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Working Group on Environment & ESCR COP28 Briefing Note

ESCR-Net members Interrogating loss and damage narratives: Towards a pathway of accountability and justice

Over the years, members of ESCR-Net have continued to reaffirm that the three planetary crises of climate change, biodiversity loss and pollution reinforce each other with devastating impacts on human rights, including economic, social and cultural rights, and with very high stakes for planetary and peoples' wellbeing.

This advocacy brief is based on the mutual exchange of ESCR-Net members, particularly via the Working Group on Environment and ESCR, building on years of analysis on the realities of climate injustices and the relationship between loss and damage and human rights in asserting accountability and justice. Social movements members of ESCR-Net have affirmed that a collective approach grounded in solidarity has transformative promise in terms of building powerful action to resist the structural drivers of the intersecting global crises and to realise just and equitable recovery from the current climate catastrophe.

Realising accountability and justice amid the realities of loss and damage: Social movements speaking out on the existing and emerging challenges

The rapidly worsening climate crisis falls in the hands of the wealthy countries and corporations. The fossil-fueled and extractive business practices draw a clear picture of the historical and present responsibilities of the Global North to address the environmental crisis. However, in tackling the intersecting crises, developed countries have proven to undermine the relationships between climate change and human rights; Indigenous Peoples and their lands, territories and resources; and women's human rights and their contributions particularly through unpaid care work to the environment and natural resources. This results in the commodification of the natural environment (e.g. through carbon market mechanism) and the privatisation of public services that harm communities in order to solidify the power of the capitalists to continue their business as usual.

Climate-induced losses and damages occur when mitigation and adaptation efforts fail to address climate change. Centuries of colonialism and corporate extractivism left the Global South with a scarcity of resources and capacity to address the impacts of loss and damage, further pushing them to the forefront of climate crises. Grassroots communities are not only deprived of their capacity to deal with the impacts but also their human rights to adequate access to information, and meaningful and effective participation at different fronts of decision-making processes to avert, minimise and address loss and damage. When there is community participation, often, it is compromised by lack of transparency and accountability of States and private actors who engage in profit-oriented project interventions in the name of addressing loss and damage.

While the economic impact of loss and damage must not be undermined, the ongoing conversations must pay particular attention to the non-economic losses and damages including loss of lives, the sky-rocketing sex and gender-based violence, and most importantly the historical trauma of forced relocations and migration. In the case of Indigenous Peoples, failures of addressing the impacts of loss and damage have led to the violations of their collective rights to Free, Prior and Informed Consent (FPIC), right to self-determination, distinct identity and cultural heritage. For other frontline communities including peasants and other small-scale food producers, the failures led to violation of their human rights particularly to land and biodiversity. All these impacts go hand in hand with more rampant extreme weather events and the slow ecological destruction resulting from climate change.

In terms of engagement in decision-making processes, particularly at the national and local levels, grassroots communities find layers of challenges in following the ongoing discussions related to loss and damage due to the shrinking space for meaningful and effective participation. More importantly, instead of clear and structured mechanisms communities found rampant cases of corruption around the channelling of climate funding to support the affected communities. Complicated bureaucratic processes further hinder direct access of communities to financial resources in case they exist.

Among the crucial issues mentioned by social movements, pushback on the nexus between women's human rights and climate crises is prevalent. Yet, intersectional approach and intergenerational justice and equity in addressing loss and damage are ironically seen as contentious issues in many negotiations shaping climate ambition and actions.

The strong correlation between loss and damage and the enjoyment of human rights reaffirms the importance of the realisation of the right to a remedy for human rights violations associated with its impacts. In international human rights law, the right to a remedy is a substantive right that is well-established through both custom and treaties. Furthermore, to pave the way for just and equitable transition from the worsening impacts of loss and damage, measures taken must not only be preventive but also coercive to balance the power between the oppressed and the oppressors including through reparations that enable access to justice and accountability.

The existing and continuously emerging issues and challenges indicate that there is an urgent need to strengthen and advocate for the implementation of key principles grounded on human rights, justice and accountability when addressing the impacts of loss and damage.

Addressing loss and damage towards a pathway of accountability and justice

Addressing loss and damage involves adhering to several key principles identified by ESCR-Net members that serve as foundational guidelines in pursuing justice and accountability for frontline communities affected by harms that come along with the realities of loss and damage.

Key principles in addressing loss and damage to realise accountability and justice

- **Recognition, respect, and realisation of human rights.** As a precondition to enable meaningful changes in the collective efforts to avert, minimise, address, and compensate for the impact of loss and damage. Climate ambitions and actions must respect, protect, fulfil, and advance human rights. This includes realisation of the right to a healthy environment underpinned by many fundamental rights, particularly the collective rights of Indigenous Peoples to self-determination, and Free, Prior and Informed Consent (FPIC) and the human rights of peasants and small-scale food producers to their territories and biological diversity.
- **Meaningful and effective participation of frontline communities directly affected by the impacts of loss and damage.** Addressing loss and damage requires meaningful and effective

participation of the grassroots communities grounded on human rights along with recognition of the right to remedy and reparations to the impacts of loss and damage caused by historical emissions by the developed countries. This includes ensuring the recognition of and support to community and women-led solutions to address loss and damage.

- **Polluters pay.** Global North countries must be bound by their extraterritorial obligations, regulate their corporations, and be held accountable for their extractive and exploitative business practices focusing merely on economic growth while undermining ecological sustainability and human rights.
- **Address historical responsibility of the polluters.** Accountability of the polluters must go beyond their current business practices. Wealthy and industrialised countries must first and foremost address their historical responsibility in causing the worsening climate chaos based on the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC). Drastic cut of emissions through immediate, just and equitable phase out of fossil fuels is a precondition to address the historical responsibilities of the developed countries and their corporations.
- **Ensure gender and social justice.** Tackling the impacts of loss and damage requires recognition of the historical inequalities between men and women in all their diversities, between and within countries, and the imbalance power dynamic that lies within. Gender transformative approach in climate ambitions and actions including financing must be realised. Affirmative actions for the historically oppressed and subjugated groups must be taken to address gender inequality and social injustices.
- **Funding arrangement that is fit for purpose and accountable to the peoples.** Loss and damage funding arrangements must flow from the developed to developing countries, while ensuring direct access of communities to new, additional, public, non-debt creating and long-term financial resources at the scale needed based on community needs and priorities.
- **Addressing non-economic loss and damage.** Beyond securing adequate, public, non-debt creating funds to address loss and damage, States must as well address the non-economic impact of loss and damage and ensure the respect, protection, and fulfilment of human rights. This includes protection of the lands, territories and resources collectively owned by Indigenous Peoples, the human rights of frontline communities, peasants and other small-scale food producers.
- **Intergenerational justice and equity.** The current generation must be held accountable for the intersecting global crises. This principle clarifies that human rights of the future generations are in the hands of the current generation and the failure to preserve a livable planet is a grave intergenerational human rights violation.

Adhering to the key principles is a way forward to foster a just and equitable transition from the worsening climate crises and ensure a comprehensive approach in avert, minimise and address loss and damage. The key principles contribute to ensure access to justice and restoration of dignity for the frontline communities.

Avert, minimise and address loss and damage: What do we want from COP28 and beyond?

As part of the collective efforts to realise accountability and justice, it is evident that meaningful climate actions, or lack thereof, significantly impact human rights and the well-being of communities. The proactive efforts to avert potential harm, strategic measures to minimise loss and damage and initiatives

to address its impact are pivotal. Through the mutual exchange, ESCR-Net members highlighted some key points that addressed the question of “*What do we want from COP28 and beyond?*” in the context of averting, minimising and addressing loss and damage.

1. **Promote community-led approach and solutions.** Discussions on loss and damage must address the trend of shrinking spaces for climate and social movements, particularly grassroots communities. Direct and effective participation of grassroots movements and organisations is imperative to shape and promote meaningful solutions and approaches led by communities disproportionately impacted by loss and damage. In the context of Indigenous Peoples, States must recognise indigenous ecological/traditional knowledge as a basis for Indigenous Peoples led climate solutions.
2. **Loss and damage fund grounded on human rights.** To pursue accountability and justice, the design and operationalisation of the loss and damage fund must be grounded on human rights, particularly the collective rights of Indigenous Peoples, along with human rights of frontline communities, peasants and other small-scale food producers to their land, territories, and resources. Developed countries must stop human rights violations in mitigation and adaptation projects at all costs and continue to pay their fair share to all developing countries at the funding scale needed based on the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC).
3. **Private sector out of the loss and damage fund.** Private sector including the World Bank and other International Financial Institutions (IFIs) must be out of the loss and damage fund in the efforts to realise non-debt creating finance flow without the control of developed countries and to address the historical inequalities within and between countries in paying for losses and damages deriving from the ongoing climate colonialism.
4. **Stop illegitimate debt and bankruptcy of the Global South countries.** Beyond providing new grants instead of loans, developed countries must stop privatisation often imposed towards developing countries during debt crises. Addressing historical accountability and realising fiscal, tax and debt justice require developed countries to cancel illegitimate and unsustainable debts while ensuring that lending policies and safeguards give primacy to human rights obligations and ecosystem protection.
5. **Protect environmental, land and human rights defenders.** Environmental, land and human rights defenders, particularly those opposing the production and use of fossil fuels, continue to be increasingly targeted and killed for their work. With the worsening global crises along with the urgency to address loss and damage, it is vital for countries to take all necessary measures to protect environmental, land and human rights defenders.
6. **Reject commodification of nature.** To prevent and address loss and damage, countries must stop the continuous commodification of lands, ocean, and natural resources. Grassroots communities continue to reaffirm that carbon market mechanisms put in place in the name of tackling climate crises such as blue carbon, nature-based solutions, clean development mechanism, and REDD+ often pave the way for further human rights violations including forced relocations, and deprivation of lands, territories, and natural resources of rural and indigenous communities.
7. **Legally binding instruments on business and human rights must address climate injustices.** Corporations must be regulated to ensure just and equitable transitions from the worsening climate catastrophe. The urgency of climate crises requires legally binding instruments to hold polluters and businesses accountable for their environmental impact and respect for human rights. The legal instruments must be applicable across industries, address clear obligations of corporations particularly in drastic emission reduction targets with clear timeline. Accountability mechanisms, sanctions, fines, and legal repercussions must be established for non-compliance.

8. **Remedy and reparation grounded on accountability and justice.** Addressing loss and damage must come hand in hand with the realisation of human rights to remedy and reparation. Polluters must acknowledge their roles in contributing to the devastating consequences of climate crises, ensure prevention of further injustices and mitigate the harms suffered by frontline communities facing the impacts of loss and damage. Remedy and reparation must also include meaningful and effective participation of the affected communities in all design and implementation of measures including restoration of their identity and dignity grounded on historical accountability and justice.
9. **Provide culturally appropriate and accessible information for the frontline communities.** Countries must strengthen transparency and accountability, provide information on climate related issues that are culturally appropriate and accessible by the frontline communities directly and disproportionately impacted by the climate crisis. Information on climate financing is particularly crucial to monitor the loss and damage finance flow as well as the implementation of relevant climate policies at the national level.