BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

The NOVA BHRE Blog

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Legislating for Corporate Due Diligence, Climate Change and Accountability

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This blog post is based on the intervention of Arianne Griffith in the webinar on Corporate Due Diligence and the Green Deal organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese Presidency of the Council of the European Union in partnership with the British Institute of International and Comparative Law, the Portuguese Ombudsman (Provedor de Justiça), the Teaching Business and Human Rights Forum, and NOVA 4 The Globe on the 22nd of April 2021.

Question: Why is corporate due diligence needed in relation to climate change?

In a few words, we need mandatory human rights and environmental due diligence for companies that covers climate change because *we are already in a crisis*.

Business is an important stakeholder for taking action on this in the sense that, if we are to do anything about the climate crisis – meaningfully – we need them on board. The response that we need to see from companies requires a massive shift in the way that they do business. As we've already seen with human rights issues, this is non-negotiable: we simply cannot go on with business as usual and expect the outcomes to change. Due diligence provides us with a model for making behavioural change since it requires companies to take action in response to a set of assessed risks and impacts. Human rights and environmental due diligence is also an appropriate response because one of its central objectives is the prevention of harm – it's about designing a system of active risk management that prevents these things from happening and mitigates the impacts that they have. In that sense that's what we urgently need in relation to corporate action on climate change.

We need businesses to address their risks and impacts on climate in at least two areas, the first of which is greenhouse gas emissions, and the second is the human impacts and human rights impacts of climate change. For example, we need companies to assess their own (direct) emissions and measure those as well as their indirect emissions – and then we need them to take action based on this. This means that we need them to stop the production of, and reliance on carbon intensive sources of energy and carbon intensive products and we need them to do something about the carbon intensive products, forest

risk commodities and so on that are in their supply chains and value chains. We then need them to go through the steps of monitoring the effectiveness of the actions taken, publicly accounting for that and working to continuously improve it. In that sense human rights and environmental due diligence provides a useful framework for us in relation to, and in responding to climate change and the climate impacts.

I think that the idea of continuous improvement aligns quite well with the objectives of the Paris Agreement. The point is that we need companies to do more than produce voluntary zero deforestation policies and climate related sustainability policies without doing more and a mandatory due diligence requirement can help to make sure that companies are walking the talk on climate change.

Alongside that, of course, we need mechanisms to provide remedy for those people and communities that suffer harm and we need accountability for companies when they get it wrong.

Finally, in line with this central objective of due diligence – to prevent negative impacts – the action to address climate risks and impacts needs to focus much more on reducing our absolute emissions in the short term, instead of relying on offsetting emissions at some time in the future. There's a lot of talk about the latter today as we mark Earth Day, but the emphasis on prevention, on stopping this familiar cycle, needs to be front and centre when deciding what we require of companies and their climate response.

Question: Can you explain the relationship between environmental dimension and the human rights dimension of due diligence in relation to the forthcoming legislative proposals

It is important that both human rights impacts and environmental impacts – which include climate change, are covered in the forthcoming EU legislation and legislative proposals (on sustainable corporate governance and deforestation) as individual issues and as intersecting issues. There is no doubt that climate change has serious impacts on human rights and will affect the enjoyment of a range of rights. It will definitely also create setbacks in the progress that we have made to ensure the enjoyment of human rights. The same is true for harm to the environment more broadly since pollution, loss of biodiversity, deforestation and so on will also have negative impacts on human rights.

However it is also important that we recognise that the environment needs protection in and of itself. We need to consider environmental protection, not just when there's a harm to human health or property and not just *because* there's harm to human health or property. We need to stop flattening forests and end the loss of biodiversity that goes with that – we need to stop climate change. We need to acknowledge that climate change *is* the impact and see that there is an environmental impact of climate change, not just a human rights impact of climate change.

In terms of legislating on this, there may be differences between human rights due diligence and anything we could consider climate due diligence. Thanks to the UN Guiding Principles on Business and Human Rights and the work that has been done around those in the last decade, we know that an adverse human rights impact is one that reduces or removes a person's ability to enjoy any of their rights but one of the things that the Commission and the EU's legislative bodies more broadly will have to decide is, what constitutes an adverse environmental impact.

Global Witness has just published a policy briefing as well as a joint NGO position paper which sets out our position on a number of these issues. In relation to adverse environmental impacts in particular, what we are proposing is the inclusion of a non-exhaustive list of impacts that should be developed in consultation with stakeholders. In order for it to be effective, this needs to include actual and potential impacts. It needs to include impacts that have different magnitudes and frequencies – as appropriate in the context of environmental issues – and it needs to take both temporary and permanent impacts into account. There is precedent for such an approach in domestic legislation in

Australia for example.

Admittedly, enforcement is quite another matter. However, we need to have strong regulation in place coupled with strong enforcement and one without the other – either one without the other – won't work well.

As mentioned earlier, the directive should account for the individual elements of human rights issues and environmental issues and also needs to account for the extent to which they overlap, that overlap is quite well known, particularly in these (business and human rights) circles. What we hope to see in the European Commission's legislative proposals is an effort to account for these individual elements and the overlap between them that demonstrates an understanding of the complexity of the impacts that companies have through their operations and value chains.

The final point that I will mention briefly is that of remedy and accountability. Companies need to be held accountable for their environmental and human rights impacts. In the case of environmental impacts, this is so even if these are not overly explicitly tied to human rights violations. Regarding access to remedy provisions – environmental claims can't prevent victims of human rights abuses from having recourse for those impacts, or vice versa. It is important that we see this in the legislation and its approach to this interplay between human rights and environmental issues. A finding of administrative liability by a competent national authority can't preclude victims from bringing civil claims against a company in relation to the same set of facts involving environmental or human right harms. In closing, I think that we need to anticipate these intersections and respond to them by really creating multiple avenues for responsibility and for accountability, and multiple avenues that are not mutually exclusive, that allow for recourse against the company when there are either or both types of harms happening.

Question: alongside due diligence, what role do you see for legal remedies and climate change litigation?

For affected people and communities around the world, the possibility of litigation – a mechanism through which they can approach the courts and can hold companies to account – is really important. Legal liability for companies is an essential component of both legislative proposals that we expect to get from the European Commission in the coming months. Part of the reason that it is important is because it creates consequences for companies where there are few, if any, right now. It also creates more meaningful opportunities for victims of human rights abuses and environmental harms, to hold companies to account. Hopefully, the new EU legislation will help to address the current challenge – which is a monumental one – of it being far too difficult and far too expensive to hold companies accountable, and that's speaking in absolute terms. It's worse still if you think about it in relative terms and when you consider the imbalance of power between victims and the companies that they are seeking recourse against.

Due diligence will require a change of course from companies. What we need the legislation to do alongside that is create a situation where, if they don't change course and don't change how they behave, that that can no longer be without consequence – and if they cause harm, to ensure that there are penalties. And climate change litigation, strategic litigation, test cases and so on are important mechanisms for accountability. We recognize that that's partly symbolic (it's called a test case for a reason), but it also has an important deterrent effect, and that too has value and can spur action in the direction that we need more companies to move in. So, human rights and environmental due diligence together with liability should cause companies to change course, and that should mean that if we get the enforcement right, if we get the liability mechanism right, thar they can't just do what they like and quite frankly, continue to get away with it.

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