Open statement of Civil Society on the UNFCCC Loss and Damage Fund and Human Rights. This Declaration analyzes the decision and structure that has been given to the Loss and Damage Fund from a perspective of Human Rights and Justice.

Climate Justice is a political movement based on human dignity and Human Rights. Our Rights are not transactional, but the basis of State obligations and must guide climate action. The Loss and Damage Fund must provide Access to Justice and the Right to Climate Reparations. Climate impacts represent an existential crisis for our peoples and territories that threaten human dignity.

This declaration accompanies an official statement that several NGO observers have sent from COP 28 to the Inter-American Court of Human Rights. The contribution has been sent to the court in the context of the Request for Advisory Opinion of the Republic of Chile and the Republic of Colombia on “Climate Emergency and Human Rights.”

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Executive Secretary
Inter-American Court of Human Rights
San Jose Costa Rica

Dubai, December 7, 2023

Open statement from Civil Society on the UNFCCC Loss and Damage Fund and Human Rights. In the context of COP 28, we reiterate to the parties to the United Nations Convention on Climate Change (UNFCCC), that we have the right to climate reparations. This declaration is a call from civil society to the Inter-American Court of Human Rights, urging it to rule on our right to climate reparations, and regarding the obligations of States to guarantee human rights within the framework of the UNFCCC and beyond.
The international community recognizes that climate change poses unacceptable threats to the full enjoyment of human rights. Loss and damage, a concept used in international climate policy, refers to climate impacts that cannot be avoided through adaptation and mitigation measures, leading to devastating human rights harm, including, inter alia, irreparable damage or irreversible losses. Developing states have emphasized the need to recognize and address loss and damage as a central component of global climate action, while the largest emitters of greenhouse gases have persistently sought to protect themselves against the provision of reparations for the effects of the climate crisis.

Within the framework of the UNFCCC, northern States promoted the incorporation of a clause that excludes the possibility of using Article 8 of the Paris Agreement – which recognizes the need to avert, minimize and address loss and damage – as a basis for liability or compensation. Paragraph 51 clarifies that the aforementioned article “does not involve or provide a basis for any liability or compensation.” While Paragraph 51 does not recognize the claim for compensation and liability for loss and damage, this clause does not limit the general reparation rules of public international law, including international human rights law. Furthermore, human rights systems must ensure the protection of impacted communities even if the international climate regime does not.

From the beginning of its jurisprudence, the Court has recognized, when applying the American Convention, that:

> “[i]t is a principle of international law, which jurisprudence has considered “even a general conception of law”, that any breach of an international obligation has caused damage entails the duty to make adequate reparation. Reparation of the damage caused by the breach of an international obligation consists of full restitution (restitutio in integrum), which includes the reestablishment of the previous situation and reparation for the consequences of the breach and the payment of compensation for pecuniary and non-pecuniary damage, including moral damage.”

As similarly established by the Inter-American Commission, the American Declaration of the Rights and Duties of Man also ensures the “right to obtain reparations for harm suffered.”

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6 The Inter-American Commission, establishing reparations for violations of the American Declaration, has declared the state’s duty to carry out compensatory measures, such as, for example, in a 2021 decision in which it determined that the State “[p]rovide reparations...including the payment of
considerations on the American Declaration have been fundamental for the comprehensive understanding and interpretation of the human rights of the inter-American corpus juris, since "[f]or the Member States of the Organization [of American States]...the American Declaration constitutes, as relevant and in relation to the Charter of the Organization, a source of international obligations." 7

The fundamental premise of international human rights law establishes that violations of human rights imply comprehensive reparation, including in the context of transboundary impacts. When the acts and omissions of States, such as the failure to meaningfully reduce GHG emissions, leads to climate impacts linked to the violations of human rights, this triggers State responsibility, and consequently, the obligation to provide reparations for victims, which includes compensation.

Within the realm of climate governance, this should result in concrete measures to seek compensation for communities directly impacted by the crisis. In Decision 2/CMA.4, the UNFCCC established "a fund to respond to loss and damage whose mandate includes an emphasis on addressing loss and damage." 8 Although at COP 28, the Loss and Damage Fund (LDF) was operationalized, it does not have the basic elements to ensure access to justice and respect for human rights. 9

First, while there is inclusion of the same language on human rights enshrined in the Preamble of the Paris Agreement in the preamble of the decision text operationalizing the LDF, the articles of the decision text and the governing instrument have no reference to human rights. Moreover, there are no non-party seats on the Board of the Fund, including for Indigenous Peoples and/or frontline communities, their participation now limited to modalities to be decided by the Board, to invite for example, active observers, and establish consultative forums. Additionally, all mention of the fundamental principle of common and differentiated responsibilities was eliminated. It was indicated in the LDF decision text, that the "fund, for responding to loss and damage [is] based on cooperation and facilitation and [does] not involve liability or compensation," which aims to liberate countries of their obligation to provide resources for climate harm. It was further determined that funds would be provided on a voluntary basis, and the text omitted to establish any scale regarding the required financing. These decisions affect the human rights of millions of people, present and future generations.

In short, the format approved for the Fund at COP 28 distorts the common but differentiated responsibilities of States to repair the damage caused by their historical and current emissions. Therefore, we allow ourselves to present to the Court the contradictions of the current model of the LDF with the international legal obligations of States, specifically regarding the obligations to protect the human rights of communities affected by the climate crisis.

1. Measures taken to address loss and damage must be aligned with States’ obligations under international human rights law

The LDF has not included any reference to human rights in its governing instrument. The LDF must have a Human Rights approach to ensure that it is a mechanism that allows access to justice but also does not cause harm. Human Rights are not transactional elements within international climate governance processes, but rather obligations of the members of the UNFCCC. By discarding the mention of rights in the governance instrument, a vacuum is created in its implementation that puts the protection of people and communities at risk.

According to the Paris Agreement, States should, when taking action to address climate change, “respect, promote and consider their respective obligations on human rights,” especially those of local communities, Indigenous Peoples and people in vulnerable situations. According to the United Nations High Commissioner for Human Rights, international human rights law applies to loss and damage associated with the adverse effects of climate change.

Likewise, the Committee on the Rights of the Child has reiterated that the component of loss and damage constitutes the third pillar of the Paris Agreement. Furthermore, the Committee has mentioned that, from a human rights perspective, loss and damage is closely related to access to justice and the right to reparation, “including [measures such as] restitution, compensation and rehabilitation,” as well as satisfaction measures and guarantees of non-repetition. For this reason, the Paris Agreement must be internationally recognized as a human rights treaty, as has already been done in Brazil by the Supreme Federal Court.

In this sense, it is essential that decision-making regarding matters related to loss and damage by the Conference of the Parties be in dialogue and complement the regime of international human rights law. This is consistent with the principle of harmonious interpretation and systemic integration as set forth in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969). On the one hand, human rights offer concrete standards and frameworks to demand preventive and adaptive behavior from States, and on the other, human rights can offer justice and reparations to the most vulnerable and threatened populations. The global climate regime must dialogue with human rights frameworks in order to respond adequately to the loss and damage caused at a global level, promoting climate justice, and towards the consolidation of a reparation framework appropriate to the scale of climate impacts on vulnerable communities and populations.

2. Communities impacted by the climate crisis have the right to reparations


As it stands, the structure of the Loss and Damage Fund facilitates the evasion of responsibility and breaches of human rights in respect of loss and damage suffered by communities. In the prologue to the decision on the Fund, adopted at COP 28, it is expressly reiterated that said fund or its financing mechanism “does not imply responsibility or compensation.” In this sense, the structure of the fund is not based on the principle of common but differentiated responsibilities, but on the logic of voluntary donations for international support. In other words, the fund created ignores the legal responsibility of States and the right to reparations for losses and damages. This implies that the communities that are victims of loss and damage are not recognized as subjects of the right to reparation, but rather subjects of financial donations, often distributed as loans.

Loss and damage, material and immaterial, are direct impacts, and constitute one facet of human rights violations due to the climate crisis. Therefore, it is essential to frame loss and damage in terms of human rights obligations. Likewise, it is essential that it is recognized that reparation to communities that have suffered damage from climate change is an obligation provided for in the international human rights framework.

The Paris Agreement itself, has recognized in Article 8 the importance of “avoiding, minimizing and addressing loss and damage associated with the adverse effects of climate change.” In the same sense, Article 3.1 of the United Nations Framework Convention on Climate Change establishes that: “the Parties should protect the climate system for the benefit of present and future generations, on the basis of equity and in accordance with their common but differentiated responsibilities and their respective capabilities.” Meaningfully addressing loss and damage entails redress on the basis of human rights, and with a focus on equity.

The fact that the World Bank can become the administrator of the new Fund puts at risk the communities most affected by the impacts of the climate crisis to access reparation resources quickly, directly and without debt, which is critical, understanding that these are vital to cope with, and recover from, climate impacts. Although the LDF will have its own board, the World Bank is a multilateral institution that responds to the interests of its main financiers, especially the United States, which is also primarily responsible for the historic climate debt, and has opposed the recognition of the obligation to provide remedy, and the construction of a fund with binding mandates. This conflict of interest could negatively affect the operation of the Fund. Added to this is the problem of the potential dissipation or dissolution of the funds. Between transactional and administrative costs at the World Bank, intermediary agencies, and implementing institutions - affected communities are likely to receive less resources than was originally intended for them.

Also, importantly, the Loss and Damage Fund, to respond to the needs of the most marginalized communities, disproportionately affected by climate change, should guarantee broad participation and representation of these communities. Unfortunately, as has been mentioned above, there are no non-Party seats on the Fund Board for representatives of

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14 The Decision (“FCCC/CP/2023/L.1−FCCC/PA/CMA/2023/L.1) adopted at COP28, invites the World Bank to operationalize and host the FDPo as a financial intermediary fund for a provisional period of four years, subject to conditions (§20) that must be accepted (§21) and fulfilled (§22-23).”) by the World Bank.
impacted communities, and the envisioned modalities for effective participation of civil society are limited, despite the fact that there are a variety of examples already established in other mechanisms of UNFCCC financing.15

The American Convention requires States to "ensure the participation of persons subject to their jurisdiction in decision-making and policies that may affect the environment." Furthermore, in this context "States must … previously ensure access to the necessary information."16 The guarantees of public participation and access to information for decision-making on environmental matters are also enshrined in other treaties such as the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Agreement from Escazú")17 and multiple instruments of international environmental law.18

States must be urged to support and strengthen the measures taken at the global cooperation level to respond to loss and damage in line with their human rights obligations. This implies that their actions must be consistent with their responsibilities to provide reparations, and be directed towards the promotion of justice. Under this logic, resources allocated to loss and damage must be implemented in the most beneficial and rights-based way for communities. This would involve respect for the interests, autonomy and decisions of the communities, as well as for community members to actually receive the funds intended to redress the harm they have suffered in the context of the climate crisis.

3. States have the obligation to redress damage caused by their historical contributions to climate change

The IPCC has mentioned that GHG emissions vary substantially between regions in terms of total magnitude.19 In 2019, 35% of the global population lived in countries that emitted more than 9 tCO2-eq per capita, while 41% of the world population emitted less than 3 tCO2-eq per capita.20 This inequality in responsibility for the causes of climate change is reflected in the

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16 IACtHR, (2023). , for. 231.
17 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement"), arts. 6 & 7.
20 Ibid., p.5
principle of common but differentiated responsibilities and respective capacities, a principle that is part of the Paris Agreement but has not been contemplated in the Fund.

The principle of common but differentiated responsibilities establishes that States must take appropriate measures to achieve climate goals in a way that takes into account their "respective capacities, in light of different national circumstances." Thus, although all States are obliged to contribute to addressing the climate crisis, equity must be taken into account, in terms of historical greenhouse gas emissions (GHG emissions) and the financial capacity of each State. This means that mitigation measures (including adjustment of ambition and emissions cuts), adaptation measures, and measures related to the means of implementation (including financing within the climate regime), must be based on the obligation of the States to use the maximum available means and resources, with the "greatest possible ambition" to address climate change, in light of their "common but differentiated responsibilities and their respective capacities."

In this sense, it is essential to recognize that the measures taken by States with respect to loss and damage must also be compatible with their common but differentiated responsibilities and their respective capacities. The University of Manchester report on phasing out fossil fuel production pathways notes that since historically polluting states "have so far abdicated their 'common but differentiated responsibility' to rapidly reduce their emissions," they must now provide "substantial levels of financial assistance" to the poorest nations as they struggle to address climate impacts and develop their economies "without resorting to continued revenues from fossil fuel production."

The scale of loss and damage suffered grows as emissions increase. The Subsidiary Body for Implementation of the UNFCCC explains the interconnection of responsibilities between the pillars of climate action: "the choice of public policies that lead to a reduction in the impacts of climate change through mitigation and adaptation will, in turn, lead to in turn, a reduction in loss and damage. (...) The negative impacts of climate change that cause loss and damage are also linked to the ability of human systems to adapt to changes in climate." It has been estimated that the funds needed to responsibly address loss and damage may amount to between $200 billion to $400 billion annually. The Loss and Damage Fund, as structured at

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21 Paris Agreement, Article 4(3).
22 idem.
23 idem.
COP 28, does not propose any scale regarding financing nor does it formulate its governance instrument taking as reference the principle of common but differentiated responsibilities and respective capacities. The millions promised are not subject to any obligation or delivery timeline. Furthermore, the amount pledged $700 millions to the loss and damage fund at COP 28 covers less than 0.2% of what is needed annually, according to studies that have been published on this topic.28

The decision taken at COP 28 regarding the structure of the LDF creates an obstacle to access to justice and encourages structural violence, to the detriment of the communities most vulnerable to the impacts of the climate crisis, but who at the same time have the least responsibility in its causation. The structure given to the fund by the States (i) ignores the UNFCCC principle of common but differentiated responsibilities and respective capabilities; (ii) avoids (except in the preambular text) mentioning and articulating its obligations regarding Human Rights; (iii) expressly denies the right to reparation, contrary to what is established in the general principles of law, and (iv) creates a problematic model, where the perpetrators assume the role of donors, transferring the economic and procedural burden of the losses and damages to the victims, exposing them to greater vulnerability and defenselessness.

Conclusion

Considering that the obligation to provide reparation for losses and damages linked to the climate crisis – when the State has caused or contributed to these impacts and has not taken appropriate measures to prevent them – is an irrefutable, long-standing state obligation, and established under the law of State responsibility and international human rights law, we respectfully request that the Court, in its Advisory Opinion, clarify that (i) The provisions of the UNFCCC, the Paris Agreement, and the decisions adopted pursuant thereto (including the decision containing the aforementioned paragraph 51) do not limit the obligations of States to guarantee the right to an effective remedy and to provide full reparation to victims of the climate crisis; and (ii) the actions of States to establish a fund for losses and damages created within the framework of the climate regime do not presumptively discharge or satisfy the obligations of States under international human rights law. In that sense, (iii) given that the structure and financing of the Fund does not comply with minimum human rights standards, its establishment, implementation and operation does not exclude other claims for reparation of loss and damage or the need for other processes, measures or judicial or administrative mechanisms to deliver access to justice and comprehensive reparation for victims of climate impacts.

28 idem.