

Enhancing Climate Action: Exploring Human Rights Approaches in the Implementation of the Loss and Damage Fund

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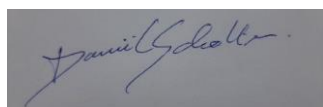
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Abstract

Climate change is a major challenge facing humanity. The need to address it is unfortunately not matched by sufficient action. Countries either fail to reach agreements, implement policies or stick to their commitments. The recognition of climate change as a human rights issue in UN resolutions, by the Human Rights Council and the recent judgment of the European Court of Human Rights in *KlimaSeniorinnen v. Switzerland* opens up new possibilities to ‘help’ countries to take action and stick to their commitments. In light of this development, this paper explores how the inclusion of human rights principles into climate change action could enable more possibilities to ensure that countries stick to their commitments. Utilizing a mixed-methods approach, and focusing on the Loss and Damage Fund (LDF) as the case, the paper examines in how far human rights principles are part of the LDF make-up and in how far their further addition can ensure states stick to their commitments. Drawing from academic and gray literature, as well as the author's firsthand experience as a practitioner and observer at the 28th Conference of the Parties, the paper concludes that meaningful integration of human rights principles, including references to international human rights law, can create more avenues for states to make them liable. Consequently, this paper underscores the importance of integrating these principles into climate change actions and develops policy recommendations to advance the enjoyment of basic human rights.

Subject Keywords: Human Rights, Climate Change, Loss and Damage Fund, Climate Justice.

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Abbreviations and acronyms

CMA - Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

COP - Conference of the Parties

COP28 - 28th Conference of the Parties of the United Nations

LDF - Loss and Damage Fund

Transitional Committee (TC) - transitional committee established for the operationalization of the new funding arrangements to address loss and damage

OHCHR - Office of the High Commissioner for Human Rights

UNDP – United Nations Development Program

UNFPA – United Nations Population Fund

UNHCR – United Nations High Commissioner for Refugees

HRBA – Human Rights - Based Approaches

WMO – World Meteorological Organization

1. Introduction

In 2023, the Copernicus Climate Change Serviceⁱ and the World Meteorological Organizationⁱⁱ jointly declared that the year marked a milestone, standing as the "very likely" warmest in the past 100,000 years, propelling global temperatures dangerously close to the 1.5°C limit set by the Paris Agreement.ⁱⁱⁱ This threshold, aimed at preventing catastrophic climate change, underscores the urgency of global efforts to curb emissions and mitigate environmental impacts. However, the alarming data from 2023 raises profound questions about the feasibility of meeting this commitment. Climate change is no longer a future abstraction; it is a present reality inflicting devastating consequences on communities worldwide.

The International Federation of Red Cross and Red Crescent Societies report revealed that climate and weather related disasters impacted 97.6 million people in 2019, also stating that approximately 3.3 billion people reside in countries highly vulnerable to climate change. Collectively, these calamities resulted in the deaths of over 410,000 individuals and impacted a staggering 1.7 billion people.^{iv}

Despite recognitions and commitments, the global community has not yet undertaken sufficient action to tackle climate change. It is not on track to meet the Paris Agreement's 1.5 degrees' target.^v Countries either fail to reach agreements, implement policies or stick to their commitments. Findings of the first global stocktake synthesis report assessing states' "the collective progress in the implementation of the Paris Agreement" highlight that countries lagging behind their commitments.^{vi} Considering the urgency and impact of climate change, it is of paramount importance that we find new ways to spur action and enhance countries' commitment. The recent recognition of climate change as a human rights issue in UN resolutions, by the Human Rights Council and judgment of the European Court of Human Rights in *KlimaSeniorinnen v.*

Switzerland opens up interesting possibilities in this regard. In July 2022, the United Nations General Assembly (GA) passed resolution A/RES/76/300^{vii}, officially recognizing access to a clean, healthy environment as a universal human right.^{viii} The resolution garnered support from 161 countries. This action followed the Human Rights Council Resolution A/HRC/RES/48/13,^{ix} which established the human right to a clean, healthy, and sustainable environment a year earlier on October 8, 2021. Both decisions by the two main UN bodies were labeled as "historic."^x

Despite the overwhelming majority voting in favor of the resolution, debates ensued, labeling the resolution a "political declaration" rather than an international legal affirmation of the right. Some emphasized that GA resolutions are not binding documents and argued that recognizing a new human right should occur within a treaty or convention framework, where the UN member states explicitly commit to such a right.^{xi} Either way, the decision strengthened the argument and the need for a rights-based approach in framing and implementing climate policies.

The first linkage between climate change as a human rights issue was officially made at the 2010 UN Conference of the Parties (COP16) in Cancun.^{xii} The final text of the report of COP16 “noted resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, recognizing that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights,” with an emphasis on the fact that it mostly impacts the most vulnerable and underrepresented groups. In addition, the text called the member states “to fully respect human rights” in the actions fighting climate change.^{xiii}

Another link between climate change and its impact on the enjoyment of human rights is the incorporation of the human rights language in the Paris Agreement preamble. The agreement was built upon the work of COP16 and in addition, expanding on the states’ obligation to respect, promote and fulfill human rights while taking action.

In light of these developments, this paper explores how the inclusion of human rights principles into climate change action could enable more possibilities to ensure that countries stick to their commitments. With an understanding of integrating human rights principles into climate change policies, that provide a legal and ethical foundation for holding nations accountable, this paper specifically aims to:

1. Explore how human rights language and principles can incentivize proactive climate action.
2. Examine the role of human rights principles in enhancing the legal standing and functionality of the Loss and Damage fund.
3. Evaluate the moral obligations surrounding climate change governance and assess the need for increased monitoring, pressure, and oversight mechanisms.

The paper focuses on the Loss and Damage Fund (LDF) as a case study to analyze its hypothesis. To this end, it delves into the intricacies of addressing loss and damage, examining the establishment of the LDF and its operationalization that was officially supported during the 27th and 28th United Nations Conference of the Parties (COP). This fund, aims at assisting vulnerable countries affected by climate change, reflects a crucial step in recognizing the need for financial support to mitigate irreparable losses and damages. The paper scrutinizes the complexities and inequities related to the protection, promotion and fulfillment^{xiv} of human rights in the establishment of the Loss and Damage fund, emphasizing the need for a paradigm shift by incorporating human-rights based approaches. These approaches are based on the principles developed by the United Nations^{xv} including addressing the historical responsibilities of major polluters, as well as countries' commitments and human rights obligations.

2. Analytical Framework

2.1 Climate change as a Human Rights Issue

The Universal Declaration of Human Rights stresses the indivisibility and interdependence of all rights, meaning that one right cannot be fully enjoyed without the other.^{xvi} Climate change intersects with the enjoyment of human rights as outlined in international human rights instruments.^{xvii} This includes the right to life, health, water and sanitation, food, right to healthy, clean and sustainable environment, housing, self-determination, and the right to education.^{xviii} However, this list is not exhaustive. These intersections disproportionately impact the most vulnerable and underrepresented communities, such as women,^{xix} children,^{xx} Indigenous people,^{xxi} persons with disabilities,^{xxii} ethnic and religious minorities, LGBTQIA+ people and other groups with various social and economic determinants. Within the framework of Human Rights, the concept of intersectionality, which recognizes the various characteristics of groups facing more barriers and challenges in accessing their fundamental rights, is important. It requires the decisions to be made by prioritizing these communities due to their vulnerability and marginalization. As a result, the actions and policies made in response to fighting climate change call for understanding the challenges faced by marginalized communities. This intersects with the main message of the United Nations as “leaving no one behind”.^{xxiii}

The 2023 report by the Intergovernmental Panel on Climate Change (IPCC) focuses on how extreme events cause loss and damage to humans, leading to human mortality and morbidity, as well as creating “health issues and presenting evidence of vector-borne diseases and mental health challenges.” Climate change is causing economic damage in sectors like agriculture, forestry, fisheries, energy, and tourism. Weather extremes are driving displacement in Africa,

Asia, North America, and, with moderate confidence, in Central and South America. Small island states in the Caribbean and South Pacific are hit hardest, relative to their population size. Urban areas also suffer from climate change, with heat waves stressing transportation, water, sanitation, and energy systems, leading to economic losses and disruptions of services.^{xxiv}

Climate change impacts stress the importance of the indivisibility and interdependence of all rights. In the last ten years, weather-related events have resulted in an annual average of 21.5 million new displacements, surpassing the number caused by conflict and violence, which is more than double.^{xxv} The displacement, along with other barriers to the enjoyment of fundamental rights, increases the susceptibility of women and girls to various forms of gender-based violence.^{xxvi} This encompasses conflict-related sexual violence, human trafficking, child marriage, and other instances of violence.^{xxvii} This is an example of how displacement and the violation of the right to housing, food, water, and sanitation are interlinked to the violation of the right to life, freedom of liberty and personal security, freedom from slavery, freedom from torture and degrading treatment, and other forms of rights violations. Thus, it is important while talking about climate change to acknowledge its immediate impact on the enjoyment of certain rights and how a breach of those rights contributes to a further cycle of rights violations.

With the establishment of the access to a clean, healthy, and sustainable environment as a human right in July 2022, states recognized the interlinkages between the environment and human rights by the support resolution A/RES/76/300. Although a resolution is not a binding document, it creates the precedence and need for complete implementation of multilateral environmental agreements within the scope of international environmental law highlighted in the resolution text. This commitment involves adhering to agreements like the UN Framework Convention on Climate Change (UNFCCC),^{xxviii} the Kyoto Protocol^{xxix} and Paris Agreement.^{xxx} OHCHR describes the

rights into four categories.^{xxxii} It highlights the need for a safe and stable climate, healthy ecosystems, justice, and inclusion within the right. It advocates for access to accurate environmental information, inclusive environmental policymaking, and justice for those affected by stopping pollution and environmental degradation to prevent human rights violations, particularly affecting vulnerable groups.

Over time, states have started to bring international human rights obligations into play. In January 2023 Chile and Colombia jointly requested for an advisory opinion to the Inter American Court of Human Rights asking for the clarification about the duties and obligations of states in response to a climate emergency.^{xxxiii} The advisory opinion is expected to create the precedent to address the shortcomings in the legal interpretation to respond to impacts of climate change despite not imposing binding obligations on member states. Moreover, international court rulings evidence the interlinkages between climate change and human rights. The European Court of Human Rights' recent ruling in the case of *KlimaSeniorinnen v. Switzerland* underscores the state's failure to protect human rights in the context of climate change, deeming it a human rights breach, specifically violating right to protect private and family life (Article 8) and right to access justice (Article 6 § 1) enshrined by the European Convention of Human Rights.^{xxxiii} This ruling not only impacts Switzerland's climate policies but also sets a precedent for other European countries, emphasizing the need for compliance with the Paris Agreement and reinforcing the human rights implications of climate change.

The impact of climate change also plays a vital role in the achievement of the United Nations Sustainable Development Goals — another commitment and obligation of states, albeit not binding. The 2023 United Nations Sustainable Development Goals special report stresses that “The Sustainable Development Goals are disappearing in the rear-view mirror, as is the hope and

rights of current and future generations”, calling for a crucial transformation - a change in commitment, solidarity, financing, and action - to redirect the world onto a more promising trajectory.^{xxxiv}

The lack of binding international climate agreements is considered one of the main challenges in enforcing compliance, allowing countries to avoid direct consequences for failing to meet their commitments.^{xxxv} However, the consequences of climate change clearly demonstrate that rights not enjoyed by people do not necessarily require climate-related international agreements to be binding documents. The International Human Rights mechanisms, which are already binding, enforce these rights. Additionally, by supporting and signing these documents, countries commit to the text, providing the framework to translate their words into actions.

2.1.1 The role of the Paris agreement in the integration of human rights-based approaches

Out of three multilateral environmental documents, UNFCCC, Kyoto Protocol and the Paris agreement - the latest one is the only document that brings comprehensive human rights language and calls for the integration of Human Rights-Based Approaches (HRBA) in climate change decisions, as well as stresses a specific focus on loss and damage.

Within Article 8, 195 signatory countries to the Paris Agreement are encouraged to boost understanding, action, and support in a cooperative manner concerning loss and damage. In addition Article 8 acknowledges the linkages between climate change and human rights by incorporating comprehensive text into its preamble: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights, the right to health, the

rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.”^{xxxvi}

By being a signatory of the Paris agreement, parties officially recognize the text as well as the direct impact of climate change, considering the need to "respect, promote, and consider their respective obligations on human rights." This text is copied directly in the final documents and outcomes in the UN Conference of the Parties. COP27^{xxxvii} and COP28^{xxxviii} documents added the right of a clean, healthy and sustainable environment discussed above.

However, the agreed text of COP28^{xxxix} has opened up more possibilities for advancing human rights advocacy in climate change negotiations. Parties have agreed to go beyond merely copying the Paris Agreement preamble text incorporating an additional paragraph (number 127) in the final document, emphasizing the crucial need for the full respect of human rights and a focus on underrepresented communities: “Also encourages Parties to implement climate policy and action that is gender responsive, fully respects human rights, and empowers youth and children.”- reads the text. This is another linkage and the acknowledgement of the importance of understanding of interconnectedness between climate change issues as a human rights issue.

After the adoption of the A/RES/76/300 Resolution on the right to a clean, healthy and sustainable environment the integration of the human rights-based approaches in the loss and damage has strengthened the argument of it being a legal obligation. The 2022 report of the UN Special Rapporteur on climate change sees the states obligation within the loss and damage as the fulfillment of the right to remedy and “the principle of reparations, including restitution, compensation and rehabilitation”.^{xl} By taking this approach, under international human rights law,

States are obligated to prevent, minimize, and address loss and damage linked to the adverse impacts of climate change.^{xli}

2.2 Framework of Human Rights based approaches - mainstreaming human rights in loss and damage

The idea of Human Rights-Based Approaches is to support policy development and contribute to the implementation of the human rights obligations of duty-bearers, aiming to protect, promote, and fulfil the rights of rights-holders.^{xlii} It is argued that the application of HRBA to climate change can increase political will and pressure to tackle the issue, and promote equity in climate change responses in doing so, by contributing to the establishment of stronger accountability mechanisms rooted in human rights law.^{xliii}

Scholarly articles mainly focus on integrating HRBA into two pillars of climate change: mitigation and adaptation. They also identify various groups and causes resulting from climate change and discuss how duty-bearers must address these causes based on HRBA principles. For instance, in the case of displacement and human mobility, we see highlights of the need for HRBA to effectively address the risks related to human rights violations.^{xliv} Far less attention has been given to loss and damage at this stage. HRBA has been already strongly advocated as an effective tool for adaptation and mitigation purposes.^{xlv} As a result, there is more literature around these pillars. However, in recent times, the challenges of marginalized populations and issues surrounding loss and damage came to forefront. This includes the establishment of the Warsaw International Mechanism (WIM), which is explicitly mandated to work on the topics related to loss and damage,^{xlvi} and the founding of the Loss and Damage Fund as further evidence.

The integration of HRBA in the loss and damage aims to protect the most marginalized and underrepresented communities,^{xlvii} which is not a main focus of adaptation and mitigation.

This integration strengthens the need for and engagement of international human rights bodies and mechanisms in the incorporation of HRBA into loss and damage. It also calls for strengthening and adjusting policies that require a comprehensive approach from states. Additionally, it would progress in understanding the need for bridging the gap between discussions around compensation and liability.^{xlviii} Integration of HRBA into tackling impacts of climate change does not come without its limitations. The impacts of climate change are complex and cannot be attributed to single events. Assessing liability for these impacts and addressing resulting human rights violations is challenging.^{xlix} Scholars also acknowledge that application of HRBA create additional challenges such as lack of experience, uncertainties, and political constraints, as well as lack of capacity of states and international community “to guarantee even a bare minimum of protection to the millions of people affected”.¹ Another limitation, is that HRBA is understood in its narrow focus, lacking linkages to broader concepts such as “rights of nature, and other non-human-centred approaches or the interests of future generations.” Moreover, HRBA does not contain the structured guidelines that would help states integrate and create specific tracking mechanisms.^{li} One of the most important limitation, which will also be described below, is the weak enforcement mechanisms of HRBA. Research on the importance and limitation of the HRBA can be found in various fields, not only within legal or human rights scholarship, but also from environmental economics and international relations perspectives. However, the aim of the paper is not to conduct an explicit literature review but also to present a different way of analysis, which is described in the methodology section. Despite the above mentioned limitations, mainstreaming HRBA into decision-making would be an acknowledgment of the text written in the final document of COP28 enforcing the intersections between climate change and human rights. In this case, it is not only an acknowledgment that climate change impacts the enjoyment

of people's rights, but also an understanding of the inherent inequalities between states, the need for the progressive realization of rights, and respect for “common but differentiated responsibilities and respective capabilities” enshrined in the Paris Agreement text.

The Human Rights-Based Approach is founded on key principles, commonly known as the PANEL:¹ Participation, emphasizing involvement in decision-making processes; Accountability, which underscores the obligations of duty-bearers (states) to fulfill the rights of rights-holders (citizens); Non-discrimination and Equality, ensuring access to equal rights without any form of discrimination, “with all discriminatory practices being prohibited, prevented, and eliminated;” Empowerment, enabling individuals and communities to comprehend their rights and engage in policy development; and Legality, requiring all decisions to adhere to international human rights obligations and national law.^{lii} While the paper examines the incorporation of human rights approaches and references to international human rights instruments in the foundational documents of the Loss and Damage Fund, it also explores actions and activities that, while not explicitly tied to human rights language, may align with the human rights approaches discussed above. As loss and damage serves as a case representing the harm caused by climate change, the integration of human rights-based approaches into the establishment of the Loss and Damage Fund from the beginning might become vital and set precedence. Moreover, it will acknowledge inherent inequities and recognize how vulnerable communities and underrepresented individuals suffer from the devastating impacts of climate change.

¹ The paper employs a Human Rights-Based Approach (HRBA) adjusted by the European Network of National Human Rights Institutions, which differs slightly from the United Nations' established Human Rights-Based Approaches. The UN's version encompasses universality, indivisibility, equality, non-discrimination, participation, and accountability. However, the PANEL version, used in this paper, is more appropriate given the topic and context, as it inherently considers the universality and indivisibility of all rights.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) stresses that international human rights law is applicable to loss and damage resulting from the adverse effects of climate change, “including both extreme weather events and slow-onset events caused by human-induced greenhouse gas emissions.”^{liii} But the understanding of HRBA goes beyond the concept of legality, which is just one pillar out of five. To address loss and damage effectively, OHCHR developed key messages around "Human Rights and Loss and Damage" that add to above-discussed pillars of HRBA. These principles are not only suggested by the OHCHR but are also frequently voiced by human rights organizations and climate justice advocates to be integrated and based in addressing loss and damage.^{liv}

To analyze the human rights intersections in the establishment of the loss and damage fund, the paper synthesizes the aforementioned principles and incorporates two following key messages out of five, bringing into analysis as an independent standing principles, because of its context and linkage to loss and damage.

1. Operationalizing the Right to Effective Remedy to those experiencing loss and damage from climate change including elements such as equal access to justice, prompt reparation, and access to relevant information.
2. Resource mobilization by states individually and through international cooperation.

As a result, the paper’s ultimately focuses on seven areas, which includes all of PANEL and two additional principles. This approach extends beyond legal avenues to identify human rights intersections throughout the process of establishing the LDF.

The consideration of the loss and damage as the direct consequences of climate change, creates its direct linkage to the enjoyment of the human rights of the communities. The immediate

action of the states to prioritize the support to the most vulnerable communities would also mean the integration of the human rights- based approaches. Furthermore, a broader understanding of human rights-based approaches opens up new legal avenues for holding states accountable for not only their climate-related commitments but obligations related to the enjoyment of human rights. This will pave the way to create links to international human rights mechanisms and legal frameworks. As a result, this approach empowers the most affected communities to demand accountability and seek redress for climate-induced harms. Consequently, the understanding of this paper is that the integration of the human rights based approaches brings a broader scope and understanding that might create more possibilities, legal and advocacy avenues for states to make them liable.

3. Methodology

This paper employs a mixed-methods qualitative research design to explore how the inclusion of human rights principles into climate change action could enable more possibilities to ensure that countries stick to their commitments. The research design integrates an analysis of a case study to provide an understanding of the subject matter by using archival research methods and content analysis of the relevant documents. With that in mind, the study specifically aims to:

1. Explore how human rights language and principles can incentivize proactive climate action.
2. Examine the role of human rights-based approaches in enhancing the legal standing and functionality of the Loss and Damage fund.
3. Evaluate the moral obligations surrounding climate change governance and assess the need for increased monitoring, pressure, and oversight mechanisms.

To gather information for this study, author uses UN database systems and digital libraries,^{lv} as well as the thematic pages of the UN Special Rapporteurs and their latest reports. Another key resource is the official UNFCCC webpage, particularly the documents and decisions section, which provided access to all the relevant documents and latest decisions from COP events and agreements. To find peer-reviewed articles, the author utilizes academic databases like JSTOR and Science Direct. The research strategy included key terms such and phrases, such as human rights based approaches, human rights, climate change, loss and damage, relevant UN bodies, the titles of important resolutions, and terms associated with international law and policy.

3.1 Case Study: Loss and Damage Fund

COP27² and CMA4, held in Sharm El Sheikh, Egypt in November 2022, established new funding arrangements to support developing countries most affected by climate change in responding to loss and damage, resulting in the creation of the Loss and Damage Fund (LDF).^{lvi} The establishment of the fund had been advocated for decades. At COP27, the UN member states agreed to create the Transitional Committee (TC), tasked with developing recommendations on institutional arrangements and operationalization of the fund.^{lvii} The TC agreed on the document at its fifth meeting, which marked a milestone in the establishment of the LDF and received support at COP28 and CMA5, meaning the suggestions and recommendations developed in the document will serve as a basis for operationalizing the Loss and Damage fund. The Transitional Committee

² The COP is the highest decision making entity of the United Nations Framework Convention on the Climate Change that unites 198 signatory countries. The COP sessions assess the implementation of the Convention and other legal instruments adopted, making decisions to enhance its effectiveness, including organizational and administrative arrangements.

developed its recommendations and gathered information from three main sources: submissions, workshops, and synthesis reports.^{lviii}

To examine the process from the HRBA perspective, considering the importance of the document developed by the TC, the paper employs archival analysis of the relevant documents, which encompasses 47 submissions to the TC.³ These submissions represent countries individually, jointly, or through a constituency, as well as organizations. Notably, certain states or organizations made multiple submissions prior to TC sessions. The analyzed submissions were contributed by the following representatives:

- **Member states:** Group of 77 and China, European Union TC Constituency (France, Germany-Ireland, Denmark-Netherlands), Morocco, Pakistan, China as the Asia-Pacific Constituency Member, Group of Developing Country Constituency, Least Developed Countries (LDC), Germany and Ireland (joint), the United States, France, Palau on behalf of Pacific SIDS, Holy See and Fiji.
- **Organizations:** World Bank, OHCHR, Food and Agriculture Organization (FAO), United Nations Children's Fund (UNICEF), United Nations Office for Disaster Risk Reduction (UNDRR), United Nations Development Programme (UNDP), Loss and Damage Collaboration (L&DC) and Refugee Law Initiative (RLI), Platform on Disaster Displacement (PDD) and IMPACT Initiatives, Climate Action Network (CAN), Global Campaign to Demand Climate Justice (DCJ), and Women and Gender Constituency (WGC), WMO-GWP Integrated Flood Management Programme and Associated Programme on Flood Management, Oxfam International, Perspectives Climate Research,

LoCAL (UNCDF), International Transport Workers' Federation (ITF), Manila Observatory, Oxfam in Timor-Leste, Climate Refugee. Children's Environmental Rights Initiative on behalf of: UNICEF, Save the Children, Plan International, International Center for Climate Change and Development and the Loss and Damage Youth Coalition. Stockholm Environment Institute, Germanwatch, ICCCAD, Oxfam Australia and Oxfam in the Pacific, Cross-constituency CSO (ENGO – CAN international and DCJ, Women and Gender, TUNGO and Indigenous Peoples, C40, Mayors Migration Council, ICLEI, UCLG and the Scottish Government as part of the LGMA Constituency, Amnesty International/Centre for International Environmental Law (CIEL), Heinrich Böll Stiftung, Living Laudato Si' Philippines and Home of Sibuyan Island Peoples.

Within the submissions, content analysis was used to better understand what was advocated by the organizations as well as the member states. During the process, the author disregarded recommendations that were technical and did not have direct, or indirect linkages to HRBA, and were not related to questions discussed in the framework. In addition, the author also specifically searched for the use of human rights language, and references to the international human rights mechanisms. For instance, human rights language was brought by Palau on behalf of Pacific SIDS, using the following wording: "furthers adherence to fundamental values of human rights, democracy, and the rule of law." ^{lix}

After conducting content analysis of the submissions, the paper specifically focused on the process and the work around the Transitional Committee, its representation, actions, and the final document itself. Following the content analysis of the document developed by the TC, the author tracked the happenings and negotiations of the finance committee at COP28 as an observer and followed digital media publishers covering events related to the Loss and Damage fund during

the 28th Conference of the Parties. Additionally, the author analyzed the final Global Stocktake text summarizing COP28, which constituted a non-binding commitment of states to continue both joint and individual action towards climate change.

The archival analysis adds to the relevant documents such as the latest resolutions supported by the United Nations General Assembly and the Human Rights Council, relevant international human rights mechanisms, reports, and recommendations developed by the UN Special Rapporteur on Climate Change, Right to Development, Clean, Health, and Sustainable environment. To understand the intersections of the indivisibility and interdependence of rights and the impact of climate change, the paper also incorporates the latest reports and research from Human Rights organizations and the UN Agencies. In addition to the relevant documentary analysis, the study is based on the main principles of Human Rights-Based approaches and additional principles relevant to loss and damage. Specifically, the paper brings seven principles discussed above, exploring each one individually to understand if they are currently integrated or not in the establishment of the Loss and Damage Fund, and to examine their potential impact on the LDF's operations and outcomes (if they would be added and are not currently present):

- Participation - What does the decision-making process in the establishment of the Loss and Damage Fund look like? Whose voices are considered and whose are undermined? Will these voices hinder or promote the process of the enjoyment of Human Rights? How representative is the participation and what is the level of participation, and what kinds of formats are accessible?
- Accountability - What are the states' obligations as a duty bearer to fulfill the rights of duty holders? How did they engage in the process?

- Non-discrimination and Equality - Ensuring access to equal rights without any form of discrimination. It also includes duty to respect, promote and fulfill the rights of marginalized groups, examining how integration of intersectional approaches to the LDF can address the specific needs of vulnerable populations and promote their equal inclusion.
- Empowerment - How is the idea behind empowerment incentivized within the LDF, and how does it comprehend the rights of individuals and communities to engage in policy development?
- Legality - Do latest documents reference international human rights law? If the decisions made within the establishment of the LDF are guided by international human rights obligations, if not, how should it be integrated?
- Operationalizing the Right to Effective Remedy - Does the fund acknowledge the need for the right to remedy within financing the LDF? How ensuring access to effective remedies for loss and damage aligns with HR principles and if it is discussed. If not, how can it be operationalized within the LDF framework?
- Resource Mobilization - Explores how HR language can incentivize states to mobilize resources for the LDF, emphasizing the ethical and legal obligations of states to support most impacted states.

3.2 Statement of Positionality

As an observer of the University of Minnesota delegation at UN 28th Conference of the Parties, the author's lens on the 28th Conference of the Parties seeks to amplify the voices of those most impacted by climate change.^{lx} Her positionality is shaped by first-hand experiences as a human

rights advocate and approaches this research with a commitment to shedding light on the intricacies of climate negotiations, emphasizing the need to place human rights principles at the core of the negotiations, to pressure states to adhere to their commitments. Author's perspective is informed by the belief that, beyond legal considerations, climate action is a shared moral obligation rooted in the fundamental right to life.

4. Analysis of the Establishment of the Loss and Damage Fund based on seven principles of Human Rights

This section analyzes the negotiations, events, and developments surrounding the establishment and operationalization of the Loss and Damage Fund based on the seven Human Rights Principles discussed in the methodology section. It evaluates the level of human rights integration into the negotiation process regarding the LDF. Initially, the text introduces the background of the establishment of the Fund before delving into an analysis. The analysis examines the Transitional Committee's efforts, including its final document outlining new funding arrangements. Furthermore, the section reviews the 47 submissions made to the Transitional Committee by UN parties and third-party organizations, assessing whether suggestions related to incorporation of Human Rights were reflected in the final document developed by TC, as well as related decisions. Consequently, the paper also examines the events happening and documents developed during COP28 around the Loss and Damage Fund. The analysis illustrates the current state of the Fund and explores how it would appear if it fully implemented human rights principles at its core.

4.1 The Loss and Damage Fund

As already mentioned above, at COP27⁴ states agreed on establishment new funding arrangements to support the countries most impacted by climate change in responding to loss and damage.^{lxi} Therefore, the Transitional Committee was tasked to operationalize new funding arrangements associated with the fund.^{lxii}

The TC composed of 24 members from Parties to the Convention and Paris Agreement, with 10 members from “developed”⁵ countries and 14 members from “developing” countries. The 14 members from “developing” countries were chosen based on geographical representation, including three from Africa, three from Asia and the Pacific, three from Latin America and the Caribbean, two from small island States, two from the “least developed” countries, and one from a “developing” country not included in the mentioned categories.^{lxiii}

On the official website of the UNFCCC, 47 submissions were available from TC member countries. The TC was able to agree on the final document during its fifth additional meeting, which was not foreseen by the official agenda. Apart from the submissions, two workshops were held in Bonn, Germany and Bangkok, Thailand each attended by 250 participants. Additionally, TC incorporated the May 2023 synthesis report, that included mapping existing funding arrangements and sources for addressing loss and damage.

⁴ The COP is the highest decision making entity of the United Nations Framework Convention on the Climate Change that unites 198 signatory countries. The COP sessions assess the implementation of the Convention and other legal instruments adopted, making decisions to enhance its effectiveness, including organizational and administrative arrangements.

⁵ The term "developed" and "developing" is used by the UNFCCC. The author of the paper acknowledges that this simple division reinforces stereotypes that go beyond economic distinctions. There is also a prolonged discussion around the term, questioning if certain rich countries, dependent on oil production, still should carry the developing country label.

The agreement around the loss and damage deal was reached during the first day of COP28 supporting the document developed by TC.^{lxiv} This action earning the label of historic, setting high hopes. As of now, the Loss and Damage pledges are “totaling more than USD 700 million to date”.^{lxv}

In addition, the final global stocktake draft decision text of the COP28 included a comprehensive section on the loss and damage emphasizing the recognition and response to loss and damage associated with climate change.^{lxvi} The text highlights sustainable development, coherence in addressing impacts, and acknowledges the vulnerabilities of specific regions and populations. It also expresses deep concern about the economic and non-economic losses for developing countries, calling for urgent action, encouraging Parties to improve coherence in disaster risk reduction and humanitarian efforts. In addition, the text in a separate section calls for “developed country Parties to continue to provide support and encourage other Parties to provide, or continue to provide support, on a voluntary basis, for activities to address loss and damage”.

The current structure of the Loss and Damage fund as well as the negotiations during the COP28 brought discussions questioning the efficiency of the fund in the state as it was established. The debate revolved around whether the fund should be hosted under the World Bank, as proposed by wealthy nations, or if it should be an independent standalone body associated with the United Nations.^{lxvii} As a result, during COP28 negotiations it was decided that the World Bank was set as an interim organization to host the fund for four years, in contrast to an independent body mostly advocated by low and middle-income countries and global south activists, who are the direct and possible recipients of financial support from the fund. The opposition from the global south to the World Bank hosting the fund stems from the inherent inequities and gaps in the international financial architecture that fails to address the causes created by climate change.^{lxviii}

Another question that arises is related to the amount of funds pledged by the Global North. The current amount is not sufficient to contribute to the fight against loss and damage and its impact on people and communities. This is particularly evident in the findings of the International High-Level Expert Group, which notes a \$200-400 billion external debt-free (grant-based) developing country financing need by 2030.^{lxix}

The text also overlooks the important wording acknowledged by the Paris Agreement, specifically the principle of "common but differentiated responsibilities and respective capabilities" of states. This neglects the main polluters causing climate change. Additionally, the final text of COP28 stresses the continuation of the "voluntary" contribution of states to the Loss and Damage Fund, disregarding the historical causes behind climate change and the ignorance, particularly of the Global North, of their decisions directly exacerbating the impacts of climate change, affecting the fundamental human rights of individuals and communities.

The agreed text does not indicate the scale of the fund, does not include affected communities in decision-making about its funding priorities, and does not give any guidance that the Fund will operate consistently with human rights obligations and there is uncertainty if it will operate in an inclusive, participatory, and human rights-compliant way.

[4.2 Analysis of the Loss and Damage Fund based on seven principles](#)

Above, we discussed the indivisibility and interdependence of all rights, meaning that failing to ensure one right will automatically exclude the enjoyment of another, and vice versa, as enshrined in the Universal Declaration of Human Rights. The paper shares the same understanding of Human Rights Principles that serve as the basis of the analysis. The acknowledgment of the interrelatedness and interdependence of all principles is crucial in the analysis. If one principle is

fully or partially ensured, or not taken into account at all, it would imply that the integration of other principles may have the same level of integration. For instance, the level of participation in the decision-making process is also related to whether the principle of non-discrimination and equality is ensured by bringing the most affected communities to the table.

4.2.1 Participation

This paper analyzes participation in the establishment of the LDF in two main categories: Participation in the negotiation process and decision-making of the operationalization of the fund during the development of recommendations via the Transitional Committee and participation in climate change negotiations at COP28.

The analysis finds that the process mostly resulted in partial participation. Despite ensuring the geographical representation of states at the Transitional Committee, composed of 24 members from Parties to the Convention and Paris Agreement, with 14 members representing the most impacted areas by climate change, such as “Africa, Asia-Pacific, Latin America and the Caribbean, small island States, least developed countries, and other developing countries,” suggestions communicated by the Global South have not been included, or partially included in the final document. It should be mentioned that the process also ensured the participation of third parties, organizations, UN bodies, environmental justice advocacy organizations, and individuals willing to make submissions to the Committee on how the fund shall be operationalized. This created the possibility of bringing the voices of underrepresented communities by suggesting the incorporation of human rights-based approaches.

The principle of participation in a Human Rights-Based Approach (HRBA) includes ensuring the involvement of all relevant stakeholders, particularly those most affected by the issue

at hand. However, the format of the Transitional Committee as well as the UN Conference of the Parties, in practice, limits the involvement of the civil society and the most vulnerable groups by not incorporating, or partially incorporating their suggestions. Despite the possibility of making submissions to the Transitional Committee as well as to the relevant committees at the Conference of the Parties, the voices of these groups were not directly heard, nor voiced in finalized document developed by the Transitional Committee, and also was limited during the COP28 negotiations.

The main document developed by the TC also limits the participation of the most affected communities into the Loss and Damage decision making process. For instance, the document only considers the state representatives as board members of the Loss and Damage fund.^{lxx} It ensures the equal geographical representation of the signatories to the Convention and the Paris Agreement, however, the power dynamics between the states must be taken into account. The concept of the participation and representation requires more than counting the numbers, considering the fact that in reality the voices of those who have less power in global politics are less considered, without fully, and in some cases even partially incorporation in the decision making process.

Partial participation is the case while attending the Conference of the Parties itself. The UN Special Rapporteur on climate change in the 2022 report which was already mentioned in the text emphasized the crucial role of participation in various forums, including the UN Conference of the Parties. There have been widespread calls for increased involvement of indigenous peoples, youth, and civil society in these conferences. The Special Rapporteur noted the exclusion of these groups from certain negotiations.

Additionally, the current structure of the conferences under the Framework Convention and the Paris Agreement is characterized by a disconnect between government negotiations and

side events organized by non-State actors. The challenges to the format identified by the Special Rapporteur have not been changed during the COP28 either. Moreover, climate activists at COP28 claimed their efforts to be heard outside of the negotiation rooms were hindered by stringent rules, despite permitted protests at the designated locations. Where the U.N. secretariat mandated advance permission for protests and prohibited taking them to the streets, which was the common practice at previous COP events.^{lxxi} Moreover, there were the cases where despite in advance permission the civil society movements voicing the needs of the underrepresented communities have not granted the permission to have gatherings and make their voices heard.^{lxxii} Representation of indigenous people at COP28 numbered more than 300 but despite their advocacy the final COP28 agreement lacked substantial incorporation of Indigenous rights and omitted the presence of an Indigenous representative from participating on the board of the established loss and damage fund.^{lxxiii} On the other hand, the text considers the establishment of the consultative forums targeting diverse stakeholders including civil society organizations and underrepresented communities, such as Indigenous Peoples, youth, women, climate-induced migrants. However, the text is vague and does not provide a clear understanding of what the consultative forum entails, how stakeholder engagement will be ensured, what formats will be used, and how these groups will be included in the decision making process.

Considering the above-mentioned facts, the current level of participation in the establishment of the LDF, including its process of document development and engagement in climate negotiations, does not fully meet the Human Rights principles related to participation. Fully integration of participation into this process would entail including the most vulnerable and impacted communities by climate change at the table. This would add value to the process of tackling loss and damages and involve these communities in the operationalization of the fund. By

mainly targeting the most affected groups, identifying their needs, and prioritizing them, this approach would lead to a better understanding of the context and events happening on the ground. Consequently, it would improve the efficiency, effectiveness, and transparency of the activities carried out by the fund and ensure that rights are promoted, protected, and fulfilled directly on the ground. An increase of the participation level, or ensuring the full participation would also be linked to ensuring justice and equity. The integration of one principle will have a direct impact on another.

An increase in the level of participation, particularly inclusion of the most affected vulnerable groups in the process, can play a significant role in making countries liable to their commitments. When these communities have a direct voice they can publicly advocate for their rights and remind the states of their human rights obligations. This precedence also could create more efficient monitoring and reporting mechanism ensuring countries follow their pledges and commitments. The integration the voices of the communities into the final documents also would create the official acknowledgement and commitment of the states that certain issues exist, which would establish strong links to strengthen advocacy efforts through legal avenues.

4.2.2 Accountability

Accountability in Human Rights Based Approaches centers on the core relationship between duty-bearers and rights-holders, where duty-bearers are states⁶ that have human rights obligations towards their citizens, within their sovereign territory and beyond.^{lxxiv} The United Nations describes the principle of accountability as covering various measures that ensure the fulfillment

⁶ Since this paper does not explicitly focus on the roles of corporations and private companies and their impact on climate change, it limits the understanding of duty bearers to states due to the approach of the analysis.

of rights and responsibilities. In case of accountability, the paper seeks to find what are the states' obligations as a duty bearer to fulfill the rights of duty holders and if it is included in the operationalization of LDF. Accountability mechanisms are broad, and they include judicial, quasi-judicial, administrative, and informal systems.^{lxxv} Understanding accountability calls for national laws to align with international human rights standards, which also calls for adherence to human rights norms by non-state actors that would contribute to transparency and strengthen law-enforcement mechanism. Analyzing the fund from an accountability perspective, based on the available documents, became challenging because there is no explicit reference to international human rights law and standards. The word “obligation” is used only once in the final text of TC, which repeats the Paris Agreement preamble text discussed above. Moreover, the same text explicitly highlights that “that funding arrangements, including a fund, for responding to loss and damage are based on cooperation and facilitation and do not involve liability or compensation”.^{lxxvi} On the other hand, the text recognizes an integration of accountability mechanisms for the fund to be more transparent and efficient. In this context the term is used six times, calling for establishment of interdependent mechanisms such as grievance procedure, publicly periodic evaluation of the fund and other operational modalities.

The analysis reveals a complex relationship between LDF and the principles of accountability from a Human Rights perspective. An approach to LDF emphasizes cooperation and facilitation over clear accountability for loss and damage, with an explicit disclaimer against liability or compensation. Despite these limitations, the fund's framework does include elements that promote accountability. However, the absence of a direct reference to international human rights law and standards does not align with other human rights principles and neglects the existence of state's legal obligations, which creates a gap related to state's responsibilities to ensure that the rights of

those affected by climate change are protected and fulfilled. If the principle of accountability is fully included, it could create more robust enforcement mechanisms for states to adhere to their commitments and, moreover, acknowledge the need for making new commitments regarding compensation and liability. This approach would align with other principles discussed in the analysis.

4.2.3 Non Discrimination and Equality

This principle ensures access to equal rights without discrimination and examines if the establishment of the Loss and Damage fund had intersectional lenses, meaning if it tailored the needs of vulnerable populations and based its decisions on equity. The final document developed by the TC does not explicitly bring an understanding how the Loss and Damage fund will ensure the access to equal rights without discrimination considering the intersectionality of different groups characterized by various determinants. The text disregards suggestions of International Human Rights Organizations and climate justice advocates that call to base the decisions on human rights. Although the final text copies the preamble of the Paris Agreement related to human rights, the document does not clearly emphasize how the principle of equality and non-discrimination will be ensured.

In the case of fully integrating the principles of equality and non-discrimination into the establishment and operation of the Loss and Damage fund, several key considerations would come into play: recognition of the intersectional character of discrimination and ensuring that the needs of all vulnerable populations are adequately addressed. The approach would consider factors such as gender, race, ethnicity, disability, socioeconomic status, and geographic location. The fund

would prioritize ensuring equitable and immediate access to grant based resources and support for all affected communities, regardless of their background or circumstances. The principle will recognize the equal and full participation of impacted communities in the decision-making process, and as a result, states will ensure that rights enshrined in the Human Rights treaties to support the principle of equality and non-discrimination are upheld.

4.2.4 Empowerment

The establishment of the loss and damage fund and the idea behind the financial support of the most impacted communities contributes to the empowerment of the groups who cannot enjoy their basic human rights. While talking about the term “empowerment” we have to acknowledge critiques around the evolution of the term by various scholars. For instance, in case of the women’s rights advocacy the narrative of “empowerment” in general exposes the pitfalls of "white savior" advocacy, which prioritizes simplistic stories of victimhood to garner attention and funding, reinforcing paternalistic attitudes and undermining the agency of the women they aim to empower.^{lxxvii} Acknowledging this approach to empowerment, the Loss and Damage fund, while disregarding other human rights principles, may perpetuate the failure to create spaces for different communities to be engaged in the decision-making process and to consider their voices, which have historically been undermined. Empowerment is not a standalone principle, but it depends heavily on the full integration of the principles, such as participation, and non-discrimination and equality. The lack of effective platforms for various groups, especially those vulnerable to climate change, to be included in the decision-making process contributes to their disempowerment. The concept of empowerment is not only about engaging in the process, but also about allowing the most impacted communities to make decisions themselves and prioritize their issues. If

empowerment is fully integrated into the fund, it would mean that the voices of these communities are not only heard, but their real needs are prioritized, enabling them to manage resources locally and have the possibility to access to funds. While the aim of the LDF is explicitly to support developing countries, it fails to incorporate the idea of empowerment, which is crucial for achieving the fund's goals.

4.2.5 Legality

The signatory states to the UN human rights treaties have an obligation to respect, promote and fulfill all human rights without discrimination. Failing to fulfill any of these obligations is a violation of these rights.^{lxxviii} OHCHR in its submission to COP21 states that “Failure to take affirmative measures to prevent human rights harms caused by climate change, including foreseeable long-term harms, breaches this obligation.”^{lxxix}

The step into the establishment of the fund can be understood as a clear acknowledgment of states commitment to comply with their human rights obligations. However, the final document developed by TC and approved at COP28 lacks direct linkages between the enjoyment of human rights and the Fund as a contributor to supporting and promoting universal human rights for the most vulnerable communities. OHCHR in its submission to TC mentions the concern about the limited reference to Human Rights and its integration throughout the process.^{lxxx} Consequently, the final document does not reflect suggestions basing on Human rights, nor references and linkages to the international Human Rights Law and mechanism. In Annex II, the initially defined objectives lack a clear connection to human rights. The fund is primarily portrayed as aiding “vulnerable developing countries in responding to economic and non-economic loss and damage associated with climate change's adverse effects, including extreme weather events and slow-onset events.” This common wording, right from the outset, fails to elaborate on the significance of non-

economic and economic loss and their relationship to human rights. The “non-economic and economic loss” is shrunk to acknowledge the impact on the wide variety of rights such as the right to a clean, healthy and sustainable environment and the rights to life, food, water and sanitation, health, housing, development, self-determination.

In general, the word "human rights" appears twice in the document. In summarizing the main finding of the synthesis report, the document underscores, "the meaningful inclusion of vulnerable communities, gender-responsiveness, and the promotion of human rights are important facets to consider and mainstream in the new funding arrangements and the Fund." However, the report's language remains vague, and is not reflected into recommendations. Further human rights-related language can be found in Annex I. However, the paragraph mirrors the preamble text of the Paris Agreement found in official documents and in final texts of the UN Conference of the Parties. Apart from these two mentions, the document does not bring any additional angle from the human rights perspectives and does not reflect submissions made by the different actors advocating for the integration of the human rights approaches to the Transitional Committee.

Avoiding the use human rights language and references to international human rights mechanisms into the final texts and agreements around the Loss and Damage fund may be intentional for states to avoid their human rights obligations. This approach in the end rejects the idea shared in the beginning of the paragraph that the establishment of the Loss and Damage fund could be the acknowledgement of states to fulfill their human rights obligations. Linking climate change negotiations to human rights might make states concerned about potential legal consequences and financial obligations, as well as the possibility that historical context will “complicate” the negotiation process.

By connecting the fund with human rights obligations, states would be held more accountable for addressing the needs of vulnerable communities affected by climate change. This could deter states from avoiding their responsibilities, as failing to meet these obligations officially acknowledged in the official texts would constitute of failing the human rights obligations. Consequently, if the principle of legality is fully integrated, it would contribute to more consistent actions by states in fighting climate change, specifically in addressing loss and damage.

4.2.6 Operationalizing the Right to Effective Remedy

The actions and negotiations surrounding the Fund neglect the existence of the right to remedy, another topic advocated by climate justice advocates and organizations. Consequently, the right to remedy is not embedded in any official documents either. One of the key themes discussed by the UN Special Rapporteur on climate change in the 2022 report is loss and damage, specifically the impacts of climate change and participation in decision-making processes within the 'climate change regime.' The UN system and the Special Rapporteur view loss and damage from a human rights perspective in the context of “the right to remedy and the principle of reparation, including restitution, compensation, and rehabilitation”.

In annex I the TC recommendations encourage “developed” countries to contribute to the fund on the voluntary basis. The text excludes the right to remedy trying to disregard the possible legal obligations under the International Human Rights Law. The Loss and Damage Fund should aim to provide effective remedies for those most impacted by the climate crisis without burdening the budgets of developing countries.^{lxxxix} The final document does not make any reference to the remedy as well as the UN Basic Principles and Guidelines to remedy that includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition highlighted in the submissions of Amnesty International & CIEL, OHCHR, Heinrich Böll Stiftung.^{lxxxii} Disregarding

the right to remedy and basing the wording on the voluntary contribution goes against the understanding of historical responsibility and “polluter pays” approach. Furthermore, the submission omits the UNFCCC principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), which acknowledges the uneven contributions of nations to climate change due to historic and current emissions. Guided by the principle of CBDR-RC, which reflects historical responsibility, developed countries, recognized as historic polluters under the Convention and the Paris Agreement, are obligated to provide climate finance specifically stressed in the submission of Heinrich Böll Stiftung to TC.

Mentioning the right to remedy would be an official acknowledgment of the historical responsibilities of the main polluters. This would also recognize their human rights obligations. As a result, the fund would be based not only on voluntary contributions but also on obligations that should be fulfilled by the states and create more legal avenues to access the justice at International Human Rights Courts. This would serve the purpose of the establishment of the Fund, where the states acknowledge that their actions cause climate change impacts that ultimately breach the human rights of communities, especially the most underrepresented and marginalized groups.

4.2.7 Resource Mobilization

The resource mobilization is directly related to the right to remedy, as discussed above. Acknowledgement of the right to remedy in the context of loss and damage would raise the topics of the state obligations and create the possibility for victims to access the reparations. In addition, this principle also suggests establishing the fund purely only on grants advocated by the Global South. While developing countries stressed the importance of “adequate non-debt producing grant-based public finance”.^{lxxxiii} This emphasis was not explicitly reflected in the final document. Annex

It acknowledged diverse financial resources, including grants and concessional loans, and various financial instruments, aligning with Board policies and guidance from COP and CMA to support national efforts in addressing loss and damage. The wording to bring into agenda “concessional loans and various financial instruments” is vague and gives the possibility to navigate, the idea of the grant based public finance is explicitly related to historical responsibilities, and gives the Loss and Damage fund its uniquenesses, considering other climate funds established to fight climate change based mostly on loans. At this stage, the states officially committed around \$ 700 million,^{lxxxiv} which is not known how it will be allocated at this stage and considering that the current amount will not make any relevant impact taking into account the level of loss and damage.

The resource mobilization lacks a human rights angle. Bringing human rights language, such as acknowledgment of the right to remedy, as well as understanding the linkages between grant-based funds, historical polluters, and their impact on the enjoyment of human rights in resource mobilization, is a key step in integrating it as a human rights principle and connecting this to state obligations. Human rights language can serve as a powerful tool to underscore these obligations, framing climate change impacts within the context of human rights violations. An incorporation of human rights language will make states obliged to take more action and provide financial support that does not consider loans, but has explicitly grants based approach and context understanding.

4.3 Summary of Results

To analyze the research question: how the inclusion of human rights principles into climate change action could enable more possibilities to make sure that countries stick to their commitments, this paper set three aims to investigate, which are briefly responded below:

Investigate how human rights language and principles can incentivize proactive climate action

The paper found that integrating human rights language and principles into climate change policies can indeed incentivize proactive climate action. Framing climate change as a human rights issue creates legal obligations for states to fulfill and makes countries accountable more likely to recognize their legal commitment enshrined in the international human rights binding documents. This recognition stems from the understanding that failing to address climate change effectively undermines fundamental human rights. Moreover, the paper highlights how integration of human rights principles, such as non-discrimination and equality, can support to advocate for climate action among diverse stakeholders. By emphasizing the disproportionate impacts of climate change on vulnerable communities, including indigenous peoples, women, children, and persons with disabilities, countries are compelled to take more inclusive and equitable measures to fight climate change and address loss and damage.

Examine the role of human rights principles in enhancing the legal standing and functionality of the Loss and Damage fund.

The paper found that incorporating human rights principles into the operationalization of the Loss and Damage Fund can enhance its legal standing and functionality. By aligning the fund with international human rights law, integrating into the fund the Human Rights based approaches including principles of legality, accountability, participation, and non-discrimination, countries are more likely to adhere to their commitments and fulfill their obligations. However, the analysis also revealed limitations in the current structure of the fund, particularly concerning inclusivity and representation of vulnerable communities. Despite ensuring some levels of diverse participation, there are still gaps not only in a full engagement of civil society and underrepresented communities, but the incorporation of their suggestions and recommendations in the decision-

making process. This highlights the need for stronger mechanisms to ensure meaningful participation and empowerment within the fund's framework. Additionally, acknowledging and incorporating language related to the right to remedy will bring recognition of the harm caused by historical polluters, which could also influence approaches to resource mobilization and grant-based funding. As of now, the analysis showed that discussing the right to remedy has not been prioritized by the member states.

Evaluate the moral obligations surrounding climate change governance and assess the need for increased monitoring, pressure, and oversight mechanisms.

The paper evaluates the moral obligations of countries in addressing climate change through a human rights lens which underscores the importance of increased monitoring, pressure, and oversight mechanisms to hold nations accountable for their commitments. Understanding that the legal obligations and commitments have weak enforcement mechanisms paper also brings the importance of moral obligations of the states, specifically in loss and damage by basing climate change issues on human right lens and understanding the importance of the historical context, as well as the states accountability and commitments by signing and ratifying international human rights instruments. By referencing international human rights instruments and legal precedents, the paper emphasizes the need for robust enforcement mechanisms to ensure compliance with not only climate agreements by the international human rights law obligations.

5. Discussion

The findings of this study reaffirm the existing linkages and the work of prominent organizations in the field of climate change and the importance of a call for basing climate-related decisions on human rights approaches. This approach could create more effective avenues for states to adhere to their human rights obligations. This might be the reason why states try to avoid incorporating

the human rights language and avoid referencing international human rights instruments into the climate negotiations - the establishment of the Loss and Damage Fund is a great evidence to that. The study's added value to research around climate change negotiations is the understanding of how human rights-based approaches can be integrated into climate change action, specifically within the context of the Loss and Damage Fund. It emphasized the interconnectedness between climate change and human rights, highlighting how violations in one area can lead to impacts on others. The analysis in this paper focuses on the negotiations, events, and developments surrounding the establishment and operationalization of the Fund, with particular emphasis on its alignment with seven Human Rights Principles. It evaluates the degree of human rights integration into the negotiation process regarding the LDF, examining both the background of its establishment and its current status.

Results have shown that although several human rights principles are partially integrated into the establishment of the LDF, the right to remedy and resource mobilization have not been addressed at all. Despite efforts to ensure representation from various regions and stakeholders, the level of participation in decision-making processes for the LDF remains incomplete. Civil society and vulnerable groups are notably underrepresented, raising concerns about the fund's inclusivity. The foundational document for the LDF does not contain explicit measures to ensure non-discrimination and equality, especially in regard to the needs of vulnerable populations. Although the LDF intends to empower communities affected by climate change, its approach to empowerment appears tokenistic, and the exclusion of marginalized voices from decision-making processes does not align with the principle of empowerment.

Study found more about the practical implications of integrating human rights into climate action, such as the need for resource mobilization and legal accountability. However, it also

acknowledges the gaps that remain in terms of the effectiveness of these approaches in compelling states to fulfill their climate commitments and the mechanisms required for consistent enforcement. One area of deviation is the difficulty in ensuring that human rights-based approaches lead to tangible enforcement and accountability. While the theoretical framework supports the idea that integrating human rights principles can drive climate action, the real-world challenges of enforcement, resource mobilization, and legal mechanisms to ensure compliance with climate-related obligations remain significant. This deviation may be due to the lack of binding mechanisms in climate agreements and the complexity of international law enforcement.

However, the analysis highlights the critical importance of integrating human rights principles into the establishment of the fund to uphold the protection, promotion, and fulfillment of human rights. Basing climate related decisions on human rights principles still remain one of the most significant tools. Acknowledging the right to remedy could hold states accountable for their actions and obligations within the LDF framework. Resource mobilization efforts for the LDF lack a human rights perspective, particularly regarding grant-based funds and historical responsibilities. Integrating human rights language into resource mobilization could underscore state obligations and prioritize support for affected communities.

Disregarding references to International Human Rights Law helps states to maneuver and avoid being held accountable for failing to fulfill their obligations. This integration could lead to states acknowledging their duties and responsibilities, particularly within their jurisdiction and regarding the consequences of their decisions on exacerbating the impacts of climate change worldwide. Litigation and court decisions further underscore the deep linkages between climate impacts, human rights violations, and states' obligations. The recent landmark decision of the European Court of Human Rights *KlimaSeniorinnen v Switzerland* shortly discussed above is a

strong acknowledgment of the state's failure to ensure the protection of rights due to the climate change crisis, constituting a human rights violation. The case was filed by the Association of Senior Women for Climate Protection Switzerland, representing around 2500 individuals with an average age of 75, and was brought to the ECHR in 2020.^{lxxxv} On April 9, 2024, the court ruled that Switzerland violated the rights of the applicants by failing to uphold its commitment to the Paris Agreement. Specifically, the European Court found a violation of the right to respect for private and family life (Article 8), which was interpreted as freedom from environmental threats to one's personal life, and access to court (Article 6 § 1), as it determined that Klimaseniorinnen had exhausted all judicial avenues by bringing their case to all three judicial instances of the Swiss bodies before it brought the case to the ECHR. The Court determined that Switzerland breached its positive obligations under the Paris Agreement due to significant shortcomings in establishing an appropriate domestic regulatory framework. This included the absence of a carbon budget and national greenhouse gas (GHG) emissions limitations and failing to achieve its previous GHG emission reduction targets. The decision will not only impact Switzerland's decision to be aligned with its Paris Agreement commitments but it creates precedence for 45 other member states of the Council of Europe to ensure their positive obligations.^{lxxxvi}

Another significant example where states were held accountable to live up to their climate pledges is the climate litigation case in the Netherlands. The violation of Articles 2 and 8 of the ECHR in the Urgenda Foundation v. The State of the Netherlands litigation case was determined by the Hague Court of Appeal, which upheld the District Court's decision.^{lxxxvii} It affirmed that the Dutch government failed to reduce greenhouse gas emissions by at least 25% by the end of 2020, which was judged as the violation of state's duties under the aforementioned articles. The court acknowledged Urgenda's claim under Article 2, which safeguards the right to life, and Article 8,

which protects the right to private and family life, home, and correspondence. It determined that the Dutch government is obligated under the ECHR to safeguard these rights.

Despite the rapid growth of climate justice advocacy and environmental law, the 2019 report by the UN Environmental Program discovered the main challenge stems from “weak enforcement mechanisms”, which is found as a major obstacle in addressing climate change, curbing pollution, and averting extensive loss of species and habitats.^{lxxxviii}

As we see, despite the landmark and precedence-setting decisions, and the existence of international law, weak enforcement mechanisms pose a challenge in holding states accountable for their actions in terms of breaching the right to remedy or ensuring their positive obligations within their jurisdiction. Relying solely on environmental law in climate change negotiations might pose another obstacle due to the non-binding nature of the documents or the absence of enforcement mechanisms. However, referencing specific rights in official documents will create more linkages to international binding human rights instruments that states have officially ratified and signed. Ultimately, it is up to each state to decide how it wishes to position itself on the international stage: whether to fulfill obligations posed by binding documents to strengthen its reputation, or to avoid them. The nature of International Human Rights Law limits the enforcement of the implementation and adherence of state obligations.

Additionally, recent litigations are related to mitigation but not loss and damage. Without a robust legal framework or more legal decisions explicitly related to loss and damage with a clear understanding of the context of historical polluters, the losses and damages created by climate change may still be approached narrowly and overlooked during climate negotiations. However, we have to acknowledge that the incorporation of Human Rights based approaches and explicit reference to state obligations will create more avenues for advocate and legal decisions

highlighting the states breaching their obligations. The findings underscore the critical importance of integrating human rights approaches into climate-related decisions, particularly regarding vulnerable communities impacted by climate change. This study highlights the need for more robust mechanisms to ensure inclusivity, representation, and adherence to human rights obligations within the Fund's processes.

5.1 Policy Recommendations

While the paper examined the incorporation of human rights principles and references to international human rights instruments in the foundational documents of the Loss and Damage Fund, it also explored actions and activities that may not be explicitly tied to human rights language but aligned with human rights approaches. This approach was also considered in the development of the recommendations, ensuring the level of participation, principle of equality and non-discrimination, as well as empowerment that can be incorporated by fulfilling the demand of the most vulnerable. The current framework and analysis contributed in the development of the recommendations around the operationalization of the Loss and Damage Fund, which also directly aligns with the struggles voiced by underrepresented communities, as well as climate justice advocates:

Independent Legal Standing Entity: To achieve an efficient funding infrastructure, the creation of an independent, legal standing fund is the most important. The Fund operating autonomously under the UNFCCC, is crucial for directing attention and resources specifically towards addressing the most vulnerable communities. While the World Bank's Fiduciary Intermediary Framework is considered an interim setup, it is essential to recognize its limitations and the level of trust of Global South advocates because of historical inequities.

Inclusive Governance: An inclusive governance structure is crucial to ensure several principles discussed above. A strong Board, that would create the possibility to include voices of the most impacted communities in the decision making process will create the ambitious precedence. Integration of quotas and the rotation based system for the most impacted groups on the Advisory Board, or as part of other decision-making platforms, will enhance the level of participation, and would ensure the principle of quality and non-discrimination.

Direct Access for Communities: Another aspect of participation and empowerment involves ensuring adequate and direct access to funds for communities through local organizations. Receiving small grants by community organizations would ensure that funds are allocated promptly, addressing immediate needs to mitigate loss and damage. The simplicity and directness of access to finance within a short period of time must be guaranteed.

References to international human rights law: The LDF's actions must be based on the human rights principles and align with the international human rights law, including the main environmental documents and other relevant binding documents, taking into account “Common but Differentiated Responsibilities”, state commitments and obligations.

5.2 Reflections on Theory and Methods

While this study provides valuable insights into the integration of human rights approaches into climate change, it is not without limitations. One potential limitation is that, despite being a case study, it does not integrate more qualitative research methods, such as interviews or focus groups. Engaging stakeholders from different sectors, as well as incorporating the private sector perspective, could have been helpful in understanding this sector's importance in climate change action. As a result, other possible avenues and tools for fighting climate change could have been

discovered, such as comparisons between the Loss and Damage Fund and the existing Climate Change Green Fund. This would allow for better understanding and comparison of the existing fund's experience with the current developments surrounding the operationalization of the new fund. Including these methods would enrich the study, enabling to identify more intersections, challenges, and intricacies behind the negotiations and incorporation of rights-based approaches.

Further research is needed to fully understand the implications of the findings and explore alternative approaches to addressing climate-related loss and damage. This may be an interesting avenue for academia to further contribute by exploring the intersections between climate change, human rights, and international law, specifically focusing on loss and damage. It could explore each human rights principle and elaborate more on ways it must be incorporated and the actions that must be taken, using different research methods.

Considering the complexity of human rights and defining the analytical framework was a challenge, especially in prioritizing principles while acknowledging their indivisibility and interdependence. However, after identifying the main principles that helped establish the specific framework, it was possible to formulate questions and evaluate current happenings around loss and damage from a human rights perspective. On the other hand, weak enforcement mechanisms may weaken our argument that even the full incorporation of human rights approaches will compel states to adhere to their commitments. It may be challenging to strongly declare this statement due to the aforementioned arguments, which are sometimes only dependent on the moral understanding of specific countries and their willingness to adhere to human rights obligations.

The study findings underscore the importance of integrating of human rights principles as an effective instrument in enhancing climate action. This strengthens the scholarly literature that

recognizes the demand of HRBA in promoting of rights of the most marginalized, particularly in the first and second pillars of climate action, such as adaptation and mitigation. The main similarities between the three pillars are evident, especially in the promotion of meaningful participation, accountability, the creation of non-discrimination, and an equitable approach with a focus on intersectional approaches. However, loss and damage introduce unique challenges and greater needs for referencing legal frameworks. Notably, there is a specific need to acknowledge the right to remedy in this context, which is not typically addressed in adaptation and mitigation efforts. Considering the readiness of states and their commitments within the operationalization of the Loss and Damage fund, the process around loss and damage creates momentum to fully integrate HRBA into the process as a tool for effective climate action.

6. Conclusion

This paper explores how integrating human rights principles into climate change policies can serve as an incentive for UN member states to take proactive action and create more opportunities for them to stick to their commitments. By framing climate change damages within the context of human rights violations, the paper also highlights the moral obligations for countries to address climate issues seriously. To this end, the paper develops an analytical framework based on human rights principles, such as participation, accountability, non-discrimination and equality, legality and empowerment, and brings two additional principles specific to the context related to loss and damage: operationalizing the right to remedy and resource mobilization developed by OHCHR. For analysis, the paper presents a case study examining the establishment of the Loss and Damage Fund and assesses how incorporating human rights principles into its establishment and operation can strengthen its legal standing and functionality.

The paper found that by aligning the fund with international human rights law, it enhances its legitimacy and reinforces the obligations of states to fulfill their commitments. However, in the current state of the fund, states avoid basing their decisions on human rights principles and overlook the references of human rights law into the Fund's official documents. The analysis showed that some human rights principles such as participation, accountability, non-discrimination and equality are partially implemented, while other principles are only slightly implemented, and some, including the operationalization of the right to remedy have not been considered at all. It also found that incorporating human rights principles into the establishment of the Loss and Damage Fund will create more legal avenues and incentives for states to commit to their human rights obligations, such as the duty to protect, promote, and fulfill. However, the paper also acknowledges the weak enforcement mechanisms that can be obstacles to fulfilling states' legal obligations.

The paper in the end develops policy recommendations considering Human Rights principles, which align with the advocacy of environmental activists. Recommendations include creating the Loss and Damage Fund as an independent legal entity based on grant-based public finance, acknowledging the right to remedy, avoiding the term "voluntary basis," referencing human rights language and international human rights law in official documents, and ensuring that the most affected communities are meaningfully engaged in the decision-making process. This could involve creating a seat on the Advisory Board of the fund and other platforms for these communities, allowing them not only to voice their concerns but also to have their suggestions heard and supported for implementation.

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