

# Climate-related human rights harm and the right to effective remedy

Submission by Amnesty International and the Center for International Environmental Law (CIEL) for the UN Secretary General’s analytical study on “the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same” to be presented to the Human Rights Council at its fifty-seventh session.

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## **Executive summary**

**At an average warming of 1.1°C, climate change poses an unprecedented threat to human rights, disproportionately affecting those who have been made vulnerable through historic marginalization. Under international human rights law, those who have experienced human rights violations are entitled to access to effective remedies and fundamental to this obligation are reparations, domestically and extraterritorially, to individuals and peoples whose rights have been violated. The right to remedy applies in the context of climate harm, and foundational guidance in realizing reparations for climate harm can be found in existing international arrangements for compensation and other forms of redress.**

**Human rights and equity-based approaches to addressing loss and damage, the topic of this call for input, are essential to ensure that those who have lived experience of climate impacts are in the driver's seat of determining appropriate redress for the harms suffered; to push past voluntary finance towards an obligation to provide reparations; and ensure that human rights are protected, respected and promoted in the context of addressing the impacts of the climate crisis.**

**In the light of this submission, Amnesty International and CIEL recommend that the UN Secretary-General addresses the following aspects in his report:**

- 1. The wide range of human rights harms caused by the climate crisis, and how they are disproportionately impacting communities and groups made vulnerable through historic marginalization, often subject to intersectional discrimination.**
- 2. States' international legal obligations, including extraterritorial obligations, in the context of climate-related human rights harms, including as they relate to the right to remedy, and what they entail in terms of concrete pathways for redress and reparations for the wide range of human rights harms concerned, including in the context of non-economic loss and damage.**
- 3. Recommendations to address the limitations of States' current approaches and pathways to addressing loss and damage under the United Nations Framework Convention on Climate Change (UNFCCC), including as they relate to its voluntary approach towards funding mechanisms and the explicit exclusion of compensation.**
- 4. Concrete recommendations for any current and future mechanisms, funds and frameworks for addressing loss and damage and/or reparations programs, based on human rights obligations and principles, including by ensuring access to information,**

meaningful participation and access to justice, and advancing substantive equality, and on lessons from existing international and national mechanisms for reparations.

## 1. Impacts of the climate crisis violate human rights

At an average warming of 1.1°C, climate change poses an unprecedented threat to human rights such as the rights to life; water and sanitation; health; food; a clean, healthy and sustainable environment; adequate housing; education; decent work; culture; and self-determination, in particular for individuals and groups who are already subjected to multiple and intersecting forms of discrimination or who are marginalized as a result of structural inequalities.<sup>1</sup> Not only through the direct impacts of extreme weather<sup>2</sup> and slow onset events and the health and other negative impacts of the production and burning<sup>3</sup> of fossil fuels, the main source of greenhouse gas emissions, but also through negatively impacting access to food, water, and sanitation, climate change jeopardizes human life and health.<sup>4</sup> Meanwhile, the dual impact of climate change, involving both direct consequences such as destruction of school infrastructure and threats to safety, as well as indirect effects on health, water, food security, livelihoods, income, and migration, collectively exacerbates absenteeism and dropout rates,<sup>5</sup> posing a multifaceted and complex threat to the right to education overall.<sup>6</sup> Additionally, erratic climate patterns pose a significant threat to the right to food, as

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<sup>1</sup>Amnesty International (2023), “A burning emergency: Extreme heat and the right to health in Pakistan”, <https://www.amnesty.org/en/documents/asa33/6823/2023/en/>; World Meteorological Organization (2022), “Climate Change made devastating early heat in India and Pakistan 30 times more likely”, accessed on 12.1.2024 via <https://www.worldweatherattribution.org/climate-change-made-devastating-early-heat-in-india-and-pakistan-30-times-more-likely/>; Office of the United Nations High Commissioner for Human Rights (2023), “Fossil fuels at the heart of the planetary environmental crisis: UN experts”, accessed on 12.1.2024. via <https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmental-crisis-un-experts>.

<sup>2</sup> Over 12,000 people died in 2023, a 30% rise from 2022, as a result of climate disasters such as cyclones, floods, landslides and wildfires, including over 1,400 in Madagascar, Malawi, and Mozambique as a result of Cyclone Freddy, and at least 4,500 killed (with at least 8,000 still missing) by the Derna dam flood in Libya after Storm Daniel. See Save the Children (2023), “2023 In Review: Climate Disasters Claimed 12,000 Lives Globally In 2023”, accessed on 12.1.2024 via <https://www.savethechildren.net/news/2023-review-climate-disasters-claimed-12000-lives-globally-2023>.

<sup>3</sup> Climate change, increasing the intensity and frequency of heatwaves, and extreme heat, compounded by wildfires and desert dust, is measurably damaging air quality on a vast scale and threatening people’s human right to health and to a healthy environment. See Amnesty International (2023), “Heatwaves are worsening air pollution, underscoring the urgent need to phase out fossil fuels”, accessed on 12.1.2024 via <https://www.amnesty.org/en/latest/news/2023/09/global-heatwaves-are-worsening-air-pollution-underscoring-the-urgent-need-to-phase-out-fossil-fuels/>.

<sup>4</sup> Amnesty International (2023), “Fatal fuels: Why human rights protection urgently requires a full and equitable fossil fuel phase out”, <https://www.amnesty.org/en/documents/pol30/7382/2023/en/>.

<sup>5</sup> For more information about the effect on dropout rates and access to food, see Amnesty International (2022), “Any Tidal Wave Could Drown US: Stories from the climate crisis”, <https://www.amnesty.org/en/documents/ior40/6145/2022/en/>, page 31.

<sup>6</sup> Committee of 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 (CRC/C/GC/26)”, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/crcgc26-general-comment-no-26-2023-childrens-rights>.

they reduce or alter productivity in crops, livestock, fisheries, and aquaculture, causing loss or changes in both terrestrial and marine biodiversity and increasing agricultural pests,<sup>7</sup> as well as increasing the risk of zoonoses and food-, water- and vector-borne diseases.<sup>8</sup> Furthermore, in addition to the health impact due to heat exposure that may compromise an individual's ability to work, the disruption of natural processes by climate change significantly affects workers, including those working in agriculture, fisherfolk, mountain people, and pastoralists.<sup>9</sup> Ultimately, natural disasters, sea level rise, desertification and other forms of environmental degradation from climate change trigger human displacement, adversely affecting -amongst others- individuals' right to culture or self-determination.<sup>10</sup> These impacts are both economic and non-economic in nature, often occurring simultaneously, for example a loss of crop yields from floods can lead to loss of income (economic) and to food shortages leading to malnutrition (non-economic). Non-economic losses and damages relate to aspects such as health, territory, Indigenous knowledge, cultural heritage and biodiversity, and are therefore inextricably linked with human rights.<sup>11</sup>

**As confirmed by the IPCC, climate change perpetuates and aggravates structural inequalities,<sup>12</sup> disproportionately affecting those who have been made vulnerable through historic marginalization, such as women, Indigenous Peoples, persons living with disabilities, and LGBTIQ+ individuals.** Women are disproportionately struck by food insecurity, both due to limited access to food, but also due to their increased nutritional needs during pregnancy, lactation, and childbirth.<sup>13</sup> Exposure to extreme heat, alongside poor nutrition, water, hygiene, and sanitation, disproportionately affects the physical and mental health of women, particularly pregnant and

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<sup>7</sup> For instance, in 2020, crops in the Horn of Africa were devastated by locust swarms. See Amnesty International (2021), "Stop Burning Our Rights! What Governments and Corporations Must Do to Protect Humanity from the Climate Crisis.", <https://www.amnesty.org/en/documents/pol30/3476/2021/en/>.

<sup>8</sup> World Health Organization (2023), "Fact Sheet: Climate change and health", <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>

<sup>9</sup> This significantly affects women as over 60% of employed women in South Asia and Sub-Saharan Africa work in agriculture. See Amnesty International (2021), "Stop Burning Our Rights! What Governments and Corporations Must Do to Protect Humanity from the Climate Crisis.", <https://www.amnesty.org/en/documents/pol30/3476/2021/en/>.

<sup>10</sup> Amnesty International (2021), "Stop Burning Our Rights! What Governments and Corporations Must Do to Protect Humanity from the Climate Crisis.", <https://www.amnesty.org/en/documents/pol30/3476/2021/en/>.

<sup>11</sup> Loss and Damage Collaboration (2022), "Passed the Point of no Return. A Non-Economic Loss and Damage Explainer", [https://assets-global.website-files.com/605869242b205050a0579e87/63581776a7e3681e75e45c72\\_L%26DC\\_NELD\\_EXPLAINER\\_FULL\\_BRIEF\\_24102022.pdf](https://assets-global.website-files.com/605869242b205050a0579e87/63581776a7e3681e75e45c72_L%26DC_NELD_EXPLAINER_FULL_BRIEF_24102022.pdf).

<sup>12</sup> Intergovernmental Panel on Climate Change. "Climate Change 2022: Impacts, Adaptation and Vulnerability.", <https://www.ipcc.ch/report/ar6/syr>.

<sup>13</sup> International Labour Organization, "Just Transition: An Essential Pathway to Achieving Gender Equality and Social Justice.", [https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202204141910---ILO\\_submission\\_-\\_Just\\_transition\\_-\\_An\\_essential\\_pathway\\_to\\_achieving\\_gender\\_equality\\_and\\_social\\_justice.pdf](https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202204141910---ILO_submission_-_Just_transition_-_An_essential_pathway_to_achieving_gender_equality_and_social_justice.pdf).

postpartum women<sup>14</sup> and older women.<sup>15</sup> Moreover, factors such as stigma, social exclusion, poverty, discriminatory legislation and policies as well as the limited availability of tailored services and programs exacerbate the impact of climate change on people living with disabilities<sup>16</sup> The disruption of social protection systems and healthcare services during extreme weather phenomena coupled with a lack of measures to ensure accessible communication and information render their right to life and their right to health particularly at risk.<sup>17</sup>

LGBTQI+ individuals, who are often marginalized, can also suffer disproportionate impacts, as they may be in precarious situations before climate events, and face discrimination in accessing support afterwards.<sup>18</sup> Meanwhile, women, and people living with disabilities tend to have lower access to resources for climate change adaptation.<sup>19</sup> Since many such individuals are employed in the informal economy or small enterprises, they face additional challenges in recovering from the effects of climate change, thus jeopardizing their right to livelihood and decent work.<sup>20</sup> Indigenous Peoples, who often continue to experience the harsh consequences of colonial policies and practices, are also at increased risk of the impacts of climate change, including the loss of their cultures, languages and traditional ways

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<sup>14</sup> For instance, in Bangladesh, salinization of drinking water sources as a result of sea-level rise may cause increased rates of adverse health outcomes, including preterm births and maternal and perinatal deaths. See Khan, Aneire Ehmar et al., (2011). Drinking water salinity and maternal health in coastal Bangladesh: implications of climate change. *Environmental Health Perspectives*. 119(9), e1328-e1332. 10.1289/ehp.1002804; World Health Organization (2006), “Protecting Maternal, Newborn, and Child Health from the Impacts of Climate Change: A Call for Action.”, [https://apps.who.int/iris/bitstream/handle/10665/43541/9241547073\\_eng.pdf;sequence=1](https://apps.who.int/iris/bitstream/handle/10665/43541/9241547073_eng.pdf;sequence=1).

<sup>15</sup> Older people are more likely to have health conditions that put them at risk of heat-related illnesses and death, and older women are more likely to die during heat waves than men, although the specific reasons are yet to be confirmed. See Amnesty International (2022) “Any tidal wave could drown us: Stories from the climate crisis”, <https://www.amnesty.org/en/documents/ior40/6145/2022/en/>.

<sup>16</sup> International Labour Organization, “Just Transition: An Essential Pathway to Achieving Gender Equality and Social Justice.”, <https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202204141910---ILO%20submission%20-%20Just%20transition%20-%20An%20essential%20pathway%20to%20achieving%20gender%20equality%20and%20social%20justice.pdf>.

<sup>17</sup> Research suggests that difficulty to access services and medicine has disproportionately affected people living with disabilities during Hurricanes Harvey and Katrina, while lack of accessible communications for people living with pre-existing disabilities and chronic conditions who experience flooding in the United Kingdom, hurricanes in the US, and Puerto Rico, and wildfires in Australia. (Lindsay, Sally et al. (2022). The Impact of Climate Change Related Extreme Weather Events on People with Pre-Existing Disabilities and Chronic Conditions: A Scoping Review.”. *Disability and Rehabilitation* 45(25), e4338–e4358. <https://doi.org/10.1080/09638288.2022.2150328>.)

<sup>18</sup> See Amnesty International (2022), “Any Tidal Wave Could Drown Us: Stories from the climate crisis”, <https://www.amnesty.org/en/documents/ior40/6145/2022/en/>, Chapter 8 on Marginalized communities in Fiji: Climate change impacts on residents of the Daloumani safe home.

<sup>19</sup> International Labour Organization, (2022) “Just Transition: An Essential Pathway to Achieving Gender Equality and Social Justice.”, <https://www4.unfccc.int/sites/SubmissionsStaging/Documents/202204141910---ILO%20submission%20-%20Just%20transition%20-%20An%20essential%20pathway%20to%20achieving%20gender%20equality%20and%20social%20justice.pdf>.

<sup>20</sup> International Labour Organization, (2018), “The Employment Impact of Climate Change Adaptation.” [https://www.ilo.org/wcmsp5/groups/public/--ed\\_emp/documents/publication/wcms\\_645572.pdf](https://www.ilo.org/wcmsp5/groups/public/--ed_emp/documents/publication/wcms_645572.pdf)

of life and may also face discrimination in access to adaptation resources and disaster relief.<sup>21</sup> They have invaluable scientific knowledge regarding climate crisis adaptation, and this knowledge is too often marginalized, or used without acknowledging them or obtaining their Free, Prior and Informed Consent (FPIC). These vulnerabilities often intersect, as is for example the case with disability and gender, putting Indigenous women and girls living with disabilities at higher risk for the climate crisis.<sup>22</sup>

**States' human rights obligations are essential when looking at the loss and damage the climate crisis is already causing and will cause in the future, as those who have been harmed are entitled to effective remedy. Additionally, human rights standards are essential to ensure that responses to loss and damage are inclusive and effective.**

## 2. Right to remedy in the context of climate harm

**Under international human rights law,<sup>23</sup> communities and individuals that have experienced human rights violations are entitled to access to effective remedies.<sup>24</sup> States making reparations to individuals and peoples<sup>25</sup> whose rights have been violated, domestically and**

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<sup>21</sup> See Amnesty International (2022), “Any Tidal Wave Could Drown Us: Stories from the climate crisis”, <https://www.amnesty.org/en/documents/ior40/6145/2022/en/>, chapters three “Marginalized communities in coastal south-western Bangladesh”, six “Indigenous Innu People in Pessamit, Quebec, Canada” and seven “Indigenous peoples in Yakutia, Russian Federation”.

<sup>22</sup> International Disability Alliance & International Disability and Development Consortium (2022), “Persons with Disabilities and Climate Action”, [https://www.internationaldisabilityalliance.org/sites/default/files/cop\\_28\\_-\\_final\\_version\\_-\\_nov\\_16th\\_-\\_02.pdf](https://www.internationaldisabilityalliance.org/sites/default/files/cop_28_-_final_version_-_nov_16th_-_02.pdf).

<sup>23</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 (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”, <https://digitallibrary.un.org/record/533996?ln=en>, 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”, <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>; 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”, <https://www.refworld.org/legal/general/cedaw/2010/en/77255>, paragraph 32; United Nations (2011), “Guiding Principles on Business and Human Rights”, [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf), principle 25; Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), [https://www.ciel.org/wp-content/uploads/2015/05/Maastricht\\_ETO\\_Principles\\_21Oct11.pdf](https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf), paragraph 37; Maastricht Principles on the Human Rights of Future Generations (2023), <https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>, paragraph 30

<sup>24</sup> See Margaretha Wewerinke-Singh (2019). Remedies for Human Rights Violations Caused by Climate Change. *Climate Law* 9(3). e224-2243. 10.1163/18786561-00903005

<sup>25</sup> United Nations Declaration on the Rights of Indigenous Peoples, Article 28.

**extraterritorially,<sup>26</sup> is fundamental to the obligation to provide remedy.<sup>27</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, are relevant normative foundations for those seeking redress in the context of economic and non-economic loss and damage linked to climate change. Remedy for victims of human rights abuses or harm can only be effective when it entails both access to justice and substantive redress (also known as reparations). 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>28</sup> (hereafter: the UN Basic Guidelines) define substantive redress according to the following typology: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

Restitution can be defined as restoring the victim 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 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 is particularly relevant 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.

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<sup>26</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), [https://www.ciel.org/wp-content/uploads/2015/05/Maastricht\\_ETO\\_Principles\\_21Oct11.pdf](https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf).

<sup>27</sup> Human Rights Committee (2004), “General Comment No. 31 (80), The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, <https://digitallibrary.un.org/record/533996?ln=en>, 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”, <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>.

<sup>28</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”, <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>.

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. Providing remedy to 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>29</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.

**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>30</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>31</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,<sup>32</sup> the Committee on the

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<sup>29</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 via <https://www.carbonbrief.org/analysis-global-co2-emissions-from-fossil-fuels-hit-record-high-in-2022/>.

<sup>30</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”. <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/statements/2023-11-13-HC-Open-Letter-COP28.pdf>

<sup>31</sup> Office of the United Nations High Commissioner for Human Rights (2023), “Human Rights and Loss and Damage. Key messages.” <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf>.

<sup>32</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, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/crcgc26-general-comment-no-26-2023-childrens-rights>.



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, compensation and rehabilitation.” 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”.

## Failure to prevent and redress harm

**Despite the UNFCCC objective to “achieve [...] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”<sup>33</sup>, and States’ legal obligations under international human rights law to tackle the climate crisis, they have failed to do so.<sup>34</sup>** A core principle of international environmental law is the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), which entails that higher income States with historical and large cumulative emissions have to take the lead in combating climate change and its adverse effects. Highly industrialized, higher income countries are responsible for the majority of excess emissions, with research quantifying national responsibility for climate damages demonstrating that countries classified as ‘Annex I’ States under the UNFCCC are responsible for 90% of the national overshoot of fair shares in the context of the 350 ppm planetary boundary.<sup>35</sup> Allocating the responsibility of emissions under colonial rule to colonial powers further increases their historic responsibility.<sup>36</sup> Additionally, States have failed to provide the necessary resources for climate adaptation.<sup>37</sup> As described above, the failure to curb emissions and guarantee effective adaptation amounts to a failure to prevent and reduce climate harm or loss and damage, and those affected are entitled to remedy.

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<sup>33</sup> United Nations Framework Convention on Climate Change, 1992, Art.2, [https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf)

<sup>34</sup> Despite the Intergovernmental Panel on Climate Change’s unequivocal evidence that global emissions have to be cut by 45% by the end of this decade compared to 2010 levels to limit warming to 1.5°C, an essential limit to avoid catastrophic climate damage, the United Nations Framework Convention on Climate Change synthesis report of Nationally Determined Contributions under the Paris Agreement demonstrates that Greenhouse Gas emissions are set to increase by almost 9% by 2030, compared to 2010 levels. See United Nations Framework Convention on Climate Change (2023), “Nationally determined contributions under the Paris Agreement Synthesis Report by the Secretariat”. [https://unfccc.int/sites/default/files/resource/cma2023\\_12.pdf](https://unfccc.int/sites/default/files/resource/cma2023_12.pdf).)

<sup>35</sup> Hickel, Jason. (2020). Quantifying national responsibility for climate breakdown: an equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary. *The Lancet. Planetary health*. 4. e399-e404. 10.1016/S2542-5196(20)30196-0.

<sup>36</sup> Carbon Brief (2023), “Revealed: How colonial rule radically shifts historical responsibility for climate change”, accessed on 9.1.2024 via <https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change/>

<sup>37</sup> The adaptation needs in developing countries are 10-18 times bigger than public finance flows, with a current adaptation gap that is estimated at US\$194-366 billion per year. See United Nations Environment Programme (2023), “Adaptation Gap Report 2023”, <https://www.unep.org/resources/adaptation-gap-report-2023>.

**Over the three decades since the adoption of the 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 Paris Agreement established action to address loss and damage as a third pillar of climate action (Article 8 of the Paris Agreement), 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>38</sup>. The Loss and Damage Fund established at COP27 and operationalized at COP28 includes similar language.<sup>39</sup> While the inclusion of this article may limit the interpretation of Article 8 of the Paris Agreement and the Loss and Damage Fund, it does not limit the application of long-standing State obligations under international law<sup>40</sup>, including the obligations to ensure access to effective remedy, which, as explained above, includes compensation.<sup>41</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 of the Loss and Damage Fund 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>42</sup> These include a lack of strong guarantees that there will be meaningful and effective public participation and access to information in the context of the fund’s activities and decision-making, with

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<sup>38</sup>Sethi, Nitin (2015), “US pressure tactics work, clause excluding compensation option retained”, accessed on 9.1.2024 via [https://www.business-standard.com/article/current-affairs/us-pressure-tactics-work-clause-excluding-compensation-option-retained-115121200365\\_1.html](https://www.business-standard.com/article/current-affairs/us-pressure-tactics-work-clause-excluding-compensation-option-retained-115121200365_1.html).

<sup>39</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. [https://unfccc.int/sites/default/files/resource/cp2023\\_L01\\_cma2023\\_L01E.pdf](https://unfccc.int/sites/default/files/resource/cp2023_L01_cma2023_L01E.pdf).

<sup>40</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 via [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en)

<sup>41</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, <https://drive.google.com/file/d/1JZobSwUmDTTrQXargSZHIRJZvTIEtc8/view>.

<sup>42</sup> Center for International Environmental Law (upcoming, February 2024), “Promoting Human Rights in Climate Action: Report from the Dubai Climate Conference (COP28)”.

decisions regarding these fundamental aspects having been left to the Board, and a reliance on the environmental and social safeguards and grievance and redress mechanisms of implementing agencies rather than tasking the Board to develop a strong, human rights-based and fit for purpose framework that will apply to all activities of the Loss and Damage Fund. The current dependence on voluntary contributions and the lack of explicit references to human rights in the fund's Governing Instrument make it unfit to fulfill the obligation to provide effective remedy, and as long as these issues are not addressed will limit its ability to function at the scale required and to reach those in the most vulnerable situations.

**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>43</sup> It will be crucial for States to ensure that any future steps taken under the UNFCCC address the shortcomings mentioned above, while considering complementary and comprehensive actions at the local, national, regional and global level to realize effective remedy for those affected by the climate crisis.

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<sup>43</sup> AIDA, La Ruta Del Clima, CIEL, 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, <https://drive.google.com/file/d/1JZobSwUmDTTrQXargSZHIRJZvTIEtc8/view>.

## **Box: Reparations in practice, foundational guidance**

**Numerous international arrangements and funds have been established to create legal frameworks and instruments for redress for human rights and environmental harm, which can provide foundational guidance in relation to arrangements States could consider to deliver climate reparations.** In this chapter, we provide examples of such arrangements with a focus on compensation mechanisms and truth commissions.

### **Compensation funds**

According to the International Law Commission's (ILC) "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities" all efforts should be made for the establishment of international agreements, including funds, where those agreements would provide effective arrangements for compensation and other remedies for harm suffered.<sup>44</sup> This has been applied in cases of both environmental and non-environmental harm, leading to the establishment of international mechanisms to provide transnational reparations. Below are two examples of such funds that could usefully provide guidance in the context of climate harm: the UN Compensation Commission (UNCC), and the International Oil Pollution Compensation Funds (IOPC Funds).

#### **UN Compensation Commission (UNCC)**

The UNCC was established in the aftermath of the 1990-1991 Gulf War, when Iraq was held liable for breach of International Law, resulting from its invasion of Kuwait. UN Security Council (UNSC) Resolution 678<sup>45</sup> held that Iraq is liable for "any loss, damage and injury arising in regard to Kuwait and third States, and their nationals and corporations" and established the UNCC as a subsidiary organ to the UN Security Council, to award compensation for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations". The UNCC consisted of a Governing Council, in charge of establishing guidelines on policy matters and approving commissioner's recommendations, the Commission, verifying validity of claims, evaluating losses, assessing payment and resolving disputed claims, and a Secretariat. Claimants were individuals and corporations, submitting claims through governments or through alternative parties in case not possible (e.g. through UNHCR). A total of 52.4 billion USD was awarded to approximately 1.5 million claimants, including for environmental damages (5.3bn USD).<sup>46</sup> The funds to pay for compensation were derived from a share of proceeds of Iraq's petroleum export, which could serve as an interesting precedent in the context of revenues for climate reparations based on the polluter pays principle. On 31 December 2022, the commission was closed after the

UNCC's Governing Council declared that the Government of Iraq had met its international obligation to compensate all claimants awarded compensation by the commission.<sup>47</sup>

### International Oil Pollution Compensation Funds (IOPC Funds)

After a major oil spill in 1967 in the UK exposed the absence of an international framework on liability and compensation in the context of oil spills, several steps were taken to establish such a framework<sup>48</sup> that now includes the International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention), together with the Protocol of 2003 to the 1992 Fund Convention (Supplementary Fund Protocol)<sup>49</sup>. IOPC Funds have provided financial compensation for oil pollution damage in Member States.<sup>50</sup> Individuals and companies can claim compensation for damages that might have occurred due to oil spills from tankers, and the resources for compensation under the 1992 Fund are financed by oil companies. All companies in Member States receiving more than 150,000 tonnes of oil by sea must contribute, and the contribution is based on the quantity of oil transported and received.<sup>51</sup> Since the Funds' establishment, 150 incidents have been addressed.<sup>52</sup>

### Truth Commissions

Truth Commissions (TCs) are forms of transitional justice. They have been defined as “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or

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<sup>44</sup> International Law Commission (2006). “Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries.” [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_10\\_2006.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf), Principle 7.

<sup>45</sup> United Nations Security Council (1991), “Resolution 687 (1991), UN Doc. S/Res/687”, <https://www.un.org/depts/unmovic/documents/687.pdf>.

<sup>46</sup> UN Compensation Commission, “Claims”, accessed on 12.1.2024 via <https://uncc.ch/claims>.

<sup>47</sup> United Nations News (2022), “Closure of the UN Compensation Commission” accessed on 12.1.2024 via <https://www.ungeneva.org/en/news-media/press-release/2022/12/closure-united-nations-compensation-commission>.

<sup>48</sup> Initially through the Civil Liability Convention (1969) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971), which were de facto replaced by the more recent conventions.

<sup>49</sup> International Oil Pollution Compensation Funds, “About Us - Legal Framework”, accessed on 7.1.2024 via <https://iopcfunds.org/about-us/legal-framework/>

<sup>50</sup> There are currently 121 State Parties to the 1992 Fund Convention and 32 State Parties to the Supplementary Fund Protocol. See International Oil Pollution Compensation Funds, “About Us - Membership”, accessed on 12.1.2024 via <https://iopcfunds.org/about-us/membership>.

<sup>51</sup> International Oil Pollution Compensation Funds (2018), “Guidelines for presenting claims for environmental damage”. [https://iopcfunds.org/wp-content/uploads/2018/12/IOPC\\_Environmental\\_Guidelines\\_ENGLISH\\_2018\\_WEB\\_01.pdf](https://iopcfunds.org/wp-content/uploads/2018/12/IOPC_Environmental_Guidelines_ENGLISH_2018_WEB_01.pdf)

<sup>52</sup> International Oil Pollution Compensation Funds, “About Us - Funds Overview”, accessed on 7.1.2024 via <https://iopcfunds.org/about-us/>.

humanitarian law, usually committed over a number of years”.<sup>53</sup> The object of their inquiry (a pattern of human rights violations, rather than a specific event) distinguishes TCs from other commissions of inquiry. Their temporary character distinguishes TCs from many national human rights commissions and other national institutions for the promotion and protection of human rights, which are permanent monitoring and enforcement bodies. TCs are established by national authorities, generally during a political transition. They take a victim-centered approach and conclude their work with a final report containing findings of fact and recommendations.<sup>54</sup> The proper establishment and functioning of a truth commission is in itself a form of reparation.<sup>55</sup> Historically, TCs have focused on uncovering the truth about civil and political rights violations and gross violations of international law but there is growing attention to the need for TCs to also address economic, social and cultural rights, violations of which underpin situations of conflict and if not addressed in a post-conflict situation, are likely to lead to renewed tensions and potentially further conflict and human rights violations.

### **Truth and Reconciliation Commission of Canada**

One example of a TC that was set up with a mandate to include economic, social and cultural rights and the rights of Indigenous Peoples is Canada’s Truth and Reconciliation Commission (TRC).<sup>56</sup> It was established to “contribute to truth, healing and reconciliation” as part of a legal settlement with survivors of the government-funded and church-run Indian Residential Schools (IRS). For over a century, more than 150,000 First Nations, Métis and Inuit children were forcibly taken from their families and communities to attend these institutions. The Settlement Agreement includes five different elements to address the legacy of IRS: 1) compensation in the form of a Common Experience Payment (CEP) for all eligible former students of Indian Residential Schools; 2) an Independent Assessment Process (IAP) for claims of sexual or serious physical abuse; 3) measures to support healing such as the IRS Resolution Health Support Program and an endowment to the Aboriginal Healing

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<sup>53</sup> Orentlicher, Diane, (2005), “Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Addendum to the Report of the independent expert to update the Set of principles to combat impunity”, [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=E/cn.4/2005/102/Add.1](https://ap.ohchr.org/documents/dpage_e.aspx?si=E/cn.4/2005/102/Add.1), page 6.

<sup>54</sup> United Nations Secretary General (2004), “The rule of law and transitional justice in conflict and post-conflict societies <https://digitallibrary.un.org/record/527647?ln=en>, paragraph 50; .

<sup>55</sup> For more information on the effective establishment and operation of truth commissions, see Amnesty International (2007), “Truth, justice and reparation: Establishing an effective truth commission”, <https://www.amnesty.org/en/wp-content/uploads/2021/08/pol300092007en.pdf>; Amnesty International, (2007), “Checklist for the establishment of an effective truth commission”, <https://www.amnesty.org/en/documents/pol30/020/2007/en>. Amnesty International (2010), “Commissioning Justice: Truth commissions and criminal justice”, <https://www.amnesty.org/en/documents/POL30/004/2010/en/>

<sup>56</sup> Government of Canada (2022), “Truth and Reconciliation Commission of Canada”, accessed on 12.1.24. via <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525>.

Foundation; 4) commemorative activities and 5) the establishment of a TRC.<sup>57</sup> The TRC made 94 recommendations that include a range of judicial, policy and budgetary measures to provide redress and guarantee non-repetition.<sup>58</sup> Actions taken as a result include a formal apology, compensation payments and funding for commemoration, health and healing projects and a public information programme.<sup>59 60</sup>

### Community-based truth commissions

Another type of restorative justice has also emerged in the form of community-based truth commissions (CBTCs). Although heavily influenced by more traditional truth commissions, these ‘unofficial truth projects’ have considerable differences: they are community driven, and as such, they are not state sanctioned or funded, they are not established by statute and do not involve the state as an official party to the proceedings. While traditional TCs are usually set up in post-conflict situations, CBTCs are established in non-conflict situations to transform communities and to deal with structural and social violence and injustice at a community and local level and often feed into and inspire campaigns for social and economic justice. They focus on both civil and political rights and economic, social and cultural rights, although human rights are not always explicitly defined in their mandate.<sup>61</sup>

Several such initiatives have been set up in various countries including the USA and the UK, including some that use the model to address poverty (such as the Poverty Truth Commissions in the UK). They work in similar ways to TCs, by gathering testimonies (written and oral), hosting hearings (open and closed), producing research and reports documenting experiences; and making recommendations for policy change/actions. They contribute to justice in several ways, including facilitating the exercise of the right to truth and providing a platform for community members to be heard and acknowledged;

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<sup>57</sup> Government of Canada (2021), “The Indian Residential Schools Settlement Agreement” accessed 12.1.24. via <https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074>.

<sup>58</sup> Government of Canada (2024), “Truth and Reconciliation Commission of Canada: Calls to Action” accessed 12.1.24. via [https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls\\_to\\_Action\\_English2.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf)

<sup>59</sup> Government of Canada (2021), “The Indian Residential Schools Settlement Agreement” accessed 12.1.24. via <https://www.rcaanc-cirnac.gc.ca/eng/1100100015576/1571581687074>.

<sup>60</sup> It should be noted that many Indigenous Peoples in Canada believe the recommendations cannot guarantee non-repetition in the circumstances of ongoing harm from discrimination and colonization which they continue to face in Canada. For information on the implementation of the recommendations see also Government of Canada (2023), “Fourth Annual Report Pursuant to Section 10 of the Department of Crown-Indigenous Relations and Northern Affairs Act, Statutes of Canada, Chapter 29, 2019, which provides <https://www.rcaanc-cirnac.gc.ca/eng/1701201728842/1701201753199#sec3>.

<sup>61</sup> Cahill-Ripley, Amanda, and Graham Luke David. (2021). Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice. *Journal of Human Rights Practice*, 13(2), e225–e249, <https://doi.org/10.1093/jhuman/huab021>.

they use moral persuasion to drive change, through relationship building between rights holders and policy makers; they facilitate broad participation at the community level; they document and store data on violations; they contribute to wider movements for social change in the political process by highlighting policy failures; and they have the potential to feed into international accountability mechanisms, such as human rights treaty bodies.<sup>62</sup>

### 3. Human rights- and equity-based approaches to address loss and damage

**In addition to the right to remedy, other human rights obligations are key to ensure that approaches to address loss and damage reach communities and groups that are facing intersecting forms of discrimination and that they meet their needs and respect, protect and promote their human rights. All mechanisms and instruments established with the aim of addressing loss and damage or climate harm, including the Loss and Damage Fund, should be guided by human rights principles and standards.** This chapter summarizes relevant human rights principles and what they mean in terms of concrete implementation in the context of addressing loss and damage.

#### Remedy

**The right to remedy does not only serve as a legal basis for determining State duties, signaling the need to move from a voluntary approach towards responsibilities, but also brings in the element of access to justice as key to meaningfully redressing climate harm,** which entails removing barriers hindering access to justice, which can be regulatory, social, economic, and procedural, using an intersectional approach<sup>63</sup> and paying particular attention to barriers faced by children and

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<sup>62</sup> Cahill-Ripley, Amanda, and Graham Luke David. (2021). Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice. *Journal of Human Rights Practice*, 13(2), e225–e249, <https://doi.org/10.1093/jhuman/huab021>.

<sup>63</sup> Indicatively see Kaijser, Anna, and Kronsell, Annica. (2014). Climate change through the lens of intersectionality. *Environmental Politics*, 23(3), e417–e433, <https://doi.org/10.1080/09644016.2013.835203>; United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (2023), “Information Note on Climate Change and the Guiding Principles on Business and Human Rights, <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>, paragraph 24; With regard to Indigenous and Tribal Peoples, States have the obligation to establish and offer appropriate proceedings that provide a real possibility for the indigenous and tribal communities to be able to defend their rights and exercise effective control over their territory. See also Inter-American Court of Human Rights (2015), “Kaliña and Lokono Peoples v. Suriname, Judgment of November 25, 2015: Merits, Reparations and Costs”, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_309\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf), paragraph 240.



youth.<sup>64</sup> It also entails measures to take away the burden of proof from the victim by requiring the respondent State to prove lack of causation and/or enabling access to attribution science, for which there is precedent in environmental matters.<sup>65</sup>

**The remedy framework as set out by the UN Basic Guidelines<sup>66</sup> can serve as important guidance for how to design and implement approaches to address loss and damage. By building on the diverse aspects of redress as put forward by the framework, namely restitution, compensation, rehabilitation, and satisfaction, it can help to go beyond a narrow approach of addressing economic and infrastructural damage towards remedying all types of harm, including non-economic loss and damage, and by utilizing the wide spectrum of redress, including compensation.**

Lastly, by including an obligation of non-repetition, using the remedy lens ensures that the inextricable link between causing and redressing harm will not be neglected, meaning that no State or corporation can claim to have met its obligations or responsibilities under international law regarding the right to remedy in the context of climate harm, without curbing emissions in line with the principle of CBDR-RC and with the objective of keeping warming limited to 1.5°C. Indigenous Peoples have long reiterated the importance of averting loss and damage first and foremost, as certain losses and damages cannot be compensated for, especially those that relate to loss of territory and ecosystems as they are inextricably linked to cultural and spiritual heritage.<sup>67</sup> Additionally, the duty to offer appropriate assurances and guarantees of non-repetition can necessitate significant legal and regulatory reforms, and also reinforces procedural obligations to ‘provide information about the risks and consequences of climate change while ensuring the rights of individuals and communities to participate meaningfully in the design and implementation of responses to climate change’.<sup>68</sup>

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<sup>64</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” <https://www.ohchr.org/en/documents/general-comments-and-recommendations/crcgc26-general-comment-no-26-2023-childrens-rights>.

<sup>65</sup> Center for International Environmental Law, upcoming submission on climate reparations to the International Court of Justice in relation to the request for an advisory opinion on the obligations of States with respect to climate change, expected March 2024.

<sup>66</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”, <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>.

<sup>67</sup> International Indigenous Peoples Forum on Climate Change (2023), “Position of Indigenous Peoples on Transitional Committee Co-Chairs’ Proposal for TC5”.

<sup>68</sup> Wewerinke-Singh, Margaretha. (2019). State Responsibility, Climate Change and Human Rights under International Law, Hart Publishing, page 136.

## 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, to ensure that any response to loss and damage or reparations programs, from national approaches to international mechanisms, fits the needs of affected communities and respects, protects and promotes human rights.** 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.<sup>69</sup> 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).

## Non-discrimination, substantive equality and intersectionality

**All responses to loss and damage need to be non-discriminatory, inclusive, intersectional, gender-responsive, and advance substantive equality for individuals who are already marginalized, as well as intergenerational justice.** As clarified by the UN 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>70</sup> By way of example, responses related to labor could lead to exclusion of people working in the informal sector,<sup>71</sup> often people living in poverty.<sup>72</sup> Persons living with disabilities<sup>73</sup> and older persons<sup>74</sup> are often disproportionately affected by climate hazards, and among the least able to

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<sup>69</sup> In the context of the Loss and Damage Fund, it is essential that strong and comprehensive participation modalities are established at the level of the Board, and in the context of planning, design and implementation of the Fund's activities.

<sup>70</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), <https://digitallibrary.un.org/record/659980>, paragraph 8.

<sup>71</sup> Amnesty International, (2022), “Pacific: Transgender Rights Progress, but much more needs to be done”. <https://www.amnesty.org/fr/wp-content/uploads/2022/05/ASA1856132022ENGLISH.pdf>

<sup>72</sup> International Labor Organization, “More than 60 per cent of the world's employed population are in the informal economy”, accessed on 8.1.2024 via [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_627189/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang--en/index.htm).

<sup>73</sup> Office of the United Nations High Commissioner for Human Rights (2020), “Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change”. <https://documents.un.org/doc/undoc/gen/g20/097/56/pdf/g2009756.pdf?token=ImMkRdSk22tjEiLkYg&fe=true>.

<sup>74</sup> For instance in British Columbia, Canada in 2021, 595 people died from heat-related deaths over a five day period, most of whom were over 70 years old and who died in their homes. See British Columbia Coroners' Service, (2021) “BC Coroners Service (BCCS) Heat-Related Deaths – Knowledge Update”, accessed 12.1.24. via [https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/statistical/heat\\_related\\_deaths\\_in\\_bc\\_knowledge\\_update.pdf](https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/statistical/heat_related_deaths_in_bc_knowledge_update.pdf).

access warning systems and emergency support,<sup>75</sup> and the way entities such as ‘households’ are described (e.g. in a heteronormative way) could lead to exclusion of relief for LGBTQI+ individuals and couples.<sup>76</sup> Children and young people’s right to education can be severely disrupted by climate impacts, if school buildings are damaged, or families are displaced.<sup>77</sup> Consideration must also be given to the specific policies and practices that are needed to ensure appropriate security and remedies to violence that may occur, including gender-based violence, in the aftermath of sudden onset climate hazards such as cyclones and in temporary shelters and when people are displaced.<sup>78</sup> These examples demonstrate how the principle of non-discrimination, which the UN Basic Guidelines reinforce in the context of remedy and reparations<sup>79</sup>, entails that responses to loss and damage are targeted and 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>80</sup>

**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>81</sup>

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<sup>75</sup> Global Age Watch (2015), “Building disaster resilience of older people”, <https://www.helpage.org/silo/files/building-disaster-resilience-of-older-people.pdf>

<sup>76</sup> Oxfam (2018). “Down By The River”. [https://www.edgeeffect.org/wp-content/uploads/2018/02/Down-By-The-River\\_Web.pdf](https://www.edgeeffect.org/wp-content/uploads/2018/02/Down-By-The-River_Web.pdf)

<sup>77</sup> United Nations Environmental Programme (2020), “The impact of climate displacement on the right to education”, <https://unesdoc.unesco.org/ark:/48223/pf0000374966>.

<sup>78</sup> United Nations Women (2022), “Tackling violence against women and girls in the context of climate change”. <https://www.unwomen.org/sites/default/files/2022-03/Tackling-violence-against-women-and-girls-in-the-context-of-climate-change-en.pdf>.

<sup>79</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”, <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>.

<sup>80</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>81</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)”, [https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no37-2018-gender-related-paragraph-31\(a\)](https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no37-2018-gender-related-paragraph-31(a)).

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

Finance needs to address loss and damage in developing countries have been estimated to amount to hundreds of billions of dollars.<sup>82</sup> However, 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. 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, 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, a Climate Damages Tax, can ensure finance for addressing loss and damage is available at the scale required.<sup>83</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. 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-concessional.<sup>84</sup> This is highly problematic as 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 adaptation,<sup>85</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**

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<sup>82</sup> Loss and Damage Collaboration & Heinrich Böll Stiftung, Washington, DC, (2023) The Loss and Damage Finance Landscape. [https://us.boell.org/sites/default/files/2023-05/the\\_loss\\_and\\_damage\\_finance\\_landscape\\_hbf\\_ldc\\_15052023.pdf](https://us.boell.org/sites/default/files/2023-05/the_loss_and_damage_finance_landscape_hbf_ldc_15052023.pdf).

<sup>83</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”, <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/StatementLossAndDamages.docx>; Sharma-Khushal, Sindra et al (2022), “Loss and Damage Finance Facility: Why and How”, [https://us.boell.org/sites/default/files/2022-05/The%20Loss%20and%20Damage%20Finance%20Facility%20webversion\\_a%20discussion%20paper.pdf](https://us.boell.org/sites/default/files/2022-05/The%20Loss%20and%20Damage%20Finance%20Facility%20webversion_a%20discussion%20paper.pdf); Stamp Out Poverty (2018), “The Climate Damages Tax: A guide to what it is and how it works”, <https://www.stampoutpoverty.org/the-climate-damages-tax-a-guide-to-what-it-is-and-how-it-works/>.

<sup>84</sup> Oxfam (2022). “Climate finance short-changed. The real value of the \$100 billion commitment in 2019–20”, <https://oxfamilibrary.openrepository.com/bitstream/handle/10.>

<sup>85</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.

be grants-based and primarily public, including through taxes and levies for 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>86</sup>

## Social protection

Over half of the world's population - 4.1 billion people - are not protected by any social protection measure other than healthcare, rising to over 80% in Africa.<sup>87</sup> As stated by OHCHR, “the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their human rights.”<sup>88</sup> Climate-related loss and damage is creating such circumstances. Both in the face of slow-onset climate impacts and climate hazards, social protection mechanisms - fundamental to decent work and essential to a just transition<sup>89</sup> - such as income support and employment guarantees can significantly increase the resilience of people dealing with climate impacts, protect their human rights, and prevent communities from falling into a poverty spiral.<sup>90</sup> Similarly, social protection measures ensuring access to adequate healthcare and food are crucial to protect the rights of communities at risk of climate shocks and facing loss and damage. **States urgently need to scale up and systematize universal social protection schemes that are accessible to everyone, adequate, gender-responsive, inclusive of the most marginalized, and adjusted to both slow-onset and sudden climate-related challenges<sup>91</sup>, at the national level and within the UNFCCC.** States should also support the establishment of a global

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<sup>86</sup> Debt Justice UK, Climate Action Network International et al. (2022), “The debt and climate crises: Why climate justice must include debt justice” <https://debtjustice.org.uk/wp-content/uploads/2022/10/Debt-and-the-Climate-Crisis-Briefing-October-2022-UPDATED.pdf>

<sup>87</sup> Amnesty International (2023), “Rising Prices, Growing Protests: The Case for Universal Social Protection”, <https://www.amnesty.org/en/documents/pol40/6589/2023/en/>.

<sup>88</sup> Office of the United Nations High Commissioner for Human Rights (2023), “About the right to social security and human rights: OHCHR and the right to social security”, <https://www.ohchr.org/en/social-security/about-right-social-security-and-human-rights>

<sup>89</sup> International Trade Union Confederation, (2018) “Economic and Social Policy Brief: The Role of Social Protection in a Just Transition”, [https://www.ituc-csi.org/IMG/pdf/role\\_of\\_social\\_protection\\_in\\_a\\_just\\_transition\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/role_of_social_protection_in_a_just_transition_en.pdf).

<sup>90</sup> ActionAid (2021), “Avoiding The Climate Poverty Spiral: Social protection to address climate-induced loss & damage”, [https://actionaid.org/sites/default/files/publications/Avoiding%20the%20climate%20poverty%20spiral\\_0.pdf](https://actionaid.org/sites/default/files/publications/Avoiding%20the%20climate%20poverty%20spiral_0.pdf).

<sup>91</sup> ActionAid (2021), “Avoiding The Climate Poverty Spiral: Social protection to address climate-induced loss & damage”, [https://actionaid.org/sites/default/files/publications/Avoiding%20the%20climate%20poverty%20spiral\\_0.pdf](https://actionaid.org/sites/default/files/publications/Avoiding%20the%20climate%20poverty%20spiral_0.pdf).

fund for social protection, as proposed by the UN Special Rapporteur on Extreme Poverty and Human Rights, the UN Secretary General and the International Labor Organization (ILO).<sup>92</sup>

## Responses to climate-induced displacement

Climate-induced displacement is a form of loss and damage affecting human rights. **All States must establish mechanisms to protect the human rights of people who have been displaced by the impacts of climate change, internally and across borders. States most responsible for climate change must accept their collective responsibility to provide a remedy to displaced persons.** This includes accepting and integrating in their territory people forced to move on account of climate change and cooperating to support people who need to relocate because the place they live in is becoming uninhabitable due to climate change. States should ensure that following a genuine consultation process, affected people can re-establish themselves and maintain their collective identity and right to self-determination in a safe and adequate location that ensures all their human rights are guaranteed. Finally, they should cooperate to ensure adequate resources are available to respond to human mobility in the context of climate change.<sup>93</sup>

## 4. Recommendations

In the light of this submission, Amnesty International and CIEL recommend that the UN Secretary-General addresses the following aspects in his report:

1. **The wide range of human rights harms caused by the climate crisis, and how they are disproportionately impacting communities and groups made vulnerable through historic marginalization, often subject to intersectional discrimination.**
2. **States' international legal obligations, including extraterritorial obligations, in the context of climate-related human rights harms, including as they relate to the right to remedy, and what they entail in terms of concrete pathways for redress and reparations for the wide range of human rights harms concerned, including in the context of non-economic loss and damage.**
3. **Recommendations to address the limitations of States' current approaches and pathways to addressing loss and damage under the United Nations Framework**

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<sup>92</sup> Amnesty International (2023), "Amnesty International calls for universal social protection, as overlapping crises leave hundreds of millions facing disaster", <https://www.amnesty.org/en/latest/news/2023/05/global-amnesty-international-calls-for-universal-social-protection-as-overlapping-crises-leave-hundreds-of-millions-facing-disaster/>.

<sup>93</sup> Amnesty International (2021), "Stop Burning Our Rights!" <https://www.amnesty.org/en/wp-content/uploads/2021/11/POL3034762021ENGLISH.pdf>.

**Convention on Climate Change (UNFCCC), including as they relate to its voluntary approach towards funding mechanisms and the explicit exclusion of compensation.**

- 4. Concrete recommendations for any current and future mechanisms, funds and frameworks for addressing loss and damage and/or reparations programs, based on human rights obligations and principles, including by ensuring access to information, meaningful participation and access to justice, and advancing substantive equality, and on lessons from existing international and national mechanisms for reparations.**