

Unlocking Climate

Reparations:

Key Obstacles in the Emergence of a Climate Reparations Framework



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Executive summary

This paper aims to identify some of the principal obstacles affecting the development of an effective climate reparations framework within the international policy response to the climate crisis. These obstacles need to be overcome in order to unlock the transformative potential of this emerging narrative to empower climate justice advocates in African countries to challenge the status quo in the international climate policy field. The paper is intended as a conversation starter, to explore – through dialogue between affected communities, civil society organisations and government representatives from across the globe – how to further develop a climate reparations framework for African countries.



01

Introduction

The global climate crisis is by far one of the most pressing challenges of our time, with far-reaching consequences for ecosystems, economies, and communities worldwide. The impacts of climate change are distributed unequally, with vulnerable populations often bearing the brunt of long-term environmental degradation and extreme weather events. At the multilateral level, governments, civil society, affected communities, and others are grappling with the question of how to deal with the resulting loss and damage from adverse climate impacts under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement.

The Intergovernmental Panel on Climate Change (IPCC) highlights that loss and damage from climate change are on the rise and is becoming ‘increasingly difficult to avoid, while strongly concentrated among the poorest vulnerable populations.’¹ This is especially problematic since poor and marginalised communities that are most likely to be affected have least contributed to the problem.

This is the case for vulnerable communities in Africa that are disproportionately affected by the impacts of climate change despite contributing minimally to global greenhouse gas emissions. The continent faces a myriad of challenges, including increased frequency and severity of catastrophic weather events, loss of biodiversity, food insecurity, and displacement of communities resulting from climate change.² Moreover, Africa bears the historical burden of colonial exploitation and extraction of natural resources, exacerbating its vulnerability to climate change.³

African countries face a compounded challenge when it comes to addressing climate change: how to raise finance, how to access rapid funding, how to rebuild and not worsen the debt burden, and longstanding economic dependencies that are the product of former colonial settlements and post-independence negotiations. It is estimated that lower-income countries spend up to five times of their climate adaptation budgets on repaying their external debts – Mozambique, for example, had to take out a US \$118 million loan to respond to loss and damage from cyclone Idai in 2019.⁴ In many cases, the vulnerability of their economies is also tied to the vulnerability of the environmental infrastructures.

This vulnerability is not natural. Rather, as Olúfemi Táíwò points out, ‘vulnerability to climate change results from flows and accumulations over time that were set in motion by colonialism and slavery.’⁵ Historically, mechanisms of intensive extraction, pollution and fragilization of the soils and community exploitation have led to highly intersectional vulnerability: human displacement, migration, economic crisis, climate-related humanitarian disasters and collective trauma. The stakes are high for African countries to address

the adverse impacts of climate change in a rapid and secure way by financing tailored, effective and sustainable solutions, through mitigation, adaptation and reparation.

After more than thirty years of negotiations under the UNFCCC, the international response to the climate crisis appears to have reached a crossroads: Despite political opposition and institutional constraints, those seeking justice for loss and damage within the UNFCCC are pushing ahead to secure fair and effective finance for loss and damage. These efforts culminated at the twenty-seventh meeting of the Conference of the Parties (COP27) in the establishment of the Loss and Damage Fund (LDF).

The establishment of the LDF under the UNFCCC marks a hard-fought milestone for vulnerable developing countries, civil society organisations and affected communities seeking justice and accountability for climate harms.⁶ Yet, as it is argued in this paper, the fund by itself cannot amount adequate compensation, let alone climate reparations.

This paper aims to identify some of the principal obstacles affecting the development of an effective climate reparations framework within the international policy response to the climate crisis. These obstacles need to be overcome in order to unlock the transformative potential of this emerging narrative to empower climate justice advocates in African countries to challenge the status quo in the international climate policy field. The paper is intended as a conversation starter, to explore – through dialogue between affected communities, civil society organisations and government representatives from across the globe – how to further develop a climate reparations framework for African countries.

After providing our understanding of a climate reparations framework, this paper highlights the key obstacles to the emergence of this framework, taking a closer look at the LDF established under the UNFCCC. It then considers the contribution of international courts and tribunals to advancing the climate reparations framework. Finally, the paper closes with key messages that may inform global efforts to advance climate reparations.



02

A Framework for Climate Reparations

Historically, reparations have been advocated to redress the injustices of slavery and colonialism. However, there is a compelling case to be made for industrialised countries and corporations headquartered in the global North to engage in climate reparations to African countries. The root injustice, as pointed out by Táíwò, lies in the fact that states that are particularly vulnerable to climate impacts are formerly colonised ones, and those least vulnerable are former colonisers.⁷

Broadly speaking, the demand for reparatory justice involves restitution; rehabilitation; material compensation (monetary or other); achieving some form of satisfaction such as an apology, acknowledgment of wrongdoing; cessation of the wrongful act; and guarantees not to repeat it. Applied to the climate context, reparations address both racial injustice and ecological crisis which must be considered intertwined. It offers a holistic narrative to address historical and ongoing injustices related to climate change.

The demand for reparatory justice acknowledges that international hegemonic law and institutions, as presently configured, are part of the problem and will require significant reform and transformation. Reparations can thus be understood as a deliberative process of healing that looks backward to address past harm and forward by addressing the ongoing injustices stemming from that past harm.

Building on this definition, climate reparations can be understood as a comprehensive framework to give full force to the demand for climate justice by climate victims in African countries and around the globe. The aim of climate reparations does not solely lie in financial compensation or penalising the global North. The ultimate objective of reparations is that relevant policies and measures are adopted to cease current harm and prevent future harms. As such, an effective climate reparations framework can serve both as a catalyst for more ambitious climate mitigation and adaptation and as a tool to achieve enforcement and compliance.

A comprehensive *climate reparations framework* could include the following elements:⁸

- 1 An apology, which is essentially an acknowledgment of wrongdoing (that makes an explicit connection between the climate crisis and its root causes in capitalist production modes led by the global North and emulated in the South);
- 2 Restitution (e.g. restoring climate victims' agency, freedom, mobility, property, or employment);
- 3 Rehabilitation (investing in education, healthcare, social structures to revitalise social life);
- 4 A compensatory award (monetary or other) to give real weight to that apology; and
- 5 A guarantee by the perpetrator to stop and not repeat the offending act, which in this case entails limiting greenhouse gas emissions and investing in adaptive capacity to prevent future harm.



Image by 350 Ghana Reducing Our Carbon

It is worth highlighting that while acknowledging responsibility should be part of the climate reparations framework, such an admission alone is insufficient to amount to full reparations.

While remedies are a principal focus of the climate reparations framework, it is equally important to consider **how the framework is developed and structured**. Climate victims and vulnerable countries will have a central role to play in determining who should provide reparations, what types and levels of remedies are appropriate, and should be given a strong voice in the deliberations to share their lived experiences of loss and damage. Ultimately, the remedies sought by climate reparation advocates could be imposed on industrialised countries by international courts and tribunals, but the poor track record of state compliance with international legal judgments, casts some doubt over their implementation and enforcement.⁹ Rather, climate reparations could aim to deliver structural justice based on a consensual deliberative process between perpetrators and victims.¹⁰

There are four key qualities that make climate reparations an appropriate framework for addressing climate harms and the colonial burden associated with it:

- 1 Climate reparations draw on moral argument:** In practical terms, climate reparations provide affected communities with a strategy to right wrongs, by redressing past harms and preventing future harm. Such a strategy draws on moral arguments first and foremost, to address the injustice faced by climate victims. Advocates frequently draw on the language and toolbox of international law to give weight and effect to these moral arguments, including the law of state responsibility, human rights law, as well general principles of international environmental law and customary international law.¹¹
- 2 Climate reparations place the focus on climate victims:** They focus on people and on rectifying harms, and thereby provide a direct tool to empower marginalised peoples.¹² By bringing moral and justice arguments to the fore, climate reparations give vulnerable countries, civil society and affected communities an effective voice that cannot be ignored. Only by engaging meaningfully with the lived experiences of loss and damage on the ground can we move from treating the symptoms of the climate crisis to addressing the root causes of the injustices that the international policy response has thus far been unable to rectify.
- 3 Climate reparations do not shut the conversation down. They open it.** Reparations can be understood as 'deliberative processes that go beyond the application of existing legal doctrines and may result in very different outcomes that focus on transforming power relations among states, and people in them, through fundamental changes to the international

legal order.¹³ Rather than side-stepping responsibility, climate reparations empower climate victims to engage perpetrators in collaborative ways towards a comprehensive resolution.¹⁴

- 4 Climate reparations are disruptive and go deeper than mere compensation.** As mentioned, compensation is one of the elements that can form part of a broader climate reparations framework. This framework aims to "interrupt" what is normalised and codified in racial capitalism, not just mitigate its adverse effects", and to disrupt how patterns of trade and finance, dependency and environmental damage produce structural injustice and unjust enrichment.¹⁵

Given these qualities it is clear why several countries and civil society organisations and vulnerable communities have come to embrace a climate reparations narrative. That being said, as will be explored below, the emergence and advancement of this framework is subject to a number of obstacles.

03

Key Obstacles to the Emergence of a Reparations Framework

The emergence of a climate reparations framework as a dominant narrative in the response to the climate crisis is hampered by a number of obstacles. Many of these obstacles are tied to the political process under the UNFCCC, others also apply to the efforts of vulnerable countries and communities outside the multilateral negotiations. These shall be addressed in turn:

Opposition from the Global North

Historical denial of reparations claims. For over thirty years, the multilateral response to climate change has essentially shut down conversations about climate reparations in any form. This stems from political opposition by industrialised countries, first and foremost, the United States to endorsing any form of liability or compensation for climate loss and damage. In the early 1990s, when countries met to negotiate what would become the UN Framework Convention on Climate Change, demands by the Alliance of Small Island States (AOSIS) for the creation of an international mechanism to compensate vulnerable small island and low-lying coastal developing countries for loss and damage from sea level rise were rejected outright. Similar demands were systematically frustrated by industrialised nations throughout decades of UNFCCC negotiations.¹⁶ The recent establishment of the LDF, appears to have opened up the deadlock somewhat, but as discussed below falls significantly short of full and effective climate reparations.

Scepticism about monetary compensation. One rationale behind the strong opposition from industrialised countries stems from their reluctance to provide financial compensation to victims of climate loss and damage. The response often is that monetary compensation is either unnecessary, difficult to quantify accurately, at risk of being mismanaged by recipient countries, or would open the developed world to a floodgate of claims.¹⁷ These arguments are reflective of perceived colonial biases that undermine the autonomy of vulnerable countries in decision-making. Whereas in the past, some First World states and former colonisers enforced financial compensation for colonists and slaveowners (take for example the double debt paid by Haiti between 1825 and 1947 to the French), their critiques now appear to imply that those who demand climate reparations need patronage.¹⁸ Instead of compensation, industrialised countries have continuously emphasised the importance

of mitigation and enhancing adaptation to minimise future loss and damage, as well as providing capacity-building and humanitarian aid to cope with ongoing climate harms.

Avoiding liability at all costs. In the same vein, industrialised countries have pushed back strongly against any insinuations that responding to loss and damage under the UNFCCC could imply legal liability. The United States have been particularly vocal on this issue, motivated in part by the need to appease the US Congress. For instance, when industrialised countries were finally persuaded to include a dedicated Article 8 on loss and damage under the Paris Agreement, they successfully insisted on an explicit disclaimer in paragraph 51 of the accompanying COP Decision.¹⁹ When vulnerable countries successfully advocated for the establishment of the LDF at COP27, industrialised nations insisted on including the same disclaimer in the decision text, placing emphasis instead on ‘cooperation and facilitation’. The issue is so politicised that nearly two years since its formal establishment even the name of the LDF still remains subject to dispute.²⁰

Ongoing diffusion of responsibility. A close reading of UNFCCC negotiation history reveals that over time the rhetoric on who is considered responsible for the climate crisis was watered down.²¹ Explicit calls from vulnerable nations during the early 1990s highlighting that ‘responsibility for the problem lies historically with industrialised countries’ never survived into the final Convention text.²² Instead, they were spun by the latter into a narrative of developed countries taking the lead – not because of their moral responsibility but because of their greater capacity to take action and their goodwill.²³ Recent decisions related to loss and damage finance have adopted the same, politically more palatable, rhetoric of developed country leadership.²⁴ **These decisions do not obligate industrialised countries to pay into the LDF, nor do they specify how much, and crucially why these countries should pay.**

Missing buy-in from actors in the Global South

Many are playing ball. A number of actors based in the Global South, including vulnerable communities, civil society and governments have already adopted a climate reparations narrative.²⁵ African countries have advocated for compensation for climate harms under the UNFCCC in a concerted manner as early as 2009, when African leaders met in Ouagadougou, Burkina Faso at the World Forum on Sustainable Development, a regional meeting held two months ahead of the Copenhagen Climate Summit (COP15).²⁶ Jean Ping, Chairman of the African Union Commission declared that going into Copenhagen, Africa will demand reparations and damages.²⁷ In the Ouagadougou Declaration adopted at this Forum, African states affirmed ‘the common African position advocating for the relaxation of financing conditionalities, rationalisation of funds, facilitation of direct and rapid access to resources by developing Party Governments, and the promotion of an

individual allocation system to countries.¹²⁸

However, in the course of negotiations they have had to compromise their position drastically to ensure that agreement could be reached. Towards the end of COP15 their position had softened drastically, with Meles Zenawi, the Chair of the African Group of Nations negotiating under the UNFCCC and Prime Minister of Ethiopia scaling back the group's demand to US \$50 billion per year by 2015 and US \$100 billion per year by 2020 to align with offers from the UK and EU. Criticised by some influential African voices for essentially selling out, Meles Zenawi justified the proposal noting it 'dramatically scales back our expectation of the level of funding in return for more reliable funding and a seat at the table in the management of such fund.'¹²⁹ The Copenhagen Accord tabled for adoption in the late hours of the Summit ultimately fell through with many delegations criticising the process as untransparent and undemocratic. The African Group had supported the outcome though divergent views were expressed, notably from Ambassador Lumumba di-Aping of Sudan, chief negotiator of the G77 who called the Accord 'a suicide note for Africa.'¹³⁰

Under the UNFCCC, these voices are still few and far in between. This is partly due to the consensus-based nature of the UNFCCC and the need to keep playing the game despite decades of unfulfilled reparatory demands by the Global South and not least the strong opposition from industrialised countries, which have led some advocates to adopt a more moderate stance. Instead, many actors buy into the narrative of loss and damage finance as being based primarily on international solidarity. Avinash Persaud, Special Special Envoy on Climate Finance to the Prime Minister Mottley of Barbados, for example, cautioned against an 'unhelpful conflation' of loss and damage finance with climate reparations, suggesting that 'reparations imply payment for past deeds' whereas 'the loss and damage fund finances a resilient recovery.'¹³¹

However, as outlined in this paper, a holistic climate reparations framework encompasses past, present, and future harms. Separating the LDF and other recent initiatives from their historical context is unhelpful as it distorts the reality and root causes of the climate crisis, contributing to the diffusion of responsibility at play under the UNFCCC.

Exclusion of marginalised voices. Climate change is not only an intergovernmental problem, as over thirty years of UNFCCC negotiations would suggest. Yet since the inception of the multilateral negotiations, the central focus of the global policy response to the climate crisis has been on states, building on a normalised culture of restricting the effective participation of marginalised groups in global environmental decision-making processes.

In fact structural discrimination is encoded in the rules of procedure underlying the UNFCCC, its practices and institutional memory. In the same way that 19th century international law excluded 'uncivilised' nations from shaping

global rules and institutions, present day international climate law does not recognize affected communities, civil society, and other 'non-state actors' as decision-makers. These actors must obtain 'accreditation' as 'observers' or 'non-Party stakeholders.' Unlike 'Parties,' observers do not have voting rights and often find themselves excluded from sensitive negotiation sessions through a practice of 'closed meetings.'¹³²

There is an implicit assumption that affected communities are adequately represented through delegations of vulnerable states, coalitions, and civil society organisations participating as observers.¹³³ However, affected communities cannot participate effectively in delegations of vulnerable countries, where their narratives of lived experiences of loss and damage compete with other interests across government and industry in a negotiated country position. Worse yet, they cannot directly influence decisions or set the agenda when participating as observers with restricted speaking rights and zero decision-making power.

There is a need to reform this outdated and inappropriate model of representation, starting with a rethink of who gets to sit at the table and who they represent by virtue of their participation. Much like truth and reconciliation processes, giving climate victims a direct and equal say in the process would alter power imbalances in the regime and shift the focus on the needs of climate victims.

Asymmetries in knowledge production

To many vulnerable countries, the negotiations of the LDF may feel like a repeat of their experience negotiating under the UNFCCC's chief technical process on loss and damage, the Warsaw International Mechanism (WIM). We are seeing the same inequalities in the process of knowledge production under the WIM and in the development of the LDF. Where developed countries produce documentation, resources and research aligned with international standards and means, representatives from developing countries like Kenya or Uganda highlight the difficulty of securing access and funds to generate optimised data and research within the short timeline of work of the Transitional Committee set up to operationalize the LDF. A number of African countries, in particular African small island developing states (SIDS) and least developed countries (LDCs) rely on borrowed capacity from consultants to keep up with the overwhelmingly large delegations of specialised technical and legal experts of industrialised and large developing countries.¹³⁴

04

The Loss and Damage Fund – Smoke and Mirrors?

Those seeking justice and accountability for the climate crisis may look to the LDF as becoming an important means to provide financial resources to help frontline communities cope with the immediate consequences of loss and damage. That being said, it would be misguided to equate the LDF with reparations however broadly defined. This is so for several reasons.

The LDF is unlikely to generate the level of finance required, at scale. Established at COP27³⁵ and further fleshed out at COP28,³⁶ the fund is yet to be ‘operationalized’³⁷ and would need to be stocked up through voluntary contributions. However, the funding made available is expected to fall far below the level of finance required to address loss and damage. By way of example, the 2022 floods in Pakistan that killed 1,723 people and adversely affected the lives of a further 33 million people, cost an estimated US \$30 billion in flood damages and total economic losses, and required over US \$16 billion for reconstruction alone.³⁸ By contrast, the UNFCCC’s Loss and Damage Fund received just over US \$661 million in pledges to date.³⁹ Current mid-point estimates for economic loss and damage in developing countries suggest costs of US \$425 billion annually in the 2020s and US \$671 billion per year in the 2030s.⁴⁰

The LDF provides neither satisfaction nor does it guarantee cessation and non-repetition. Born out of political compromise at the UNFCCC negotiations, the provisions establishing and guiding the operationalization of the fund do not amount to what can be considered ‘satisfaction.’ They do not include any acknowledgement of historical wrongs. There is no apology, in fact the perpetrators of the wrongful act are not explicitly named, not even as a generic group. Further, they are under no legally binding obligation to cease activities which cause climate harms (e.g. emissions) which would contribute to mitigating future loss and damage. The fund being voluntary, polluting countries are not obligated to pay into it in the first place. Another major limitation of the LDF is that it does not address to any degree the contribution of corporations to the climate crisis. Without an explicit acknowledgement of responsibility, let alone the colonial past, the LDF amounts to charity, empowering a longstanding narrative of industrialised countries providing aid to the Global South as a matter of goodwill, solidarity or humanitarian relief.⁴¹

The LDF contributes to the diffusion of responsibility for the climate crisis. It sidesteps the matter of historical responsibility entirely by ‘inviting contributions with developed country Parties continuing to take the lead to provide



financial resources for commencing the operationalization of the Fund.⁴² This language is reminiscent of the efforts of industrialised countries to diffuse and obscure responsibility for climate change during the negotiations of the early 1990s that gave rise to the Framework Convention.⁴³ Moreover, the decision operationalizing the Fund notes ‘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,’ echoing the disclaimer (paragraph 51) insisted on by industrialised countries in exchange for including loss and damage under the Paris Agreement.⁴⁴

The prospect of industrialised countries acknowledging under the UNFCCC any form of moral responsibility for climate loss and damage born out of a history of colonialism and excessive resource exploitation remains illusive to date.⁴⁵ Further, it is unlikely that the UNFCCC will ever arrive at a consensual framing of loss and damage finance in terms of compensation, however ambiguously worded.⁴⁶ Thus while celebrated by some as an important victory, the LDF can be said to contribute to the diffusion of responsibility for loss and damage under the UNFCCC.

However, and importantly, this compensation framing does not have to come from within the UNFCCC. In fact, given the consensus-based nature of the multilateral negotiations, it might not even be the right forum for the task. After over three decades of rejected demands for liability and compensation for climate harms, this is perhaps as far as the process can go. **That said, the battle for climate reparations is being fought on many fronts and the necessary impetus may need to come from outside the UNFCCC.**

Some may ask whether a fund without any acknowledgment of responsibility can still amount to compensation. Others might ask if having a loss and damage fund, assuming it is fully operationalized and provides adequate levels of finance, is better than nothing. A more critical angle could question whether the LDF essentially amounts to hush money from industrialised countries to secure acquiescence from the Global South. As Michai Robertson, a loss and damage finance negotiator for the Alliance of Small Island States

(AOSIS) aptly remarked during a press conference at COP28 in Dubai, 'We need to dispel this narrative that we now [that we have the LDF] need to be grateful and be quiet.'⁴⁷

The LDF may struggle to deal with non-economic loss and damage. Parties at COP28 decided that the Fund will provide support for both economic and non-economic loss and damage.⁴⁸ However at present it is unclear how the LDF will deal with the question of valuing or quantifying non-economic losses, which may include loss of life, cultural heritage, indigenous knowledge, social networks, statehood, ecosystem services as well as impacts on mental health.⁴⁹ Given this difficulty, it is possible that some of these losses will fall outside of the scope of loss and damage finance under the LDF.

Reliance on existing international financial institutions. Parties under the UNFCCC are presently negotiating the Fund's name, governance, disbursement modalities, and other elements regarding its operation. In this context, it should be recalled that vulnerable countries already had to make significant concessions in the establishment and operationalization of the LDF. Despite their vocal opposition, in order to secure the creation of the LDF, African negotiators had to agree to house the Fund under the World Bank for the first four years while it is being operationalized.⁵⁰

Many view this as a worrying signal that the LDF will move in the direction of loans rather than grant-based modes of finance, posing a real impediment to the ability of the fund to provide direct access to communities.⁵¹ Instead, Global South negotiators, civil society organisations, and affected communities have long been advocating for a debt-free financial instrument, or at least not increasing debt. Similarly, their calls for greater and more direct representation by affected communities on the LDF Board, and for greater clarity on how the funds would be accessed and distributed have fallen on deaf ears. Further concerns have been expressed over the risk of World Bank influence over the LDF Board, its administration fees, its lack of transparency and engagement of affected communities, its track record of funding fossil fuel projects, and connected to this, the need to strengthen its environmental, social and human rights safeguards,⁵² as well as approving an effective remedy framework for its private sector arm, the International Finance Corporation (IFC).⁵³

05

Turning to the Courts for climate reparations?

International law can be considered both part of the problem and the solution. Not only did international law facilitate extractivism, colonial exploitation and racial oppression, its institutions and modern-day practices continue to perpetuate the colonial legacy and uphold a Western-centric capitalist model of natural resource exploitation and subjugation to the detriment of the vulnerable countries.

But, any discussion of climate reparations would be incomplete without considering the role of the courts, in particular international courts and tribunals. Given the lack of concrete action and support for loss and damage under the climate regime to date, outside the UNFCCC, affected communities, vulnerable countries, and civil society have increasingly pursued court action to hold industrialised countries and corporations to account for their overwhelming responsibility for global warming.⁵⁴

At the international level, three proceedings have been brought to date for advisory opinions related to climate change from the World's top courts, including the International Court of Justice (ICJ),⁵⁵ the Inter-American Court of Human Rights (IACtHR),⁵⁶ and the International Tribunal on the Law of the Sea (ITLOS).⁵⁷ While few domestic cases have been brought with the explicit aim of awarding liability or compensation for climate harms, past and future loss and damage has been the focus in much of recent major climate litigation.⁵⁸

The First Climate Advisory Opinion from an International Court/Tribunal:

Out of these three proceedings, ITLOS recently delivered its findings on 21 May 2024, stressing amongst others, that States do not discharge their international legal obligations related to climate change simply by fulfilling their obligations under the Paris Agreement; that the United Nations Convention of the Law of the Sea (UNCLOS) requires a stringent level of due diligence required from States to regulate greenhouse gas emissions; that obligations to prevent transboundary harms are additional and might define even more stringent requirements upon States' climate policies; and that States need to implement measures to protect those marine habitat and species most vulnerable to climate impacts. Importantly, the Tribunal further highlighted that Article 194 of UNCLOS requires States to act both individually and collectively, noting that there is no hierarchy between the two approaches and rejecting the notion that collective action (e.g. under the Paris Agreement) alone could be sufficient.⁵⁹

Some advocates for climate reparations within the UNFCCC are hedging their bets for international courts and tribunals to provide clarity and guidance to further aid the climate reparations effort. Vishal Prasad of the Pacific Students Fighting Climate Change, for example, emphasises that "our efforts have been focusing on the ICJ advisory opinion to be this catalyst that would tell countries in no uncertain terms that they [industrialised countries] have this responsibility under international law to provide reparations if their acts and omissions cause significant harm to the climate system by the anthropogenic emissions of greenhouse gases."⁶⁰

Indeed, with the fund now in place, international courts and tribunals can play a key role to spell out the obligations of states with respect to climate change, which could include a duty to provide reparations for loss and damage, and at the very least, a duty to pay into international funds, such as the LDF.

While advisory opinions themselves are not legally binding, they can provide the basis for ongoing and future litigation at international, regional and national levels, as well as influence the emergence of hard law (e.g. treaties, legislation) over the long-term.

By clarifying applicable laws and spelling out the obligations of countries with respect to climate harms, advisory opinions can help raise awareness, mobilise stakeholders (including civil society and affected communities), create a sense of urgency and political momentum that can help build consensus, promote dialogue and cooperation, and encourage voluntary compliance by states and corporations.

06

Recommendations

- 1 Decolonize international climate politics.** There is a need to decolonize the international policy response to the climate crisis, particularly on loss and damage. We need to transform knowledge frameworks, social dynamics, and political paradigms. In order to challenge prevailing narratives that perpetuate inequality, we need **new wording around reparations and accountability**, stating exactly what it would mean for vulnerable countries, in clear and defined mechanisms. Reframing global narratives is essential for addressing systemic injustices and advocating for climate justice.
- 2 Empower affected communities.** Reframing and advocating for the LDF operationalisation requires contesting Global North-centric narratives and acknowledges the realities of exploitation perpetuated by dominant power structures. Overcoming these challenges requires **a holistic understanding of the lived realities of loss and damage and climate injustice, shaped by collaboration and research with grassroots communities.** These voices can only gain traction if they are given space in the decision-making process.
- 3 Liberate the LDF.** The principal question going forward is whether there is still scope to shape the LDF into a fund that is diverse, accessible, and not tied solely to international finance institutions as they exist today. We need a fund with equitable decision-making that does not further indebt vulnerable countries, and succeeds in reaching the most vulnerable communities. It would require streamlined and transparent disbursement processes, to ensure timely and equitable distribution of funds. **We need an LDF that can extricate itself from the colonial logics at the very foundation of its existence,** that transcends the colonial legacies in finance and decision-making processes by which it was created.
- 4 Building a coordinated alliance that participates in key decision-making fora, shares best practices, integrates influential leaders from all types of sectors.** Faced with the shortcomings of the UNFCCC to loss and damage, climate victims, civil society, and vulnerable countries continue to make the demand for climate reparations in other fora, seeking out new and complementary approaches to get their voices heard. Despite the inextricable link between the climate crisis, related environmental crises, and racial injustice, social

movements working on these issues have rarely joined forces to address the ongoing colonial violence of resource extraction and exploitation. Bridging these silos will bring us a step closer to establishing a more robust global climate reparations movement.

Endnotes

- 1 Hans-Otto Pörtner and others, *Climate Change 2022: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Sixth Assessment Report of the IPCC: Summary for Policymakers* (IPCC 2022) 6.
- 2 *Ibid.*, Chapter 9: Africa, Executive Summary (IPCC 2022) 1289.
- 3 Intergovernmental Panel on Climate Change. 2023. *Synthesis Report of the IPCC Sixth Assessment Report*, 51; see also UN General Assembly, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume: Ecological Crisis, Climate Justice and Racial Justice', 25 Oct. 2022, UN Doc. A/77/549, para. 4.
- 4 International Monetary Fund, 'IMF Executive Board Approves US\$118.2 Million Rapid Credit Facility Assistance to the Republic of Mozambique in the Wake of Cyclone Idai' (Press Release No. 19/121), <https://www.imf.org/en/News/Articles/2019/04/19/pr19121-republic-mozambique-imf-exec-board-approves-rapid-credit-facility-assistance-cyclone-idai>
- 5 Olúfemi Táíwò, *Reconsidering Reparations* (OUP, 2022), 171–172.
- 6 UNFCCC, 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', UN Doc. FCCC/CP/2022/10/Add.1 (17 March 2023).
- 7 Táíwò (n 5), 215–222.
- 8 Based on Maxine Burkett, 'Climate Reparations' (2009) 10(2) *Melbourne Journal of International Law* 509–542, 526; and Sonja Klinsky, 'Reparations: Lessons for the Climate Debate' (2016) (*Climate Strategies*, November 2016), <https://www.jstor.org/stable/resrep16181>. An additional element can be found in broader reparations discourses: truth and reconciliation. Arguably there is no easy way to apply these processes to the context of the climate crisis, primarily because there cannot be reconciliation while climate harms are still ongoing, and perpetrators have not ceased activities that result in these harms.
- 9 In the past some states have simply ignored unfavorable rulings or revoked the court's jurisdiction. For a relevant example, see Japan's reaction to the ICJ's 2014 ruling on the country's whaling programme. Andrew Darby, 'Japan Rejects International Court Jurisdiction over Whaling', *The Sydney Morning Herald* (19 October 2015) <https://www.smh.com.au/politics/federal/japan-rejects-international-court-jurisdiction-over-whaling-20151019-gkc7rm.html>.
- 10 This is aligned with Riley-Case and Dehm's understanding of climate reparations as 'claims for structural justice through negotiated agreement', Sarah Riley-Case & Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present', in B. Mayer & A. Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021), 170–89, at 171.
- 11 See for example, Amicus Brief submitted by the Center for International Environmental Law (CIEL) to the International Court of Justice, 'Memorandum on the Legal Consequences for States for Internationally Wrongful Acts Causing Harm to the Climate System' (CIEL, 20 March 2024), available at: <https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations-Applicable-Law.pdf>
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- 16 Benjamin K. Weinger, 'Thirty Years On: Planetary Climate Planning and the Intergovernmental Negotiating Committee' (2023) 80 *Global Environmental Change*, article 102669; Patrick Toussaint, 'Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward' (2024) 13(1) *Transnational Environmental Law* 134–159.
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available at: <https://www.reuters.com/world/us/us-under-no-circumstances-will-pay-into-loss-damage-fund-kerry-2023-07-13>.

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22 INC Secretariat, 'Compilation of Possible Elements for a Framework Convention on Climate Change', 13 June 1991, UN Doc. A/AC.237/Misc.2, p.17.

23 UNFCCC Convention Article 3.1 and Paris Agreement, Article 9.3.

24 COP guidance on finance, based on the first global stocktake, for example 'invites financial contributions with developed country Parties continuing to take the lead to provide financial resources for commencing the operationalization of the Fund' (UNFCCC, Decision 1/CMA.5 (15 March 2024), para. 89).

25 Vocal actors for climate reparations within the UNFCCC include for example civil society organisations such as the Pan African Climate Justice Alliance and La Ruta del Clima. See only 'Civil Society Groups Demand Climate Reparations and Accountability for Loss and Damage' (Press Conference at UNFCCC SB60, 10 June 2024), available at: <https://www.youtube.com/watch?v=gQ6kAeh8SSk>

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