

The Ambiguities of the Loss and Damage Fund

Jernej Letnar Čerňič

How do we respond to the negative impacts of climate change on the enjoyment of human rights? Recent discussions and negotiations at the United Nations Climate Change Conference (COP28) resulted in establishing the Loss and Damage Fund (hereinafter the Fund). States parties at the 2009 United Nations Climate Change Conference (COP15) already envisaged the establishment of the Fund to respond to the negative impacts of climate change. They noted in the Copenhagen Accord that “New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries” (Decision 2/CP.15, Copenhagen Accord, 2009, para. 9). Later, the Warsaw international mechanism for loss and damage associated with climate change impacts emphasized the importance of “... enhancing action and support, including finance, technology and capacity building, to address loss and damage associated with the adverse effects of climate change” (Decision 2/CP.19, para. 5 (c), 2014). The direct legal basis for establishing the Fund was established at the 2022 Sharm el-Sheikh United Nations Climate Change Conference (COP27). The States there decided “... to establish a fund for responding to loss and damage whose mandate includes a focus on addressing loss and damage” (Decision 2/CP.27, para. 3, 2022). The Fund was finally operationalized at the Dubai United Nations Climate Change Conference (COP28). The States there observed that the objective of the Fund: “... is to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and noneconomic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events” (Decision -/CP.28 -/CMA.5, Annex I, p.5, para. 2, 2023).

The Fund will serve as a mechanism of a financial nature that would compensate those countries that were adversely impacted by different adverse impacts of climate change. It aims to compensate countries and provide them with financial support for all losses and damages sustained due to climate change that cannot be remedied through mitigation and adaptation measures. The Global South countries consider the Fund as the mechanism by which Global North countries would compensate them for historical injustices. They argue that the Global North countries have a moral obligation to aid countries adversely affected by their industrial activities over the past centuries. The Global South countries that are mainly affected are primarily coastal states, small island developing states, and least developed countries, which have carried the most harmful effects of climate change. Nonetheless, for the Fund to have credibility and legitimacy, it would have to ensure equality in assisting all countries affected by the negative impacts of climate change.

The concept of loss and damages includes economic losses, such as infrastructure deterioration and destruction, and non-economic losses (negative impacts on biodiversity, human dignity, cultural heritage, etc). States will have to agree on the exact definition of “loss and damage” in the future. The legal nature of the Fund is based on states’ shared and joint responsibility for the adverse consequences of climate change. Its aim is not primarily preventive but mostly to compensate most affected states for losses and damages. It is embedded in the values of international cooperation, extraterritorial environmental and human rights obligations, solidarity, and shared responsibility to respond to the adverse effects of climate change on the enjoyment of human rights. Therefore, the Fund should assist states and other stakeholders in building capacity to prevent climate change risks for the enjoyment of human rights.

Nonetheless, several ambiguities exist. It needs to be made clear who the rights-holders and duty-holders under the Fund are and how at least its minimum funding will be secured. Some countries have already pledged contributions to the Fund (UN, 2023). However, the sustainability of such donations beyond Global North countries will have to be ensured. The United Nations should encourage the private sector’s contribution to the fund. Most importantly, how the causal link and attribution be-

tween cause and adverse impacts on climate change will be established is still being determined. Nonetheless, the Fund should complement existing climate finance frameworks such as the Green Climate Fund, which at COP28 achieved the funding record (Green Climate Fund, 2023).

As the Fund is still in its early stages, how it will operate and administrate the funds is still being determined. One can expect a disagreement over who will be obliged to contribute to its functioning along the Global South - Global North divide that is often visible in the United Nations General Assembly. Nonetheless, establishing the Fund should be welcomed as an attempt to respond to the negative effect of climate change on countries in both the Global South and the Global North. The Fund will attempt to create financial incentives to rebuild countries and help vulnerable communities address the negative impacts of climate change. As climate change is an issue of urgency, the effectiveness of the Fund should not be lost in the governance, financial, and ideological disputes between the Global South and the Global North. Therefore, a robust mechanism should be established to ensure and monitor the independence, impartiality, and fairness of the Fund's functioning.

The author acknowledges the financial support from the Slovenian Research and Innovation Agency (Research project "Corporate accountability, human rights, and climate change: Towards coherent and just Slovenian and international legal order", no. JP. 50171).

LITERATURE AND SOURCES

- Green Climate Fund, COP28: Green Climate Fund reaches record funding level <https://www.greenclimate.fund/news/cop28-green-climate-fund-reaches-record-funding-level>.
- United Nations Loss and Damage Fund, Pledges to the Loss and Damage Fund, 2023, <https://unfccc.int/process-and-meetings/bodies/funds-and-financial-entities/loss-and-damage-fund-joint-interim-secretariat/pledges-to-the-loss-and-damage-fund>
- United Nations, Conference of the Parties Report of the Conference of the Parties on its twenty-seventh session, held in Sharm el-Sheikh from 6 to 20 November 2022 Addendum Part two: Action taken by the Conference of the Parties at its twenty-seventh session, FCCC/CP/2022/10/Add.3, 17 March 2023.
- United Nations, Decision -/CP.28 -/CMA.5, Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4, Annex I. Annex I, Governing Instrument of the Fund, FCCC/CP/2023/L.1–FCCC/PA/CMA/2023/L.1, 29 November 2023.
- United Nations, Decision 2/CP.27, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, 20 Nov 2022, p. 11, para. 3.
- United Nations, Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session, FCCC/CP/2009/11/Add.1, 30 March 2010, Decision 2/CP.15, Copenhagen Accord, 18 December 2009.
- United Nations, Warsaw international mechanism for loss and damage associated with climate change impacts, Decision 2/CP.19, Conference of the Parties Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013 Addendum Part two: Action taken by the Conference of the Parties at its nineteenth session, FCCC/CP/2013/10/Add.1 Distr.: General 31 January 2014.