**SUBMISSION FROM THE INTERNATIONAL CENTER FOR CLIMATE CHANGE AND DEVELOPMENT (ICCCAD), CENTER FOR CLIMATE JUSTICE-BANGLADESH (CCJ-B), AND THE CLIMATE LITIGATION ACCELERATOR (CLX) AT NEW YORK UNIVERSITY SCHOOL OF LAW**

1. What experiences and examples are you aware of that are being faced by particularly individuals and communities in vulnerable situations (as identified above) that have suffered loss and damage due to the adverse impacts of climate change?

The impacts experienced by individuals and communities differ if it is a sudden onset event like floods and heatwaves as opposed to slow onset events. The case of a sudden onset event like the ongoing floods in Bangladesh and North-eastern India has left a devastating trail of loss of life, livelihood, access to education, health, property, and displaced poor communities. The losses are non-economic too with the loss of land and associated cultural values. An alarming statistic is that nearly 700,000 Bangladeshis were displaced each year by natural disasters, according to the Internal Displacement Monitoring Centre. The annual number spikes during years with powerful cyclones. While the countries cope with managing these disasters which are now more frequent due to climate change, they struggle to rehabilitate these communities and compensate for the losses incurred which are unjustly borne by the individuals and communities impacted. A recent study conducted by the International Institute for Environment and Development showed that the high share of spending by female-led households - many based in the flood-prone north - is double the average of 15% because women have lower incomes than men. [[1]](#footnote-1)

In the case of slow-onset events like sea-level rise in parts of Bangladesh, it has led to increased salinity in the soil causing loss of fertility and forcing small and marginal farmers to move away from their traditional livelihood to shrimp cultivation. Slow-onset events also have devastating consequences on vulnerable ecosystems like the Sundarbans which is a large mangrove forest that stretches between India and Bangladesh. These losses to ecosystems and cultural values are irreversible and frame the experience of many of the examples of loss and damage in South Asia.[[2]](#footnote-2)

A pioneering study by ICCCAD and the International Institute for Environment and Development published in 2021 documents case studies from the frontline of communities experiencing loss and damage it chronicles how the effects of sudden and slow-onset events have cascading impacts on the lives of the vulnerable. A case study from India shows how climate change has increased heatwaves have resulted in prolonged droughts which have in turn adversely impacted women as the case study reads that under severe water-stressed conditions, women have to cover long

distances to collect water for livestock and domestic purposes, as well as being engaged in other economic activities like farming and livestock rearing. Fetching water involves getting up early,

walking long distances and waiting for hours in a queue. Often children — mostly girls — help their mothers with this task. When they are not with their mothers, children stay at home to look after their younger siblings or perform household chores with a view to supporting their mothers. It deprives girls of an education, as well as stopping them from playing and enjoying their childhood”[[3]](#footnote-3)

1. What legislation, policies, and practices do you think are necessary to provide redress for particularly individuals and communities in vulnerable situations that have suffered and will continue to suffer loss and damage due to the adverse impacts of climate change?

The legislation, policies, and practices should aim at making resources both monitory and technical assistance available to vulnerable communities who are unjustly bearing the burden of loss and damage due to climate change. In this submission, we identify three key areas for legislation, policy, and practice at the multiple levels to redress loss and damage. Below is the description of the areas and specific legal approaches that can be used for redressal.

* **Compensation for Victims and Vulnerable Countries**: The primary area for the need for legal development identified by us is the need for devising mechanisms for compensation for victims from vulnerable countries. This would mean designing laws, policies, and practices that enable the identification, quantum, and distribution of compensation to frontline communities. At the international level, this would entail establishing a globally agreed-upon financial window, facility, and mechanism within the UNFCCC. At the national level, Legislation on processes for claiming compensation for both economic and non-economic losses, a framework for establishing an institutional architecture for reporting and documenting the nature of losses and damage being experienced, and modalities for the distribution of the compensation. At the local level rules and procedures that create a flexible bureaucratic structure for responding to legal claims of loss and damage with immediacy.
* **Resettlement and Rehabilitation of Displaced Communities**: A legal gap identified is the lack of legislation, policies, and practice that specifically address the plight of communities displaced by climate change. International law is yet to recognize the category of a climate refugee and instead identifies a “person displaced in the context of disaster and climate change”. The Global Compact on Refugees identifies this category yet there is insufficient legal clarity on guidance to state obligations in relation to climate refugees and those internally displaced by climate change. At the national level to require countries to develop comprehensive legislation, policies, and practices on documenting and addressing displacement and rehabilitation due to climate disasters as well as the development of protocols for the planned relocation of vulnerable communities. Examples of this can be better legal practices for ensuring housing, livelihood, and social safety nets for communities displaced by climate change.
* **Reporting, Accountability, and Transparency:** Another legal gap identified by us is the lack of reporting on the state experiences of loss and damage as well as accountability in redressing these losses and damages. To correct this we suggest that states document the nature and contours of the violation of a variety of human rights due to loss and damage and the kinds of losses and damages experienced. To incorporate as part of Article 13 of the Paris Agreement on transparency reporting on human rights impacts of loss and damage. At a national level framework legislation can facilitate the reporting of human rights violations because of loss and damage and how the state has worked to redress the losses and damages identified. At the local level to assign a loss and damage focal point with responsibilities to document cases of loss and damage and the situation of the victims. To harness the transparency and global stocktake requirements as essential elements of reporting to the compliance committee and use this exercise as a window into understanding accountability for loss and damage.

1. Please provide examples of policies and practices (including legal remedies) and concepts of how States, business enterprises, civil society, and intergovernmental organizations can provide redress and remedies for individuals and communities in vulnerable situations who have suffered loss and damage to the adverse impacts of climate change.

The state, business enterprises, civil society, and intergovernmental organizations have specific roles to play, and within it, they can fulfill specific legal practices and provide remedies. It is important to reassert here that loss and damage as much as it is an issue of access to financial resources is fundamentally an issue of climate and social justice. It is pertinent then to place social justice and resilience at the heart of designing laws and policies through a multi-actor collaboration. In this spirit below we describe for each actor what these legal approaches and remedies can be.

* **State:** The state is an important actor in the redressal of loss and damage as well as an actor that is yet to be held adequately accountable for addressing loss and damage. To begin with, we suggest that states must develop a comprehensive policy and practice for reporting on the human rights and economic impact of loss and damage and the methods used to address them. An example of this is the Environmental Impact Assessment but designed for climate-induced loss and damage. A pre-emptive and post-disaster impact assessment is required. In terms of remedies. Compensation to victims of loss and damage and immediate rehabilitation of displaced communities. Establishment of a disaster insurance scheme like the Caribbean Catastrophe Risk Insurance Facility.
* **Business Enterprise**: Business enterprises especially fossil fuel majors have escaped accountability for their contributions to climate change. International law remains weak in being able to hold corporations accountable. We suggest that legal approaches like the polluter pays principle to be used in filling this accountability deficit. businesses need to assess the nature of loss and damage caused by their activities both before beginning operations and after operations have begun. To require regulatory processes that can determine the extent of loss and damage caused by the business and its activities.
* **Civil Society:** Civil society has been at the forefront in finding novel solutions and pushing the envelope on discussions of loss and damage globally. To require civil society actors to work more closely on devising remedies and redressal for loss and damage and increased avenues to inform international negotiations on loss and damage. The international committee for red cross has provided immediate response and relief to victims of disasters. A rapid response network of civil society actors with national focal points and other actors identified here to address the needs of victims of loss and damage as part of the Santiago Network of Loss and Damage
* **Intergovernmental Organizations**: Intergovernmental organizations play a coordinating role in accessing specific relief under the international treaty and mechanism. Yet there is fragmentation in how this is occurring. There is a need for a comprehensive and integrative strategy for organizations working on migration, disaster relief, environmental problems, and climate change to come together to form a strategy and plan to address loss and damage. A comprehensive strategy and plan those vulnerable countries can use to access the multiple mechanisms available internationally to address loss and damage.
* **Local communities and community-based NGOs**: Another key actor in this multi-actor partnership are local communities and NGOs who are at the front line when experiencing loss and damage. There is a need for laws and policies to be designed in ways that recognize the vital role played by these organizations and incorporate their needs in identifying remedies for loss and damage.

1. Please provide examples of ways in which States, the business enterprises, civil society and intergovernmental organizations have provided redress and remedies for individuals and communities in vulnerable situations who have suffered loss and damage due to the adverse effects of climate change.

Vulnerable states and civil society actors have been front runners in devising novel remedies to redress victims of loss and damage. Businesses are yet to actively partake in redressing loss and damage. Below are some specific examples of initiatives taken by states and civil society to address the claims.

* **States:** Bangladesh was an early mover amongst Least Developed Countries (LDCs) to create a National Adaptation Programme of Action (NAPA) and a dedicated national policy on climate change. Stemming from the NAPA process, the Ministry of Environment and Forests, along with DFID and other partners, formulated the Bangladesh Climate Change Strategy and Action Plan (BCCSAP) in 2009, which aims at guiding climate change policies, programs, and projects in the country and is in line with the government’s vision to eradicate poverty and achieve economic prosperity for its people. To fund the projects and activities under the BCCSAP, two funds were established by the government in 2010, the Bangladesh Climate Change Trust Fund (BCCTF) from the government’s resources and the Bangladesh Climate Change Resilience Fund (BCCRF) from donor funding and managed by the World Bank. The government of Bangladesh has planned to set up a National Mechanism on Loss and Damage and develop a two-year pilot program tasked to find out how to provide compensation to the victims of climate change. The two-year pilot phase will experiment with different aspects of loss and damage; including both fast onsets as well as slow-onset insurance as a potential mechanism, non-economic loss and damage enabled migration, etc. The Caribbean Catastrophe Risk Insurance Facility is another example of a state-led initiative on devising a remedy. [[4]](#footnote-4)
* **Civil Society**: Several Civil Society Organizations are currently pushing for the agenda of loss and damage, like ActionAid Bangladesh, the International Center for Climate Change and Development, Climate Action Network, and so on, both nationally and internationally. ICCCAD’s loss and damage program are hosting the Least Developed Countries Universities Consortium on Climate Change (LUCCC) network to carry forward a programmatic approach to develop evidence-based case studies from diverse locations experiencing loss and damage from slow- and rapid-onset climate events, focusing on enhancing research and understanding as well as building capacities of those governments and communities.

1. What international, regional, and national policies and legal approaches are necessary to protect current and future generations and achieve intergenerational justice, particularly for individuals and communities, from the adverse impacts of climate change?

We have identified four legal approaches that can be used to shape international, regional and national policies for the protection of current and future generations. These approaches are:

* **Human Rights-Based Approach**: As stated earlier in the submission a human rights-based approach will provide a framework for guiding state action on intergenerational justice. OHCHR defines an HRBA as a ‘conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights (OHCHR, 2006, p. 15). The greening of human rights has been foundational in ensuring that the rights of future generations is recognized. More recently The UN Human Rights Council adopted resolution 48/13 recognizing that a clean, healthy, and sustainable environment is a human right. The recognition and enforcement of this right can provide an effective legal basis for ensuring that the rights of current and future generations is secured. [[5]](#footnote-5)
* **Environmental Rule of Law**: The report by working group 2 of the IPCC documented how the climate crisis is a combination of multiple crises from biodiversity loss, pollution, and others. Enforcement and recognition of environmental rule of law will be key in achieving intergenerational justice by combatting the multiple crises through the enforcement of existing laws and the creation of new ones. In a recent report by the United Nations Environment Program, it documented how despite the proliferation of environmental laws the outcomes have not been promising. The report calls for stricter enforcement of environmental laws to be able to protect biodiversity. [[6]](#footnote-6)
* **Protection of Biodiversity:** While a human rights-based approach is salient in achieving inter-generational justice there is a need to enhance the protection of the non-human world too which is a shield against the adverse impacts of loss and damage. In light of this, there is a need to combine the global biodiversity protection targets with international climate law to render an integrative legal approach that secures the rights of current and future generations. This includes an emphasis on nature-based solutions that adequately recognise the role of traditional knowledge and their participation in decision-making on the protection of biodiversity. [[7]](#footnote-7)
* **Ensuring Accountability through Climate Litigation**: Climate litigation has been an effective tool in holding governments and corporations accountable for climate inaction and pushing for ambitious climate commitments. The range of legal strategies used in climate Many cases of loss and damage have been in the United States by sub-national units against fossil fuel majors for the payment of damages. The carbon majors case was filed before the Philippines national commission on human rights. The opportunity that climate litigation as a potential strategy offer is three-fold namely:

1. It creates an avenue for making claims of liability and compensation which have not yet firmly been made in the context of international climate change law.
2. It offers an alternative pathway to counter the glacial pace and geopolitical gridlock of international climate negotiations; and
3. It creates more legal possibilities for holding corporations accountable for claims of liability and compensation.[[8]](#footnote-8)
4. In 2021 at 26th session of the UN Climate Change Conference (COP26), some Parties and civil society organisations proposed a new financial facility to support loss and damage.
5. Please provide ideas and concepts on how a new facility would operate and how the funds needed to underwrite this fund would be established and maintained.

We will address this question in three parts, namely the sources of finance for loss and damage, access to finance, and governance of such a facility. The need for such a facility emerges because the five financial entities i.e the Global Environment Facility administered by World Bank focus on climate change impact, and the Adaptation fund exclusively focuses on adaptation finance. The Special climate change fund is used for special circumstances which even developing countries have access. The Lease Developed Countries Fund which only LDCs can access and the green climate fund where 50% of the funding is to be used for adaptation and 50% for mitigation. There are limitations in the existing financial entities to support the financial claims of loss and damage. It is due to this that a need for a new financial entity in the form of a facility has been identified. Given this context we suggest the following:

* **Source of Finance**: Loss and Damage Finance should harness finance from various existing sources as a financial window that can act as a global solidarity fund, bringing together a mosaic of existing resources to ensure it effectively supports a comprehensive response to cope with climate impacts. This has to be accompanied by the establishment of a new financial facility that exclusively funds loss and damage. The disbursement structure needs more research and consideration, based on existing gaps. A recent study (Mechler and Deubeli, 2021) [[9]](#footnote-9)on CRM suggests a risk-based three-tiered Loss and Damage finance framework: finance for transformation, risk finance, and curative finance. In addition, innovative mechanisms should complement the existing structure, some of which includes the levy on Air and Maritime Transport, carbon pricing etc.
* **Access to Finance:** Requirements that funding (whether from the financing facility directly or via national funds) be distributed to and in the control of communities enduring the greatest impacts of climate change. Hence a detailed mechanism needs to be designed, in consultation with the varying National and local governments, to cater to on the ground needs and ease of access of finance for set causes that will enable communities to shift from vulnerability to resilience and then towards prosperity. Access to funding has to be made available with immediacy and there is a need for simple procedures to be able to obtain finance.
* **Governance of facility**: The financial facility should include representation from vulnerable countries and communities to decide on the functioning of the facility. The governance should draw from the Warsaw Mechanism and the Santiago Network to be grounded in evidence-based research to decide on the priorities of funding. It can consist of a steering committee, an advisory board with representatives from vulnerable groups and an implementing arm both internationally and nationally drawing on the SNLD structure being discussed.

1. Please provide ideas and concepts on how a new financial facility for loss and damage could provide redress and remedies for individuals and communities in vulnerable situations who have suffered loss and damage due to the adverse impacts of climate change.

The Finance Facility will help cover the costs of loss and damage to low- and middle-income countries — for instance, the money needed to rebuild homes and hospitals or provide shelter, food, and emergency cash transfers after a cyclone. This does not account for non-economic losses such as the loss of life, cultures, ways of living, and biodiversity; however, it will help people readjust to newer ways of life and livelihood in the face of both rapid and slow onset events for sustainable living.

1. What actions are necessary to enhance actions by States, business enterprises, civil society and intergovernmental organisations to dramatically increase efforts to reduce emissions of greenhouse gases, including through support to developing countries, in particular small island developing States, least developed countries and landlocked developing States, to limit the human rights impacts on particularly individuals and communities in vulnerable situations to the adverse impacts of climate change?

* Incentivising energy transition and doing away with incentive structures that support the continuing dependence on fossil fuels.
* Some ways in which national governments can confront climate change includes Protecting and restoring key ecosystems.
* Focusing on curbing deforestation and boosting renewable energy sources. Several nations are experimenting with cap-and-trade plans: Regulators set mandatory limits on industrial emissions, but companies that exceed those "caps" can buy permits to emit from companies that have allowances to spare.
* To hold corporations accountable for their carbon emissions and commitment to reducing carbon emissions from their operations.

1. What actions are necessary to enhance actions by States, business enterprises, civil society and intergovernmental organisation to increase efforts to ensure that actions to adapt to the impacts of climate change contribute to reducing, and not exacerbating, the vulnerabilities of individuals and communities in vulnerable situations to the adverse impacts of climate change?

* Adaptation strategies can benefit from a combination of traditional knowledge with innovative approaches to address evolving challenges. Priority should be given to building the resilience of livelihoods, protecting people and assets from climate hazards such as droughts, floods, and cyclones, and engaging and building the capacity of local institutions to support people in adapting.
* Planning and implementation of adaptation measures must be integrated into existing development plans and processes. Adaptation strategies in agriculture, for example, have to be defined taking into account the differences between the agribusiness sector and family farmers.
* National strategies must outline key social and ecological vulnerabilities, climate projections, and basic adaptation needs. Financial mechanisms should be defined in advance, as a guarantee of implementation. All relevant sectors inside governments must be engaged in decision-making.
* The most effective way to ensure that adaptation funds help the most vulnerable people is through community-based and locally led adaptation. Mechanisms to support community-based adaptation as part of an integrated and comprehensive approach to adaptation should be encouraged, enabling governments to avoid top-down design that fails to address the needs and concerns of the most vulnerable people.

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9. Reinhard Mechler, Teresa M Deubelli,Finance for Loss and Damage: a comprehensive risk analytical approach, Current Opinion in Environmental Sustainability,Volume 50,2021,Pages 185-196. [↑](#footnote-ref-9)