

HUMAN RIGHTS AS A COMPASS FOR OPERATIONALIZING THE LOSS AND DAMAGE FUND

Submission to the UNFCCC Transitional Committee, April 2023

This brief was submitted to the Transitional Committee on 25 April 2023 by Amnesty International and the Center for International Environmental Law (CIEL), responding to the call of the Transitional Committee to submit views ahead of its second meeting¹.

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¹ Workplan of the Transitional Committee on the operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 of decisions 2/CP.27 and 2/CMA.4.
https://unfccc.int/sites/default/files/resource/TC1%20Paper%203%20Workplan_Final.pdf

I. INTRODUCTION

Amnesty International and the Center for International Environmental Law (CIEL) appreciate the invitation by the Transitional Committee (TC) to submit views to inform the discussions at its second meeting (TC2), May 24-27, 2023. The TC has been mandated by the COP and the CMA to develop recommendations for the operationalization of the newly established funding arrangements, including a fund, to respond to loss and damage, for consideration and adoption by COP28/CMA5 and based on paragraph 5 of 2/CP.27² and 2/CMA.4³. Paragraph 5 lays out that those recommendations ‘shall consider, *inter alia*, (a) Establishing institutional arrangements, modalities, structure, governance and terms of reference for the fund referred to in paragraph 3 above; (b) Defining the elements of the new funding arrangements referred to in paragraph 2 above; (c) Identifying and expanding sources of funding; (d) Ensuring coordination and complementarity with existing funding arrangements’. As a core part of its mandate, this submission focuses on paragraph 5(a). Additionally, as the fund would not be able to operate without adequate funding, the submission elaborates on paragraph 5(c): ‘Identifying and expanding sources of funding’.

Under the Paris Agreement, Parties should take adequate and urgent action to reduce emissions, support people to adapt to climate change, and avert, minimize and *address* loss and damage⁴. This should be done on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities (CBDR-RC), as enshrined in the UNFCCC.⁵ At COP27, Parties acknowledged “*the urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change*” and in this context established new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change in responding to loss and damage, including a fund for responding to loss and damage, hereafter the ‘Loss and Damage Fund’⁶.

This submission aims to provide inputs to the TC to ensure that the Loss and Damage Fund is operationalized in such a way that it is compliant with human rights law and standards. Under existing human rights law applicable to all UNFCCC Parties, States have an individual and collective obligation to address climate change. More specifically, international human rights bodies, as well as national courts, have affirmed that States should protect individuals and communities from climate-induced human rights harms, domestically and also extraterritorially⁷. Ahead of COP27, High Commissioner for Human Rights, Volker Türk, sent an open letter to Parties, stating that “*the adverse effects of climate change can violate human rights, requiring access to justice and an effective remedy for those affected. Equitable, flexible and accountable mechanisms to address climate change-related loss and damage, now and in the future, are a climate justice imperative.*”⁸

² Decision 2/CP.27. https://unfccc.int/sites/default/files/resource/cp2022_10a01_adv.pdf#page=11

³ Decision 2/CMA.4. <https://unfccc.int/sites/default/files/resource/decision%202%20CMA%204.pdf>

⁴ Paris Agreement, Article 8

⁵ See United Nations Framework Convention on Climate Change, art 3.2.

⁶ Decision 2/CP.27 and Decision 2/CMA.4.

⁷ See for example: Daniel Billy and others v Australia (Torres Strait Islanders Petition), CCPR/C/135/D/3624/2019, 2019; David Richard Boyd, Safe Climate: A Report of the Special Rapporteur of Human Rights and the Environment, UN Special Procedures, A/74/161, 2019, paras 65, 91 and 92, www.ohchr.org/en/special-procedures/sr-environment/safe-climate-report; Frequently Asked Questions on Climate Change and Human Rights-Fact Sheet No. 38, UN Office of the High Commissioner of Human Rights (OHCHR), 2021, www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf; UN Committee on Economic, Social and Cultural Rights (CESCR), Climate change and the International Covenant on Economic, Social and Cultural Rights, 8 October 2018: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E; State of the Netherlands v. Urgenda Foundation, ECLI:NL:HR:2019:2007, Judgement (Sup. Ct. Neth. Dec. 20, 2019) (Neth.).

⁸ Open-Letter from the United Nations High Commissioner for Human Rights on priorities for human rights-based climate action at the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change. 2 November 2022. www.ohchr.org/sites/default/files/2022-11/2022-11-02-HC-Open-Letter-to-UNFCCC-COP27.pdf

All Parties to the Paris Agreement have obligations under international human rights law and these obligations help identify appropriate ways to meaningfully address loss and damage. **This submission aims to clarify how human rights can and should be fully integrated into the TC's discussions and outcomes on funding arrangements to address loss and damage, and more specifically the newly established Loss and Damage Fund.**

II. THE WORK OF THE TRANSITIONAL COMMITTEE

1. Objectives of the Transitional Committee

Given the limited time of the Transitional Committee, **its focus must be on operationalizing the Loss and Damage Fund**, in line with paragraph 5(a) of 2/CP.27 and 2/CMA.4, as the core element of its mandate. Its main objective should be to develop recommendations to adopt an instrument, similar to the Governing Instrument for the Green Climate Fund⁹, that includes the objectives and guiding principles of the Loss and Damage Fund, its core operational modalities, including regarding public participation, access to information, effective safeguards, and accountability, and its governance and institutional arrangements. Its elaborations on the other elements of paragraph 5 should be considered from the perspective of how they are relevant to and inform the realization of paragraph 5(a).

2. Public participation

Public participation is critical to ensuring effective climate policies¹⁰, as confirmed by the IPCC¹¹, recognized by the Paris Agreement¹², and enshrined as a human right¹³. International environmental law and legal instruments specifically recognize that public participation must also be guaranteed in relation to international processes related to the environment¹⁴. In particular, women, Indigenous Peoples, children, older people, persons with disabilities, peasants and other persons working in rural areas and those with lived experience of loss and damage from climate change impact, must have a seat at the table at all stages and levels of decision-making.

At TC1 in Luxor, Egypt, concerns arose around limited civil society participation. For this first meeting, in-person participation was limited to three observers per constituency and information was shared late, leading to constraints related to obtaining travel documents. Upon arrival, observers were separated from the actual proceedings, having to follow a live stream from an overflow room thereby unnecessarily hampering effective interactions between decision-makers and stakeholders. After asking for it, observers were given the floor three times during the meeting. This was not the case for people following remotely, as the provided webcast does not allow for meaningful participation.

The TC has committed to **enhancing observer participation going forward**. Importantly, the TC should not wait until during TC2 to put in place better participation modalities. For TC2, it is important that the UNFCCC Secretariat allows for more in-person participants; communicates in a clear and timely way about

⁹ Governing Instrument for the Green Climate Fund.

<https://www.greenclimate.fund/sites/default/files/document/governing-instrument.pdf>

¹⁰ Cattino, Massimo, and Diana Reckien. "Does public participation lead to more ambitious and transformative local climate change planning?." *Current opinion in environmental sustainability* 52 (2021): 100-110.

¹¹ IPCC WGII, page 160 [report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf](https://www.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf)

¹² Paris Agreement, Article 12, Preamble. unfccc.int/sites/default/files/english_paris_agreement.pdf

¹³ Universal Declaration of Human Rights, article 21, www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf; International Covenant on Civil and Political Rights, article 25,

www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

¹⁴ Including the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ([Escazú Agreement](https://www.oas.org/en/las/area)) and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ([Aarhus Convention](https://www.aarhusconvention.com/)).

meetings and opportunities for observer participation; supports observers from developing countries to ensure balanced participation; allows observers to be in the meeting room; and puts in place full, effective, and meaningful remote participation modalities. This is essential to develop policies that align with affected people's needs and human rights, and ensure transparency and accountability.

Additionally, the TC and its workshops should be informed by human rights law and obligations, and human rights institutions and authorities must be invited to contribute effectively and provide input to ensure this. Examples include the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change, the Office of the High Commissioner on Human Rights, and National Human Rights Institutions. Parties should build structural synergies with these institutions for the design, implementation and monitoring of activities related to the Loss and Damage Fund.

III. A LOSS AND DAMAGE FUND COMPLIANT WITH HUMAN RIGHTS STANDARDS

1. Objectives and guiding principles

In order to effectively design the institutional arrangements, modalities, structure, governance and terms of reference of the Loss and Damage Fund, as laid out in paragraph 5(a) of 2/CP.27 and 2/CMA.4, it is critical to have its objectives and guiding principles in mind. The objective of the Loss and Damage Fund should be to ensure rights-based and comprehensive action to effectively address the wide range of losses and damages faced by communities and groups in vulnerable situations in particular (economic and non-economic losses and damages, sudden-onset and slow-onset impacts), including by providing effective redress and remedy. It therefore should be guided by the core principles of the UNFCCC such as historic responsibility and equity, as well as important human rights principles and approaches such as non-discrimination, substantive equality and inclusion, and intersectionality and gender-responsiveness.

- Protecting the most impacted through rights-based, intersectional & gender-responsive finance

Climate impacts and related loss and damage often disproportionately affect individuals and communities that already face marginalization. Under human rights law, governments have committed to **the principle of non-discrimination**¹⁵. Discrimination can be multi-layered, and thus it is essential to identify and redress these harms from an intersectional perspective. Any decision taken to address loss and damage should therefore consider potential discrimination in multiple ways: to prevent its occurrence, to systematically identify harms, to provide redress, and to guarantee substantive equality. All responses to loss and damage should be **inclusive, intersectional, gender-responsive, and aim to achieve substantive equality** for individuals who are already marginalized or in vulnerable situations.

For example, persons with disabilities are often disproportionately affected by climate hazards¹⁶ and among the least able to access emergency support¹⁷; as violence occurs in the aftermath of sudden onset climate

¹⁵ UN CESCR, General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights, 2009, para. 8, www.refworld.org/docid/4a60961f2.html; UN CESCR General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, 2005, www.refworld.org/docid/43f3067ae.html; UN CEDAW Committee, General Comment No. 28 on the core obligations of Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2010, para. 18 www.refworld.org/docid/4d467ea72.html

¹⁶ Human Rights Watch (2023). Leave no one behind. People with Disabilities and Older People in Climate-Related Disasters. https://www.hrw.org/sites/default/files/media_2022/11/20221111drd_global_LeaveNoOneBehind.pdf

¹⁷ OHCHR (2020). *Analytical study on the promotion and protection of the rights of persons with disabilities in the context of climate change*. Report of the Office of the United Nations High Commissioner for Human Rights. undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F44%2F30&Language=E&DeviceType=Desktop&LangRequested=False

hazards such as cyclones and in temporary shelters and when people are displaced, this comes with specific implications for women and girls; the way entities such as ‘households’ are described (e.g. in a heteronormative way) could lead to exclusion of relief for LGBTQI+ individuals and couples¹⁸; and responses related to and understanding of what constitutes labor could lead to exclusion of people working in the informal sector¹⁹, who are also often people living in poverty²⁰. These are just some examples of how loss and damage responses need to be inclusive and informed by patterns of discrimination to ensure all people who have been made vulnerable are reached. Additionally, specific policies and practices are needed to ensure appropriate security and remedies to violence, including gender-based violence. Without taking into consideration these and other examples, the actions and policies supported through the loss and damage fund risk failing to adequately respect and protect the rights of many impacted people.

- Providing effective remedy

Under international human rights law, communities and individuals that have experienced human rights violations are entitled to access to effective remedies²¹. The rights to life, food, water, sanitation, health, a clean, healthy and sustainable environment, and an adequate standard of living, as well as collective rights to land and culture, may be relevant normative foundations for those seeking redress in the context of economic and non-economic loss and damage linked to climate change. The objective of the Loss and Damage Fund should be to **provide effective remedy to those most affected by the climate crisis**, in such a way that it does not put additional pressure on public budgets of developing countries.

Remedy for victims of human rights abuses or harm can only be effective when it entails both access to justice and substantive redress. The Loss and Damage Fund is particularly relevant in the context of providing substantive redress or reparations for the harm suffered. The UN 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 Law²² define substantive redress according to the following typology: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. This typology can be applied to addressing loss and damage to guide decisions on the activities that the fund will undertake and ensure that it covers the wide spectrum of needs of people and communities affected by the climate crisis, going beyond immediate emergency needs.

Loss and damage can be experienced very differently by groups and communities and in varying situations. **Participation of affected communities is therefore essential in the process of determining effective and meaningful remedy.** As remedy frameworks have been developed and applied in varying contexts²³, ensuring that people whose human rights have been harmed receive the redress they are entitled to, these can serve as an important basis for the Loss and Damage Fund.

2. Operational modalities

The operational modalities of the Loss and Damage Fund should promote community-led action, including through accessibility for communities, and effective and meaningful stakeholder participation, including

¹⁸ Rainbow Pride Foundation Fiji, Edge Effect & Oxfam (2018). *Down by the River. Addressing the Rights, Needs and Strengths of Fijian Sexual and Gender Minorities in Disaster Risk Reduction and Humanitarian Response*. www.edgeeffect.org/wp-content/uploads/2018/02/Down-By-The-River_Web.pdf

¹⁹ Amnesty International (2022). *Pacific: Transgender rights progress, but much more needs to be done*. Amnesty International Joint Statement, 17 May 2022. www.amnesty.org/fr/wp-content/uploads/2022/05/ASA1856132022ENGLISH.pdf

²⁰ International Labor Organization. *More than 60 per cent of the world's employed population are in the informal economy*. Press release, 30 April 2018. www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang-en/index.htm

²¹ Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2.

²² Resolution adopted by the General Assembly on 16 December 2005, “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”. www.ohchr.org/sites/default/files/2021-08/N0549642.pdf

²³ See for example CIEL (2022). *Remedying Harm: Lessons from International Law for Development Finance*. www.ciel.org/wp-content/uploads/2022/03/Remedying-Harm_Lessons-from-International-Law-for-Development-Finance.pdf

through access to information and by conducting inclusive and rights based needs assessments. The Fund must focus on doing good and avoiding harm through effective safeguards adapted to specific circumstances, and at the same time establish accountability and grievance mechanisms in case harm does occur as a result of its activities.

- Effective stakeholder engagement and access to information

Access to information, participation in decision-making, and access to justice are core principles of international environmental and human rights law, and should be central to the design, planning, and implementation of the Loss and Damage Fund. As Parties move through the stages of operationalizing the newly established fund and commence its implementation, transparent reporting is vital to ensuring accountability and responsible decision-making. Those most directly affected by climate change impacts who have lived experience of loss and damage should be able to fully and effectively participate in the design and implementation of related policies and funding mechanisms. This includes the further development of modalities of the fund, the disbursement of funding and monitoring of its activities, and national implementation. In order to ensure meaningful participation, protecting, respecting and fulfilling the right to access information about decision making processes and arrangements is essential, as well as effective stakeholder consultation, including respect for Indigenous Peoples' right to Free, Prior and Informed Consent (FPIC). In the context of the Loss and Damage Fund and its activities, this means that timely and comprehensive information must be publicly available and presented in an accessible manner, including that it should be in the language(s) used by affected people, groups and communities, and presented in a manner that is culturally appropriate, taking into consideration that people may have difficulty reading, may lack internet access, and may face barriers due to their position in a marginalized group.

- Rights-based, participatory and inclusive Loss and Damage Needs Assessments

Parties should be encouraged and supported to conduct **human rights-based, inclusive and participatory Loss and Damage Needs Assessments (LDNAs)**, considering the adverse effect of climate change on the enjoyment of human rights, such as the rights to life, health, food, water, a clean, healthy and sustainable environment, adequate housing, education, work, culture, and self-determination. These LDNAs should inform national and sectoral policy planning and budgeting and can help inform which activities should be funded at the national and local levels to provide effective redress. Human rights law, standards and approaches, including a gender lens, can be useful to provide indicators, especially for non-economic dimensions of loss and damage, which are difficult to quantify and thus to assess and remedy²⁴. When assessing loss and damage, attention should be paid to the effective participation of marginalized groups²⁵. This is important to determine the magnitude of the loss and damage, including non-economic losses, how harms have differentiated impacts on specific groups, and to improve understanding of how to provide effective and meaningful remedies. While the Santiago Network for Loss and Damage could play an important role in building the capacity of national governments to conduct human rights-based, participatory and inclusive LDNAs, the Loss and Damage Fund could provide funding for carrying these out.

- Local ownership and direct access for frontline communities

To ensure that the activities of the Loss and Damage Fund reach those at the frontlines of the climate crisis, **local ownership and direct access for marginalized groups are key**. Local ownership can help ensure that funding is in line with local and national priorities, including those of Indigenous Peoples, and involves people from the local, sub-national, and national levels in designing, implementing, and monitoring activities as well as relevant institutions such as National Human Rights Institutions and gender-related mechanisms.

²⁴ Katherine Lofts, Sébastien Jodoin and Larissa Parker (2020). A rights-based approach to loss and damage due to climate change. www.elgaronline.com/display/edcoll/9781788974011/9781788974011.00018.xml

²⁵ See for example ActionAid, ADDRN & CANSA (2019). Loss & Damage Handbook for community-led assessment of climate-induced loss and damage: A 7 step guide. actionaid.org/sites/default/files/publications/HandbookforLossandDamageActionAid

This goes hand in hand with the participatory, human rights-based LDNAs mentioned above. The fund should also consider national systems for distributing loss and damage funds that make use of existing instruments such as national disaster mechanisms and social protection schemes, enabling immediate support when needed and overcoming the aspects of the project-based model of climate finance for mitigation and adaptation that are inappropriate for loss and damage finance or that have proved problematic²⁶. This should go together with the inclusion of direct access modalities for marginalized groups, such as those pioneered by the Adaptation Fund²⁷.

- Effective safeguards

It is essential that funding provided by the Loss and Damage Fund does not contribute to or cause adverse social and environmental impacts. **Social and environmental safeguards consistent with international law and standards** must be in place to not only prevent social and environmental harm, but also to ensure that the funding advances rights-compatible action including by maximizing public benefit, participation, transparency, accountability, equity and the protection of rights in the activities of the Loss and Damage Fund.

Safeguards should include²⁸:

- ❖ processes for the anticipation and mitigation of social and environmental impacts through social and environmental impact analysis, including gender analysis and human rights impact analysis;
- ❖ respect for human rights, including the rights of children, women, Indigenous Peoples, and local communities, and involving them in decision-making;
- ❖ excluding any activities that violate human rights, including the rights of Indigenous Peoples (for example activities that could result in forced evictions and displacement or involuntary resettlement, or that could have significant adverse impacts on traditional livelihoods and Indigenous Peoples' way of life);
- ❖ avoiding harms to biodiversity or ecosystems;
- ❖ provisions for public participation and meaningful consultation, including FPIC;
- ❖ compliance with existing international obligations on gender, labor standards, cultural protection and multilateral environmental agreements

The development of these safeguards can and should build on good practices and lessons learned over the last several decades of experience with safeguards in the development finance, climate finance, and humanitarian and disaster risk reduction (DRR) spaces. The nature of the activities of the Loss and Damage Fund might require adapted standards, where activities related to post-disaster response and recovery could build on safeguards developed for the humanitarian and DRR sector, and activities related to long term restitution, rehabilitation and addressing slow onset impacts could build on safeguards developed in the context of the Green Climate Fund and the Adaptation Fund, and other internationally-recognized standards.

- Accountability, monitoring and grievance mechanisms

Having safeguards in place does not guarantee proper implementation and successful operation or that there will not be adverse impacts. The Loss and Damage Fund must have effective **mechanisms for monitoring and oversight**, enhancing implementation and addressing problems that arise during implementation in place. This includes having **effective and independent grievance mechanisms** at the

²⁶ Shawoo, Z., Maltais, A., Bakhtaoui, I. and Kartha, S. (2021). Designing a fair and feasible loss and damage finance mechanism. SEI brief. Stockholm Environment Institute, Stockholm. doi.org/10.51414/sei2021.024

²⁷ www.adaptation-fund.org/about/direct-access

²⁸ See also CIEL (2021). Funding our Future. Five Pillars for Advancing Rights-Based Climate Finance.

www.ciel.org/wp-content/uploads/2021/03/FundingOurFuture_5PillarsForRightsBasedClimateFinance_CIEL_mar2021.pdf

local, national, and global levels for the public to raise concerns and to seek redress. To be effective, grievance redress mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning²⁹. It is also important to have participatory monitoring and to engage non-government actors in the monitoring process, including national human rights institutions.

3. Governance and institutional arrangements

- A participatory, inclusive, and representative Board

To ensure effective public participation in the day to day operations of the Loss and Damage Fund, **groups affected by climate-related loss and damage should be represented on the Board** and its modalities should allow for their active participation. Lessons can be learned from the recently established modalities for the Advisory Board of the Santiago Network for Loss and Damage, which includes representatives of women, youth and Indigenous Peoples³⁰ as well as from the Green Climate Fund (GCF). The Green Climate Fund includes observers in Board meetings by not only having observers at the meeting and webcasting all meetings but also by allowing the participation of active observers in the Board meetings themselves³¹. While observers do not have a “vote” on the Board, they are able to take the floor and intervene in GCF discussions as well as participate in many meetings of the Board. The Loss and Damage Fund should build on the experience at the GCF by including self-selected active observers from civil society and Indigenous Peoples representatives. This should be the case for meetings, and by always ensuring observers’ ability to participate prior to decisions being taken. Further, importantly, observers on the Board of the Loss and Damage Fund should be allowed to take the floor, suggest agenda items, and be active in all working groups, Board committees, or other forms of division of work and activities of the Board. Additionally, as is the case for the Adaptation Fund, developing countries should constitute the majority of Board members, with a significant number of seats provided to the most vulnerable countries.

4. Adequate and structural funding

As mentioned above, other elements of paragraph 5 of 2/CP.27 and 2/CMA.4 should be viewed from the perspective of how they can effectively inform the realization of paragraph 5(a). Paragraph 5(c) will be important in the sense that **the Loss and Damage Fund can only be effective if it is structurally and adequately financed**. In order to protect human rights in the context of climate-induced loss and damage, new and additional, needs-based, human rights compliant, and gender-responsive finance is crucial. Based on state obligations under international human rights law and core principles under the international climate regime such as equity and CBDR-RC, a significant share of the funding should be provided by countries with a historic responsibility for the climate crisis. The Paris Agreement requires “continuous and enhanced international support” to developing countries for the implementation of their climate action obligations, including through financial support from developed countries.³² International human rights law similarly acknowledges the need for international cooperation in the context of the progressive realization of social, economic and cultural rights³³. In 2019, five Human Rights Treaty Bodies clarified that this established legal obligation implies in the context of climate change that “*states must co-operate in good faith in the establishment of global responses addressing loss and damage suffered by vulnerable countries, paying*

²⁹ *ibid*

³⁰ Decision -/CP.27 -/CMA.4. Santiago network for averting, minimizing and addressing loss and damage under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. unfccc.int/sites/default/files/resource/cma4_auv_7_WIM.pdf

³¹ Green Climate Fund, Governing Instrument, para. 16 (2011) (adopted by the UNFCCC and annexed to Decision 3/CP.17), www.greenclimate.fund/document/governing-instrument

³² Paris Agreement, article 7.13, article 9.1.

³³ International Covenant on Economic, Social and Cultural Rights, article 2.1, www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

particular attention to safeguarding the rights of those who are at particular risk of climate harm.”³⁴ Additionally, innovative sources of finance can ensure funding is provided at scale.

- Adequate funding based on CBDR-RC and the polluter pays principle

While the finance needs for addressing loss and damage are immense, recent examples in the context of the pandemic and war have demonstrated that mobilizing resources at scale in short time frames is possible. As mentioned above, the resources provided to the fund must be new and additional and, based on human rights obligations and equity principles, **historic polluters have the responsibility to contribute significantly** to the Loss and Damage Fund. Additionally, innovative sources of funding should ensure that finance for addressing loss and damage is available at the scale required. Many actors have proposed and explored such sources of finance, including based on **the polluter pays principle** applied to private actors, such as international levies on commercial air passenger travel and emissions from international shipping, redirection of fossil fuel subsidies, or a Climate Damages Tax, as well as debt cancellation and debt relief³⁵. **Innovative sources must be equitable**, placing the highest burden on those most responsible and most able to pay. The UN Special Rapporteur on climate change and human rights has proposed that the UN Secretary-General establish a group of experts to explore these new and innovative sources of funding³⁶. Such a high-level group should comprise experts from various backgrounds, including from civil society and human rights experts, and feed into the conversations on the Loss and Damage Fund, while making important linkages with other relevant UN processes. Related to the adequacy of funding, states should refrain from subsidizing polluters including through harmful tax incentives and exemptions and should ensure that they pay their fair share of taxes. By mobilizing innovative sources of funding at scale, States can comply with their human rights obligation to prioritize the collective allocation of the maximum available resources to ensure the progressive realization of economic, social and cultural rights.

- Public, grants-based finance to avoid new debt creation

Many countries vulnerable to the climate crisis have a significant debt burden, which negatively impacts the delivery of public services and thus the realization and protection of economic, social and cultural rights. The economic cost of climate-related loss and damage is contributing to this debt crisis. At the same time, climate finance for adaptation and mitigation has been provided primarily in the form of loans, a large share of which is non-concessional³⁷. This is highly problematic as climate finance should not indebt the Global South further. Additionally, as is the case for adaptation³⁸, loans are ill-designed to address irreversible losses, as borrowers seeking money to address loss and damage will not be investing those funds in ways that will generate income and enable them to pay the loan back. **Funding for loss and damage should be grants-based and primarily public**, including through taxes and levies for corporations and sectors based on the polluter pays principle (see above).

³⁴ OHCHR, 5 UN Treaty Bodies issue a joint statement on human rights and climate change, 16 September 2019, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998

³⁵ See for example Boyd and Keene (2021), Air Travel and Maritime Shipping Levies: Making Polluters Pay for Climate Loss, Damages and Adaptation. A Policy Brief from the UN Special Rapporteur on Human Rights and the Environment, October 2021; CAN International, Christian Aid, Heinrich Böll Stiftung, Practical Action and Stamp Out Poverty (2022). The Loss and Damage Finance Facility. Why and How climatenetwork.org/resource/ldff-paper/; Stamp Out Poverty (2018). The Climate Damages Tax. A guide to what it is and how it works, www.stampoutpoverty.org/live2019/wp-content/uploads/2019/06/CDT_guide_web23.pdf.

³⁶ Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change. Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation. A/77/226. undocs.org/Home/Mobile?FinalSymbol

³⁷ Oxfam (2022). Climate finance short-changed. The real value of the \$100 billion commitment in 2019–20. oxfamilibrary.openrepository.com/bn-climate-finance-short-changed

³⁸ Timperley, J. (2021). The broken \$100-billion promise of climate finance—and how to fix it. *Nature*, 598(7881), 400–402.