

Submission to the UN Special Rapporteur on right to development on climate justice, specifically on loss and damage

29 March 2024

We, the Asia-Pacific Youth Advisory Group on Environmental and Climate Justice (YAG)¹, respectfully submit our inputs regarding the nexus between the right to development and loss and damage from climate crisis, specifically the impacts of loss and damage on realising the right to development, the basis of responsibility for loss and damage, the contours and bearers of this responsibility from a climate justice perspective, and the human rights-based approach to administer and operationalise the Loss and Damage Fund, as established in recent UN climate negotiations.

1. How is the realisation of the right to development impacted by both economic and non-economic loss and damage from climate change? How is the impact experienced differently and/or disproportionately by different individuals (e.g., children and women), groups (e.g., Indigenous Peoples) and States (e.g., Small Island Developing States)?

The impacts of climate-related loss and damage (L&D) on the right to development are manifested through different forms and aspects, most notably through the following:

- *Economic disruption.* An increase in global temperature and frequency and intensity of extreme weather events causes substantial economic damage and disruptions to human settlements² and infrastructure³ that provide essential services for development (i.e., energy, transport, water and wastewater management). Health effects of climate change lead to reduced and lost productivity and economic opportunities, which is more evident for sectors and groups, such as workers in the informal sector, women, elderly, LGBTQIA+, and the differently-abled.
- *Rising humanitarian impacts.* When people are unable to adapt to climate change, surrounding ecological effects^{4,5} (i.e., water cycle disruption, zoonotic diseases, soil degradation and crop failure), and exacerbation of sociopolitical issues⁶ (i.e., conflict, poverty, inequalities), they are unable to be resilient to climate change and exercise their right to development. Moreover, climate change has led to instances of growing displacement, which causes displaced people to be in a state of flux and with reduced opportunities for development.
- *Education.* Climate impacts lead to disruption of education systems, most negatively affecting children and youth and infringing upon their right to education⁷ and, subsequently, corresponding developmental outcomes. According to UNESCO the number of people

¹ YAG was established by the UNEP, UN Human Rights Office, UNFCCC, and UNDP, anchored in the Youth Empowerment in Climate Action Platform (YECAP) and the presence of youth from across Asia and the Pacific. YAG is a youth-led group which strives to have members from grassroots, community-based groups, and indigenous peoples' organizations operating in differing spaces and constituencies in climate justice.

² Day, E., Fankhauser, S., Kingsmill, N., Costa, H., & Mavrogianni, A. (2018). Upholding labour productivity under climate change: an assessment of adaptation options. *Climate Policy*, 19(3), 367–385, doi:10.1080/14693062.2018.1517640.

³ Thacker, S., et al. (2019). Infrastructure for sustainable development. *Nature Sustainability*, 2(4), 324–331, doi:10.1038/s41893-019-0256-8.

⁴ Lawler O. et al. (2021). The COVID-19 pandemic is intricately linked to biodiversity loss and ecosystem health. Available at: [https://doi.org/10.1016/S2542-5196\(21\)00258-8](https://doi.org/10.1016/S2542-5196(21)00258-8).

⁵ Lal, R., et al. (2021). Soils and sustainable development goals of the United Nations: An International Union of Soil Sciences perspective. Available at: <https://doi.org/10.1016/j.geodrs.2021.e00398>.

⁶ Cappelli, F., Costantini, V. and Consoli, D. (2021). The trap of climate change-induced 'natural' disasters and inequality. *Global Environmental Change*, 70, 102329, doi:10.1016/j.gloenvcha.2021.102329.

⁷ The right to education has been widely recognised by constitutions around the globe and have been elaborated by the United Nations through international legal instruments, including UDHR, including the International Covenant on Economic, Social and Cultural Rights (1966, CESCR), the Convention on the Rights of the Child (1989, CRC), and the UNESCO Convention against Discrimination in Education (1960, CADE).

displaced due to natural disasters and extreme weather events surged to 30.7 million in 2020. This gravely affected the access to education for the displaced, through impacts such as infrastructure destruction, dropout, economic difficulties, linguistic barriers, and difficulties with getting their past education or qualifications recognized.⁸

- *Social and mental health.* Climate change has had a profound impact on loss of cultural activities, social activities, and culturally-significant elements of nature. Climate-induced displacement has caused losses of belonging and/or cultural connection, which is especially pertinent in the case of indigenous populations, whose livelihoods and culture is closely intertwined with nature. When this sacrosanct relationship is disrupted, indigenous communities become more prone to adverse mental health outcomes. This calls for dedicated mental health support systems to be established by states⁹.
- *Political turmoil and instability.* Increasing levels of food insecurity, climate induced migration, climate and weather-related disasters, and other impacts of climate change can result in a destabilisation of political environments¹⁰.

2. What are the obligations of States and other actors such as development finance institutions and businesses to prevent, mitigate and remediate the impacts of climate change-related loss and damage on human rights, including the right to development?

The States, insofar as they are mandated to uphold human rights, are obligated to reduce L&D, as impacts directly jeopardise human rights and security. The private sector can play a key role in administration of L&D funds. Though under no obligation, development finance institutions are established and owned by States and non-profit entities for mobilising finance for development, especially including ‘non-commercially viable’ projects with high risk. Thus, the inaction in preventing L&D would indicate failure of purpose for these institutions. Concepts such as ‘stakeholder capitalism’ show slivers of self-awareness. For example, a literature analysis from Beck and Ferasso (2023) found that “*Stakeholder capitalism, designed to benefit all stakeholders and the environment rather than just shareholders, could be a means to achieve better global health, greater sustainability, more inclusive development, and revived productivity growth*”.¹¹

3. What is the legal and/or moral basis for States and other actors including businesses to contribute to the Fund for climate change-related loss and damage?

From a legal perspective, States have a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. The preamble of the UNFCCC explicitly refers to “principle of prevention” or the “no-harm rule” and other international climate policies/treaties have also reflected similar ideas, such as the “polluter pays”. In addition, the International Law Commission’s 2006 Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities state: “*Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.*” and the Paris Agreement (Art. 2.1.c / Art. 4 / Art. 6 / Art. 8 / Art. 9).

⁸ UNESCO. “*How climate change and displacement affect the right to education*”

Available at: <https://www.unesco.org/en/right-education/climate-change-displacement>

⁹ WHO policy brief on “*Mental health & climate threats*” Available at: <https://www.who.int/publications/i/item/9789240045125>

¹⁰ Cappelli, F., Costantini, V. and Consoli, D. (2021). The trap of climate change-induced ‘natural’ disasters and inequality. *Global Environmental Change*, 70, 102329. doi:10.1016/j.gloenvcha.2021.102329.

¹¹ Beck, D. and Ferasso, M. (2023). How can Stakeholder Capitalism contribute to achieving the Sustainable Development Goals? A Cross-network Literature Analysis. *Ecological Economics*, 204, p.107673. Available at: <https://doi.org/10.1016/j.ecolecon.2022.107673>.

The International Court of Justice has opined similar legal standing on this issue, stating that, “*State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State*”.

National courts have also reflected similar opinions through plethora of judgements:

- In **Indonesia**, a tort based lawsuit was filed by the Indonesian ministry of env. against PT Arjuna, a palm oil plantation corporate on the ground that the firm intentionally burned the peatlands with the intent of using them for plantation purposes. The court held PT Arjuna liable for damages caused by wildfires inside its concessions.¹²
- **The Hague District Court** ordered Shell to reduce its emissions by 45% by 2030, relative to 2019, across all activities including both its own emissions and end-use emissions.¹³
- **The Federal Court of Australia** held that the government currently does not have a duty of care towards young people and the same needs to be established by the parliament. The parliament has recently proposed an amendment to the Climate Change Act, known as the Duty of Care and Intergenerational Climate Equity Bill¹⁴, that will see this duty of care established.

States must also consider their moral obligation to climate justice towards those most disproportionately impacted by climate change. Addressing climate change and its impacts on territories, children, and communities is a moral responsibility of States, with an emphasis on historical emitters owing moral duty to victims of climate change.¹⁵ There is a need to ascribe historical responsibility to assign emission reduction responsibilities by States.¹⁶ Such liabilities must include demands for equity and justice in sharing the burden of negative climate change impacts.¹⁷

Moreover, there is currently a moral imperative to contribute to the L&D Fund for present and future generations.

4. In addition to making a financial contribution to the Fund, what non-financial components may be relevant from a climate justice perspective (e.g., transfer of green technologies, building of capacity and relocation pathways for climate-induced migrants)?

Both means of implementation (i.e., finance, technology development and transfer, capacity-building) and enabling environments are essential to achieve L&D outcomes. Communities affected by climate change, particularly those most disproportionately impacted, are particularly at risk of L&D. To further address this, capacity-building mechanisms coupled with activities on climate education, training, and awareness-raising are necessary to accelerate the development and/or implementation of interventions relevant to addressing L&D.¹⁸ While there is a growing awareness about the dangers brought by the

¹² Ministry of Environment and Forestry v. PT Arjuna Utama Sawit. 213/Pdt.G/LH/2018/PN.Plk (Supreme Court of Indonesia 2018). <https://climatecasechart.com/non-us-case/ministry-of-environment-and-forestry-v-pt-arjuna-utama-sawit/#:~:text=Summary%3A,to%20peatlands%20and%20ecosystem%20within>

¹³ Milieudéfensie and Others v. Royal Dutch Shell PLC and Others, C/09/571932 (The Hague District Ct. 26 May 2021). <https://climatecasechart.com/non-us-case/milieudéfensie-et-al-v-royal-dutch-shell-plc/>

¹⁴ Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023, Parliament No. 47 (2023).

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/DutyofCareBill

¹⁵ García-Portela, L. (2020). Moral responsibility for climate change loss and damage: A response to the excusable ignorance objection. *Teorama*, 39(1), 7-24.

¹⁶ Panayotou, T. (2000, July). *Economic growth and the environment* (Working Paper No. 56). <https://www.hks.harvard.edu/sites/default/files/centers/cid/files/publications/faculty-working-papers/056.pdf>

¹⁷ Wallimann-Helmer, I. (2019). 26 – Justice in managing global climate change. *Managing Global Warming*, 751-768, doi:10.1016/B978-0-12-814104-5.00026-0

¹⁸ Leiserowitz, A., Verner, M., Goddard, E., Wood, E., Carman, J., Reynoso, N. O., ... & Buttermore, N. (2023). *International public opinion on climate change, 2023*. New Haven, CT: Yale Program on Climate Communication.

climate crisis and how it would impact future generations, there remain large sections of populations in these nations that lack a sufficient understanding of the climate crisis and its impacts, let alone on L&D. Much of this is a result of insufficient education programs, alongside overwhelmed communities, too focused on daily survival to have the capacity to absorb, comprehend and act on climate information.

Education, training, and awareness-raising are three of the elements under Action for Climate Empowerment (ACE), implementation of Article 6 of the UNFCCC that aims to empower Parties to empower the whole of society to meaningfully engage in climate action. Programs aligned with these elements must emphasise the interlinkages between L&D, climate justice, and human rights, including both substantive and procedural rights. They must also focus on the significance of understanding and addressing slow onset events, which are more likely to cause irreversible L&D, such as loss of cultural heritage and loss of ecosystems services. At the global level, developing-country Parties to the UNFCCC could seek technical assistance from L&D experts, including those under the Santiago Network on Loss and Damage. They may also develop or enhance their respective National ACE Strategies that would improve knowledge and capacity-building strategies for different stakeholders in addressing impacts in their respective areas.

It must be emphasised that biodiversity and ecosystems conservation, especially those part of nature-based solutions (NbS), can strengthen climate resilience at the local level and provide co-benefits for adaptation and mitigation, which in the long-term reduces the likelihood of both economic and non-economic L&D¹⁹. In ASEAN, countries are accounting for NbS in shaping their domestic and international policy targets and striving for implementation at scale. They are also improving national policy frameworks to further give importance to the role of ecosystems for greenhouse gas sequestration and ecosystems-based adaptation²⁰. These solutions would also avoid non-economic L&D, such as loss of indigenous knowledge, loss of cultural identities, and mental health.

5. How should a human rights-based approach to operationalise and administer the Fund look like (e.g., integration of considerations such as accessibility, non-discrimination, fair representation in decision making, gender responsiveness, and accommodation for marginalised communities and countries especially vulnerable to the adverse effects of climate change)?

A human rights-based approach is essential to operationalise and administer a L&D fund that is centred in climate justice. To deliver this, donors and Fund implementers need to work closely with the communities where the L&D Fund is being implemented. While it is crucial to prioritise participatory development principles, these stakeholders should extend beyond just participation to encompass co-development and the leadership of local communities to develop and implement projects.

Organisations often talk about empowering people, but frequently, those directly facing the brunt of the climate crisis are already equipped with a deep understanding of the issues and potential solutions. What is missing are effective partnerships and the necessary funds to translate these solutions into action. For the Fund to be truly human rights-oriented, it cannot be top-down. The focus should be on channelling funds to those most in need, rather than getting lost in bureaucratic processes and failing to reach the local level. Despite regular large funding pledges at UNFCCC and other climate conferences, there is often a disconnect between these promises and on-the-ground implementation.

Gender considerations, child safeguarding, and a focus on inclusion must be an integral part of projects and policies funded by the L&D Fund. Donors and implementers must critically assess who holds

¹⁹ UNEP (2023). *Nature-based Infrastructure: How natural infrastructure solutions can address sustainable development challenges and the triple planetary crisis*. Geneva, Switzerland: United Nations Environment Programme. doi:10.59117/20.500.11822/44022

²⁰ Suratno, A., Pistorius, T., Mislimshoeva, B., & Elkan, S. (2023). *Study on nature-based solutions (NbS) in ASEAN*. Jakarta, Indonesia: Association of Southeast Asian Nations.

decision-making power and who is represented. Tokenism and instances where individuals superficially represent marginalised groups without true understanding or connection should be avoided. The Fund must also acknowledge and integrate indigenous knowledge, traditions, and histories which have largely been ignored in the past. It includes actively incorporating indigenous perspectives into decision-making processes and adapting to indigenous ways of thinking and doing. The discussion of a human rights approach to the Fund cannot also not overlook ongoing conflicts and the resulting barriers preventing access for communities impacted by both conflict and climate change.

6. How do we ensure that the Fund and/or climate finance (including for mitigation and adaptation) does not result in a debt trap for developing countries?

To ensure that the Fund does not result in further debts for developing countries, it is recommended that finance under the Fund must be delivered to the most vulnerable countries only in the form of grants. As L&D is fundamentally rooted in the reality that climate-related risks and impacts are becoming worse to the point of countries or communities being unable to adequately address them through adaptation or mitigation, delivering any means of L&D finance or support to them with the conditionality of having to pay up within months or years is a total disregard of climate justice and would only exacerbate existing inequalities.

It is also a contradiction to the principle of “common but differentiated responsibilities”, a primary fixture within the UNFCCC and the Paris Agreement that is based on both the recognition that developed countries largely caused the climate crisis, including L&D, and that developing nations do not have as much resources or capacities to address associated risks and impacts.

Given the imperative of rapidly and collectively scaling up solutions to address the climate crisis, a multitude of financial mechanisms should be used such that the implementation of these solutions would be accelerated, without further burdening countries with fewer resources and higher vulnerabilities (including considerations around reporting requirements, donor requirements etc). These mechanisms must be suitable to national circumstances, and executed in a manner that allows countries to still pursue sustainable development.

For instance, debt-for-climate swaps (this can be defined as an agreement where debt is reduced in exchange for a verifiable commitment to invest in climate mitigation and adaptation projects)²¹ can be scaled up to enable more debt relief and improve financial flows into adaptation or mitigation projects. Instead of bilateral deals, a pooling system can be implemented such that part of the debt of a developing nation from several developed countries can be cancelled, which reduces risks for the latter and still allows the former to implement its climate actions. Blended financing may also be employed by combining grants with other financial instruments (i.e., loans, guarantees) that can produce returns to be reinvested in additional climate and/or sustainable development projects; this would attract a wider range of investors and increase the impact of these actions, while reducing the risk of debt trap for developing countries.²²

Conclusion

This submission has been put together by representatives of Youth Empowerment in Climate Action Platform (YECAP)'s Youth Advisory Group on Climate and Environmental Justice. It outlines our contribution to the creation of an equitable Loss and Damage Fund based on our collective knowledge, skills and lived experience. The Fund provides an opportunity to address the impacts of climate change

²¹ ESCAP75 (2023). Policy Brief: Debt for Climate Swaps. https://www.unescap.org/sites/default/d8files/knowledge-products/PB_Debt-for-Climate%20Swaps_final.pdf

²² Karaki, K., Medinilla, A., & Bilal, S. (2023). Three ways to scale up debt-for-climate swaps. Available at: <https://ecdpm.org/work/scale-debt-climate-swaps-infographic-three-ways>

on those on the frontlines of the climate crisis. However, to do so, it must be based in human-rights and consider both the moral and legal obligations of funders and governments globally. Ultimately, the Fund must centre the people it aims to serve and ensure a focus on addressing and upholding the right to development for all.