British Institute of International and Comparative Law

Human Rights Due Diligence for Climate Change Impacts

Webinar Series Report

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British Institute of International and Comparative Law

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Date: January 2021

This report contains the respective presentations made by speakers as part of the British Institute of International and Comparative Law (BIICL) 'Webinar Series: Human Rights Due Diligence for Climate Change Impacts', (September - October 2020).

The views of speakers are their own and do not necessarily reflect the views of BIICL or the editors. Please cite accordingly, for example:

[Name of speaker], '[Title of presentation]', in Lise Smit and Ivano Alogna (Eds) *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report*, (January 2021), available at: https://www.biicl.org/categories/business-and-human-rights

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Executive Summary

The British Institute of International and Comparative Law (BIICL) held the webinar series 'Human Rights Due Diligence for Climate Change Impacts' from 10th September to 1st October 2020, as part of the newly established BIICL Human Rights Due Diligence Forum.

Developments around mandatory human rights due diligence laws are multiplying across Europe, and increasingly include climate change impacts within their scope. As a result, companies, regulators, judges, legal advisors, civil society and the public are asking what the legal implications of these due diligence laws will be for companies relating to their climate change impacts.

In this webinar series, the discussion turned on the nature of due diligence as a legal standard of care, how this can be applied in relation to climate change, and what the practical implications for companies are likely to be.

This report provides an overview of the discussions and is divided into four parts according to the episodes' topics. It contains the written versions of each speaker's presentation, in the order that they took place.

The editors wish to thank the speakers for their participation and for making this webinar series a resounding success, and the first of its kind to explore this topic in detail. Special thanks to the BIICL Events Team, particularly Leigham Strachan, Bradley Dawson, Carmel Brown and Bart Kolerski for ensuring the smooth running of the series. Thank you also to Dr Irene Pietropaoli and Dr Claire Bright for their input.

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

Lise Smit and Ivano Alogna

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.[1] The study showed that although there now seems to be consensus that climate change is a human rights issue[2] – even being called 'the greatest ever threat to human rights'[3] by the UN High Commissioner for Human Rights, Michelle Bachelet – companies' human rights due diligence and their climate due diligence seem to be developing 'in silos'.[4] 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.[5] Various other regulatory developments have similarly underscored the need to consider how due diligence-related regulation would apply to business' climate change impacts.[6] 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)[7] 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.

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[1] Lise Smit *et al*, *Study on due diligence requirements through the supply chain*, European Commission (2020) ('EC study') available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[2] David R Boyd, *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment*, UN Doc. A/74/161, United Nations Environment Programme (2019), available at: https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf.

[3] Agence France-Presse in Geneva, 'Climate crisis is greatest ever threat to human rights, UN warns', *The Guardian*, 9 September 2019, available at: https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations. Michelle Bachelet stated that '[t]he world has never seen a threat to human rights of this scope', in her Opening statement at the 42nd session of the Human Rights Council, in Geneva, 9 September 2019, available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24956&LangID=E.

[4] Above n 1 at 53.

[5] BIICL, 'BIICL-led due diligence study basis for European legislative initiative', 30 April 2020, available at: https://www.biicl.org/newsitems/16415/biicl-led-due-diligence-study-basis-for-european-legislative-initiative.

[6] See Sara Seck, 'Climate change and the human rights responsibilities of business enterprises', *in* David Ismangil *et al*. (eds), *Climate Change, Justice and Human Rights*, Strategic Studies, Amnesty International (2020), available at: https://www.amnesty.nl/content/uploads/2020/08/Verkenningen2020-climate-change.pdf?x81110.

[7] UN OHCHR, *UN Guiding Principles on Business and Human Rights*, 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

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,[8] mentioned by Jaap Spier, the Climate Vigilance Benchmark[9] highlighted by Paul Mougeolle, and the Business and Human Rights Resource Centre's Transition Minerals Tracker,[10] 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'[11] 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.[12] It applies the OECD Guidelines for Multinational Enterprises (OECD Guidelines)[13] 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 Fronterra*[14] 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.

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[8] Climate Principles for Enterprises, available at: https://climateprinciplesforenterprises.org/updated-principles/.

[9] Paul Mougeolle, 'Benchmark de la vigilance climatique des multinationales', Notre Affaire à Tous (2020), available in its original French version at: https://notreaffaireatous.org/wp-content/uploads/2020/03/Rapport-General-Multinationales-NAAT-2020.02.01.pdf; and its main results in English: '25 French Multinational Corporations Challenged by the NGO *Notre Affaire à Tous* on Climate Shortcomings' at: https://notreaffaireatous.org/wp-content/uploads/2020/03/Press-release-2.pdf.

[10] Transition Minerals Tracker, available at: https://trackers.business-humanrights.org/transition-minerals/.

[11] Accordingly with the definition of 'due diligence': 'such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.' *Black's Law* Dictionary, 6th ed. (St. Paul, Minnesota, West, 1990), cited by the Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide,* 2012, at 6.

[12] Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises, *Final Statement: Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING*, (19 April 2019), available at: https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing.

[13] OECD Guidelines for Multinational Enterprises, available at: https://www.oecd.org/corporate/mne/; OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*, available at: https://www.oecd.org/corporate/mne/.

[14] *Smith v Fronterra Co-Operative Group Limited* [2020] NZHC 419.

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:

a. 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;

b. 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

c. A creative combination of the above.

The third option was the most popular choice.[15] 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.'

[15] The results were: a) 42%, b) 12%, c) 46%.

Episode 1: Corporate Due Diligence for Climate Change Impacts: The Status Quo

The idea that companies have responsibilities to address their climate change impacts is not new. However, the above-mentioned BIICL-led study for the European Commission on due diligence requirements through the supply chain found that within companies, "human rights and climate change processes often take place in 'silos'".[16]

In the first episode of this webinar series, speakers discussed the status quo of current corporate due diligence practices relating to climate change impacts, and considered to what extent these could be utilised, integrated, adapted and expanded to meet any future mandatory due diligence legal standard.

1. Keynote Speech

David R. Boyd
UN Special Rapporteur on Human Rights and the Environment

Although it has been somewhat overshadowed by the Covid-19 pandemic in recent months, the stark reality is that we are living in an unprecedented global climate emergency. Carbon dioxide in the atmosphere is at its highest level in more than three million years, dating back to the Pliocene Epoch before Homo sapiens had even evolved. We have been very fortunate over the past 10,000 years of the Holocene to live in a stable climate, which has really enabled the emergence of agriculture, cities and civilisation. The climate emergency is having huge impacts all around the world today. These are no longer distant, unforeseeable, or future impacts, but are impacting countries around the world today, including more frequent and severe storms, and other extreme weather events: droughts, wildfires, floods, ocean acidification, the melting of glaciers and ice caps, increased incidence of water and vector-borne diseases and many other impacts. And these biophysical impacts have impacts on human rights: on the rights to life, the right to health, the right to food, water, sanitation, the right to culture, the right to property, the right to development and the right to a healthy environment.

I have witnessed some of these impacts first-hand in my role as the Special Rapporteur on human rights and the environment. My first country mission was to Fiji, one of the small island States that really is at the front lines of climate change impacts. I visited a small community called Vunidogoloa, one of the first communities in the world that had to be completely relocated because of the impacts of climate change. This tropical paradise, this small village located on the coast of one of the Fijian islands, was relocated because of rising sea levels, storm surges and the salinisation of their drinking water and agricultural lands. And although they only moved three kilometres inland, as a subsistence community dependent on the ocean, it has had a profound impact on many of their human rights.

I also visited two small communities on the outskirts of the capital of Fiji, informal settlements that have arisen because of the impact of Tropical Cyclone Winston on Fiji in 2016. One of the strongest storms to ever reach land in the southern hemisphere, Tropical Cyclone Winston killed more than 60 people in Fiji, left thousands of people homeless and destroyed homes, crops and infrastructure. Some of those homeless people have moved to these informal settlements on the outskirts of Suva, where they are living in really subpar housing, very ramshackle conditions. The government of Fiji, to its credit, has managed to provide them with access to safe drinking water and electricity, but they do not have access to adequate sanitation. As a result, both of these communities are subject to regular flooding: one is beside a river, the other beside the ocean. And when the floods happen, the faecal matter washes out of the pit toilets

[16] EC study above n 1 at 16.

and contaminates the lands, the food and the waters of these communities, resulting in some of the world's highest levels of cholera, a deadly waterborne disease.

I also visited Norway, and I went north of the Arctic Circle to meet with the Sami indigenous people. For the Sami people reindeer herding is at the heart of their culture and of their economy. Yet changes in precipitation have really had a dire impact on reindeer herding. Reindeer during the winter use their hoofs to scrape away the snow, in order to access the lichens that give them sustenance. But in northern Norway in recent years, for the first time in memory, there has been a lot of rainfall during the winter, which results in ice and the reindeers simply cannot get through the ice to get at their food. Therefore, the reindeer herders, the Sami people are having to supplement the reindeer during the winter, which is logistically challenging, dangerous and also very difficult.

These are just a few examples of the actual impacts that climate change is having today on people around the world, and are really the tip of the iceberg. Countries got together in 1992 and negotiated the United Nations Framework Convention on Climate Change, in which they committed to avoiding dangerous anthropogenic interference with the Earth's climate system. And what have we done as a society in the intervening 28 years? Greenhouse gas emissions globally have risen 60% since 1992; the use of fossil fuels constituted 80% of the global energy system in 1992; in 2019, the use of fossil fuels still constituted 80% of the global energy system. Clearly the pace of change has not been adequate to address the challenge of climate change.

In 2018, the Intergovernmental Panel on Climate Change (IPCC) issued a landmark report outlining what would be necessary in order for States to comply with their obligations under the 2015 Paris Agreement on Climate Change, where States committed to limit the increase in global average temperatures to 2 degrees Celsius at the most, but ideally to keep the increase below 1.5 degrees. Unfortunately, we are already at 1.1 degrees of increased warming over pre-industrial times, and the IPCC concluded that we need rapid, far-reaching and transformative changes in all aspects of society in order to meet the challenge of climate change.

In order to meet the climate change challenge, I believe that we need regulations that are legally binding, that apply to all businesses in all sectors of the economy, in all States.

In a report[17] that I presented to the United Nations General Assembly last Fall, I outlined the obligations of States and the responsibilities of businesses vis-à-vis climate change, referring to due diligence obligations for both States and business. The current landscape in terms of due diligence requirements is not adequate to the magnitude of the climate challenge. We have the UN Guiding Principles, the OECD Guidelines, but these are voluntary tools with a lot of uncertainty in their application. We have some sectoral regulations that have emerged in recent years, such as the European Union's timber regulation and the European Union's conflict minerals regulation, but these are also not sufficient. In order to meet the climate change challenge, I believe that we need regulations that are legally binding, that apply to all businesses in all sectors of the economy, in all States.

It is encouraging to see the French Corporate Duty of Vigilance Law and other European nations moving in that direction. And it is really encouraging to see the discussions now taking place at the European Union about an EU wide directive that would make due diligence mandatory. All of these are critical steps towards legal systems in place. And if we think about the impacts of climate change, and where we need to go, what the Intergovernmental Panel on Climate Change has said, then some of the recommendations that I made in my report last Fall become very clear.

It is impossible for me to conceive of a situation in which a State or a business could fulfil its due diligence obligations in approving or proposing a new mine for thermal coal or a new coal fired power plant. In light of the fact that the world already has more fossil fuel reserves than it can possibly burn and stay within the 1.5 or 2 degree target set forth in the Paris Agreement, it is

[17] David R Boyd, *Safe Climate* (n 2).

impossible for me to understand how a business or a government can authorise or propose additional exploration for more coal, for more oil, or for more natural gas. If we cannot burn what we have, then it makes no sense to explore for more.

Therefore, I think that this due diligence trend, this due diligence requirement in legislation is actually entirely consistent with what the Intergovernmental Panel on Climate Change has called for, which is rapid, far reaching and transformative change. Corporations and businesses have to be part of the solution, and this is one of the ways that they can be. I hope that you have really fruitful discussions throughout the rest of this webinar and through this series of webinars. And I hope all of you will contribute to protecting the people we love and the place that we call home from the impacts of climate change.

David R. Boyd was appointed as the UN Special Rapporteur on Human Rights and the Environment for a three-year term commencing August 1, 2018. He is an associate professor of law, policy, and sustainability at the University of British Columbia.

He has a PhD in Resource Management and Environmental Studies from UBC, a law degree from the University of Toronto, and a business degree from the University of Alberta. His career has included serving as the executive director of Ecojustice, appearing before the Supreme Court of Canada, and working as a special advisor on sustainability for Canadian Prime Minister Paul Martin. He has advised many governments on environmental, constitutional, and human rights policy and co-chaired Vancouver's effort to become the world's greenest city by 2020. He is a member of the World Commission on Environmental Law, an expert advisor for the UN's Harmony with Nature Initiative, and a member of ELAW, the Environmental Law Alliance Worldwide.

David is also the author of nine books and over 100 reports and articles on environmental law and policy, human rights, and constitutional law. His most recent books include *The Rights of Nature* (ECW Press, 2017*), The Optimistic Environmentalist* (ECW Press, 2015), *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (UBC Press, 2015) and *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

2. A holistic perspective to human rights due diligence for climate change impacts

Shona Hawkes
Senior Global Policy Advisor – Forests at Global Witness

> 'Land, environmental and indigenous peoples' rights remained the most dangerous sector of human rights defense due to the profit-driven exploitation of natural resources…The lack of a binding regulatory framework [on climate change] at the international level is a contributing factor to the risks faced by human rights defenders' (Front Line Defenders, 2019).[18]

This quote comes from a group called Front Line Defenders in a report showing that land and environmental defenders, particularly indigenous peoples, are the most targeted group of human rights defenders. I start with this quote because it highlights that the separation between 'human rights' and 'the environment' or 'climate' is often an artificial one. While the tactics and strategies we use in our work may vary, they are all relate to parts of the one ecosystem and often reflect the interconnected nature of the social and the ecological world.

Each year, my colleagues at Global Witness put out a report tracking threats to land and environmental defenders. Our latest report 'Defending Tomorrow',[19] highlights some of the incredible achievements of environmental defenders in protecting the natural world, but also raises the alarm that threats are not only persisting but escalating. It also notes that 2019 saw the highest number of documented killings of environmental defenders since we started our reporting. And that is just the data that we can collect, the true numbers are likely much higher. Indigenous peoples are particularly impacted – while they comprise about five percent of the global population, members of indigenous communities account for around a third of documented killings we track each year. I raise this to emphasize that when we discuss the future of climate and environmental laws first and foremost we need to ask 'Who are these laws for?' and 'Who needs them most?'. To be effective, laws must be tailored to the needs of people on the frontlines of safeguarding the environment such as grassroots activists, rural communities and indigenous peoples. It is also vital to include their expertise and perspectives.

To reduce the threats to people who are safeguarding their land, forests and waters we cannot only focus on abuses as they occur, but there is a need to tackle the broader business models that incentivise such abuses.

To reduce the threats to people who are safeguarding their land, forests and waters we cannot only focus on abuses as they occur, but there is a need to tackle the broader business models that incentivise such abuses. If we want to support defenders we need to also focus on what they are defending. Increasingly, I have seen many of my friends in the human rights space working on climate and environmental issues. This is because the most destructive business practices in industries such as agribusiness, mining, logging or dams target the lands and environments of the most marginalised peoples.

As BIICL launches this important discussion, I wanted to share some reflections on what we currently see in the corporate accountability space and what we can learn from, and be mindful of, as we start to build new legal frameworks.

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[18] Front Line Defenders, 'Front Line Defenders Global Analysis 2019', 2020, available at: https://www.frontlinedefenders.org/sites/default/files/global_analysis_2019_web.pdf.

[19] Global Witness, 'Defending Tomorrow: : The climate crisis and threats against land and environmental defenders', July 2020, available at: https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/.

Firstly, it is important to identify that the economic shifts taking place in response to the climate emergency are nuanced and complex.

What we are seeing is a global shift from a fossil fuel-based economy to a land-based economy. Today, many of the structures evolving to address companies' climate impacts are focused on fossil fuels. This is obviously critical and rightly prioritised. However, as the Intergovernmental Panel on Climate Change (IPCC) and others are pointing out, we need to ensure that solutions on climate issues cover other high-risk industries. We need to ensure that legal tools to tackle climate change deliver impacts to curb issues like deforestation and unsustainable land use – which will become even more pressing as money moves from fossil fuels to other sectors.

Secondly, another challenge that we see is that discussions on corporate accountability often focus on reporting of net or aggregate data and a company's total carbon emissions. If a company is running a coal power plant, it will likely know what its emissions are going to be, based on the core product that it is dealing with – so in that case, its planned emissions can be easily tabulated. The problem is that this approach does not necessarily translate to other high climate impact industries. For example, we know that agribusiness is a key driver of deforestation in climate-critical forests. Yet, many of the companies found linked to forest destruction have 'zero deforestation' policies in place so their emissions reporting on this issue would be zero. The problem is not that they plan for deforestation – it is just the highly predictable outcome of undertaking high-risk activities in the middle of a rainforest without adequate due diligence or accountability.

The problem is not that they plan for deforestation – it is just the highly predictable outcome of undertaking high-risk activities in the middle of a rainforest without adequate due diligence or accountability.

In terms of empowering land and environmental defenders, the most effective forms of transparency are those that ensure that an individual community can know which businesses, financiers and buyers are connected to what is happening on their land or in their community. This is the basic step needed to ensure that communities can talk to those companies, they can understand what their climate change policies are, what their human rights policies are, and they can access the rights under those policies as well as their rights under international law. Currently, this is really where a lot of the current system breaks down. Company policies and commitments mean very little if those most affected have no way of knowing if a company is engaged in activities in their area.

A third and trickier point, is a question that we are dealing with in the human rights space that I think will equally apply on climate and environmental issues as well. If we are constructing forms of liability or accountability on climate change for companies, what does this mean for supply chain actors and financiers?

If a company commits abuses on the ground, it is also highly likely it has been enabled, financed and potentially incentivised by others who have profited from those activities and that have not done their due diligence. How do we calculate the liability of a bank that repeatedly loaned money to that company, or to an investor that profited off it, or a supply chain company that bought its products? We know that financial flows are a key driver of how companies make decisions so it is critical that all actors are considered as we work through these questions about liability.

It is also critical to ensure that efforts are focused on holding businesses accountable for their contributions to climate change and to environmental harms, and not only on what costs climate change may present to their business. It is, of course, positive to see the evolution of discussions about how coal or fossil fuels might impact a business' profitability. However, this alone is not enough. If we want to deter bad behaviour and foster truly sustainable economies, we need legal models that ensure all environmental and climate abuses come with meaningful costs and consequences for business. This requires adequate deterrents to ensure that paying penalties or fines does not just become part of the cost of doing business, as is often the case.

A final point to consider in these discussions about emerging law is to aim for legislation that can complement the legal strategies that are being used by grassroots activists in their own country and context. Of course, in many places climate change is an incredibly salient and powerful legal framework. However, we should also ensure that we are attentive to, and building on, other legal ideas where possible too. In some places, grassroots activists and environmental defenders may be aligning to the OECD frameworks on responsible business conduct, the rights of nature, evolving work on ecocide and safeguarding biodiversity or other environmental laws. There are also some exciting legal cases emerging around torts and duty of care.

If we want to deter bad behaviour and foster truly sustainable economies, we need legal models that ensure all environmental and climate abuses come with meaningful costs and consequences for business.

Looking forward, I would also encourage you to draw inspiration from legal scholars who have deeper expertise in taking a holistic approach to the law. This includes, for example, learning from indigenous jurisprudence. One of my favourite legal texts is *The Land is the Source of the Law* by Kombumerri academic C.F. Black.[20] She is a descendant of the Kombumerri and Munaljahlai first nations on the continent of Australia. She stresses that when we think about governance or the power of the law, we are not only considering rights – but rights, responsibilities and relationships. How we think about rights and responsibilities to the environment should also be informed our relationships to lands, forests and waters as well. We need legal structures that prioritise and centre the needs and voices of those who are most knowledgeable about, and invested in, caring for their local lands and environment. This is critical to redirect us away from an extractive model of doing business that typically centres the wishes and interests of far-off companies above all else, to create more equitable and sustainable practices.

Shona Hawkes is a Senior Global Policy Advisor – Forests at Global Witness. Shona has over a decade's experience working in support of communities protecting their land, forest and water rights and has led policy and advocacy work at local, national and international levels at the nexus between human rights and safeguarding the environment. At Global Witness she advices on strategies to address the financing behind forest destruction and its role in the climate crisis.

[20] CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence*, 2010, Routledge.

3. EU and French perspectives on due diligence for climate change impacts

Clotilde Henriot
Senior Law and Policy Advisor, Trade and Environment Lead at ClientEarth

My presentation provides an overview of the current legal framework which exists in the EU and in France in relation to due diligence for climate change impacts. I will finish my presentation with food for thoughts, basically raising questions for any upcoming legislative proposal on due diligence for climate change impacts.

I will start by providing the state of play of due diligence for climate change impacts with reference to not all but some of the existing legal frameworks. Before entering into some explanation around the EU Non-Financial Reporting Directive,[21] I will start with the concept of due diligence in order to understand why its requirements will differ for disclosure requirement on climate change impacts. Basically, based on the OECD Guidelines for Multinational Enterprises, the concept of due diligence 'involves a bundle of interrelated processes to identify adverse impact, prevent and mitigate them, track implementation and results, and communicate how adverse impacts are addressed with respect to the enterprises' own operation, their supply chains and other business relationships'.[22]

I think it is important to try to keep this concept in mind when we talk about due diligence, because there is a big element which is based on prevention. This is a bit different when we are talking about reporting, when unfortunately the negative impact could have already occurred. Basically, we know that some progress has been made, notably thanks to the adoption of the Non-Financial Reporting Directive in 2014. Member States had two years to transpose this Directive into their national legal framework. Obviously, its transposition will differ in each Member State depending on how much they keep to exactly the same scope of companies, considering that it is supposed to be targeting large public interest companies with more than 500 employees. It means that it targets, approximately so far, 6000 large company and groups across the EU.

Therefore, what is this Non-Financial Reporting Directive? What is its idea? The idea is to provide some information in relation to environmental, social and employee matters, respect for human rights, anti-corruption and bribery. Moreover, when we look at the type of information that should be given, I think it is interesting to notice that there is indeed – when you need to give a description of the policies that are pursued by the undertaking in relation to those matters – the fact that there is the mention of any type of due diligence process implemented. In order to avoid confusion, it does not mean that the companies have to implement a due diligence process. They just have to report on it if they have it.

It is also interesting to look at another component of the information that should be given in the non-financial statement, where it does say that the information should be on 'the principal risks related to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks'.[23]

That is quite interesting because it is basically an assessment of the risks and the impacts (which is at the core of the due diligence requirements) with the need to disclose the type of information in relation to those risks. And there is also this interesting component of the description of the management of those risks. Unfortunately, at this stage, it needs to go a step further than having the idea of managing the risk. Building on the definition I gave at the very beginning, what is interesting is to be able to understand,

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[21] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN.
[22] OECD Guidelines above n 13 at p. 16.
[23] Article 19a, 1d Directive 2014/95/EU.

when there is a due diligence requirement, how the company will mitigate those risks and how it will take it into consideration before making any business decision.

Therefore, these disclosure requirements are a first step, but unfortunately – particularly in relation to climate-related risks – there has been a study done by the Alliance for Corporate Transparency Research in 2019, which demonstrates that so far only 46,2% of all companies assessed (around 1000 companies) do not provide any information on climate-related risks.[24] Even though this figure is disappointing, I think there is now better sign on how companies can do better, and how they can inform what they put in their non-financial information statements with the production from the European Commission in June 2019 of Guidelines on Reporting Climate-related Information.[25] These guidelines integrate the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD),[26] established by the G20's Financial Stability Board, and they provide a set of examples of risks of a negative impact on the climate resulting from business activities.

Concerning due diligence requirements, France has gone a step closer with the adoption of the French Duty of Vigilance Law in 2017.[27] According to this law, companies with a certain number of employees and a quite high turnover must include due diligence measures, in order to identify risks within their operations or the operations of their suppliers that can have severe impacts on human rights, fundamental freedom, health and safety of persons and on the environment. This is a quite broad provision and there is not any secondary legislation in France detailing the meaning of the impact on the environment. Therefore, it should be assumed that it encompasses climate change impacts. There is some ongoing litigation in France, in relation particularly to the scope of the legislation, especially in relation to climate change impact and how it should be integrated into the vigilance plan. Hence, there is some hope that we will have more details on the type of responsibility and obligation on how to address and mitigate those climate change impacts, when they are identified. Finally, there has been a study on this French Duty of Vigilance Law, which has been released in March 2020, identifying that 10 companies – out of the 25 which were scrutinized – do not integrate climate in their vigilance plan.[28]

[T]he due diligence system is proactive, having a forward-looking function that identifies potential risks and impacts before entering into any business decision. But it should also be a reactive process, basically to take measures to mitigate the impacts which have occurred.

Finally, the current legal framework shows that there can definitely be some place for improvement toward a strong due diligence requirement in relation to climate change. In fact, I think that we know that we need more, and we need to continue to think about the key questions in relation to corporate due diligence for climate change impacts. Some of the key steps of due diligence are the identification, the assessment and the mitigation of the risk and impacts. I think that it is extremely important to understand that the due diligence system is proactive, having a forward-looking function that identifies potential risks and impacts before entering into any business decision. But it should also be a reactive process, basically to take measures to mitigate the impacts which have occurred.

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[24] Alliance for Corporate Transparency, '2019 Research Report', 2019, available at: https://www.allianceforcorporatetransparency.org/.

[25] European Commission, *Guidelines on reporting climate-related information*, 2019, available at: https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf.

[26] Task Force on Climate-related Financial Disclosures, 'Final Report: Recommendations for the Task Force on Climate-related Financial Disclosures', June 2017, available at: https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf.

[27] French Duty of Vigilance Law (Law No. 2017-399 of 27 March 2017), available at: https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.

[28] Above n 9 and see Episode 3.4. below.

Another thing which is going to be very important is how we define a climate change risk. There are thankfully a lot of guidance documents, principles and a good basis to touch upon how this can be defined. And, in order to define and to adjust it should go hand in hand with human rights. Lastly, what we have seen so far for the French Duty of Vigilance Law as well as for the Non-Financial Reporting Directive on the scope of company is that the threshold is high, so we also need to assess what threshold, if any, is really needed if we want to ensure that companies address correctly their climate change impacts.

Clotilde Henriot is Trade lead and Senior Law and Policy Advisor at ClientEarth. After working for several years in a French private law firm., Clotilde joined ClientEarth in 2013. Since then, she has been working on the implementation of legal instruments to reduce the drivers of deforestation, particularly on the implementation of the EU Timber Regulation. For the last year she has been working on EU initiatives that aim to regulate imports of forest risk commodities. Finally, she has also been developing legal analysis of the type of legal instruments needed to strengthen corporate accountability in global supply chains.

4. Investment Arbitration and Human Rights Due Diligence for Climate Change Impacts

Stuart Bruce
Former Senior Associate in the International Arbitration Practice Group at Wilmer Hale

I will say a few words about climate change due diligence in the context of investor state dispute resolution, ISDS or investment arbitration. In particular, on the current potential for counterclaims to enforce human rights and climate change due diligence obligations and standards, such as those mentioned by my co-panellists. One key to my presentation is please keep in mind that much of what I discuss could also be relevant to challenging jurisdiction, and even the merits going to some cases of the investors' primary claims. But I will be answering these issues from the counterclaim perspective as an alternative. I am currently finishing a paper on this topic. So stay tuned for an extensive assessment, but for the moment I will provide two background comments and get into the detail of one particular area.

My first background comment is simply to note that until relatively recently, counterclaims were uncommon in investment arbitration, and are actually still infrequently used. Therefore, the jurisprudence in this area is very much under construction and there are pros and cons to this. There is not a whole lot of guidance, but at the same time there is perhaps some room to be creative and innovative in our legal thinking, in the way we use this area to implement and enforce climate change obligations.

The second background point is to note that of the handful of counterclaims that have been brought, only a few were successful. And two of those that were successful involved environmental considerations, as the *Burlington v. Ecuador* case and the *Perenco v. Ecuador* case. Some kinds of claims that were unsuccessful, also involved environmental considerations and indeed human rights considerations, such as the *David Aven and others v. Costa Rica* case. So there is a small but growing body of environmentally focused case law to interrogate. The stream of cases will no doubt grow as the world sees more and more climate action and disputes inevitably arise out of that action. So counterclaims do present a new and under explored area for climate change due diligence and investment arbitration.

Which brings me to my third and more substantive comment. To successfully bring a counterclaim a State will need to do three things: it needs to show that the tribunal has jurisdiction over the counterclaim, in an express or implied consent, in a BIT or legislation. This is definitely surmountable. It will also need to adhere to procedural and substantive rules. This is actually quite important because typically that requires a degree of connectedness between investors' claim and the counter-claim. For today's thought experiment, I am going to assume that has been satisfied. And the third element is to establish a cause of action on the merits, showing that the investor breached its obligations under domestic or international law in relation to climate change and human rights due diligence, for example. And whether it is domestic or international law used to establish a cause of action, very much depends on the wording of the BIT. This is, of course, where climate change due diligence could potentially come in. I am going to focus on this third one just a little bit more.

To establish a cause of action and a breach of domestic law, it could be possible to argue that the relevant investor failed to comply with the host State's environmental laws, including any due diligence obligations related to climate change and human rights. Making such a claim, one would have to consider whether, under the BIT, breach of a domestic law obligation alone is sufficient amount of breach of the BIT itself or whether something more is required. For example, whether the BIT either expressly incorporates the domestic obligation in the BIT, or contains something like an umbrella clause for domestic law obligations, elevating breaches at the domestic level up to the international level.

Three cases relating to counterclaims have found that a host State's domestic environmental laws had or could be incorporated into the BIT itself. And that is in the *Costa Rica*, *Burlington* and *Perenco* cases. This approach is also likely to be much easier under the new generation BITs, which have been recently negotiated or currently being negotiated, because they tend to include an express or implied incorporation of domestic law obligations into the BIT. A good example is the Iran-Slovakia BIT, which states that the respondent may assert as a counterclaim that the claimant has not fulfilled its obligation under this agreement to comply with the host State's law (so an express hook there to the counterclaim and domestic law). The Indian model BIT could also be an interesting example. It is very broadly worded

in relation to compliance with domestic law obligations, although it does not expressly refer to counterclaims. Other treaties which could also be used and have been discussed in counterclaim cases: the DR-CAFTA, the Australia-Hong Kong investment agreement and the Hong Kong-Chile BIT.

Establishing a course of action and breach of international law obligations owed by an investor is a little more challenging, conceptually and practically, for the simple reason that few international obligations are imposed on non-State actors such as investors. But how could it be feasible in a BIT context? There are at least two possibilities: a BIT could contain a provision that stipulates the obligations owed by the investor, such as CSR or environmental obligations. Or the BIT may incorporate, by reference other international law obligations it deems to apply to the investor, such as not to undermine the UNFCCC or the Paris Agreements or international labour standards or the OECD Guidelines. So they take on the status of international law by incorporation.

I am going to focus on the first category articulating investor obligations in the BIT itself, and I will use the Morocco-Nigeria BIT 2016 as a case study to do so. The BIT is signed, but not in force. So what I am about to say has not been tested. The Morocco-Nigeria BIT sets out both pre- and post-investment obligations on the investor, which could have implications for climate change due diligence. One of the pre-investment obligations is found in Article 14, which mandates the completion of an environmental impact assessment and requires the precautionary principle to be used in that environment impact assessment. Both of these tools are highly relevant to climate change issues. Everybody heard, and especially in the context of the uncertainties and the magnitude and timing, of certain climate change impacts. One of the post-investment obligations is found in Article 18, and this requires that certain types of investments maintain an environmental management system in accordance with the ISO standard 14001 or equivalent. This essentially creates an ongoing environmental due diligence obligation. The ISO has issued guidelines about how climate change falls within that standard, thereby potentially providing an avenue to bring climate change issues into the arbitration, especially if the obligation is also coupled with a domestic climate change due diligence obligation. Article 18 also creates an obligation on the investor to not manage or provide investments in a way that circumvents international labour, environmental or human rights obligations which are owed by the home and the host State parties, really broadening the span of obligations. This essentially renders the investor a participant in the protection of those obligations under the BIT. It is a costly international obligation for States to undertake due diligence and major projects that could cause transboundary harm, and civil obligations exist in many treaties such as the Espoo and the Aarhus conventions. So it could be possible to argue that under this BIT, the investor would be treaty bound not to interfere with any such obligations but with any measures that implement them domestically.

To establish a cause of action and a breach of domestic law, it could be possible to argue that the relevant investor failed to comply with the host State's environmental laws, including any due diligence obligations related to climate change and human rights.

And this issue arose in *Cortec Mining v. Kenya*, where the investor's claim was dismissed on the merits as it failed to conduct a proper environmental impact assessment under Kenyan law and other reasons as well. This particular issue can also be caught by the Article 14 pre-investment provision under the Morocco-Nigeria BIT that we just discussed.

Finally, another post-investment obligation is created by Article 19, and I think this actually holds considerable latent potential for broader use. It states the investments 'shall meet or exceed national and international accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices'. On the face of it, this provision could potentially be interpreted as applying to both internationally accepted voluntary corporate governance standards (codes, best practices, recommendations) and mandatory standards in national law and regulations. Climate change due diligence and climate risk governance are relevant to both categories, as we just heard. Specifically, in 2017, the TCFD, which has been mentioned previously, made many recommendations that squarely target corporate governance, including directors' duties. Those recommendations are currently voluntary and are more or less internationally accepted standards, which is arguably enough to require compliance with them under the BIT. But in any event, even if Article 19 does require mandatory standards, the TCFD

recommendations will soon be mandatory in many jurisdictions, including in the UK. Thus, managing accounting for climate risk as a component of corporate governance will become a legal responsibility under domestic law for boards of directors. The board's obligations will include ensuring that climate change due diligence is undertaken for planned investments and attesting that corporate reports incorporate climate-related disclosures. So because of Article 19, boards may also be required to do the same thing under international law, and that is how climate change due diligence could potentially fall in the scope of the BITs corporate governance provision. So to conclude, if this Article 19 provision or similar was incorporated into the BITs of major economies, especially those pursuing mandatory climate corporate governance reporting requirements, not only climate due diligence, but climate risk management could potentially become a binding international obligation on investors.

Stuart Bruce is a former senior associate in the International Arbitration Practice Group at WilmerHale, where he focused on international commercial and investment arbitration, and public international law matters, across various sectors, and with a particular interest in environment-related issues. In addition, Stuart is an Expert Reviewer for the Intergovernmental Panel on Climate Change's forthcoming Sixth Assessment Report, and Vice Chair of the International Chamber of Commerce UK Energy and Environment Committee. Previously, Stuart was a research associate to (now Judge) James Crawford at the Cambridge Lauterpacht Centre for International Law and he worked with the UNFCCC Secretariat during the early stages of designing the Paris Agreement.

5. Human Rights Due Diligence for Climate Change Impacts: the Status Quo in Energy and Finance

Caroline Sloan
Consultant – Sloan Consulting

I am going to look at industry practices, from the oil and gas industry in particular, that might inform a due diligence standard and in trying to examine where climate change impacts can be better reflected in terms of human rights standards.

In the last months, we have seen quite a range of statements from a number of the European-based energy majors, such as BP and Shell, stating how they are going to approach the reduction of carbon emissions, particularly in line with the Paris Agreement. Those are problematic in places and it is a bit of a change of tone. What I would hope that we can see developed from those sorts of statements, if we are talking about setting global standards, is some kind of expectation around companies having a climate change policy that reflects how they will tackle their emissions to get to 'Net Zero' in line with the Paris Agreement. And if oil companies are able to get on board with that, then surely that opens the door to other sectors as well. However, the real challenge is whether the sector can respond at the required pace, so moving from words to actions. The way that oil companies and energy majors are addressing emissions is quite variable.

It is possible, however, to see areas of focus, activities that many of the European-based companies are engaging with. I have compiled a list which really tries to show potential standards of behaviour, and from that it is possible to pick out companies who are not keeping up with their competitors, and it may be possible to argue they are excessively emitting in relation to the Climate Change Principles. However, what we also know is that climate change needs to be tackled urgently, and many of the actions oil and gas companies take are focused on reducing emissions from production. In fact, the focus needs to be on the 86% of carbon emissions that come from consumption of fossil-fuels. This kind of perspective within the industry does need to change, and the guidance, documentation and legislation that we have needs to address that part of emissions.

In fact, the focus needs to be on the 86% of carbon emissions that come from consumption of fossil-fuels.

What I now propose to do is to take a climate change lens, and to look at how climate change impacts on human rights due diligence might be approached specifically in relation to the energy sector. We look at where people start when they start with a human rights due diligence exercise, typically with a risk mapping exercise. And that is in line with UNGP Principle 18. The Total vigilance plan (2019) gives us a window into what they do in practice, and what other companies in the sector do in terms of that mapping exercise for human rights. The recurring theme is that actually there is not necessarily a reflection of climate change impacts in that risk mapping exercise and elsewhere in the process. Certainly, what should be obvious is that the businesses in the sector are not linking their own carbon emissions directly to climate change.

Moving on then from the risk mapping exercise to impact assessments, which are carried out widely throughout the industry in terms of a requirement by law before beginning any operations on the ground in host States. The industry is very familiar with these and they look at the social, environmental and health aspects of the impact of the project, but they are not necessarily human rights compliant. If their purpose is to meet legal requirements, they are not necessarily a human rights impact assessment. Increasingly, however, as we see from the IFC performance standards and the Equator Principles, which (broadly) imports IFC performance standards into a commercial lending for projects, standalone and integrated human rights impact assessments are carried out.

Social, environmental and health impact assessments have historically struggled to address a cumulative global impact such as climate change. That is not to say that there is no climate change impact assessment going on. Examples include a situation in sub-Saharan Africa where the operator conducted

scenario planning with the use of experts in order to help locate infrastructure in a known water stressed region, and to work out where this infrastructure can be located so that it does not add to the existing water resource constraints, nor will it do so in the future, in the event of temperature rises. It should be noted, however, that 'climate change impacts' here means wider impacts of climate change – rather than a direct link between the entity and its emissions through production of oil and gas.

It is also worth noting that consideration of, for example, infrastructure impacts on water, has not necessarily happened in the past, nor is it a global approach. It is not exactly a requirement from an industry perspective. See IPIECA[29], the body that helps to set and provide industry guidance on social and environmental issues for further information here.

Climate change impacts assessments will, however, be required under the Equator Principles IV, so banks will expect companies to conduct climate change impact assessments in some cases on new projects. However, that approach uses the TCFD as an underlying framework. The Task Force for Climate-related Financial Disclosure is a disclosure project, and it is also aimed at investors and at informing investors so there is not a human rights approach there. And in looking at scenario planning more generally, that human rights perspective is something that needs to be brought in to help make impact assessments work better.

That is an area where we really need to see the contracting process brought under a climate change lens, and to see the environment and the human rights processes joined up more effectively to tackle that cumulative effect and impacts side of climate change.

On how we prevent actions that lead to human rights impacts under the UNGP, that is quite often about relating to your suppliers and your contracts. In the oil and gas industry, the environmental contracting side is very technical. And it is often focused on design, where we see the industry working in silos, with the environmental piece done in one place, and the human rights side done in another one. Therefore, if there is a screening happening for human rights, it would not necessarily incorporate thinking about climate rights or climate change impacts. That is an area where we really need to see the contracting process brought under a climate change lens, and to see the environment and the human rights processes joined up more effectively to tackle that cumulative effect and impacts side of climate change.

Finally, on stakeholder engagement and operational grievance mechanisms, it is something of an open question as to how you are going to deal with stakeholder engagement on climate change impacts. This is a particular area of concern in relation to fragile States and areas where there is ongoing conflict, or areas which are post-conflict. The oil and gas industry tends to major in operations that happen in these places, so we need to examine afresh what is best practice for stakeholder engagement and for operational grievance mechanisms. What do we need to change in order to take account of the climate? Climate change impacts may have already or will occur in those regions, and will likely exacerbate conflict. How that will affect, for example, how you engage with your stakeholders, and who you engage as experts: they will need to have an understanding of the climate change perspective. Who you engage and how you engage on independent monitoring will also require a climate change perspective. There is a whole raft of issues around operational grievance mechanisms, stakeholder engagement that needs to take account of the fact that climate change impacts will exacerbate conflict and will cause their own complications for fragile States.

In conclusion, there are lots of open questions and areas that need development within the industry, and there are particular areas that the industry brings into focus, like the fragile States. That ongoing perspective on how we deal with existing infrastructure and existing sites is a big issue for climate change impacts, and there are no easy answers. What we really need is a more collaborative approach, which

[29] https://www.ipieca.org.

involves engaging a range of experts who can really work together from different areas of expertise to inform what climate change impact should bring to how we address human rights.

Caroline Sloan has a special research interest in business, human rights and sustainability with a focus on the finance and energy sectors. She also teaches courses on environmental sustainability and the social responsibility of business at Oxford Brookes Business School.

Caroline's interest in the field of business and human rights developed during her time as a lawyer in the Oil and Gas industry where she specialised in oil and gas finance. She has worked with the IFC and commercial banks on the funding of international oil and gas developments in sub-Saharan Africa.

Caroline qualified as a lawyer in Scotland in 2001 and has an LLB from Aberdeen University. She qualified as a lawyer in England and Wales in 2005 and has an MSc in Corporate Governance and Business Ethics from Birkbeck, University of London.

6. The Climate Principles for Enterprises as a Global Framework to Come to Grips with Climate Change

Jaap Spier
Reporter – Climate Principles for Enterprises (1st and 2nd edition),
Senior Associate – University of Cambridge, Institute for Sustainability Leadership,
Honorary Professor of Global Challenges – University of Stellenbosch

It is commonly accepted that the world is heading towards catastrophe if we do not keep climate change below 2 degrees and if possible below 1,5 degrees Celsius. Sadly, very few players – States, enterprises and other major players – are really keen to translate this commonly adopted goal into concrete steps.

Key players have little appetite to enter into discussions about their legal obligations in the face of climate change. They prefer vague discussions and, at best, non-binding self-imposed obligations. This state of affairs is the perfect breeding ground for global catastrophe.

We desperately need to concretize the discussion. If a State or an enterprise does not have a clue about its (legal) obligations, it cannot comply. It is impossible to assess whether it complied meaningful disclosure is difficult. If an entity, be it a State or an enterprise, does not comply, it may run a liability risk. Very credible experts sound the alarm; liability for damages is in the air. Personally, I do not think that liability is the answer. The better strategy is to focus on prevention, but that view is not overly popular anymore.

An international group of experts has tried to map the legal core obligations of States, the Oslo Principles and of enterprises and investors, the Principles on Climate Obligations of Enterprises (EP)[30]. Since the publication of these Principles a lot has happened: recent IPCC reports, new research by other climate experts, further depletion of the already limited carbon budget, to mention just a few 'highlights'. My learned friends and I arrived at the conclusion that the EP no longer sufficed. Hence, we have been working on an update (second edition)[31], published in November 2020. Hereinafter I will discuss the updated principles (49 in total) and the approximately 300 pages of the commentary thereto in a few minutes.

The primary reduction obligation of enterprises, expressed in a percentage, is the same as that of the State in which they operate. The reduction obligations of States are based on the global carbon budget per capita. Needless to say, the lion's share of the reductions must be achieved by enterprises in affluent countries.

It would be against the odds if most States and enterprises are going to curb their GHG emissions to the extent required to keep the increase of global temperature below fatal thresholds, be it well below 2°C, 1.75°C (as we propose), or 1.5°C. In addition, climate science is in the dark when tipping points will be passed. It could be anywhere between tomorrow, or by the time we get close to the threshold of two degrees. That means that we should not confine ourselves to direct emissions. Instead, we should also focus on other trajectories that might help to reach our goal. That means that we should also focus on suppliers, products and services, very much in line with the strongly emerging view that enterprises bear responsibility for their scope two, and scope three emissions. Focusing on products and services (and major retailers), is important. It means, for practical purposes, that a not insignificant part of the emissions of natural persons can be covered.

The update introduces obligations of buyers of fossil fuels, which we believe is the more promising approach to get rid of fossil fuels as soon as possible, compared to a sole focus on fossil fuel companies.

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[30] https://climateprinciplesforenterprises.org.
[31] https://climateprinciplesforenterprises.org/updated-principles/.

Governance is extremely important; the update introduces a series of principles to the effect that boards of enterprises must take concrete, appropriate steps to cope with the challenges of climate change, which otherwise will jeopardize their enterprises and society at large.

Seeing the apathy of the greater part of the corporate world, we must explore strategies to bring enterprises to their senses. Next to investors, accountants, credit rating agencies, insurers and attorneys have to play a role to stem the tide. Accountants cannot do a proper job if they do not have a clue and do not want to have a clue about the obligations of the enterprises they have to audit. Without such an understanding, they cannot assess relevant issues such as the liability and the reputational risk of the enterprises they have to audit. Accountants, credit rating agencies, insurers and attorneys cannot escape researching the legal obligations of their clients, their rated or insured enterprises. They do not only have fiduciary obligations towards their clients, but also towards those who, as they know or should have known, rely on their opinions or reports.

For now, compliance is possible and also affordable, as recent reports illustrate. The alternative is the devil and the deep blue sea.

Our update aims to provide concrete guidance about all these issues. We realize that our principles are not law. They are based on our group's interpretation of the law as it stands, or will likely develop. Our aimed audience may arrive at the conclusion that our assessment is mistaken. It would, however, be irresponsible to bet on the idea that enterprises do not have discernible concrete obligations in the absence of pertinent black letter law. It would also be a mistake to believe that courts will not be willing to come on board. In the short term some may not; we expect that ever more courts will be prepared to render 'responsible' judgments if they (come to) realise that our planet is otherwise doomed to experience global catastrophe. One of the 'niceties' of climate change as a global issue is that enterprises can often be sued before courts in multiple countries. So do not bet on an alleged or assumed reluctance of the judiciary in your own country.

Human rights law is important as an underpinning of our principles. Next to human rights law, we also borrow from many other legal sources, such as environmental, liability, and company law; soft law, such as codes of conduct, and governance, all kinds of declarations, authoritative reports, academic writings, and case law.

Authoritative reports such as David Boyd's brilliant 'A Safe Climate: Human Rights and Climate Change'[32] refer to the EP. Our website is visited daily by people from around the globe: all European countries, almost all Asian, Latin American and many African countries; and, of course, the U.S., Canada, Australia and New Zealand. Some international law firms explicitly refer to our principles on their websites or otherwise.

The choice between hugely insufficient measures or compliance with legal obligations, such as our Principles, is not a choice between the devil and the deep blue sea. For now, compliance is possible and also affordable, as recent reports illustrate. The alternative is the devil and the deep blue sea. It is really astounding how many people seem to believe that is an attractive option.

[32] David R Boyd, *Safe Climate* above n 2.

Jaap Spier graduated from Erasmus University (Rotterdam) in 1973. He was attorney at the Rotterdam Bar, lecturer of private law, Leyden university, company lawyer Unilever and professor of private law, Tilburg University.

Between 1997- 2016 he served as Advocate-General in the Supreme Court of the Netherlands. He held honorary chairs at Maastricht University, and the University of Amsterdam and currently an extraordinary chair at the University of Stellenbosch. Jaap is senior associate of the University of Cambridge Institute for Sustainability Leadership, senior fellow Global Justice Program, Yale University, and Member of the Scientific Advisory Board of ClimLaw (University of Graz). He received a PhD, Leyden University.

Jaap is founder and honorary President of the European Group on Tort Law, co-founder and reporter of an expert group that issued the Oslo Principles and co-founder of the Expert group on Principles on Climate Obligations of Enterprises (reporter and author of the commentary); he is currently working in an update of the Principles on Climate Obligations of Enterprises. Jaap has extensively published on tort law and legal aspects of climate change.

Episode 2: The (Intended) Impact of Climate Change Litigation on Corporate Due Diligence

We are witnessing an increasing wave of strategic climate change litigation. Traditionally brought against States, to date we have seen a few cases against companies. Civil claims are often focused on compensatory damages which, even if awarded, may not necessarily lead to a change in the practices or governance within the relevant company or industry.

In this episode, speakers considered whether climate change litigation is even intended to have impacts on corporate due diligence, whether there is any evidence that litigation to date (ongoing, successful or otherwise) have resulted in changes in companies' due diligence practices, and whether we can expect litigation to increasingly drive corporate due diligence in the future, given the move towards mandatory legal requirements and ever more widespread recognition of the climate emergency.

1. Overview of Some Trends in Global Climate Litigation

Jolene Lin
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Director – Asia Pacific Centre for Environmental Law

When we talk about litigation and the effects it has on the target actors - the idea of litigation being strategic litigation - oftentimes we see climate litigation being used in combination with other legal and non-legal strategies, particularly social media campaigns and political campaigns, to seek legal and social change.

When we talk about climate change litigation, we are talking about a wide range of legal actions, including court cases, administrative proceedings, petitions and prosecutions, addressing both issues of mitigation as well as adaptation.

We have seen a growth in the amount of litigation in the United States as well as globally. The United States has often been singled out because of the high number of cases – a kind of super mega jurisdiction – but we have also seen litigation in 29 other countries, including the European Union and in some of the regional and international tribunals. Based on the latest count, there have been 2215 cases filed in the US with about 384 cases filed in other jurisdictions.

Of course, there is a certain level of underreporting to these numbers. We rely on the official databases for these numbers, but in my work on developing countries, we find that there are many cases which do not get reported because of translation issues, and the fact that many of these cases do not reach the databases.

Most litigation continues to involve statutory pathways, particularly in the US, and there is a primary focus on governments. But we do see more cases against corporate actors. Increasingly, we see the so-called 'rights turn' in climate litigation, by which we mean that increasingly we find human rights arguments as well as constitutional rights arguments being advanced in cases. The vast majority of cases focus on mitigation, but there is an emerging body of case law looking at climate adaptation.

Now when we talk about climate litigation, there tends to be an assumption that is always about seeking regulatory action to promote climate action. That is true - most of the litigation is largely pro regulatory movement, but there are also anti-regulatory cases.

As we can see from the LSE Grantham's Institute's latest trends report,[33] we can see here there has been a steady increase in the number of cases up until 2019.

Now, here I just want to share the idea that litigation has both direct effects as well as indirect effects. By direct effects, we mean statutory interpretation, changing the common law such that you recognise the need to take into account climate change impacts, and, of course, constitutional interpretation, the right to life or the right to a clean environment, including the right to live in a stable climate. But there are also indirect effects. What does this refer to? The idea that litigation poses costs as well as risks to business and to governments in trying to continue as per business as usual. Litigation also reflects and seeks to change social norms and values. And therefore the indirect effects of litigation seek to mobilise change, and elicit a corporate response or a government response.

> *[T]he indirect effects of litigation seek to mobilise change, and elicit a corporate response or a government response.*

Now, moving on to talk about business climate disclosure. I chose to talk about this as an emerging trend because it seemed quite relevant to the issues that we are discussing today. At the moment, there are not that many cases, so I will just briefly share three cases that that are examples. These cases are trying to challenge inadequate disclosure by companies of the risk posed by climate change to their business model. So far, we have seen examples in the US, Europe and Australia.

One of the most high profile cases would be the one against Exxon Mobil. This lawsuit was filed by the New York Attorney General alleging that misleading statements about the cost of future climate regulations to investors meant that Exxon Mobil was guilty of legal misrepresentation and therefore in violation of the relevant securities law. The case was dismissed by the New York Supreme Court last December, primarily because the Court found that the statements did not constitute a material misrepresentation, in that these statements made by Exxon Mobil were not likely to significantly influence investors' perceptions about the business risks. There have been similar suits that are being filed in the US, modelled on this idea of going after oil and gas companies for their misrepresentation of climate risks to their business. However, there is a high bar to cross in such cases because of the idea of materiality and whether it really affects investors' decisions, and the jury is still out about this.

The Enea Ostrołęka case is one that most people are probably very familiar with because it is one of the most high profile cases in the EU, and also relates to the idea of the campaign 'beyond coal'. This particular power plant was meant to be the last coal-fired power plant to be built in Poland, and at the expense of € 1.2 billion. There was a shareholder resolution consenting to the construction of this coal fired power plant.

However, an environmental law firm filed a shareholder lawsuit that sought to annul the resolution and to hold that the resolution was invalid. One of the core arguments behind the claimants' case was that the power plant harmed the company's economic interests due to climate-related financial risks. In other words, this power plant would be a stranded asset, and it was not in the country or the company's interest to build this power plant. The case was brought in the Polish Commercial Companies Court, and in August last year the regional court in Poland found the resolution to be invalid. This was one of the obstacles in the construction of this coal-fired power plant. Since then, there have been other factors that have stood in the way, mostly to do with decisions by investors that they will not be investing in this coal-fired plant because of the direction being taken by the EU Green Deal.

And finally, you have cases against banks, companies and pension funds seeking to argue that they are being negligent in failing to disclose climate risk to their customers. For example, in Australia there are a few examples. There was a lawsuit against the Commonwealth Australia Bank over the inadequate disclosure of climate risks. This case was settled after the bank agreed to include details of climate risks in the annual report. Right now, there are two ongoing cases that are of interest. The first is *McVeigh v*

[33] Joana Setzer and Rebecca Byrnes 'Global trends in climate change litigation: 2020 snapshot' (July 2020), available at https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/.

REST, a superannuation fund, which is basically a pension fund. McVeigh is a 24-year old employee who has been putting money in their superannuation fund, and argues that the fund's failure to provide pensioners like him information about how they are dealing with climate risks violates their fiduciary duties as trustees. And very recently, in the midst of the pandemic, a law student, Catherine O'Donnell, filed a lawsuit against the Australian government, arguing that Australian sovereign bonds were being negligent in failing to provide adequate information about climate risk to its investors. The argument is that anyone who holds these sovereign bonds is holding something that could potentially be a stranded asset, and that this is therefore a violation of its duties.

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2. Human Rights-Based Climate Change Litigation

Annalisa Savaresi
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Human rights have come increasingly to the fore after the adoption and indeed in the lead up to the adoption of the Paris Agreement, because this issue is specifically mentioned in the Preamble of the treaty. In anticipation of that, a number of human rights bodies have taken positions on the matter of human rights and climate change, largely drawing attention to the fact, which may sound obvious, that States' human rights obligations in this area are quite important. There has been an increasingly large body of intergovernmental documents that try to interpret climate change obligations of States in light of human rights law, and in this connection there is a lot of literature. Human rights law and obligations at the national and international level are relevant as a paradigm for climate action, on the one hand, and on the other as a remedy.

So human rights obligations provide in principle an avenue for climate litigants in order to complain about human rights violations associated with climate change. The UN Special Rapporteur on Human Rights and Environment last year published his second report, dedicated specifically to the matter of climate change.[34] Particularly important for our purposes is that, for the first time, the UN Special Rapporteur made an effort to distil what are business responsibilities in relation to climate change. And here is what he had to say:

- He suggested that business responsibilities in relation to human rights have specific connotations vis-à-vis climate change.
- In particular, businesses should, in order to comply with their human rights responsibilities, reduce greenhouse gas emissions from their own activities and those of their subsidiaries.
- He also suggests that businesses should reduce greenhouse gas emissions for their products and services, minimize greenhouse gas emissions from their suppliers and publicly disclose data in relation to climate.
- And finally, quite importantly, they should support rather than oppose public policies concerning climate change and ensure that people affected by business related human rights violations have access to remedies.

'This may not be as outlandish as you think.' It is true, it is the first time a question of this kind is posed, but if we logically build on the case law and the other quasi-judicial decisions that have been taken in a number of places concerning human rights, we are not going very far. We are really doing something that is quite logical and builds upon existing practice.

And here is what is going on in a nutshell. Jolene Lin has mentioned that there is already quite a lot of climate change litigation, but not so much climate change litigation is based on human rights arguments. These are largely non-state actors going against States. However, there have been some cases of non-state actors going against other non-state actors - and in this case, I intend to refer to corporate actors. This is not always judicial litigation, but also relates to quasi-judicial processes.

For example, the Carbon Majors inquiry which I have been involved with, dealt with the impacts of climate change in the Philippines. Clearly, the ongoing impacts of climate change are already causing harm to

[34] David R Boyd, *Safe Climate,* above n 2.

the environment, to real estate and to persons. But in the Carbon Majors inquiry, these impacts were for the first time in history translated into human rights complaints.

This inquiry was started upon the initiative of Filipino individuals as well as civil society organizations, including Greenpeace. It was brought after a series of typhoons wreaked havoc in the Philippines, and the applicants suggested that the carbon majors - i.e. global corporate actors that were not headquartered in the Philippines but were causing the bulk of emissions - were to be held responsible for these impacts of climate change, from a human rights perspective. They invoked human rights that were embedded in the law of the Philippines and in international treaties that Philippines had ratified.

This complaint was not a lawsuit technically speaking, because the Philippines Human Rights Commission is a National Human Rights Institution that has the power to conduct inquiries, but it is not a judicial body. There were clearly many opportunities here:

- For raising awareness of the issues – i.e. egregious human suffering and harm associated with the impacts of climate change in the Philippines, and
- Enhancing visibility of a question that is not well resolved by the international climate treaties,
- And finally, to put pressure on state and non-state actors to do more in order to address these kind of problems.

At the same time, the technical, substantial and existential challenges associated with this type of complaints are enormous:

- There are questions of jurisdiction and extraterritorial reach of States' obligations, let alone corporate responsibility.
- There are also substantial limits to what you can actually do with human rights complaints such as these,
- And more existential constraints, if you like, about what human rights law and remedy are for: Are they meant to deal with issues like that?

These are the questions that were raised to begin with in 2016 when the Commission started to look at this matter. And of course, a lot has happened since.

The first element is that of transnational operations and human rights responsibilities of business. Here we are clearly looking at an evolving area. This very series is a testimony to that evolution and how fast the law in this area is moving. At the same time, we have judicial precedents that already acknowledge the extraterritorial reach of business responsibilities. So we said in this connection to the Philippines Human Rights Commission: 'This may not be as outlandish as you think.' It is true, it is the first time a question of this kind is posed, but if we logically build on the case law and the other quasi-judicial decisions that have been taken in a number of places concerning human rights, we are not going very far. We are really doing something that is quite logical and builds upon existing practice.

Concerning the question of causation. Again, the petitioners were building upon early scientific reports that have since been corroborated by more scientific evidence concerning the impacts of the carbon majors on the climate system. If we follow the case law concerning state responsibilities, it is possible, at least in principle, to argue convincingly that they are responsible, at least since they have demonstrated that they had knowledge of what they were up to and the impact of their activities on the climate system. So in this connection, the matter is more one of attribution rather than causation. A joint and several liability scheme has been proposed as a possible way in order to address the issue of attribution to specific actors of specific impacts. And finally, demonstrate that there has been a breach of due diligence duty. And here, a failure to act on the back of awareness of climate change, as I said, is possibly the trump card.

I will conclude here with a few reflections on the Carbon Majors inquiry. It does provide an important precedent for recognizing that international human rights bodies have a role in this debate, and they are oftentimes the only place to go to complain about egregious issues such as the ones that I mentioned. At the same time, the inquiry is supposed to deliver its recommendations very soon, and the Commission has already anticipated they will find the corporations responsible for human rights violations. And this is the first time this is done in the context of climate impacts. It will be very important to see what

repercussions this case has in relation to other cases, such as for example the *Milieudefensie* case[35] in the Netherlands where similar issues are being discussed.

Which brings me to my conclusions. Human rights are being used here as a gap filler, because we lack better specific dedicated remedies to address liability issues associated with the impacts of climate change. We are using human rights law and the evolution of due diligence practice in order to address these shortcomings. Human rights have a role to play here and it will continue to have a role to play. However, in the meantime, we are waiting for more and better and more systemic ways to address egregious impacts of climate change.

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[35] *Milieudefensie et al. v. Royal Dutch Shell plc*, summary available at: http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/.

3. Human Rights Due Diligence for Climate Change Impacts: Focus on Africa

Olanrewaju Fagbohun
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The global consensus is that Africa is the continent that is more vulnerable to the impact of climate change than any other region in the world. And why is that so? When you look at the frontiers of science innovation, you will find out that Africa is still very far behind in terms of the ability to adapt to climate change, in tandem with its own local knowledge, values and so forth. Again, you find that there is always this lack of will on the part of government to prioritize and act on climate change. And when I look at some of the decisions that we have within the African continent, you begin to see the incoherence in policies, in laws and in the strategies that are being used. Of course, poverty is large-scale and with food security, Africa is heavily dependent on rainfall. So you see that interconnection between Africa and the climate. And when you see a challenge to the climate, it has very serious negative impacts on Africa. So that is the background to the problem.

So I underline that the importance of climate change litigation in respect of corporate due diligence as another critical approach to meeting the challenge of climate change - particularly when it concerns multinational and transnational companies - is very key to Africa.

In the context of international law, what are those critical documents that we are looking at that, documents that we are conversant with? The UN Framework Convention on Climate Change, the Paris Agreement, it makes it possible for litigants to place the action of their governments or corporate bodies into the international climate change policy context. And then, of course the African Charter on Human and Peoples Rights, which actually consolidates the notion that rights are interdependent and indivisible. And of course, a number of cases that has been determined in Africa underscored that, in the context of public interest litigation.

Now, in terms of the national laws, what I am going to reflect on relates to Nigeria, but it is actually replicated in almost all the other jurisdictions in Africa. When you look at the constitutions of some countries, you see justiciability for issues related to the environment, and it is reflected in such a way that you can go ahead to enforce it. Environmental impact assessment is there. But when you look at environmental impact assessment in some of the African countries, you find that it is probably there just to fulfil our righteousness, that we are also doing it without necessarily taking on board the philosophy of EIA. For those of them that have oil, national oil spill detection, you have it in different variants. The Nigeria Code of Corporate Governance, in Nigeria you see it in 2018, for other African countries you see it in different years. The Central Bank of Nigeria Sustainability Bank in Principles, other countries also have it in different years. And you find out that the Central Bank is very critical because of the funding approach. If you are interested in funding green projects, it would be a lot easier for climate change. If you are not really focused on funding green projects then that is a challenge. Then again for the oil industry, you see the environmental guidelines and standards. As I stated earlier, what do you see here reflected in relation to Nigeria is also what you see in a number of African countries, reflected in the different laws.

That takes us to: What do you see as the goals and objectives of the regulatory framework in most of these African countries? There are three things that you can look at. One is to create a legal standard of care that will compel adequate attention to sustainability issues. They want to turn these sustainable practices to become corporate culture for a number of the companies. And then the last one is to underscore the fact that it can be a win-win situation. Responsible corporate governance in the corporate bodies can contribute to successful long-term business. So the fact that you are following sustainability approaches will not in any way impact on your profit margin at the end of the day. It can actually be a win-win.

Now, it is one thing to talk about the corporate goals. It is another thing to look at: How is that playing out in real life? So I asked the question: Any role for climate change litigation?

When you look at the laws, without a doubt, yes. While there is a role for climate change litigation, you begin to ask yourself, how well are those law being utilized? What are the things challenging the usage of these laws, if they are not utilized? And about this I will talk in a moment.

How about the codes, principles and guidelines? As we all know, the codes, principles and guidelines are not things that you can enforce because it is more of self-regulation by the industry. But you when you look at these codes, principles and guidelines in depth, you will see that they mandate a number of climate-related sustainability initiatives. Some of the things I identify there: waste recycling, power / energy saving initiatives, support for environmentally friendly projects. Then where there is insistence on environmental impact assessments as a precondition for projects, you see a whole lot of things playing out. So when you look at the codes, the principles and guidelines, what you will expect is that gradually they should begin to result in more regulations. When they result in regulations that can become binding and enforceable, not just as a self-regulatory thing, but that civil society organizations and NGOs can also occupy that space to utilize them. They will galvanize climate change mitigation a lot more.

And why do I say this? There was a study that was done by Deloitte on *Sustainable Banking as a Driver of Growth*.[36] And one of the things that came out as the findings of that study is that there are two critical drivers of sustainable activities for corporate bodies. The first one is reputation. When we look at the effect on consumers vis-à-vis the reputation, it drives them to want to do sustainable activities. The second one there is compliance with regulation. In their bid for their operations not to be negatively impacted, they are willing and ready to comply with regulations.

And then that takes us to the success so far with climate change litigation. And here I have picked out three countries in Africa that have actually experienced climate change litigation. You will be surprised that most of what you have in Nigeria, for instance, is public interest litigation as opposed to climate change litigation. Climate change litigation is still in the embryotic stage. It is just coming up. So what most people still do is public interest litigation. I will look at cases in three countries, namely Nigeria, South Africa and Uganda.

Firstly, in Nigeria, the case of *Gbemre v Shell Petroleum* was filed in 2005 by the local communities supported by civil society organizations. The goal was to curb gas flaring, which actually, as we all know, contributes significantly to climate change. Two things that they relied upon in that case, were violation of rights to life under the Constitution and the African Charter, and the compliance with the provisions of the environmental impact assessment. The Court in that case held in favour of the applicant. When the Court held in favour of the applicant, the judgment was not enforced. Somehow we can say it is a coincidence, but at the end of the day, it may be the more you look, the less you see. The judge was transferred from that jurisdiction. And that signals something because it is a kind of precedent that would really have snowballed climate change litigation in Nigeria. Shell did not follow up its appeal until 2019. And to date, the judgment remains unenforced. Now, assuming that judgment was enforced, it would have resulted in reform of the law relating to gas flaring. And that would have had tremendous impact on climate change. Again, it would have been a precedent that would have encouraged several other activities to come on board.

The next jurisdiction is South Africa. South Africa has done a lot in terms of environmental protection. The case I am referring to here is the case of *Earthlife Africa, Johannesburg v Minister of Environmental Affairs (Thabametsi dispute)*. What the court had to consider in that case was the quality and form of climate change impact assessment that is required when a competent authority assesses an application for environmental authorisation in South Africa. Notwithstanding the lack of expressed legal obligation to conduct a focused climate change, in that case, the court ruled that climate change is a relevant consideration when granting and environmental authorisation and a formal report on climate change impacts is the best evidentiary means from an independent person to consider the impacts in their multifaceted dimensions.

So you see that this particular case in South Africa went a long way to actually show that climate change litigation can be effective. But at the end of the day we ask ourselves: how is it that so many of these cases have not come up since that time?

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[36] Deloitte, *Sustainable Banking as a Driver of Growth, A Survey of Nigerian Banks* (May 2018).

That takes me to the last court decision I examine here, which is one in Uganda, in *Mbabazi and Others v Attorney-General and National Environmental Management Authority*. That case was instituted on behalf of four Ugandan miners in relation to the obligations of the Ugandan government to mitigate climate change pursuant to the public trust doctrine. Since the time it was filed up to today, it has not taken further progress. After the order of the court that the parties should undertake a 90-day mediation process, nothing has happened thereafter.

> *[I]n terms of attitudinal change and influence of different sectors, it is very difficult to gage what has been the impact [of litigation] on companies, because not too many cases have been filed. We do not have enough cases to come to a conclusion.*

So I ask what is the impact of this litigation on companies due diligence? From the cases that have applied, you will see that in terms of attitudinal change and influence of different sectors, it is very difficult to gage what has been the impact on companies because not too many cases have been filed. We do not have enough cases to come to a conclusion.

And I ask again that what do I see as the challenges, why many cases are not being filed? What do I see as the challenge in this area? And quite frankly, I see it in terms of there is a short-term approach to energy security, which remains a driving force in many African countries. There is a lack of prioritization of climate change issues for many African countries. They look at let us take care of our energy requirements, whatever sources that is cheaper in the context of oil, in the context of coal. That is what we will do, for now. So you do not see that prioritisation. And for as long as government is not showing so much interest, it is only civil society organizations and NGOs that can actually robustly try to compel them to take some steps.

Then again, when you look at quite a number of laws in Africa and in many of the restrictions, you see that extant procedural issues are still very, very critical. For instance, you still see challenges with your locus standi. When people go to court, and the court declares that they do not have the standing to come before the court. In the case of Nigeria, that has changed significantly. There was a case in *Centre for Oil Pollution Watch v NNPC*, that was very significant. It made clear that you do not have to show any other thing beyond the fact that, yes, there is something that is happening here and that you are interested in pushing the frontiers of it. The same thing with the Fundamental Rights Enforcement Procedural Rules 2009. The Rules and the case have actually extended the frontiers of the concept of locus standi in Nigeria. Other things that I see as procedural obstacles that are still affecting this is non-compliance with service of statutory notice, mostly in terms of Pre-Action Notice, statute and time limitations, lack of rules of procedure for enforcement of human rights. And then, of course, the problem with the status of codes, principles and guidelines.

What are the suggestions for moving forward? What are those things that I think we should be looking at in terms of our focus?

The first one, I think, is as lawyers in Africa, we need to go beyond the regular public interest litigation approach and embrace the specific goals of climate change litigation. We need to be a lot more creative. We need to be a lot more innovative and we need to challenge the status quo a lot more. What would be the issues? Some of these things, even when the courts overrule these cases, some of those things may be the reason why we will continue to focus attention on this and we need to come back to it.

A second thing is there is a need for the judiciary to be more innovative in the drive towards climate change sustainability. Part of what the court should look at as part of the new vision should be impact assessments, intergenerational justice, precautionary principles. All of these things are interrelated when it comes to sustainability issues and climate change issues. They are interrelated and we should not see any disconnection with them in interpreting them. And that was the kind of thing that the judge in the *Gbemre* case did, but unfortunately, it was not enforced, and were not able to move forward with that.

Then there is a need to evolve engagement strategy between civil society organizations and regulators to deliver better on outcomes of the regulatory process. That is, CSOs can actually legitimize the knowledge in this area and push the frontiers of it.

And finally, efforts must be made to deepen support for credible CSOs and NGOs in their interface with local communities.

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4. Observations from Climate Change Litigation

Stijn Franken
Partner – NautaDutilh

I would like to share three observations with you. These observations are based on our experience as a law firm with the Urgenda litigation against the Dutch State.[37] (We represented Urgenda at the Dutch Supreme Court, judgment was rendered in December, last year).

My first observation is an obvious one, but important by way of prelude:

Climate change is a true revolution. It is not only about new technologies, opening up new opportunities with newly discovered resources. Climate change is first and foremost about scarcity and the urgent need to adapt and to redistribute the limited and scarce resources we have; and as a consequence: the re-valuation or transformation of our traditional values into a new, commonly shared equilibrium. Climate change is a true '*Umwerting aller Werte*', a French revolution, which – like the Glorious one in the UK – will ideally develop as smoothly as possible.

My second observation, is about an important distinction we need to make:

We need to distinguish between two types of responsibilities. One is the duty of care: to anticipate on foreseeable risks on a case-by-case basis and to take precautionary measures if the probability and the kind of loss require a person in a specific case to do so.

The Milieudefensie claim against Shell is based on Shell's duty of care[38]. In essence, Milieudefensie claims Shell acted and still acts negligently by contributing willingly and in a relevant way over a very long period to the present and future climate change. One of Shell's main defences, however, is that Shell is operating in a worldwide market with a huge energy demand, and that Shell can individually change neither the demand nor the supply by just stop producing oil and/or gas. Such 'emergency break' would even have a disruptive effect on its interests and the interests of many others. Shell alone cannot change the market rules in order to save the world.

> *[D]istribution rules are the outer limits of the individual freedom and apply irrespective of the individual consequences. Everyone should stop for a red traffic light, even if there is no traffic visible.*

Shell's defence refers to another type of responsibility and that is the responsibility to distribute: to abide by the rules and take the consequential responsibility simply because the distribution rule has been broken, for instance if we apply rules like traffic lights for every person irrespective of their specific circumstances, or if we redistribute damages on a strict-liability/ no-fault basis, in order to avoid disproportionate free riding, which will automatically require disproportionate sacrifices by others.

The Urgenda claim against the Dutch government was based on this. The strongest defence of the Dutch government was undoubtedly that the requested Dutch greenhouse gas emission reduction per 2020 had a negligible and insignificant impact on the worldwide risk of climate change. Positioned as a duty of care case, Urgenda's request to the court had little weight against the democratic decision of the Dutch government, effectively, to free ride on the emission reductions by larger EU countries, such as France, the UK and Germany. The Supreme Court nevertheless allowed Urgenda's request and ordered the Dutch State to reduce its emissions according to internationally agreed standards and human rights. And

[37] *Urgenda Foundation v State of the Netherlands*, 2019, Supreme Court of the Netherlands, Netherlands, summary available at: http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.
[38] *Milieudefensie et al. v. Royal Dutch Shell plc* above n 35.

rightfully: distribution rules are the outer limits of the individual freedom and apply irrespective of the individual consequences. Everyone should stop for a red traffic light, even if there is no traffic visible.

The difference between prevention and distribution has a significant impact on the meaning of corporate due diligence and climate change litigation. I will illustrate this by way of my third observation:

If we want to prevent damage to occur, due diligence helps in 'explaining how' damages can or should have been prevented in a specific case. Reporting serves the purpose of individual accountability. It helps us for instance to prevent a serious violation of human rights, because we all more or less know beforehand what is meant by such 'serious violation'.

However, if the due diligence serves the purpose of reaching a fair distribution, information on 'how' such allocation can be realised is often either less relevant ('better practice what you preach') or just not available. What is a fair distribution in a specific case? Particularly in a new area as climate change clear rules or guidelines are often not available, because we simply do not yet know what we believe a fair distribution to be. Privacy, internet and climate change are just the newest examples of defining the traffic regulations as we did about a hundred years ago. Information and the preceding due diligence do not serve the purpose of prevention, but serve the joined interest to reach commonality on what a fair distribution could be, by 'explaining why' an individual company believes it made a responsible trade-off.

In 2017, various NGO's filed an OECD complaint with the Dutch National Contact Point against ING, one of the largest Dutch banks, for not measuring, targeting and publishing about its total carbon footprint in line with the Paris Agreement. Many meetings, also with experts, followed. ING was able to explain its new Terra approach to help steer its lending portfolio towards meeting the Paris Agreement's well-below 2 degrees goal. The notifying NGO's believed that ING and the Terra program should move from the 2 degrees scenario towards a 1.5 degrees scenario. Ultimately, all parties decided to call directly upon the Dutch Government to request the International Energy Agency to develop as soon as possible two 1.5 degrees scenarios, one with and one without Carbon Capture and Storage (CCS), that provide a 66% chance to limit global warming to below 1.5 degrees.

In 'explaining why', self-regulation can be key. Redistribution needs a broad social basis. Such basis requires sufficient awareness and transparency. It is therefore crucial that each and every individual stands up and speaks out, as much as possible about its interests, risks and trade-offs. Only then, a resilient process of redistribution can be achieved that will help the transition of values into new, generally accepted distribution rules. Ideally, self-regulation operates as a risk management model, as we see in other high risk industries (aerospace, pharmaceutical companies): as a matter of 'just culture': not about blaming, but about learning from disagreement or 'mistakes' in order to reach solid commonality on what a fair distribution is.

This year, a new OECD complaint was made against ING, concerning the corporate lending to large-scale palm oil producers and traders. This complaint was accepted, since the decision to further examine this specific instance 'does not entail substantive research or fact-finding', nor does it entail 'a judgment', and the National Contact Point believed it could help to interpret the Due Diligence Guidance for responsible corporate lending and securities underwriting with regard to the aspect of 'shifting' from the 'directly linked' to the 'contributing' category.[39]

In the learning process of uncertain risks, the liability of individual companies is far from evident. Traditionally, judges are cautious and will only step in if the specific behaviour is either 'reckless-ly negligent' or if the specific situation is 'clearly disproportionate'. In the *Urgenda* case, the Dutch State ultimately lost the court's sympathy, since in every instance it was not able to explain in a very least credible way why it should be allowed to free ride on larger EU countries.

[39] Netherlands National Contact Point for the OECD Guidelines on Multinational Enterprises, *Initial Assessment: Milieudefensie / Friends of the Earth Netherlands, WALHI / Friends of the Earth Indonesia and SDI / Friends of the Earth Liberia versus ING*, 20 January 2020, available at: https://www.oesorichtlijnen.nl/documenten/publicatie/2020/01/20/initial-assesment-friends-of-the-earth-vs.-ing.

Nevertheless, in specific circumstances, litigation can help the learning process in finding a new balance in society. Questions of distributive justice are generally left to the public debate or political arena. However, privacy, internet, climate change show us the urgency to turn to the more distributive questions in the private law decisions as well, for instance via human rights. The reason often being: the essence of time and the political or social inertia. Again, the Urgenda case serves us with a shameful Dutch example. It took 7 years of fierce litigation. The OECD/ING complaints illustrate that a publicly reported mediation is quicker and potentially more effective in reaching understanding and agreement on a new, fair distribution. With respect to climate change, we cannot afford that the outer limits of individual responsibility are being neglected systematically. 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.

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.

Stijn Franken is a partner in our Dispute Resolution group. He specialises in product liability (Bison, DSM, GSK, Eli Lilly, Sanofi, Philips), new risks (Urgenda, Scheuten, Shell, TU Delft), insurance law (AIG, HDI, Amlin, Travelers, AXA, Allianz), as well as law of damages. He successfully defended Dutch/UK insurers in a multi-billion euro US asbestos claim and British American Tobacco in the first-ever Dutch tobacco claim. Stijn is presently representing insurers (Aegon, Achmea) in mass claims pertaining to unit-linked life insurances and advising on the coverage of various large directors' liability claims (LyondellBasell Industries, Fortis, Imtech).Stijn graduated in law from the University of Leiden in 1992 and obtained a master's degree from the University of London. He joined NautaDutilh in 1994 and became a partner in 2003. Stijn is lecturing insurance law at Leiden University, product liability law at Grotius Academy, a board member of various law associations (VASR, VvVW), and a member of the editorial staff of two legal journals (AV&S, Bb).

5. Experience from the Corporate Advisory Perspective

Holly Stebbing
Partner – Norton Rose Fulbright LLP

I have been asked to focus on the corporate perspective on climate mitigation and human rights due diligence. I am actually a dispute resolution lawyer in private practice, so I am certainly not a spokeswoman for the corporate world. However, in my practice, which focuses on energy and infrastructure disputes, I obviously work closely with corporates, and in preparing for today I have had the opportunity to consider some of the factors which they may be thinking about when it comes to this challenging topic. I have also been greatly assisted by the report published by BIICL earlier this year and the data, which was very useful, contained therein.

So I am briefly going to cover three points today. First is a kind of general corporate perspective on climate litigation to date. The second point is the relationship between climate litigation and due diligence for climate change impacts, if any. And then finally, some factors that corporates may be taking into account when it comes to the pros and cons of mandatory due diligence for climate impacts and what they might expect a mandatory law to look like.

We have heard today about the growth of climate litigation over recent years and how the type of claims issued by claimants has changed and developed over time. In the first wave, we saw claims primarily against States to mandate them to do more to prevent and mitigate climate change. Claims against corporates were rarer and typically focused on tort and public nuisance causes of action, which, as we have heard, faced real hurdles to success when it came to justiciability, causation and attribution. I think at this stage many corporates, particularly those outside the energy and infrastructure space, did not consider this type of litigation posed a material risk to their business. There were the obvious reputational concerns and the time and cost of defending claims, but perhaps a general feeling that they were unlikely to succeed. In my view, that perspective will have changed over recent years with the rise in claims targeting companies and also the shift in focus to claims based on human rights breaches, corporate law, consumer protection rules, planning and environmental challenges, and fraud and disclosure claims. These claims have had demonstrable success in some jurisdictions and also go beyond the prospect of damages payouts for historic contribution to climate change, to having a real and immediate impact on corporate day-to-day business. For example, some claims are seeking orders imposing mandatory and deep reductions in corporate greenhouse gas emissions, and Stijn has touched on the *Milieudefensie* case[40] against Shell. Other claims are directly or indirectly disrupting the development of new projects which claimants do not consider aligned with the Paris Agreement. A good example of that is the successful challenge to the construction of the third runway at Heathrow Airport. And more generally critical access to capital is tightening for corporates with large carbon footprints.

So how does mandatory due diligence on human rights fit with this climate litigation picture? I have been interested to hear the various takes today. My initial view was that the two were really separate issues and it was not obvious that the objective of claimants in climate litigation cases to date was to bring about mandatory due diligence. But I think that it is actually a bit more nuanced than that. Different claimants have obviously had different objectives. Broadly speaking, they fall into two categories. Those who have been looking for monetary compensation for climate-related harm and perhaps more relevant to today those seeking orders to compel action by corporates to tackle climate change. And in relation to that second objective, driving change, litigation is obviously one way of doing that, although I think as we have heard today, it has probably had mixed success. But mandatory due diligence may be another, and I do think the two are linked. Without climate litigation getting critical corporate buy-in to the introduction of mandatory due diligence laws may have been difficult. Corporates respond to risk, and for large carbon emitters, at least, climate litigation is now a real risk for the reasons I have just mentioned. And naturally, they will be looking to mitigate that risk. And due diligence, depending on its form, can be a mechanism for doing that, particularly where demonstrating that you have complied with due diligence obligations constitutes a defence to claims. This seems to me to be one of the reasons why some

[40] *Milieudefensie et al. v. Royal Dutch Shell plc*, above n 35.

corporates, although I must not say all, are now in favour of a mandatory due diligence law being introduced.

Whether procuring corporate buy-in to mandatory due diligence was a conscious or specific objective of claimants in climate litigation, I do not know. But it certainly aligns with the wider objective of galvanizing change.

Moving on then to some of the factors that corporates might be considering when it comes to a law on due diligence for climate impacts. And I am limiting my horizons today to a European-wide law. The concept of human rights due diligence is obviously not a new one, and I think the corporate world, broadly speaking, is familiar with the UN Guiding Principles and the OECD Guidelines, together with the various soft law mechanisms which call for corporates to undertake due diligence on human rights issues. They will also be more or less aware of the legislative measures which have been implemented more recently on issues such as deforestation, modern slavery, conflict minerals and so forth, together with the more general French Duty of Vigilance Law[41]. But as noted in the BIICL report, the concept of due diligence for climate impacts has not been as well explored. And with the EU having announced plans to implement legislation requiring businesses to carry out due diligence, that discussion is now essential.

For corporates, I think there will be some appeal in a mandatory due diligence law. First, it promotes harmonisation, at least across the EU, at a time where there is a risk of Member States taking individualistic action and corporates being left facing a myriad of different standards to comply with. I think it will also help give some legal certainty as to the standard that corporates will be held to, just go back to Stijn's point on the standard of care. At the moment, I think there is significant uncertainty about what that standard of care amounts to and therefore what corporates need to be doing to discharge their duties and reduce their litigation risk. A piece of this is the extent to which due diligence can be used as a defence. I think corporates on the whole would advocate that due diligence should be able to be used as a defence, or safe harbour to climate related claims. So that where a corporate can show that it is undertaken adequate, appropriate, or whatever the standard may be of due diligence, that that can be a defence to a claim of breach.

For the corporates who are front runners, legislation obviously pulls others along and creates a level playing field in the market, helping to ensure that business shares in the corporate response and perhaps also assisting with conversations between customer-facing corporates and their supply chain, who might not be as quick to see the benefits of due diligence as their customers are. Carrying out due diligence can obviously also enhance your brand, improve your reputation with consumers, and is increasingly something that is required by investors. That investor piece is critical to me. Companies need access to capital and we are seeing not only shareholders but also financial institutions calling for action and threatening to withdraw lines of capital if that does not happen. And for those working in corporate and charged with sustainability issues, it is probably easier for them to get into the C-suite decision makers where there is binding legislation rather than soft law limits.

I think that businesses will be interested in the sanctions which accompany any law. There are always good actors who stop at the red light and those who do not. If legislation is introduced but not enforced, that level playing field advantage falls away.

But I think corporates may also be cautious about mandatory due diligence for a number of reasons. I think there needs to be an appreciation that this is different to some of the forms of mandatory due diligence we have seen to date. It is not so much the giving of information to shareholders and investors so that they can make decisions about where to invest that money. It is really a tool to tell companies to take more positive and wide-ranging steps to mitigate and prevent climate change. And that is a much larger mandate for any legislation and therefore needs to be given careful consideration. There seems

[41] French Duty of Vigilance Law above n 27.

to be a general view that if it is not pitched right, due diligence can end up becoming just an administrative burden focused on box-ticking and not really on outcomes. And therefore, ultimately, it fails to meet its objective while still requiring corporates to go through the process. And I talked in the advantages about the level playing field effect, but obviously, if the law is only EU wide, there is the risk that other major jurisdictions will not keep step. I am thinking of the U.S. and China in particular in this respect. And that will lead to a loss of competitive advantage for European businesses.

Similarly, I think that businesses will be interested in the sanctions which accompany any law. There are always good actors who stop at the red light and those who do not. If legislation is introduced but not enforced, that level playing field advantage falls away. And I think that that has been a criticism of, for example, the UK Modern Slavery Act[42] in that respect.

If due diligence is to amount to a legal standard of care, corporates will want that to be clearly defined, particularly if the route to recourse will be directly at parent company level. And I suspect they will be looking for some flexibility depending on the size of company, the nature of its business, the likelihood of harm, the severity of the harm and so forth.

There is also an argument that, in fact, mandatory due diligence will increase climate litigation not only for companies who do not comply, which is probably justifiable but also against those companies who, by complying and providing details of their climate change impacts and the steps thye are taking to address those, may therefore be targeted by claimants both for the impacts that they have identified or by it being said that they are not doing enough. I think that would really be an unintended consequence of any due diligence law but it is perhaps an inevitable one.

Just to conclude, overall, I think it is obvious that that due diligence, in whatever form it may come in, has to be part of a wider suite of measures, which includes greater action at state level and potentially States using their trade arms to ensure that standards are adhered to outside of the EU, as a condition of doing business here. So that is just a little food for thought for the wider debate.

Holly Stebbing is a commercial litigation and dispute resolution lawyer based in London. Her practice focuses on disputes in the energy, infrastructure and natural resources sectors, both domestic (including UKCS) and international. She has a wide range of experience, including litigation in the Commercial Court, Technology & Construction Court, Chancery Division and appellate courts, institutional and ad hoc commercial arbitration (LCIA, ICC, SCC, LMAA, SIAC), all forms of ADR and incident response (including representing clients in the Crown Court and Coroner's Court).

Holly's clients include IOCs and NOCs, mining companies, renewable energy providers, oilfield services contractors, construction companies, utilities and petrochemical companies. She advises on all forms of commercial dispute, including licensing and concession arrangements, joint venture and shareholder disputes, construction matters, M&A litigation, decommissioning, third party access to infrastructure, offtake and trading agreements and transportation and processing arrangements.

Holly has been tracking climate litigation developments globally for a number of years and is leading the firm's response to this new and novel area of litigation. She regularly writes and delivers training and thought leadership presentations on this topic.

Holly is recommended in Legal 500 for oil and gas, mining and minerals and commodities and physicals, as well as dispute resolution and international arbitration. She was recognised in Legal Week as a rising star for the future. She holds a Masters' degree in Energy and Natural Resources Law and is one of the contributing editors for *Getting the Deal Through: Energy Disputes*.

[42] UK Modern Slavery Act 2015, available at: https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

6. Observations from the Area of Tort Law

Sudhanshu Swaroop QC
Barrister, Twenty Essex

I will consider the law of tort. Specifically, does the law of tort require corporations to exercise duties of care or due diligence in relation to climate change?

I want to address that question by focusing on the intriguing judgment in *Smith v Fronterra*,[43] which was handed down by the High Court of New Zealand in March of this year. In that case, the plaintiff, Michael Smith, was of Maori descent. His claim related to sites of particular cultural and spiritual significance to him, which were close to the coast or on low-lying land and which were at risk from the effects of climate change. Mr Smith claimed against various defendants who operated facilities that emitted greenhouse gases, including dairy farms, a power station and an oil refinery. He alleged that the defendants' contributions to climate change made them liable under the tort of public nuisance, the tort of negligence and thirdly, for breach of a novel duty, which he described as a duty to cease contributing to climate change.

The High Court of New Zealand dismissed the first two claims, but allowed the third, novel claim to proceed to trial. As regards nuisance, the Court concluded that Mr Smith could not demonstrate public nuisance for various reasons, including that the alleged harm was not the direct consequence of the defendants' actions. The court put it as follows: 'Mr Smith does not and cannot plead that, but for the defendants' activities, he would not suffer the claimed damage.'[44]

The Court said: 'In a very real sense, everyone is a polluter, and therefore a tortfeasor, and everyone is a victim and therefore a potential claimant.'

As for negligence, Mr Smith alleged a duty of care owed by the defendant 'to take reasonable care not to operate its business in a way that will cause him loss by contributing to dangerous anthropogenic interference with the climate system'.[45] The Court dismissed the claim, holding that the conditions for establishing a duty of care in the tort of negligence were not satisfied. In particular, the Court held that the damage claimed by Mr Smith was not 'a reasonably foreseeable consequence of the defendants' acts or omissions.'[46] The Court added that the 'defendants' collective emissions are miniscule in the context of … global greenhouse gas emissions'[47] and that the proportion of alleged damage contributed by each defendant was impossible to measure.[48]

There was a further point here. The Court said that it was not fair or just to impose a duty of care as this would give rise to issues of indeterminate liability. The Court said:[49]

> 'In a very real sense, everyone is a polluter, and therefore a tortfeasor, and everyone is a victim and therefore a potential claimant. If a duty of this kind alleged were recognised, every New Zealander would be liable to suit from every other New Zealander.'

However, as to the third, novel claim, the Court allowed this to proceed to trial. Mr Smith framed the claim as followed. He said that the defendant corporations owed a duty 'to cease contributing to damage to the climate system', including the 'dangerous anthropogenic interference with the climate system' and the 'adverse effects of climate change'.[50] The Court said that the claim was at least arguable and should

[43] *Smith v Fronterra Co-Operative Group Limited* [2020] NZHC 419.
[44] At para 67.
[45] At para 75.
[46] At para 81.
[47] At para 82.
[48] At para 88.
[49] At para 98.
[50] At para 15.

proceed to trial, so that a trial judge could consider the point properly. The judge said 'the common law must be developed to meet changing economic conditions and habits of thought':[51]

> '[I]t may be that a novel claim such as that filed by Mr Smith could result in the further evolution of the law of tort…It may be that climate…science will lead to an increased ability to model the possible effects of emissions. These are issues which can only be properly explored at trial.'[52]

And finally, a word on remedies. Mr Smith was not claiming damages. He was claiming an injunction requiring each defendant to produce or cause zero net emissions from its activities by 2030. I will come back to this point at the end, but in essence the Court said that it is very difficult to envisage any court granting that kind of injunction, because in effect you are asking a court to devise a bespoke emissions plan for a corporate. That is not the kind of thing that courts do.

Against that background, I want to make six brief comments.

First, this is a significant decision. As a decision of a common law court, it would be relevant in other common law jurisdictions. Obviously not binding, but it would be relevant, for example, in the US, the UK, India, Australia and Canada. The principles that I have just discussed will be familiar to any common lawyer practising in those jurisdictions.

Second, the science. It was common ground in this case that the science was as set out in the most recent IPCC reports. The judge said: 'All admit the IPCC reports record current scientific consensus as to the nature, effects and mitigation requirements of climate change on a global scale.'[53] Indeed, the Court proceeded on the basis that climate change is 'the most pressing issue of this age'.[54] In other words, for all the talk in the media about climate change denial and so on, in the hard reality of the courtroom, it was science that prevailed.

Third, knowledge. Knowledge is the essential condition for any duty of care or duty of due diligence to be established and breached. Unless it can be proved that the defendant knew or ought to have known the relevant risks of climate change, that defendant cannot be held liable for failing to address those risks. That is fundamental in the tort of negligence, including some of the cases I have been involved with. And again, crucially in this case, that was all common ground. Mr Smith argued the defendants knew or ought to have known, since at least the release of the IPCC Fourth Assessment Report in 2007, that their activities were contributing to dangerous interference in the climate system. That proposition was not seriously challenged in the case.

Fourth, causation. Underlying much of the reasoning of the Court was the notion that these particular defendants made a 'miniscule' contribution to climate change, which was 'impossible to measure'. An interesting point of comparison here is the case of *Lliuya v RWE*,[55] which is being brought in the German courts by a Peruvian farmer, Mr Lliuya, who is suing RWE, Germany's largest electricity producer in the tort of nuisance. Mr Lliuya argues that RWE has knowingly contributed to climate change and bears some responsibility for the melting of mountain glaciers near his town. Crucially, Mr Lliuya argues that RWE's contribution to climate change can be specifically measured based on attribution science. He puts the figure at 0.47%. And so he seeks 0.47% of the costs of dealing with these melting glaciers. It may be that in future cases, the tort analysis will depend upon whether the defendants are sufficiently large fossil fuel emitters, for it be scientifically possible to measure their contribution to climate change.

Fifth, as I said, the novel claim was allowed to go forward. And to me this illustrates an important point about litigation in general. Judges do not exist in hermetically sealed laboratories. They exist within a public culture, which itself is dynamic. And their decisions respond to that public culture.

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[51] At fn 8, citing *Myers v Director of Public Prosecutions* [1965] AC 1001 (HL) at 1021 per Lord Reid.
[52] At para 103.
[53] At para 19.
[54] At para 27.
[55] *Lliuya v RWE AG* Case No. 2 O 285/15 Essen Regional Court, summary available at: http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/. See also Episode 3.6 below.

And sixth and finally, I want to say something about the role of courts in all of this. I mentioned that Mr Smith was seeking an injunction requiring each defendant to produce or cause zero net emissions by 2030. The judge decided that the court was not equipped for this. He said:

Judges do not exist in hermetically sealed laboratories. They exist within a public culture, which itself is dynamic. And their decisions respond to that public culture.

> The injunctions sought by Mr Smith would require the Court to … apply an emissions accounting methodology to determine gross emissions from each defendant… The Court would have to select a methodology to apply to carbon dioxide equivalents, so that greenhouse gases could be meaningfully compared… [The Court] would have to determine whether an emissions trading type scheme would be required by any Court order … and if so, whether, how and to what extent units would be acceptable offsets… The Court would have to consider what if any trajectory of net emission reductions each defendant would be required to achieve between 2020 and 2030…'[56]

And so on. The judge said that these and other tasks made it extremely difficult to craft any form of injunction.

In this regard, a comparison can be made with litigation going on in France. In *Notre Affaire à Tous and Others v Total*, a claim has been brought against Total, the French oil company, under the French Duty of Vigilance law.[57] As I understand it, the claimants seek an order requiring Total, in the first place to devise a corporate strategy for addressing the risks of climate change (rather than asking the court to devise such a strategy).

In conclusion, I suggest that there is there is certainly scope for duties under tort to be to be applied to corporations, but how this area of law develops will depend on the particular defendants, the particular facts and perhaps ultimately the particular judge that the case ends up being heard in front of.

Sudhanshu Swaroop QC is a barrister practising commercial, arbitration and public international law. He is in chambers at Twenty Essex in London. Sudhanshu's public international practice has involved some of the leading cases of recent times, including on immunities, law of the sea and international human rights. Sudhanshu's commercial and arbitration practice encompasses shipping and international trade, banking and finance, energy and natural resources and investment treaties. He has particular experience of group and tort claims against multinational corporations, having acted in several of the important English cases. These include Chandler v Cape, on the duty of care owed by a parent company. Drawing on his background in both commercial and public international law, Sudhanshu has developed expertise in climate change. He is currently acting in a claim against Australia in the United Nations Human Rights Committee, challenging Australia's record on fossil fuel emissions and seeking remedies to protect the Torres Strait Islands from rising sea levels. The case has attracted worldwide media coverage and was hailed on CNN as a 'landmark'.

[56] At para 107.
[57] French Duty of Vigilance Law above n 27.

7. Overview from Climate Rights-Holders Perspective

Ingrid Gubbay
Head of the Human Rights and Environmental Disputes – Hausfeld

I am going to make just some headline observations that have come out of what has been said today, and of course, in my experience and observations in the last 10 years in the climate space, five very actively in litigation.

The first thing that comes across very loud and clear is the uneven and ad hoc nature of rights-based litigation and advocacy across the globe in particular, judicial approaches, and the types and nature of cases being brought. And while we sit here in this bubble and look at these cases and think there are lot of them in fact, they are a tiny drop in the ocean, so it is important to get some perspective on really how much impact litigation overall is actually having in the environmental and related human rights actions. This is largely because the Paris Agreement itself lacks an enforcement mechanism for justiciable actions, so we looked to human rights, international environmental and constitutional law largely, in the beginning. So in the last five years, we have sought remedies through human rights and, while few in number, some cases have had some systemic impacts.

Now, of course, we are on the cusp, of a very exciting time, where we are now looking to competition, commercial, company law, where duties are hardening in various ways. Non-financial reporting and disclosure obligations, directors and fiduciary duties, in the private sector, and competition is now looking hard at energy infrastructure and renewables in Europe and elsewhere. So I think we will see some very exciting developments which will be informed through the SDG's and climate and sustainability lens. Certainly within this firm, the competition and commercial teams are alive to the climate change opportunities that might be on the horizon and are currently being put to us.

[There] is an extreme danger of generally looking at tick-boxing - it may be called 'meaningful', but tick-boxing anyway - as an exercise. We will then fall away tragically into no remedy.

I think Holly's presentation really was very interesting because it was looking at due diligence, what it is, what it might be. And we have got this, what looks like a very tantalizing pledge from the EU saying that they will be remedies, there will be sanctions, there will be things that we have been long seeking in the in the new EU regulations coming on stream next year. It is difficult to know exactly what that looks like, but we can assume from previous attempts at implementing due diligence instruments to date particularly in France, that a lot of it will be or could be, again, voluntary based. And as Holly rightly said, if companies and corporates are able to say they have met a certain standard within the due diligence standards, that that may well act as a complete defence to any further liability. That I think would be a tragedy for all of those people who have worked very hard on the due diligence side and to make these mechanisms work. So it is extremely important, and I know Olivier de Schutter has been speaking about this around the world, that we separate legal liability and the opportunities for litigation from due diligence. I think that is going to be an important headline as we move forward. That here is an extreme danger of generally looking at tick-boxing - it may be called 'meaningful', but tick-boxing anyway - as an exercise. We will then fall away tragically into no remedy.

I think it is important to say that the UN recently invited me to a session of ambassadors from vulnerable States who are advocating very hard, along with David Boyd and others, for a separation between the mandates of environment and climate change as the work is stretched and not enough resource devoted to climate change work, what is envisaged is a new mandate of human rights and climate change, so they are seen to be indivisible. Their experience is that the current situation of human rights and environment mandate is so broad that it cannot possibly provide the guidance required or the clarification required to States, to corporations, to civil society, to stakeholders. The new mandate, and a resolution will be forthcoming. This will offer the opportunity for greater clarification, greater oversight and greater dedication to this area. And I think that we will see some impacts coming through from such a move, hopefully sooner rather than later, as Stijn rightly pointed out, we have the 10-year turnaround. Up to

now, litigation and all the initiatives around it have taken an incredibly long time, so we really need to get this show on the road. And I think the UN now is starting to mainstream this throughout all bodies in its work. The Human Rights Council has come out or certain people individuals from have shared that there is no consensus within the Council around climate change. And I think that is the status around the UN. So it is extremely important that from the top we start getting more clarification guidance. They are seeking more civil society support for that mandate.

And from the bottom up, obviously, we have seen civil society coming out massively. We have acted for many youth and children who we know are actively and continuously advocating in this area. They are now moving into all sorts of what could be said legal or justiciable type of areas, including writing open letters to governments, setting out protocols and the recent children's Declaration of Rights. Some of these children we represent currently before the UN CRC, who are now greatly empowered, have formed their own hub. They are writing to Norway, writing to Poland, are actually setting up frameworks for liability through notice to governments. And what they are attempting to do is, of course, introduce tighter legislative controls around corporations. As Holly and others have rightly pointed out, companies can still rely on that old chestnut of uncertainty to not do anything that may be legitimate to a certain point. But we have had, just in our experience, contact with a number of climate change risk managers within banks who contacted us saying that they accepted a poisoned chalice. They are offered climate risk management roles but their reports are ignored, and they are finding that they are isolated within the corporate structure and no one really wants to take much notice of what they have to say. I think these things are all very important because within corporates they need more support. These people who have taken on these responsibilities, they need more support networks for those people who are working within the corporates. There needs to be more guidance, clarity from the top down to corporates and States and there needs to be more engagement as there is quickly growing engagement from civil society coming up from the bottom.

And as for us lawyers, we need to be listening to all of them. And as has been said by Stijn and Holly and others, and we need to be extremely bold and creative with what we are hearing and reading. And we have to ride the wave very quickly.

Ingrid Gubbay is the head of the human rights and environmental disputes at the London office of the law firm HausfeldGlobal. She has been a litigator for over 24 years and is recognised for her work in a number of ground-breaking cases, in both Australia where she formerly practiced, and the UK. Recently, she acted as co -counsel together with the NGO Earth Justice, in the first Petition submitted to the UN Childs Rights Committee on behalf of 16 children drawn from variously climate affected regions of the world against five G20 Countries. Ingrid's work is mainly focused on domestic/international climate emergency cases and related high level policy development. She is also a Trustee of three social enterprises, including one based in the Netherlands which trains and empowers youth to become sea rangers to work with European Government fisheries, to stop/monitor illegal fishing in the Mediterranean and Baltic seas.

Episode 3: Mandatory Human Rights Due Diligence Laws: What Are Their Implications Regarding Corporate Climate Change Impacts?

Several examples of existing and proposed mandatory human rights due diligence laws expressly include environmental harms, which are commonly recognised to include climate change impacts. For example, some of the first cases which have been brought in accordance with the French Duty of Vigilance Law[58] relate to the alleged failure to institute adequate vigilance for climate change impacts. However, in the absence of case law, it is not yet clear how these new legal concepts around due diligence will be applied to climate change impacts.

In this episode, speakers considered the legal implications of the scope of some new and proposed mandatory human rights due diligence laws, and focussed on how the respective legal standards would apply to companies in terms of undertaking climate chance due diligence.

1. Climate Change, Human Rights and the UN Guiding Principles: Interlinkages and Red Flags

Surya Deva
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In this brief time, I would like to focus on three aspects. First, I would like to highlight some interlinkages between climate change and human rights. And because of these interlinkages, climate change considerations are relevant to human rights due diligence. Then I will talk about what needs to be done by whom, and I will base it on the three pillars of the UN Guiding Principles, because I am drafting an Information Note for the UN Working Group about climate change and the UN Guiding Principles, so that will also give you some idea where this Information Note could be going. Finally, I will talk about some red flags or signpost that we should be careful about going forward.

Let me start with interlinkages, and I would mention four elements that are crucial. First, it is very well established now that all businesses have a responsibility to respect human rights. However, this responsibility cannot be discharged by any business unless they take into account climate change considerations throughout their process of due diligence. I think this first point hardly needs any elaboration, because all civil, political, social, economic and cultural rights are very closely connected with positive or adverse impact on the climate.

The second point is that we also have the right to development as a human right. Development can never be sustainable if we are not able to integrate climate considerations. I am highlighting this element because many States, especially in the Global South which is lagging behind in the so-called economic development, have a temptation: 'OK, the Global North has already developed, and they ignored climate change considerations in their pathway to development. And now it is our turn to do the same.' That is why they tend to put issues about climate and environment on the backburner. In my view, this is a problematic approach. I think an integration should take place at the outset: development will not be

[58] French Duty of Vigilance Law above n 27.

sustainable, equitable and inclusive if the climate considerations are not integrated at the outset and throughout this process.

My third point is that adaptation and transition to a low carbon economy must also be compatible with human rights. If it is not compatible with human rights, it is very likely that some people will suffer more from such a transition. And if we ignore that, then we are not going to achieve the Sustainable Development Goals, which are based on the idea of leaving no one behind. So transition to low carbon economy should not mean leaving certain people behind. And that is inevitable if we did not integrate human rights considerations into adaptation-transition approaches and strategies.

My fourth point is that often we talk about policy coherence in relation to governments or States. But I would like to highlight coherence also in relation to businesses. If a company makes a commitment to respect human rights, but same company is lobbying against government regulations which are trying to reduce or cut down fossil fuel. There is incoherence here. If you are funding certain things which are totally inconsistent with the idea of sustainability or climate mitigation, but at the same time claiming that you are respecting human rights, there is a contradiction here which is worth highlighting.

Let me move on to the second component of my presentation and which is about who needs to do what. As I mentioned to you briefly, I am writing an Information Note for the UN Working Group on this issue. I will just provide a snapshot of some of the ideas that may be relevant, and I welcome your comments and feedback on those ideas.

In relation to Pillar I, which is state duty to protect human rights, I think it is critical that the States lead by example. To lead by example has several components. We have public procurement, which should be used to create incentives for businesses that are mitigating climate change already or going for a low carbon economy instead of giving contracts to those businesses that have offered to provide certain products or services at the lowest price. So climate considerations should be integrated in public procurement. State-owned enterprises too have to lead by example in this regard. At the same time, States have to ensure that the businesses take the current climate crisis seriously. In my view, a mandatory human rights due diligence legislation is just one component of it, but there could be other ideas in terms of incentives and disincentives that the government should create. For example, there can be disclosure regulations, whether these are about the stock exchanges or disclosure even about the products that consumers are buying in a supermarket. For instance, now calories listed on the products that consumers buy from a supermarket. In future, should the products say a pair of jeans also mention data about how many litres of water is consumed in preparing this pair of jeans? That kind of disclosure is also going to be quite relevant. So it is not merely about mandatory human rights due diligence.

The second pillar of the UN Guiding Principles, as you know, is about the business responsibility to respect human rights. It is very obvious that climate change considerations must be integrated at all four stages of human rights due diligence. As you would note, the UN Guiding Principles do not mention climate change anywhere. Which is a bit of a surprise, because they were not adopted in the 20th century, they were adopted in 2011. The same applies to the OECD Guidelines: they do not mention climate change anywhere, though there is a chapter on the environment which talks about reduction of greenhouse gas emissions, which is good. But I think we need to bolster and make it more explicit what needs to happen in terms of Pillar II if businesses claim they are complying with the UN Guiding Principles and the OECD Guidelines.

I would also like to highlight that we should not see climate change as a black box, that everyone is affected and impacted in the same way. So if businesses do not appreciate that the climate change is going to impact people differently and in a disproportionate manner, then we are not going to achieve climate justice. For instance, the impact on women and the impact on indigenous peoples could be very, very different. The impact on people who are already developed and have a very decent life would be very different from people in the Global South who would just striving to earn a livelihood and survive. So differentiated and disproportionate impacts have to be factored in. It is not that the all the rights-holders are affected in an identical way.

The third pillar is about access to remedies. I think we should appreciate that climate change remediation involves some unique challenges such as about attribution, standing, and transnational dimensions. So it is not environmental pollution kind of remediation, and it is not typical human rights remediation that you are talking about. So while remediation is absolutely vital, we might have to develop some different types of strategies and different kind of remediation. I would just mention that the restorative justice idea could be very much relevant here. The second component I would like to highlight is the global accountability mechanism, because if you hold a company accountable operating in one jurisdiction that may have implication in another jurisdiction operating thousands of miles apart. These are some of the points that I hope the information note will clarify.

In some cases, including concerning climate change, businesses as well as States must have an obligation of result. 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.

Finally, and very quickly, let me mention a couple of red flags. My first point is about this obsession with mandatory human rights due diligence. It has become the 'darling' of the business and human rights field.

We should not think that human rights due diligence is a panacea that is going to fix all the challenges. In my view, there is a critical distinction we should be making about obligations of means and obligations of result. In some cases, including concerning climate change, businesses as well as States must have an obligation of result. 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. So this is a red flag that I would like to highlight because we often do not see human rights due diligence in this way. Rather many consider due diligence as a process: if a company is able to satisfy that it has taken reasonable steps, the due diligence process may operate as a defence. This is a highly problematic pathway in my view if applied to all situations.

The second red flag for me is if we create a mandatory human rights due diligence regime without Pillar III remediation. So if businesses are merely required conduct due diligence properly, but there are no remedies that the affected communities can seek, then this is not going to work. In my view, remediation for a violation of human rights is absolutely vital.

My last point is human rights due diligence may not be able to solve the fundamental tension or fundamental challenge that we are dealing with about the current model of economic development. We need significant and transformative changes in how we consume and what we eat. For example, if companies continue to encouraging consumers to buy more, eat more and travel more, we will never be able to achieve climate justice. We need significant transformative changes in the current model of development and mandatory human rights due diligence, unfortunately, will not achieve it.

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2. Climate Due Diligence as an Inherent Component of Human Rights Due Diligence

Chiara Macchi
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Associate Member – Essex Business and Human Rights Project

In my intervention I will focus on what I refer to as climate due diligence. I will argue that it constitutes an inherent dimension of human rights due diligence, and I will look at what corporations might be required to do in practice to comply with this standard of conduct.

Let me start by saying that the fact that the UN Guiding Principles do not expressly refer to environmental law or climate law among their legal foundations does not bar a holistic approach to human rights due diligence. Quite on the contrary, in my opinion, a holistic interpretation of the underlying standard of conduct is the only coherent approach to the corporate responsibility to respect. One that takes into consideration all relevant international norms. A holistic approach to human rights due diligence means recognizing that the climate targets adopted by the international community to prevent the human rights impacts of climate change are relevant to the definition of what constitutes reasonable conduct for corporations. Regardless of the wording that the new EU regulatory instrument might adopt, therefore, human rights due diligence must be read through the mutually reinforcing principles of international human rights law, environmental law and climate law.

But what does the concept of climate due diligence entail, in practice, for corporations? I will answer by resorting to the UN Guiding Principles' articulation of human rights due diligence and apply it to the concept that I define as climate due diligence. Climate due diligence as a standard of conduct binds all companies. All companies are potentially contributing or at least linked to climate change. They must assess the risk, communicate the results of such assessments and act upon those findings. As shown by the complaint filed with the Dutch NCP against ING Energy Bank,[59] it is a responsibility of the company to find ways to measure its own impacts. A task that is facilitated today by advancements in climate science and in the availability of climate data. Risk assessments should entail not only the company's own emissions, but also aspects such as the climate change-related vulnerabilities of communities, categories, individuals that might be further impacted by the company's operations. Climate due diligence also entails checking the company's business relationships, the supply chain and exercising leverage when necessary. To use an example, a bank might be directly linked to a high level of greenhouse gases emissions through companies in its own portfolio. As clarified by the OHCHR directly linked and direct contribution to adverse impacts are placed on a continuum. Thus, if the bank fails over time to exercise its leverage over the investors responsible for high levels of emissions, it might eventually find itself in a position of contribution, which entails a responsibility of remediation.

Now, obviously, the specific climate due diligence steps required of a specific company will vary with its size, sector and with the context of its operations. However, in some cases, the only way for a company to discharge its responsibility to respect will be to end its relationship with an entity whose contribution to climate change could not be mitigated through leverage. In the example of the bank, this might require a divestment decision, for instance.

But what about those companies whose core business is literally the production and marketisation of fossil fuels? For the so-called 'carbon majors', risk mitigation arguably requires cutting their emissions to a level at least compatible with the Paris Agreement's mitigation targets. For these companies, the reasonable approach to climate due diligence, at least according to my own reading of the UNGPs, is to start diverting their investments away from fossil fuel projects and to collaborate with governments to accelerate the energy transition, the low carbon transition. This obviously entails a fundamental shift in their core business, and according to the UN Guiding Principles, such a process must be carried out duly taking into account its potential adverse human rights impacts. But in light of the severity and irremediable

[59] Above n 12.

character of climate change-related human rights impacts, the only way for carbon majors to discharge their responsibility to respect, I believe, is to engage in such a shift as a matter of urgency and to cooperate in the remediation of the impacts that they have already contributed to.

Let me also specify that personally, I do not believe that investing in environmental projects around the world through carbon offsets schemes is enough to discharge a company's responsibility to respect. The UN Guiding Principles stress that it is not possible to offset the company's failure to address its own human rights impacts by adopting voluntary CSR initiatives. In the same way, there is no way, in my opinion, of working around the duty of big emitters, such as the carbon majors, to mitigate their own emissions and their own contribution to worsening global warming.

Rather, the added value of such EU-wide instrument could be to better clarify such standards and its climate due diligence dimension, providing additional regulatory guidance to businesses, and most importantly, to link breaches of that standard to an improved access to remedies for affected individuals and communities.

Now, some elements of climate due diligence are emerging from the rapidly growing examples of climate change litigation and might be further clarified in the near future as some of these cases reach the decision stage. Existing lawsuits accuse companies of failing to perform adequate climate risk assessments, to honestly communicate the real climate impacts, to set concrete climate objectives. But also, in the case of big emitters, these companies are accused of having historically contributed to global emissions in a quantifiable manner, which in turn entails a duty to remediate the human rights impacts deriving from global warming.

While climate change litigation is evolving, what can be the role of mandatory human rights due diligence legislation in relation to the necessity to consolidate the definition of climate due diligence? I am of the opinion, and I am interested to hear the other panellists' ideas on this, that human rights due diligence as a standard of care for corporations, together with its climate due diligence component, already exists. It derives from an already established normative framework that informs what a reasonable corporation should do. And it exists before and regardless of any regulatory developments that we might witness in the area of mandatory human rights due diligence legislation. The expected role of this kind of legislation, therefore, including of the announced EU wide instrument is not so much to create a standard of conduct *ex novo*. This standard already exists. Rather, the added value of such EU-wide instrument could be to better clarify such standards and its climate due diligence dimension, providing additional regulatory guidance to businesses, and most importantly, to link breaches of that standard to an improved access to remedies for affected individuals and communities.

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3. The Mobilisation of Human Rights Standards to Prevent Climate Change: Overview from the French Perspective

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The mobilization of human rights standards such as the UNGPs for the protection of the environment and to prevent climate change seems fundamental for me. This has been my approach for years, but completely by accident.

My contribution is that of a researcher specialised in international human rights law and corporate responsibility. When I started working on the issue of corporate responsibility for human rights violations, I was confronted with environmental degradation in relation to human rights violations. The tools I had were from the international human rights protection system, and it was these tools that I had mobilized by extending them to environment and even climate issues.

For example, at the time of COP 21, as part of our research project developed at the College de France, we drew up a number of legal proposals to strengthen the responsibilities of states and corporations. And a part of our broad research project on the legal tools that could be used to reinforce corporate social responsibility - CSR captured by law - we have highlighted the cross-cutting nature of some legal tools, including the concept of due diligence.

I think my research approach is in line with the approach of the organizers of this webinar who want to avoid the fragmentation between the work on human rights due diligence and the work on the fight against climate change. To this end it is important to remember the potential of all the United Nations human rights treaty monitoring bodies. For example, the Committee on Economic, Social and Cultural Rights in 2016 in its concluding observations on France, it encouraged the country to adopt a law on the duty of vigilance. This law which is now being used to fight against climate change.

With Paul Mougeolle, we are two speakers to talk about the French model. I will focus on what I consider to be movement of hardening at the national level the soft law principle of due diligence established in the UNGP. I will briefly talk to you about this process, a veritable legislative saga. Then in a prospective way I will discuss the eradiation potential of this French model in other normative space, notably European and United Nations. Behind this movement is the question of normative 'porosities' between soft and hard law, but also between national regional and global normative spaces. The recognition by French law of a duty of vigilance imposed on parent companies and ordering companies is emblematic of these inter-normativities. The development of the concept of due diligence from the United Nations sphere to the French national sphere, which is certainly not linear, shows this process which is hardening soft law, and finally hardening CSR.

Even if the issue of business and human rights has been taken into consideration by United Nations since the 70s, it has taken on a new dimension since the end of the 90s, when the issue returned to the United Nations agenda. A process was launched within the former Sub-Commission on Human Rights for the adoption of a hard law text. And in parallel, I think we can even say in competition, we saw the adoption of the Global Compact - soft law. The failure of the draft binding text was followed by the appointment of John Ruggie and the adoption of the UNGPs by the Human Rights Council.

The previous speakers have already discussed the Principles very well, and their potential for the protection of human rights, and beyond that for the protection of the environment and the fight against climate change. I agree with them, with their holistic approach of these Principles. Continuing their remarks, I would like to share with you a brief analysis of the evolution of these Principles in the way in which the fundamental notion at the core of these Principles, which is due diligence, has been developed.

The notion of due diligence is eradiated at the international level. John Ruggie was a very good strategist. He has worked closely with a number of public and private actors during the six years he was developing his Principles. The UNGPs have achieved the status of an international standard within the OECD, within ILO, within the European Union and the Council of Europe.

A normative jungle, instead of reinforcing responsibilities, can on the contrary, delude them, unless all standards seems to converge. And I think that due diligence is a point of convergence in this normative jungle.

The proliferation of norms in the field of corporate responsibility leads us to think of a normative jungle. And this can be dangerous. A normative jungle, instead of reinforcing responsibilities, can on the contrary, delude them, unless all standards seems to converge. And I think that due diligence is a point of convergence in this normative jungle. It is in this context that France has succeeded in adopting a law on the duty of vigilance.

The legislative process was launched in 2013 in the context of the commotion caused by the Rana Plaza tragedy. In this context, the first national steps have been taken to implement the UNGPs in France. A first draft national plan was drawn and the government sought the opinion of the National Consultative Commission on Human Rights, which highlighted the inadequate consideration of the risks of human rights violations and recommended that the government establish a legal duty of due diligence. Also in 2013, the legislative process was launched and met several resistances. For its opponents, the law was going to sacrifice the French economy and expose its corporations to unfair competition.

The French Constitutional Council abolished punitive damage, but left the possibility for any person with a justified interest in action to ask the judge to order the company to comply with the duty of care, if necessary under penalty. I will not go into details, because Paul Mougeolle will talk to us about this law and its mobilisation in French tribunals.

While the due diligence is well known and used in international and in national law, this concept has taken on a new dimension with the UNGPs. For corporations, while this concept was also known and used in corporate governance to determine business risks, it has become, thanks to the UNGPs, a standard for measuring compliance with international obligations. It has also left a context of central internal risk and management within the company. The risks that needs to be prevented are no longer only those caused to the corporation, but also the risk is that a corporation creates for third parties in the exercise of its activities. It has thus become an instrument for internal and external risk management in the area of human rights, including the right to a healthy environment. This notion applied to corporate responsibility has a soft nature in the UNGPs, but becomes hard law at the national level, in the example of France.

But with the Human Rights Council Draft Treaty, could not this notion become hard law this time at the global level as well? The process of negotiating a binding instrument at the international level is not easy. Since 2014, the process has been paved with difficulties. Strong resistance has emerged, including from the European Union. One of the arguments against the adoption of a treaty was that soft law, and the application of the UNGP, should be favoured instead, as if the two process were incompatible. However, the two processes are not incompatible and should not be considered as competitors. They are completely complementary. A binding text could be used in the event of a failure of a soft law and voluntary commitments in the area of human rights, but also in the fight against climate change.

How can we move from competition between these forms of normativity duty to complementarity? Positions seem to be changing. Perhaps the health crisis of covid has played and will play a role in this movement. At the European level, the impact of the crisis in the evolution of the position on the adoption of a binding text of the duty of vigilance seems obvious to me. The Reynders declaration[60] and an acceleration of the timetable occurred during the peak of the health crisis in Europe. Debates on the fragility of supply chains contribute to spread this notion.

The argument used by the opponents of the adoption of a national law on the duty of vigilance in France must be recalled: 'French companies should not be penalized!'. In order for them not to be sacrificed, this debate must be brought to a European level, and a binding text of a duty of vigilance adopted at this level. But the argument can be made again, this time with regard to European companies. 'They should

[60] Above n 5.

not be penalized!'. In order not to be penalized, this debate must also be conducted at the global level. And the current negotiations in the United Nations Human Rights Council can contribute to a global eradiation of due diligence this time around. Even if the process will be hard and a large part of responsibility still lies with the states, is this not the best eventually? In my opinion, yes, provided that the text does not imply a lowering of the level, and that it does not fall short of the UNGPs.

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4. The Existence and the Extent of a Climate Standard of Care in France

Paul Mougeolle
Project Coordinator and Legal Advisor – Notre Affaire à Tous,
PhD Candidate – Paris Nanterre University & University of Potsdam

I will give a presentation today about the existence and the extent of a climate standard of care in France. I am a Ph.D. Candidate at the University of Paris Nanterre and Potsdam and working for the French NGO Notre Affaire à Tous. With the NGO, we launched the first climate litigation in France against a business enterprise, namely Total. Total is an oil and gas company, which is one of the biggest companies in France, and one of the major contributors worldwide to greenhouse gases. Its greenhouse gas represents approximately 1% of worldwide emissions.

The Duty of Vigilance Act is a very concise and general phrased piece of legislation. It only States that serious human rights and environmental harms must be prevented, but it does not really specify more what should be done. So, the first vigilance plan (a report that must be disclosed by the parent company to demonstrate compliance with the legislative requirements) of Total was not addressing the climate issue. We started this litigation by sending a letter of non-compliance to the company in 2018 to notify the necessity to tackle climate change and integrate mitigation measures into it. The legal director of the corporate group responded that Total would modify its second vigilance plan in this regard. But Total only incorporated its climate information that was already released in its non-financial statements. This move did not change substantially the conduct of the company. However, Total agrees now that climate-related-risks are part of the law, so there will be probably no dispute anymore regarding this matter.

The claims of our litigation against Total are also based on the tort environmental duty of care to which everyone is beholden in France according to the French Constitutional Court.[61] And the legal literature specified very clearly that it does also apply to climate change impacts. So, we probably do not need mandatory human rights due diligence legislation as in France to claim a climate standard of care because it probably already exists in the general tort liability schemes.

Also, indications that a climate standard of care already exists is coming from the corporate world. 15 out of 25 large companies coming from very high emitting sectors, such as the financial sector, energy sector, transportation, industrial, and construction are already presenting climate mitigation measures in their second vigilance plans published in 2019. Companies will very likely increase their efforts in the upcoming years. You can see these findings in the Climate Vigilance Benchmark on the website of Notre Affairs a Tous as well as a summary in English.[62]

Enforcing a climate standard of care or vigilance can be very useful because the climate regulatory framework in place for companies is very limited and not ambitious enough. Take for instance the 'cap and trade' European Trading System (EU ETS). Within this system, companies must only surrender allowances against the direct emissions stemming from their industrial activities (scope 1 emissions). So, Total has to surrender allowances only against the emissions arising out of its extracting and production activities (scope 1), but not when it is selling products to their customers since these emissions are released by its clients (scope 3). This is problematic since 90% of Total's emissions are scope 3 emissions. More generally, more than 50% of greenhouse gases in Europe are not addressed by the ETS framework. A general climate standard of care might fill this regulatory gap and already require from all companies to cut their direct and indirect scope 1 – 3 GHG. Total denies of course any responsibility towards scope 3 emissions. However, after careful legal assessments, we believe Total is wrong. I summarised this issue

[61] *Michel Z case* Decision n° 2011-116 QPC.
[62] Above n 9.

in the second issue of the 2020 *Carbon & Climate Law Review*.[63] I will outline very briefly why companies should reduce their indirect scope 3 emissions to prevent liability risks.

> *Enforcing a climate standard of care or vigilance can be very useful because the climate regulatory framework in place for companies is very limited and not ambitious enough.*

Other multinational corporate groups, such as BNP, Airbus, Peugeot-Citroën (PSA) Michelin, are also already tackling scope 1 – 3 emissions in their vigilance plans. Even ING in the Netherlands stated in the OECD case it is trying to reduce the emissions related to their financial activities, which constitute also indirect scope 3 emissions. Companies often state they are doing it on a voluntary basis. However, I do not think this is the case. The standard of care might actually already require this. Many soft law texts such as the GHG Protocol, TCFD, and the Climate NFRD Guideline of the European Commission (2019/C 209/01) expect companies to report and reduce scope 1 – 3 emissions if it is relevant and proportionate with regards their activities. Even the Principles on Climate Obligations of Enterprises, an attempt to codify existing climate obligations drafted by very recognised jurists from all over the world[64] already set out very clear obligations for companies towards their subsidiaries, supply chain, and products and services. So, there is probably a whole range of obligations that already apply, I think, especially through the implicit tort-law standard of care.

We also included recommendations in our Climate Vigilance Benchmark study, and we sent letters to all concerned companies to alert them of the non-compliance risks. These recommendations are in essence similar to the claims in the Total case. Thus, to prevent non-compliance risks with the Duty of Vigilance Act and the French environmental standard of care, companies should:

- First of all, track direct and indirect emissions (scope 1 – 3);
- Recognise their share of responsibility;
- Identify climate-related risks with regards to human rights and environmental harms;
- Adequately assess climate science which will enable them to know that limiting global warming to 1.5°C will prevent dangerous global warming. This is a global target also enshrined in the Paris Agreement;
- Implement consistent measures to achieve net-zero GHG by 2050.
- All these steps must be reported publicly, especially in the vigilance plan.
- And if companies notice these steps are still not enough to properly mitigate climate change on a global scale, we believe they should call on governments to enhance the regulatory framework, especially if companies are not able to self-regulate.

Eventually, I want to share some words concerning climate loss and damage and adaptation, topics that are not related to climate mitigation (reduction of GHG). When businesses are transitioning to zero emissions, they should, as Professor Surya Deva already stressed, ensure that they are protecting and considering the rights of their workers and other affected stakeholders.

And with regards to climate harms that are already taking place today, which will only increase in the following years, some litigations are requiring monetary compensation from fossil fuel companies in the US (so-called carbon majors lawsuits). These are claims made by very large municipalities such as New York, Oakland. Even though I support the spirit of these claims, there is an evident risk that many victims will remain uncompensated since there are simply too many, potentially an infinite number. So, if Courts 'open the floodgates of liability' only against some companies, there will certainly not be able to compensate everyone. This is, I think, a risk that must be taken into account by Courts. In any case, companies should cooperate on a global scale to find solution with the international community and

[63] Paul Mougeolle, 'Practitioner's Perspective: A Brief Commentary on the French Total Climate Case' *Carbon & Climate Law Review*, Volume 14 (2020) Issue 2 128-132, available at: https://cclr.lexxion.eu/article/CCLR/2020/2/8.
[64] Above n 8; see also Episode 1.5 above.

other companies. And I believe an extended responsibility scheme should be introduced as it is already in place in Europe for waste legislation to compel companies to contribute to a compensation fund so that current and future victims are compensated. And companies' fair share should be based on scope 1, 2, and 3 emissions.

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5. Overview of Legislative Developments in Germany

Lena Walker
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I am going to talk today about the German preparatory work on a human rights and environmental due diligence law. I am going to present two documents that are a part of these preparatory works. They are documents by the German government. And I am going to focus on comparing these two documents in relation to climate change.

The first one I am going to call the Draft Law.[65] It was a classified document that was leaked to the public in February 2019. It is a document by the Federal Ministry for Cooperation and Development. So what does this draft law contain? It is applicable to businesses with more than 250 employees and annual turnover of more than 40 million Euro per year. What are the duties in this law? Among others to conduct due diligence. This includes the whole supply chain, so including subsidiaries and contractors. The due diligence is a human rights due diligence, but also expressly an environmental due diligence. The law foresees a duty to appoint a compliance officer to monitor the compliance with the law's requirements. It also foresees the duty to establish a complaints mechanism, including whistle-blower protection. The consequences of a breach of the duty of diligence are, among others the intervention of public authorities, criminal sanctions, exclusion from public procurement, and the law also makes reference to civil liability, to general civil liability without further clarifying.

One major challenge in relation to environmental issues such as climate change is to find an appropriate material standard or a substantive standard. And the solution of the draft is that it refers to basic requirements of environmental protection. And this is further clarified by three points: The national laws of the host state concerning air, water, soil, the climate, biodiversity and preservation of natural resources. Second, multinational environmental agreements which are binding for Germany. And third, the international best available technology.

So what would the consequences of this duty be for climate change impacts? What would the proposed law require businesses to do? First of all, it would require them to do due diligence, to do a risk assessment. So if the business is prone to affect the climate, for example by using fossil fuels, the business would have to identify and mitigate this risk. But to what extent? The question as to which emissions would still be acceptable and which would surpass the limit to a violation of this duty is left open. So in my opinion, the draft does not find a satisfying solution to this question.

So maybe you thought this Draft Law sounded at least quite promising. Now I have to disappoint you. There has been a new document that was officially published by two ministries, the Ministry of Labour and the Ministry of Development. It was published in March 2020. It is called the Draft Key Points of a Federal Law on strengthening corporate due diligence to prevent human rights violations in global value chains. Or in short, the Draft Key Points on a Due Diligence Act.[66]

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[65] Business and Human Rights Resource Centre ('BHRRC'), 'German Development Ministry drafts law on mandatory human rights due diligence for German companies', available at: https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies. It is noted that the German Federal Government issued a statement stressing that the document merely constitutes "internal considerations" within the German Federal Ministry for Industrial Cooperation and Development ('BMZ'), available at: https://www.bundestag.de/presse/hib/670510-670510.
[66] Draft key points of a Federal law on strengthening corporate due diligence to prevent human rights violations in global value chains (Due Diligence Act), July 2020, available at: https://www.rph1.rw.fau.de/files/2020/06/key-points-german-due-diligence-law.pdf.

So what does this contain in comparison to the first Draft Law? It is restricted in several aspects. First of all, it is only applicable to companies with more than 500 employees. That is in total a number of about 7280 companies in Germany. Also, the due diligence obligation is restricted. In this draft the human rights due diligence is in focus, so it is a human rights-focused approach, and there is no general environmental due diligence. Instead, this draft makes reference to certain areas of risk, which are damage to health, to accommodation, or those economic goods needed for subsistence, for example, water, soil or air pollution. So the climate is not mentioned anymore.

The question as to which emissions would still be acceptable and which would surpass the limit to a violation of this duty is left open.

This proposal also contains civil liability, but it is also restricted in this respect. It names only certain violations, for example the harm to life, to health, freedom, property and the right to privacy. The document also clarifies that the duty is an obligation only to make an effort, that the burden of proof lies on the claimant, and it includes a safe harbour clause, in terms of which companies that implement an approved industry standard can limit their liability to intent and gross negligence.

So climate change in this proposal plays a minor role. Claimants in litigation will have to rely on human rights violations by environmental damages. So this leaves them with additional challenges, for example, to demonstrate the company's contribution to climate change and causality, etcetera.

So what can we expect from a future German law? In my opinion, it seems clear that the German government, the current government, has agreed internally that there will be some kind of due diligence act. However, it is unclear to which companies it will be applicable. In a recent statement, the Federal Minister of Economic Affairs, Altmaier, argued that the law should be applicable only to companies that employ at least 5000 people. Also, under the current government, it is rather unlikely that the law will contain a civil liability clause. Mr Altmaier also mentioned that he is not in favour of this civil liability. And I also am of the opinion that it will most probably not contain duties that specifically refer to climate change.

However, there will be elections in Germany next year in September, so in one year. And my predictions are, of course, only true if the law is passed before these elections.

Lena Walker is a PhD student at the Institute for Environmental and Planning Law at the University of Münster. She currently explores environmental due diligence regulation in European and national law. This includes existing legislation such as the European Timber Regulation and newly suggested legislation such as the German Draft on Human Rights and Environmental Due Diligence. Lena studied Law in Münster (Germany) and Saragossa (Spain) and completed her legal clerkship at the Higher Regional Court of Cologne, at the German Federal Ministry for Economic Cooperation and Development and in Cape Town, South Africa. She has worked in Environmental Law at Görg Lawyers and contributed to several expert reports on Human Rights Due Diligence, among others for Amnesty International.

6. Observations from German Legal Practice

Roda Verheyen
Partner – Rechtsanwälte Günther

I am going to provide some points that I would like to add to what was already said. I think in this whole debate, we have to really differentiate between the issue of due diligence or due diligence national laws or EU law, and the matter of substantive legal duties on companies. That is a real necessity. And I entirely agree with what Chiara said that these duties already exist, as can be seen in the Shell case in the Netherlands.

However, we are not there yet. We have not actually received one single proper judgment in any jurisdiction. So we need to really make and develop the point of what all these tort or nuisance type rules, what is the standard that is applicable there. There needs to be a lot of more a lot more research done. So there is a huge gap for us to actually apply these standards.

However, as was raised before, there is the remediation issue, of how do we actually link human rights and climate cases together? My client's case against RWE, the Peruvian house owner from Huaraz, actually sort of does this.[67] While it is not a human rights case, it actually addresses remediation. It is I think worldwide the first one that actually does this in a concrete way and actually reached evidence phase. We have yet to wait and see what results from this case. But this would to some extent be the first case where a specific human rights infringement equals a nuisance infringement under national tort law, and where we can actually find remedies, concrete remedies.

What I would like to draw attention to as well is that these kinds of cases obviously also turn on what is due diligence for companies. Because you can either talk about due diligence with respect to general obligations toward the public or the globe. Or you could actually turn to what is mostly referred to as directors' duties with respect to the company. And there is a lot of development in terms of disclosure and directors' duties. So I believe that if there is a substantive duty to actually take climate change into account, both with respect to physical risk and regulatory risk and litigation risk, that actually then will translate and does translate already into disclosure rules and then substantive law.

Again, we are not there yet in practical application. The kinds of cases that we are talking about here with respect to material duties and actual remedies - so do you actually ever get a judgment against that company? - this issue has not reached accountant firms. There is no substantive materiality standard that has actually ever been reached. So, we see CSR type reporting, but the task also for academia now is to actually turn that over into materiality financial reporting. That is where we are at, and I think we are really at the threshold. In my mind, these duties exist already, but the issue is how to capture them.

What I think should be stated with respect to national laws, and the types of cases that Paul was referring to in France, and also with respect to our initiative in Germany right now, is that we are not there yet either. Because if you look at the general perception and what economists tend to say about these kinds of initiatives, it is mostly completely negative. There is no perception in the public - and with the judges, that is very important to my mind - that we actually need these kinds of laws, that there is a need to recapture globalization in this way. And there is a huge issue of how to actually substantiate these kinds of duties. So that is why the Kik case[68] and Rana Plaza case in Germany failed. Legally it failed because of other issues that are vested in Pakistani law or Bangladeshi law. But it actually failed substantively because there was such huge reluctance to actually establish standards that are not set out in law.

So I really believe the issue here for all of us is to actually work hard on substantiating the laws. And Paul's publication on benchmarks actually does this to some extent. The *Shell* case[69] does this to some extent with concrete medium terms targets and the greenhouse gas reduction target overall.

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[67] Above n 55.
[68] *Jabir and others v. KiK Textilien und Non-Food GmbH* (Case No. 7 O 95/15), BHRRC summary available at: https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/.
[69] Above n 35.

I would like to note that in the German debate about a due diligence law (value chain), what we are currently seeing is both from lawyers, professors and economists, are the types of arguments as follows: These kinds of laws will not help, but actually cause the opposite effect in the host countries. Because children that are no longer able to work in factories where German corporations ask them to not be employed will then essentially go into prostitution. Those kinds of arguments are seriously in the German media currently. So there is a there is a very steep hurdle to be to be overcome still. And I think that will happen with the with the EU law as well. So we need to really get the message out there: What is due diligence? What does it mean? Why do we need it? And that it actually helps people to understand how this is not this is not an impossible burden on companies.

What we have done so far is only looked at the carbon majors. We have only either looked at the main producers of emissions or the extraction industry. What we have not done at all is to actually look at real supply chain issues and companies.

Then I would like to talk a little bit about what is the substantive duty of due diligence. I think it is really important what Paul said about the benchmarks and how to actually make it workable. There are huge differences between types of industries, I think. And Paul's report this is the first that actually looks at these different areas and how to make it work. What we have done so far is only looked at the carbon majors. We have only either looked at the main producers of emissions or extraction industry. What we have not done at all is to actually look at real supply chain issues and companies.

And that is another point for research in my view. I am working on a project with a medium-sized company here in Germany on how to actually make that work and due diligence. What can one company that produces not oil, not gas, its products are completely all over the place, do? Especially about scope 3 emissions? Then how do you do that? What can you do? And that is something that nobody has worked on properly. So I would really call on the global research community to do that. Because that will be needed if we actually want support for these kinds of substantive laws. Which I think we all agree we will need to make this work. Even if the standards already exist, people like me who sit here in legal offices and try to actually get judges to declare something, we will probably need a little more.

The last issue is something that needs to go to the company law directorates of whichever institution people are working for, is work on the whole issue of the separation principle. Due diligence, what does that actually mean? It means that you are to some degree at least responsible for what others do along the supply chain. And even if you do not actually break the principle of responsibility for your own legal company or own legal entity, that is what it essentially is about. It makes you responsible for what other people do. And this is something that actually is vested theoretically and in legal terms, to my mind, in the concept of why legal entities are shielded in this way through company law. The environment community knows so little about company law. It is sad. This issue of business, human rights, environment and due diligence actually breaks these boundaries a little bit. Which is why I find this very helpful. But essentially what we need to talk about more is about the issue of why do we actually need this shielding principle? What is the real reason behind it? And do we actually still need it? With respect to - you can take whatever international global covenant, the UN Guiding Principles or any other - do we actually still need it? Is it actually sustainable? And that goes back to what we heard before in the beginning from Surya.

Roda Verheyen is Partner at the firm Rechtsanwälte Günther since 2013. Roda has written her Ph.D. on climate change damage in international law and now works in her own law firm specialized in environmental, planning and energy law in Hamburg, Germany. She was previously a Director of the Climate Justice Programme, which she founded in 2002 with Peter Roderick. Before registering as an attorney, she was an independent consultant for (inter alia) the GTZ (today GIZ), the Federal Environment Ministry, Friends of the Earth, Greenpeace and Germanwatch e.V., Foundation for International Environmental Law and Development (FILED, London) as well as a member of the German delegation to the Climate Change Convention. She is a co-

author in one of the main text books on Environmental Law in Germany (Koch/Reese/Hofmann, *Umweltrecht*, Beck). Her active cases include a case brought by a Peruvian houseowner against a major energy utility, claiming costs for a risk reduction measure to protect his house from a major glacial outburst flood (*Lluiya v. RWE*), several cases against development consents and permits for coal power plants in Germany and Poland, as well as cases involving lignite mining permits and planning acts. She co-represents the People's Climate Case, a case brought by families in and outside the EU against the insufficient climate targets for 2030 (ECJ Case No, C-565/19 P, GC Case No.T-330/18). She also represents claimants in an ongoing constitutional complaint before the Federal Constitutional Court of Germany requesting adequate climate protection.

7. Shedding Light on Climate Change Due Diligence Laws: Consideration from Other International Frameworks, Arenas and Contexts

Merryl Lawry-White
Associate – Debevoise & Plimpton

Today we have been asked to think about the factors that might influence the standards in considering climate change impacts in the context of mandatory human rights due diligence law, and particularly the law proposed by the EU. We have also been asked to consider remedies. Effectively, it is a little bit of gazing into the future and considering the various factors that may — and should – be taken into account. You have heard from the other panellists about various frameworks that might shed some light on these standards — the UNGPs, national laws — and my objective is to add just a couple of other framework considerations into the mix of today's discussion.

The first of those is the primary public international law instrument applicable to climate change: the Paris Agreement. As many of you will know, the Paris Agreement enshrines a global objective to hold global average temperature to 'well below' 2 degrees pre-industrial levels, with an aspirational goal of 1.5 degrees. Amongst other things, States set nationally determined contributions – their climate goals as it were – under Agreement. The EU's current NDC is to reduce greenhouse gas emissions by at least 40% by 2030 as compared to 1990.[70] And everything we are talking about today has to be seen in the context of the fact that living up to the 40% goal will clearly require a rather large shift in regulation, policy, incentives and how we do most things, including business. We can therefore expect that due diligence requirements as to environmental and climate change impacts will be moulded by the EU's commitments, and the Member States' national energy and climate plans. For example, we can expect that the emphasis that the EU has placed on land use and change in land use to trickle into how businesses understand climate impacts in their operations and supply chains and what that means for their assessment of risk.

The changing laws and regulations are already beginning to directly apply to businesses, and we should not understand the forthcoming due diligence legislation in isolation from the many other regulatory initiatives the EU is currently pushing through as part of its efforts to reach its targets: the disclosure regulation, the taxonomy regulation and the new conflicts minerals regulation which requires due diligence are all examples of regulation enacted under a broader agenda.

Another reason to avoid considering these regulations in isolation is that, as a practical matter, most businesses are not going to set up separate processes to assess and report on risk for different regulations. They are likely to integrate the various requirements into the same process. A degree of diligence is necessary to report; and many of the reporting regulations require that businesses report on the process itself. So the process itself may become as much of the focus as the end product. The definitions and thresholds that are applied within one set of regulations will therefore be relevant for how the others play out in practice; and the taxonomy used for one may mould the terms used and the risks conceived of for the purposes of another.

A quick aside here, because it has not really been discussed yet, another piece of legislation that will be relevant to understanding the standards that will be applied to due diligence of at least some corporations in the UK—we do not yet know how many—is the proposed legislation targeting use of products resulting from illegal deforestation.[71] There is not currently a huge amount of available information about this

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[70] European Commission 'Paris Agreement' available at: https://ec.europa.eu/clima/policies/international/negotiations/paris_en#:~:text=The%20EU's%20nationally%20determined%20contribution,by%20the%20end%20of%202018.

[71] See generally Debevoise & Plimpton LLP, 'The UK Proposes Legislation Targeting Use of Products Resulting from Illegal Deforestation and Mandating Supply Chain Due Diligence' (17 September 2020), available at https://www.debevoise.com/insights/publications/2020/09/the-uk-proposes-legislation-targeting.

legislation. The consultation will finish on the 5th of October [2020]. But a couple of things we do know are that: *(i)* the proposed legislation, if passed into law, would make it illegal for larger businesses to use forest risk commodities that have not been produced in accordance with local laws protecting forests and other natural ecosystems; and *(ii)* it will mandate supply chain due diligence into these factors and publication of the results. And there are also proposals that it be extended to institutions financing deforestation indirectly. So given the link to potential illegality, we might expect that the due diligence standard will be either relatively exacting or will be taken relatively seriously.

Separate from the national and regional shifts in the regulatory framework, the Paris Agreement has already begun to influence the behaviour of businesses directly rather than via national legislation. This is another example of public international law directly influencing the behaviour of private actors, separately from its enactment into domestic law. Certain businesses have already committed to aligning with the Paris goals, for example, in the Katowice Commitment.[72]

Before I leave the Paris Agreement, just one quick word on remedies. The dispute resolution provisions (which are obviously State/State) refer to ICJ adjudication or arbitration where there has been the requisite consent. Very few States have given this consent, so the default mechanism is conciliation. We do not know the exact contours of a conciliation mechanism yet, but State/State claims could be direct claims for non-compliance and they could also conceivably involve diplomatic protection claims. Not only is this theoretically possible, but there is precedent for diplomatic protection claims being submitted to conciliation at the international level. There would be some real challenges to this route, given the nature of the Paris Agreement obligations and the procedural hurdles associated with diplomatic protection claims. We know that the outcome would be a recommendatory award, but we do not know what the process would be, or the transparency involved, nor the international pressure associated with it. All of which would affect the type of remedy available.

The second framework point I want to make is on the intersection between climate change and human rights: that they are legally integrated as a matter of public international law, but also practically integrated in many specific scenarios. Legally, they are part of an international system that prefers integration over conflicts, so they will be read together where possible. We can also see this intersection in the decisions of human rights courts and bodies, which could well add to the regulatory recalibration we have just discussed. And the Paris Agreement also emphasizes the importance of respecting human rights and efforts to combat climate change, and Surya has already mentioned why that is the case.

> *In the same way you can never truly 'remedy' in the sense of reverse an experience of sexual violence, many climate impacts can equally not be reversed, and prevention is therefore an important overarching objective of any due diligence standard.*

They are also linked as a practical matter, in terms of assessing risks and mitigating impacts. My colleagues have already spoken about many points of overlap, and there are just two points I want to add to this. The BIICL report that was commissioned by the European Commission and fed into the announcement of the due diligence legislation found that many respondents conduct climate due diligence — but without actually calling it that — in a silo from human rights due diligence.[73] Practically that approach might misunderstand the risks and impacts and how the climate change and human rights intersect. If you think about scenarios such as the conflicts in parts of South Sudan or displacement in the Sahel, which are influenced by both factors, addressing the different risks associated with supply chains in isolation might skew the ultimate understanding of risks and the potential to mitigated impacts. A siloed approach might also upset the application of principles that apply to allocate resources and focus as part of the due diligence process, such as proportionality. Proportionality depends on an assessment of severity, and if the way that the various

[72] The Katowice Commitment, available at https://group.bnpparibas/uploads/file/katowice_commitment_letter.pdf.
[73] Above n 1.

factors interact is not being fed into the assessment, the actual severity in practice might not be properly understood.

There is just one point I want to pause on here, that the legislation might also want to consider in this respect, which is the limited data and modelling that is available in respect of some areas and industries, which determines what can actually be done and understood in a due diligence process. This data and modelling can be particularly important in understanding specific effects of what are often in a climate change context seen as very diffuse impacts. And it is also important in understanding how to address and assess the intersection with more specific impacts caused by other risks.

Another important point of integration is the mainstreaming of certain perspectives across all areas of due diligence. For example, adopting a gender lens. As Surya has already mentioned, a gender lens not only recognizes that impacts might be better or worse based on gender, but also that risk and impacts might be experienced completely differently, and therefore that avoiding them or remedying them might require different approaches. It is an important part of not only effective human rights due diligence, but also addressing climate change concerns. And such factors will and should influence the practice of due diligence under future laws.

In essence, therefore, these frameworks again emphasize the importance of an integrated and contextual approach to due diligence — in theory and in practice — when considering a standard and implementation.

One final note. The overarching goal of any due diligence legislation in this arena must be prevention and mitigation. Not that remedy is not important: it has huge value, including normative value. However, there is only so much that law and compliance can do once the damage has been done. And that is one of the key lessons we take away from other frameworks, other arenas and contexts. In the same way you can never truly 'remedy' in the sense of reverse an experience of sexual violence, many climate impacts can equally not be reversed, and prevention is therefore an important overarching objective of any due diligence standard.

Merryl Lawry-White is member of Debevoise & Plimpton's International Dispute Resolution Group based in London. Merryl's practice includes contentious and advisory work across public international law, investment treaty arbitration, commercial arbitration, international humanitarian law, human rights and transitional justice. She acts as counsel on claims and complaints brought before multiple international bodies, including international arbitral tribunals, the International Court of Justice, WTO panels, international conciliation commissions, human rights treaty bodies and domestic courts. Merryl is also a member of the firm's business integrity group, assisting clients to understand and mitigate business and human rights and environmental impacts. She is also a member of the IBA's Subcommittee on ESG in arbitration, and the Justice Rapid Response Roster of Experts for the investigation and reporting on international humanitarian law, human rights and criminal law violations. She frequently publishes and speaks on questions of public international law, human rights and international arbitration.

8. Observations on the need for transformative change

Sara Seck
Associate Professor at the Schulich School of Law and Marine & Environmental Law Institute at Dalhousie University, Canada

I have learned a great deal in this session and have the challenge of trying to pull some threads together. I want to start by acknowledging that I am speaking from the ancestral and unceded territory of the Mi'kmaq in Nova Scotia. I am based in Halifax.

One of the comments made by Surya was of the need for transformative change and that even the best EU human rights due diligence legislation, even with lots of reference to climate impacts, is not going to be enough. And I think I am going to start there. I absolutely endorse the sense which was common among several panelists that already there is an existing standard of human rights and climate due diligence. And so we do not need specifically legislation for this to exist. It is already there. But whether or not we have legislation, or are interpreting what we understand as being already there, involves an interpretive exercise. And so I think we should reflect on what it means that unless there is specific reference, for example, to gender or to the rights of children, it is assumed that the human who is the subject of rights is not a woman or is not a child or is not an Indigenous person.

The starting point of the human rights framework, an assumption that we make - and this is not just about who the human is who is the holder of rights, it is also how we think about the worker, it is also how we think about the investor - is as what I call a bounded autonomous individual. This is the liberal subject who pretends to exist autonomously without being dependent on relationships with other people or with nature. And this is a fundamentally problematic starting point for any work in the human rights space that I think we have to confront. The writings that I have done in this area have drawn upon feminist and relational theory theorists, but also Indigenous theorists. And so another important piece is a recognition that everyone is differentially situated. And so I would not say that everybody is the same. But why is the starting point that unless we make specific additional reference to gender or to children or to Indigenous rights or to whatever, that we assume this is not who the human is?

So when we think about what is required for human rights due diligence, whatever the context is, we should always question what we are thinking about the human. And think of the human as what I call an ecologically embedded relational being. Again, all differentially situated. I think that is a piece of the transformative change puzzle that we need to confront as those who are engaged in conversations about human rights.

> *[We] need to think of the worker as not just a worker who is doing their supply chain work to keep the global economy functioning, but also as someone who is a member of a family and a member of a community and ecologically embedded within that community space, as well as someone who is part of a global planetary mother earth system.*

And I think this changes how we think about not just rights but also about responsibilities. Because a very important part which we see in particular in many Indigenous cultures - and I should note that I had the tremendous privilege of listening for two hours last night to Mi'kmaq elders and other knowledge holders talking about environmental responsibilities within the communities here - an important part of moving from the bounded autonomous individual of the liberal framework into thinking about the ecologically embedded relational human is that it draws our attention not just to rights, but also to responsibilities. And responsibilities of all humans, but this extends also to when we think about workers and workers' rights, when we think about investors, when we think about those who are within the company, and even how we think about companies (and States!).

I am still, I would say, at the somewhat early stages of trying to figure out what the implications are of transformative change if we take this step. But I do think this is important. And I have several publications which I can share where I am exploring these ideas.[74] But that is the first point that I want to make. I think we need to think transformatively and this is a piece of the puzzle.

Let me give a couple of concrete examples of this. For example, if we think of the Rana Plaza example and we focus on this tragic event through the lens of a worker, we miss perhaps other issues surrounding the factory context that might come into play if we were to think of the worker as this ecologically embedded relational being.

So in one article that I have written about this idea,[75] my claim is that if you take that approach, then you bring in issues of environmental degradation that are also associated with these kinds of factories. And so the claim would be you need to think of the worker as not just a worker who is doing their supply chain work to keep the global economy functioning, but also as someone who is a member of a family and a member of a community and ecologically embedded within that community space, as well as someone who is part of a global planetary mother earth system. I will leave that example there for the moment.

Let me just conclude with reflections from things that other panelists have said. One is actually the comment about limited liability and why it is that we have that. I think this was an important point. But I also think that we sometimes forget that the reason we do have this is to protect small business owners, perhaps, who in a time of covid-19 crisis, many of them are going to be facing bankruptcy. So I think it is an important principle and that there is a reason for it. And the question might be the extent to which it should, or to which we should, overcome this principle in different contexts. But the principle of limited liability did emerge for a good reason and continues to exist for a good reason, and will be relied upon, unfortunately, by many companies that are facing a crisis due to our current pandemic situation. So I think there is more to talk about there, but it struck me that that was actually an important piece, and one that relates to how we think of the corporation and the individuals behind it.

I think transformative change is going to require us to think differently, and so I offer those thoughts and look forward to further conversations on this.

Sara L Seck is an Associate Professor at the Schulich School of Law and Marine & Environmental Law Institute at Dalhousie University, Canada. In 2015, Sara was the recipient of an Emerging Scholarship Award from the Academy of Environmental Law of the IUCN in recognition of her research contributions on sustainable mining and international environmental law. She is a co-editor of *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2017), co-editor of a special issue of the *Canadian Journal of Women and the Law* on resource extraction and the human rights of women and girls, and co-editor of the forthcoming *Cambridge Handbook on Environmental Justice and Sustainable Development*. Current projects include co-editing a research handbook on international and transnational approaches to climate loss and damage. She is affiliated with the Business and Human Rights Scholars Association, the Business and Human Rights Teaching Forum, and the Global Network for Human Rights and the Environment (GNHRE).

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[74] For further readings about the concept of the ecologically embedded relational individual and the BHR concept, see Sara L Seck, 'Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker' (2018) 33:2 *CJLS* 137-157, available at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works/222/; 'Relational Law: Re-imagining Tools for Environmental and Climate Justice' *Canadian Journal of Women and the Law* Vol. 31 Iss. 1 (2019) p. 151 – 177, available at: http://works.bepress.com/sara-seck/46/; 'A relational analysis of enterprise obligations and carbon majors for climate justice' Oñati Socio-Legal Series: Climate Justice in the Anthropocene [forthcoming in 2020], available at: https://works.bepress.com/sara-seck/82/.

[75] Sara L Seck, "Transnational Labour Law and the Environment: Beyond the Bounded Autonomous Worker" (2018) 33:2 *CJLS* ibid.

Episode 4: Meeting the Standard: What Does Adequate Human Rights Due Diligence for Climate Change Look Like in Practice?

Once a mandatory human rights due diligence law is adopted, corporate decision-makers, regulators, judges, legal advisers and potential claimants will need to consider what kind of practical steps are expected from the company with respect to its climate change impacts in order to meet the relevant legal standard.

In the final episode, speakers focussed on which steps companies could take to meet a legal standard to undertake human rights due diligence for their climate change impacts. Speakers provided practical examples from their experience of working with and advising business on their due diligence practices in various contexts.

1. Human Rights Due Diligence for Climate Change Impacts in the African Context

Manson Gwanyanya
Southern & Anglophone West Africa Regional Researcher & Representative Researcher
Business & Human Rights Resource Centre

First of all, I want to speak about human rights due diligence in the African context: what it is, what discussions we have been having in Africa, amongst civil society, investors and companies. Secondly, I would like to address the question of what human rights due diligence looks like for climate change in practice. And I want to bring that discussion closer to what I am speaking from – the African context – but also highlight some of the resources and the research that we have produced over the years at the *Business & Human Rights Resource Centre*, as tools that everyone can actually use to try and get those questions answered. Lastly, but not least, I would also want to offer some thoughts or recommendations, based on our work at the Centre.[76]

The *Business & Human Rights Resource Centre* is an international non-profit NGO with over 18 regional researchers, located all over the world. What we seek to do is to strengthen corporate accountability for human rights violations by companies across the world. We also want to ensure that there is transparency in all dealings between companies and communities. And lastly, we seek to support local advocates for human rights as well as civil societies within the regions where we work.

For the first point, I should mention that the question of human rights due diligence has not really been at the centre of the discussions within the African context for a number of reasons. The main issue concerns its enforcement, because we already have quite a number of legal instruments which we struggle to implement. Amongst civil societies, investors, companies and human rights defenders, the question of human rights due diligence is not currently taking centre stage in the African context. We already have quite a number of instruments in place in the constitutions of a number of countries, such as the Africa Mining Vision[77] which, although it only relates to the extractive industry, also provides a

[76] See the reports and accounts available on the BHRRC website: www.business-humanrights.org.
[77] Available at: http://www.africaminingvision.org/about.html.

number of protections for communities as well as individuals and employees who work within the mining sector. Recently, there is also been growing support for a binding treaty on business and human rights, as well as environmental impact assessments, as regulatory frameworks which are already in place to ensure that when companies operate, they try and avoid some of these harms covered by human rights due diligence. The second issue is that there is still a number of other obstacles, regardless of these existing domestic legal instruments, and therefore a need for some form of regulation. However, the question is whether human rights due diligence is the appropriate instrument to answer the relating questions, or we should focus more on the general implementation of the current existing regulations within the African countries.

[T]here has been a very high increase in the risks associated with these minerals [that are used to produce low-carbon technologies], which really pose serious threats to human rights.

As a second point, I will focus on the question of what human rights due diligence should look like in practice, with a particular focus on the African continent. According to the research developed at the Centre, climate change is a human rights issue, and – as far as we are concerned – we do not separate the issue of climate change and the issues of human rights. With this growing global trend of moving from fossil fuels to cleaner energy, there has been a huge demand in a number of minerals that are used to ensure that there is going to be this 'just transition'. Therefore, a part of our research started in 2012 looked at the minerals necessary to ensure that this just transition takes place, in order to develop low-carbon technologies. And, as a part of that work, we developed a Transition Minerals Tracker,[78] looking at the six key minerals that are used to produce low-carbon technologies, such as nickel, copper, lithium, cobalt, manganese and zinc. And what we did with this research was going to analyse those companies producing these minerals, trying to see if they have any policies in place that addressed key human rights concerns as well as their conduct in practise. The idea was to provide information that can be used by civil society, investors, companies, and anyone else who might be interested, to ensure that they have information on how these companies operate and what precautions – if any – need to be taken, and what are the key human rights risks that are associated with mining these minerals.

As key findings from our research indicated, the demand for these minerals has certainly led to the rapid growth of potential human rights violation in some of these companies mining these key minerals. However, there has not been any sort of significant steps taken to address the human rights due diligence impact of mining these minerals. On the contrary, there has been a very high increase in the risks associated with these minerals, which really pose serious threats to human rights. Some of the allegations that we found concerning these mining companies include environmental rights, access to water, or land rights, such as when people are displaced without fair compensation. Among the 24 companies targeted by our research, only eleven had publicly available policies on human rights. Twelve out of the 24 had serious allegations of human rights violation when they were mining their minerals some concerning labour rights or contamination of water for example. None of these companies have taken any steps to respond to these allegations that have been raised against them. That is also why we hope that the information that we have provided can assist many investors who are going to invest in renewable energy sources to actually take steps to mitigate some of the harms related to those minerals that are used to produce low-carbon technologies.

Another research developed by the Centre – which is not necessarily limited to the African context – concerns companies that are producing renewable energy, even though only limited to the wind and solar sectors. We looked at 16 of the largest companies in the world that produce wind and solar, aiming to see if they have any human rights policies in place and what practices they have to ensure that, when they produce these renewable energies, this happens in a just manner, in the sense of a transition from fossil fuels to cleaner fuels. As for the methodology, we used a list of questions issued by the Corporate

[78] Available at: https://trackers.business-humanrights.org/transition-minerals/.

Human Rights Benchmark[79], just to ensure that the companies have certain requirements in place. And we found that only nine of those companies (out of 16) had a public commitment to human rights across all activities; and that a lot of these companies lagged essential policies to avoid abuse of communities and workers which are operating in their firms. These aspects are actually essential to ensure that there is a genuine just transition, which we all largely depend on in order for us to avoid the impact of climate change. What was interesting in this regard is that none of the companies analysed fully met the requirements of respect to human rights responsibility in terms of the UN Guiding Principles. In terms of human rights due diligence commitments, only half of the companies had those in place; 9 out of 16 had publicly available human rights policies. None of them had any remedial mechanisms in place, which would ensure that if something goes wrong the communities or the workers can naturally approach the companies for their grievances to be addressed. Moreover, none of the companies had any policies relating to land rights, which is particularly concerning.

As a last point, I would like to address some of the recommendations that we mentioned in both of those researches, which apply to renewable energy companies as well to those companies that are producing minerals used in the transition to low-carbon technology. First of all, we would recommend that all the companies should adopt and effectively implement human rights policies to ensure that they are in line with the UN Guiding Principles and the international standards. Secondly, we also recommend that they must regularly consult with communities and workers to ensure that all their concerns are addressed on a regular basis. We also encourage the companies to adopt policies that protect human rights defenders, which are also concerned, particularly for human rights benchmarks (none of them had any policy that looks at human rights defenders). As a recommendation for investors, we encourage them to actually engage their companies to ensure that they have some of these policies in place (human rights, due diligence, climate change, etc). We ask them to demand that companies regularly report on these issues of human rights due diligence, providing clear policies which are fundamental for the transition from fossil fuels to low-carbon technologies. And, lastly, concerning some of the recommendations for the governments, we suggest that they adopt and enforce human rights safeguards through legislation and regulatory frameworks to ensure that companies that operate within their jurisdictions – particularly in Africa – operate in accordance with the international standards, as well as the United Nations Guiding Principles. We also encourage governments to ensure that they enhance access to remedy, principally through legislation. And lastly, we suggest to civil society to keep an eye on all these companies, ranging from renewable energy ones to those that are producing minerals useful for the production of low-carbon technologies.

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[79] Available at: www.corporatebenchmark.org.

2. Insights on Corporate Due Diligence for Climate Change from Existing Normative Corporate Accountability Frameworks

Joseph Wilde-Ramsing
Senior Researcher – SOMO; Coordinator – OECD Watch Network

I am going to focus my remarks as practically as possible on some of the concrete steps to answer the question about what corporate due diligence for climate change means, focusing my comments around the normative framework for due diligence that has been developed within the OECD Guidelines framework[80] and the UN Guiding Principles (UNGPs). That has been translated into hard law through mandatory due diligence legislation in various countries, particularly in Europe – namely in France, but also potentially coming up in Switzerland and in the Netherlands – and also maybe at the EU level, with some very concrete paths forward on mandating due diligence. One of the big questions that is going around is what that is going to mean for different sectors and for addressing different impacts and climate change, one of the most pressing issues of our time that due diligence and these legislations are going to have to address. Of course, there is also some jurisprudence that is starting to be developed within the OECD system because it has been around for a long time, since 2000. Indeed, in recent years there have been several National Contact Points (NCP) cases, OECD guidelines cases dealing with climate change. Since 2011, when the climate change provisions were negotiated into the OECD guidelines, there have been eight complaints about dealing with due diligence and corporate impacts on climate change or related to climate change. And seven of those have been just in the last three years. There is really an increasing trend of communities and civil society organisations looking to use the mechanism that is attached to the OECD guidelines: the NCP mechanism.

So in order to get at the heart of what does due diligence mean for addressing the issue of climate change, I am going to draw some of my suggestions and remarks from these cases. There are particularly two very interesting ones that I am going to be drawing from. One is a case against the financial institution ING Bank,[81] that was filed several years ago by some NGOs that I advised in the case. It looked at the bank's responsibility for climate change and its due diligence related to climate change. Moreover, under the French Duty of Vigilance law,[82] there is now a case against Total that has been filed by several NGOs trying to get what due diligence means for an oil company in addressing climate change.

First, the basic premise in this due diligence framework is that greenhouse gas emissions are the same as pollution and that climate change is a negative environmental impact, and companies are expected to conduct due diligence to prevent, mitigate and remediate it. Climate change is an impact that needs to be addressed, and the due diligence framework provides a structure for company to address that impact. At first, it helps companies determine what is their relationship with the adverse impact of climate change, as a causing, a contributing or a directly linked relationship. The due diligence framework from the OECD Guidelines and UNGPs is quite helpful in getting a wide range of companies who are contributing or linked in some way to the impacts related to climate change to start taking action. This framework not only helps identify the causing, contributing or directly linked relationship but also the appropriate steps that companies are expected to take in order to fulfil their responsibility and their obligation in some jurisdictions to address the impact. Basically, any company emitting a significant amount of greenhouse gas can be considered to be contributing to the impacts associated with climate change. And those companies whose products or services are linked to those emissions through a business relationship, such as a supplier or a client, should be considered to be directly linked to the

[80] Above n 13.
[81] *BankTrack, et al. vs ING Bank*, summary available at: http://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank/.
[82] French Duty of Vigilance Law above n 27.

impacts of climate change. Moreover, under the OECD due diligence framework, it has become clear that companies can shift, depending on how they address their impacts, from a directly linked relationship to a contributing relationship. And this is important, especially when we get to the actions that are expected of companies and the responsibility to remediate an impact like climate change.

The due diligence framework from the OECD Guidelines and UNGPs is quite helpful in getting a wide range of companies who are contributing or linked in some way to the impacts related to climate change to start taking action.

In terms of practical steps that companies are expected to take in dealing with climate change, through the OECD due diligence framework, it is clear that the responsibility to avoid the impacts associated with climate change pertains not just to a company's own operations (to stopping whatever greenhouse gas it might itself be emitting) but also to its value chain. Indeed, it is really expected as part of due diligence to take this value chain approach and look at how companies are related to or linked through business relationships to other companies, which also have a responsibility to seek to mitigate those impacts.

The OECD due diligence framework has six steps of due diligence. How could they be applied and what do they mean for climate change?

Step 1 of due diligence is about embedding policies and management systems designed to promote responsible business conduct. Looking at this in terms of climate change, that means that companies are expected to maintain an appropriate system of environmental management, which includes managing climate change. That consists of having an environmental management system specifically designed to look at climate change and mainstreaming climate change across its supply chain risk management processes. That means making sure that the company is indeed managing environmental and human rights risks throughout its supply chains, besides other things concerning corporate structure relationships, like having a board level position responsible for due diligence and for addressing the risks that are prioritized such as climate change. This would ensure that risks like climate change are addressed at a high level in the corporate management.

Step 2 of due diligence is about identifying and assessing the risks and the impacts associated with the enterprise's operations, products or services. This obviously is the stage of due diligence where companies should be identifying climate change as a negative impact and then determining what their relationship is to it. Are they contributing to climate change? Are they directly linked to climate change through a business relationship that they have? Which are their products and services that are providing those links? Which are the business relationships that are providing those links? Then, after having identified that this is an impact, they need to identify whether they are or they are not going to prioritize it. That is part of assessing the risks in due diligence. And this prioritization, according to the OECD Guidelines and the UN Guiding Principles, needs to be done on the severity of the risk and the severity of the impact. That severity in its turn is based on the scale of the impact, the scope of the impact and the irremediable nature of the impact (scale refers to how serious the impact is; scope refers to the number of people under the environment that is impacted; and irremediability is obviously whether or not it can be undone). This is the very practical framework that the OECD Guidelines and due diligence gives companies for prioritizing risks that they need to address or not. And these three factors, if you look at climate change, make it clear that climate change should be very high on almost all companies risk prioritization.

Step 3 is about addressing the risks to actually ceasing, preventing and mitigating the impacts. This is where the reduction of a company's greenhouse gas emissions comes into place, including those in the value chain. This involves exploring alternatives and – if no alternatives exist – doing your best to mitigate the impacts and the emissions. The OECD Guidelines and the UNGPs also insist that, if mitigation is not possible, companies really should be considering divesting or disengaging from certain business relationships, maybe even changing business models.

Steps 4 and *5* are respectively about tracking results and communicating about them, and these in particular have come out clearly in some of the cases that have been filed, where the OECD due diligence

framework was applied by the Dutch NCP in the ING Bank case.[83] Tracking and setting goals for greenhouse gas emissions reductions is really important and it should be tied to the Paris Agreement, with the 2 degree standard and – based on some of the science coming out of the IPCC – probably the 1,5 degrees scenario. Therefore, companies should be looking at different methodologies to tie their own operations (and those in the supply chains) to these targets and should be working towards reducing them. As already mentioned, communicating about the entire due diligence process is *step 5* of due diligence. That involves making it clear to stakeholders and impacted rights holders about the fact that these targets have been set, being clear what companies' impact is, how they assess their own impacts (this is something they should be communicating about publicly), what targets they set to reduce those impacts, and what steps they have taken in order to do that, and the impact of those.

Finally, *step 6* is about remediation of due diligence. This is where companies that are considered to have contributed to an impact are expected to contribute to the remediation. There is obviously a big discussion on what it means for a company to contribute to remediation of an impact that is huge and diffuse as climate change. The OECD Guidelines for the due diligence framework offer some suggestions about this, such as setting aside part of the profits from a particular loan or from a particular activity to go into remediation funds, assuming that there are going to be these impacts.

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[83] Above n 12.

3. Trend Analysis and Practical Suggestions for Business to Prepare for HRDD Legislation

Colleen Theron
CEO of Ardea International

Today we will be looking around the state of the law on human rights and climate change due diligence, with an emphasis on where the trend is going, and then particularly on how business are reacting to this moving trends around mandatory due diligence. About Ardea, we work internationally supporting businesses with the development of their policies and their due diligence processes, and we also have a range of online trainings.

As highlighted by the World Business Council on Sustainable Development,[84] human rights reporting provisions that have been developed since 2012 show the huge growth in the requirements around reporting on human rights issues, but also on sustainability and environmental issues. Moreover, there is a 2016 report which was done by KPMG[85] indicating a 68% growth in mandatory reporting. From a practical point of view, what this does for companies is obviously to challenge them about whether they are operating within the local legislation requirements and how that also fits in international law and the broader frameworks around the UNGPs, and of course climate change, with the Carbon Disclosure Project (CDP) reporting and all other kind of voluntary reporting frameworks that have come to the fore.

Considering where we are with reporting laws and with due diligence, it seems helpful to think about what kind of laws are currently in place relating to reporting and relating to due diligence. There is a distinction I would like to draw on.

The current mandatory reporting requirements legislation includes the EU Non-Financial Reporting directive,[86] the UK Modern Slavery Act[87] and the Companies Act 2006,[88] the Australia Modern Slavery Act,[89] and the California Transparency in Supply Chains Act,[90] just to mention a few. These provisions actually ask businesses to be transparent about the steps that they take to combat modern slavery within their organizations and their supply chains. It is a transparency, a reporting requirement with no enforcement penalties for failure to do that, other than potentially civil injunction under the Modern Slavery Act for a company that has not produced a slavery statement. Therefore, those are the trends we have seen in domestic legislation around mandatory reporting requirements.

What we are seeing now is a move towards including increased transparency with reference to due diligence systems, which cover both environmental and human rights legislation. I have seen reference to this as a 'second generation' of human rights due diligence (HRDD) legislation, which goes further than the first generation (just mentioned above, with mandatory reporting requirements but just around transparency). This trend is to ask businesses to include risks identification, an obligation to take action, and then to report on the measures, including the outcomes that they have taken. This is linked to the 'third generation', which is going to be what the European Union has been talking about: to introduce mandatory due diligence around companies taking action and then reporting on it. The backing for this legislation has come from institutional investors and also companies. And that shift is particularly

[84] WBCSD and Shift, 'CEO Guide to Human Rights', October 2020, available at: https://docs.wbcsd.org/2020/10/WBCSD_CEO_Guide_to_Human_Rights.pdf; WBCSD and Ry 'Reporting matters: Maintaining ambition amidst disruption', 2020, available at: https://docs.wbcsd.org/2020/10/WBCSD_Reporting_Matters_2020.pdf.
[85] KPMG '2020 Carrots & Sticks report', 2020, available at: https://www.carrotsandsticks.net/about-carrots-sticks/.
[86] Directive 2014/95/EU above n 21.
[87] UK Modern Slavery Act 2015 above n 42.
[88] UK Companies Act 2006, available at: https://www.legislation.gov.uk/ukpga/2006/46/contents.
[89] Australian Modern Slavery Act 2018, available at: https://www.legislation.gov.au/Details/C2018A00153.
[90] California Transparency in Supply Chains Act of 2010, available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf.

interesting, notably because there are many businesses that have put their name behind this kind of mandatory due diligence.

The reason for that is really clear: for businesses who are actually seeking to do the right thing, who are looking to meet their legal obligations, actually ensuring that they manage both their organization and their supply chains in a responsible way, having a law that sets out exactly what it requires does two things. In the first instance, it gives them the opportunity to understand what mitigation measures they might put in place. This way, it is really going to be clear what is required of them and how they do that. This is important because it helps them in their resource management, it helps them from a governance perspective, but it also levels the playing field. Indeed, what I have experienced in the last 10 years has been a number of companies who feel that it is unjust that they put a lot of time and effort into something, while other companies are still cost cutting, not taking into regard what is expected of them, and getting away with it. And I think that Covid-19 has really exemplified those distinctions in how businesses feel around this agenda. There are certainly those that are still wanting to do the right thing, spending money in developing their approach to reporting and due diligence; but there is also a number of others who are just using Covid-19 and any other excuse to simply do nothing.

Looking at examples of HRDD laws – such as the French Duty of Vigilance Law (2017)[91], the Netherlands' Child Labour Due Diligence law (2019), and the EU Conflict Minerals Regulation (2017) – they are speaking specifically to the requirement of due diligence that a company has to carry out, a risk assessment on how it manages its human rights and environmental impacts, and how it will go on to report on it.

Another interesting point concerns the distinction between reporting obligations and due diligence obligations, about which (in practice too) there is often a bit of a confusion around what is required from business in terms of what they do and what they say they are doing. A reporting obligation is an obligation to disclose on what you are doing and not actually the obligation to do something as such. The criticism that arises around reporting legislation is that it is easy for business to comply because they can simply write a statement. As we have seen generally in modern slavery statements that it is important that what they say they are doing is embedded in their practice, and actually making a difference around supply chain management. Therefore, there is a real criticism around reporting: it does not carry an obligation for a business to act on the risks. However, the due diligence legislation that is coming through, and hopefully what we will see with the EU is different, because it will set a requirement for a business to do something, to actually take action, and to put in place measures that are adequate and effective. I am sure that what we will see in due course, when we have more cases coming through, more clarity around the laws – particularly if we have civil penalties attached to these pieces of legislation – is that hopefully more businesses will actually be doing what they say, and that we will be able to see effective measurements around these particular issues.

I am sure that what we will see in due course, when we have more cases coming through, more clarity around the laws – particularly if we have civil penalties attached to these pieces of legislation – is that hopefully more businesses will actually be doing what they say, and that we will be able to see effective measurements around these particular issues.

Just to clarify, HRDD is requiring business to act on negative impacts and to provide remedy. There is a requirement to publicly disclose on these efforts, and HRDD laws will also set specific standards, which are normally tied into the UNGPs, as we have seen for the French Duty of Vigilance Law or the OECD Guidelines. The actual content around due diligence per se is something that is going to have to be really fleshed out. I am not sure that we have seen a lot of discussion around what those standards and obligation requirements will be, when we tried to tie in both human rights and environmental due

[91] French Duty of Vigilance Law above n 27.

diligence, because from a practical point of view they are often addressed very differently in business. And that is been driven by the way the law is created and the different ways of measuring impact.

And, of course, that is going to give challenges to businesses themselves, because of the 'silo effect' in business around how these things are managed. In 2018, we produced a publication with IEMA around to how to manage compliance with both environmental laws and human rights laws.[92] As part of that publication, I ran a number of stakeholder engagement workshops across the UK to really assess what the barriers were in business to managing compliance, particularly around environmental and human rights issues. Compliance is obviously the baseline measure that we are going to have when we are talking about due diligence, but, clearly, there is still such a silo effect on these two subjects. Hence, we often find that the managers who deal with environmental issues are now being asked to deal with the human rights issues, and they have a different expertise, a different insight into how to manage environmental issues versus human rights. Therefore, there has to be a lot more done around the education piece, around actually resourcing people within businesses themselves to work on a more cross-functional way to address the silo issues.

These are just a few thoughts that I have developed working with different companies of what business can do to prepare for HRDD legislation. It seems really critical that they establish a means of documenting current and proposed HRDD regulations. I am always surprised about how many businesses – large ones particularly – actually do not have an appreciation for what laws are in place, what they actually already required to do, not even considering what is coming across the threshold. Moreover, there is not often a central mechanism of documenting these regulations. I would also suggest that companies stand back and identify what due diligence processes they have in place, doing gap analysis work. What do they have? What don't they have? They should align what they do with international standards, such as ILO standards or UNGPs standards, which generally are not referenced in codes of practice or supplier codes of conduct. In this regard, we have recently published a white paper with the University of Westminster on *The value of supplier codes of conduct: supporting transparency and improving performance*.[93] Further suggestions include assigning cross-functional due diligence and ensuring that there is adequate time and resources that are available, assessing what additional data or evidence is required in order to produce HRDD disclosures. And, finally, if an organization is a parent company, we recommend to establish a line of communication with subsidiaries around HRDD.

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She has over 25 years of legal and commercial experience of working with business, organisations and NGOs across sectors and provides training and online resources on human rights, modern slavery and sustainability issues. Colleen has a LLM (with distinction) in Environmental Law from the University of Aberdeen. She lectures on business and human rights and environmental issues at Birkbeck School of Law and University of Westminster Business School. Her book, *Strategic Sustainable Procurement: law and best practice,* is published by Routledge. She recently published a chapter 'Modern Slavery and Transparency in Supply Chains- the Role of Business' in *The Modern Slavery Agenda: Policy, Politics and Practice in the UK*.

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[92] IEMA, *Managing Compliance with Environmental and Human Rights Laws in Organisations*, 2018, available at: https://www.iema.net/resources/event-reports/2018/07/25/managing-compliance-with-environmental-and-human-rights-laws-in-organisations.

[93] Area International and University of Westminster Business School, *The value of supplier codes of conduct: supporting transparency and improving performance*, available at: https://www.ardeainternational.com/resources/publications/the-value-of-supplier-codes-of-conduct/.

Colleen co-founded the not-for-profit organisation Finance against Trafficking, sits on the advisory board for LexisPSL Environment, she is a committee member of the Social Responsibility Alliance and an independent member of the APSCA Disciplinary Board for Member Firms. She is nominated as one of the Top 100 Corporate Modern slavery influencers in the UK in 2018. Colleen was part of the Modern Slavery Garden team which won Gold at the Chelsea Flower Show 2016 and has been nominated for an award by the Anti-Slavery Awards group.

4. The experience of the Principles for Responsible Investment and human rights due diligence for climate change impacts

Nabylah Abo Dehman
Manager, Social Issues, Principles for Responsible Investment

I will give a brief introduction of the Principles for Responsible Investment (PRI) and its work with investors. I will focus on ESG and on PRI's work around human rights due diligence for investors, and on how investors have a responsibility under the UN Guiding Principles and the OECD Guidance on Responsible Business Conduct for Institutional Investors.[94] After mentioning PRI's work on just transition, I will end the presentation with some final considerations.

The PRI was created in 2006, instigated by the UN Secretary general Kofi Annan, who had invited a group of institutional investors to join the process to develop principles for responsible investment. A group of 20 investors – drawn from 12 countries and assisted by 70 experts coming from the investment industry, intergovernmental organizations and civil society – created these principles that were launched at the New York Stock Exchange in 2006. At the beginning we had 100 signatories to these principles, and today we have over 3300 representing around 100 trillions of assets under management, about half of the assets in the world.

In terms of the principles, they basically revolve around how investors should incorporate environmental, social and governance issues into investment analysis and how they can engage and be active owners – engaging with investing companies to improve these companies' practices, trying to seek appropriate disclosure around ESG issues to level the playing field and to collaborate within the investment industry to try and gain more leverage to push for these issues. PRI also asks its signatories to report every year on how they implement these principles, which is quite a lengthy process for investors, that are sometimes a bit reluctant. However, it allows for achieving a bit more accountability among them.

In terms of ESG, historically, there has been more ease in dealing with environmental issues just because it has been easier for investors to measure environmental issues – considering the quantitative nature of this measurement – and thus to integrate them into their investment decisions. The 'Social' of ESG has always been kind of the poor cousin of the three fundamental elements (comparing to 'Environmental' and 'Governance'). It has been quite a journey to try and push investors to realize how they can engage on human rights, and how they can integrate these assessments of their investing companies into investment decision.

Moreover, historically, climate and human rights have been managed and addressed separately, and are governed by different policy frameworks, addressed by different communities of practice, and managed by different tools. In the ESG space, there has also traditionally been a tendency to work on environmental and social issues in silo. However, there is an increasing awareness in the investment community that we need to adopt a more holistic approach to these issues, in part because the known impacts of climate change really undermine a range of internationally recognized human rights, including the rights to life, health, food, adequate housing, property and water. Therefore, the fact that there is an absence of adequate protection for human rights, exacerbating the vulnerability to climate impacts, and that these situations of increased vulnerability also expose these populations to other human rights violations like forced labour, it is very much becoming at the heart of investor preoccupations.

In fact, climate change and human rights both represent a global financing challenge, and addressing these issues is definitely crucial for investors to protect their long term returns and reduce their portfolio risks. The institutional investors that PRI works with are commonly known as universal owners, which means that their holdings are so widespread across the economy that the financial impacts affecting society at large are likely to also impact their overall portfolios (and these kind of systemic risks will have

[94] OECD, *Responsible Business Conduct for Institutional Investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, (2017), available at: https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf.

an impact on the overall performance of the portfolio). Moreover, we have seen that climate impacts such as extreme weather, food and water scarcity, increasing income inequality, conflict and mass migration could all present a long-term risk to long-term investors. While they have been taken often in isolation, investors are increasingly aware that climate change is part of a set of interrelated global issues. Over the last years, we have seen an increase of investors activities aimed at improving human rights due diligence. As an example, 101 investors have been calling on the EU to provide some guidance and legislate on mandatory due diligence. Also, the UNGPs provide a common due diligence framework for both companies and investors, and the support of investors for the UNGPs continues to grow.

That is why PRI tried to articulate its position on human rights in order to raise awareness among the investment community, conscious that a minority of institutional investors is very much active on human rights, while the majority of the industry is still unaware of their direct responsibility to respect human rights, as defined by the UNGPs and OECD Guidelines on responsible business conduct. PRI is trying not just to raise awareness among its signatories, but also to raise the bar in terms of expectations for investors, and to translate these expectations into practical steps that investors can be taking in terms of human rights due diligence.

Currently, there is such a momentum from governments championing human rights and embedding their expectations of investors into regulation, as well as an investor momentum on human rights. Indeed, leading investors recognise that meeting international standard leads to better financial risk management, which helps align their activities with the evolving demands of their beneficiaries, their clients, and regulators. However, as already said, a lot of the investment industry is still either unaware or unclear on how they can fulfil their responsibility to human rights.

Therefore, in order to close the implementation gap, PRI has set out a framework for investors on how they can implement respect for human rights in their investment activities. This is really a key part of PRI's work in supporting investors to shape and enable real world outcomes in line with the Sustainable Development Goals. Really ensuring respect for human rights is also central to achieving our ten years blueprint for responsible investment, which aims to bring responsible investors together to work towards sustainable markets that contribute to a more prosperous world for all.

Here is some of the initiatives that showcase investors involvement and momentum on human rights:

- In the past five years, approximately 115 institutional investors with more than US$13 trillion of assets under management (AUM) have engaged with 100 companies through PRI-led collaborative engagements to improve human rights practices and disclosure, using the UNGPs as the reference.
- More than 180 PRI signatories apply to their investment portfolios some form of screening based on the UNGPs and/or the OECD Guidelines.
- A growing number of companies (currently 152) are disclosing information through the UN Guiding Principles Reporting Framework[95] – an initiative backed by 88 investors with US$5.3 trillion in AUM.
- The Corporate Human Rights Benchmark[96] – an investor and civil society-led initiative – assesses the human rights performance of 200 of the largest publicly traded companies.
- An investor call for governments to legislate on mandatory due diligence for companies led by the Investor Alliance for Human Rights is currently supported by 105 investors with US$5 trillion in AUM.[97]

Concerning the impacts in the value chain, obviously all entities can cause negative human rights outcome and therefore they have a responsibility to respect human rights. However, for this to happen effectively throughout the chain, each entity must identify their negative human rights outcome and communicate what they are doing to others, to those above them in the value chain, to government, to

[95] Shift and Mazars, UN Guiding Principles Reporting Framework, available at: https://www.ungpreporting.org/.
[96] Corporate Human Rights Benchmark, available at: https://www.corporatebenchmark.org/.
[97] Investor Alliance for Human Rights, Investors with US$5 trillion call on governments to institute mandatory human rights due diligence measures for companies, (21 April 2020), available at: https://investorsforhumanrights.org/news/investor-case-for-mhrdd.

business partners, to clients and to beneficiaries. Therefore, in order to understand the exposure and the actions required, each entity in the value chain needs to actually request information from the entity below them. For instance, in the context of investment, this flow of information allows a pension fund with outsourced investment management to be aware of the human rights outcomes that it is linked to through their portfolio.

As due diligence is really often lacking alongside seeking information from further down the chain, we are also recommending that investors should actively work to fill potential information gaps through service providers, through NGOs, through governments, media and affected rights holder. It is often quite complicated, because a lot a lot of investors use funds of funds, benchmark administrators, engagement providers, stock exchanges or other financial intermediaries. At the same time, we still consider that institutional investors retain the influence to obtain information, identify adverse human rights outcomes and address these issues.

Therefore, while they can cause negative human rights outcomes through their operational activities, investors are primarily responsible or linked to negative human rights outcomes through their investing companies, directly causing or contributing to negative outcomes, with the investors being linked to them through their holdings. Investors, either on their own or collectively, should therefore exercise their leverage, their influence to ensure that the companies in which they invest, prevent and mitigate those negative outcomes and that they provide access to remedy where the harm has already occurred. We are asking of institutional investors that have a policy commitment, a due diligence process, and where the investor is directly linked or causing that negative outcome, that they must enable access to remedy for those affected.

The policy and due diligence process should cover the human rights included in the international legal instruments and also extend to climate change related impacts. The due diligence system could be really considered the backbone of day-to-day management of activities. Unlike investors' traditional risk management systems – that are focusing on business risk, operational risk or financial risk – the core component is a focus on the risk of negative outcomes for people, trying to shift that narrative, applying to the human rights space the vocabulary that investors are using in different contexts.

In terms of the leverage, there are different ways in which investors can use it: through investment allocation and through stewardship activities (engagement with investing companies, and with policymakers and key stakeholders). If an investor lacks leverage, it should also seek to increase leverage by, for instance, collaborating with other investors. If the investee company is not responsive to the engagement – an investor is asking the company to improve its human rights practices and see no progress – there are ways to escalate the dialogue, which ultimately can lead to an investor divesting. This is basically the decision-making framework of how investors can use their influence.

In the work done by PRI with investors for the last two years, one of the most striking examples in terms of human rights and climate change concerns the just transition, such as the investor statement of commitment to the just transition agenda that was presented at COP24.[98] That has been signed by 160 investors representing over US$10 trillion of assets under management.[99] PRI has been working with them into figuring out how investors can play a role on the just transition and its different areas, such as renewable energy. Therefore, it is not just

If the investee company is not responsive to the engagement – an investor is asking the company to improve its human rights practices and see no progress – there are ways to escalate the dialogue, which ultimately can lead to an investor divesting. This is basically the decision-making framework of how investors can use their influence.

[98] *Statement of Investor Commitment to Support a Just Transition on Climate Change*, available at: https://www.tfaforms.com/4694571.
[99] PRI, 'COP24: the PRI's four key takeaways for global investors', 17 December 2018, available at: https://www.unpri.org/news-and-press/cop24-the-pris-four-key-takeaways-for-global-investors/3900.article.

about protecting workers and other industries that will be affected by the transition away from fossil fuels, but also those climate-friendly sectors where new jobs are created. How do we make sure from the get-go that these jobs are decent jobs? Or that the communities around renewable energy companies operations are not negatively impacted? PRI is really trying to open the realm of the different aspects of the just transition, and working with investors so that they can play a role in pushing this agenda forward.

Similarly, another example relates with the engagement that PRI is doing on cobalt, the demand for which is being driven by the boom in electric vehicles which are key for the transition to a low carbon economy. How is that articulated in terms of the human rights violations that we find in the upstream of the value chain? How can we make sure that the companies producing electric vehicles are not doing so on the back of these human rights violation in the upstream?

To conclude, just a few final considerations in terms of what we are hoping to see and what I think would be some interesting developments. In terms of legislation, I think we should definitely aim at getting more robust and binding mandatory human rights due diligence requirements to level the playing field. That should address the anthropogenic climate change, given the serious and irreversible harm that it is causing to the rights and livelihoods. Requiring businesses to actually align their operations with the goals of the Paris Agreement on climate change seems especially pressing, in light of the research that shows that some entities, including financial institutions, actually bear responsibility for an enormous proportion of current and historical emissions of greenhouse gas. A binding legislation would set common standard that would bring about uniformity and legal certainty and go a long way in levelling the playing field. That is also related to another point, around driving meaningful data, which is key for investors being able to really assess the performance of companies with regards to human rights, and mitigating the negative human rights impact of climate change would allow for better asset allocation, for better engagement, more informed dialogue with stakeholders, etc.

Clarifying investor responsibility and action with respect to human rights due diligence and climate is another important point, because investors are the most remote actor in the chain, being one step further than companies. Therefore, getting that kind of information can be a bit tricky for them, as well as realizing that connection to negative impacts and outcomes (also considering that the climate change impacts are usually indirect rather than direct). Thus, rethinking the level of responsibility component of human rights due diligence could also be constructive.

Finally, in terms of enhancing communication between affected rightsholders and investors, we try as much as we can to get affected stakeholders and affected rightsholders to be in direct communication with investors, and provide a voice from the ground. More often than not, we see that corporates do not necessarily engage enough with affected rightsholders. This is obviously something that affects the quality of corporate human rights due diligence, and being able to create these channels of communication between investors and affected rightsholders has been something that has allowed PRI to really raise awareness and get more investor action on these issues.

Nabylah Abo Dehman joined the PRI in June 2017, where she has been focusing on social issues as part of the ESG team. At the PRI, Nabylah supports investors' efforts to address social issues such as human rights, working conditions and responsible sourcing with companies in their portfolio both through collaborative engagements and publication of practical guidance. In recent engagements, Nabylah has been collaborating with investors on pushing the adoption of the UN Guiding Principles by mining and oil and gas companies, on responsible sourcing of cobalt practices by electronics and automotive companies and on the just transition agenda. Prior to joining to the PRI, Nabylah completed a PhD in Political Science at Sapienza University in Rome. She also holds an MA in International Affairs from LUISS Guido Carli University and a BA in International and Comparative Politics from the American University of Paris.

5. The Insurance Industry and Climate Change

Jason Reeves & Deepa Sutherland
Zelle LLP

As liability insurance lawyers, we are going to provide a particular perspective: where the insurance industry fits into the whole climate change discussion. In our overview, we will look briefly at: the role of insurance in the financial sector as a whole; the risk and exposure to the insurance industry from climate change with particular focus on underwriting and claims; coverage concerns and strategic concerns insurers may have and what all that means for insurers' reporting duties on climate change. We will also discuss how the insurance industry has a unique opportunity to shape this debate and argue why insurers should have a seat at the table.

First of all, *where does insurance fit into the discussion?* Climate change is a business issue and has an economic impact. To illustrate it, in 2018 the economic impact from natural disasters exceeded USD 160 billion - this included US hurricanes, Asian typhoons, California wildfires. In 2017, natural disasters cost the US economy almost USD 319 billion. Climate change causes loss and puts businesses under the spotlight. It can result in regulatory actions, fines, lawsuits and reputational damage. All these things fall on the businesses and, ultimately, on their insurers, and, therefore, climate change is an insurance issue. And yet, insurance is often omitted from climate change discussions. While we hear a lot about the role of funds and investors, we rarely hear in much detail where the insurance industry fits in. However, since it is the insurance industry that picks up the bill for a lot of these losses, we would argue that insurance industry should be one of the main stakeholders in the climate change discussion.

Why are we here? We are coverage lawyers for insurers and reinsurers. In summary: we determine whether or not a claim under a policy is covered; we then help determine how much should be paid by an insurer; and then we see if we can find a third party to hold responsible for that loss. We will discuss climate change within that framework.

Fundamentally, liability insurers have a duty to defend and indemnify their policyholders against claims made by third parties. The easiest analogy here is that most people have car insurance, which will provide insurance in the event that they cause an accident, and you will be protected by your insurance policy against claims that are brought by third parties. In many cases, the policyholders, particularly the commercial ones, are being sued for causing climate change. Lawsuits are being brought in a number of jurisdictions.

We are actively involved in a number of cases in the United States involving the carbon majors. What we do in connection with these particular lawsuits is review the claim notifications made to liability insurers by the policyholder (the Carbon Major in question), and then we provide our opinion on coverage and exposure to insurance and reinsurance companies. From a litigation perspective, some green shoots are beginning to form with some of the lawsuits which have been remanded back to state court in California and in Delaware. There are some developments there that are going to overcome some of the previous bars.

Concerning *the role of the insurance and the financial sector*, fundamentally, insurers are investors. They make money two ways: they take premium and then they invest it. Investors have responsibilities, and even though insurers are large institutional investors, it is not clear oftentimes what their responsibilities are and exactly what they are investing in, and their role in the climate change discussion. Of course, insurers help spread commercial risk, and thus ease the wheels of the global economy by taking some of that risk on. Moreover, insurance is a core part of corporate risk management strategy. It is all about providing financial stability.

Talking about *risk and exposure*, the insurance sector is uniquely exposed to climate change. It obviously has an investor risk, but also shareholder obligations, and some activist shareholders are beginning to hold insurers accountable in connection with how they are conducting business.

The side of the business that we are most concerned with as coverage lawyers is the underwriting side and the paying claims side. That is how most people engage with an insurance company, sending a premium in and submitting their claims. And because of that, insurers are vulnerable to catastrophes caused by climate change: physical risks, liability and most business lines. Trillions of dollars of damages

and indemnity will be exchanged in connection with climate change. We most likely are at the beginning of what will be two decades of long tail claims against policyholders, which perhaps will be presented to insurers. And, of course, the increased vulnerability risks trickle down affordability issues – whether or not climate change is really something that can be insured, whether it is a sovereign risk rather than an insurance risk.

Companies' ESG seems often a box ticking exercise; it does not touch and concern the day-to-day business of investment, underwriting and paying claims. Only when the ESG is embedded in the core part of the insurance business will it be effective. Otherwise it is a fig leaf and not particularly useful.

As already mentioned, climate change impacts all business insurance lines. Last year, Australia suffered catastrophic fires; this year, California has. Every commercial entity has some sort of policy. When we talk about climate change in relation to liability insurance, we are mostly concerned with liability exposure, not about modelling concerns and what might happen theoretically in the future. Climate change is not a theoretical risk, nor a future risk; it is a new and emerging exposure to insurers but it is happening now, policyholders are being sued now and claim notifications are being presented under policies now. Therefore, there are key coverage issues that come up in connection with all of these issues. Moreover, we think that insurers can take some proactive steps to manage their exposure and to engage properly with their duties in connection with climate change. Part of that is about aligning an insurer's corporate and underwriting strategy, and its claims strategy.

Climate change litigation in the United States is sourced in the 1970 Clean Air Act. From 2007 to 2010 there was the "first wave" of climate change litigation, with often cited cases such as *Comer v. Murphy Oil USA* (607 F.3d 1049, 5th Cir. 2010) and *Kivalina v. ExxonMobil Corp.* (No. 4:08-cv-01138, N.D. Cal, 2013). These claims were dismissed at an early stage for lack of standing, remoteness of damage, and essentially because the science was not adequate to prove that the carbon majors had caused the damage that was being alleged in these cases. *AES Corporation v. Steadfast Insurance Co.* (2012) is the only case that exists right now on liability insurer duty to indemnify a policyholder who has been sued for causing climate change. However, it is not a widely held precedent.

The "second wave" of US climate change litigation is what is keeping us busy in our day jobs. In 2018, there were 13 nuisance lawsuits – including those in California, Baltimore and New York - and we were involved in all of these. In addition, we have some financial and securities lawsuits that have been brought by States in the US (e.g. 2018 *New York v. Exxon*; 2019 *Massachusetts v. Exxon*). Some of them have been dismissed, but they are increasingly being allowed to proceed. We think that this second wave of US climate change litigation is going to impact the exposure to the insurance industry and change in the insurance industry.

Who are we talking about? All these cases are being brought against the lowest and easiest hanging fruit: namely the carbon majors. So when we are talking about these cases, we are talking about policyholders. If we look at a list of the biggest carbon majors, it can be seen as a carbon accounting table, a list of polluters from 1751 to 2010, or as a list of blue-chip premium policyholders who pay millions of dollars every year in premium for their liability coverage. And behind every one of these policyholders is an insurance tower for billions of dollars, comprised of most well-known insurers and household names in the world. In a tower, no one insures a single risk, everyone takes a piece at different layers.

The insurance industry has learned (and maybe forgotten) a number of lessons that are relevant to climate change exposure. Climate change exposure is really like any other long tail pollution or environmental claim. It is going to be litigated like tobacco, because of the knowing conduct of many of the carbon majors. It is also going to look like asbestos and MTBE when it concerns the actual reinsurance coverage in place.

So far there has been difficulty in actually suing the policyholders. A lot of those claims have been dismissed at an early stage. There are some fundamental questions about causation and whether or not these emitters can be held responsible for historic long tail pollution. However, there are some interesting arguments out there, and certainly the science is developing in connection with this. As an important reminder (particularly for insurers), it took about 50 years of litigation – beginning in the late 1950s, until the first meaningful judgment in February 2000 – before a tobacco company was held liable in connection with causing cancer. We had the first wave of climate change litigation around 2007 in the United States. Do we really have another 50 years before jurisprudence catches up and changes the way that these issues are seen in the environmental context? Probably not.

A corporate policyholder might be held to account for its contribution to climate change, but the insurance industry is cushioning the impact of any sanctions that the company itself might receive.

So, what would insurers' reporting on climate change look like? In the broadest terms, insurers and reinsurers are companies and are subject to their own reporting requirements. However, there is something peculiar to insurance companies when they are reporting in terms of their own investments: as major institutional investors, they can open themselves up to criticism for investing in things that cause them losses. This disconnect between their investment side and their underwriting side should also be subject to reporting. Unfortunately, the underwriting/claim side is not always fully addressed by an insurance company's ESG, but that is where they pay out the money and, when we talk about something like climate change, we are talking about huge sums of money. Therefore, the underwriting and claims side is absolutely fundamental in terms of shaping behaviour. It is also important to remember that it is the underwriting/claims side where insurers are picking up the bill for corporate liability. A corporate policyholder might be held to account for its contribution to climate change, but the insurance industry is cushioning the impact of any sanctions that the company itself might receive. For these reasons, we would argue that insurers are actually *more* exposed than other businesses to the risks of climate change.

However, this also presents a unique opportunity: given their position, insurers can effect change, shaping behaviour through their own investment policies, through their underwriting policies, through bringing about new and creative insurance products to specifically deal with the effects of climate change.

From the insurer's point of view, there may be a reluctance to be the first to change their approach to climate change liability and the liability policies that they issue. As well as commercial considerations, insurers often raise a fundamental legal question as to whether or not changing their policy now would be taken to affirm coverage that previously existed. We think the answer to that is 'no' under English law, in most US States and in most other common law countries. However, it can be difficult to go first. Another fear goes to the due diligence aspect - whether by setting a benchmark, insurers can then be held accountable to it. There is a little concern about public statements in that connection: not the ESG statements, but regarding an insurance company's core business. For example, a lot of insurers declare that they are no longer going to insure coal. It is understandable why they would want to put that in their ESG publication; however, all of those industries continue to exist because they are still part of the modern world and they are almost all reinsured; therefore, a company might not insure them, but might reinsure them.

What will probably have the most impact on the way the insurance industry deals with climate change is when the six or seven top reinsurers in the world change their inwards treaty obligations with the insurers who buy reinsurance from them. Only then are we likely to see significant and systemic changes in the insurance and reinsurance industry.

To conclude, we would summarise that climate change exposure falls back onto the insurance industry. Insurance is uniquely exposed to climate change, since exposure to companies means exposure to insurers, not only on the investment side, but on the underwriting and claims side. Because of that, insurance should be at the core of climate change discussions; if it is not, there is a big part of the jigsaw missing.

Jason Reeves is an English solicitor and a licensed attorney in Texas. He has unique experience of practicing law in the U.S. and England. Jason focuses on complex insurance disputes in England, the U.S., and other jurisdictions. He resolves disputes through litigation, arbitration, appraisal, mediation, and negotiation. He primarily handles first-party insurance coverage and subrogation disputes involving energy, property, power, engineering, construction and industrial risks that often include complicated business interruption issues. He also handles third party losses – both defense and coverage. Prior to joining Zelle, he worked as an English solicitor with leading firms in the London market. Jason acts as a commercial mediator for CEDR. He regularly lectures and writes on emerging topics and key insurance-law issues.

Deepa Sutherland is an experienced insurance litigator with experience in high stakes international and domestic commercial litigation and arbitration and e-discovery expertise across commercial litigation, internal and regulatory investigations. Since joining Zelle International LLP in May 2015, Deepa's practice has focused on Rest of World matters with an English law and jurisdiction element. She is working on some of the firm's largest matters each with its own cross border element.

6. A Practical Perspective on Connecting Human Rights Due Diligence and the Climate Crisis

Catie Shavin
Director of the Global Business Initiative on Human Rights

We are seeing increasingly mainstream acceptance that there is real urgency around addressing the climate crisis. More and more businesses are pivoting their operations, activities and forward-looking strategies, and making bolder commitments in response climate change. We are also starting to see more convergence between climate change and human rights from governments in the context of pandemic response and recovery strategies. There is a real need to start connecting the dots and figuring out how the due diligence that businesses are doing already on human rights joins up with their responses to climate change. My remarks are going to focus on this link between human rights due diligence and business responses to the climate crisis.

When we talk about human rights due diligence for climate change, it means different things to different people. I have taken a broad view, encompassing the different responses, transitions and changes that companies will be making both to reduce their emissions, and also to adapt to a warmer world and build resilience across their business. My aim is to leave you with some thoughts on three things. Firstly, a sense of the breadth of climate change-related decision-making and action businesses are taking that can impact on human rights and on people. Secondly, some practical approaches that companies can take to start to expand the coverage of their human rights due diligence to encompass the work they are doing on climate – and some common challenges we are hearing from the companies that are starting to think about that. And, finally, three very brief suggestions regarding what is needed to advance work in this area further – ideally quite quickly, given the urgency of the situation. Working very closely with business practitioners and other stakeholders in this space, I bring a practical perspective.

Starting with the connection between human rights due diligence and climate change, my first observation is that this connection is not intuitive to many people. In the conversations that we have with businesses around the world and a broad range of other stakeholders, this topic is increasingly coming up, but there are a couple of common misconceptions. The first relates to the fact that the work companies are doing on climate change is part of their overarching efforts to improve sustainability. Some assume that it is therefore not high risk from a human rights perspective. The second misconception we hear is that the climate crisis is primarily an issue that concerns extractive companies, and that this is a lower priority for companies in other sectors.

I want to briefly debunk both of those myths. First, the myth that because action on climate change is directed at improving the company's sustainability, it does not present significant human rights risks. Often, those working to reduce the company's emissions are focused on environmental impacts and on improving that situation. They may assume the human rights team is dealing with human rights risks and will let them know what needs to be done. However, there can sometimes be a disconnect between these two teams. Further, companies' responses to climate change are not only focused on reducing emissions. They cover a broad range of business decisions, all of which has the potential to impact human rights. For example, many automotive companies are pivoting towards battery operated vehicles. That decision can generate benefits for the environment by reducing the use of fossil fuels – but it also means potential involvement in human rights impacts associated with the lithium and cobalt value chains, where artisanal mining, hazardous working conditions and other issues are common. Similarly, the shift towards reusable packaging can be great from an environmental perspective, but it can lead to a company becoming involved in human rights issues concerning forestry and land use – and associated impacts on local communities. Therefore, these challenges are very

However, there can sometimes be a disconnect between these two teams. Further, companies' responses to climate change are not only focused on reducing emissions. They cover a broad range of business decisions, all of which has the potential to impact human rights.

widespread and are likely to be relevant to all companies, not just extractive ones. Companies in the extractives sector may be under particular pressure to pivot their core business away from fossil fuels. However, all companies are going through an adaptation and transition process as a result of climate change, and need to be alert to the human rights risks that their climate-related decisions – big and small – can have on people.

What does this mean in terms of the human rights due diligence that companies should be doing? I think it is fair to say that different companies are in very different places on this issue. For many, it is very new and practice is nascent. In theory, what is required is simply human rights due diligence. The expectations of the UNGPs are not different because the human rights risks to be managed happen to be associated with climate-related decision-making. Human rights due diligence should be undertaken in respect of all of a company's activities – climate-related decision-making is part of that. In reality, however, there are still gaps in company practice. Partly, that is because the decisions companies are making in response to climate change are not always joined-up to efforts to manage human rights risks. Partly, it is because the ask the UNGPs make of companies is not something that can be implemented overnight, and many companies are still at an early phase of this work – building comfort, talking about human rights with their colleagues, developing practical human rights know-how – and they simply have not gotten to this yet.

There is a real need to advance practice in this area. Three priorities are coming up a lot in our discussions. Firstly, the need to build a shared vision and language between the human rights team and the climate team. As one practitioner put it to me recently: 'We speak people, we speak in qualitative terms - they speak maths and science'. There is a process to go through to find a way to build a joint understanding of what can be done to reduce a company's environmental footprint in a way that respects human rights and does not create additional risks to people. That is no different from the work that companies have to do to build connections with colleagues in legal and procurement. It is a relationship-building exercise that needs time, thought and effort.

In the meantime, it is important to prioritise building the human rights knowhow of those who are at the table, so that they can – at the very least – spot the issues, understand why it is important that they are addressed early, and then engage with the company's human rights specialist to get support.

Secondly, getting human rights due diligence integrated into early decision-making – including decisions that companies are making to exit problematic markets or enter new markets. We know integrating human rights due diligence into M&A decision-making can be tough, in part because these decisions are made at very senior levels, but also because they are often made with tight deadlines, a high level of confidentiality and a very small number of people involved. Ideally, companies will have a human rights expert at the table when making these decisions – however this can be difficult to achieve. In the meantime, it is important to prioritise building the human rights knowhow of those who are at the table, so that they can – at the very least – spot the issues, understand why it is important that they are addressed early, and then engage with the company's human rights specialist to get support.

Finally, concerning crisis management – a very pertinent topic to raise right now – it seems almost inevitable that companies will increasingly be navigating climate-related crises. And it is becoming ever more important that human rights expertise is integrated into their approach to crisis management. This should be nothing new, but we know that many companies are not there yet. It can be difficult to make the case, and in a crisis things move quickly. However, it is critical to ensure that there is human rights expertise in the crisis management team, or at least the ability to spot issues and engage the human rights specialist early when things come up.

To conclude – how do we push this forward? As with all complex problems, we need to find coordinated ways to address these challenges from a number of angles. There are three avenues that seem fundamental right now. One is improving coordination and convergence at a number of different levels. For example, at the level of government policy, we are seeing efforts to strengthen and introduce mandatory human rights due diligence requirements. Those are then being joined up with environmental

due diligence requirements. There are increasing commitments around climate under the Paris Agreement and efforts to develop plans for pandemic recovery. We need to de-silo these strategies, promote coherence and get everyone pulling in one direction. We also need more coordination and coherence within businesses and financial institutions to ensure that the right teams are talking to each other. And, finally, there is a real need to build bridges between the world of business and human rights and the world of climate change, and to support more joined-up discussions and collaboration. When we do not talk to each other, we risk missing opportunities to align and to streamline our approach, resources and effort.

The second priority is improving access to practical examples of company actions and approaches. It is not always easy to get a tangible idea of what it looks like to do human rights due diligence on climate-related decision-making. The more examples of practice we can get out there, the more ideas and inspiration we can get out on the table, the faster practice will start to move.

And, finally and less tangibly, I think we need to get more comfortable with complexity and with not-knowing. Climate change and business and human rights are both complex, wicked problems and it is important that we find ways to develop new thinking, new ways of living and new ways of working. There is an enormous amount we do not know and need to learn. I sympathise with the instinct to simplify and make things practical. It is important not to overwhelm people and to find ways to make taking that first step a bit easier. But alongside that, I would really urge all of us to embrace the need to learn together how to shift these global systems. A year ago at the IHRB's Next Generation Trade event,[100] Kumi Naidoo, the then Secretary General of Amnesty International, talked about 'creative maladjustment', referring to the reality that we are all part of systems that are not working, and we need to get unused to them in order to see them more clearly and develop something new. I see a real need to lean into this uncomfortable space, question the status quo and build a new vision. Therefore, I would urge us to resist the inclination to simplify everything. These are complex problems and we need to work hard and together to overcome them.

Catie Shavin is Director of the Global Business Initiative on Human Rights. Catie leads GBI's external engagement with business practitioners and other stakeholders around the world to strengthen business practice by convening regional workshops and disseminating practical insights and lessons learned on managing human rights issues effectively. She oversees the growth of GBI's unique 'by business, for business' resource, the GBI Business Practice Portal. She has also led GBI's business peer learning programme and a deep dive on direct linkage and leverage. Independently of her work with GBI, Catie co-founded and convenes a group of leading global law firms working together to advance implementation of the UNGPs within the legal profession. She has been immersed in the business and human rights space for more than a decade. Before joining GBI, Catie worked as an independent advisor to diverse organisations and as a lawyer with a leading Australian law firm. She holds a PGCert in Poverty Reduction: Policy and Practice from SOAS University of London, an LLM from the University of Melbourne and a BA/LLB (Hons) from Monash University. She is interested in how to drive change within organisations and at a global level.

[100] Institute for Human Rights and Business, *Next Generation Trade - Building a Principled, People-Centred Global Economy*, 3 December 2019, available at: https://www.ihrb.org/news-events/news-events/next-generation-trade.

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