

All We Need is Justice: Climate Reparations and Legal Accountability for Loss and Damage.

Loss and Damage is...

The day-to-day life of the community of Toma de Agua in Chiquimula, Guatemala, who due to the drought cannot produce beans or corn to feed themselves, struggle with malnutrition, without access to drinking water.

They are the fisherwomen of Colonia 3 de Febrero, Honduras, who cannot fish because of the storms or who return without fish because of an ecosystem that no longer provides; or they are the families of Playa Cedeño suffering swells and seeing from the beach what was part of their town under the sea.

It is the Community of Cahuita and its National Park, in Costa Rica, eroded by rising sea levels, destroying its biodiversity and endangering its people and culture.

It is the struggle of communities in Puerto Rico, enduring colonization and Loss and Damage, where exclusion and gentrification take advantage of the climate vulnerability of entire communities.

It is the community of Guna Yala, in Panama, forced to relocate its people due to rising sea levels and the erosion of its islands.

It is the struggle of Afro-descendant women in La Guajira, Colombia, against mining dispossession, as they see their crops threatened by the adverse effects of climate change.

These are the thousands of women who face hurricanes or droughts every day. Facing hunger, crop failure, life in degraded ecosystems and victims of climate breakdown, suffering from the lack of water, the overburden of caring for children and their community, being victims of violence in the face of crises.

Alone in the face of the economic cost.

Alone in the face of Loss and Damage.

We come before your authority, after having visited communities in Guatemala, Honduras, El Salvador, Costa Rica, Panama, Puerto Rico and Colombia. Listening and observing, as communities fight for their dignity in the face of Loss and Damage.

Thanks to the privilege of having spoken with peasants, fisherwomen, and leaders about their experiences, it is clear to us that Loss and Damage harms our human rights.

Loss and Damage are impacts that people cannot cope with or adapt to, causing reparable damage or irreversible losses.¹ Loss and Damage can mean loss of economic and non-economic elements such as culture, traditions, languages and even being forced to leave their homes to protect their lives.²

Today we appear before the Inter-American Court of Human Rights, to ask for a clear delimitation of the legal obligations that States have in the face of Loss and Damage caused by the adverse effects of climate change, and in consideration of the human rights of the most vulnerable populations in our America.

Loss and Damage has been caused by States' violation of long-standing obligations to prevent transboundary harm and respect and protect human rights. This internationally wrongful act should oblige States to provide reparations for massive human rights violations. This implies the duty to repair Loss and Damage caused by State omissions or actions.

Climate change is caused by the direct and indirect action of human activity.³ Economic actions that have released thousands of tons of greenhouse gases into the atmosphere, generating excessive profits and benefits for certain economic sectors and countries, while externalizing the adverse effects to vulnerable populations.

Article 8 of the Paris Agreement reiterates the duty of States to address Loss and Damage, in harmony with the provisions of human rights and international law on State responsibility.⁴

The Human Rights Council (HRC) recognizes that climate change poses an existential threat⁵ and that the adverse effects of climate change have consequences for the "effective enjoyment of human rights."⁶ The continuous and incremental production and use of fossil fuels condemn us to suffer Loss and Damage that threaten our existence.

The UNFCCC in its first article recognizes that climate change generates changes in the physical environment or biota that have harmful effects on "the composition, resilience, or productivity of natural ecosystems (...), or on the functioning of socio-economic systems."⁷ These devastating effects are what we reproach and report from our territories.

¹ Koko Warner and others, 'Evidence from the Frontlines of Climate Change: Loss and Damage to Communities despite Coping and Adaptation' (United Nations University Institute for Environment and Human Security (UNU-EHS) 2012).

² Olivia Serdeczny, 'Non-Economic Loss and Damage and the Warsaw International Mechanism', *Loss and Damage from Climate Change*. (Springer 2018).

³ UN, 'UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE' Art. 1.2.

⁴ UNFCCC, 'Paris Agreement' (UNFCCC 2015) Art. 8.

⁵ 'Human Rights and Climate Change Resolution A/HRC/RES/44/7'.

⁶ 'Human Rights and Climate Change Resolution A/HRC/RES/29/15'.

⁷ UN (n 3) Art. 1.1.

The adverse effects of climate change are the result of transboundary environmental damage. The International Court of Justice has recognized the general obligation of States "to ensure that all activities under their jurisdiction and control respect the environment of other States or of other areas beyond their national control."^{8 9} This includes the obligation not to allow the use of its territory to cause harm to its inhabitants or their property "when there are serious consequences and the damage is verified by clear and convincing evidence."¹⁰

The principle of prevention, as stated by the Inter-American Court, is "the obligation of States to take measures to prevent environmental damage before it occurs, including the adoption of measures to reduce, limit, and control activities that may cause or create a risk of damage to the environment."¹¹ The International Court of Justice has pointed out that the principle of prevention is an international standard in environmental protection, especially taking into account the irreversible nature of damage to the environment and the limitations of the mechanisms for repairing damage.¹²

States have the duty to protect the atmosphere in accordance with the provisions of Resolution 76/112 of the United Nations General Assembly and its guideline, which warns against atmospheric degradation and its harmful effects on the environment and human systems.¹³ States Parties to the UNFCCC have a duty to take precautionary measures to anticipate, prevent or reduce both the causes of climate change and its adverse effects, in accordance with Article 3.3 of the UNFCCC, Human Rights and International Environmental Law.¹⁴ This duty explicitly contemplates addressing the threat of serious or irreversible damage by adopting comprehensive measures and policies that take into account economic contexts and sectors.¹⁵

Article 2 of the UNFCCC defines the preventive responsibility of States as the stabilization of "concentrations of greenhouse gases in the atmosphere at a level that

⁸ Inter-American Court of Human Rights, 'REQUEST FOR ADVISORY OPINION SUBMITTED BY THE REPUBLIC OF COLOMBIA' (2017) para 51

<https://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/27_alber_ma.pdf> accessed 17 April 2024.

⁹ International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996, ¶ 29. See also: International Court of Justice, Nuclear Test Case (Australia v. France), 1974, Dissenting Opinion of Judge de Castro; International Court of Justice, Corfu Canal Case (United Kingdom v. Albania), 1949, United Nations Conference on Environment and Development, Rio Declaration, 14 June 1992, UN Doc A/Conf.151/5/Rev.1 31 ILM 874 (1992), p. 22; Spain v. France Case of Lac Lanoux (France v. Spain), 1957, 12 RIAA 285; UNGA Res. 1629 (XVI) (1961); UNGA Res. 2849 (XXVI) (1972)

¹⁰ Trail Smelter (United States v. Canada), 1938 and 1941, Reports of International Arbitral Awards, p. 1965.

¹¹ Inter-American Court of Human Rights (n. 6) para 66.

¹² International Court of Justice, Gabcikovo-Nagymaros Project Case, Hungary v. Slovakia, 1997, p. 75.

¹³ United Nations General Assembly, '76/112. Protection of the Atmosphere'

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi2preZocyFAXWGbTABHWKCCqIQFnoECBYQAQ&url=https%3A%2F%2Fdigitallibrary.un.org%2Frecord%2F3952214%2Ffiles%2FA_RES_76_112-ES.pdf&usg=AOvVaw3ng01zeiPgHp4mcDNNtBDO&opi=89978449>.

¹⁴ UN (n 3) Art. 3.3.

¹⁵ *ibid* Art. 3.3.

prevents dangerous anthropogenic interference with the climate system."¹⁶ Stabilization had to occur in a timeframe that would allow "ecosystems to adapt naturally to climate change, ensure that food production is not threatened, and allow economic development to continue in a sustainable manner."¹⁷ This has been breached.

Atmospheric change has increased significantly from its 1990 levels.¹⁸ The IPCC in its latest report expresses with high confidence that "human-induced climate change, (...) has caused widespread adverse impacts, and related loss and damage to nature and people, beyond natural climate variability" and that "it is unequivocal that climate change has already altered human and natural systems."¹⁹

The Framework Convention on Climate Change (Art.3.1) and the Paris Agreement (Art.2.2) establish a common but differentiated responsibility among States, in reference to the duty to protect the climate system. The Framework Convention on Climate Change explicitly extends this responsibility to combat the adverse effects of climate change.²⁰

Article 63(1) of the American Convention contains a customary rule on the responsibility of States with respect to the duty to make reparation and to cease the violation.²¹ For its part, the Inter-American Court of Human Rights has established that it is a principle of international law and even a general conception of law, "that any violation of an international obligation that has caused damage entails the duty to make adequate reparation."²²

We are entitled to weather reparations.

Reparation for damage caused by a breach of an international obligation consists of *restitutio in integrum*.²³ This involves the restoration of the previous situation and the reparation of the consequences of the infringement.

International environmental and climate law does not restrict or limit the imposition of liability or climate reparations for loss and damage. On the contrary, the principles and objectives of the UNFCCC and the Paris

¹⁶ *ibid.*, Art. 2.

¹⁷ *ibid.*, Art. 2.

¹⁸ Katherine Calvin and others, '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.' (First, Intergovernmental Panel on Climate Change (IPCC) 2023) 3 <<https://www.ipcc.ch/report/ar6/syr/>> accessed 23 August 2023.

¹⁹ Intergovernmental Panel On Climate Change (IPCC), *Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (1st edn, Cambridge University Press 2023) <<https://www.cambridge.org/core/product/identifier/9781009325844/type/book>> accessed 22 January 2024 B.1 & d.5.

²⁰ UN (n 3) Art. 3.1.

²¹ 'AMERICAN CONVENTION ON HUMAN RIGHTS' <https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos.pdf> Art. 63.1.

²² *Case of Velasquez Rodriguez v. Honduras* (Inter-American Court of Human Rights).

²³ *Ibid.*

Agreement build on and complement the pre-existing obligations of states, including the fundamental human rights obligation to prevent, minimize, and remedy violations of the rights of individuals.²⁴

To comply with this obligation, States must implement mechanisms for "restitution to the state prior to the damage, restoration, compensation or payment of an economic penalty, satisfaction, guarantees of non-repetition, care for affected persons, and financial instruments to support reparation."²⁵ This involves the transfer of public financial resources from large issuers to pay reparations for Loss and Damage. We warn against the commodification of suffering caused by Loss and Damage, and the transformation of victims into consumers of financial services.

States through paragraph 51 of Decision 1/COP21, which adopts the Paris Agreement, have decided that loss and damage does not imply or give rise to "any form of legal liability or compensation".²⁶ Ignoring the principles of international law, neglecting the most vulnerable populations and exposing them to human rights violations. We ask the Inter-American Court of Human Rights to delimit the State's responsibilities for Loss and Damage caused by the violation of its obligations to prevent transboundary environmental damage and protect human rights, generating the obligation to provide climate reparations.

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²⁴ In the preamble to the Agreement, the Parties recognized that they "should respect, promote and take into account their respective human rights obligations..." Paris Agreement, pmbI. See also Cancun Agreements, para. 8 (recognizing for the first time in a UNFCCC decision that Parties must fully respect human rights in all climate actions).

²⁵ ECLAC, Escazú Agreement 2018 2018 Art. 8(3)g.

²⁶ UNFCCC, 'Decision 1/COP21' (UNFCCC 2015) para 51.