

# Submission to the UN Special Rapporteur on the Right to Development

## Call for input on “Climate Justice: Loss and Damage”

March 2024

### TABLE OF CONTENTS

|  |    |
|--|----|
| Recommendations  | 1  |
| Climate-related loss and damage and human rights   | 2  |
| The right to remedy in the context of climate harm   | 2  |
| Development finance institutions’ failure to prevent and remedy harm: case of the World Bank | 5  |
| Rooting the Loss and Damage Fund in human rights   | 7  |
| Firewall between the World Bank and the LDF  | 8  |
| Social and environmental safeguards and an independent grievance mechanism                   | 9  |
| Participatory and community-led approaches   | 10 |
| Non-discrimination, substantive equality, and intersectionality                              | 10 |
| Finance at the scale of needs based on the polluter pays principle                           | 11 |
| No debt creation, and debt cancellation  | 11 |

## Recommendations

In light of this submission, CIEL recommends that the UN Special Rapporteur on the Right to Development addresses the following aspects in his report “Climate Justice: Loss and Damage”:

1. A clarification of States’ international legal obligations, including extraterritorial obligations, in the context of climate-related harms to human rights such as the right to development, and how they relate to the right to remedy.
2. Recommendations for concrete pathways for redress for the wide range of human rights harms concerned.
3. A critical analysis of the role of development finance institutions (DFI) in the context of the climate crisis, including as historic and current contributors through fossil fuel investments. Exposing how DFIs are failing to prevent and remedy harm to communities, making them unfit for purpose to play a significant role in addressing loss and damage.
4. Recommendations for the further operationalization of the UNFCCC Loss and Damage Fund, to bring its policies and activities in line with human rights standards, including through the creation of a firewall with the World Bank and its policies and practices.

## Climate-related loss and damage and human rights

**Climate change poses an unprecedented, multifaceted threat to a wide range of human rights, including the right to development.** Erratic climate patterns compromise food security, disrupting productivity, imperiling terrestrial and marine biodiversity, and increasing agricultural pests.<sup>1</sup> Extreme weather events and slow onset impacts of climate change jeopardize human life and health and disrupt infrastructure pertinent to energy security, transport, trade, communication, and social services.<sup>2</sup> Ultimately, natural disasters, sea-level rise, desertification, and other forms of environmental degradation threaten the territorial integrity and even the existence of states, adversely affecting - amongst others - the right to self-determination.<sup>3</sup> Furthermore, as confirmed by the IPCC, climate change perpetuates and aggravates structural inequalities, disproportionately affecting those who have been made vulnerable through historic marginalization, such as women, Indigenous Peoples, and persons living with disabilities.<sup>4</sup> These impacts are both economic and non-economic, often occurring simultaneously, for example, a loss of crop yields from floods can lead to loss of income and food shortages leading to malnutrition. Such economic setbacks, livelihood disruption, and detriments on human health and well-being, undermine the right to development and trigger relevant States' obligations to remediate loss and damage incurred.

## The right to remedy in the context of climate harm

**Under international human rights law, communities and individuals that have experienced human rights violations are entitled to access to effective remedies.<sup>5</sup> Remedy for victims of human rights abuses or harm can only be effective when it entails both access to justice and substantive redress or reparations. A state's duty to provide reparations to individuals and peoples<sup>6</sup> whose rights have been violated, domestically and extraterritorially,<sup>7</sup> is fundamental**

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<sup>1</sup> Amnesty International (2021), "Stop Burning Our Rights! What Governments and Corporations Must Do to Protect Humanity from the Climate Crisis."

<sup>2</sup> IPCC (2023), "Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change", [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 35-115, doi: 10.59327/IPCC/AR6-9789291691647.

<sup>3</sup> Amnesty International (2021), "Stop Burning Our Rights! What Governments and Corporations Must Do to Protect Humanity from the Climate Crisis."

<sup>4</sup> IPCC (2023), "Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change", [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 35-115, doi: 10.59327/IPCC/AR6-9789291691647.

<sup>5</sup> See, for example: Universal Declaration of Human Rights (Article 8), International Covenant on Civil and Political Rights (Article 2); American Convention on Human Rights (ACHR) (Article 25); the European Convention on Human Rights (Article 13) and the African Charter on Human and Peoples' Rights; Human Rights Committee (2004), "General comment no. 31 (80), The nature of the general legal obligation imposed on States Parties to the Covenant.", paragraphs. 16 and 18; United Nations General Assembly (2005), "Resolution 60/147 - 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 Law"; Committee on the Elimination of Discrimination Against Women (2010), "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", paragraph 32; United Nations (2011), "Guiding Principles on Business and Human Rights", principle 25; Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), paragraph 37; Maastricht Principles on the Human Rights of Future Generations (2023), paragraph 30; see also Margaretha Wewerinke-Singh (2019). Remedies for Human Rights Violations Caused by Climate Change. *Climate Law* 9(3). e224-2243. 10.1163/18786561-00903005.

<sup>6</sup> United Nations Declaration on the Rights of Indigenous Peoples, Article 28.

<sup>7</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011).

**to the obligation to provide remedy.**<sup>8</sup> This obligation arises when a state fails to fulfill its human rights duties, whether to respect or protect these human rights. The duty to respect requires states to avoid actions that could cause or contribute to human rights violations.<sup>9</sup> Therefore, when states participate in, authorize, or facilitate the commission of an act that breaches international obligations,<sup>10</sup> including the obligation not to cause or contribute to transboundary harm, they must provide remedy. Meanwhile, the duty to protect demands that states properly regulate the conduct of third parties, such as business enterprises, that may pose a risk of human rights violations.<sup>11</sup> If states fail to take appropriate measures to mitigate these risks and effectively protect human rights, then states must provide a remedy for any resulting harm.<sup>12</sup> 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, and the right to development constitute a fundamental regulatory basis for those seeking redress in the context of economic and non-economic loss and damage linked to climate change.

**International guidelines on the rights of victims, such as the Updated UN Principles to Combat Impunity,<sup>13</sup> and 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 Law<sup>14</sup> (hereafter: the UN Basic Guidelines) define substantive redress according to the following typology: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.** This typology is also included in the commented version of the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>15</sup> Restitution can be defined as restoring the victim's circumstance to the original situation before the violation of international human rights law occurred. In the context of climate-related loss and damage, this could mean either restoring the actual situation where possible (e.g. rebuilding destroyed infrastructure in case of a natural disaster) or assisting victims in achieving a situation that is similar to the previous one (e.g. planned relocation in the context of slow onset events that render an area inhabitable). Compensation, or monetary reparation, is often used when restitution is found to be

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<sup>8</sup> Human Rights Committee (2004), "General Comment No. 31 (80), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", paragraph 16; United Nations General Assembly (2005), "Resolution 60/147 - 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 Law".

<sup>9</sup> ACHR, art. 1. *See also* IACtHR OC-23/2017, para 117.

<sup>10</sup> *See* International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) [hereinafter ILC, ARSIWA], Nov. 2001, p. 66, art. 16 cmt., para. 5. Other bodies of law also recognize financing as a type of conduct that can incur liability when it has contributed to an act or omission resulting in harm. *See, e.g.,* S.T.J., REsp 995321, Realtor: Min. Benedito Goncalves, 15.10.2007, R.S.T.J., 15.12.2009 (Brazil); UN Environment Programme & Research Bureau of People's Bank of China, Establishing China's Green Financial System: Detailed Recommendation 13 (2015), p.8; U.N. Environment Programme, Lenders and Investors Environmental Liability (2016) (discussing several jurisdictions).

<sup>11</sup> ACHR, art. 1, 2, 11. *See* IACtHR OC-23/2017, paras. 118-119

<sup>12</sup> IACHR Inter-American Standards, para. 89; Di Sarno & Others v. Italy, no. 30765/08, Eur. Ct. H.R., Judgment of Jan. 10, 2012, para. 110

<sup>13</sup> The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, and their different versions — final (UN Doc. E/CN.4/ Sub.2/1996/18), revised final (UN Doc. E/CN.4/Sub.2/1997/20/Rev.1) and Updated (UN Doc. E/CN.4/2005/102/add.1) — were developed under the aegis of the UN Commission on Human Rights and affirmed by the Human Rights Council, paras. 34-38.

<sup>14</sup> United Nations General Assembly (2005), "Resolution 60/147 - 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 Law", paras. 19-23.

<sup>15</sup> UN Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy', Framework," RES 17/4 (June 16, 2011) in Principles 11, 22 and 25.

impossible. Next to material damages and costs for several types of assistance, this category, as defined by the UN principles mentioned above, explicitly includes physical or mental harm, lost opportunities such as education and employment, and moral losses. In the context of climate-related loss and damage this can be of particular relevance for non-economic losses such as loss of life and loss of cultural heritage. Rehabilitation is a form of reparation that can include medical and psychological care as well as legal and social services. This category is again particularly important for non-economic losses which cannot be restituted, e.g. in the context of loss of cultural heritage and planned relocation. Lastly, satisfaction entails a broad category of reparations, often aiming to emphasize the wrongful nature of the harm, publicly and symbolically acknowledge suffering, and respect the dignity of those who have been harmed. This can include recognition of losses or official apologies. The right to a remedy also entails guarantees of non-repetition, demonstrating the important linkages between mitigation (averting loss and damage) and adaptation (minimizing loss and damage) action and addressing loss and damage. Effective remedy for people whose rights have been harmed by the climate crisis is not limited to but inevitably also entails increased mitigation ambition such as a commitment to fully and equitably phase out fossil fuels as the main driver of the climate crisis<sup>16</sup>, including through the provisions of finance to developing countries to realize such a phase out, and increased public, grants-based finance for adaptation to build resilience and prevent future harms from occurring. In many cases, a combination of these forms of reparations is necessary to provide an effective remedy, which will depend, for example, on the nature of the harm and the community's expressed needs and priorities.

**Several human rights experts and institutions have explicitly insisted on the need to fulfill the right to remedy in the context of climate harm.** In an open letter to Parties ahead of COP28,<sup>17</sup> the UN High Commissioner for Human Rights, Volker Türk, urged Parties to ensure accountability and access to remedy for climate-related harm, adding that “Action to respond to climate change-related loss and damage need to ensure adequate, effective and prompt reparation, in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”. Similarly, the Office of the High Commissioner for Human Rights (OHCHR)’s key messages on loss and damage and human rights<sup>18</sup> state that: “Under human rights law, the actors responsible for climate change related harms (primarily States and businesses) should be accountable for remedying them” and that: “Action to address economic and non-economic loss and damage should include the following key elements provided for under international human rights law: equal and effective access to justice and to an effective remedy; adequate, effective and prompt reparation for harm suffered, in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, [...]; and access to relevant information concerning violations and reparation mechanisms, including through the provision of such information in accessible formats.” In its General Comment No. 26 (2023) on children’s rights and the environment with a special focus on climate change, the Committee on the Rights of the Child encourages States “to take note that, from a human rights perspective, loss and damage are closely related to the right to remedy and the principle of reparations, including restitution,

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<sup>16</sup> Fossil fuel CO<sub>2</sub> emissions accounted for approximately 91% of total global emissions in 2022. See Carbon Brief (2022), “Analysis: Global CO<sub>2</sub> emissions from fossil fuels hit record high in 2022”, accessed on 12.1.2024.

<sup>17</sup> Office of the United Nations High Commissioner for Human Rights (2023), “Open Letter from the United Nations High Commissioner for Human Rights on priorities for human rights-based climate action at the 28th Conference of the Parties to the United Nations Framework Convention on Climate Change”.

<sup>18</sup> Office of the United Nations High Commissioner for Human Rights (2023), “Human Rights and Loss and Damage. Key messages”.

compensation and rehabilitation.”<sup>19</sup> In its decision on the *Billy et al. v. Australia* communication, the Human Rights Committee found that Australia was in breach of its obligations under the International Covenant on Civil and Political Rights by failing to address climate change, and confirmed that “the State party is under an obligation to provide the [communication’s] authors with an effective remedy.”<sup>20</sup>

## Development finance institutions’ failure to prevent and remedy harm: case of the World Bank

**The right to development does not exist in a vacuum nor does it supersede other rights. It cannot be used to justify development that contributes to or exacerbates loss and damage due to climate change nor should it justify causing other human rights harms.** For far too long, however, development finance institutions (DFIs), which have provided considerable support to developing countries, have not only caused harms but have failed to remedy them. Given the large role the DFIs have played in contributing to the climate crisis, the role they are hoping to play in the just transition, and the specific role they may play in addressing loss and damage, this section takes a deeper dive look at the role of the World Bank Group (WBG). This is of particular importance given the proposed ad interim hosting arrangement of the recently established Loss and Damage Fund (LDF) under the United Nations Framework Convention on Climate Change (UNFCCC) as a World Bank Financial Intermediary Fund (FIF).

**Despite the multilateral development banks’ (MDB) joint pledge to align their financial flows with the Paris Agreement,<sup>21</sup> as well as World Bank studies demonstrating that climate change may push an additional 132 million people into extreme poverty,<sup>22</sup> several reports have demonstrated that the bank continues to invest massively in fossil fuels.** According to a 2022 report by the Big Shift Global Campaign, the WBG had spent 14.8 billion USD financing fossil fuel projects and policies since the Paris Agreement.<sup>23</sup> Urgewald demonstrated that between 2016 and 2020, the WBG contributed 12 billion USD in direct project finance for fossil fuels, with billions more being provided in other forms.<sup>24</sup> Recent research of Oil Change International and Friends of the Earth US demonstrates that still in the period 2020-2022, the WBG was the biggest provider of direct finance for fossil fuels of any MDB at \$1.2 billion a year on average.<sup>25</sup> Additionally, the pledge made by the WBG<sup>26</sup> to end its financing for upstream oil and gas by 2019 has not only not been met, it also fails to include indirect financing through intermediaries, creating a major loophole in the policy.<sup>27</sup> Due to its historic and continued investments in fossil fuels, the WBG is knowingly contributing to the human rights harms resulting from climate-related loss and damage. Moreover, the WBG’s practice of

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<sup>19</sup> Committee on the Rights of the Child (2023), “General comment No. 26 (2023) on children’s rights and the environment with a special focus on climate change”, UN Doc. CRC/C/GC/26, §106.

<sup>20</sup> Daniel Billy et al. v. Australia, U.N. Doc. CCPR/C/135/D/3624/2019, §11.

<sup>21</sup> MDBs (2018), “The MDBs’ alignment approach to the objectives of the Paris Agreement: working together to catalyse low-emissions and climate-resilient development”.

<sup>22</sup> World Bank, “Health and Climate Change”, accessed on 24.3.2024.

<sup>23</sup> The Big Shift Global Campaign (2022), “Investing in Climate Disaster: World Bank Group Finance for Fossil Fuels”.

<sup>24</sup> Urgewald, “The World Bank Drives Billions into Fossil Fuel Investments”, accessed on 23.3.2024 .

<sup>25</sup> Oil Change International and Friends of the Earth United States (2024), “Public Enemies: Assessing MDB and G20 International Finance Institutions’ Energy Finance”.

<sup>26</sup> World Bank, “World Bank Group Announcements at One Planet Summit”, press release, December 12, 2017, accessed on 23.3.2014.

<sup>27</sup> The Global Shift Campaign (2022), “Investing in Climate Disaster: World Bank Group Finance for Fossil Fuels”.

imposing austerity measures<sup>28</sup> and the continued provision of debt-creating instruments<sup>29</sup> - including for climate finance - in the context of a mounting debt crisis<sup>30</sup> are hindering critical investments of developing countries in social protection, climate adaptation measures, and recovering from loss and damage<sup>31</sup>, effectively exacerbating the human rights harms resulting from climate impacts.

**WBG projects have also repeatedly caused harm to communities directly, including in the context of climate mitigation.** Several examples of large scale renewable energy projects that have caused harm to communities exist and are still being proposed to date. Some examples include the Grand Inga Hydropower Project in the Democratic Republic of Congo,<sup>32</sup> the Bujagali Hydropower project in Uganda,<sup>33</sup> the Alto Maipo Hydroelectric Project in Chile,<sup>34</sup> and Nam Theun 2 Hydropower Project in Laos.<sup>35</sup> The World Bank committed 13 billion USD to enable renewable energy generation over the last five years,<sup>36</sup> and is purporting to increase its focus on climate change through a ‘Climate Change Action Plan (2021-2025)’. As the World Bank increases its investments in renewable energy and other forms of climate mitigation, it must ensure the prevention of harm, and respect for human rights, including procedural rights. Additionally, it must put in place mechanisms to ensure remedy for communities impacted.

The right to remedy is a core tenet of international law and an indisputable human right that development banks are responsible for upholding.<sup>37</sup> For decades, DFIs have established independent accountability systems and mechanisms to enable communities affected by DFI financed projects to voice their concerns, have them investigated, or engage in mediation and dispute resolution processes with bank clients or borrower states. **However, despite the existence of these independent accountability mechanisms, DFIs are still failing to provide reparations for harms resulting from the projects they finance.** Even after the independent accountability mechanism’s findings<sup>38</sup> demonstrated non-compliance with the DFI’s own environmental and social policies and standards, institutions have been reluctant to provide any remedy for project related harm. For more detail on how this plays out in the context of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), the private sector lending arm of the World Bank Group, which is currently creating its remedy/responsible exit framework, see box 1.

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<sup>28</sup> Independent Expert on the effects of foreign debt, “Effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights”, A/74/178.

<sup>29</sup> Bretton Woods Project, “The World Bank and climate finance: Success story or a new era of green ‘structural adjustment’?”, accessed on 10.4.2024.

<sup>30</sup> Debt Service Watch (2023), “The worst ever global debt crisis”.

<sup>31</sup> Eurodad (2020), “A tale of two emergencies. The interplay of sovereign debt and climate crises in the global south”.

<sup>32</sup> Financial Times, “World Bank ‘optimistic’ about giant African hydro project, Revival of the Grand Inga Hydropower Project seems more likely now than it has been in years” (February 8, 2024), accessed on 27.3.2024.

<sup>33</sup> Devex, “World Bank refinancing of Uganda’s Bujagali hydropower scheme under the spotlight”, (February 21, 2018), accessed on 27.3.2024.

<sup>34</sup> Compliance Advisor Ombudsman, case Chile: Alto Maipo-01/Cajon del Maipo, accessed 27.3.2024.

<sup>35</sup> International Rivers, Report I Nam Theun 2: World Bank Withdrawal Leaves Major Concerns Over Project Outcomes (June 19, 2018), accessed on 27.3.2024

<sup>36</sup> World Bank, “Energy, Overview”, accessed on 27.3.2024.

<sup>37</sup> Center for International Environmental Law (2022), “Remedying Harm: Lessons from International Law for Development Finance”.

<sup>38</sup> See for example: Compliance Investigation Report, Alto Maipo HPP (IFC Project #31632), Chile, Complaints 01 and 02, Office of the Compliance Advisor Ombudsman (CAO), June 2, 2021.

### **Box 1 - DFIs' failure to realize effective remedy for harm caused: case of the IFC and MIGA**

In the case of the Alto Maipo Hydroelectric Project in Chile, financed by the IFC, the Management Action Plan resulting from the accountability process failed to address complainants' concerns regarding the project's impact to water flows and availability within the entire Maipo watershed or its impacts on people's health and livelihoods. Rather than focusing on remediating the harms caused to the local communities, the plan, which management took some actions to implement, was primarily focused on improving the IFC's internal policies for future projects and did not appropriately address the specific environmental and social harms that the Alto Maipo project had on Chilean communities.<sup>39</sup> This is but one example among many other failures that have left project-affected communities around the world suffering from environmental and social harm and a profound lack of accountability and remedy.

Civil society organizations and project-affected people worldwide have been urging development banks to close this remedy gap and establish rights-based frameworks in accordance with relevant international standards and best practices. In February 2023, the IFC launched a public consultation for its proposed "IFC/MIGA Approach to Remedial Action." In it, the IFC and the MIGA acknowledged that they could "do more to facilitate and support remedial actions to address adverse E&S impacts that may occur in the projects they support."<sup>40</sup> Nonetheless, the proposal failed to provide a viable path for IFC, MIGA, and their clients to guarantee remedy to communities harmed by their projects. Among its shortcomings, it focused on existing prevention and mitigation practices without admitting that the institutions have a human rights responsibility to remedy harms to which they have contributed.

**For the World Bank and all other DFIs to be in line with the Paris Agreement and human rights standards, they should first and foremost stop financing anything, including all fossil fuel projects and infrastructure, that enables production and transport of oil, gas, and coal, including through indirect finance. Additionally, they have a responsibility to prevent direct harm to communities and the environment, including in the context of climate mitigation, and to provide remedy and reparations for harm that they have contributed to, including due to the climate crisis, and for direct harm caused to communities by projects and activities.**

Given the World Bank's historic and current role in fueling climate harm, its lack of adequate policies to remedy the harm its own projects are causing, and its business model as a DFI largely providing finance in the form of loans pushing developing countries into austerity and debt, it is not suitable to play a leading role in addressing loss and damage. This has implications for its potential hosting of the LDF (see below), and any role it may have in providing finance to address loss and damage should be carefully scrutinized to ensure activities do not cause harm, and do not push countries further into debt.

## **Rooting the Loss and Damage Fund in human rights**

**Over the three decades since the adoption of UNFCCC, the largest cumulative emitters have sought to evade and dilute their legal obligations under human rights law to respect the right to remedy in the context of climate harm, including under the climate convention.** While the

<sup>39</sup> "Comentarios al Informe de Progreso de la Administración de la Corporación Financiera Internacional sobre la Implementación del Plan de Acción de la Administración relacionado con Alto Maipo – Chile Proyecto No. 31632", Elaborados por el Center for International Environmental Law (CIEL), Ecosistemas y, la Coordinadora Ciudadana No Alto Maipo, Marzo de 2023.

<sup>40</sup> IFC/MIGA Approach to Remedial Action for public consultation, (October 31, 2022), at page ii.

Paris Agreement established action to address loss and damage as a third pillar of climate action (Article 8), States with the highest cumulative emissions insisted on excluding any additional legal basis for liability through the following paragraph in the decision adopting the agreement: “Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation” (1/CP.21, §51).<sup>41</sup> The LDF established at COP27 and operationalized at COP28 includes similar language.<sup>42</sup> While the inclusion of this paragraph may limit the interpretation of Article 8 of the Paris Agreement and the LDF, it does not limit the application of long-standing State obligations under international law,<sup>43</sup> including the obligations to ensure access to effective remedy, which includes compensation.<sup>44</sup> Additionally, the decision adopted at COP28 does not lay out clearly that developed country Parties shall contribute financially to the fund, and there is no indication of the scale at which the fund will operate. The Governing Instrument (GI) of the LDF does not explicitly recognize that it shall operate in line with human rights obligations, and has several shortcomings that will limit its ability to do so.<sup>45</sup>

**The steps taken under the UNFCCC to address loss and damage are insufficient and voluntary, and do not exclude other claims for reparations for climate harm or loss and damage, or the need for complementary processes or mechanisms to deliver comprehensive reparations for climate harms.**<sup>46</sup> It will be crucial for States to ensure that any future steps taken under the UNFCCC, including the further operationalization of the LDF, address the shortcomings mentioned above, while also considering complementary and comprehensive actions at the local, national, regional, and global level to realize effective remedy for those affected by the climate crisis. This chapter describes important ways in which the further operationalization of the LDF can increase its alignment with human rights obligations.

## Firewall between the World Bank and the LDF

The COP28 decision on the operationalization of the LDF proposes an interim set up as a World Bank FIF, subject to certain conditions that the Bank has to accept within six months of COP28. These conditions include but are not limited to the World Bank hosting the fund in a manner that is in line with the fund’s GI, all countries being eligible (including non-World Bank members) to receive funding, the GI superseding the World Bank’s policies in case of a clash, and direct access to resources

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<sup>41</sup> Sethi, Nitin (2015), “US pressure tactics work, clause excluding compensation option retained”, accessed on 9.1.2024.

<sup>42</sup> “Recalling the understanding of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement that funding arrangements, including a fund, for responding to loss and damage are based on cooperation and facilitation and do not involve liability or compensation”, preamble, 1/CP.28 and 5/CMA.5.

<sup>43</sup> See also declarations made by several small islands states (Cook Islands, Micronesia, Nauru, Niue, Solomon Islands, Tuvalu, and Vanuatu) upon ratification of the Paris Agreement that “acceptance of the Paris Agreement and its application shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.”. See United Nations Treaty Collection, “CHAPTER XXVII ENVIRONMENT, 7. d Paris Agreement, Paris, 12 December 2015”, accessed on 12.1.2024.

<sup>44</sup> Asociación Interamericana para la Defensa del Ambiente (AIDA), La Ruta Del Clima, Center for International Environmental Law (CIEL), International Network for Economic, Social and Cultural Rights (ESCR-net) (2023), Amicus brief submitted to the Inter-American Court of Human Rights in relation to the request for an advisory opinion on the climate emergency and human rights.

<sup>45</sup> Center for International Environmental Law (February 2024), “Promoting Human Rights in Climate Action: Report from the Dubai Climate Conference (COP28)”.

<sup>46</sup> Asociación Interamericana para la Defensa del Ambiente (AIDA), La Ruta Del Clima, Center for International Environmental Law (CIEL), International Network for Economic, Social and Cultural Rights (ESCR-net) (2023), Amicus brief submitted to the Inter-American Court of Human Rights in relation to the request for an advisory opinion on the climate emergency and human rights.



for countries and communities.<sup>47</sup> While there is no clear exit strategy for the LDF to become independent after this period, the conditions and timeline provide for moments where this is possible.<sup>48</sup> There are several reasons why the World Bank is not a suitable host for the LDF, including those already mentioned such as its failure to prevent and remedy harm to communities, as well as concerns around its ability to realize direct access for communities.<sup>49</sup> **An essential task of the LDF Board in its first year will be to ensure that the hosting agreement contains sufficient guarantees that the set conditions will be met and that the LDF will be able to operate independently of the World Bank’s policies and control. If those guarantees and conditions cannot be met, then the LDF Board must commence the process to establish a standalone, independent fund in accordance with the COP28 decision.**

## Social and environmental safeguards and an independent grievance mechanism

**Given the World Bank’s problematic track record in terms of preventing and redressing harm in the context of its own activities, and in light of the necessary independence of the LDF, the LDF Board must develop a robust set of social and environmental safeguards applying to all activities of the Fund, which may supersede the Bank’s policies as laid out in the conditions.** The LDF’s GI<sup>50</sup> makes reference to “best practice environmental and social safeguards” but at the same time also refers to “achieving functional equivalency” to the World Bank’s safeguards (§68). The World Bank’s safeguards should not be set as the benchmark because they are not adequate overall<sup>51</sup> and not adapted to the distinct nature of addressing loss and damage caused by climate change.

Moreover, rather than establishing an independent grievance redress mechanism for the LDF, the GI provides that activities financed by the fund will make use of the grievance mechanisms of implementing agencies.<sup>52</sup> This is problematic, as a mechanism at the level of the fund is critical to ensure that individuals and groups who are negatively affected by the activities of the fund have access to justice and there may be barriers to accessing the implementing agencies’ mechanism, including fear of retaliation. Additionally, it is unclear what this means for those activities that are not implemented through an intermediary, or what happens if the implementing agency does not have an effective

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<sup>47</sup> For all conditions, see §20 of the decision on the operationalization of the Loss and Damage Fund (numbering to be confirmed but likely 1/CP28 and 1/CMA5).

<sup>48</sup> The World Bank has to confirm (within six months after COP28) that it is willing and able to meet the conditions. The Board of the Loss and Damage Fund will determine (within eight months after COP28) whether the relevant documentation by the World Bank provides sufficient assurance that the conditions will be met and after the four-year interim period. The Board of the fund will determine based on an independent evaluation whether the conditions have been met. For more details on these conditions and steps, also see Heinrich Böll Foundation (2023), “Compromise Transitional Committee Outcome Falls Short of Expectations and Climate Justice”.

<sup>49</sup> See Center for International Environmental Law (2024), “Promoting Human Rights in Climate Action: Report from the Dubai Climate Conference (COP28)”; Heinrich Böll Foundation (2023), “Compromise Transitional Committee Outcome Falls Short of Expectations and Climate Justice”, accessed on 23.3.2024; Climate Home News, “Avoid our mistake: Don’t let World Bank host loss and damage fund”, op-ed by David Archer published on November 3, 2023, accessed on 23.3.2024; Context, “Loss & Damage Fund must be independent to deliver climate justice”, op-ed by Brandon Wu, published October 16, 2023, accessed on 23.3.2024.

<sup>50</sup> Decision 1/CP.28, “Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4”.

<sup>51</sup> Center for International Environmental Law (July 2016), “NGO response: Proposed World Bank standards represent dangerous set-back to key environmental and social protections”; World Resources Institute (August 2016), “The World Bank Just Overhauled its Safeguards for the First Time in 30 Years”, accessed on 27.3.2024.

<sup>52</sup> The Governing Instrument does require the implementing agencies’ grievance mechanisms to report to the Board in the context of the Loss and Damage Fund’s activities.

independent grievance mechanism in place. **To guarantee respect of human rights, the Board must rectify this flaw in the LDF's GI<sup>53</sup> and start the process for the establishment of an independent grievance mechanism in line with the standards established for DFIs and, in particular, for other financial entities under the UNFCCC, such as the Green Climate Fund (GCF) and the Adaptation Fund.**

## **Participatory and community-led approaches**

**Access to information, participation in decision-making, and access to justice are core principles of international environmental and human rights law, and should be guiding principles for any approaches to address loss and damage. Those most directly affected by climate change impacts who have lived experience of loss and damage are best placed to identify adequate remedies for the violations of their rights, and should be able to fully and effectively participate in and drive the design and implementation of related policies, programs, and funding mechanisms.** As the LDF is one such avenue for addressing loss and damage, it is essential that strong and comprehensive participation modalities are established at the level of the LDF Board through active observers representing diverse groups of rightsholders, who have opportunities to intervene and access to information on equal basis with Party Board members. Additionally, the meaningful participation of local rightsholders in the context of planning, design, and implementation of the fund's activities is essential. 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 consultation, including respect for Indigenous Peoples' right to Free, Prior and Informed Consent (FPIC). **Additionally, to ensure that the LDF reaches communities adequately and its activities are community-led, specific modalities for community access, including a dedicated small grants window, will be critical.**

## **Non-discrimination, substantive equality, and intersectionality**

**All responses to loss and damage must be non-discriminatory, inclusive, intersectional, gender-responsive, and advance substantive equality for individuals who are already marginalized.** As clarified by the Committee on Economic, Social and Cultural Rights (CESCR), "eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations."<sup>54</sup> Depending on how responses are designed, they could lead to the exclusion of persons living with disabilities, women, people working in the informal sector, or LGBTQI+ individuals, among others, or expose groups to increased risks such as gender-based violence.<sup>55</sup> The principle of non-discrimination, which the UN Basic Guidelines reinforce in the context of remedy and reparations,<sup>56</sup> entails that responses to loss and damage are targeted and

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<sup>53</sup> According to chapter "XV. Amendments to the Governing Instrument" of the LDF's GI "The Board may recommend amendments to this Governing Instrument for consideration by the COP and the CMA." (§71). It could also be argued that the GI does not exclude the establishment of an independent grievance mechanism for the LDF.

<sup>54</sup> United Nations Committee on Economic Social and Cultural Rights (2009), "General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights", E/C.12/GC/20, paragraph 8.

<sup>55</sup> For more context, see Amnesty International and Center for International Environmental Law (CIEL), "Human Rights as a Compass for Operationalizing the Loss and Damage Fund", submission to the Transitional Committee, 25 April 2023.f

<sup>56</sup> United Nations General Assembly (2005), "Resolution 60/147 - 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 Law".

designed to ensure all people who have been made vulnerable are reached and their rights are protected, and all mechanisms aimed at addressing loss and damage must have adequate and dedicated policies in place to achieve this.<sup>57</sup> This goes back to the importance for the LDF to establish a dedicated set of safeguards to avoid harm, and policies to promote human rights and advance substantive equality. **Particular attention must be paid to how different forms of marginalization and discrimination intersect, and how policy responses should be designed to redress these intersectional discriminations.** This has for example been recognized by the CEDAW Committee, which has called on State parties to “identify and eliminate all forms of discrimination, including intersecting forms of discrimination, against women in disaster risk reduction and climate change policies, legislation, policies, programmes, plans, and other activities.”<sup>58</sup>

## Finance at the scale of needs based on the polluter pays principle

The finance needed to address loss and damage in developing countries has been estimated to amount to hundreds of billions of dollars.<sup>59</sup> An exact amount can not be formulated given the inextricable link of losses and damages with current and future mitigation and adaptation efforts, therefore equitable approaches to addressing loss and damage must be needs-based rather than be guided by a politically set objective. **Based on state obligations under international human rights law and important 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 LDF Board must develop a resource mobilization strategy accordingly.<sup>60</sup> Additionally, innovative sources of finance, in line with the polluter pays principle and the State duty to regulate private actors to protect against and ensure remedy for human rights violations can help ensure that finance for addressing loss and damage is available at the scale required, such as windfall taxes on fossil fuel companies, international levies on commercial air passenger travel and use of private jets and emissions from international shipping, elimination and redirection of fossil fuel subsidies, or a Climate Damages Tax.<sup>61</sup>

## No debt creation, and debt cancellation

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<sup>62</sup>. 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

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<sup>57</sup> In the context of the Loss and Damage Fund under the United Nations Framework Convention on Climate Change, this entails that a set of environmental, social and human rights safeguards must be designed and implemented, applying to all activities, projects and programs carried out through the fund.

<sup>58</sup> United Nations Committee on the Elimination of Discrimination Against Women (2018), “General recommendation No.37 on gender-related dimensions of disaster risk reduction in a changing climate (CEDAW/C/GC/37)”, paragraph 31(a).

<sup>59</sup> Loss and Damage Collaboration & Heinrich Böll Stiftung, Washington, DC, (2023) “The Loss and Damage Finance Landscape”.

<sup>60</sup> For more information, see Heinrich Böll Stiftung, Washington DC, “The Loss and Damage Fund Board: Getting It Right from the Start”, analysis by Liane Schalatek and Julie-Anne Richards, 18 March 2024, accessed on 23.3.2024.

<sup>61</sup> For more information about the proposed taxes and levies, see Boyd, David, and Keene, Stephanie, (2021), “Air Travel and Maritime Shipping Levies: Making Polluters Pay for Climate Loss, Damages and Adaptation”; Sharma-Khushal, Sindra et al (2022), “Loss and Damage Finance Facility: Why and How”; Stamp Out Poverty (2018), “The Climate Damages Tax: A guide to what it is and how it works”.

<sup>62</sup> ActionAid (2023), “The Vicious Cycle: Connections Between the Debt Crisis and Climate Crisis”.

the form of loans, a large share of which is non-concessional.<sup>63</sup> Climate finance should not indebt the Global South further, which is all the more relevant when applying the remedy and reparations lens. Additionally, as is the case for all climate finance and, in particular, adaptation,<sup>64</sup> 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 on corporations and sectors based on the polluter pays principle. Additionally, above and beyond addressing loss and damage through resourcing of funding mechanisms and reparations frameworks, States should also take steps to create more fiscal space for affected States and communities through ensuring measures relating to debt cancellation and tax justice.**<sup>65</sup>

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<sup>63</sup> Oxfam (2022). “Climate finance short-changed. The real value of the \$100 billion commitment in 2019–20”.

<sup>64</sup> Timperley, Jocelyn. (2021). “The broken \$100-billion promise of climate finance—and how to fix it”. *Nature*, 598(7881), e400-e402. 10.1038/d41586-021-02846-3.

<sup>65</sup> Debt Justice UK, Climate Action Network International et al. (2022), “The debt and climate crises: Why climate justice must include debt justice”.