

What does human rights due diligence for climate change impacts look like?

Lise Smit Dr Ivano Alagna

The collected presentations of the BIICL webinar series "[Human Rights Due Diligence for Climate Change Impacts](#)" is now available [here](#).

BIICL held the webinar series 'Human Rights Due Diligence for Climate Change Impacts' from 10 September to 1 October 2020.

This topic came to our attention as requiring further consideration when we were leading a [study for the European Commission](#) on regulatory options for mandatory human rights and environmental due diligence. The study showed that although there now seems to be consensus that climate change is a human rights issue, companies' human rights due diligence and their climate due diligence seem to be developing 'in silos'. Moreover, it is not clear exactly how a legal duty to exercise due diligence for climate impacts could and should be framed, and how it would apply in law and in practice.

The above study has led to the [announcement](#) by the European Commission of a legislative initiative, to take place in 2021. Various other regulatory developments have similarly underscored the need to consider how due diligence-related regulation would apply to business' climate change impacts. We are at a crucial time now where we are being asked to think about the design and implementation of these mandatory due diligence laws. This webinar series was aimed at kick-starting further discussion and research at this urgent and historic moment. Indeed, in his keynote speech opening the webinar series, the UN Special Rapporteur on Human Rights and the Environment, David R. Boyd noted: 'We are living in an unprecedented global climate emergency'.

For the purposes of this webinar series, we asked speakers to work on the assumption that we will have laws on mandatory human rights and environmental due diligence - as a duty to exercise a standard of care - in the near future. We asked them to consider what this standard of care will look like for climate change impacts, how the concept of human rights due diligence that we know from the [United Nations Guiding Principles on Business and Human Rights](#) (UNGPs) applies to climate change impacts and how companies can meet this standard in real terms. We asked them what kind of legal tests or elements should be considered in the design of such a standard. We also asked them what we can learn from current and emerging practices, and the application of existing legal standards.

The presentations were so rich that we thought it best to publish them in [written form](#). For example, a number of speakers highlighted existing tools, principles and practices that benchmark and guide climate change due diligence. Examples include the recently updated [Climate Principles for Enterprises](#), mentioned by Jaap Spier, the [Climate Vigilance Benchmark](#) highlighted by Paul Mougeolle, and the Business and Human Rights Resource Centre's [Transition Minerals Tracker](#), discussed by Manson Gwanyanya. Perhaps these, and other present and future standards, could inform the legal enquiry as to what would be expected of the 'reasonable company' under specific circumstances.

Indeed, the [Final Statement](#) in the matter of four NGOs against ING before the OECD National Contact Point (NCP) in the Netherlands was mentioned by a few speakers. It applies the [OECD Guidelines for Multinational Enterprises](#) (OECD Guidelines) due diligence standards in relation to climate change with reference to the need for target-setting, measuring and steering. Although NCPs do not issue binding judgments, these are presumably the kinds of activities that a court might also look at, in deciding whether a legal due diligence duty was met. Joseph Wilde-Ramsing guided us step-by-step through the due diligence expectations set out in the OECD Guidelines, and how each could apply to a climate change duty of care.

There seemed to be a consensus that, to a certain extent and at least in theory, companies are already subject to a duty to exercise care not to harm the planet, for example in tort law. However, we do not yet have a body of case law to clarify the standard. Ingrid Gubbay states that litigation so far has been 'a tiny drop in the ocean' and Roda Verheyen points out that we do not yet have 'one single proper judgment in any jurisdiction'. Tort questions relating to causality, foreseeability, and contribution are complex in the context of climate change, especially in relation to companies that are not carbon majors. Sudhanshu Swaroop discussed the New

Zealand case of *Smith v Fonterra Co-Operative Group Limited* [2020] NZHC 419 where the Court stated that, in the climate change context, 'everyone is a polluter, and therefore a tortfeasor, and everyone is a victim and therefore a potential claimant'.

Roda Verheyen highlighted the need to look into what the practical implications of a due diligence standard are for the operations and supply chains of medium-sized companies that do not produce oil or coal. Caroline Sloan highlighted that the focus needs to shift from the production to the consumption of fossil fuels.

Many speakers also emphasised that while there might already be an existing duty in place, this has been very difficult to access in terms of remedies for victims. Indeed, Chiara Macchi captured the point that several speakers made: that the most important added value of an EU law would not be to introduce a standard *ex novo*, but rather to facilitate access to remedy which is currently lacking for victims and communities.

Further questions relate to how to ensure that other human rights are considered as part of a 'just transition' (Manson Gwanyanya), the disproportionate impacts of climate harms on certain groups of people (Sara Seck, Surya Deva, and Olanrewaju Fagbohun), and the need to think 'transformatively', as explained by Sara Seck. Speakers also discussed the perspectives of investors (Nabylah Abo Dehman), insurers (Deepa Sutherland and Jason Reeves), directors (Colleen Theron) and corporate advisors (Holly Stebbing and Merryl Lawry-White).

Some speakers called into question whether due diligence is actually the correct standard to apply here, or whether, given the nature of climate harms and the state of the climate emergency, a strict liability model is required. For example, Surya Deva argued that when it comes to climate change, there should be an obligation of result, stating: 'Merely going through a due diligence process should not suffice. We want to see the outcome. And if you do not achieve that outcome, whatever process you did is useless, in my view.'

The strength of these convincing arguments led us to introduce a poll question during a recent BIICL course in Climate Change Law. We asked course participants whether, in their opinion, a law about corporate climate due diligence should be:

1. A duty to prevent certain emissions or harmful outcomes. If the targets are met, there is no liability, but if the company fails to meet the targets, there should be liability regardless of what efforts the company made;
2. A due diligence duty, which takes into account the steps that the company took to prevent the climate harms, including whether it considered other human rights in a just transition; or
3. A creative combination of the above.

The third option was the most popular choice. When asked to elaborate, the examples all amounted to a two-fold formula: a strict legal duty to meet certain targets, but if this duty is not met, the company would be allowed an opportunity to demonstrate why it has not met these targets, and how it is going about to prevent climate change harms. We found it interesting that this is reminiscent of aspects of both the 'duty to prevent' and the 'comply or explain' models, and the question is now how to turn this into an effective legal obligation.

We hope you will find the presentations of the speakers as thought-provoking as we did. As we continue the discussion, we bear in mind Stijn Franken's warning: 'The forthcoming 10 years will be crucial: either we change, or not. If not: the consequences will most likely be devastating for the many generations to come.'

[Read the report with the collection of speakers' presentations here.](#)

[Lise Smit](#), Senior Research Fellow in Business and Human Rights and Director, Human Rights Due Diligence Forum and **[Ivano Alogna](#)**, Arthur Watts Research Fellow in Environmental and Climate Change Law

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