

Climate change: Looking beyond human rights due diligence?

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Question: Is climate change due diligence the same as human rights due diligence?

As a starting point, it is fairly well established now that climate change has an impact on virtually all human rights: civil, political, social, economic, and cultural human rights. So if we start with this premise, then businesses will not be able to prevent adverse impact on human rights if they do not integrate climate change considerations into their human rights due diligence processes.

However, I would like to highlight that we should also try to appreciate how climate change due diligence might be different from human rights due diligence, and I would like to propose four points for your consideration.

The first point is conceptual: most of the human rights, especially in the traditional understanding, are predominantly individual rights – of course in the more recent times we are looking at human rights in the collective sense as well. But when we talk about climate change, this is a global collective issue impacting the whole society, all of us together and the nature as such. We should consider this point of difference.

The second point is that when we talk about due diligence, businesses have to locate who are the rights holders that are going to be impacted. When it comes to due diligence for human rights, it should not be that difficult for businesses to do this identification if they really want to do so. But when it comes to climate change, I think the question is who is not impacted. Let us say if we have one company operating in country 'X', that activity could potentially impact almost all of us anywhere in the world directly or indirectly to some

extent: how is the company going to consult these potentially affected stakeholders? I am highlighting this difference because everyone is just talking about applying human rights due diligence for climate change as if that is going to fix everything. Rather we should carefully understand these differences and then design a due diligence process which can take care of these differences. And what about consulting future generations? When we talk about human rights, we often are looking at the rights holders who are present now, but climate change is an issue which is going to be relevant even for future generations. So how are companies going to consult the generation of the people who are not even born yet?

My third point is that when it comes to human rights, adverse impacts identification is easier comparatively, as you can see tangible impacts. For instance, you can see pollution of the river with your naked eyes in many situations. When it comes to climate change, in many cases it could be uncertain to know the exact impact without scientific evidence. How many companies have resources, capacity or the will to use the scientific evidence? Those are again the differences that we should be aware of.

The fourth and the last point is that of how do we attribute the contribution to climate change to specific companies? When we talk about human rights due diligence, now the typology under Principle 13 of the UN Guiding Principles is that a business may cause, contribute to or may be directly linked to an adverse impact. Of course we can apply this typology to the climate change as well. But how do we know that what is the contribution of this one particular business to climate change globally and how much it has to be accountable for that. So this issue of linkage with what it has caused and what it needs to do to prevent that causation or contribution is going to be different in my view than the typical human rights due diligence. I wanted to highlight these differences so that we do not put everything in this one basket of due diligence – without understanding that human rights due diligence is a different animal than climate change due diligence. Unless we appreciate these differences, we may not be able to design a regime which is good enough. Thank you.

What is the importance of legal remedies in the context of climate change?

There are two reasons why remedies are vital. The first point is that rights and remedies go hand in hand. If you do not have effective remedies, we can't really say that these are rights. So if we're talking about human rights, there have to be remedies and businesses – if they breach human rights – have to be held accountable. If a mandatory human rights due diligence law does not include an effective remediation element, if it does not include the possibility of effective accountability, then I think this is going to backfire for the communities on the ground.

The second point is that, however best companies try, prevention is never foolproof and some violations of human rights or some adverse impacts on climate are inevitable. If it is inevitable, then we need to find who has to be accountable for that: a government, a company or both of them. So accountability and remediation are absolutely vital for climate change.

In relation to climate change, in my view preventive remedies would be absolutely vital. Very often we talk about prevention, but we don't talk about preventive remedies, so I would like to highlight that sometimes remedies could be preventive in the sense that there could be an injunction. For instance, before a company starts a project (let us say a coal power plant) and if the plant has already started then it is too late, but can we prevent that coal power plant from starting in the first place. That would be a preventive remedy. Adding those kind of remedies would be absolutely vital in relation to climate change.

But we also need to think about how do we seek these remedies. Let's say we have a company in Europe it is possible that thousands of people could potentially file a case

against this company. Let us take the example of a French company that has caused climate change impacts in Fiji, in Mauritius and in the Maldives. How are these victims going to access the forum? How many cases are going to be filed against this one company? These are complex questions which again differentiate climate change from human rights adverse impacts, and I think that is where the element of collective remediation may be relevant. We might need to create a global fund for instance that could take care of the adverse impact on climate anywhere globally. In other words, we need remedies of a different kind in relation to climate change. In terms of the standing, who can file a case for remedies and what remedies a non-judicial forum can award, for instance, the Human Rights Commission of the Philippines has conducted the carbon major inquiry. What implications the recommendations of this inquiry report would have for remedies is something that we should carefully consider.

Question: Will human rights due diligence be enough to overcome the looming climate crisis, or do we need more than due diligence?

I think human rights due diligence is an important step, but it will not be a sufficient step to achieve the goal that we want to achieve here, whether it is about respecting human rights or protecting the climate. We should not see due diligence, including the mandatory one, as a panacea, that it can fix everything. And that's why I would caution people against putting all eggs in one basket and think that mandatory due diligence law in Europe or globally is going to solve all challenges. We may need more than this in my view. Let me give three concrete examples.

We need incentives for businesses, both to respect human rights and also to ensure that they do not damage the climate. That is my first point.

At the same time, there should be certain 'red lines' in my view. The idea of human rights due diligence sometimes creates an illusion for businesses that everything is fine as long as they do due diligence, and I personally do not believe that is the right approach. Because let us say a tobacco company – can a tobacco company ever comply with UN Guiding Principles? I have my doubts. Of course, tobacco companies claim that they respect UN Guiding Principles, but I don't agree with this proposition. If a tobacco company merely removes child labour or forced labour from its supply chains, that is not respecting human rights, because the very product is contrary to idea of right to life and right to health. Similarly, in relation to climate change, should we allow, for instance, deep-sea mining? That can be justified because we need renewable energy, we need battery operated vehicles, we need more minerals, and that's why deep-sea mining should be allowed, right? But there should be certain red lines, where the due diligence is not going to be enough, in my view.

Finally, due diligence is operating within the current system, but perhaps we need fundamental structural changes to the current economic order. The COVID-19 pandemic has really exposed many problems with the current order – we need a radical shift in how we live and in our relationships with nature, and I don't think human rights due diligence is going to fix that. For instance, do we need to go back to bikes, or battery-operated cars? That is the question we should be asking. For example, plastic bags were introduced many years ago and we thought "Oh, very good!", and now we are trying to get rid of plastic bags. Are we creating another crisis in the process of solving this crisis? Companies promote unnecessary consumption in the market. How is due diligence going to fix it? At least I have my doubts. We definitely need due diligence, but I would say we need human rights due diligence 'plus', we need more than due diligence.

Question: What role should trade and investment agreements play in mitigating against

climate change?

I will make three observations about how investment agreements can contribute to mitigating climate change.

First, most of the current international investment agreements confer rights on investors but they don't impose obligations on investors. So, going forward these investment agreements must impose human rights obligations, including the obligation to conduct human rights due diligence. This will fix the current imbalance in these investment agreements.

Second, international investment agreements should preserve the regulatory space that governments would need to take steps to mitigate climate change. In fact, there has been a recent case, when a company, I will not name the company or the country, but both are from Europe – so, one country in Europe proposed that “Ok, we’re going to phase out coal power plants” and then another company from Europe said “Oh, then we’ll take you to the arbitration, because if you do that, then this is going to reduce our profits”. I think that we need to ensure that the states have plenty of regulatory space that they will need to take concrete actions and fast actions to manage climate change crisis.

And finally, science and technology is going to be very crucial to manage climate change, and I think investment agreements could facilitate investment into developing green technologies and also ensuring that the Global South has access to those technologies. Otherwise we will not be able to solve this global crisis.

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