consolidation whenever in its opinion the proceeding is beneficial to and convenient for the parties. The power so exercised is discretionary.

*Id.* (citing *Salazar v. Court of First Instance of Laguna*, G.R. No. 45642, 64 Phil. 785, 791-92 (1937)).

319. 2019 AMENDMENTS TO THE 1997 RULES OF CIVIL PROCEDURE, rule 15, § 12.

320. CIVIL CODE, art. 1106 (2).

321. CIVIL CODE, art. 1146.

322. *Tijam v. Sibonghanoy*, G.R. No. L-21450, 23 SCRA 29, 35 (1968).

323. *Id.*

324. *Raneses v. Intermediate Appellate Court*, G.R. No. 68747, 187 SCRA 397, 404 (1990).

“There is no absolute rule as to what constitutes laches or staleness of demand; each case is to be determined according to its particular circumstances.”<sup>325</sup>

## VI. ISSUES ON THE MERITS

Even if the preliminary and procedural issues are successfully passed and the case is not dismissed on these grounds, the act or omission of the defendant should be legally wrong under substantive laws and the same should be proved. When this is not proven, the same is considered as damage without injury (*damnum absque injuria*).<sup>326</sup> This is because under this principle, the legitimate exercise of an entity’s rights, even if it causes loss to another, does not result in an actionable wrong because there is no violation of a legal duty.<sup>327</sup> In other words, there are losses for which the law gives no remedy such that the injured person alone bears the consequences.<sup>328</sup> The Author discusses some arguments that may be raised on the merits of the cause of action when trial does proceed.

### A. Lack of Knowledge

The tortious conduct of defendants under this study is based on acts of producing and manufacturing their products despite knowing the hazard they posed.<sup>329</sup> The basis of their tortious conduct is supposedly their culpable knowledge of their wrongful emissions, i.e., the impacts of their GHG emissions that contributed to climate change.<sup>330</sup> Plaintiffs can insist that the fossil fuel companies’ claim of ignorance of the harmful effects of the cumulative substantial GHG emissions of their business can be maintained to be acceptable only up to the time that the IPCC first released its reports in 1990.<sup>331</sup> At this juncture, they must or should have known about such harm. At the very least, they should have been aware of the information and studies about the links between climate change, GHG emissions of fossil fuels, and climate change impacts or took the opportunities presented to them to ascertain such facts. Such excusable ignorance up to this point may affect their

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325. Department of Education, Division of Albay v. Oñate, G.R. No. 161758, 24 SCRA 200, 216-17 (2007).

326. Sps. Custodio v. Court of Appeals, G.R. No. 116100, 253 SCRA 483, 490 (1996).

327. Amonoy v. Sps. Gutierrez, G.R. No. 140420, 351 SCRA 731, 736 (2001).

328. See Sps. Custodio, 253 SCRA at 490.

329. See Toft, *supra* note 121, at 15.

330. *Id.*

331. *Id.*

accountability but they also have to contend with the figures in Heede's study that show that half of the total emissions occurred from 1986.<sup>332</sup>

In terms of knowledge and denial of harm, the fossil fuel industry is compared to the tobacco and asbestos industries.<sup>333</sup> It is asserted that before harms became apparent to the public, both already knew that their products were harmful.<sup>334</sup> They supposedly had the information from their own experts and scientists but continued with producing their products without regard to the harm.<sup>335</sup> For the tobacco industry, it is common knowledge that smoking their products causes serious health risks.<sup>336</sup> For the fossil fuel industry, it is sought to be proven that even in the 1990s, when the IPCC had come up with its scientists' findings about global warming and the role of GHG emissions in relation to such phenomenon, the industry created and funded groups that would communicate to the public that the science was still very uncertain and doubtful.<sup>337</sup> In order to prevent regulation, both industries lobbied and launched information campaigns to counter, disparage, and suppress information and science that prove such harms.<sup>338</sup>

#### *B. Reasonable Care*

There is no negligence if diligence or reasonable care is shown.<sup>339</sup> Defendants can argue that they had complied with all legal protocols and secured all the necessary permits in the conduct of their business. They can even show that they have taken precautions to avoid the foreseeable risk to plaintiffs, i.e., by reducing their GHG emissions. Thus, in determining the reasonableness of their conduct, factors that would weigh in can be the efforts (or lack thereof) of the defendants to respond to climate change in their business activities in the face of their knowledge of climate science, active participation in misinformation on climate change, and suppression of information about

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332. *Id.*

333. William C. Tuck, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 *ECOLOGY L. Q.* 831, 836 (2012).

334. *Id.* at 866-67.

335. *Id.*

336. *Id.* at 836.

337. *Id.* at 833-34 & 845.

338. *Id.*

339. *See Picart*, 37 *Phil.* at 813.

climate change to delay regulatory action of governments.<sup>340</sup> The knowledge is ascribed to the juridical entity within the lifespan of its existence.

Defendants can counter that there was no intentional disregard or denial of climate science.<sup>341</sup> Upon knowledge of the best available science, they accepted it and stopped support for groups that attacked the same.<sup>342</sup> They can reason that they actively supported and complied with mitigation and adaptation measures of the government and other climate policies, such as support for renewables and plans for transitioning to the same.<sup>343</sup> They can point out their best efforts and internal policies to have carbon-efficient operations and invest in climate-friendly technologies. They can also reveal that they provided accessible remedies for victims complaining against impacts of their business.<sup>344</sup> However, these defenses are weakened or negated if shown that despite these claims, they continued to fund or promote climate denial efforts.<sup>345</sup> Such acts amount to greenwashing<sup>346</sup> which can add to their culpability.<sup>347</sup> The defenses are also invalidated by proof of promotion of misinformation or withholding of information about climate change, including destruction of documents, at such time when culpable knowledge of its contribution to climate harm can be imputed against it.

Considering that the wrongfulness of the conduct relates to historical emissions, it matters when defendants decided to make counter-measures to make positive contribution to their climate responsibilities.<sup>348</sup> Acting after letting a long period of time of inaction indicates this is a mere afterthought and a means to avoid liability.<sup>349</sup> The magnitude of the efforts will also indicate their proportionality to the harmful contribution.<sup>350</sup> Half-hearted efforts

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340. Martin Olszynski, et al., *From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability*, 30 GEO. ENVTL. L. REV. 1, 36 (2018).

341. See Toft, *supra* note 121, at 16-17.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 17.

346. These are misleading information and claims regarding the entity's actions so as to put forward an ecologically responsible image to the public. Tuck, *supra* note 333, at 847.

347. See *id.*

348. Toft, *supra* note 121, at 17.

349. See *id.*

350. Toft, *supra* note 121, at 16.

amounting to mere lip service may seem to have no weight in showing genuine reasonable care. A concern may also be raised about the fairness of letting defendants off on the basis of present efforts for harm already done.

### C. *Fortuitous Event*

Article 1174 of the Civil Code provides for the defense of fortuitous event, to wit —

Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be, foreseen, or which, though foreseen were inevitable.<sup>351</sup>

Defendants can reason that the damage caused was due solely to fortuitous events or *force majeure*, which are beyond their or anyone's control. In relation to quasi-delicts, the concept of fortuitous events is applicable.<sup>352</sup> To successfully invoke the defense of *force majeure* to exempt defendant from liability, there must be no human intervention in the cause of injury or loss and it must be exclusively due to natural causes and not foreseeable or avoidable.<sup>353</sup> Plaintiffs may counter that the extreme weather event which is climate change-related is not a fortuitous event. Also, the defendant may not be exonerated from liability solely in case of fortuitous event; it must still prove that it was not negligent.<sup>354</sup> The Court had ruled that violation of a statutory duty is negligence in itself which can be proximate cause of the injury.<sup>355</sup> In such a situation, it "is therefore immaterial that the loss occasioned to private respondent was due to a fortuitous event, since it was petitioner's negligence ... which was the proximate cause of the loss."<sup>356</sup> Even if it can be said that

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351. CIVIL CODE, art. 1176.

352. CIVIL CODE, art. 2178 (The provisions of articles 1172 to 1174 are also applicable to a quasi-delict.).

353. *Real v. Belo*, G.R. No. 146224, 513 SCRA 111, 124 (2007) (Jurisprudence defines the elements of a "fortuitous event" as follows: (a) the cause of the unforeseen and unexpected occurrence must be independent of human will; (b) it must be impossible to foresee the event which constitutes the *caso fortuito*, or if it can be foreseen, it must be impossible to avoid; (c) the occurrence must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and (d) the obligor must be free from any participation in the aggravation of the injury resulting to the creditor.). *Id.*

354. *National Power Corporation v. Court of Appeals*, G.R. No. 96410, 211 SCRA 162, 169 (1992).

355. *Cipriano v. Court of Appeals*, G.R. No. 107968, 263 SCRA 711, 717 (1996).

356. *Id.* at 718.

the extreme weather event was inevitable, the negligence can be framed in relation to acts that are not beyond defendants' reasonable control as emitters, such as reduction of their emissions.

#### *D. Assumption of Risk*

In *Abrogar v. Cosmos Bottling Company*, the Court discussed the doctrine of assumption of risk. In this case, the son of the plaintiff Abrogar died from a vehicular accident during a marathon promoted by defendant Cosmos Bottling Company.<sup>357</sup> The Court ruled that the victim had not assumed the risk of death by joining the race as this was not a known or normal risk in running a marathon, to wit —

The doctrine of assumption of risk means that one who voluntarily exposes himself to an obvious, known and appreciated danger assumes the risk of injury that may result therefrom. It rests on the fact that the person injured has *consented* to relieve the defendant of an obligation of conduct toward him and to take his chance of injury from a known risk, and whether the former has exercised proper caution or not is immaterial. In other words, it is based on voluntary consent, express or implied, to accept danger of a known and appreciated risk; it may sometimes include acceptance of risk arising from the defendant's negligence, but one does not ordinarily assume risk of any negligence which he does not know and appreciate. As a defense in negligence cases, therefore, the doctrine requires the concurrence of three elements, namely: (1) the plaintiff must know that the risk is present; (2) he must further understand its nature; and (3) his choice to incur it must be free and voluntary.<sup>358</sup>

For this defense in climate litigation, plaintiffs' consent to assume the risk is based on their full awareness of the probable harms that fossil fuels would cause. Therefore, it must be established that even with such knowledge, they voluntarily chose to assume the risk of the activity by using products that emit GHGs. The rebuttal is that their reliance on such products is based on what is available in the market for practical consumption. They also have limited knowledge of the risks of their emissions which may not be true for fossil fuel companies which had earlier and more comprehensive corporate knowledge.

#### *E. Intervening or Remote Causes*

Contrasted from proximate cause that is basis of liability, an efficient intervening or remote cause is a distinct or independent cause or condition

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<sup>357</sup>. *Abrogar*, 820 SCRA at 313.

<sup>358</sup>. *Id.* at 355-56 (emphasis supplied).

that breaks or is unrelated to the chain of events that led to the injury.<sup>359</sup> A remote cause had also been defined as “a cause which would have been a proximate cause, had there been no efficient intervening cause after it and prior to the injury.”<sup>360</sup> The relation is so remote and indirect that the injury is not reasonably foreseeable.<sup>361</sup>

Fossil fuel companies can maintain that every single individual, billions of them in the planet, is an emitter.<sup>362</sup> They merely created the products, but the end users ultimately and directly release the GHG emissions to the atmosphere.<sup>363</sup> Therefore, the end users are intervening causes such that any causal link between the harm suffered by the plaintiffs and their actions had been severed.<sup>364</sup> It can also be asserted that other emitters are intervening causes that break the chain of causation.<sup>365</sup> The more intervening factors or causes there are that can be argued to muddle the causation, the more problematic it may be to prove the foreseeability of the injury and the causal chain becomes speculative.

Albert Lin and Michael Burger observed that “[similar] contentions were rejected in the lead paint litigation, however, and could be rejected here as well. Consumers’ burning of fossil fuels was intended by the defendants, and the resulting GHG emissions were completely foreseeable.”<sup>366</sup> Furthermore, compared to fossil fuel companies, consumers have less control over their GHG emissions.<sup>367</sup> In contrast to the plaintiffs, defendants had greater control over the dangerous situation.<sup>368</sup> As for other emitters, defendants were

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359. Tuck, *supra* note 333, at 866–67.

360. Casis, *supra* 196, at 967 n. 84.

361. *See id.*

362. *See* Hunter & Salzman, *supra* note 302, at 679 & Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENVTL. L. REV. 50, 51, & 87 (2018).

363. *Id.*

364. *Id.*

365. *Id.*

366. Lin & Burger, *supra* note 362, at 87 (citing *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 545–46 (Ct. App. 2017) (U.S.)).

367. Gaby Del Valle, *Can Consumer Choices Ward Off the Worst Effects of Climate Change? An Expert Explains*, available at <https://www.vox.com/the-goods/2018/10/12/17967738/climate-change-consumer-choices-green-renewable-energy> (last accessed July 31, 2022) [<https://perma.cc/ZDH9-YGXD>].

368. *Id.*

targeted in the suit precisely because they were the top emitters, consequently, the emissions of other emitters cannot compete.<sup>369</sup>

Another argument for possible intervening causes is that socio-economic factors create vulnerabilities that amplify the harms caused by climate change. “While climate change may increase the frequency or severity of certain natural hazards, exposure[,] and vulnerability are determined by socio-economic development and human decision-making.”<sup>370</sup> For example, for deaths, injuries, and property damage caused by extreme weather events, the same may have been caused by flooding and storm surges but the victims’ exposure to hazard-prone areas and weak infrastructure could have also contributed to the harm caused.<sup>371</sup> These, in turn, may have been affected by the natural geographical features of the area, as well as certain socio-economic processes such lack of investment in the community’s development and lack of resources to provide emergency preparedness and services.<sup>372</sup> Another illustration is death which follows after lack of medical attention due to delayed rescue efforts.<sup>373</sup> Indeed, many Filipinos choose to stay in their homes (or return thereto after a disaster) which are in danger zones despite warnings and evacuation efforts.<sup>374</sup> Arguably, these factors may mitigate responsibility or even completely exonerate defendants. It must be shown that despite the existing vulnerabilities of plaintiffs, the tortious conduct of defendants still caused the climate harm.

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369. See Heede, *supra* note 24, at 237 tbl. 3.

370. Botzen, et al., *Integrated Disaster Risk Management and Adaptation*, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS, AND POLICY OPTIONS 289 (Reinhard Mechler, et al., eds., 2019).

371. See Amnesty International UK, *supra* note 39.

372. *Id.*

373. Rosemarie Francisco, Manila Hit Over Aid Delay After Storm Kills 140, *available at* <https://www.reuters.com/article/us-philippines-typhoon-idUSTRE58QoMO20090928> (last accessed July 31, 2022) [<https://perma.cc/CB5Z-CU97>].

374. Daphne Galvez, ‘Hindi Matigas Ang Ulo’: You Can’t Blame Those Who Refuse to Evacuate During Disasters, Says Marcos, PHIL. DAILY INQ., Nov. 8, 2022, *available at* <https://newsinfo.inquirer.net/1690572/hindi-matigas-ang-ulo-you-cant-blame-those-who-refuse-to-evacuate-during-disasters-says-marcos> (last accessed July 31, 2022) [<https://perma.cc/4E7U-T3ND>].



*F. Contributory Negligence*

Philippine law recognizes the concept of contributory negligence of the plaintiff under Article 2179 of the Civil Code, to wit —

Article 2179. When the plaintiff's own negligence was the immediate and proximate cause of his injury, he cannot recover damages. But if his negligence was only contributory, the immediate and proximate cause of the injury being the defendant's lack of due care, the plaintiff may recover damages, but the courts shall mitigate the damages to be awarded.<sup>375</sup>

The law does not define contributory negligence but under jurisprudence, it has been explained as negligence on the part of plaintiff concurrent with defendant's negligence,<sup>376</sup> or contributing as legal cause to the harm suffered.<sup>377</sup> The negligence of defendant should still be the proximate cause and it must be graver than the contributory negligence of plaintiff.<sup>378</sup> Though the presence of contributory negligence does not preclude plaintiffs from recovering damages, it has the effect of mitigating or reducing the amount of actual damages.<sup>379</sup> It has also been said that for plaintiffs' negligence to be contributory, it must contribute to their injury such that there is a connection between the contributory negligence and their injury or damage suffered, to wit —

Where he contributes to the principal occurrence, as one of its determining factors, he cannot recover. Where, in conjunction with the occurrence, he contributes only to his own injury, he may recover the amount that the defendant responsible for the event should pay for such injury, less a sum deemed a suitable equivalent for his own imprudence.<sup>380</sup>

The rationale for mitigating the liability of defendants is explained thus —

The underlying precept on contributory negligence is that a plaintiff who is partly responsible for his own injury should not be entitled to recover damages in full but must bear the consequences of his own negligence. The

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375. CIVIL CODE, art. 2179.

376. *Philippine National Railways Corporation v. Vizcara*, G.R. No. 190022, 666 SCRA 363, 377 (2012) (citing *National Power Corporation v. Heirs of Noble Casionan*, G.R. No. 165969, 572 SCRA 71, 81-82 (2008)).

377. *Gumabon v. Philippine National Bank*, G.R. No. 202514, 798 SCRA 103, 127-28 (2016) (citing *Valenzuela v. Court of Appeals*, G.R. No. 115024, 253 SCRA 303, 318 (1996)).

378. *Casis*, *supra* note 196, at 974.

379. CIVIL CODE, art. 2214 (In quasi-delicts, the contributory negligence of the plaintiff shall reduce the damages that he may recover.).

380. *Rakes v. Atlantic, Gulf and Pacific Co.*, 7 Phil. 359, 375 (1907).

defendant must thus be held liable only for the damages actually caused by his negligence.<sup>381</sup>

It may be argued that victims of extreme weather events contributed to their own injury by patronizing the products of defendants, creating demand for the same and likewise contributing to GHG emissions. As already stated, majority of the earth's inhabitants contributes to the generation of GHGs, albeit such contribution may be small and negligible compared to big emitters.<sup>382</sup> Plaintiffs-victims can show that fossil fuel companies have not clearly stated the risks of using their products; hence, consumers cannot accurately weigh the risks involved. Another probable response is that their emissions are insignificant at the global level and cannot considerably offset the defendants' liability. It can have the effect of reducing the compensation being claimed, by the proportion of plaintiffs' own contributions to the world's emissions.

Another question is whether plaintiffs can be said to have contributed to their own harm by their failure to adapt when they could have. If lack of resources prevented them from doing so, it seems unfair to consider this as negligence at all. But if it is the government's failure to provide for resources and measures as part of its duty to build up plaintiffs' ability to adapt, or the government's inefficiency in implementing its climate policies, the issue will be at what point are these factors regarded as the proximate, contributory, intervening, or remote causes.

## VII. CONCLUSION

The latest report of the Working Group II under the IPCC's Sixth Assessment Report was released on 28 February 2022.<sup>383</sup> Once again, it raised serious concerns about the severity of the climate crisis.<sup>384</sup> They warned that there are limits to adaption and the world is already breaching those limits, causing

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381. *Lambert v. Heirs of Ray Castillon*, G.R. No. 160709, 452 SCRA 285, 293 (2005) (citing *Syki v. Begasa*, G.R. No. 149149, 414 SCRA 237, 244 (2003)).

382. See *Hunter & Salzman*, *supra* note 302, at 679 & *Lin & Burger*, *supra* note 362, 51 & 87.

383. Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, available at [https://report.ipcc.ch/ar6/wg2/IPCC\\_AR6\\_WGII\\_FullReport.pdf](https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf) (last accessed July 31, 2022) [<https://perma.cc/2XEQ-WK8T>].

384. *Id.* at 9, ¶ B.1.1.

hardships to the most vulnerable.<sup>385</sup> The IPCC emphasized that anthropogenic climate change is unquestionable and that its effects are rapid.<sup>386</sup> It is apparent that one of the inevitable climate change impacts is the increased frequency of extreme weather events.<sup>387</sup> This highlights the necessity for remedies not just for those who had already experienced past harms but also future victims.<sup>388</sup> Aside from the essential climate actions of mitigation and adaptation, compensating those who have suffered losses is part of managing climate change.<sup>389</sup> Presently, the existing policy on environment in the country does not have direct substantive laws creating obligations in favor of victims of climate change to establish liability of major emitters.<sup>390</sup> However, it is sufficient to provide basis for causes of action and to guide the courts in interpreting existing laws.

The discussion in this Article on the issues and challenges demonstrates the difficulties faced in climate damages litigation. There are many problems such that a novel duty has to be conceived, the causation has been deemed too tenuous or maybe even impossible to prove, and the science that will produce the required evidence is still developing. Nevertheless, all these had not stopped nor slowed down the waves of litigation aspiring to hold emitters liable.

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385. *Id.* at 26.

386. *Id.* at vii.

387. *Id.* at 9, ¶ B.I.I.

388. *Id.* at 5.

389. Edward A. Page & Clare Heyward, *Compensation for Climate Change Loss and Damage*, 65 POLITICAL STUD. 356, 367 (2017).

390. *See* Department of Environment and Natural Resources, *supra* note 65.