



HOUSING AND LAND RIGHTS NETWORK

Habitat International Coalition

How to consider climate change-related cases in the VDB

The purpose of this note is to ensure a consistent and, thereby, rational and justifiable method for entering violations into the VDB that arise from the newly added violation category: Environmental/climate event.

Scope

Among the increasing drivers of displacement (forced eviction), dispossession and destruction of habitat (housing, land, municipal services, related infrastructure and facilities) are extreme weather events and environmental disasters. Weather events could be a function of climate change, environmental disasters could also include those results of environmental degradation due to human activity such as dumping toxic waste,¹ arson, military action, extractivism, or just sheer negligence. That means that the violation of the relevant human rights may be by either commission or omission on the part of the duty bearer(s). Considering such cases as entries into the VDB would have to involve a measure of predictability that should trigger measures to prevent the harm to the habitat.

At the same time, global consideration has turned to human rights approaches, including extraterritorial-obligation approaches, and the need for action by duty bearers for both prevention and remedy for loss and damage.² The instances leading to such consequences arising from housing and land rights violations must be recognized as important for their negative impacts on affected persons, as well as any liability for such harm. However, a dilemma arises in identifying such affected persons as “victims” since the legal definition of a “victim” is someone subject to either a crime (a breach of criminal law), or a violation of human rights or international humanitarian law. The same sources in law are our references for identifying “victimizers” and their accountability/liability.

Determining the Victims/affected persons

Applying human rights methodology, to determine who is a “victim” (affected person). two elements are necessary: (1) at least one of her/his codified and identifiable human rights must be breached (including through abuse of power)³ and (2) the act or event must have a causative relationship to a duty bearer. In the case of a gross violation of human rights or international humanitarian law, the victim is entitled to reparations,⁴ regardless of whether or not the duty bearer(s)/responsible party(ies) be identified, pursued, apprehended, prosecuted or convicted. The human rights approach in such situations prioritizes the recognition of, and remedy for victims, especially if restorative justice is sought (as distinct from retributive justice).⁵

Human-caused environmental degradation may already be considered a violation (of the human right to a safe, clean, healthy and sustainable environment, as the UN Human Rights Council recognized in October 2021),⁶ and which the UN General Assembly affirmed in July 2022.⁷ However, no corresponding state obligations have yet been codified. While this category of event/instance relates to the theoretical treatment of the environment, or Mother Earth, as a bearer of rights, those are not “human” rights.

Such harm to the environment would likely affect human rights bearers (i.e., humans) as *potentially* affected persons. Those would not yet be eligible for entry into the VDB, as the violation remains only a threat. Affected future generations would be even more difficult to determine and quantify. However, in the rare case that a report identify such potential victims/affected persons, their number and description should be recorded in the “• Other” field under the already-existing “Affected persons” section of the VDB entry form for a case already entered as an actual violation (having already happened). For potential cases, see discussion of Urgent Actions below.)

Determining the Duty Bearer

The obligations of a state under international human rights law may effectively be triggered when its responsible authorities know, or should have known that the conduct of the state would bring about substantial human rights consequences. Because this element of foreseeability must be present, a state or any of its constituent organs would not necessarily be held liable for all the consequences that result from its conduct, or where the proximity between that conduct and the consequences is remote.⁸ This state responsibility arises from situations wherein a state and its constituent organs are required to take measures, in order to respect, protect and fulfill (i.e., promote, facilitate and assist) the realization of a human right, in particular, the human rights related to habitat (the human rights to adequate housing and land, water and sanitation, a clean and healthy environment, etc.).

The obligation to protect requires the state and relevant organs to ensure that third parties do not violate habitat-related human rights. The strict responsibility (liability) may lie with non-state actors; however, the nature of the state’s human rights obligations ensures that, whether directly or indirectly, the concerned state is always the primary duty bearer in respecting, protecting and fulfilling a human right. As noted above, the failure to meet such obligation may violate the relevant human rights by either commission or omission on the part of the duty bearer(s).

In international law, a state takes on its responsibility where an impairment of human rights is a “foreseeable” result of that state’s conduct or other failure to respect, protect and fulfill them. The condition of foreseeability introduces a standard of liability that is distinct from strict liability, but constitutes a strong incentive for states to assess in advance the impact of their choices on the enjoyment of economic, social, and cultural rights, both domestically and abroad, because their responsibility will be assessed on the basis of what their authorities knew, or should have known. Foreseeability serves an important limiting function by ensuring that a state shall not be surprised with claims of responsibility (liability) for unforeseeable risks that are only remotely connected to its conduct.

The International Law Commission (ILC) has addressed the concept of foreseeability in the general subject of state responsibility: “To have been ‘unforeseen,’ the event must have been neither foreseen, nor of an easily foreseeable kind.”⁹ The ILC’s commentary, thus, points to two dimensions of foreseeability; that is (1) whether the result was actually foreseen and (2) whether the result should have been foreseen. The second strand of foreseeability involves a normative dimension, as it requires assessing whether, at the time of conduct, state parties took steps to obtain the scientific and other knowledge necessary to undertake a determination of risk. This normative dimension underscores the importance of foreseeability as a limiting element of the fault-based standard in contrast with a strict-liability standard.

The ILC has also addressed the issues of foreseeability and causality in the context of environmental cross-border harm.¹⁰ For example, the ILC comments:

“the extent to which civil liability makes the polluter pay for environmental damage depends on a variety of factors. If liability is based on negligence, not only does this have to be proved, but harm [that] is neither reasonably foreseeable nor reasonably avoidable will not be compensated, and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the ‘polluter-pays’ principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers or nuclear installations. Moreover, a narrow definition of damage may exclude environmental losses [that] cannot be easily quantified in monetary terms, such as wildlife, or which affect the quality of the environment without causing actual physical damage.”¹¹

Thus, in applying the polluter-pays principle, the ILC acknowledges that “a ‘great deal of flexibility will be inevitable, taking full account of differences in the nature of the risk and the economic feasibility of full internalization of environmental costs in industries whose capacity to bear them will vary.”¹² Some commentators doubt whether the ‘polluter-pays’ principle has achieved the status of generally applicable rule of customary international law, except perhaps in relation to states in the European Community (EC), the UNECE, and the Organization for Economic Cooperation and Development (OECD).¹³ However, for VDB purposes, the level of established practice or jurisprudential development in a particular country should not be a factor in determining whether or not the responsibility exists. The very loss, costs and damage should determine. And where gross violations of human rights are involved, the reparation framework should apply.¹⁴

Each Environmental/climate-even entry should contain an argument, either in the Brief Narrative or an attached Detail, **identifying the responsible party(ies)**, whether their causative act(s) be by commission or omission. Those could be state or nonstate actors, but the permanent tick on the state as **Duty holder:** will remain constant in the VDB entry form.

In some cases of environmental disaster, duty bearers other than the state and its organs may be known and identifiable. Wildfires that consume assets of nature such as forests and wildlife, lands, property, homes and livelihoods are increasingly common. However, beyond these events seeming to result from lightning strikes, or other anonymous accidents are cases where individual **Duty holders** are liable. If this is the case, the instance should be entered with the available information about the liable party, the affected persons and the consequences.¹⁵

In the event of human-induced environmental degradation and, like threatened evictions or demolitions, potentially affected persons victims would not be eligible for entry into the VDB. Rather, such instances would be cases for Urgent Action appeals, which also require identification of duty bearers with responsibility to prevent and/or protect potentially affected persons. However, once the threatened or impending violation takes place, the case would be eligible for entry into the VDB.

Types of Instances

Much of the concept of foreseeability relates to event and instances yet to take place. However, entries to the VDB must be actual—not potential—violations. The person making the entry should determine the foreseeability of the hazard resulting in the violation. In determining eligibility, the inputter first will have to distinguish between “disasters” and “hazards,” as follows:

Disaster (actual and kinetic): a sudden accident or a natural catastrophe that causes great damage or loss of life, wealth, habitat and/or wellbeing.

Hazard (potential): put (something) at risk of being lost or damaged, the risk of disaster, or a destructive event waiting/likely to happen.

Only cases entered into the VDB under the category of “Environmental/climate event” will be actual deprivation of human rights to housing and land arising from disasters that already having taken place and where identifiable natural or legal persons bears responsibility, by act of commission or omission, either directly, or arising from foreseeability.

Types of Losses and Damages

The types of losses and/or damages to be recorded for an Environment/climate event in the VDB would be precisely the same quantifiable and material goods and assets recorded for other types of violations. (The valuation is always expressed in € in numerals without period or comma.) Environmental losses that cannot be easily quantified in monetary terms, such as wildlife, or which affect the quality of the environment without causing damage to housing or land¹⁶ are not to be entered into the form fields, but may be included in the **Brief Narrative**, or annexed in the form of a **Detail** or **Development**, if known. However, if the geographical scope of the event and its impacts were known, then that should be similarly noted.

Numbers of Affected Persons

As typical in monitoring instances of housing and land rights violations globally, many available reports omit vital information about numbers and description of affected persons and any quantification of their losses. (For methods of quantifying affected values—potential and real costs, losses and damages—see the HLRN [Violation Impact-assessment Tool](#).) In the case of disasters, most reporting does identify various types of affected persons, however, often because civil defense and/or humanitarian agencies prioritize and have both capacity and responsibility to report these data.

In the case of environmental disasters, the consequences may cover a wide area, with differing degrees of impacts on directly and peripherally/collaterally affected persons. To overcome dilemmas in filling out the VDB entry form, the following guidelines will apply:

- When recording the number of affected persons, do not count deaths or injuries unrelated to the incident of habitat-related human rights violations, except perhaps with a description in the “Affected persons” field “Other.” The reason for this discrimination is to maintain the specialized focus on the housing and land rights violations and the subjects of those specific violations. Other casualties are beyond the scope of the VDB and its embedded system of enumerating affected persons.
- **Forced eviction** includes displacement, so the corresponding numbers of houses and forcibly evicted and/or displaced persons should follow the usual practice of counting each house/household as 5 individuals, unless a more-precise number is available.
- **Demolition/damage/destruction** covers all degrees of damage and destruction, so that it is not practical to distinguish between partial or total destruction, for example, in the VDB’s simplified methodology. However, a dilemma may arise as to the scope of differentiated impacts and corresponding numbers of persons affected. The number entered for affected houses, land area (square meters, in numerals without a decimal point or comma) and infrastructure should reflect the composite of all forms and degrees of damage and destruction, if known. Any distinguishing details could be included in the Brief Narrative or attached as a **Detail** or later **Development**.
- **Dispossession/confiscation**: Most likely, the most-common type of loss in the context of an environmental disaster would be understood as dispossession, rather than confiscation. That is, confiscation is usually a punitive or other aggressive and forceful act carried out by a more-powerful human protagonist or entity. In the context of environmental events, the ostensible force is a natural

element (water, wind, fire, or earth), but the loss is still a form of dispossession. However, if causation is an act of commission or omission, and responsibility/liability/accountability could be inferred, then the loss is treated as any other loss, which relates to the victims' entitlement to remedy and reparation for gross violations, thereby a subject for application of the reparation framework. This follows the logic above about prioritizing the affected persons, whether or not a duty bearer (state organ or non-state actor) has been identified, pursued, apprehended, prosecuted or convicted.

- **Privatization:** It is conceivable that a climatic or environmental event causing displacement, damage and/or dispossession could accompany a privatization process. This may be a case of land grabbing by private interests, or privatization of water infrastructure leading to a flood or exacerbating a drought that compels displacement. The same logic that applies to privatization in other instances prevails here. However, the additional violation category of Environmental/climate event creates a new possibility for classifying and analyzing cases searched under both VDB criteria.

Changes to the VDB Entry Form

The new addition would not create the need for major changes to the VDB entry form. Each Environmental/climate-event entry should contain an argument, either in the Brief Narrative or an attached Detail, identifying the responsible party(ies). Those could be state or nonstate actors, but the permanent tick on the state as **Duty holder** will remain constant.

Below is an illustration of how the Environmental/climate-event category of searchable values might look.

Environmental/climate event		<input checked="" type="checkbox"/>	
Type of loss/damage:			Value (if possible)
• Biodiversity	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Crop/food store	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Forest	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Housing	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Infrastructure/services	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Land	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Water source	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Waterfront	<input type="checkbox"/>	€	<input type="text" value="0"/>
• Other	<input type="checkbox"/>	€	<input type="text" value="0"/>

Endnotes:

- ¹ As in the case of industrial solvents contaminating the water supply in Dorado, Puerto Rico since the 1980s. VDB case “Toxic Dorado Water,” 1 January 1985, <http://www.hlrn.org/violation.php?id=p21sbKg=>; Sarah Laskow, “The Hidden Problems with Puerto Rico’s Water Supply,” *Islands Week* (5 March 2018), <https://www.atlasobscura.com/articles/puerto-rico-hurricane-water-contamination>.
- ² Action Aid, “Loss and damage from climate change: the cost for poor people in developing countries,” Discussion Paper, 2010, https://actionaid.org/sites/default/files/loss_and_damage_-_discussion_paper_by_actionaid_-_nov_2010.pdf; UN Environment Programme (UNEP), in cooperation with Columbia Law School, Sabin Center for Climate Change Law, *Climate Change and Human Rights* (Nairobi: UNEP, 2015), <https://wedocs.unep.org/handle/20.500.11822/9934>; Office of the UN High Commissioner for Human Rights, “Understanding Human Rights and Climate Change,” Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 2015, <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>; Adelle Thomas, Bill Hare, Olivia Serdeczny, Luis Zamarioli, Fahad Saeed, Mouhamed Ly and Carl-Friedrich Schlessner, “A year of climate extremes: a case for Loss & Damage at COP23,” *Climate Analytics* (1 November 2017), <https://climateanalytics.org/blog/2017/a-year-of-climate-extremes-a-case-for-loss-damage-at-cop23/>; Amanda Colombo, Frances Fuller and Laetitia De Marez, “Climate change loss & damage – an urgent, cross-cutting issue,” *Climate Analytics* (18 July 2018), <https://climateanalytics.org/blog/2018/climate-change-loss-damage-an-urgent-cross-cutting-issue/>; La Ruta Clima, “TALANOIA input on Loss and Damage and Human Rights,” Non-Party stakeholders’ input for the Talanoa Dialogue with IPCC, 18 September 2018, https://unfccc.int/sites/default/files/resource/418_TALANOIA%20INPUT%20on%20Loss%20and%20Damage%20and%20Human%20Rights.pdf; Olivia Serdeczny, Dawn Pierre-Nathoniell, Linda Siegele, “Progress on Loss and Damage in Katowice,” *Climate Analytics* (17 December 2018), <https://climateanalytics.org/blog/2018/progress-on-loss-and-damage-in-katowice/>; Olivia Serdeczny, “Loss and damage in the Paris Agreement rule book – state of play,” *Climate Analytics* (14 September 2018), <https://climateanalytics.org/blog/2018/loss-and-damage-in-the-paris-agreement-rule-book-state-of-play/>; Thomas Hirsch, *Climate Finance for Addressing Loss and Damage* (Berlin: Brot für die Welt, November 2019), https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_87_Climate_Risk_Financing_01.pdf; Patrick Toussaint and Adrian Martinez Blanco, “A human rights-based approach to loss and damage under the climate change regime,” *Climate Policy*, Vol. 20, Issue 6, special issue “Loss and Damage after the Paris Agreement” (2019), pp. 743–57, <https://www.tandfonline.com/doi/abs/10.1080/14693062.2019.1630354>; Marina Andrijevic and Joe Ware, *Lost & Damaged: A study of the economic impact of climate change on vulnerable countries* (London: Christian Aid, November 2021), <https://mediacentre.christianaid.org.uk/download?id=7693>; Annalisa Savaresi, “Human rights and the impacts of climate change: Revisiting the assumptions,” *Oñati Socio-Legal Series: Climate Justice in the Anthropocene*, Vol. 11, Issue 1 (2021), pp. 231–253, <https://opo.ijsi.net/index.php/osls/article/view/1195>; The London School of Economics and the Grantham Institute on Climate Change and the Environment, “What is climate change ‘Loss and Damage?’” 13 January 2021, <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-change-loss-and-damage/>; Dawn Pierre-Nathoniell, Linda Siegele, Inga Menke, “Loss and Damage at COP25 – a hard fought step in the right direction,” *Climate Analytics* (20 December 2019), <https://climateanalytics.org/blog/2019/loss-and-damage-at-cop25-a-hard-fought-step-in-the-right-direction/>; “Explainer: Dealing with the ‘loss and damage’ caused by climate change,” *Carbon Brief* (16 April 2022), <https://www.carbonbrief.org/explainer-dealing-with-the-loss-and-damage-caused-by-climate-change>; Heinrich Böll Stiftung, “Unpacking finance for Loss and Damage,” undated, <https://us.boell.org/en/unpacking-finance-loss-and-damage>; Malavika Rao, “A TWAIL Perspective on Loss and Damage from Climate Change: Reflections from Indira Gandhi’s Speech at Stockholm,” *Asian Journal of International Law* (2022), pp. 1–19, <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2A3A62E2FF4815926E2A25332B9B47B2/S2044251322000066a.pdf/a-twail-perspective-on-loss-and-damage-from-climate-change-reflections-from-indira-gandhis-speech-at-stockholm.pdf>.
- ³ UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/41/IMG/NR047741.pdf?OpenElement>.
- ⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [also referred to as the reparation framework], A/RES/60/147, 21 March 2006, http://www.hlrn.org/img/documents/A_RES_60_147_remedy_reparation_en.pdf.
- ⁵ See “Justice (theories of),” *The HICtionary: Key Habitat Terms* (Cairo: HIC-HJLRN, 2022), p. 49, <http://www.hlrn.org/img/documents/HICtionary.pdf>.
- ⁶ Human Rights Council, The human right to a clean, healthy and sustainable environment, A/HRC/RES/48/13, 18 October 2021, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement>.
- ⁷ UN General Assembly, The human right to a clean, healthy and sustainable environment, A/RES/76/300, 1 August 2022, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/442/77/PDF/N2244277.pdf?OpenElement>.
- ⁸ Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, “Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights,” *Human Rights*

Quarterly, Vol. 34, Issue 4, (2012) pp. 1084–1169. Commentary on Principle 9: Scope of jurisdiction, p. 1109, and Principle 13: Obligation to avoid causing harm, p. 1113.

⁹ International Law Commission, Report of the Fifty-Third Session, Responsibility of States for Internationally Wrongful Acts, 53rd session, A/56/10 (2001), Article 23, comment 2, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/81/IMG/N0155781.pdf?OpenElement>.

¹⁰ See International Law Commission (ILC), Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, Report of the International Law Commission, 58th Session, para. 44–46, Principle 4, Commentary, para. 16, A/61/10 (2006), https://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf. It reads: “The principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *condicio sine qua non* theory over the foreseeability (‘adequacy’) test to a less-stringent causation test, requiring only the “reasonable imputation” of damage.”

¹¹ *Ibid.*, para. 14. See also Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2nd edition 2002), pp. 93–94.

¹² Birnie and Boyle, *op. cit.*, p. 95.

¹³ Philippe Sands, *Principles of Environmental Law* (Cambridge: Cambridge University Press, 2nd edition 2003), p. 282. For illustration of the flexible way in which this principle is applied in the context of Organization for Economic Cooperation and Development (OECD) and European Community (EC), pp. 281–285. Rüdiger Wolfrum, notes that “Although the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 and the Convention on the Transboundary Effects of Industrial Accidents both refer in their Preambles to the polluter-pays principle as being a “general principle of international environmental law.” Such view is not sustained in the light of the United States’ practice and also in the light of the uncertainties about its scope and consequences.” See Peter-Tobias Stolt, “Transboundary Pollution” in Fred L. Morrison and Rüdiger Wolfrum, eds., *International, Regional, and National Environmental Law* (The Hague and Boston: Kluwer Law International, 2000), 169–200, <https://www.gbv.de/dms/sbb-berlin/313219451.pdf>.

¹⁴ *Supra*, note 2.

¹⁵ See VDB cases: “Eagle Creek Blaze,” USA, 1 September 2018, <http://www.hlrn.org/violation.php?id=p21ta6s=>; “Fuego de Lago Grey,” Chile, 27 December 2011, <http://www.hlrn.org/violation.php?id=p21ta6o=>; “EcoCamp Patagonia,” Chile, 15 February 2005, <http://www.hlrn.org/violation.php?id=p21ta6k=>; “El Dorado Fire,” USA, 05 September 2020, <http://www.hlrn.org/violation.php?id=p21ta6w=>; “Gender-reveal Destruction,” USA, 15 April 2017, <http://www.hlrn.org/violation.php?id=p21ta6o=>.

¹⁶ *Supra*, note 6.