

Addressing Loss and Damage from Climate Change Impacts

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The 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, to be held in Paris from 30 November 2015 to 11 December 2015, will need to resolve several long-standing issues pertaining to climate-induced loss and damage. This article lists the key issues relating to loss and damage. It then evaluates the potential for and limits of legal claims relating to loss and damage in general international law so as to contextualise their treatment in the climate negotiations.

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Given the increasingly certain and disturbing science on climate impacts, glacial pace of the global climate negotiations and the cautious “intended nationally determined contributions” being tabled, it is rapidly becoming evident that greenhouse gas (GHG) mitigation and adaptation, even if an ambitious agreement is struck in Paris, will not be sufficient or sufficiently timely to prevent the worst climate impacts. The issue of “loss and damage”—the inevitable and unavoidable, loss and damage suffered by countries and communities due to the fallouts of climate change—is therefore likely to form a crucial component of the 2015 climate deal.

This note outlines the evolution of the loss and damage discussions in the United Nations (UN) climate negotiations and lists the key issues relating to loss and damage in the Geneva negotiating text (UNFCCC 2015a) for the 2015 climate agreement. It then proceeds to briefly consider the potential for and limits of

legal claims relating to loss and damage in general international law so as to contextualise the treatment of these issues in the climate negotiations.

The Issue in the Negotiations¹

Loss and damage can be broadly defined as “the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems” (UNFCCC 2012a: para 2). There is a distinction between loss and damage: loss refers to “negative impacts in relation to which reparation or restoration is impossible” while damage refers to “negative impacts in relation to which reparation or restoration is possible” (UNFCCC 2012a: paras 2 and 3). Both these issues have underpinned the international climate negotiations from its inception.

The existential threat faced by small island states and the loss and damage they are likely to suffer, has never been far from the surface of the negotiations. Indeed, in the negotiations for the Framework Convention on Climate Change (FCCC), the Alliance of Small Island States (AOSIS) had, in 1991, tabled a proposal for an “insurance mechanism” to “compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise” (Intergovernmental Negotiating

Committee 1991). While the Convention does not contain an insurance or compensation mechanism, it does recognise the specific needs and concerns of developing country parties arising from the adverse effects of climate change and requires Parties to take actions to meet these needs (UNFCCC 1992: Article 4(8) and preambular recital 19). In the first decade of the climate negotiations, however, Parties focused on mitigation and it took considerable negotiating capital for vulnerable developing countries to bring the issue of adaptation, first and then loss and damage to the fore. The term “loss and damage” first appeared only in the Bali Action Plan in 2007 (UNFCCC 2008: para 1(c)(iii)). Since then, the issue has since progressed in the negotiations.

At the Cancun Conference, 2010, Parties agreed to launch a work programme on loss and damage (UNFCCC 2011: para 26). At the Doha Conference, 2012, Parties decided to establish institutional arrangements for loss and damage (UNFCCC 2013a) and at the Warsaw conference, 2013, Parties established the Warsaw International Mechanism to address loss and damage associated with impacts of climate change in developing countries particularly vulnerable to the adverse effects of climate change (UNFCCC 2014a). This mechanism was established “under the Cancun Adaptation Framework” but is subject to review in 2016. A key issue at that time was whether loss and damage should be addressed as part of adaptation or taken as a distinct matter (McNamara 2014). Some believe that loss and damage goes well beyond adaptation and touches on issues of liability and compensation, while others would prefer to keep the issue of loss and damage within the less-contentious framework of adaptation. The decision establishing the Warsaw International Mechanism, however, recognises that loss and damage “in some cases, involves more than, that which can be reduced by adaptation” (UNFCCC 2014a: preamble). Thus, at least some negotiators believe the issue of whether loss and damage is part of or distinct from adaptation is one of “normative but not practical value” (Hoffmaister et al 2014).

At the Lima Conference in 2014, Parties agreed to a two-year work plan for the Executive Committee of the Warsaw International Mechanism (UNFCCC 2015b), which includes consideration of: impacts of loss and damage on particularly vulnerable developing countries, populations and communities; comprehensive risk management approaches in building resilience; approaches to address slow onset events, with particular focus on potential impacts; reducing the risk of and addressing non-economic losses; capacity and coordination needs in relation to slow onset and extreme events; migration, displacement and human mobility as a result of climate impacts; and, financial instruments and tools to address the risks of loss and damage (UNFCCC 2014b: annex II). The work plan does not include consideration of issues relating to liability and compensation, on which there is little agreement.

A New Instrument

In the ongoing negotiations for a 2015 agreement, a threshold question that needs to be addressed—given its treatment in the Warsaw International Mechanism—is whether loss and damage should be addressed in the new instrument at all? The Lima Call to Climate Action, 2014, referred to loss and damage only in a preambular recital (UNFCCC 2015c: preambular recital 5). Parties decided in Lima that the 2015 agreement “shall address in a balanced manner, inter alia, mitigation, adaptation, finance, technology development and transfer and capacity building and transparency of action and support” (UNFCCC 2015c: para 2). Loss and damage is conspicuous by its absence. However, the use of the phrase “inter alia” suggests that this is not an exhaustive list and loss and damage, or indeed other issues could also be addressed in the 2015 agreement. Besides, this paragraph only indicates balanced treatment of issues highlighted in the Durban platform decision that launched the negotiations for the 2015 agreement (UNFCCC 2012b: para 5), of which “loss and damage” was not one. It does not exclude other issues from being addressed. Further, the least developed countries (LDC) made an interpretative declaration

after the Lima decision had been adopted noting that in their view the use of the term “inter alia” as well as the reference to loss and damage in the preamble indicated that the 2015 agreement “will properly, effectively and progressively address loss and damage” (UNFCCC 2015d: para 60).

Assuming that the 2015 agreement will address loss and damage, there are several issues that Parties will need to resolve. These find reflection in the “options” on loss and damage in the Geneva Negotiating Text (UNFCCC 2015a: paras 68–78). First, Parties will need to consider whether loss and damage should be addressed as part of adaptation or separately. This choice will signal whether loss and damage will form a separate pillar of the 2015 agreement or be subsumed within the adaptation pillar. This may have consequences not just in terms of indicating salience of the issue area but also in terms of the potentially expansive coverage of a separate chapter on loss and damage (that is, to potentially include liability and/or compensation).

Second, in relation to institutional arrangements for loss and damage, Parties will need to consider whether the Warsaw International Mechanism is sufficient or it needs to be strengthened through the 2015 agreement or a new international mechanism to address loss and damage under 2015 agreement is necessary. Third, in relation to compensation, Parties need to consider whether the provisions on loss and damage in the 2015 agreement should include a compensation regime or not. This is a controversial issue that constitutes a red line for many developed countries and, although it features in the Geneva Negotiating Text, is unlikely to gain traction. Some fear that the proposals for compensation are premised on underlying notions of liability and responsibility for climate harms. Not only are these notions harmful for many developed countries, they also serve to frame the issue of loss and damage in an adversarial manner.

A more acceptable multilateral basis for addressing loss and damage in the 2015 agreement might be solidarity or collective responsibility, which would facilitate framing the issue of loss and damage as one of funding and support

rather than liability and compensation. Finally, if the provisions, as is likely, do not include a compensation regime, Parties need to determine how the 2015 agreement can ensure availability of adequate funding and other necessary support to address loss and damage in vulnerable developing countries. In the context of funding and support, a further set of issues arise:

- Who should benefit from such funding and support—all developing countries or a sub set of them, that is, developing countries, particularly LDCs, small island developing countries and countries in Africa?
- Who should provide funding and support: all countries, developed countries and other Parties in a position to do so or only developed countries?
- What should funding and support address: slow onset events and/or extreme events? In the case of extreme events, how can the loss and damage be attributable to human-induced climate change be separated out from that which cannot be so attributed? More generally, how, if at all, can loss and damage—including direct and indirect losses and tangible and intangible losses (UNFCCC 2012c), economic and non-economic losses (UNFCCC 2013b) and current and future loss and damage—be quantified.

Challenging as it may be to address these issues, it is worth addressing them in a multilateral context, as the alternative—climate liability—is beset with limitations, as discussed below and may not ultimately prove helpful to nations suffering loss and damage due to climate impacts.

Responsibility and Liability

Loss and damage can be addressed in general international law. At the time the FCCC was signed, Fiji, Kiribati, Nauru and Papua New Guinea entered declarations noting that the “signature of the convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change and that no provisions in the convention can be interpreted as derogating from the principles of general international law.”⁷²

A state can bring a claim against another for state responsibility before an international dispute settlement body with jurisdiction. To do this, at its simplest, the state bringing the claim must establish that an internationally wrongful act has occurred (that is, a breach of a treaty or customary obligation), that the act (or omission) in question can be attributed to the state against which the claim is brought and that a causal link exists between the wrongful act and the damage that has occurred to the state bringing the claim. If these can be demonstrated, the state against which the claim is brought is obliged to cease the wrongful act, as well as make full reparation for any injury.³

There are however serious (albeit not insurmountable⁴) hurdles facing any state making a claim against another in relation to loss and damage associated with climate impacts. These include:

- Finding a forum with jurisdiction—since states often do not recognise the jurisdiction of international dispute settlement fora;⁵
- Establishing standing—as every state both contributes to and suffers the impacts of climate change;
- Establishing the existence of clear and binding obligations—given the contextual and soft language used in the relevant treaties, especially the FCCC;
- Establishing breach of such obligations—if the alleged breach is of the customary international law obligation to prevent transboundary harm, the state would only need to demonstrate “due diligence” in controlling the activity, thus if damage is unforeseeable or unavoidable despite the states’ exercise of due diligence, it will not be covered;
- Demonstrating causality between the GHG emissions of the defendant state, current and historic and impacts suffered by the plaintiff state—this could in part be addressed through the application of joint and several liability or by proportionate liability (Faure and Nollkaemper 2007); and
- Establishing damage—as much of it may be future damage.

Indeed, the climate change problematic exposes the fault lines and limits of international law. Although some small

island states have over the years explored the possibility of bringing an international claim against certain major emitters, no such claim has yet been brought. Instead, Palau campaigned for a UN General Assembly resolution requesting the International Court of Justice (ICJ) for an advisory opinion on the obligations and responsibilities of states under international law to avoid transboundary harm caused by greenhouse gas emissions.⁶ Advisory opinions of the ICJ are non-binding, but should such an opinion be forthcoming, it could bring much-needed clarity to the rights and obligations of states in relation to GHG emissions, adaptation and loss and damage.

Private parties could also bring claims against their own state or another state for climate-related loss and damage, if internationally protected human rights are implicated. However, only a handful of international courts hear claims from individuals,⁷ and such claims are also prone to limitations similar to those encountered in interstate claims. In their 2005 petition before the Inter-American Commission on Human Rights, for instance, the Inuit claimed that the impacts of climate change, caused by acts and omissions of the United States, violated their fundamental human rights—in particular the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security and a means of subsistence and to residence, movement and inviolability of the home (Petition to the IACHR 2005). These rights, they argued, were protected under several international human rights instruments, including the American Declaration of the Rights and Duties of Man (1992). The Commission refused to review the merits of the petition on the grounds that the “information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”⁷⁸

Finally, in addition to possible claims brought by states against each other, or private parties against their own or another state where human rights are implicated, there is potential for claims

by private parties against their own state or other private parties in domestic courts. While the promise and reach of such litigation will depend on the relevant domestic legal systems, both public and private law remedies exist in relation to loss and damage associated with climate impacts across jurisdictions.⁹ Successful claims for loss and damage are few and far between. There are difficulties, depending on the jurisdiction, in relation, *inter alia*, to establishing standing to sue, demonstrating a causal link between specific tangible harms and the sources of GHG emissions and establishing breach of the relevant standards of liability (International Bar Association 2014: 127–36).

But even unsuccessful cases have value. In the American case of *Comer vs Murphy Oil USA, Inc* (2012) Mississippi Gulf residents sued numerous energy companies alleging that their GHG emissions exacerbated the severity of the Katarina hurricane. And, in *Native Village of Kivalina vs Exxon Mobil* (2012) the Alaskan shore village of Kivalina sued 24 of the world's largest oil and gas companies, alleging that their GHG emissions were causing polar ice to melt, sea levels to rise and the shoreline land of the village to erode rapidly. Kivalina had claimed damages including the costs of relocation as a result of land being rendered uninhabitable.

Although these cases were unsuccessful, they are nonetheless valuable for their story telling or narrative potential, for building momentum towards and eventually catalyzing legislative and policy change (Peel and Osofsky 2015). However, climate liability represents a case-by-case (rather than holistic), reactive (rather than preventive or supportive), transaction-cost intensive and outcome-uncertain approach to issues of loss and damage from climate impacts and this is far from optimal. Thus, while climate responsibility and liability can play a complementary role to the multi-lateral regime it cannot supplant it. The 2015 climate agreement will need to “properly, effectively and progressively address loss and damage” if vulnerable nations and communities are to be protected.

NOTES

- 1 For a broad overview of issues pertaining to loss and damage in negotiations see Doelle (2015); Verheyen (2012); and Hyvarinen (2012).
- 2 See Declarations by Parties—United Nations Framework Convention on Climate Change, available at: https://unfccc.int/essential_background/convention/items/5410txt.php (viewed on 29 April 2015).
- 3 For scholarly efforts to address climate change damage in international law see Voigt (2008).
- 4 See Verheyen and Roderick (2008) for a more optimistic account of public international law's ability to address loss and damage from climate impacts.
- 5 See FCCC, Article 14, however, which provides for various dispute settlement options.
- 6 Statement by the Johnson Toribiong, President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly, 22 September 2011, available at: http://gadebate.un.org/sites/default/files/gastatements/66/PW_en.pdf (accessed on 29 April 2015). See generally, Korman and Barcia (2012).
- 7 For example Human Rights Committee, African Commission on Human Rights, Inter-American Commission on Human Rights.
- 8 Quoted in George (2006).
- 9 For a general overview see Lord et al (2012) and for a discussion on India see Rajamani and Ghosh (2011).

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