

Addressing ‘Loss and Damage’ For Climate Justice in The Global South: An Analysis

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Abstract

Determining climate related loss and damage and identifying historical responsibility for it is a highly debated topic in the climate change discourse. There are various critical aspects to this issue - agreeing on the contours and criteria of what ‘loss and damage’ is, acceptance of historical responsibility by big emitters, fixing compensation for the loss and damage, and the encompassing concern of equity and justice. A proper resolution of the issue must also account for the justice concerns of developing and small island states who, though having contributed the least in creating the climate change problem, are the most affected victims of loss and damage due to their geographical location, climatic conditions and limited adaptive capacities. Since the beginning of the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, developed and developing countries have struggled to frame the concept of loss and damage, and the issue remains. This article explores how developed countries have succeeded in containing progression of the concept of loss and damage and avoiding ‘historical responsibility’ for it. The launch of the Loss and Damage Fund in UNFCCC Conference of Parties 28 is no doubt a milestone for developing countries, but its constitution as a voluntary fund without compulsory contribution from the well-known and highest emitters creates skepticism as to whether it will bring any justice for the Global South. By employing an analytical method and examining both primary and secondary sources, this article concludes that the current framing of the loss and damage issue is unlikely to usher in climate justice for the Global South because it does not associate climate related loss and damage with historical responsibility of the carbon polluters – without their association, a liability framework will not take off.

Keywords: *Climate Change, Loss and Damage, Climate Justice, Global South.*

I. Introduction

Climate change is now a reality with increasingly frequent and intense climatic events and consequent loss and damage to humans and nature.¹ The term ‘loss and damage’ has not been

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¹ H.-O. Pörtner et al. (eds), ‘Summary for Policymakers’ in, *Climate Change 2022 - Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, UK and USA, 2023, pp. 9-18.

officially defined, but is generally used to indicate the residual impacts of climate change which are unavoidable even through mitigation and adaptation.² The failure of mitigation targets and adaptation efforts arguably account for climate related loss and damage.³ However, the Intergovernmental Panel on Climate Change (IPCC) has warned that even with success in limiting temperature increase to 1.5 degree Celsius, the negative consequences of already 'locked in' warming are unavoidable.⁴ There exists a high probability that in the future, further increase in the temperature will result in more drastic losses and damages.⁵ The irony in this is that the States and the people who are bearing the worst consequences of loss and damage have contributed to it the least;⁶ developing countries and especially small island states are on the frontline of the effects of climate change owing to their geographical location, climatic conditions and limited adaptive capacities.⁷ Hence, the long overdue issue of climate justice for these countries cannot be achieved without addressing the problems of loss and damage in a just and equitable way.

In the history of the United Nations Framework Convention on Climate Change (UNFCCC), loss and damage has been a debated issue between developed and developing countries. At the center of this debate lies the question of how to deal with the issue: determining liability and compensation based on past emissions, or merely containing the risk factors.⁸ In this struggle, the policy of developed countries seems to have prevailed. We see that while the Paris Agreement has recognized the issue of loss and damage in express terms in Article 8(1), stating,

Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.⁹

However, this is followed by the overly soft language of Article 8(3) which states that 'Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage

² Julia Kreienkamp & Lisa Vanhala, 'Climate Change Loss and Damage', *Global Governance Institute*, 2017, p. 4, available at <https://www.ucl.ac.uk/global-governance/sites/global-governance/files/policy-brief-loss-and-damage.pdf>, accessed on 12 December 2024; See Sivapuram VRK Prabhakar et al., 'Loss and Damage Associated with Climate Change: What and Why, Stakeholder Perspectives, and a Way Forward' in *The Paris Climate Agreement and Beyond: Linking Short-term Climate Actions to Long-term Goals*, Institute for Global Environmental Strategies, Japan, 2015, pp. 107-109.

³ Climate Action United Nations, *Loss and Damage: A Moral Imperative to Act*, Adelle Thomas, Senior Scientist at Climate Analytics, 2022, available at <https://www.un.org/en/climatechange/adelle-thomas-loss-and-damage>, accessed on 30 December 2023; See Naveeda Khan, *In Quest of a Shared Planet: Negotiating Climate from the Global South*, Fordham University Press, US, 2023, p.157.

⁴ Ibid.

⁵ See H.-O. Pörtner et al. (eds) (n 1), pp. 9-18.

⁶ Synda Obaji, 'No Leg to Stand on – Why the United States Must Reconsider its Stance on Climate Reparations', *University of Birmingham*, UK, 21 July 2023, available at <https://www.birmingham.ac.uk/news/2023/no-leg-to-stand-on-why-the-united-states-must-reconsider-its-stance-on-climate-reparations>, accessed on 23 December 2023.

⁷ Ibid; Kreienkamp & Vanhala (n 2), p. 4.

⁸ Gregor Vulturius & Marion Davis, 'Defining Loss and Damage: The Science and Politics around one of the most Contested Issues Within the UNFCCC', *Discussion Brief*, Stockholm Environment Institute, 2016, p.1, available at https://www.preventionweb.net/files/51127_scidb2016lossanddamage4traits.pdf, accessed on 12 December 2024; Lisa Vanhala & Cecilie Hestbaek, 'Framing Climate Change Loss and Damage in UNFCCC Negotiations', *Global Environmental Politics* p. 111, volume 16:4, 2016, p. 112, available at https://doi.org/10.1162/GLEP_a_00379, accessed on 12 December, 2024.

⁹ *Paris Agreement*, 4 November 2016, 3156 UNTS 79, Paris, 22 April 2016, art. 8(1).

associated with the adverse effects of climate change.¹⁰ that rules out any possible discussion of liability or compensation. At the COP28, a great breakthrough for developing countries was achieved with the launch of the ‘Loss and Damage Fund’, but this initiative also excluded the notion of compulsory contribution from developed countries.

In this juncture, this article will analyze the concept of loss and damage in tandem with associated concepts of climate reparation, liability and compensation, equity and justice, and common but differentiated responsibilities in the context of pursuing climate justice for the Global South. Thereafter, this article will explore how the concept of loss and damage is framed within the remit of the UNFCCC and assess whether such framing is appropriate. For this, the article has utilized the analytical method through examination of both primary and secondary sources.

II. Defining ‘Loss and Damage’: A Paradigm for Securing Climate Justice to The Global South

Climate change and its associated consequences cannot be isolated from historical injustices - inequality, slavery, apartheid and other means of colonial oppression.¹¹ The IPCC has clearly drawn a connection between climate change and colonialism by explaining current differences in climate vulnerabilities among peoples and regions in the context of ‘historical and ongoing pattern of inequity such as colonialism’.¹² Statistics also support this nexus - a 2020 research has shown that the Global North accounts for 92% of excess carbon emission in the world since the industrial revolution.¹³ From 1990 to 2015, over 50% carbon emissions was caused by only 10% of the world’s rich;¹⁴ whereas, in the last twenty years, climate change cost the world’s 55 lowest income countries around \$525 billion.¹⁵ Only in 2022, climate change claimed over 10,000 people’s lives and affected more than 75 million people.¹⁶ The IPCC estimates that currently 3.6 billion people live in areas highly susceptible to vulnerabilities of climate change¹⁷ and that climate change impacts are disproportionately experienced by the peoples of the West, Central and East Africa, South Asia, Central and South America, Small Island States, and the Arctic,

¹⁰ Ibid, art. 8(3).

¹¹ See H.-O. Pörtner et al. (eds) (n 1), p.12.

¹² Ibid; Yusra Suedi, ‘Loss, Damage and the Quest for Climate Reparations beyond COP27’, *AfronomicsLaw*, 2023, available at <https://www.afronomicslaw.org/category/analysis/loss-damage-and-quest-climate-reparations-beyond-cop27>, accessed on 21 March 2024.

¹³ Jason Hickel, ‘Quantifying National Responsibility for Climate Breakdown: An Equality-Based Attribution Approach for Carbon Dioxide Emissions in Excess of the Planetary Boundary’, *The Lancet Planetary Health* p. 399, volume 4:9, 2020, p. 403, available at [https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196\(20\)30196-0/fulltext](https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(20)30196-0/fulltext), accessed on 13 December 2024.

¹⁴ ‘5 Things You Need to Know about Carbon Inequality’, *Oxfam International*, available at <https://www.oxfam.org/en/5-things-you-need-know-about-carbon-inequality>, accessed on 23 December 2023.

¹⁵ Manish Bapna, ‘Facing up to Climate Loss and Damage’, *Economist Impact*, 18 November 2022, available at <https://impact.economist.com/sustainability/resilience-and-adaptation/facing-up-to-climate-loss-and-damage>, accessed on 23 December 2023.

¹⁶ ‘COP 27: Agenda and Expectations’, *Centre for Science and Environment*, 2022, India, p. 80, available at <https://www.cseindia.org/cop-27-agenda-and-expectations-11485>, accessed on 13 December 2024.

¹⁷ Autumn Burton, “‘Loss and Damage’ is not Enough: Why We Need Climate Reparations”, *Global Witness*, 11 November 2022, available at <https://www.globalwitness.org/en/blog/loss-and-damage-is-not-enough-why-we-need-climate-reparations/>, accessed on 30 December 2023.

whose per capita emissions are remarkably minimal.¹⁸ Given this inequitable and oppressive factors of climate change, all climate responses must be based on equity, justice and fairness to rectify historical wrongs.

Accordingly, just redressal of climate related loss and damage is one of the ways of appeasing historical injustices of climate change. But what is just redressal? According to Scott, it is to see historical responsibility.¹⁹ He argues that attention must be given to past deeds that ‘remain unrepaired in the present, whose wrongs continue to disfigure generations, and which, in consequence, call out now for a just recompense.’²⁰ On this note, Adelman argues that developed countries which are historically responsible for carbon emissions exacerbating climate change must compensate for Loss and Damage.²¹ Historical responsibility is considered a fair and equitable basis for assigning burdens of climate harms but it is refuted by the argument that it is backward-looking and unsuitable for assessing burdens of future climate harms.²² To this, other factors such as benefits derived through carbon emission, the ability to pay, no-harm principle can also play a role in assigning burdens.²³ Interestingly, developed countries meet all the criteria - for instance, historical responsibility for past emissions, derived benefits from emissions, current ability to pay - and hence, they are responsible to compensate for climate Loss and Damage anyway.²⁴

In contrast with liability-based climate justice, the concept of distributive justice is advanced and calls for redistributing ‘undeserved harm’ caused by climate change (both anthropogenic and natural climate vulnerability) while giving special emphasis to remedial responsibilities - given the developed countries’ discomfort with liability and compensation.²⁵ Such approach in the sense of sharing climate burdens is reflected in current mitigation and adaptation discourses.²⁶ However, the ineffectiveness of global mitigation and adaptation efforts creates doubt over the suitability of the ‘no-liability’ approach in addressing Loss and Damage.

Maxine Burkett provides a comprehensive model of climate reparations which emphasizes both

¹⁸ Ibid; See H.-O. Pörtner et al. (eds) (n 1), p.12.

¹⁹ Contrasted with David Scott, ‘Preface: Evil Beyond Repair’, *Small Axe* p.vii, volume 22:1, 2018, p. viii, available at [https://read.dukeupress.edu/small-axe/article/22/1%20\(55\)/vii/133814/PrefaceEvil-Beyond-Repair](https://read.dukeupress.edu/small-axe/article/22/1%20(55)/vii/133814/PrefaceEvil-Beyond-Repair), accessed on 13 December 2024.

²⁰ Ibid.

²¹ Sam Adelman, ‘Climate Justice, Loss and Damage and Compensation for Small Island Developing States’, *Journal of Human Rights and the Environment* p. 32, volume 7:1, 2016, p. 35, available at <https://doi.org/10.1080/10383441.2020.1790101>, accessed on 13 December 2024.

²² Ibid, p. 37; Julia Dehm, ‘Climate Change, ‘Slow Violence’ and the Indefinite Deferral of Responsibility for ‘loss and damage’’, *Griffith Law Review* p. 220, volume 29:2, 2020, p. 223, available at <https://doi.org/10.1080/10383441.2020.1790101>, accessed on 13 December 2024.

²³ Henry Shue, ‘Historical Responsibility, Harm Prohibition, and Preservation Requirement: Core Practical Convergence on Climate Change’, *Moral Philosophy and Politics*, p. 7, volume 2:1, 2015, p. 7, available at <https://doi.org/10.1515/mopp-2013-0009>, accessed on 13 December 2024.

²⁴ Adelman (n 21), p. 38.

²⁵ Ivo Wallimann-Helmer et al., ‘The Ethical Challenges in the Context of Climate Loss and Damage’ in Reinhard Mechler et al. (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options*, Springer, Switzerland, 2019, pp. 44, 47.

²⁶ Thomas Schinko, Reinhard Mechler & Stefan Hochrainer-Stigler, ‘The Risk and Policy Space for Loss and Damage: Integrating Notions of Distributive and Compensatory Justice with Comprehensive Climate Risk Management’ in Reinhard Mechler et al. (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options*, Springer, Switzerland, 2019, p. 90.

backward-looking and forward-looking elements regarding Loss and Damage.²⁷ Referring to Alfred Brophy, Burkett explains how the model is designed in a way which addresses past harms and improves the future of victims.²⁸ Apology, monetary or other forms of compensation, ‘guarantee of non-repetition’ from the perpetrator are three elements of his reparation model.²⁹ Burkett argues that a successful reparation, while addressing current Loss and Damage also ensures ‘aggressive mitigation’ and ‘long-term support for critical adaptation’ by developed countries.³⁰

However, even with all factual bases for holding developed countries accountable for Loss and Damage, doing so is not an easy endeavor. Anna Grear rightly characterizes such evasion of obligations, especially reparative obligations, as a sort of ‘structural pathology’.³¹

III. Taking stock of ‘loss and damage’ in the UNFCCC negotiations: Imposed disconnect with liability and compensation

Since the beginning of the UNFCCC negotiations, the Global South has been voicing Loss and Damage concerns, but the Global North has not welcomed that being associated with historical responsibility and consequent liability of compensating the Loss and Damage. The history of the UNFCCC demonstrates how developed countries have successfully contained the progression of the concept and succeeded in doing so through avoidance of the term ‘historical responsibility’ and thereby excluding the question of liability and compensation.³² According to Vanhala & Hestbaek, the conflict over Loss and Damage has two competing sides, first, whether it be framed as a risk management and insurance issue, and second, whether it be treated as an issue generating liability and compensation.³³

A. The AOSIS Proposal and the UNFCCC

In the year 1991, the Association of Small Island States (AOSIS) proposed at the UNFCCC negotiation table, the establishment of an international insurance pool to share the ‘financial burden of loss and damage suffered by the most vulnerable small island and low-lying countries...(to) be distributed in an equitable manner amongst the industrialized countries.’³⁴ To this, developed countries categorically rejected any reference to Loss and Damage based

²⁷ Maxine Burkett, ‘Climate Reparations’, *Melbourne Journal of International Law*, p. 509, volume 10, 2009, p. 522, available at <https://classic.austlii.edu.au/au/journals/MelbJIL/2009/29.html>, accessed on 13 December 2024.

²⁸ Ibid; Alfred L Brophy, *Reparations: Pro and Con*, Oxford University Press, US, 2006, p. 9.

²⁹ Burkett (n 27), p. 526.

³⁰ Ibid, pp. 510-511.

³¹ Anna Grear, ‘Towards “Climate Justice”? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Direction for Future Law and Policy’, *Journal of Human Rights and the Environment*, p.103, volume 5, 2014, p. 106, available at <https://doi.org/10.4337/jhre.2014.02.08>, accessed on 13 December 2024.

³² Dehm (n 22), p. 225.

³³ Vanhala & Hestbaek (n 8), p. 112.

³⁴ ‘Negotiation for a Framework Convention on Climate Change. Elements relating to mechanisms. Legal and institutional mechanisms, including, inter alia, entry into force, withdrawal, compliance and assessment and review.’, *Intergovernmental Negotiating Committee for a Framework Convention on Climate Change*, Geneva, December 1991, p. 3.

on historical responsibility. Instead, the UNFCCC ‘vaguely’ committed developed countries to ‘assist the developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects.’³⁵ However, Article 4.8 included a reference to ‘insurance’ as a necessary action to address the ‘specific needs and concerns of developing country parties arising from the adverse effects of climate change’.³⁶

B. From Bali to Cancun

The Bali Action Plan adopted at COP-13 first mentioned the term ‘loss and damage’ after 16 years of its first use in the AOSIS proposal³⁷ by referring the issue as a means of enhancing adaptation along with other risk reduction strategies.³⁸ At COP-14, AOSIS proposed the establishment of a ‘Multi-Window Mechanism to Address Loss and Damage’ with three distinct components: insurance, rehabilitation/compensation, and risk management.³⁹ However, there was no reflection of the proposal in the COP decision. In the Cancun Conference in 2010, COP-16 adopted a two-year work program to consider different ways of addressing Loss and Damage including assessing risks of Loss and Damage, including the need of international co-operation and expertise.⁴⁰ This work program laid the groundwork for establishing a distinct institution to deal with climate-induced loss and damage at COP-19.⁴¹

C. Warsaw International Mechanism

The Warsaw International Mechanism (WIM) was established at COP-19 as an institutional arrangement to address the issue of Loss and Damage.⁴² Though WIM was a great breakthrough for the developing countries, its placement under the Cancun Adaptation Framework reflected the resistance of the Global North to distinctly recognize the Loss and Damage issue.⁴³ Julia Dehm argues that keeping the WIM under an adaptation framework retains the issue as a ‘national responsibility of vulnerable states’ instead of making it the historical responsibility of ‘polluters to vulnerable states’.⁴⁴ Over time, the WIM has failed to be a financial avenue to address Loss and Damage; rather it has engaged itself in gathering and disseminating information.⁴⁵

³⁵ *United Nations Framework Convention on Climate Change*, 24 March 1994, 1771 UNTS 107, New York, 9 May 1992, arts. 4.4, 4.8 and 4.9.

³⁶ *Ibid*, art. 4.8; Kreienkamp & Vanhala (n 2), p.5.

³⁷ UNFCCC Decision 1/CP.13, ‘Bali Action Plan’, 14-15 December 2007, UN Doc FCCC/CP/2007/6/Add.1, p. 4.

³⁸ *Ibid*; Kreienkamp & Vanhala (n 2), p. 5; See Vulturius & Davis (n 8).

³⁹ Suedi (n 12).

⁴⁰ ‘The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Co-operative Action under the Convention’, COP 16, UNFCCC, Cancun, November-December 2010, paras. 25-26; See also Emily Boyd et al., ‘Loss and Damage from Climate Change: A New Climate Justice Agenda’, *One Earth*, p. 1365, volume 4:10, 2021, p. 1366, available at <https://doi.org/10.1016/j.oneear.2021.09.015>, accessed on 13 December 2024.

⁴¹ *Ibid*.

⁴² ‘Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts’, COP 19, UNFCCC, Warsaw, 11-23 November 2013, p. 6; Aparajita Suresh Rao, ‘The Overdue Climate Justice of Loss and Damage’, *Journal of International Affairs*, p. 389, volume 75:1, 2022, p. 393.

⁴³ Kreienkamp & Vanhala (n 2), p. 5.

⁴⁴ Dehm (n 22), pp. 225-226.

⁴⁵ Patricia Galvao Ferreira, ‘Arrested Development: The Late and Inequitable Integration of Loss and Damage Finance into the UNFCCC’ in Meinhard Doelle & Sara L Seck (eds), *Research Handbook on Climate Change Law and Loss &*

D. Loss and Damage in the Paris Agreement

The Paris Agreement was the first to extract the concept of Loss and Damage from the adaptation section in consonance with the longstanding demand of developing countries.⁴⁶ A full article (Article 8) was dedicated to underline the urgency of ‘averting, minimizing and addressing loss and damage’.⁴⁷ Moreover, the instrument formally recognized the WIM as a co-operative structure under the legal regime concerning climate change.⁴⁸

However, the instrument also addressed developed countries’ concerns over liability and compensation.⁴⁹ Article 8 was crafted using extremely soft language as to avoid any legal obligation.⁵⁰ Furthermore, the accompanying COP decision expressly ruled out liability and compensation based on Article 8.⁵¹ The possible impact of the provision is debatable. On one hand, the provision being included in the COP decision instead of the Agreement itself is argued to be non-binding and alterable by future COP decisions.⁵² On the other, it is argued that the provision does not preclude reparation claims under general international law.⁵³ Such arguments were strengthened when several small island states declared that their acceptance of the Paris Agreement does not amount to deserting their remedial rights under international law pertaining to state responsibility.⁵⁴

Article 8 did not mention finance as a means of enhancing support in the enumerated areas of co-operation and facilitation such as early warning systems, emergency preparedness, risk insurance facilities and more.⁵⁵ Moreover, National Determined Contributions (NDC) that were introduced in Article 3 also did not require the country parties to report on Loss and Damage,⁵⁶

Damage, Edward Elgar Publishing Limited, UK, 2021, pp. 136, 139; Veera Pekkarinen, Patrick Toussaint & Harro van Asselt, ‘Loss and Damage after Paris: Moving Beyond Rhetoric’, *Carbon and Climate Law Review*, p. 31, volume 13:1, 2019, p. 31, available at <https://doi.org/10.21552/cclr/2019/1/6>, accessed on 13 December 2024.

⁴⁶ ‘Loss and Damage in the Paris Agreement’, *Climate Focus*, 2015, p. 3, available at https://climatefocus.com/wp-content/uploads/2022/06/20160214-Loss-and-Damage-Paris_FIN.pdf, accessed on 13 December 2024.

⁴⁷ *Paris Agreement* (n 9), art. 8.

⁴⁸ *Ibid*, art. 8.2; See Pekkarinen et al. (n 45).

⁴⁹ John Kerry, the then Secretary of State of United States of America, declared that loss and damage if were framed as a compensation issue would ‘kill the deal’; Jeff Goodell, ‘John Kerry on Climate Change: The Fight of Our Time’, *Rolling Stone*, New York, 1 December 2015, available at <https://www.rollingstone.com/culture/culture-news/john-kerry-on-climate-change-the-fight-of-our-time-50220/>, accessed on 24 December 2023.

⁵⁰ Art. 8.3 of the Paris Agreement stipulates ‘Parties should enhance understanding, action and support... on a co-operative and facilitative basis with respect to the loss and damage’. Using the terms ‘should’, ‘co-operative and facilitative basis’, in art. 8 is in no way a strong language having binding effect; Ferreira (n 45) pp. 137-138.

⁵¹ ‘Adoption of the Paris Agreement’, *COP 21*, UNFCCC, Paris, November-December 2015, para. 51; See Pekkarinen et al. (n 45), p. 34.

⁵² Benoit Mayer, *International Law on Climate Change*, Cambridge University Press, New York, 2018, p.191; Kreienkamp & Vanhala (n 2), p. 7.

⁵³ *Ibid*; See MJ Mace & Roda Verheyen, ‘Loss, Damage and Responsibility after COP 21: All Options Open for the Paris Agreement’, *Review of European Community & International Environmental Law*, p. 197, volume 25:2, 2016, p. 197, available at <https://doi.org/10.1111/reel.12172>, accessed on 13 December 2024.

⁵⁴ The Cook Islands, Marshall Islands, Micronesia (Federated States), Nauru, Niue, Solomon Islands, Tuvalu and Vanuatu and Philippines made similar declarations; See Linda Siegele, ‘Loss and Damage under the Paris Agreement’ in Meinhard Doelle & Sara L Seck (eds.), *Research Handbook on Climate Change Law and Loss & Damage*, Edward Elgar Publishing Limited, UK, 2021, pp.103-104.

⁵⁵ Ferreira (n 45), p. 137; Pekkarinen et al. (n 45), p. 34.

⁵⁶ See *Paris Agreement* (n 9), art. 3; *Ibid*; See Victoria Hoffmeister & Saleemul Huq, ‘Loss and Damage in INDCs: An Investigation of Parties’ Statements on L&D and Prospects for Its Inclusion in a Paris Agreement’, *International Centre*

and neither did the enhanced transparency framework of Article 13 include the issue of Loss and Damage.⁵⁷

E. Post-Paris Developments: Launching of the Loss and Damage Fund

In the post Paris Agreement era, the WIM had its first review⁵⁸ at COP-22, and a five-year work-plan was adopted therein with the executive committee being requested to include financing for Loss and Damage in it.⁵⁹ In the COP at Fiji, a Clearing House for Risk Transfer was established merely as a storehouse of ‘information on insurance and risk transfer’ rather than advancing finance for addressing Loss and Damage.⁶⁰ The Paris Rulebook, adopted to provide detailed guidance on the implementation of Loss and Damage, included Loss and Damage within the transparency framework guidelines on adaptation and impact.⁶¹ The guidelines allowed an exchange of information for enhanced understanding, action and support on Loss and Damage but characterized it merely as ‘co-operative and facilitative’.⁶² The Paris Rulebook has thus been branded as a ‘missed opportunity’ to distinctly appreciate Loss and Damage alongside mitigation and adaptation measures.⁶³ Subsequently, the Santiago Framework was adopted to facilitate ‘demand-driven’ technical assistance relating to Loss and Damage and was finally operationalized through the Sharm el-Sheikh Implementation Plan at COP-27.⁶⁴ To make the Santiago Framework successful, experts emphasized on linking the Framework with the funding arrangements on Loss and Damage.⁶⁵

In the following years, the issue of establishing a financing facility to address Loss and Damage gained momentum. At the Glasgow Conference in 2021, Group-77 along with China again made a proposal for the establishment of a loss and damage fund but other developed countries refused.⁶⁶ Nevertheless, an agreement to set up a two-year Glasgow Dialogue to discuss possible

for Climate Change and Development, 2015, available at <https://website.icccad.net/wp-content/uploads/2015/12/Loss-and-Damage-in-INDCs-.pdf>, accessed on 23 August 2024; However, more than 50 countries mentioned climate-related loss and damage in their NDCs.

⁵⁷ Ibid; Jorge E Vinales, ‘The Paris Climate Agreement: An Initial Examination’, *C-EENRG Working Papers No. 6*, Cambridge Centre for Environment, Energy and Natural Resource Governance, 2015, available at <https://www.ceenrg.lanedecon.cam.ac.uk/system/files/documents/wp03.pdf>, accessed on 23 December 2023.

⁵⁸ See ‘Review of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts’, *COP 22*, UNFCCC, Marrakech, 7-18 November 2016.

⁵⁹ ‘Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts’, *COP 22*, UNFCCC, Marrakech, 7-18 November 2016, para. 4.

⁶⁰ See Dehm (n 22), p. 232.

⁶¹ ‘Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement’, *COP 24*, UNFCCC, Katowice, 2-14 December 2018, para. 115.

⁶² Ibid.

⁶³ Pekkarinen et al. (n 45), p. 36.

⁶⁴ ‘Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 Review’, *Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, UNFCCC, 15 December 2019, para. 43; See ‘Santiago Network for Averting, Minimizing and Addressing Loss and Damage Associated with the Adverse Effects of Climate Change under the WIM for Loss and Damage Associated with Climate Change Impacts’, *COP 27*, UNFCCC, Egypt, 6-20 November 2022.

⁶⁵ Hyacinthe Niyitegeka, ‘Unpacking the Link Between the Santiago Network and Funding Arrangements and Fund for Loss and Damage’, *The Loss and Damage Collaboration*, 2023, available at <https://www.lossanddamagecollaboration.org/publication/unpacking-the-link-between-the-santiago-network-and-funding-arrangements-and-fund-for-loss-and-damage>, accessed on 13 December 2024.

⁶⁶ Anna Aberg & Nina Jeffs, ‘Loss and Damage Finance in the Climate Negotiations: Key Challenges and Next Steps’,

funding arrangements for Loss and Damage was reached.⁶⁷ Group-77 and China deliberated with the Executive Secretary of the UNFCCC to add ‘Matters relating to the funding arrangements for addressing loss and damage’ as a sub-agenda item under the provisional agenda ‘Matters related to finance’ of COP-27,⁶⁸ and the issue so included in the provisional agenda was adopted at the beginning of COP-27. In the closing hours of the COP-27, parties agreed to establish a loss and damage fund, whose institutional framework was to be finalized at COP-28.⁶⁹ Unfortunately, there was no indication in the COP decision that developed countries would be responsible to contribute to the proposed loss and damage fund.⁷⁰

The emergence of the loss and damage fund at COP-28 was indeed a success for developing countries. But again, developed countries were saved from the mandatory obligation to finance for Loss and Damage. The Preamble of the COP decision adopting the fund instrument stipulates that such funding arrangements are ‘based on co-operation and facilitation and do not involve liability or compensation’.⁷¹ In Paragraph 13 of the decision, developed countries are softly asked to take the lead in providing financial resources for the Fund while the preceding paragraph (Paragraph 12) characterized developed countries’ duty to finance as ‘voluntary’.⁷²

IV. Analyzing The Current Framing of The Loss and Damage Mechanism *Vis-À-Vis* the Notion of Climate Justice

There is no denying the fact that Loss and Damage issue is the eye of the storm in the UNFCCC regime. Till now, it has undergone several institutional changes, the latest being the initiation of the Loss and Damage Fund. But the way it has been framed so far in each stage reinforces developed countries’ stand towards the issue, which is disconnected from the notion of climate justice. Since the AOSIS’s proposal in 1991, developed countries have avoided any reference to historical responsibility and resultant liability and compensation. From the Bali Action Plan to Warsaw International Mechanism, developed countries have been able to successfully confine the issue to the risk management and insurance paradigm which task the vulnerable states themselves to respond to climate change impacts. While the Paris Agreement recognized Loss and Damage

Research Paper, Environment and Society Program, 2022, p. 13, available at <https://www.chathamhouse.org/2022/11/loss-and-damage-finance-climate-negotiations>, accessed on 13 December 2024; See Justin Worland, ‘Moral Obligation.’ John Kerry Says Developed Countries Need to Ramp Up Help for Growing Climate Losses’, *Time*, New York, 28 October 2022, available at <https://time.com/6225834/john-kerry-loss-and-damage-climate-interview/>, accessed on 23 December 2023.

⁶⁷ Though Glasgow Dialogue on Loss and Damage found place in the draft decision of the Glasgow Conference, the finally adopted Glasgow Climate Pact omitted the provision; ‘Glasgow Climate Pact: Proposal by the President’, *COP 26*, UNFCCC, Glasgow, October-November 2021, para. 73; See Glasgow Climate Pact, 8 March 2022, Glasgow, 13 November 2021.

⁶⁸ ‘Provisional Agenda and Annotations: Note by the Executive Secretary’, *COP 27*, UNFCCC, Egypt, 6-20 November 2022, p. 2.

⁶⁹ See ‘Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, including a Focus on Addressing Loss and Damage’, *COP 27*, UNFCCC, Egypt, 6-20 November 2022.

⁷⁰ *Ibid.*

⁷¹ ‘Draft Decision on the Operationalization of the New Funding Arrangements, including the Fund, for Responding to Loss and Damage referred to in paragraphs 2-3 of Decisions 2/CP. 27 and 2/CMA.4’, *COP 28*, UNFCCC, UAE, November-December 2023, p.2.

⁷² *Ibid.*

through a stand-alone article, developed countries attached a caveat in the COP decision that excludes liability and compensation. This apathy of the Global North towards liability and compensation persists, while the established Loss and Damage Fund does not mention any mandatory contribution for historical responsibility. The question of liability and compensation is again expressly precluded. It can be anticipated that if the fund continues as a purely voluntary fund without any compulsory contribution from historical polluters, it is less likely to scale up in finance given the amount already pledged by developed countries.⁷³ Moreover, the placement of the fund in the hands of the World Bank which is more used to give loans than provide grants creates apprehension among developing countries regarding imposition of new debt burdens.⁷⁴ Additionally, in the current framing, fossil fuel companies are also not called upon to take financial responsibility for their acts.⁷⁵

V. Analysis and Conclusion

Climate change accounts for not only monetary losses and damages but also incalculable and invaluable losses and damages including the loss of lives, statehood, cultural heritage and so on. However, throughout UNFCCC's history, the issue of Loss and Damage has been confined to a voluntary mechanism with a view of facilitating co-operation. The framing of Loss and Damage as merely a co-operative and facilitative measure denies climate justice to vulnerable states and people. Although the initiation of the Loss and Damage Fund in COP-28 is considered a breakthrough in the UNFCCC regime, it fails to wipe out suspicions over its effectiveness as the Fund does not warrant any compulsory contribution from developed countries. Moreover, without associating climate related Loss and Damage with the historical responsibility of carbon polluters, a liability framework will not take off. No voluntary approach to address Loss and Damage is going to be a success.



⁷³ Developed countries have so far pledged combinedly just over \$700 million to the loss and damage fund, which is less than 0.2% of the losses the developing countries face every year. See Nina Lakhani, '\$700 m Pledged to Loss and Damage Fund at COP 28 Covers Less Than 0.2% Needed', *The Guardian*, London, 6 December 2023, available at <https://www.theguardian.com/environment/2023/dec/06/700m-pledged-to-loss-and-damage-fund-cop28-covers-less-than-02-percent-needed>, accessed on 23 December 2023. However, in a search for innovative funding sources for loss and damage, Roberts et al. suggested six options, for example, financial transaction tax, international airline passenger levy, solidarity levy, bunker fuel levy, fossil fuel majors carbon levy, global carbon tax. J Timmons Roberts et al., 'How Will We Pay for Loss and Damage?' *Ethics, Policy & Environment*, p. 208, volume 20:2, 2017, p. 215.

⁷⁴ See UNFCCC (n 71), para. 15; Ylenia Gostoli, 'Reparations Fund 'Historic', but Real Fights Begins Now: Climate Campaigners', *Al Jazeera*, Doha, 2 December 2023, available at <https://www.aljazeera.com/features/2023/12/2/reparations-fund-historic-but-real-fight-begins-now-climate-campaigners>, accessed on 14 December 2023.

⁷⁵ Recent research shows that fossil fuel companies' contribution to climate crisis is equivalent to \$209 billion per year; Marco Grasso & Richard Heede, 'Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages', *One Earth*, p. 459, volume 6:5, 2023, p. 461, available at <https://doi.org/10.1016/j.oneear.2023.04.012>, accessed on 13 December 2024.