



Submission to the Special Rapporteur on the Right to development to the call for input for the 2024 reports

Dear Mr. Surya Deva,

We welcome your initiative to examine the issue of Loss and Damages and their impact on the right to development. This submission is made on behalf of the European Center for Constitutional and Human Rights (ECCHR), the Swiss Church Aid HEKS, and Wahana Lingkungan Hidup Indonesia (WALHI) – Friends of the Earth Indonesia. Our three organisations are supporting a climate lawsuit brought by four islanders of the Indonesian island of Pari against the Swiss cement company Holcim, one of the biggest corporate CO₂ emitters in the world.¹ It is only the second transnational climate litigation launched from plaintiffs in the Global South against a corporate 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. This submission draws on the experiences of the community of Pari Island, and in particular the women of the community, while also highlighting the obligations of companies in the context of the climate crisis.

More information about the case can be found online at <https://callforclimatejustice.org/de/>. For questions or further information please reach out to mockel@ecchr.eu.

Specific questions / issues

How is the realisation of the right to development impacted by both economic and non-economic loss and damage from climate change? How is the impact experienced differently and/or disproportionately by different individuals (e.g., children and women), groups (e.g., Indigenous Peoples) and States (e.g., Small Island Developing States)?

While the impacts of climate change are widespread across all regions of the earth, they do not affect everyone equally. Communities and individuals who have historically contributed least to climate change and who have benefited least from the economic drivers that have led up to it are disproportionately affected. Apart from climatic factors linked to specific geographical locations, people living in regions with significant development constraints are highly vulnerable to climate hazards because they lack the resources to respond and adapt adequately to climate change. The Intergovernmental Panel on Climate Change's (IPCC) Assessment Reports have repeatedly noted that this climate vulnerability is aggravated by inequality and marginalisation linked to, inter alia, gender,

¹ *Call for climate justice*. Call for Climate Justice. <https://callforclimatejustice.org/en/webreport/>.

ethnicity, disability, age, economic poverty and historical and ongoing patterns of inequity.² It is thus those who are already most compromised in their right to development that are also bearing the brunt of the climate crisis.

This is exemplified by the fisherfolk community and to a particular extent the women on Pari Island who are experiencing the impact of climate change in the form of economic and non-economic loss and damages on a daily basis. The traditional source of income on the island is fishing and, for many women, seaweed cultivation; however, increasing water pollution, changes in currents and sea temperature combined with recurrent floodings have already forced many to look for alternative sources of income. Many islanders have thus been engaging in small-scale tourism activities, such as renting out homestays and snorkeling gear, and cooking for tourists. But sea level rise and increasing floodings threaten also these activities, as tourists stay away from the island for months when houses and infrastructure are flooded. In the aftermath of a flood, the community is forced to spend days of their time and their small income on repair works for themselves and their families, as well as for community assets such as the vegetable garden run by the island's women group, or for cleaning up the beach. Much of this work is done by the island's women, who at the same time worry particularly about the safety of their children as well as about how to provide them and their families with healthy food (including safe drinking water). Finally, unhindered continuation of global warming will lead to an ever-decreasing habitability of Pari Island and ultimately to the displacement of the islanders, who lack the financial resources to build a dignified life from scratch elsewhere. As a result, the inhabitants of Pari Island are suffering from great emotional distress, fearing for their safety and their future and particularly that of their children. While it would be possible to protect the island from the worst impacts of the floods, by raising houses, investing in water distilleries, installing breakwaters, and planting mangroves to prevent further soil erosion, the community of Pari lack the resources to do so to the necessary extent. Thus, instead of being able to strive for the constant improvement of the well-being of all individuals³ of the community on Pari Island, the inhabitants are increasingly prevented from realizing their right to development due to climate-related losses and damages.

It is against this background that four members of the community brought the lawsuit against Holcim in Switzerland, to hold the carbon major to account for its responsibility for climate change. While Swiss law is not able to capture the lived experience of the four plaintiffs to its full extent, it offers protection for certain dimensions of the right to development under the concept of personality rights. The civil law duty not to interfere with another's personality rights (Article 28 of the Swiss Civil Code) is essentially the realization of human rights between private parties. According to legal scholars, personality rights cover a) *physical areas of protection*, such as the right to life, physical integrity, sexual freedom, bodily self-determination or personal freedom, b) *psychological areas of protection*, such as one's emotional life and mental integrity or the right to relationship and respect for loved ones, or c) *social spheres of protection*, such as the right to one's own image, voice and words and the right to informational self-determination, the right to respect for intimacy and privacy. Part of the social

² IPCC (2022), Summary for Policymakers. In: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at B.2.4; IPCC (2014), Summary for policymakers. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, at p. 6.

³ UN General Assembly, Declaration on the Right to Development (1986) UNdoc A/RES/41/128, Preamble.

sphere of protection is also the protection of economic advancement.⁴ Applying this concept, the plaintiffs argue in the complaint that the climate change impacts on Pari Island violate and further threaten their personality rights in all areas of protection – physical, psychological and social – which ultimately hinders their personal freedom, economic advancement and mental wellbeing. All of these facets are also indispensable conditions to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁵

What are the obligations of States and other actors such as development finance institutions and businesses to prevent, mitigate and remediate the impacts of climate change-related loss and damage on human rights, including the right to development?

Multinational corporations, especially the so-called carbon majors, have played a significant role in exacerbating climate change and its far-reaching consequences, mainly affecting those who have contributed least to the climate crisis and also benefitted least from the economic drivers leading up to it. Under the UN Guiding Principles on Business and Human Rights which set out the responsibilities of business enterprises to respect human rights and not to cause, contribute to or be directly linked to human rights impacts, business enterprises also have the responsibility to act in regard to actual and potential impacts related to climate change, including providing remedy.⁶ Albeit not explicitly addressing climate change, the UN Guiding Principles are based on the so-called International Bill of Human Rights which also applies to the human rights impact of the climate crisis and is integrated within the due diligence process. The recently updated OECD Guidelines call for due diligence over potential and actual adverse environmental impacts, defined as “significant changes in the environment or biota which have harmful effects on the composition, resilience, productivity or carrying capacity of natural and managed ecosystems, or on the operation of socio-economic systems or on people” which includes climate change.⁷

In addition, companies are obliged to due diligence under domestic legislation such the German Supply Chain Law (Lieferkettensorgfaltspflichtengesetz) and the French Due Diligence Law (Loi de Vigilance). Introduced in 2023, the German Supply Chain Law obliges companies to do a risk analysis with regards to their own business presence, first tier suppliers and when there are indications of human rights or environmental risks with regard to their whole supply chain.⁸ Companies need to develop preventative and remedial measures to meet the identified violations or risks. They also need to establish a company based grievance mechanism, which enables rights holders and others to inform the company of risks in their full supply chain. A government agency (BAFA) is overseeing the implementation of the law, controls the annual reports of the companies on their human rights due diligence (HRDD) processes and can intervene in cases of possible non-compliance. The BAFA has far reaching

⁴ Protected also under Art. 27 of the Swiss Constitution.

⁵ Ibid, article 1.

⁶ UN Business and Human Rights Working group, Information Note on Climate Change and the Guiding Principles on Business and Human Rights (June 2023), <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>.

⁷ OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, <https://doi.org/10.1787/81f92357-en> at Chapter IV. Environment.

⁸ Federal Ministry of Labour and Social Affairs. Supply Chain Act. www.bmas.de. <https://www.bmas.de/EN/Europe-and-the-World/International/Supply-Chain-Act/supply-chain-act.html>.

competences in terms of investigating possible violations of the law and it can impose fines on companies with up to 2% of the annual turnover. The decisions of the BAFA are subject to judicial review, rights holders can bring the BAFA to court for not acting upon rights violations. While the German law does not explicitly address risks to the realization of the right to development, nor does it create explicit climate change related obligations for companies, it remains relevant in this context, as explained below.

The German Supply Chain Law obliges to identify and, to a certain degree, prevent and remedy human rights and environmental risks such as land grabbing and deforestation as well as pollution of water, soil and air, in the context of agricultural production or resource extraction. These adverse impacts not only hinder the realization of the right of development, but are also typically drivers of climate change, indirectly contributing to the loss and damage resulting thereof.

In France, the Duty of Vigilance Law (loi de vigilance) was adopted in 2017. It establishes a civil law duty on companies to take all reasonable measures to identify and prevent severe violations of “human rights and fundamental freedoms, the health and safety of people and the environment resulting from their activities or those of the companies it controls (...) as well as from suppliers or suppliers with whom there is an established business relationship (...)”,⁹ and a tort law reparation mechanism to parties affected by the violation of the duty. While the first cases¹⁰ filed under the Law exemplify challenges for access to justice under the Law by those affected¹¹, its scope can include the investors’ activities resulting in climate harm. In 2023, French NGOs filed a lawsuit under the Vigilance Law against BNP Paribas, as well as the provision on prejudice écologique (“ecological harm”) enshrined in the Civil Code¹² referring to “non-negligible impairment of the components or functions of ecosystems or the collective benefits derived by humans from the environment”, requiring the bank to comply with the law by identifying and effectively preventing risks of serious environmental damage resulting from its investments in fossil fuel energy projects. In particular, the claimants point to unclarity concerning the report of information about investments and loans and shortcomings of the measures that the bank allegedly implements to respect the parameters of the Paris Agreement.¹³ It can thus be argued that the law effectively obliges companies to a certain extent to take measures to identify, prevent, and, with its tort law mechanism, remedy climate harm, including loss and damages.

In addition to the due diligence duty, the updated OECD Guidelines also give guidance for responsible business conduct in relation to the environment that is beyond integrating climate into the human rights due diligence duty. The new guidelines *inter alia* emphasise that companies should ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals, while they should also avoid activities which undermine climate adaptation for, and

⁹ French Commercial Code Article L. 225 – 102 – 4 – I.

¹⁰ The Vigilance Law Radar provides a database of ongoing cases: <https://vigilance-plan.org/court-cases-under-the-duty-of-vigilance-law/>.

¹¹ See for the instance first lessons learned from the case filed by Mexican indigenous community Union Hidalgo challenging EDF’s windpark: <https://www.ecchr.eu/en/publication/from-rights-to-reality/>.

¹² Articles 1246-1252 of the French Civil Code.

¹³ Formal notice and lawsuit available at <https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>.

resilience of, communities, workers and ecosystems, and contribute to the conservation of biodiversity.¹⁴ All these aspects are relevant for preventing or mitigating the impact of the climate crisis.

In spite of the foregoing, we observe that there is a wide corporate accountability gap in terms of reparations for climate impacts. Recent attribution science studies¹⁵ have been used in litigation efforts against carbon majors to prove their contribution to climate change-related loss and damage, and to hold them accountable for affecting the human rights of millions of people through their historical contribution to the crisis. The civil lawsuit filed by the people of Pari Island against the Swiss cement company Holcim¹⁶ is a case on point. Holcim has publicly committed to the UNGPs and the OECD Guidelines for Multinational Enterprises which, as stated above, imply a duty to respect human rights also in the context of climate change and to contribute to the financial and non-financial reparation of those affected by the crisis. It is commendable that courts identify the duties of companies related to climate change-related loss and damages under general provisions of tort law or civil law. However, it is crucial to also consider the responsibility of private actors for the impacts of climate change in both areas of domestic legislation as well as in international decision making. While it might not be expedient that private companies should be directly obliged to contribute to the Loss and Damage Fund, states must be reminded of their own obligation to regulate business activities in order to prevent human rights violations, which includes the responsibility of private actors to contribute to achieving a 1.5 °C scenario. Along these lines, it becomes evident that the realization of the right to development requires a climate justice approach that actively addresses the responsibility of corporate actors within the framework of the climate crisis.

How should a human rights-based approach to operationalise and administer the Fund look like (e.g., integration of considerations such as accessibility, non-discrimination, fair representation in decision making, gender responsiveness, and accommodation for marginalised communities and countries especially vulnerable to the adverse effects of climate change)?

Meaningful and effective participation of frontline communities as well as particularly affected groups is key to a human rights-based operationalisation of the Loss and Damage Fund, so that it can meet the actual needs of those it is meant to cater for. In particular, the need for gender-responsiveness is exemplified by testimonies of the Pari Islanders, where it was the women who painted a more holistic picture of how climate change affected life on the island.¹⁷ Their accounts of the climate impacts went well beyond damages to property and impact on fishing, highlighting impacts on food and water security as well as on children and the mental well-being of the community at large. The women also often showed a better understanding of their individual household finances, as well as the larger financial and non-financial support system operated by the community. Leading action that responds to the impacts of the climate crisis, a group of women founded a female collective called “Perempuan Pejuang Pulau

¹⁴ OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, <https://doi.org/10.1787/81f92357-en> at Chapter IV. Environment.

¹⁵ Global Climate Forum. *New GCF study on climate change impacts on Pari Island (Indonesia)*. (2023, February 3). <https://globalclimateforum.org/2023/02/02/new-gcf-study-on-climate-change-impacts-on-pari-island-indonesia/>.

¹⁶ *Call for climate justice*. Call for Climate Justice. <https://callforclimatejustice.org/en/webreport/>.

¹⁷ Yet, it is important to keep in mind that ‘gender’-responsiveness needs to acknowledge the multifaceted gender dimensions of humans in reality that go beyond the simple binary of “men” and “women”.

Pari” (Women's Group of Pari Island) that carries out various community activities. The women’s collective manages a beach at the eastern tip of the island, which includes regular cleaning and caretaking of the facilities and the local ecosystem, for example cutting trees, which are dying from the augmenting salinization of the soil due to rising sea levels. The group also cultivates communal gardens (which also have been impacted by floods several times). The women’s group further undertakes the planting of mangroves on a large scale in the effort to protect the island from the impacts of flooding, while being conscious of the fact that an even larger quantity of seedlings is required for effective protection. When it came to deciding on the Pari Islanders’ demands against Holcim, it was the women who brought up the need for planting more mangroves as well as water distilleries to provide the individual households with safe drinking water.

This example demonstrates that women’s participation is crucial for identifying the actual needs and responses when it comes to climate change-related loss and damages. In fact, experience from local decision-making on climate change adaptation has shown that the participation of women’s organisations is essential for ensuring that the socio-economic needs of all members of their communities are considered. This is because women’s perspectives tend to include more consideration for and awareness of their immediate family and surrounding community.¹⁸ Not listening to women’s perspectives might for example lead to an overly narrow focus on damages to property, while failing to consider that only 20 percent of the world’s land is owned by women, often resulting from legal, cultural, and economic barriers.¹⁹

However, this does not simply mean to reserve a seat for women, or women from frontline communities, on the table. Effective participation must also respond to structural factors that hinder access to consultation and decision-making processes. This concerns for example access to information and knowledge, the ability to travel and leaving one’s family without support for that time, and other aspects of structural gender inequality. Not taking into account sufficiently the inequalities and power relations at play when assessing the impacts of the climate crisis has led to an overly narrow focus on climate change vulnerability in current debates.²⁰ This limited perspective often comes with the association of the ‘vulnerable’ with victimhood and passiveness, while tending to overlook the crucial role of agency and empowerment in mitigation and adaptation strategies,²¹ as proven by the women on Pari Island.

¹⁸ Mary Picard, ‘Beyond Vulnerability to Gender Equality and Women’s Empowerment and Leadership in Disaster Risk Reduction: Critical Actions for the United Nations System’ (2021) <<https://caribbean.eclac.org/publications/beyond-vulnerability-gender-equality-and-womens-empowerment-and-leadership-disaster>> accessed 30 October 2023.

¹⁹ UNHRC ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd’ (2023) UN doc A/HRC/52/33, para 21.

²⁰ Djoudi H and others, ‘Beyond Dichotomies: Gender and Intersecting Inequalities in Climate Change Studies’ (2016) 45 *Ambio* 248.

²¹ *Ibid*, 251; N Urzola Gutiérrez, ‘Gender in Climate Litigation in Latin America: Epistemic Justice Through a Feminist Lens’ (2023) *Journal of Human rights Practice* 1, 4.