

**Submission to the Special Rapporteur on the promotion and protection of human rights in the context of climate change**

**to the call on**

**“Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergeneration justice”**

**Input on climate litigation**

All answers to the following questions are based on the case ‘*Asmania et al. vs Holcim’*, a climate litigation launched in January 2023 by four inhabitants of the small Indonesian island Pari against the world’s largest cement producer Holcim, headquartered in Switzerland. It is only the second transnational climate litigation launched from plaintiffs in the Global South against an actor from the Global North, and the first one with a holistic approach, seeking not only a reduction of absolute CO2 emissions (mitigation), but also proportional compensation for climate change-related damages on the island, as well as a financial contribution to adaptation measures in Pari. The claim is based on Swiss civil law and addresses corporate accountability for contributing to climate change and its impacts.

More information on the case can be found online on the campaign website: <https://callforclimatejustice.org/de/>. In case of any questions or further information, please reach out to nina.burri(at)heks.ch.

1. **How are human rights considerations being incorporated into climate change litigation?**

Even though the tort claim is based on civil law, human rights are at the core of the legal arguments in the case *Asmania et al. vs Holcim.* Namely, the plaintiffs argue that their personality rights are continuously being violated by the greenhouse gas emissions of Holcim.

Article 28 of the Swiss Civil Code states that “(a)ny person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.” The rights of one’s personality then consist of numerous facets which should be interpreted by legal notions ascribed to a person. The literature lists, for instance, the following recognized sub-areas of personality rights: a) the right to life, physical integrity, sexual freedom; b) personal freedom, especially freedom of movement; c) the right to body and death; d) the right to relationships with loved ones (family, friends); e) emotional life (mental integrity); a) the right to respect for intimacy and privacy; b) the protection of economic advancement. An infringement is unlawful if it is not justified by the consent of the person whose rights are violated or by an overriding private or public interest, or by the law.

Here, human rights law and jurisprudence come into play, because the Swiss authorities applying the law are obliged to interpret general clauses and indeterminate legal concepts of statutory law in conformity with fundamental rights and to allow the normative content of fundamental rights to flow into the exercise of discretion. This results in the principles of interpreting federal laws in conformity with the Federal Constitution, the ECHR and the United Nations Human Rights Covenants Switzerland has ratified. As a result, personality rights, as described in the Civil Code, must be interpreted along with human rights law. Hence, in essence, the protection of personality rights in the Swiss Civil Code is the realisation of the horizontal effect of human rights.

In case of a violation of these facets of anyone’s personality, the affected person may petition the court for protection against all those causing the infringement. The claimant may ask the court to i) prohibit a threatened infringement, ii) to order that an existing infringement ceases, or iii) to make a declaration that an infringement is unlawful if it continues to have an offensive effect. In the case ‘*Asmania et al. vs Holcim’*, the plaintiffs ask the court a) to adjudge them compensation for financial and non-financial damages they have already suffered as well as for future impending damages; b) to oblige the defendant to undertake mitigation measures; and c) to order the defendant to contribute to the costs of local adaptation measures.

Based on the notion of personality rights, all plaintiffs argue that their right to economic advancement has been affected as they have lost income due to the two major floods in 2021. Furthermore, the water well of one of the plaintiffs was flooded with salt water and could not be used for a certain period, which caused him extra spending for water supply for the whole family. All plaintiffs are seriously concerned and suffer from the fact that further floods, which are to be expected in more frequency and intensity, will produce similar impairments in the years to come. Based on the experience from the last three years and especially from 2021, they further fear that fishing, fish farming and especially the tourist activities cannot continue to be operated in the form they have been in the long term. All plaintiffs further bring forward that they are all fearing for the future and especially their safety and physical integrity and that of their children. The more frequent and severe the flooding becomes, the more likely it is to be expected that their own children will suffer such significant consequences and damages. Even before the island is largely flooded, dignified living and working on Pari may no longer be possible. It is to be expected that, according to general life expectancy, the children of three of the plaintiffs will live to see the year 2100, in which the island of Pari could be largely submerged and uninhabitable.

The island community is making massive efforts to promote the planting of mangroves. However, for dense mangrove vegetation off the coast, far more plants would be needed. Moreover, it takes several years to grow them. The community on Pari island claims to feel powerless as they alone have no means to avert these consequences, which are very likely to occur, and which will be all the more serious if globally effective climate mitigation measures and protective measures for the island and its population are not taken immediately.

These considerable and repeated losses from both economic sectors, fishing and tourism, significantly affected their economic existence and advancement, as protected under article 28 of the Swiss Civil Code. Furthermore, their mental integrity is affected by the continuous greenhouse gas emissions and Holcim’s climate strategy for the future, which is, in their view, not in line with the 1.5°C limit of the Paris agreement. Consequently, the plaintiffs argue that their personality rights have been violated by the excessive greenhouse gas emissions of Holcim and its subsidiaries in the past and continue to be violated now and in the future without their consent and without overruling private or public interests.

1. **Are there issues with making the link between human rights and climate change litigation?**

As stated in the answer to question 3 there are major legal hurdles for making the link between human rights and climate change in a specific case. However, climate change consequences represent a fundamental threat to human rights, which is why it is evident that human rights are increasingly subject to climate change litigation.

1. **What do you think are the major barriers to initiating climate change litigation?**
* Individual standing/individual interest requiring legal protection: In Swiss law, public and civil, plaintiffs need to be specifically affected in order to have standing for a claim. In the context of climate change, this is crucial, since especially mitigation measures will benefit not only the plaintiffs, but always all human beings on the planet.
* In case of a specific damage, standing is not the challenge. However, Swiss law (and other jurisdictions) only know individualised positions of property, but no collective property in the community sense it is lived in Pari. Hence, damages on collective goods, as for example community gardens are very difficult to substantiate.
* For claims from plaintiffs in the Global South who live in an informal economy it is a challenge to meet the high threshold of substantiation in civil legal proceedings in the Global North (how to substantiate income and spendings, if there is no paper track and no formalised tax declaration?).
* Legal practitioners do often (and sometimes rightly so) worry to not be able to proof the requirements of causation and unlawfulness:
	+ Most of them are not fully aware of how clear climate science can already describe and attribute both causation as well as impacts and damages of climate change and specific weather events to certain actors and regions. Here, more knowledge exchange among the disciplines is necessary.
	+ Furthermore, climate change is not the first constellation in which courts have found themselves facing a case that defied the existing system for compensating and deterring harm. In certain medical and toxic tort cases, like asbestos or tobacco, courts have developed innovative approaches that have provided solutions for complex causality scenarios. Some of these theories acknowledge not only liability in case of concurrent, cumulative and alternative causality constellations, but they also provide for solutions to apportion compensation according to the statistical evidence of causation.
* Access to justice: high court fees, no legal aid for plaintiffs from the Global South
* Applicable law in civil cases: In many jurisdictions, also in Switzerland, the law foresees the possibility of applying foreign law if a damage in a transnational case has occurred abroad. This may lead to high translation costs and advisory opinions on foreign law, which are very cost intensive.
1. **Is the judiciary in your country well equipped to understand the connection between human rights and climate change?**

In Switzerland, the judiciary is not yet well equipped to understand the connection between human rights and climate change. First and foremost, because there is almost no case law on the topic. Second, the sole judgment from the highest Swiss court, the Federal Court, failed to acknowledge the direct connection of climate change and human rights in the case of the ‘Klimaseniorinnen’, now pending before the Grand Chamber of the European Court of Human Rights. Third, it is not yet a mandatory part of the curriculum and legal training. And forth, because there is not yet a lot of legal literature on the relation to climate change and human rights in German or French. Furthermore, the legal profession does not regularly read scientific publications from other disciplines, as e.g. climate science. Assumingly, most of the judiciary still is of the opinion, that in Switzerland, human rights are not yet affected due to climate change.

1. **How could this be improved?**

By knowledge exchanges among the disciplines. Exchange of legal professionals with climate scientists, as the University of Zurich started to organise. Such exchanges should also encourage to reduce the information which is lost in translation among the disciplines. For example, we noted, that the language climate scientists use to describe the probability of causation or attribution, although quite strong in their norms, might often still be understood as week in legal terms.

There is a need for translation of scientific results (evidence on causality and attribution) into legal language.

See thereto the important publication of E. A. Lloyd, N. Oreskes, S. I. Seneviratne and E. J. Larson, [*Climate scientists set the bar of proof too high*](https://link.springer.com/article/10.1007/s10584-021-03061-9), in: *Climatic Change*, 2021/165, p. 1-10.

1. **Are there particular issues with getting access to the courts?**
* In Switzerland, the law of the bar prohibits contingency fees. Consequently, there is no established pro bono culture among Swiss attorneys, which makes representation of plaintiffs from the Global South less attractive for lawyers.
* Access to justice: high court fees, hard to access legal aid for plaintiffs from the Global South, since they may not meet the requirements of having a bank account or tax declaration.



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