

Submission in response to the call for input from the Special Rapporteur on Climate Change on: “Promotion and protection of human rights in the context of mitigation, adaptation, and financial actions to address climate change, with particular emphasis on loss and damage.”

ESCR-Net - International Network for Economic, Social and Cultural Rights connects over 280 non-governmental organizations, social movements, and advocates across more than 75 countries to build a global movement to make human rights and social justice a reality for all. Numerous network members contributed to the strategy, research, drafting, and/or reviewing of this collective ESCR-Net submission, foremost via the Environment and ESCR Working Group, with special thanks to:

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Recommendations in the submission are aimed towards addressing a cross section of the questions presented by the Rapporteur and focus primarily on loss and damage. For any questions or clarifications in relation to this submission, please email Joie Chowdhury (jchowdhury@escr-net.org)

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1. Introduction

Historical and present responsibility for the climate crisis lies with wealthy, highly industrialized countries and powerful corporate actors. Yet countries, peoples and communities, especially Indigenous Peoples and those in the Global South, who have contributed the least to the climate crisis, are not only the hardest hit in terms of loss and damage, but climate change impacts are likely to more rapidly escalate in their contexts in relation to the rest of the world. They must confront these climate impacts with limited resources due to histories of colonialism and extractivism, which contribute to increasing peoples' climate vulnerabilities and undermining their adaptive capacities, resulting in immense global inequalities. Meanwhile, countries in the Global North which have far more fiscal space and far more responsibility for climate change, are refusing to take action at the scale required and commit significant resources to loss and damage, despite the human rights obligations of international cooperation and assistance, and to provide remedy for human rights violations, which in this case would involve not preventing foreseeable human rights harm. Given existing legal duties and in light of extensive knowledge of the drivers and harms of climate change, the failure of States, especially wealthy nations, to take adequate action to reduce emissions, support people to adapt to climate change and provide redress to those whose rights have been violated as a result of loss and damage, constitutes a human rights violation.¹

International human rights bodies as well as national courts, have affirmed, in some cases with direct reference to loss and damage, that States need to protect affected individuals and communities from climate-induced human rights harm, domestically and extraterritorially.² In one example, five United Nations treaty bodies affirmed in a joint statement that “*States must cooperate in good faith in the establishment of global responses addressing loss and damage suffered by vulnerable countries.*”³ Notably, climate change detection and attribution science now more clearly links human-induced climate change with slow onset and extreme weather events, providing a firmer causal basis to establish human rights harm in the context of loss and damage.

Human dignity, accountability, remedy, participation, and cooperation are well-established human rights principles and vital to a meaningful and sustainable approach to loss and damage. In terms of the right to remedy, victims of human rights violations—including those associated with climate change—are entitled to access effective remedial mechanisms, and ultimately substantive redress,⁴ including ‘ex-ante social transformations and ex-post reparations.’⁵ It is important to emphasize that redress goes beyond finance. From a procedural standpoint, the right to a remedy might require States to take specific measures to eliminate barriers in access to justice. Substantive human rights standards ranging from the rights to food, water and sanitation, health and social security to the collective rights to land and natural resources, further strengthen the normative foundation for seeking redress in the context of loss and damage, including via litigation.

States must take urgent action at scale to address human rights harms caused by loss and damage in accordance with their international, regional and national level human rights obligations, domestic and extraterritorial. There must be policy coherence across relevant multilateral spaces whether the UNFCCC or relevant regional and international human rights bodies, to ensure consistency in shaping and implementing a human rights-based approach to loss and damage.

¹ Stop Burning our Rights, Amnesty International, 2021, p. 9, <https://www.amnesty.org/en/documents/pol30/3476/2021/en/>; Margaretha Wewerinke-Singh, Remedies for Human Rights Violations Caused by Climate Change, *Climate Law*, pp. 224-243, <https://bit.ly/3HE28YC>

² UN Special Procedures, David Richard Boyd, Safe Climate: A Report of the Special Rapporteur of Human Rights and the Environment, A/74/161, 2019, paras 65, 91 and 92; OHCHR, Frequently Asked Questions on Climate Change and Human Rights-Fact Sheet No. 38, 2021, https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf; UN Committee on Economic, Social and Cultural Rights (CESCR), Climate change and the International Covenant on Economic, Social and Cultural Rights, 8 October 2018:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>; *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (Sup. Ct. Neth. Dec. 20, 2019) (Neth.); There is need for further clarification of State obligations in the context of loss and damage and there are multiple legal initiatives in the regard including the ongoing case of Huaraz, the first loss and damage lawsuit before German courts, https://link.springer.com/chapter/10.1007/978-3-319-72026-5_20 or the efforts of the Government of Vanuatu to secure an advisory opinion from the International Court of Justice on the rights of present and future generations to be protected from climate change, <https://www.theguardian.com/world/2022/may/11/vanuatus-push-for-legal-protection-from-climate-change-wins-crucial-support>; In terms of State responsibility for transboundary environmental harm, of relevance: The Stockholm Declaration, 1972, Principles 21 and 22.

³OHCHR, 5 UN Treaty Bodies issue a joint statement on human rights and climate change, 16 September 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998>

⁴ Wewerinke-Singh, *supra* note 1.

⁵ Petra Tschakert, et al., One Thousand Ways to Experience Loss: A Systematic Analysis of Climate-Related Intangible Harm from Around the World, *Global Environmental Change*, 2019, p. 69.

II. Recommendations in relation to laws, policies and action on loss and damage

1. States must integrate human rights in decisions to avert, minimize and address loss and damage

It is essential to integrate human rights in decisions to avert, minimize and particularly address loss and damage. Within the context of the United Nations Framework Convention on Climate Change (UNFCCC), despite the establishment of various mechanisms and processes, including the Warsaw International Mechanism, the Glasgow Dialogue and the Santiago Network, there has been a conspicuous lack of concrete progress in securing sufficient redress for those affected by loss and damage. Meanwhile, as referenced above, international, regional and national human rights bodies are also grappling with how to best support individuals and populations experiencing grave human rights harm following the adverse impacts of climate change, and endeavoring to hold States accountable for their actions or inactions. The recommendations below are focused on key areas which may require technical assistance (in support of locally led efforts), and/or new, additional, needs-based, rights-compliant, gender-transformative and sustainable finance, anchored as applicable within the UNFCCC to ensure accountability, and further supported, as relevant, by the development and enforcement of norms and action beyond the UNFCCC, such as international human rights law. **In particular the recommendations call on States to, *inter alia*:**

a. Adopt a Feminist, Intersectional Approach to Designing Loss and Damage related policy and frameworks, including collecting disaggregated data and addressing data gaps

The climate crisis and consequent loss and damage disproportionately impacts those facing marginalization⁶ and exacerbates structural inequalities.⁷ To cite just one example, *countries in the Pacific have reported that climate induced disasters and displacements heighten the existing vulnerabilities of women and girls to gender based violence especially in the context of women climate refugees due to increased stress and family hardships as well as lack of space, privacy and security in emergency shelters.*⁸ Targeted attention and tailored policy responses are often vital to realizing the human rights of diverse right-holders who often experience intersecting forms of marginalization in the context of climate change impacts.⁹ The multi-layered forms of discrimination that marginalized groups experience must be systematically identified and redressed when addressing loss and damage at the international, regional, national and local levels. Human rights standards require States to ensure substantive equality and prevent and redress intersectional discrimination that individuals and communities disproportionately impacted by the climate crisis may experience in legal, political, policy, financial and institutional responses to their situation,¹⁰ including the adoption of temporary special measures¹¹ to support the most marginalized individuals and communities accessing what they need in a timely manner.

The Committee on the Elimination of Discrimination Against Women has articulated how women are disproportionately impacted by the climate crisis, highlighting intersecting forms of discrimination against, *inter alia*, women living in poverty, Indigenous women, and women belonging to ethnic, racial, religious and sexual minorities. States must urgently mainstream women's rights and gender equality across policy and action on loss and damage.

⁶ IPCC, Climate Change 2007 – Impacts, Adaptation and Vulnerability – Contribution of Working Group II to the Fourth Assessment Report of the IPCC, 2007, p. 374, https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf; Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations, UNFCCC, FCCC/SBI/2019/INF.8, 12 June 2019, https://unfccc.int/sites/default/files/resource/sbi2019_inf8.pdf

⁷ UN CEDAW Committee, General Recommendation 37 on Gender-related dimensions of disaster risk education in the context of climate change, 2018, para. 2, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_37_8642_E.pdf;

⁸ Climate Change, Disasters and Gender-Based Violence in the Pacific, UN Women, <https://www.unclearn.org/wp-content/uploads/library/unwomen701.pdf>

⁹ Anna Kaijser and Annica Kronsell, Climate change through the lens of intersectionality, Environmental Politics, 2014, p. 418

¹⁰ UN CESCR, General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights, 2009, para. 8, <https://www.refworld.org/docid/4a60961f2.html>; UN CESCR General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, 2005, <https://www.refworld.org/docid/43f3067ae.html>; UN CEDAW Committee, General Comment No. 28 on the core obligations of Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2010, para. 18, <https://www.refworld.org/docid/4d467ea72.html>

¹¹ UN CEDAW Committee, General Recommendation 37 on Gender-related dimensions of disaster risk education in the context of climate change, 2018 (CEDAW/C/GC/37), para 30.

In addition, to truly understand who is particularly marginalized or vulnerable in the context of climate impacts, States must also collect and as needed, in compliance with extraterritorial obligations, provide support for the collection of disaggregated data, to map disproportionate impacts and needs, taking a human rights approach. It is important to recall there are clear human rights-based principles to apply in guiding data collection,¹² including in relation to participation. In addition, States must also address data gaps. For example, *informal settlement residents (heavily impacted by loss and damage) are often simply "not counted" by national statistics agencies and global monitoring efforts.*¹³

b. Ensure the Rights to Self-Determination and Public Participation; Strengthen the Right to Land and Tenure Rights

Core to effectively addressing loss and damage is acknowledging and enforcing the right to self-determination, an overarching principle of international law.¹⁴ Indigenous Peoples and other peoples, including those in situations of occupation and settler-colonialism and apartheid such as in the case of the Palestinian people, have a fundamental right to shape responses to present and future loss and damage and prioritize their collective rights and well-being, as part of their right to self-determination. This includes the right to advance alternative models, practices and solutions based on care, the sustainability of life and a more harmonious co-existence with nature, including, but not limited to: permaculture, agroecology, energy sovereignty, food sovereignty, seed sovereignty, traditional farming, buen vivir, radical ecological democracy, and local economies based on community ownership of the commons, including land and water. In one relevant example, it has been asserted that *Palestinians residing in climatically vulnerable areas, as exemplified in Masafer Yatta and other communities across the Occupied Palestinian Territory, are precluded from applying basic community-based and small-scale climate change adaptation options, including basic access to their lands and natural resources, that would allow them to reduce the future scale of loss and damage, without the genuine realization of the collective right of the Palestinian people to self-determination.*¹⁵

Further, strengthening related rights such as free, prior and informed consent of Indigenous Peoples,¹⁶ a standard embedded within the right to self-determination of Indigenous Peoples,¹⁷ as well as rights to ownership of land, including coastal land, territory and resources, and tenure rights may lead to reducing vulnerability in the context of loss and damage. *Evidence increasingly demonstrates that insecure land tenure exacerbates vulnerability to natural and climate-related hazards, both directly and indirectly.*¹⁸ For instance, *one traditional approach of pastoralists to deal with water shortage has been migration to less-affected areas for the drier months.* Secure land tenure that allows flexibility of movement is needed to continue to support this kind of response.¹⁹

Similarly, the right to full and effective public participation must be guaranteed for rural and urban populations, in all decision-making in designing policy and action in relation to how loss and damage is addressed, averted and minimized, and more broadly in climate-related decision-making. In this context, it is important to address the structural barriers to women's access to participation. Also, for effective participation, the rights to information and transparency are critically important. *In rural Nepal, women from Bhaise and Satkanya villages actively engaged with their local governments for an inclusive climate adaptation plan that responds to the needs of rural and Indigenous women. With access to information, space and opportunity, women have been able to showcase and sensitize government representatives on climate change impacts and women's initiatives on the ground, resulting in commitments by their local governments to*

¹²Collective Position-Data for Economic, Social and Cultural Rights, ESCR-Net, https://www.escr-net.org/sites/default/files/attachments/collective_position_data_2022_complete_en.pdf, p. 8-9.

¹³ David Satterthwaite, *Invisibilising cities: the obsession with national statistics and international comparisons*, International Institute for Environment and Development, 25 February 2020, <https://www.iied.org/invisibilising-cities-obsession-national-statistics-international-comparisons>

¹⁴ Aureliu Cristescu, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development based on United Nations Instruments*, United Nations, 1981, available at: <https://undocs.org/pdf?symbol=en/E/CN.4/Sub.2/404/Rev.1>

¹⁵Suha Jarrar, *Adaptation Under Occupation: Climate Change Vulnerability in the Occupied Palestinian Territory*, Al-Haq, 2019, https://www.alhaq.org/cached_uploads/download/2021/07/15/climatechange2019-1626328773.pdf.

¹⁶ UN Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

¹⁷ UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Free, prior and informed consent: a human rights-based approach*, 10 August 2018, available at: <https://undocs.org/A/HRC/39/62>

¹⁸ David Mitchell and Darryn McEvoy, *Land Tenure and Climate Vulnerability*, United Nations Human Settlements Programme (UN-Habitat), 2019, p. VIII, <https://cutt.ly/SJ8iXEL>

¹⁹*Ibid*, p. 10.

*promote gender responsive climate policies to support community based climate solutions.*²⁰ Top-down solutions addressing loss and damage which are shaped without meaningful participation and consultation may result instead in heightening societal vulnerabilities to climate change in the same vein as maladaptation. For example, *the lack of consultation with local coastal communities in the Sunderbans has led to the kind of embankments in concrete being erected that may have further heightened the vulnerability of populations on the frontlines of confronting cyclones which regularly batter the region.*²¹

In terms of policies to strengthen participation, this might include *wide ratification and enforcement of the Escazú Agreement*²² *as an important step for governments to effectively meet loss and damage obligations under the Paris Agreement.* This Latin American treaty, especially in countries where the right to participation is under-recognized in national legislation,²³ is very relevant for the shaping of Nationally Determined Contributions (NDCs) and climate change commitments in the region, as it guarantees access to environmental information and public participation on environmental matters. Further, the agreement guarantees protection of environmental defenders. Considering frameworks similar to Escazu and Aarhus²⁴ across legal jurisdictions would be helpful in supporting work on loss and damage to advance effectively.

c. Strengthen Societal Support- Protect Human Rights and Environmental Defenders; Center Care; Enhance Social Protection; Invest in Public Services and Infrastructure

The escalating deadly attacks on human rights and environmental defenders are egregious in and of themselves because of the inherent value of every human life. In the context of loss and damage, communities are rendered more vulnerable and marginalized when their leaders are repeatedly targeted. For example, *in the reconstruction process of San Andres and Providencia after the passage of hurricane Iota in 2020, human rights defenders who exposed the government lack of transparency and consultation with local communities, and the misguided intentions to build a military fortress as part of the 'reconstruction efforts', faced threats to their lives.*²⁵ Across the globe, especially the Global South, States, military and private actors are complicit in targeting environment defenders with impunity. The international community can no longer ignore the rising numbers of violations against environment defenders and must urgently secure and enforce stronger protections.

Further, there is an urgent need for a commitment to centering care as a structural response to loss and harm. Care²⁶ is at the core of a feminist, regenerative society that centers human rights and planetary well-being. Climate disasters and societal inequalities disproportionately place increased needs for care on women and girls, therefore a redistribution of gendered roles and power is necessary, in addition to appropriate recognition of the social and economic value of care work. Towards societies better equipped to cope with loss and damage, and a gender-just and equitable transition away from fossil fuels which centers human rights including *inter-alia*, the right to an adequate standard of living, social protection, decent work and health care, States need to take measures to strengthen societal support. Such measures include among others: safeguarding, expanding and investing in social protection systems; as well as expanding and increasing investment in quality public services (including affordable service delivery), utilities for drinking water supply, sanitation and waste management, care work, public education and public infrastructure. Moreover, States must provide jobs training to respond to the massive loss of livelihoods caused by loss and damage as well as workers transitioning out of the fossil fuel industry. States must also counter privatization in opposition to conditions often imposed during debt crises. Such measures are indeed necessitated by States' human rights obligations in the context of

²⁰ Rural and Indigenous Women Advocating for Gender Responsive Budgeting to Tackle Climate Catastrophe, Asia Pacific Forum on Women, Law and Development, 2022, <https://apwld.org/cj-fpar-briefer-nepal/>

²¹ What the Sundarban tells us, Interview with Megnaa Mehta on the Sundarban after Cyclone Amphan, 11 June 2020, Himal South Asia, <https://www.himalmag.com/what-the-sundarban-tells-us-podcast-2020/>

²² Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean (2018)

²³ Madariaga, M., Policy brief, Observatorio Ley de Cambio Climático | Participación Ciudadana en el Proyecto de Ley Marco de Cambio Climático, 9 June 2020, <https://www.cr2.cl/policy-brief-observatorio-ley-de-cambio-climatico-participacion-ciudadana-en-el-proyecto-de-ley-marco-de-cambio-climatico/>

²⁴ The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

²⁵ Daniela Bueno, Preocupan las amenazas a líderes raizales de Providencia, El Espectador, 2 December 2021, <https://bit.ly/3HGHSiK>

²⁶ The Leap Manifesto; <https://leapmanifesto.org/en/the-leap-manifesto/>; Towards a feminist and human rights-based social pact on care, ESCR-Net, https://www.escr-net.org/sites/default/files/2-pager_socialpactoncare_en_final.pdf; Care & Climate-Understanding the Policy Intersections, A Feminist Green New Deal Coalition Brief, April 2021, Lenore Palladino & Rhiana Gunn-Wright, <http://feministgreennewdeal.com/wp-content/uploads/2021/04/FemGND-IssueBrief-Draft7-Apr15.pdf>; <https://www.congress.gov/116/bills/hres/1102/BILLS-116hres1102ih.pdf>

climate change, which include the duty to mobilize maximum available resources for the realization of economic, social and cultural rights.²⁷ In terms of social protection, there are clear national level examples that can be drawn from to strengthen social protection, including for example *the Krushak Assistance for Livelihood and Income Augmentation Scheme of Odisha*,²⁸ *India-several farmers for example reportedly received assistance following cyclone Fani. Such schemes have many challenges, yet still carry promise in terms of delivering much needed support in the face of loss and damage.*

d. Recognize the grave implications of ‘non-economic’ loss and damage, and protect related rights including cultural rights

Rights of individuals and communities are also undermined by devastating “non-economic” loss and damage (or harm which cannot be easily measured in economic terms), for example, the loss of lives, cumulative negative effects on human health and mobility, loss of community networks, access to lands and territories, cultural traditions, and Indigenous and local knowledge and science; depletion of livestock production; and damage to biodiversity and habitats. For example: *climate change threatens New Guinea’s biocultural heritage by causing local extinctions of wild foods, medicines and ritual foods, which then negatively impacts the wellbeing and cultural integrity of Indigenous Peoples.*²⁹

Non-economic loss and damage is intrinsically tied to cultural heritage and identity. For example, *in a letter sent to President Iván Duque Márquez, the Raizal community of Providencia and Santa Catalina requested that their voice be heard in the reconstruction process of the island and its future plans after Hurricane Iota in relation to traditional architectural preferences integral to preservation of their culture.*³⁰ Cultural rights under international human rights law are not a luxury. They are vital to the overall implementation of universal human rights and a critical part of the responses to many current challenges, from climate change to discrimination and poverty.³¹

What might safeguarding cultural rights in the context of loss and damage look like concretely? For example, *effective remedial measures to protect tangible and natural heritage sites have included re-designing boundaries as well as buffer zones to facilitate migration of species and supporting traditional methods to protect a site from sand encroachment.*³² In another example, *a case was brought against Shell in South Africa³³ where seismic blasting threatened to cause significant and irreparable harm to marine life, impact constitutional rights and customary rights (including customary fishing rights), and result in cultural and spiritual harm. The applicants and their legal counsel focused inter-alia on fishing as a cultural practice of the coastal communities, not only as a livelihood necessity, and the court granted an urgent interdict in the matter.* Other measures include *the legal, ethical, spiritual and scientific recognition of the inherent, inalienable rights of nature, the rights of Mother Earth, and the non-human components of the Earth system. Examples include Bolivia adopting the Universal Declaration of the Rights of Mother Earth, Ecuador articulating Nature’s Rights in its constitution, New Zealand recognizing the Whanganui River, India recognizing the Ganga and Yamuna Rivers, or Colombia recognizing the Atrato River.*³⁴

e. Follow a rights-based approach to Forced Displacement and Migration caused by Loss and Damage

Climate impacts are also forcibly displacing millions of people which then has a cascading impact on human rights, including economic, social and cultural rights. Additionally, there are those who cannot migrate because they do not

²⁷ CESR, Governments’ Obligation to Invest ‘Maximum Available Resources’ in Human Rights, May 2020, https://www.cesr.org/sites/default/files/CESR_COVID_Brief_1.pdf

²⁸ ActionAid & Rosa Luxemburg Stiftung, Avoiding the Climate Poverty Spiral: Social protection to address climate-induced loss and damage, 2021, <https://actionaid.org/publications/2021/avoiding-climate-poverty-spiral-social-protection-avoid-climate-induced-loss>

²⁹ Karen E. McNamara et al., Understanding and responding to climate-driven non-economic loss and damage in the Pacific Islands, *Climate Risk Management*, Volume 3, 2021, <https://www.sciencedirect.com/science/article/pii/S2212096321000656>

³⁰ Líderes raizales piden ser incluidos en reconstrucción de Providencia, *El Tiempo*, 24 November 2020, <https://bit.ly/3tVnKu5>

³¹ Karima Bennoune, Special Rapporteur in the field of cultural rights, Report: International legal frameworks related to climate change, culture and cultural rights, A/75/298 Annex, para 7.

³² Ibid, para 39.

³³ SUSTAINING THE WILD COAST NPC v MINISTER OF MINERAL RESOURCES AND ENERGY, 2021, Interim Interdict, CASE NO. 3491/2021, IN THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE DIVISION, GRAHAMSTOWN, <https://bit.ly/3OsWfQw> (Affidavit, Judgment and Other Papers here: <https://bit.ly/3OSgS8X>)

³⁴ Cullinan, Cormac. (2019). ‘Nature Rights’. In: Kothari et al. (eds). *The Pluriverse: A Post-Development Dictionary*. Pp. 243-246.

have the capability to do so. Involuntary immobile populations can frequently be among the most vulnerable to climate impacts. In 2020, according to estimates, direct economic loss and damage from so-called natural disaster events were assessed at US\$ 268 billion and have displaced more than 40.5 million people. There are projections of 200 million climate migrants by 2050.³⁵ *Women of Carteret Islands in Papua New Guinea might be considered among the world's first climate refugees due to climate change impacts. The forced migration reinforced the existing inequalities and women's vulnerabilities to gender-based violence. Geographical isolations and lack of access to public services have caused loss of livelihoods, an increase of infant mortality and deaths of women in the temporary camps during childbirths and from curable diseases.*³⁶ In another example, *in many parts of Guatemala, prolonged droughts have forced populations to migrate to peri-urban areas in search of work, and the situation worsens when extreme weather events hit. Recently hurricanes Eta and Iota severely impacted communities and many families had to migrate because they lost their livelihoods.*³⁷ Alongside internal displacement, the accelerating trend of global displacement related to climate impacts is increasing cross-border movements, particularly where climate change interacts with conflict and violence.³⁸

States have a human rights obligation to address forced displacement and migration caused by loss and damage. Moreover, averting and minimizing loss and damage would also entail measures to avoid or reduce the risk of forced displacement. One such measure includes enhancing safe and regular migration pathways that respect, promote and realize human rights, including labor rights, to ensure that those who live in areas where climate change is negatively impacting their human rights have the option to migrate safely and regularly. Importantly, increasing adaptive capacities minimizes the negative impacts of climate-related displacement and involuntary migration for migrants and sending and receiving areas.³⁹

While there are several relevant normative developments, including the Platform for Disaster and Displacement, Global Compact on Refugees, Global Compact on Safe, Orderly and Regular Migration, and Sendai Framework on Disaster Risk Reduction, there is an urgent need for stronger human rights protections for individuals, families, and communities, forcibly displaced by the climate crisis whether internally or across borders. States, particularly wealthy nations bearing historical responsibility and with the most available resources, must urgently address climate induced forced displacement and migration, through *inter alia*, enhanced legal protections for persons forcibly displaced by disasters and climate change, including mechanisms to accept and integrate in their territory people who cannot return to their countries due to climate change; and the rejection of militarized responses, as seen, for instance, at the borders of the United States and Europe.

f. Ensure Corporate Accountability and Stop Corporate Capture

Overall, whether in relation to mitigation, adaptation or loss and damage, transnational corporations play an outsized role in causing and profiting from the climate crisis, and consequent human rights harm, even as regular corporate human rights abuses weaken the ability of communities to cope with climate change impacts. States must effectively regulate businesses, domestically and extraterritorially⁴⁰ in line with their human rights obligations.⁴¹ Adoption of the binding

³⁵ Climate Induced Migration, Women and Gender Constituency, 2021, https://womensgenderclimate.org/wp-content/uploads/2021/10/WGC_IssueBrief_ClimateInducedMigration_EN.pdf

³⁶ Impacts on Climate Refugees of the Carterets Islands, Papua New Guinea, Asia Pacific Forum on Women, Law and Development, 2015: <https://apwld.org/wp-content/uploads/2014/12/flyer-lnwda.pdf>

³⁷ Contribución del Centro por la Justicia y el Derechos Internacional (CEJIL) y Franciscans Internacional en respuesta al llamado a contribuciones por el Relator Especial sobre los derechos de los migrantes para su informe sobre "El impacto del cambio climático y la protección de los derechos humanos de las personas migrantes" en Centroamérica, Abril 2022, <https://www.ohchr.org/sites/default/files/2022-05/cejil-franciscans-international.docx>

³⁸ UNHCR's Global Trends Report 2020, page 26, which cites IDMC and the Notre Dame Global Adaptation Index, and states that "95 per cent of all conflict displacements in 2020 occurred in countries vulnerable or highly vulnerable to climate change. Disasters can also strike populations already uprooted by conflict, forcing them to flee multiple times, as was the case with IDPs in Yemen, Syria and Somalia and refugees in Bangladesh," (<https://www.unhcr.org/60b638e37/unhcr-global-trends2020>)

³⁹ H.-O. Pörtner et al, Summary for Policymakers: Climate Change 2022: Impacts, Adaptation, and Vulnerability, IPCC, 2022, SPM.C.2.12, https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf

⁴⁰ David Boyd, Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, A/HRC/46/28, 19 January 2021, para 89(e), <https://bit.ly/3b3Y9Z9>

⁴¹ See UN OHCHR, Human Rights, Climate Change and Business: Key Messages, p. 1, 5, 7, <https://www.ohchr.org/Documents/Issues/ClimateChange/materials/KMBusiness.pdf>. See also UN Guiding Principles on Business and Human Rights, 2011, Principle 1; UN CEDAW Committee, General Recommendation 37 on Gender-related dimensions of disaster risk education in the context of climate change, 2018 (CEDAW/C/GC/37), para. 49; Relevant here is recent case, where the Hague District Court recognized the responsibility of a corporation based on the Civil Code's

treaty on business and human rights, which is currently being negotiated,⁴² is a critical step in providing a stronger normative foundation for corporate accountability.

Furthermore, it is essential to stop corporate capture of government institutions and public decision-making and its influence on driving false solutions, such as market-based schemes, through the development and enforcement of clear legal standards. It is important to recall that false solutions cut into sustainable and human rights-aligned finance flows that could provide much needed redress to communities dealing with loss and damage. Additionally, in disaster contexts, some corporations actively seek to make profit in a manner that actively harms communities already hard hit by climate impacts. For example, *a big corporation Ayala which spearheaded reconstruction efforts in the Philippines post Typhoon Haiyan was accused of harshly exploiting the residents of the island Sicogon to obtain their land to build hotels.*⁴³ Laws and policies must be framed to actively prevent such realities that worsen human rights harm in the wake of climate impacts. The primary obligation of States is to respect, protect and fulfill human rights over unrestrained economic growth and profits. Given historic responsibility for the climate crisis, corporations must also be held accountable under the do no harm requirement as well as the polluters pays principle, including in relation to transboundary harm, and to provide a fair share of the finance needed to effectively act on loss and damage.

2. Wealthy States must provide finance for loss and damage

Under international human rights law, wealthy industrialized countries must provide new, additional, needs-based, rights-compliant, predictable, and sustainable finance for loss and damage, at the scale required, in light of the legal duties of international cooperation, and to provide remedy for human rights violations--in this case the failure to prevent foreseeable human rights harm, including intersecting forms of structural discrimination rooted in legacies of colonialism, among others--and on the basis of the principles of solidarity, historical responsibility and the polluter pays. All States have extraterritorial obligations, but those with a more powerful position in the global economy, more fiscal space and more historical responsibility for climate change have a heightened obligation to provide loss and damage finance. If Global North countries continue to stonewall meaningful efforts in this regard, this would constitute a profound failure to comply with their extraterritorial human rights obligations, which require them to cooperate internationally, including through economic and technical assistance, in order to support all governments in meeting their human rights obligations.⁴⁴ The Committee on Economic, Social and Cultural Rights has affirmed⁴⁵ that “*a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so*” could constitute a breach of domestic and extraterritorial obligations under treaty law.

Wealthy nations have failed to meet even the current 100 billion USD per year commitment in climate finance under the Paris Agreement,⁴⁶ hugely insufficient in itself, and despite pledges, the proportion of finance being channeled to adaptation efforts remains very low. This very significantly affects effective responses to the climate crisis and the ability to reduce the risk of future loss and damage. It is important to recall that the estimated economic cost of loss and damage by 2030 is between 290 and 580 billion USD in developing countries alone.⁴⁷ There are also the non-economic costs to consider. Research shows that existing sources of finance including emergency humanitarian aid to support people in at least some contexts relevant for loss and damage, for example in the immediate aftermath of climate impacts, are

unwritten standard of care, holding Royal Dutch Shell accountable for the impact of their CO₂ emissions on climate change and ordered the Shell group to reduce such emissions by net 45% in 2030, compared to 2019 levels, through their corporate policy; in its ruling, the Court factored in human rights, such as Articles 2 and 8 of the ECHR, in its interpretation regarding the civil standard of care. See, The Hague District Court, *Millieudedefense et al. v. Royal Dutch Shell* (English), 26 May 2021: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339#_924824fc-f061-4321-b9ec-95e763787836.

⁴²Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>

⁴³Drew Ambrose and Khaleel Majeed, *Typhoons and Tycoons: Disaster capitalism in the Philippines*, Al Jazeera, 16 August 2018, <https://www.aljazeera.com/features/2018/8/16/typhoons-and-tycoons-disaster-capitalism-in-the-philippines>;

⁴⁴ CESR, *Governments' Obligation to Cooperate Internationally to Realize Human Rights*, June 2020, <https://www.cesr.org/sites/default/files/Issue%20Brief%202021.pdf>

⁴⁵ *Climate change and the International Covenant on Economic, Social and Cultural Rights*, Statement of the Committee on Economic, Social and Cultural Rights, United Nations, 8 October 2018, paras 5-6.

⁴⁶ Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow from 31 October to 13 November 2021, UNFCCC, FCCC/PA/CMA/2021/10/Add.1, 8 March 2022, para 44, https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf

⁴⁷ For more details, see, Heinrich-Böll-Stiftung, *Dossier: Unpacking finance for Loss and Damage, 2021*, <https://us.boell.org/en/unpacking-finance-loss-and-damage>

painfully inadequate.⁴⁸ The need for separate loss and damage finance is urgent. Notably, the UN Independent Expert on human rights and international solidarity has powerfully condemned the unwillingness of certain developed countries to develop the loss and damage agenda, particularly through extending strong financial support, as “*an acute gap in human rights-based international solidarity, demanding a substantive enhancement thereto.*”

We join civil society allies across constituencies in calls for the ‘Glasgow Dialogue’ to establish a Loss and Damage Finance Facility at COP27 in line with a climate justice-oriented approach.⁴⁹ Loss and damage finance must be structured and delivered in ways that are gender-transformative and comply with human rights, including providing public and grants-based finance in a manner directly accessible to communities and Peoples on the frontlines.⁵⁰ It is imperative to ensure the provision of finance as direct transfers rather than as loans or other non-grant instruments, which is unacceptably the case with 80% of finance delivered so far. (Of this 80%, about half has been non-concessional, which means loans were offered on ungenerous terms.)⁵¹ When not provided as direct grants, climate finance ends up adding to the fiscal stress of countries rather than supporting those most affected. This fails to meet basic human rights standards. States must also support concrete efforts towards fiscal justice, including debt and tax justice.

III: Final Reflections

Human Rights must be centered in loss and damage response mechanisms, institutions, and discussions within the UNFCCC, including the Warsaw International Mechanism, the Glasgow Dialogue and the Santiago Network. Moreover, in line with human rights obligations, States must take measures to guarantee access to effective and human rights-compliant, independent redress mechanisms to provide remedy for loss and damage, whether these are existing mechanisms at the national, regional or international levels, or as needed new mechanisms grounded in multilateral processes, for the example the Loss and Damage Finance Facility. Also, it is important to note that effective and ambitious action on mitigation and adaptation is essential to reduce the future scale of loss and damage. Decisions must advance immediate and full divestment from fossil fuels, ending all fossil fuel subsidies, and enhanced ambition and transparency in emission reduction to real zero to ensure a just and equitable transition, centering human rights, gender equality and climate justice.

In addition, States increasingly address issues relevant to loss and damage via international forums, including international financial institutions (IFIs) such as the International Monetary Fund and the World Bank. Decisions taken in these contexts have far-reaching consequences on local communities worldwide and may result in adverse human rights impacts on their lives. States must thus commit to integrating a human rights-based approach,⁵² which would include centering mandatory human rights due diligence into decision-making about funding and grants to be provided; ensuring robust and enforceable human rights safeguards, including strong liability standards and independent monitoring and accountability mechanisms; and eliminating engagement with false solutions.

In relation to Nationally Determined Contributions (NDCs) under the Paris Agreement, whether submitting new ones or updating existing ones, Parties must include a loss and damage component which centers a human rights approach. Similarly, where human rights have been mentioned in NDCs, they should be linked in the implementation phase or when updated, to measures to address, avert and minimize loss and damage, given the strong interrelationship.

As loss and damage devastates lives across regions, a human rights approach to loss and damage is important as it brings the focus back to core principles of human dignity, remedy, participation, cooperation, and accountability.

⁴⁸ Tracy Carty & Lyndsay Walsh, *Footing the bill: fair finance for loss and damage in an era of escalating climate impacts*, Oxfam, 7 June 2022, <https://www.oxfam.org/en/research/footing-bill-fair-finance-loss-and-damage-era-escalating-climate-impacts>

⁴⁹ Dr Sindra Sharma-Khushal et al., ‘Loss and Damage Finance Facility – Why and How’ Discussion Paper (PDF), CAN International and others, 2022, CAN International, <https://climatenetwork.org/resource/ldff-paper/>

⁵⁰ IIED, *Least developed countries get less than 3% of money needed to transform to face climate change*, Press release, 14 July 2021, <https://www.iied.org/least-developed-countries-get-less-3-money-needed-transform-face-climate-change#:~:text=Research%20finds%20little%20evidence%20of,research%20published%20today%20by%20IIED.>

⁵¹ Oxfam, *Climate Finance Shadow Report 2020*, p.4, <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/621066/bp-climate-finance-shadow-report-2020-201020-en.pdf>

⁵² Particularly relevant here is Maastricht Principle 15. See, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 2013, available at: https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf