

University of Eastern Finland

**Helping victims of climate impacts: Loss  
and damage finance under the UNFCCC  
and beyond**

Master's Thesis

MDP Environmental Policy and  
Law

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# Abstract

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Name of the Thesis <b>Helping victims of climate impacts: Loss and damage finance under the UNFCCC and beyond</b>			
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Abstract <p>Previous works and studies have sufficiently highlighted that despite strides made at the diplomacy level as it relates to greenhouse gas (GHG) emission mitigation and management, the issue of loss and damage has remained contested. Liability and compensation to vulnerable states remain largely unresolved – despite the studies and science that prove that loss and damage is an impact beyond adaptation that requires large amounts of financing. Whilst the global community grapples with negotiations on how to define and treat loss and damage, vulnerable countries continue to remain on the receiving end of negative climate impacts which threaten livelihoods and statehood.</p> <p>It is against the backdrop of this harsh reality of cyclical annual loss and damage (L&amp;D) that these countries and territories, prepare and rebuild. However, repairing, rebuilding and improving attracts a cost.</p> <p>Notwithstanding calls by vulnerable countries under the UNFCCC regime to make substantive advancements in legally framing the provision of financing to address loss and damage within the climate machinery for more than 20 years, the provision of a legal framework remains outstanding. In light of their unanswered calls, Small Island Developing States (SIDS) and Least Developed Countries (LDCs) have moved to explore legal pathways, outside of the climate regime, for financing to address L&amp;D.</p> <p>Despite, the long history and genesis of L&amp;D, gaps in financing obligations remain. The provision of financing for L&amp;D remains on a voluntary basis and through a series of UNFCCC Decisions and other diplomatic positions on behalf of powerful negotiating countries such as the United States and China will remain so until otherwise. Recent developments at the 2021 COP26 suggest that vulnerable countries are ready to take the helm and explore the various legal logical arguments which are available to be utilised under international law. Although this may yield uncertain and/or piecemeal results, this approach has the potential to reinvigorate the visibility and support lobby efforts of this critical agenda item. The short-term future for the obligatory provision of L&amp;D financing for victim States is discouraging, however, the elevation of this agenda item may lead to the eventual acceptance of financing for L&amp;D – though it may not necessarily be under the climate regime.</p>			
Key words Climate change, loss and damage, small island developing states, legal pathways, financing, compensation			

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## List of Abbreviations

<b>Abbreviation</b>	<b>Definition</b>
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
AOSIS	Alliance of Small Island States
AWG- LCA	Ad Hoc Working Group on Long-term Cooperative Action
BPOA	Barbados Programme of Action
CBDRRC	Common But Differentiated Responsibility and Respective Capabilities
CCRIF SPC	Caribbean Catastrophe Risk Insurance Facility
DRR	Disaster Risk Reduction
DRM	Disaster Risk Management
COP	Conference of the Parties
EU	European Union
GDP	Gross Domestic Product
GHG	Greenhouse gas
HRC	United Nations Human Rights Committee
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
IPCC	International Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
LDC	Least Developed Country
LRI	Legal Resource Institute
NDC	Nationally Determined Contribution
SBI	Subsidiary Body for Implementation
SCF	Standing Committee on Finance
SIDS	Small Island Developing States
SLR	Sea Level Rise
SN	Santiago Network

SPC	Secretariat of the Pacific Community
UDHR	Universal Declaration on Human Rights
UNDRR	United Nations Office for Disaster Risk Reduction
UNDP	United Nations Development Programme
UNECLAC	United Nations Economic Commission for Latin America and the Caribbean
UNFCCC	United Nations Framework Convention for Climate Change
UNICEF	United Nations Children's Fund
UNU-EHS	United Nations University Institute for Environment and Human Security
US	United States
WFP	World Food Programme
WIM	Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts
WWF	World Wildlife Foundation

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# 1. Introduction and Rationale

## 1.1 Background brief

The international community has had a substantial history of cooperation towards collectively defining a global agenda to address and overcome environmental challenges and to pursue sustainable development for all. Notwithstanding the collective thrust and the articulation of declarations and agreements to treat with the degradation of the environment and climate change, there has been a history of divergent views between developing and developed countries—specifically, liability and responsibility for the resultant socio-economic impacts of that degradation.<sup>1</sup> Despite these differences in opinions, climate change, which is invariably linked to different forms of environmental pollution<sup>2</sup>, is recognized as an international concern. Thus, the Agreements developed under the United Nations Framework Convention on Climate Change (UNFCCC), notably the Kyoto Protocol and Paris Agreements, have been heralded as landmarks in the climate change regime<sup>3</sup>, as both agreements have instituted globally agreed greenhouse gas (GHG) abatement targets, strategies and the creation of a funding regime for Parties to mobilise action towards the reduction of concomitant GHG emissions, with the overall ambition to abate climate change and its deleterious impacts.<sup>4</sup>

Despite the success<sup>5</sup> of the UNFCCC, the divergence of views between developing and developed countries regarding the assumption of legal liability for associated climate change impacts persists.

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<sup>1</sup> Brunnee, Jutta, “The Stockholm Declaration and the Structure and Processes of International Environmental Law”, in *The Future of Ocean Regime Building: Essays in Tribute to Douglas M Johnston*, edited by Chircop, Aldo and McDorman, Ted (eds), *Kluwer Law*, 2009, pp41-62

<sup>2</sup> MDPI, “Environmental Pollution and Climate Change”, 2019, [https://www.mdpi.com/journal/climate/special\\_issues/environment\\_pollution\\_climate\\_change#info](https://www.mdpi.com/journal/climate/special_issues/environment_pollution_climate_change#info) Accessed September 1 2021

<sup>3</sup> Kuyper, Jonathan and Schroeder, Heike and Ola Linnér, Björn, “The Evolution of the UNFCCC”, 2018, Vol 43 *Annual Review of Environment and Resources*, p343-368

<sup>4</sup> In 2007, the Intergovernmental Panel on Climate Change (IPCC) found that there is a better than nine in ten chance that global warming can be attributed to emissions of carbon dioxide from industry, transport, deforestation and other human activities. IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, p104 [http://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.htm#1](http://www.ipcc.ch/publications_and_data/publications_and_data_reports.htm#1) Accessed September 1 2021

<sup>5</sup> Kuyper, Jonathan and Schroeder, Heike and Ola Linnér, Björn, “The Evolution of the UNFCCC”, 2018, Vol 43 *Annual Review of Environment and Resources*, p343-368

The issue of Loss and Damage (L&D), as a challenge that is documented as affecting developing countries, exhibits pressure on national assets – including its people, culture and statehood. As developing countries, such as SIDS and LDCs continue to make up a small proportion of total greenhouse gas emissions, these countries are primarily concerned with adapting to and limiting the social, economic and physical effects of climate impacts. These include those impacts which are currently occurring and those which will occur in the immediate future. Although mitigation and adaptation efforts help in the limitation of future climate change impacts, the issue of loss and damage is time-sensitive – and these countries continue to grapple with limited international support and an uncertain legal standing with the ‘nowness’ of the events. Whereas, adaptation involves proactive measures to adjust social and economic systems to enhance a community’s ability to withstand and/or respond to climate impacts<sup>6</sup>, and support the reduction of the scale of L&D, it is no silver-bullet solution. Research has indicated that, “adaptation cannot prevent unavoidable slow-onset climatic impacts such as inundation from sea-level rise. Migration and planned relocation are the only coping mechanisms after a territory becomes uninhabitable”.<sup>7</sup>

In its history of lobbying for the inclusion of Loss and Damage under the UNFCCC, the Alliance of Small Island States (AOSIS), an intergovernmental organisation of small island states, has argued, that without agreement and substantive action, negative impacts which directly affect this particularly vulnerable group will not only increase in frequency but also intensity.<sup>8</sup> As part of its contribution towards the negotiations of the formulation of the UNFCCC in 1991, and through subsequent interventions thereafter, the AOSIS formally highlighted the issue of persistent and destructive impacts of climate change which result in loss of territory, lives, livelihood and many other ‘unseen’ socio-economic facets of a society and a State. Despite the AOSIS and their representatives being part of the global treaty-making regime, these islands have historically stood alone at the fore of anthropogenic, climate-induced phenomena that causes substantial negative impacts on these island economies, threaten societies and their way of life.

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<sup>6</sup> Adelman, Sam, “Climate justice, loss and damage and compensation for small island developing states”, *Journal of Human Rights and the Environment*, 7(1), 2006, p32-53

<sup>7</sup> *Ibid*

<sup>8</sup> UNFCCC, “A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change”, Note by the Secretariat, at 4-5, 37th Sess., Nov. 26–Dec. 1, 2012, U.N. Doc. FCCC/SBI/2012/INF.14 (Nov. 15, 2012)



Loss and Damage as a concept, although not new, has been receiving increasing attention in recent years culminating with the call made by several Caribbean leaders<sup>9</sup> at the most recently held 2021 Conference of the Parties (COP) in Glasgow. Also in 2021, affirmative action to finally address Loss and Damage was had by Antigua and Tuvalu through the penning of an Agreement which created a Commission of Small Island States on Climate Change and International Law. The context behind this step is further elaborated in Chapters 3 and 4. The impetus behind the formation of the Commission was the continued exposure of developing states – particularly SIDS. Scientifically, according to the IPCC<sup>10</sup>, success in achieving 100% resiliency is highly doubtful. In the interim, the uniquely vulnerable of the global community find themselves in a grim situation where “there is high confidence that neither adaptation nor mitigation alone can avoid all climate change impacts”.<sup>11</sup> AOSIS’ early calls for assistance sought to look at measures beyond efforts to mitigate and adapt, and thus sought to include mechanisms to insure and compensate where impacts are unavoidable.<sup>12</sup>

Vanhala and Hestbaek (2016)<sup>13</sup> quote that for the Group of 77 developing states, “addressing loss and damage is understood as something ‘beyond adaptation’”.<sup>14</sup> The need to take collective action and provide redress to injured parties on the receiving end of environmental pollution or degradation was first formally introduced in Principle 9 of the Stockholm Declaration<sup>15</sup> and has also been outlined in Principle 13 of the Rio Declaration<sup>16</sup> and the Barbados Programme of Action

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<sup>9</sup> Reuters, “Don't make them wait': Pressure grows at COP26 for new funding for climate damage”, November 7 2021, <https://www.reuters.com/article/us-climate-un-finance-adaptation-idUSKBN2HT04V> Accessed November 20th 2021

<sup>10</sup> IPCC, 2007: Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds.)]. IPCC, Geneva, Switzerland, 104 pp.

<sup>11</sup> Ibid

<sup>12</sup> Burkett, Maxine, “Rehabilitation: A Proposal for Climate Compensation Mechanism for Small Island States” 2015, 13(1), Santa Clara Journal of Law p81-124

<sup>13</sup> Vanhala, Lisa and Hestbaek, Ceilie, “Framing Climate Change Loss and Damage in UNFCCC Negotiations”, 2016, Global Environmental Politics (16)2, 111-129

<sup>14</sup> Ibid p112

<sup>15</sup> “Environmental deficiencies generated by the conditions of under-development and natural disasters can best be remedied by the transfer of substantial quantities of financial and technological assistance.” Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972)

<sup>16</sup> “States shall... cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.” Rio Declaration on Environment and Development (Rio Declaration, 1992)

further discussed in Chapter 2. However, the limited advancement of this topic within the global agenda has been widely criticized – more so by those parties who are most affected such as those islands of the Caribbean and the Pacific and non-state actors such as the World Wildlife Foundation (WWF)<sup>17</sup>. It is thus firmly recognised that there are climate change impacts which are beyond adaptation and should be financed as such. These impacts cannot be avoided “through reductions of greenhouse gas emissions (mitigation) or adjustments to climatic changes (adaptation). Some adverse impacts are already ‘locked in’ as a result of past, current and projected future emissions”.<sup>18</sup>

## **1.2 The impacts of Loss and Damage**

Understanding the range of climate-induced impacts that spark loss and damage will assist in further understanding the urgency of the appeal of SIDS and LDCs. Due to climate impacts, there is a need to reduce the intensity and frequency of future events but, at the same time, provide appropriate support to address persistent existing and immediately impending events. These threats are inherent and emerge through fast and slow onset events. Fast onset events include those such as low-pressure systems (storms, hurricanes, tornadoes) and flooding, and slow onset events include such as sea-level rise (SLR), drought and land erosion. More so these threats are exacerbated by three factors that are attributable to SIDS a. the geographical siting of many of SIDS within the belts where tropical storms form and traverse, b. the predominant coastal nature of major settlements, infrastructure and populations<sup>19</sup> and c. their economic vulnerabilities due to isolation, small economies of scale and vertical dependencies on revenue generation such as tourism and agriculture. As such a climate-induced event has the potential to cause losses and damages, seen and unseen, of several orders of magnitude greater than an island’s economy – thus impacting a country’s ability to undertake rebuilding, public infrastructural projects in pursuit of the sustainable development agenda<sup>20</sup> as well as mitigation and adaptation activities to withstand future events.<sup>21</sup>

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<sup>17</sup> Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage”, WWF-UK, 2008

<sup>18</sup> Kreienkamp, Julia and Vanhala, Lisa, “Climate Change Loss and Damage”, Global Governance Institute, 2017, p1

<sup>19</sup> “Approximately 70 percent of the Caribbean population lives in coastal areas” UNOHRLLS, “Small Island Developing States in Numbers: Climate Change Edition 2015”, UN-OHRLLS, New York, 2015 p20

<sup>20</sup> GA/RES/70/1, 21 October 2015, Transforming our world: the 2030 Agenda for Sustainable Development

<sup>21</sup> UNOHRLLS, “Small Island Developing States in Numbers: Climate Change Edition 2015”, UN-OHRLLS, 2015

Members of the SIDS community have experienced irreversible and unavoidable economic and non-economic losses and damage due to extreme events. After the passage of Hurricane Irma in 2017, the island of Barbuda was deemed uninhabitable with more than 80% of buildings being reported destroyed or severely damaged.<sup>22</sup> Tuvalu, alongside other Pacific Islands such as Kiribati, has been facing the slow onset threat of SLR resulting in the loss of territory, displacement of people and thus well-being, culture and economy.<sup>23</sup> This is but a snapshot of the reality and recent history of SIDS which is why there is a fervent call to address those specific events which cannot be avoided through mitigation and adaptation alone.<sup>24</sup>

For example, the impacts of Hurricanes Maria and Irma, two Category 5 hurricanes that made landfall in the Caribbean in 2017, caused approximately US\$ 2.089 billion of Loss and Damage in Sint Maarten, a tourism-based island with a population of approximately 40,000 and annual GDP of US\$1.185 billion. The L&D impacts in Sint Maarten are outlined in Table 1. Table 2 Effects of Hurricane Irma by sectors, British Virgin Islands US\$ million

highlights the magnitude of losses and damage experienced in the British Virgin Islands in the same year.

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<sup>22</sup> IFRC, "Emergency Appeal Final Report: Antigua and Barbuda and Saint Kitts & Nevis: Hurricane Irma", 2020, <https://reliefweb.int/sites/reliefweb.int/files/resources/MDR49009fr.pdf> Accessed December 10 2021

<sup>23</sup> Farbotko, Carol and Lazrus, Heather, "The first climate refugees? Contesting global narratives of climate change in Tuvalu", 2012, 22(2), *Global Environmental Change*, p382-390

<sup>24</sup> IPCC, 2007: Summary for Policymakers. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M.Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

Sectors	Damage	%	Losses	%	Additional Costs	%	Total costs
<b>Infrastructure</b>	202.1	19.3	79.3	8.0	11.2	21.1	292.6
<b>Productive</b>	343.4	32.7	866.3	87.7	9.1	17.2	1,218.8
<b>Social</b>	502.1	47.9	36.6	3.7	32.5	61.4	571.1
<b>Environment</b>	1.0	0.1	5.3	0.5	0.1	0.12	6.4
<b>Total</b>	1,048.6	100	987.5	100	52.9	100	2,089.0

Table 1 Effects of Hurricane Irma by sectors, Sint Maarten US\$ million

Source: Adapted from: UNECLAC, Irma and Maria by Numbers, Issue 1, January – March 2018

Sectors	Damage	%	Losses	%	Additional Costs	%	Total costs
<b>Infrastructure</b>	664.2	40.3	14.1	3.2	66.7	33.7	745.0
<b>Productive</b>	291.1	17.6	60.6	13.7	103.3	52.1	455.1
<b>Social</b>	691.6	41.9	365.3	82.3	27.8	14	1084.8
<b>Environment</b>	2.7	0.2	3.9	0.9	0.4	0.2	7
<b>Total</b>	1,649.7	100	443.9	100	198.2	100	2,291.8

Table 2 Effects of Hurricane Irma by sectors, British Virgin Islands US\$ million

Source: Adapted from: UNECLAC, Irma and Maria by Numbers, Issue 1, January – March 2018

The above case studies are the type of economic loss and damage attributed to fast onset events. The duration of the events unleashed by these hurricanes, lasted approximately 6 to 8 hours on each of these islands. L&D also encompasses slow-onset circumstances which are currently most prominently displayed in the Western Pacific, which has experienced SLR at a rate three times the global average.<sup>25</sup>

<sup>25</sup> Pacific Coastal and Marine Science Centre, “The Impact of Sea-Level Rise and Climate Change on Pacific Ocean Atolls”, 2020, <https://www.usgs.gov/centers/pacific-coastal-and-marine-science-center/science/impact-sea-level-rise-and-climate-change#:~:text=Sea%20level%20in%20the%20western,to%202.0%20meters%20by%202100>. Accessed November 28 2021

### 1.3 To whom loss and damage is important

Furthermore, and as discussed in detail in the next Chapter, there is a need to substantively find solutions to address L&D due to its potential global reach. Typically, and as articulated by the Subsidiary Body for Implementation (SBI)<sup>26</sup> in Note FCCC/SBI/2012/INF.14, L&D is ringfenced as a concern for developing countries.<sup>27</sup> As global emissions and temperatures move past the target outlined within Article 2(a) of the Paris Agreement<sup>28</sup>, uncurbed emissions will undoubtedly result in more frequent and intense events which will stretch and cross the boundaries beyond SIDS and LDCs.

Nonetheless, despite the global potential, the devastation wrecked upon islands that negatively and, in some unfortunate cases, permanently impacts socio-economic facets of these island societies are not elements that these islands can endeavour to repair or rebuild on their own. L&D as an occurrence on its own “can halt or reverse development and “reinforce cycles of poverty”.<sup>29</sup> This reticence and lacklustre action on the part of developed parties can be partially attributed to the narrative established that L&D is a problem solely affecting developing countries. Despite this division, with the increased frequency and severity predicted and reported in Section A.3 of the 2021 IPCC Assessment Report<sup>30</sup> being realized, developed countries may find themselves experiencing more frequent uncharacteristic events which result in significant L&D.<sup>31</sup> The floods

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<sup>26</sup> The work of the SBI “has been at the heart of all implementation issues under the Convention, the Kyoto Protocol, and more recently the Paris Agreement. In this respect, its agenda is shaped around the key building blocks of implementation of all these treaties and instruments: transparency, mitigation, adaptation, finance, technology and capacity-building, and aims at enhancing the ambition of Parties on all aspects of its agenda.” Note FCCC/SBI/2012/INF.14, 15 November 2012

<sup>27</sup> “...the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems...”, Note FCCC/SBI/2012/INF.14, 15 November 2012

<sup>28</sup> “limit global warming to well below 2, preferably to 1.5 degrees Celsius, compared to pre-industrial levels”, UNFCCC, Paris Agreement, United Nations, New York, 2015, p3

<sup>29</sup> Burkett, Maxine, “Rehabilitation: A Proposal for Climate Compensation Mechanism for Small Island States”, 2015, 13(1) *Santa Clara Journal of Law* p81-124

<sup>30</sup> IPCC, “Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change”, 2021 [MassonDelmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press. In Press.

<sup>31</sup> “For example, atmospheric hazards such as heatwaves could become more prevalent as long-term ‘process’ climate change, such as increasing temperatures, takes place, with implications for urban dwellers, food production, energy demand, etc...the importance of finding appropriate approaches to address said continuum of loss and damage, in order to ensure climate-resilient growth even in the face of climate change and the loss and damage which accompanies it” UNFCCC, Subsidiary Body for Implementation, A literature review on the topics in

of September 2021 in New York, which claimed more than 67 lives<sup>32</sup> and exceeded US\$2 billion in L&D in Louisiana alone<sup>33</sup>, highlights the far-reaching, non-discriminate impacts of climate variability - thus not making L&D specifically a phenomenon which should only concern SIDS and LDCs.

Despite the advancements of the UNFCCC towards addressing climate change through adaptation and mitigation, the global community of SIDS has sounded the clarion in advance to alert the rest of the global community as to what may and can happen to their own territories if climate change continued unabated. Thus, the focus should not be on whom loss is damage is important but at what temperature threshold will loss and damage become a truly global concern – spanning all developed and developing countries. The persistent and destructive attribute of L&D, alongside its potential global reach, highlights the importance of articulating a legal pathway, in the absence of a substantive support mechanism under the UNFCCC, for which climate victims, can utilize to maintain their Statehood and secure the lives and well-being of their population.

As mentioned above and as discussed in the following chapters, under the UNFCCC, there has been limited headway in the requirement of the provision of obligatory financial and technical support for those countries identified as ‘most vulnerable’ in the treatment of L&D. Ideally, the global diplomacy regime would rally to provide financial assistance and technical support in the swiftest manner possible to stymy future, unavoidable events. However, countries classed as the ‘most vulnerable’ still face challenges with resilience building and counter-measures to face climate impacts. Due to these perennially outstanding concerns, States are moving to explore opportunities outside of the climate regime to gain redress for L&D.

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the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change, Note by the Secretariat, at 4-5, 37th Sess., Nov. 26–Dec. 1, 2012, U.N. Doc. FCCC/SBI/2012/INF.14 (November. 15, 2012)

<sup>32</sup> ABC News, “Ida updates: Over 50 dead in Northeast after flooding as death toll continues to rise”, September 4 2021 <https://abcnews.go.com/US/idas-remnants-deluge-york-jersey-flooding-rain-tornadoes/story?id=79780365>, Accessed November 1 2021

<sup>33</sup> FEMA, “Federal Disaster Assistance in Louisiana Exceeds \$2 Billion Two Months after Hurricane Ida” October 28 2021, <https://www.fema.gov/press-release/20211028/federal-disaster-assistance-louisiana-exceeds-2-billion-two-months-after> Accessed November 1 2021

As a result of the above, this study will provide an analysis of whether there is scope and opportunity for corrective justice, for climate victims to address L&D. The study will also determine if the overlapping nature of the international treaty regime could be leveraged to explore options to provide support to L&D victims outside of the climate regime, brokering options for climate justice and corrective justice for SIDS and LDCs.

#### **1.4 Research objectives, research questions and methodology**

Loss and Damage, in its current form, is the square peg of the round hole of climate financing. At present, it can only be applied if its edges are ‘rounded’ to fit within a mitigation and adaptation context. However, undoubtedly, its edges cannot be rounded.

*Some foreseeable loss and damage will be avoided, due to the mitigation of GHG emissions or timely adaptation measures. Some foreseeable loss and damage will not be avoided, due to insufficient mitigation efforts and delays in accessing adequate adaptation funding and technologies, or challenges in institutional capacity. Finally, some loss and damage is unavoidable, regardless of future adaptation measures to be undertaken.*<sup>34</sup>

As a result of the perpetual, unavoidable and outstanding issue of L&D and its impacts on the most vulnerable, the overall objective of this study is to determine whether or not there is a legal basis in existence, which allows for the provision of adequate financial support to address Loss and Damage to climate victims, particularly SIDS and LDC countries.

To meet the overall objective of this study, this work will first attempt to define Loss and Damage. It will also subsequently focus on cataloguing the genesis of L&D and the need to compensate due to injury from environmental negligence within the framework of international environmental law. Secondly, the study will then examine the broad climate finance obligations of developed countries under the UNFCCC. It will also take a further look at the progress made thus of the international machinery in existence under the UNFCCC, such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change impacts (WIM), tasked with addressing L&D. It will also provide a brief analysis of the logical arguments which are utilised to deploy redress in the

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<sup>34</sup> Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage”, WWF-UK, 2008, p11

short-term. In this framework I will also present the shortcomings of this approach. Advancements within the Caribbean region to close the gap in L&D financing will also be studied and the role of regime interaction and fragmentation in this regard. Finally, this thesis will conclude by summing up the outcomes of each chapter providing my opinion on if there is an immediate pathway for the inclusion of L&D financing as a legal obligation within or outside of the climate regime.

In the pursuit of the discussion and delivering on the specific objectives, the study will address the following questions:

1. What is the history of loss and damage and what are the climate finance obligations of developed countries under the UNFCCC?
2. Are there any institutional bodies in existence with a mandate to address finance obligations for L&D under the climate regime and what have they achieved since their institution?
3. Depending on climate finance obligations, what, if any, type of legal arguments may loss and damage victims utilize to seek redress under international law?
4. Are there any sub-regional or international instruments in existence that address Loss and Damage?

#### *1.4.1 Methodology*

A multi-disciplinary approach will be assumed to complete this research work and it will vary by chapter.

The predominant methodology to undertake analysis in Chapters 2 to 4 will include desk-top research and review of previous journal articles, discussion papers and commentaries, and my own doctrinal analysis of relevant frameworks which speak to the topic of legal options to achieve recourse for climate-induced loss and damage. There will be limited data analysis with respect to assessing the socio-economic, country-level impact of climate change-induced extreme events. Key sources include works by the Decisions of the UNFCCC, World Wide Fund for Nature, Reports undertaken by the UNECLAC, previous research on Loss and Damage, the WIM and legal options for mounting an argument for compensation. Case studies derived from journal articles on Loss and Damage perspectives from countries such as Vanuatu and from the Pacific (and others where available) will also be utilized.



Desk review supplemented by discussions with appropriate personnel operating in International Government Organisations (IGOs) in the Caribbean region in the Disaster Risk Management field – in particular those which operate within the area of disaster risk insurance and country payouts to satisfy Chapter 4. These include the Caribbean Catastrophe Risk Insurance Facility (CCRIF SPC), the World Food Programme (WFP) and the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC).

#### *1.4.2 Thesis Outline*

Chapter 2 will open with an attempt to define loss and damage in the context of climate change. It will also introduce the notion that Loss and Damage is not an effect only experienced by developing countries – that there is potential for impacts to spread to those who are historical opponents to the inclusion of L&D as a third pillar under the UNFCCC and the need for compensation. I will also hypothesize on whether or not the stance of the powerful players will waiver as the wider physical impacts of climate change extend to their borders.

The history of liability and compensation under the international environmental law regime will be touched on in chapter 2. I will also provide historical background on the context of loss and damage within the environment and those norms which have been adopted within the climate regime. The chapter will close with a discussion on climate finance obligations under the UNFCCC.

Chapter 3 will explore the original proposal on the structure of financing under the theme of Loss and Damage as a multi-window fund and explore how this structure has evolved since the Fund's original proposal, if at all. The core function and the progress of the work of the WIM since its institution will also be touched on in this chapter.

Chapter 4 will reiterate that a legal basis must be thus founded to help the victims of climate change as some countries realise the loss of territory and experience forced migration. For this Chapter, I will present the varying arguments utilised in previous research as researchers and lawyers alike have, and continue to explore, avenues for a legal basis to adequately address loss and damage. Arguments cover issues from human rights, to state responsibility, and where possible I will discuss the shortcomings of these arguments to adequately advance the legal basis for financing of L&D.

Chapter 5 will be devoted to recognising the financing gaps which exist for L&D. Reports and previous research undertaken will be utilised to highlight that voluntary financing and what is available under complementary regimes is not enough. Examples of activities that contribute to L&D financing solutions such as social security programmes, and the provision of micro-insurance, will also be touched on to support the argument that schemes should be replicated and upscaled to support national needs. An example in practice in the Caribbean region, supported by the World Bank, is the world's first parametric insurance facility CCRIF SPC. Although completely funded by participating states, it represented the first of its kind to provide financial support to climate victims after a trigger event.

Following this Chapter, I will conclude by summarising the findings of each section and hence address each of the 4 questions which have been posed above. In closing, I will provide a determination of the short-term future of the L&D financing for climate victims and provide an overarching opinion on the application of legal logic to advance this agenda. Finally, I will also provide a brief input on the pathways ahead for climate victims to advance L&D financing discussions for vulnerable states.

## **2. Background and the genesis of the Loss and Damage position**

### **2.1 What is Loss and Damage**

This section aims to provide a specific and practical definition for loss and damage within the climate context as a foundation to expound on the research presented in the rest of the thesis. With all the uncertainty and tumult surrounding the issue of L&D, exactly what is it? Despite, its paramount importance to vulnerable groups, no concrete and globally accepted definition exists - outside of broad descriptions targeting developing parties.

As an example of an attempt in existence, the UNFCCC Subsidiary Body for Implementation (SBI), for the drafting of its Note FCCC/SBI/2012/INF.14, provided a definition of loss and damage to encompass “the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems”.<sup>35</sup> Despite the intent to utilise the proposed definition for the Note, there are indeed shortcomings. It is admittedly broad and fails to convey the urgent, permanent and critical nature of Loss and Damage. It also limits the scope of impact and effect on developing countries and is also silent on its existing legal standing/strength. Alternatively, other Works, in lieu of providing a definition, attach a descriptor to the general characteristics of L&D. This is evinced in Kreienkamp and Vanhala (2017) where they identify that loss and damage “can be the result of severe weather events or slow onset events such as sea-level rise or desertification”.<sup>36</sup>

As a result, despite there being much agitation on the topic of L&D, there has been no success, to coin a definition of the phenomena which would guide how it should be treated with. As the destructive and permanence of L&D has been demonstrated, can a legal argument be mounted within the confines of the climate regime without a definition of what L&D is?

In an attempt to provide a definition for L&D, I referred to existing definitions for “loss” and “damage” as individual terms within the legal and economic fraternity. Firstly, there exists an emphasis on the marked difference between the two phrases and the un-interchangeability of the two concepts.

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<sup>35</sup> Note by the Secretariat, at 4-5, 37th Sess., Nov. 26–Dec. 1, 2012, U.N. Doc. FCCC/SBI/2012/INF.14 (Nov. 15, 2012)

<sup>36</sup> Kreienkamp, Julia and Vanhala, Lisa, “Climate Change Loss and Damage”, Global Governance Institute, 2017, p2

*... there is a distinction between legal and economic approaches of analysed concepts...the perception of loss and damage concepts is different because of several aspects: the interpretation in legal and economic scientific literature, the content of loss and damage concepts depend on event, place and time.*<sup>37</sup>

‘Loss’ and ‘Damage’ as terms already used in property, contract and other fields of law are already assigned a legal definition. The Bouvier’s Law Dictionary defines losses as “1) the value of injury or accident caused by other person’s negligence and carelessness; 2) breach of contract or law; 3) impairment of resources of the injured party, an increase of insurer’s liabilities.”<sup>38</sup> Recognising that there are legally refined definitions of loss and damage as individual concepts, what would be considered an apropos definition that can be applied and accepted under the UNFCCC framework? Although I would not be able to successfully undertake and complete this effort independently considering the collective nation of the Framework Convention, I can however extrapolate key pillars which can be utilised for this Work. The key pillars utilized will be those extracted from the existing definitions within the legal and economic fraternity, and will be merged with the context as provided by Note FCCC/SBI/2012/INF.14 thus reflecting a more refined scope and breadth of L&D as experienced. Therefore, I merged and extrapolated existing descriptors to be utilized for this body of Work, and included those key pillars which should also satisfy the climate context. These key pillars that should be satisfied include that L&D is:

- Associated with climate change
- Permanent or temporary impairment or reduction of resources or assets
- Caused by the negligence, lack of care or actions of another party/parties
- A breach of contract law
- Applicable in developing and developed countries

With this in mind, I seek to determine in this work how elements of this definition can provide further support in lobbying efforts for the inclusion of financing for L&D as an obligation at the international level.

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<sup>37</sup> Palekienė, Oksana and Bruneckienė, Jurgita and Simanaviciene, Zaneta, “Critical analysis of loss and damage concepts under process of economic assessment”, 2014, 156, Procedia - Social and Behavioral Sciences, p305

<sup>38</sup> Ibid

## 2.2 History of the L&D position

This chapter will situate and provide context to the issue of Loss and damage and introduce the genesis of the issue of compensation for victims of environmental degradation and its connection with loss and damage due to climate change. Furthermore, the chapter will also discuss that L&D remains largely untreated; exploring the opinion that “the absence of a mechanism under the UNFCCC process to comprehensively address the loss and damage to the world’s most vulnerable developing country Parties from human-induced climate change is a gaping hole in the international climate change regime”.<sup>39</sup> In support of this opinion, this chapter will trace the history of liability and compensation within the complementary regimes of environment and sustainable development. It will introduce the non-binding 1972 Stockholm and 1992 Rio Declarations, and will then touch on the formal proposals to address L&D as put forth by AOSIS. Moreso, it will mention other frameworks which speak to the need to establish a comprehensive system to provide financial and technical support for the world’s most vulnerable and finalise with a stocktake of the current position as of 2022.

### 2.2.1 Stockholm and Rio Declarations

Fifty years have elapsed since 1972 when States, first convened to undertake a stock take on compensation for environmental damage due to international acts.<sup>40</sup> The 1972 Stockholm Declaration represented the outcome of this first international stock take.<sup>41</sup> Within the pages of the Declaration are many relevant acts within International Environmental Law which bears weight within the climate change regime and directly feeds into the discussion surrounding L&D. One of these acts is Principle 11<sup>42</sup>, which sets the stage for the future global climate framework and also speaks to state responsibility as it relates to transboundary environmental harm and suggests

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<sup>39</sup> UNFCCC, “*Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16*”, 28 September 2012

<sup>40</sup> Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage”, WWF-UK, 2008

<sup>41</sup> Handl, Gunther, “Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration), 1972 And The Rio Declaration On Environment And Development, 1992”, United Nations Audiovisual Library of International Law, 2012.

<sup>42</sup> Principle 11 “The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.” Stockholm Declaration, 1972

ramifications for where there is non-compliance. Another relevant act is Principle 21<sup>43</sup> which also reiterates the foundation and application of the widely recognized no-harm rule which is a principle of customary international law. Finally, Principle 22 signals and documents the intention of States to convene the global processes to develop international law to financially compensate victims of pollution and environmental damage.<sup>44</sup>

To fully appreciate why the Declaration is justly seen today as a historical marker, it is essential to recall that the Stockholm Conference and its outputs were directly influenced by the differing viewpoints, developmental contexts and approaches to environmental preservation of developed and developing countries at that time.<sup>45</sup> The Stockholm Conference was the forum where the growing concerns of increasing transboundary pollution by rapidly industrialising countries could be brought to the fore by developing countries seeking resolution to this hazardous issue.<sup>46</sup> Furthermore, beyond transboundary pollution, the significance of the Stockholm Declaration also lies in the fact that it highlighted the nexus and direct correlation between activities with a negative impact on the environment and resultant developmental issues.<sup>47</sup> It also reiterated the importance of the no-harm rule as a principle of international law which is evident through its influence on judicial cases on transboundary pollution such as the 1938 Trail Smelter Case.<sup>48</sup>

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<sup>43</sup> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Stockholm Declaration, 1972

<sup>44</sup> "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." Stockholm Declaration, 1972

<sup>45</sup> Brunnée, Jutta, *The Stockholm Declaration and the Structure and Processes of International Environmental Law* in Aldo Chircop, Ted McDorman, (eds), *The future of ocean regime building: essays in tribute to Douglas M. Johnston*, Kluwer Law, 2008, pp. 41-62

<sup>46</sup> Brunnée, Jutta, *The Stockholm Declaration and the Structure and Processes of International Environmental Law* in Aldo Chircop, Ted McDorman, (eds), *The future of ocean regime building: essays in tribute to Douglas M. Johnston*, Kluwer Law, 2008, pp. 41-62

<sup>47</sup> Ibid

<sup>48</sup> "In 1935 a Canadian based corporation (defendant) owned a smelter plant which emitted hazardous fumes (sulphur dioxide) that caused damage to plant life, forest trees, soil, and crop yields across the border in Washington State in the United States (plaintiff). The United States took Canada to court... The Tribunal concluded, with respect to future harm, that: 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'." Miller, Russell, "Trail Smelter Arbitration", in *Max Planck Encyclopedia of Public International Law*, 2007

Subsequent to the Stockholm Declaration, the Rio Declaration, borne out of the 1992 United Nations Conference on Environment and Development, reaffirmed the ideas and commitments expressed 20 years prior at Stockholm. Notwithstanding that the landmark outcome of the Rio Declaration was the basic framework for the understanding of Sustainable Development<sup>49</sup>, embedded within its 27 principles, the Rio Declaration, also asserts the importance of the no-harm rule and also situates the rule within international law. Furthermore, Principle 13 of the Declaration also speaks to the obligation of States to “cooperate in the development of international law regarding liability and compensation for adverse effects of environmental damage”.<sup>50</sup> This showcases the emergence of the critical need to address negative transboundary environmental impacts as well as the need to develop international law specific geared towards addressing liability and compensation.

Despite the advancements, as non-binding instruments, States are not obligated to act on these principles and even more so, the lack of prescriptiveness and precision articulated within the principles allows for latitude and non-implementation. Yamineva (2021) defines prescriptiveness as “whether the obligation is absolute or its subject has some discretion”<sup>51</sup> whereas precision “refers to ‘how well defined the obligation is in terms of the addressee (who), the substance (what), and the timeline (by when)’”.<sup>52</sup> In a climate setting, the application of the aforementioned principles reveals some ambiguity about who would be entitled to demand compliance - especially where the injured represents a collective, such as SIDS and LDCs, versus a singular entity or State. As a result, although Principle 21 hints at “the existence of an obligation owed *erga omnes*, it remains hamstrung by the unresolved question of the extent to which states other than the ‘injured state’ are entitled to invoke state responsibility”.<sup>53</sup> Moreover, Principle 22 showcases where the global community has failed on this agenda 50 years after its articulation to cooperate on developing international law surrounding the attribution of responsibility and hence legal liability for victims

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<sup>49</sup> Tokuç, Ayca, “Rio Declaration on Environment and Development (UN)” in Idowu S.O., Capaldi N., Zu L., Gupta A.D. (eds), *Encyclopedia of Corporate Social Responsibility*, Springer-Verlag Berlin Heidelberg, 2013, pp76 - 101

<sup>50</sup> Principle 2, Rio Declaration 1992

<sup>51</sup> Yamineva, Yulia, “A Legal Perspective on Climate Finance Debates: How Constructive Is the Current Norm Ambiguity?” in Benoit Mayer and Alexander Zahar (eds), *Debates in climate law*, Cambridge University Press, 2021 p367

<sup>52</sup> Ibid

<sup>53</sup> Brunnée, Jutta, *The Stockholm Declaration and the Structure and Processes of International Environmental Law* in Aldo Chircop, Ted McDorman, (eds), *The future of ocean regime building: essays in tribute to Douglas M. Johnston*, Kluwer Law, 2008, pp. 41-62

of environmental degradation. Moreso, the intent of the principle has been defeated by the lack of a timeline for the elucidation of such international law. Whilst there are legal instruments in existence that treats with liability for environmental damage<sup>54</sup>, some limitations continue to be persistent. These include the determination of the limits at which point environmental damage results in liability<sup>55</sup> - which is the point at which redress through compensation becomes a possibility. In addition, notwithstanding that the Declaration recognises the unique vulnerabilities and exposure of developing countries and the need for the provision of support, the provision is ambiguous by type and scale of financing in the protection against environmental impacts. Stockholm Principle 12<sup>56</sup> mentions that ‘resources should be made available’ but does not specify the type of resources – whether it be financial, technical or technological.

The Stockholm Declaration provides the foundation of environmental diplomacy and articulates several principles which, 50 years later, are still yet to be absorbed within the climate regime. The assertion and reaffirmation of the no-harm rule as a key principle of international law and its demonstrated strength through historical litigation would engender the assumption that some impact within the climate regime should be realised. As a normative rule, however, the no-harm principle has not been widely applied under the L&D rationale. This will be discussed further and the potential of the no-harm principle as a legitimate legal argument to seek redress for L&D impacts is also explored in Chapter 4.

### *2.2.2 UNFCCC and beyond*

The Alliance of Small Island Developing States, first formally highlighted the issue of persistent and destructive impacts of climate change as part of its contribution towards the negotiations of the formulation of the UNFCCC in 1991. AOSIS called to attention that, if remained unchecked

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<sup>54</sup> (a) Convention on International Liability for Damage Caused by Space Objects, London, Moscow, Washington 1972); adopted 29 March 1972, in force 1 September 1972, (b) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London)); adopted 3 May 1996, but not yet in force,

<sup>55</sup> UNEP, “Liability & Compensation Regimes Relating to Environmental Damage: A Review”, Kenya, United Nations Environment Programme, 2003

<sup>56</sup> “Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose” Principle 12, United Nations Conference on Environment and Development, “Agenda 21, Rio Declaration, Forest Principles”, New York, United Nations, 1992



and untreated, L&D would result in loss of territory, lives, livelihood and many other ‘unseen’ socio-economic facets of a society and a State. This is relevant as the States, represented by AOSIS, share long histories and collective experience in slow and fast onset climate change impacts.

Subsequently, in 2008, the AOSIS in another attempt to formalize L&D under the UNFCCC undertook to craft a proposal that considered an expanded spectrum of necessary responses and ensured alignment with foundation regimes such as the need for an international insurance mechanism.<sup>57</sup> As the representative body with an interest in addressing L&D under the Convention, the AOSIS thus crafted a proposal and submitted it to the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA).<sup>58</sup> The AWG-LCA was established under the Framework Convention as a subsidiary body tasked “with conducting a comprehensive process to enable the full, effective and sustained implementation of the Convention”.<sup>59</sup> This process to enable and implement stemmed from the Conference of the Parties (COP) of 2007 and the articulation of the Bali Action Plan and its accompanying roadmap where an outcome decision was made to explore pathways to address climate-induced L&D in vulnerable states.<sup>60</sup>

The structure of the AOSIS proposal as submitted, as highlighted in Figure 1, reaffirmed the need for mitigation and adaptation but also included two further elements of insurance and compensation as pillars to address L&D as outlined below.<sup>61</sup>

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<sup>57</sup> UNFCCC, “*Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16*”, 28 September 2012

<sup>58</sup> “The Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) was established as a subsidiary body under the Convention by decision 1/CP.13 (the Bali Action Plan) to conduct a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome to be presented to the COP for adoption.” UNFCCC, “AWG-LCA bodies page”, n.d. <https://unfccc.int/awg-lca-bodies-page> Accessed February 1 2022

<sup>59</sup> UNFCCC, “AWG-LCA bodies page”, n.d. <https://unfccc.int/awg-lca-bodies-page> Accessed February 1 2022

<sup>60</sup> UNFCCC, “Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Decision 1/CP.13 Bali Action Plan”, United Nations, New York, FCCC/CP/2007/6/Add.1, 2008

<sup>61</sup> Burkett, Maxine, “Rehabilitation: A Proposal for Climate Compensation Mechanism for Small Island States”, 2015, 13(1) *Santa Clara Journal of Law* p81-124



Figure 1 Structure of the AOSIS proposal

Source: Adapted from: Burkett, Maxine, “Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States”, 2015, Santa Clara Journal of International Law, 13(81) p 92

According to the island of Nauru as part of their submission to the Subsidiary Body on Implementation, “the absence of a mechanism under the UNFCCC process to comprehensively address the loss and damage to the world’s most vulnerable developing country Parties from human-induced climate change has been a gaping hole in the international climate change regime”.<sup>62</sup> The work and proposals of the AOSIS negotiating body focuses on closing this gap and leverages the outcome of the AWG-LCA’s work under Section 1 (ciii).<sup>63</sup> of the Bali Action Plan.

Further attempts have been made consistently by the AOSIS, LDCs and SIDS to firmly establish tools to substantively address L&D under the UNFCCC. In 2009, at COP19 in Copenhagen, headway to address L&D was unsuccessful. In Cancun, at COP 16, there was mobilisation in this agenda with the establishment of a work programme<sup>64</sup> formed under the subsidiary body for implementation in the context of the Cancun Adaptation Framework.<sup>65</sup> This occurred due to the recognition that risk management and risk reduction play major roles in both loss and damage articulation as well as adaptation strategies and financing.<sup>66</sup> Incremental strides were made at each

<sup>62</sup> UNFCCC, “Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16”, 28 September 2012, p1

<sup>63</sup> Disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change;” Section c1 (iii), Bali Action Plan, 2007

<sup>64</sup> UNFCCC, “Elaboration of the sources of and modalities for accessing financial support for addressing loss and damage”, 2019, FCCC/TP/2019/1, p4

<sup>65</sup> “Decides to hereby establish a work programme in order to consider, including through workshops and expert meetings, as appropriate, approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change” UNFCCC, Decision 1/CP.16, 2010

<sup>66</sup> Ranger, Nicola et al, “Open questions about how to address ‘loss and damage’ from climate change in the most

COP towards the formalization of L&D under the UNFCCC, and in 2013 the establishment of an institutional body to address loss and damage in those developing countries particularly vulnerable to climate impacts was realized.<sup>67</sup> The WIM, established at COP19, has a mandate which focuses on developing “approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”.<sup>68</sup> The establishment of the WIM and the work programme of its Executive Committee and its advancements thus far are discussed further in Chapter 3.

Towards further inclusion of the L&D within the climate regime, Article 8.1<sup>69</sup> of the 2015 Paris Agreement, ensured to reiterate and highlight the importance of L&D and the challenges that those developing countries face due to their heightened vulnerabilities. Despite this, the Agreement attaches no legal obligation, within its text, that States must substantively address L&D through financing or technical assistance. Furthermore, in support of this ‘soft’ position, Paragraph 51 of the Decision adopted by the Conference of the Parties 1/CP.21 firmly denounced “that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation”.<sup>70</sup>

In addition to the above discussion on L&D in the climate regime, although the UNFCCC is where L&D has been predominantly debated, it is not the only international regime in which L&D plays a role. Since 1992 under the United Nations’ Sustainable Development<sup>71</sup> regime, Small Island Developing States (SIDS) have been designated as a special case both for the environment and

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vulnerable countries: a response to the Cancún Adaptation Framework”, LSE Research online documents on economics, 2011

<sup>67</sup> Hirsch, Thomas, “Climate Finance for Address Loss and Damage: How to mobilise support for developing countries to tackle loss and damage”, Brot für die Welt, Berlin, 2019

<sup>68</sup> UNFCCC, Decision 1/CP.16, 2010, paragraph 26

<sup>69</sup> “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.” UNFCCC, Paris Agreement to the United Nations Framework Convention on Climate Change, 2015

<sup>70</sup> UNFCCC, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, FCCC/CP/2015/10/Add.1 p.8

<sup>71</sup> “*The UN Global Conference on the Sustainable Development of SIDS was held in Barbados from 25 April to 6 May 1994. The Conference reaffirmed the principles and commitments to sustainable development embodied in Agenda 21 and translated these into specific policies, actions and measures to be taken at the national, regional and international levels.*” United Nations (1994), Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados A/CONF. 167/9, New York, United Nations <https://sustainabledevelopment.un.org/conferences/bpoa1994> Accessed November 4 2021

development. This is made specific in Agenda 21<sup>72</sup>, which shines the light on the sensitivities and co-dependency of SIDS on the environment and its role in SIDS development. Providing further support to the sensitivities of SIDS, the 1994 Barbados Programme of Action (BPOA), presented a complementary framework that highlighted that the assets of Small Islands Developing States (SIDS) “are under severe stress and all efforts must be taken to ensure the central position of people in the process of sustainable development”.<sup>73</sup>

Apart from the initial call by the AOSIS to provide a financing mechanism to address the unavoidable gaps which represent L&D directly to the UNFCCC, the BPOA highlights in Part III.2 of the Affirmation<sup>74</sup> the link of addressing loss and damage to the ability of SIDS to attain sustainable development objectives – highlighting the cross-cutting nature of this challenge.<sup>75</sup> This affirmation highlights that the SIDS community have been looking toward the global community to provide support in a multitude of ways to adapt and withstand some of the ‘unique vulnerabilities’ of which SIDS are typically characterised. One of those ways has been the call for the provision of financing by those considered to be responsible<sup>76</sup> for the wicked problem of climate change.

The provision of support, not only through technical assistance but the provision of financing is a highly debated topic within L&D negotiations. The issues of liability, compensation, the burden of proof and the existing scope of climate financing obligations all arise as pertinent arguments.

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<sup>72</sup> *Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment... it was by more than 178 Governments at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3 to 14 June 1992.* UN, “Agenda 21, A/CONF.151/26/Rev.1, 1992”, <https://sustainabledevelopment.un.org/outcomedocuments/agenda21>, Accessed November 4 2021

<sup>73</sup> United Nations (1994), *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados A/CONF. 167/9*, New York, United Nations p.2

<sup>74</sup> “While small island developing States are among those that contribute least to global climate change and sea level rise, they are among those that would suffer most from the adverse effects of such phenomena and could in some cases become uninhabitable. Therefore, they are among those particularly vulnerable States that need assistance under the United Nations Framework Convention on Climate Change, including adaptation measures and mitigation efforts” United Nations (1994), *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados A/CONF. 167/9*, New York, United Nations p.3

<sup>75</sup> Ibid

<sup>76</sup> “Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,” United Nations, “United Nations Framework Convention on Climate Change”, 1992, United Nations, New York, p1

The next section will introduce the topic of climate finance obligations and how they influence the L&D discussion within the climate regime.

### **2.3 Climate finance obligations under the UNFCCC**

Thirty years have elapsed since the first AOSIS proposal, and almost ten since the institution of the WIM, yet countries still clamour for support to improve resilience against climate variability and the implementation of financial counter-measures to face climate impacts. In order to understand why L&D financing is not widely available and made voluntary, we must first briefly examine what are, if any, the financial obligations of states under the international climate regime. As one would recall within the fundamentals of international law, States are bound to adhere to those articles within a treaty or international agreement which are legally binding. As obligations perpetuated throughout the Vienna Convention on the Law of Treaties, by being a signatory to an international legislative framework, States agree to be bound by the dutiful obligations contained therein. This obligation holds steadfast to the global climate treaties and the articles contained therein – especially where there are ‘conditions of duty’ levied upon specific groups.

Currently, under the Paris Agreement, developed parties are legally obligated to provide pathways toward financing for ‘developing’ countries to access climate finance to undertake mitigation and adaptation pledged at COP 15 in 2009 as 100 billion per year.<sup>77</sup> Previous research has been undertaken to determine the exact obligations of those States - States which are not specifically identified in the Paris agreement - which are legally bound to the article of the provision of climate finance and have offered an opinion on the effectiveness of the financing obligations in practice.<sup>78</sup>

Research from Yamineva (2021), investigates “whether there is an obligation for developed countries to provide climate finance to developing countries, and, if so, what it consists in”.<sup>79</sup>

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<sup>77</sup> UNEP, ‘What does COP26 mean for adaptation?’, 2021, <https://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation#:~:text=Back%20in%202009%2C%20developed%20nations,US%20%2480%20billion%20in%202019.&text=The%20boost%20for%20adaptation%20funding,as%20one%20of%20COP26's%20successes>. Accessed December 5 2021

<sup>78</sup> Yamineva, Yulia, *A Legal Perspective on Climate Finance Debates: How Constructive Is the Current Norm Ambiguity?* in Benoit Mayer and Alexander Zahar (eds), *Debating climate law*, Cambridge University Press, 2021 p366

<sup>79</sup> Ibid p365

In summary, in undertaking the analysis of the substantive obligations of the main groups outlined in the UNFCCC Agreements (developed countries and developing countries) in the provision of climate finance, firstly one must reiterate and revisit that historically the Framework Convention recognized the contribution of industrialized countries to the current climate crisis.<sup>80</sup> As a result, developed countries have been afforded a measure of responsibility for the climate crisis. This responsibility has been translated into a clear obligation, as in Article 9.1 of the Paris Agreement, to provide climate finance with the purpose to treat with mitigation and adaptation actions particularly in vulnerable countries.<sup>81</sup> These vulnerable countries are covered under the principle of Common But Differentiated Responsibility and Respective Capabilities (CBDRRC).<sup>82</sup>

Furthermore, Yamineva (2021) also sought to study the prescriptiveness and precision of the Treaties in articulating finance obligations; the broad obligation of creating finance flows is a positive and necessary action, however, whether the obligations are specific in their limits, timeline and function greatly improves the effectiveness and delivery of the obligation. Her findings determine that the use of hortatory such as ‘shall’ and voluntary language such as ‘should’ is a heavy determinant in the analysis of the obligations of states in the Treaty frameworks developed under the UNFCCC.<sup>83</sup> The starting point of the analysis on financial obligations looks more specifically at Article 9.1 of the Paris Agreement, which articulates that, developed countries – a signifier which still needs to be thoroughly defined – “shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation”.<sup>84</sup> The use of hortatory language highlights the bindingness of those which are obligated to provide financing, developed countries, and highlights the grouping of states to which the financing must be directed, those being developing states.

Notwithstanding the vagueness surrounding those eligible to be donors, and recipients by the undefined use of the groupings of ‘developed’ and ‘developing’, the group of SIDS countries is

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<sup>80</sup> United Nations, “United Nations Framework Convention on Climate Change”, 1992, United Nations, p1

<sup>81</sup> UNFCCC, “Paris Agreement”, United Nations, New York, 2015

<sup>82</sup> “In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.” Article 19(3) of the Constitution of the International Labour Organization (ILO), same as Article 405(3), 1919 Versailles Peace Treaty

<sup>83</sup> Ibid

<sup>84</sup> UNFCCC, “Paris Agreement”, United Nations, New York, 2015 p13

firmly entrenched within those which are considered as possessing unique vulnerabilities as per Article 9.4<sup>85</sup> of the Paris Agreement. Thus, by the categorization of SIDS as described above in terms of their isolation, small economies of scale and vertical dependencies on tourism and agriculture, it can be deduced that SIDS will be categorised as ‘recipients’. Meanwhile, those countries which have been previously considered as ‘donor’ countries under previous regimes such as the Kyoto Protocol and which have been directed to provide financing under Article 9.1 of the Paris Agreement are legally obligated to provide States such as those with ‘unique vulnerabilities’ with the necessary financial resources to undertake mitigation and adaptation actions. Of the 100 billion per year pledged in 2009, SIDS should be at the forefront of receiving development finance to undertake resilience building through mitigation and adaptation. This falls directly in accordance with chapter 33 of Agenda 21 and Part 2III1 of the BPOA which also addresses the need to provide adequate financing to sustain the developmental agenda of SIDS.<sup>86</sup> Reality tells a different story however, as although 12<sup>87</sup> multilateral funds exist within the three SIDS regions, 2.1 billion US dollars of funds have been programmed between 2003 and 2020<sup>88</sup> – 0.12% of what would have been the total funding commitment.

From the perspective of precision, however, “the provision is vague... the substance (provision of financial resources) is not detailed: for instance, neither the scale of financing nor the timelines are

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<sup>85</sup> *“The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation”* UNFCCC, “Paris Agreement”, United Nations, New York, 2015, p8

<sup>86</sup> United Nations (1994), *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados A/CONF. 167/9*, New York, United Nations p5.

<sup>87</sup> ‘Green Climate Fund, Least Developed Countries Fund, Pilot Programme for Climate Resilience, Global Environment Facility, Global Climate Change Alliance, Adaptation Fund, Clean Technology Fund, Scaling Up Renewable Energy Program in Low Income Countries, Special Climate Change Fund, Forest Carbon Partnership Facility, UN-REDD Program, Adaptation for Smallholder Agriculture’. Watson, Charlene, Schalatek, Liane “Climate Finance Regional Briefing: Small Island Developing States”, Heinrich Böll Stiftung Washington, Washington DC, 2021, <https://us.boell.org/sites/default/files/2021-03/CFF12%20-%20ENG%202020%20-%20Digital.pdf> Accessed December 5 2021 p2.

<sup>88</sup> Watson, Charlene, Schalatek, Liane “Climate Finance Regional Briefing: Small Island Developing States”, Heinrich Böll Stiftung Washington, Washington DC, 2021,

specified”.<sup>89</sup> The vagueness in the provision of the obligation leaves the door open for underperformance with no legal ramifications attached. Notwithstanding the pledges made in 2009 and the obligations put forth by the Agreement, targets have not been met in the provision of financing nor in the spread of financing across mitigation and adaptation regimes. With climate finance at approximately US\$80 billion in 2019 with 25% being allocated to adaptation<sup>90</sup> versus the originally recommended 50% share<sup>91</sup>, this means that SIDS have accessed, between 2003 and 2020, 2.5% of available funding with the majority of approvals provided for under adaptation. This signals that although climate mitigation is a large concern and has received more attention, evinced by the proportion of climate finance actually appropriated for adaptation, SIDS and LDCs have different priorities from those of donor countries.

As no budget provision, from an accounting perspective, has been made available to address L&D, it is my opinion that despite targets not being met in the provision of financing by those obligated to do so, the low rates of accessibility and the direction of spending once those funds are accessed, is a signal of ‘turning tides’. The formal funding priorities and obligations of the global community under the UNFCCC rests squarely in mitigation and adaptation with more attention being paid to the mitigation agenda as indicated by the direction of funding commitments. However, based on the information presented above, the funding and project priorities of SIDS and LDCs are not predominantly towards mitigation and GHG abatement. Vulnerable states are turning their attention evermore to safeguarding those assets which can be secured through adaptation programmes and those which are ‘beyond adaptation’.

The likelihood of L&D finance being included as an obligation under the climate machinery has been and continues to be a topic under protracted discussion and insubstantial action. In treating the financing gaps in implementing activities ‘beyond adaptation’ under the climate regime, institutions have been formalized to navigate the discussion regarding L&D as a climate finance

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<sup>89</sup> Yamineva, Yulia, *A Legal Perspective on Climate Finance Debates: How Constructive Is the Current Norm Ambiguity?* in Benoit Mayer and Alexander Zahar (eds), *Debates in climate law*, Cambridge University Press, 2021 p367

<sup>90</sup> UNEP, ‘What does COP26 mean for adaptation?’, 2021, <https://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation#:~:text=Back%20in%202009%2C%20developed%20nations,US%20%2480%20billion%20in%202019.&text=The%20boost%20for%20adaptation%20funding,as%20one%20of%20COP26's%20successes>. Accessed December 5 2021

<sup>91</sup> Ibid



obligation. In this regard, Chapter 3 will introduce and explore the progress of the institutions which have been set up to translate policy and strategy into action with respect to financial obligations to address L&D.

### **3. Addressing L&D under the climate regime**

As the previous Chapter has introduced the concept of L&D and presented the history of negotiations under the climate regime, as well as the existing financial obligations related to the main two pillars of mitigation and adaptation, this chapter seeks to investigate the institutions that have been set up to address L&D responsibility and hence financial liability. This Chapter will briefly discuss their set-up, mandate and how the institutional machinery has thus far failed to yield products that are of tangible use to the most vulnerable.

The WIM, at its establishment, represented a potential pathway towards resolving a long outstanding global issue and what would have been the culmination of many years of lobbying on behalf of AOSIS, SIDS and LDCs. To provide a comparison between what was originally proposed and what has been advanced thus far, the first section will introduce and discuss the structure of the resultant WIM, its work streams and its outputs thus far and compare it to the 2008 structure of the multi-window funding mechanism as proposed by the AOSIS to the UNFCCC. Finally, the chapter will close on how the outputs achieved by the WIM thus far falls short of the needs articulated by SIDS and LDC.

#### **3.1 Operationalising L&D: the institution of the WIM**

This section will open the chapter on the progress and genesis of treating the issue of L&D within the climate regime. The culmination of consistent efforts by the SIDS and LDC community to treat L&D as a third pillar– as a complementary action to be addressed alongside mitigation and adaptation – seemed to materialise in the establishment of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. The establishment of the WIM marked the first major milestone to formally recognise - beyond verbiage –the importance of the requirement to formalize the treatment of L&D under the climate regime.

In 2013, within the frame of the COP19, the WIM was established with a mandate to address climate-induced loss and damage. Another part of the WIM’s mandate also included the promotion of implementation approaches to address L&D. At the same time as the establishment of the WIM, the Executive Committee was also implemented to function under the WIM and guide the

implementation of the three core functions of the WIM. The overarching functions, as articulated in Article 5 of Decision 2/CP19, include<sup>92</sup>:

1. “Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage...
2. Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders...
3. Enhancing action and support, including finance, technology and capacity building...”

It is the third function of the WIM, which I am certain would have held the most interest and promise for those vulnerable countries to yield the results expected. In the dispensation of its functions as outlined above, the WIM subsequently developed work programmes to undertake the actions which would lead to the WIM achieving its purpose. As part of the five-year rolling work plan of the WIM, the Executive Committee - which is tasked with guiding the implementation of the functions of the WIM - has incorporated strategic work streams with a general focus on cooperation and facilitation toward filling knowledge gaps in understanding risk and risk management of non-economic impacts of L&D. The five workstreams seek to enhance cooperation and facilitation in relation to:

- a. “slow onset events
- b. non-economic losses
- c. comprehensive risk management approaches.
- d. human mobility - including migration, displacement and planned relocation
- e. action and support, including finance, technology and capacity-building”<sup>93</sup>

Moreso, as part of initial efforts to meet the mandate of the WIM, the Executive Committee also sought to act as a facilitation body for high-level discussion and dissemination on the different types of financial tools and instruments which can be utilised to address risk associated with

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<sup>92</sup> UNFCCC, Decision2/CP.19, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013

<sup>93</sup> UNFCCC, “Workplan - Executive Committee of the Warsaw International Mechanism for Loss and Damage” <https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/workplan> Accessed November 29 2021

L&D.<sup>94</sup> In order to gather and disseminate this information, the Executive Committee has undertaken to collaborate with other bodies to invite discussion. This included inviting the Standing Committee on Finance (SCF)<sup>95</sup> to host, in one of its annual forums<sup>96</sup> a session on such financial instruments. Resultantly, in September 2016 the SCF Forum on financial instruments that address the risks of loss and damage was held the outcome of the discussion was the formulation of a myriad of financial approaches including: “(1) risk transfer schemes; (2) catastrophe and resilience bonds; (3) social protection schemes; and (4) contingency finance”.<sup>97</sup>

In terms of progress since the institution of the WIM and its Executive Committee, up until the writing of this study, the achievements comprise predominantly of reports on its progress regarding the setting-up of the “institutional arrangements under the Executive Committee”.<sup>98</sup> In the three years between COP21 and COP24, not much has been done in terms of promoting and advancing financing mechanisms. More focus has been the development of a clearing house and the establishment of a task force to address L&D within the framework of the Paris Agreement.<sup>99</sup> The workstreams undertaken by the WIM thus far, though useful in understanding L&D and has the potential in laying the foundation for eventually developing mechanisms, databases, and other supportive tools, has not yielded any tangible results or assets for climate victims. Although finance is not the crux of the L&D argument, one cannot seek to address L&D without substantive

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<sup>94</sup> UNFCCC, “Elaboration of the sources of and modalities for accessing financial support for addressing loss and damage”, FCCC/TP/2019/1, 2019, p.5

<sup>95</sup> “As part of the Cancun Agreement, at the 16th Conference of the Parties (COP 16), Parties decided to establish a Standing Committee on Finance (SCF) to assist the COP in relation to the Financial Mechanism of the Convention. The SCF is to assist the COP in exercising its functions with respect to the Financial Mechanism of the Convention in terms of improving coherence and coordination in the delivery of climate change financing, rationalization of the Financial Mechanism, mobilization of financial resources and measurement, reporting and verification (MRV) of support provided to developing country Parties” UNFCCC, “Background and chronology of the Standing Committee on Finance, including updates from each annual Conference of the Parties”, n.d, <https://unfccc.int/process-and-meetings/bodies/constituted-bodies/standing-committee-on-finance-scf/background>

<sup>96</sup> “Organizing a forum for communication and continued exchange of information among bodies and entities dealing with climate change finance in order to promote linkages and coherence” UNFCCC, “Background and chronology of the Standing Committee on Finance, including updates from each annual Conference of the Parties”, n.d, <https://unfccc.int/process-and-meetings/bodies/constituted-bodies/standing-committee-on-finance-scf/background> , Accessed November 30 2021

<sup>97</sup> UNFCCC, “Elaboration of the sources of and modalities for accessing financial support for addressing loss and damage”, UNFCCC, New York, FCCC/TP/2019/1, p.5

<sup>98</sup> UNFCCC, “Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts”, UNFCCC, New York, FCCC/SB/2021/4, 2021

<sup>99</sup> Huang, Jennifer and Wenger, Catherine and Guilanpour, Kaveh, “Loss and Damage: Issues for COP26”, Centre for Climate and Energy Solutions, Virginia, 2021

discussion on financing.<sup>100</sup> However, the work programme of the WIM and the progress reported thus far have not allowed for the mobilisation of the enhancement of support, including finance, to strengthen existing approaches to L&D and the development and implementation of new ones.<sup>101</sup>

### **3.2 Status of enhancing support of financing under the WIM**

The lack of progress in terms of financing, including compensation, has several potential sources. Firstly, opinion is divided between developed and developing country lines on issues of attributing responsibility and hence liability, as well as the necessity of establishing a new financial instrument for L&D.<sup>102</sup> On one hand, opinion exists that post-disaster financing and adaptation funding should be able to meet the required rehabilitation needs due to unavoidable impact; not taking into consideration that there are limits to adaptation and mitigation when faced with issues such as loss of statehood, culture and displacement of people.<sup>103</sup> Another critical challenge is disagreement over attribution and hence liability – in the legal sense – and the resultant obligatory compensation that is expected of developed nations, especially within the confines of defining the limits of adaptation to what is beyond ‘unavoidable’.<sup>104</sup> Another challenge is the determination of thresholds where L&D can be considered as ‘significant’. This increasing legitimisation and recognition of L&D will undoubtedly contribute to the articulation of an agreed-upon definition for L&D supported by empirical research – which will also have the ability and reach to affect national policy processes.<sup>105</sup>

Furthermore, notwithstanding the thrust put forth for exploring financing pathways under L&D, the lacklustre approach toward the provision of funding by developed parties is entrenched in a UNFCCC Decisions of the UNFCCC. Decisions, such as Decision 3/CP.18<sup>106</sup>, although having no

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<sup>100</sup> Burkett, Maxine, “Loss and Damage”, 2014, 4 (1-2), *Climate Law*, p119-330

<sup>101</sup> Mace, M.J and Verheyen, Roda, “Loss, damage and legal responsibility after COP21: All options open for the Paris Agreement, 2016, 25(2), *Review of European, Comparative & International Environmental Law*, p197-214

<sup>102</sup> Burkett, Maxine, “Loss and Damage”, 2014, 4(1-2), *Climate Law*, p119-330

<sup>103</sup> Ibid

<sup>104</sup> Shawoo, Zoha, Maltais, Aaron, Bakhtaoui, Ines, and Kartha, Sivan “Designing a fair and feasible loss and damage finance mechanism”, SEI, Oxford, 2021.

<sup>105</sup> Roberts, Erin and Pelling, Mark, “Climate change-related loss and damage: translating the global policy agenda for national policy processes”, 2018, 10(1), *Climate and Development*, p13

<sup>106</sup> “Requests developed country Parties to provide developing country Parties with finance, technology and capacity-building, in accordance with decision 1/CP.16 and other relevant decisions of the Conference of the Parties”

legal status within the UNFCCC, the Decision seemingly undermines efforts towards the requirement of the provision of financing. Decision 3/CP.18 speaks specifically to approaches to address L&D to climate change impacts. Within article 8, the Decision opts out of obliging developed countries to provide finance, technology and capacity building to developing countries by utilising soft language by employing the term ‘requests’.<sup>107</sup> Furthermore, the contents of Paragraph 52 of Decision -1/CP21<sup>108</sup> regarding liability and compensation under Article 8 of the Paris Agreement, may also be viewed as a direct rebuff to the pursuit of climate justice for vulnerable states through compensation. This compromise, which does not meet the requested needs as put forth repeatedly by the SIDS and LDC community, highlights the political hurdle on the issue of L&D and securing commitment by developed countries.

At its institution, the WIM was a signal that L&D would finally be taken seriously by the international community and move towards providing the needs-based components articulated by SIDS and LDCs in their 2008 proposal discussed in the next section. By having developed and developing parties agree on a way forward with formally treating L&D within the climate regime “legitimized the exploration of responses beyond mitigation and adaptation”.<sup>109</sup> Yet, up to this point, glaringly the WIM as a mechanism, has not provided for any form of financing or compensations arrangements under the UNFCCC.<sup>110</sup> Resultingly, the conservative remit of the WIM and the persistent gap in the identification and promotion of funding streams to address L&D have persistent short to long term consequences on the most vulnerable.

Between 2015 and 2018, which were the years between COP21 and COP 24 respectively which presented no further advancements in L&D finance under the WIM, five vulnerable Caribbean islands<sup>111</sup> amassed economic loss and damages of approximately US\$5.4billion in 2017 alone<sup>112</sup>,

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<sup>107</sup> Requests developed country Parties to provide developing country Parties with finance, technology and capacity-building, in accordance with decision 1/CP.16 and other relevant decisions of the Conference of the Parties;

<sup>108</sup> “Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation” UNFCCC, “Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015”, FCCC/CP/2015/10, 2015

<sup>109</sup> Burkett, Maxine, “Loss and Damage”, 2014, 4 (1-2), *Climate Law*, p119-330

<sup>110</sup> *Ibid*

<sup>111</sup> “Anguilla, the Bahamas, the British Virgin Islands, Sint Maarten and Turks and Caicos Islands” United Nations Economic Commission for Latin America and Caribbean, “Irma and Maria by Numbers”, 2018, UNECLAC Subregional Headquarters for the Caribbean, Port of Spain, p3

<sup>112</sup> United Nations Economic Commission for Latin America and Caribbean, “Irma and Maria by Numbers”, 2018, UNECLAC Subregional Headquarters for the Caribbean, Port of Spain

with many islands still unable to totally recover since.<sup>113</sup> There is still a fundamental and substantive gap in attaining the goal of providing, expeditiously, assistance to the ‘most vulnerable’ within the climate regime beyond knowledge gathering and coordination. With no redress in sight under the WIM, separate approaches to create other financing avenues under the climate regime have been aggressively explored.

Post-2013, another attempt to close this gap was undertaken to formulate a pathway to the provision of financial and technical support. This pathway would not only undertake the necessary infrastructural, societal and institutional adaptation efforts but also assist with ‘building back better’ where calamitous slow or fast onset events occur. The Santiago Network (SN) represented the attempt to close this gap. Proposed in 2019 at the COP25 this new Network was meant to mobilise the technical assistance and necessary international support to implement relevant and appropriate approaches and tools to address L&D.<sup>114</sup> With the institution of this Network there was care to ensure that duplication of mandates and hence effort within the climate regime (and outside of it) does not occur.<sup>115</sup> In the two years since its institution, the SN has been collecting information on the type and scope of technical assistance provided to developing countries through bilateral channels and other intergovernmental organisations<sup>116</sup> to populate its portal. As a first step, the portal will contribute to the mandate of the SN by providing a platform where those organisations and countries which provide technical and financial support to address climate risk are connected to developing countries in need of support. In the design of this modality to access support, although yet to be realised under the WIM, SN or any other mechanism, lessons learned should be incorporated from the existing challenges experienced by developing countries to

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<sup>113</sup>Sint Maarten –An official signing with the General Contractor of The Airport Terminal Reconstruction Project took place on August 24 2021. The rebuilding of the terminal is part of the Sint Maarten Recovery, Reconstruction and Resilience Trust. Sint Maarten Trust Fund, “PJIAE N.V. and Ballast Nedam International Projects B.V. conducts official signing to signify the start of the Airport Terminal Reconstruction Project”, 2021, <https://www.sintmaartenrecovery.org/official-signing-signify-start-airport-terminal-reconstruction-project> Accessed December 20 2021

<sup>114</sup> Huang, Jennifer and Wenger, Catherine and Guilanpour, Kaveh, “Loss and Damage: Issues for COP26”, Centre for Climate and Energy Solutions, Virginia, 2021

<sup>115</sup> Ibid

<sup>116</sup> UNFCCC, “Addendum: Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts”, UNFCCC, New York, FCCC/SB/2021/4/Add.1, 2021

accessing development finance. These challenges include overwhelming bureaucratic processes and protracted lag times in the mobilisation and disbursement of funds.<sup>117</sup>

Despite the achievement of the institution of the WIM and the subsequent Santiago Network, the work programme and outputs have proven not to be as nimble and expeditious as developing parties under threat require them to be in terms of providing support through finance. In terms of the expectations of developing SIDS and LDCs and how the mechanisms under the UNFCCC fall short, the next section will briefly present the proposal made by the negotiating body AOSIS, and highlight in what ways the structure and design remain unaddressed (or addressed).

### **3.2 Structure of the multi-window funding mechanism**

As mentioned in the previous chapter, the issue of compensation due to environmental harm has been on the international radar since 1972. During the crafting of what would eventually be the UNFCCC in 1991, the AOSIS highlighted the need for the inclusion of loss and damage as a complementary workstream to mitigation and adaptation. Subsequently, in 2008 the negotiating coalition took a bold move and formulated a proposal encompassing a multi-window funding mechanism to advance the discussion on L&D financing and compensation for climate victims.<sup>118</sup> This proposal, put forth within the frame of the 2007 Bali Action Plan, fits squarely within the operational context of the UNFCCC and its relevant frameworks, including external frameworks under disaster risk reduction (DRR) and management (including the Hyogo<sup>119</sup> and Sendai<sup>120</sup> Frameworks), and is tailored to the needs of the most vulnerable. At a glance, the original multi funding mechanism proposed to address L&D is made up of three inter-related and inter-connected key components:

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<sup>117</sup> Shawoo, Zoha, Maltais, Aaron, Bakhtaoui, Ines, and Kartha, Sivan “Designing a fair and feasible loss and damage finance mechanism”, SEI, Oxford, 2021.

<sup>118</sup> UNFCCC, “*Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16*”, 28 September 2012

<sup>119</sup> The Hyogo Framework for Action (HFA) was the global blueprint for disaster risk reduction efforts between 2005 and 2015. The HFA was adopted in 2005 at the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan. Its goal was to substantially reduce disaster losses by 2015 - in lives, and in the social, economic, and environmental assets of communities and countries. United Nations Office for Disaster Risk Reduction, “Hyogo Framework for Action”, n.d. <https://www.preventionweb.net/sendai-framework/Hyogo-Framework-for-Action> Accessed December 20 2021

<sup>120</sup> The Sendai Framework for Disaster Risk Reduction aims to achieve the substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries between 2015-2030. United Nations Office for Disaster Risk Reduction, “Sendai Framework for Disaster Risk Reduction 2015-2030”, United Nations, New York, 2015p 1-32



- “An **Insurance Component** to...manage financial risk from increasingly frequent and severe extreme weather events”<sup>121</sup>. This component would focus on the development and implementation of financial risk management tools, including risk-sharing and risk transfer mechanisms, tailored to the needs of countries that are particularly vulnerable.<sup>122</sup>
- “A **Risk Management Component** to support and promote risk assessment and management tools and facilitate and inform the Insurance Component and Rehabilitation/Compensatory Component”<sup>123</sup>; focused on the development of improved risk management tools, including risk assessments, evaluation and treatment to reduce the severity of potential risks. It will also “enable the expansion of private insurance markets and facilitate the development of innovative schemes”.<sup>124</sup>
- A **Rehabilitation/Compensatory Component** “to address the progressive negative impacts of climate change, such as sea-level rise, increasing land and ocean temperatures, and ocean acidification”.<sup>125</sup> Even with the integration of insurance and risk management schemes, residual risk will remain as some actions are unavoidable. As such a financing mechanism “to compensate small-island and low-lying developing countries for the otherwise uninsured loss and damage”<sup>126</sup> should be instituted.

Each component is derived to address those climate-induced events which impact the community, as well as propose supportive tools to adapt and respond to future events – as the climate risk has

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<sup>121</sup> UNFCCC, “Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16”, 28 September 2012 p2

<sup>122</sup> UNFCCC, “Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16”, 28 September 2012

<sup>123</sup> Ibid p2

<sup>124</sup> Ibid p6

<sup>125</sup> UNFCCC, “Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16”, 28 September 2012

<sup>126</sup> Ibid p7

been proven time and time again. The multi-window components, in its implementation and administration, were proposed to be supported by:

- A technical advisory facility that would work directly with countries under the 3 components in the provision of technical assistance for the establishment of risk sharing and risk transfer schemes, establishing baseline parameters and the facilitation of data collection on risk, amongst other activities.
- A financial vehicle/facility – which would enable the provision of external financial support to finance risk reduction and risk management activities including data collection, hazard mapping and risk assessments. Further, it was proposed that funding should come from Annex 1 Parties, with further criteria such as GDP and share of GHG emissions and ability to pay. The Kyoto Protocol Adaptation Fund and bilateral and multilateral sources were also identified as possible funding sources.
- Administration – Administrative support would be provided by the UNFCCC Secretariat

### **3.2.1 The Insurance Component in practice**

In terms of insurance for SIDS and LDCs, according to a 2020 report published by the United Nations University Institute for Environment and Human Security (UNU-EHS), reiterated that due to the geographically small, isolated, vertically dependent markets of SIDS, accessing disaster related insurance schemes came with challenges in terms of assuring availability and affordability.<sup>127</sup> Other typical barriers include the highly skewed nature of disaster risks, lack of data and restrictive regulations.<sup>128</sup> In an effort to close the gap in the access to insurance mechanisms and to improve the range of insurance products on offer, the 2020 UNU-EHS report sought to close data gaps and to provide baseline information for risk assessments and profiles amongst SIDS. It also considered the islands' readiness for insurance solutions based on determining a country's exposure and vulnerability to climate risk, including loss and damage and vulnerability of exposed elements), as well as its readiness to accommodation insurance solutions

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<sup>127</sup> Hagenlocher, Michael; Cotti, David; Denno Cissé, Jennifer et al, "Disaster risk and readiness for insurance solutions in Small Island Developing States", 2020, United Nations University Institute for Environment and Human Security (UNU-EHS), p11

<sup>128</sup> UNFCCC, "Mechanisms to manage financial risks from direct impacts of climate change in developing countries", United Nations, New York, FCCC/TP/2008/9, 2008

- capturing local elements such as financial literacy, enabling environment and existing insurance industry.<sup>129</sup>

Domestic resources alone are typically not sufficient to assist communities to cope<sup>130</sup> with the ravages of L&D. Even where insurance mechanisms do exist, such as the Caribbean Catastrophe Risk Insurance Facility (CCRIF SPC) in the Caribbean, payouts- which are triggered by an event – do not adequately cover the calculated value of loss and damage as shown where insurance payouts in the Caribbean region represented just 0.2%<sup>131</sup> of losses. As such SIDS and LDCs have made repeated calls for the establishments of a ‘collective loss-sharing scheme’ to “compensate the most vulnerable small island and low-lying coastal developing countries”.<sup>132</sup> In the continued absence of a specific insurance facility available under the UNFCCC, efforts have been made outside of the climate regime to develop insurance products designed as a disaster response measure. Insurance products developed include the provision of micro-insurance in the agricultural sector– as a form of social protection - for developing countries. This type of work is currently being undertaken by the Caribbean chapter of the World Food Programme (WFP)<sup>133</sup> which acts as a complementary initiative to regional mechanisms such as the CCRIF SPC. Markers of the insurance debate are found in the UNFCCC’s reference to ‘insurance’ in Articles 4.4 and 4.8<sup>134</sup> and the Bali Plan of Action 1ciii.<sup>135</sup> Yet, the creation of an international insurance pool as put forth by the AOSIS has not been realized and thus still remains elusive under the climate regime.

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<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Association of Caribbean States, “The Broken Window Fallacy; Economics, Investment and Disaster Risk Reduction”, 2015, <http://www.acs-aec.org/index.php?q=disaster-risk-reduction/the-broken-window-fallacy-economics-investment-and-disaster-risk-reduction>, Accessed December 20 2021

<sup>132</sup> Mace, M.J and Verheyen, Roda, Loss, Damage and Responsibility after COP21: All options open for the Paris Agreement” 2016, Review of European Community and International Environmental Law, 25(2) p.197-214

<sup>133</sup> The R4 Rural Resilience Initiative is WFP’s flagship approach for integrated climate risk management. The initiative combines four risk management strategies: improved natural resource management through asset creation or improved agricultural practices (risk reduction), microinsurance (risk transfer), increased investment, livelihoods diversification, and microcredit (prudent risk taking) and savings (risk reserves). World Food Programme, “2020- R4 Rural Resilience Initiative Factsheet “, 2021, <https://www.wfp.org/publications/2020-r4-rural-resilience-initiative-factsheet>, Accessed December 20 2021

<sup>134</sup> Mace, M.J and Verheyen, Roda, Loss, Damage and Responsibility after COP21: All options open for the Paris Agreement” 2016, Review of European Community and International Environmental Law, 25(2) p.197-214

<sup>135</sup> “Disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”, UNFCCC, “ Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Decision 1/CP.13 Bali Action Plan”, United Nations, New York, FCCC/CP/2007/6/Add.1, 2008

### 3.2.2 *The Risk Management component in practice*

The second pillar of the mechanism sought to introduce and utilize risk management in the international community in an effort to avoid or minimize climate change impacts – resulting in a reduction of the risk of future loss and damage. The operationalization of the risk management component although not present within the climate regime, has been unfolding as part of the global disaster risk sphere as highlighted earlier in the elaboration of the Hyogo and Sendai Frameworks for Disaster Risk Reduction. As part of the adaptation ‘*ex-ante*’ mandate within the disaster risk reduction objectives, this includes assessing the risk of a hazard, and the design of responsive, country-level risk management strategies and approaches.<sup>136</sup>

Regional and international intergovernmental organisations (IGOs) are tasked with the management and reduction of disaster risk. At the international level, the United Nations Office for Disaster Risk Reduction (UNDRR), created in 1991, possesses the mandate to reduce risk by managing existing risk whilst preventing the emergence of new risk.<sup>137</sup> The work programme of the UNDRR focuses on implementing, follow - up and review of the Sendai Framework for Disaster Risk Reduction 2015-2030 which carries out its work under seven pillars.<sup>138</sup> Pillars speak to increasing the number of countries with national and local disaster risk reduction strategies, increasing international cooperation with developing countries, and the reduction of economic losses in relation to GDP, amongst others. The UNDRR undertakes work globally and hence also within the member states of the AOSIS; undertaking action in conjunction with regional and national agencies with responsibility for disaster risk management including the UNECLAC, the Association of Caribbean States, and the Caribbean Disaster Emergency Management Agency in the Caribbean and the Pacific Disaster Centre and Pacific Disaster Risk Management Partnership Network in the Pacific.

Notwithstanding the continued absence of the substantive treatment of risk management and reduction as a component under the UNFCCC, the resultant cross-cutting mandate of the disaster

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<sup>136</sup> Roberts, Erin and Pelling, Mark, “Climate change-related loss and damage: translating the global policy agenda for national policy processes”, 2018, 10(1), *Climate and Development*, p8

<sup>137</sup> United Nations Office for Disaster Risk Reduction, “Our Work”, n.d., <https://www.undrr.org/about-undrr/our-work>, Accessed December 22 2021

<sup>138</sup> *Ibid*

regime under the UNDRR, interacts and aligns with the needs expressed and proposed by the SIDS and LDC community as above.

### **3.3.3 The Rehabilitation / Compensation Component in practice**

Finally, the AOSIS in the 2008 proposal saw the need to develop “a mechanism that collects and distributes funds to address residual risks that are unavoidable despite adaptation, or not avoided because of inadequate mitigation”.<sup>139</sup> This outcome builds upon the preamble of the UNFCCC framework which attributes climate change to the historic activities undertaken by developed nations. As such there was and continues to be an argument that developed nations should shoulder financial responsibility to not only rehabilitate, but also compensate for the climate induced impacts experienced by vulnerable nations such as SIDS.<sup>140</sup> To date, the rehabilitation and/or compensatory mechanism has seen the least success in terms of substantive advancement. This is mainly due to opposition, as discussed above, which stems from the refusal to be legally attributed responsibility to compensate.<sup>141</sup> The resulting protracted negotiation process to address L&D within the framework of the UNFCCC, not only continues to expose SIDS and LDCs to future climate impacts in the magnitude of billions of US dollars, but also degrades the diplomatic and political, collective processes established by the Framework Convention.

The above diagnosis highlights how each of the components proposed to treat Loss and Damage have been absorbed within the international community. This absorption is not necessarily applied specifically within the climate regime – but there is evidence of meaningful interactions with a complementary regime such as that of disaster risk and management. It has also highlighted the continued issue of the application of attribution of responsibility and the (lack of) financial obligations which are attached to L&D. It also provided evidence that the lack of financial obligations is rooted within the frame of UNCFCC Decisions - thus thwarting and hindering the design and application of substantive tools to adequately finance L&D. The next section will explore briefly how because of these differences and that an agreement on compensation for L&D has remained elusive, steps have been made towards mounting a legal argument beyond the

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<sup>139</sup> Burkett, Maxine, “Loss and Damage”, 2014, 4 (1-2), *Climate Law*, p119-330

<sup>140</sup> *Ibid*

<sup>141</sup> Mace, M.J and Verheyen, Roda, *Loss, Damage and Responsibility after COP21: All options open for the Paris Agreement* 2016, *Review of European Community and International Environmental Law*, 25(2) p.197-214

function of the WIM. This is indeed necessary, as the institution and operationalization of financial mechanisms to support countries may become increasingly critical and globally relevant as climate impacts (and hence L&D) extend to and cause severe impacts within the borders of developed countries.

#### 4. A legal path outside of the climate regime

Whilst there is opinion that the broad structure of the WIM, could, in time, provide and enable the type of financing mechanisms as originally proposed by the AOSIS<sup>142</sup>, the continuous and persistent cycle of loss, damage and rebuild highlights that time is of the essence. Whilst the Parties rationalise the foundation and setting up of the institutional structures of the WIM and SN respectively, alternative options are being investigated by those who have been most affected to bring quicker relief in addressing the economic and non-economic losses.

Within the frame of COP 26 in 2021, the islands of Antigua and Barbuda and Tuvalu penned an Agreement to establish a Commission of Small Island States on Climate Change and International Law. As per the Agreement, the Commission shall have an international legal personality with a mandate to determine “the obligations of States relating to the...responsibilities for injuries arising from internationally wrongful acts in respect of the breach of such obligations”.<sup>143</sup> The Commission, apart from implementing and mobilising norms and principles under international law, is also empowered to uncover the breadth of legal arguments, including treaty law, to seek redress for its membership as per Article 2(2) of the Agreement.<sup>144</sup> Thus far the Governments of Antigua and Barbuda and Tuvalu remain the only signatories, yet, all members of the AOSIS may become parties and members of the Commission by signing on to the Agreement.

The formation of this type of body is a signal to all Parties of the UNFCCC that there is an emerging unwillingness by injured states to await another 20 years or the finalisation of institutional frameworks and knowledge gathering towards addressing L&D within the climate change governance framework.<sup>145</sup> The expectation is that this new Commission will pursue climate justice for SIDS, by exploring the realm of available avenues outside of but complementary to the climate regime to pursue financing for L&D. Thus, in the pursuit of this mandate, regimes

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<sup>142</sup> Mace, M.J and Verheyen, Roda, Loss, Damage and Responsibility after COP21: All options open for the Paris Agreement”, 2016, Review of European Community and International Environmental Law, 25(2) p.197-214

<sup>143</sup> Article 1(3) “Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law”, entry into force 31 October 2021

<sup>144</sup>Article 2(2), “Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law”, entry into force 31 October 2021

<sup>145</sup> Island Innovation, “Antigua – Barbuda, Tuvalu To Seek Justice For Climate Change Damage Before International Courts”, n.d. [https://islandinnovation.co/antigua-barbuda-tuvalu-to-seek-justice-for-climate-change-damage-before-international-courts/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=antigua-barbuda-tuvalu-to-seek-justice-for-climate-change-damage-before-international-courts](https://islandinnovation.co/antigua-barbuda-tuvalu-to-seek-justice-for-climate-change-damage-before-international-courts/?utm_source=rss&utm_medium=rss&utm_campaign=antigua-barbuda-tuvalu-to-seek-justice-for-climate-change-damage-before-international-courts) Accessed November 29 2021

(divergent or cross-cutting) under other branches international law such as the United Nations Convention on the Law of the Sea or the Refugee Convention and Protocol may be used to open the door towards the provision of L&D financing.

Considering the longstanding issue of L&D finance under the climate regime as highlighted in chapters 2 and 3, this chapter will briefly examine how existing international law could potentially be utilised by the Commission to provide some relief for climate victims in the short to medium term. Shortcomings to the various legal logic will also be presented – as these cannot be ignored. The sufficiency and the impact of the legal arguments posed are dependent on overcoming the myriad of shortcomings not all exclusively identified in this chapter.

## **4.1 Legal logic towards the pursuit of financing**

### *4.1.1 No-harm rule*

As a form of customary international law, the no-harm rule bears weight on the environmental regime. This rule has been exercised in several ICJ judgements such as the 1938-1941 Trail Smelter Arbitration<sup>146</sup> and applied several times thereafter (e.g the 1956 *Lac Lanoux arbitration*<sup>147</sup>). It also appears in the preamble text to the UNFCCC.<sup>148</sup> This rule essentially holds that no State must harm another or do its utmost to prevent the transference of harm to other States in the dispensation of its socio-economic development. The avoidance of harm outside of a State's

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<sup>146</sup> "The Trail Smelter case, brought by the USA against Canada before an arbitral tribunal. The dispute concerned mining and smelting in the Columbia River valley. Mining and smelting operations contributed to the environmental decline of the area. The tribunal concluded: under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." Tignino, Mara, Bréthaut, Christian," The role of international case law in implementing the obligation not to cause significant harm", 2020, 20, International Environmental Agreements, pp631–648

<sup>147</sup> The "no-harm" rule was only affirmed by the tribunal by way of obiter dicta stating that "there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances to do serious injury to the lower riparian State" Tignino, Mara, Bréthaut, Christian," The role of international case law in implementing the obligation not to cause significant harm", 2020, 20, International Environmental Agreements, pp631–648

<sup>148</sup> "Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"



borders also is a signal of respect for the equality and sovereign right of other States.<sup>149</sup> Within the European regime, the no-harm rule is rooted within Article 191<sup>150</sup> of the Treaty on the Function of the European Union under the principle of prevention and is enshrined and reaffirmed in other international mechanisms such as Principle 21 of the Stockholm Declaration<sup>151</sup>, Principle 11 of Rio Declaration.<sup>152</sup>

In applying this logic, Verheyen and Roderick (2008)<sup>153</sup> have pointed out that despite the existence and application of the no-harm rule, the requirement to be held legally accountable is noticeably absent under the climate regime.<sup>154</sup> In terms of testing the temperature of mounting a legal argument using the no-harm rule in the climate context, Verheyen and Roderick (2008) articulate several criteria to determine if the ‘standard of care’, has been breached. These criteria include:

- 1) “An opportunity to act – a state can only fail to exercise due diligence concerning a specific prevention duty if it does not act where it otherwise could have”<sup>155</sup>
- 2) Foreseeability of harm; “can be established if the state actually knew or foresaw or ought to have known or foreseen that (its) individual conduct was or would be part of a composite cause bringing about inadmissible harm”<sup>156</sup>
- 3) Proportionality of measures taken to prevent harm or risk – “the technical and economic abilities of the state controlling the activity must be balanced against the interests of the

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<sup>149</sup> Mayer, Benoit, “The relevance of the no-harm principle to climate change law and politics”, 2016, 19, Asia-Pacific Journal of Environmental Law, p79-104

<sup>150</sup> “EU Policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the EU. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

<sup>151</sup> “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”

<sup>152</sup> Ibid

<sup>153</sup> Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage”, WWF-UK, 2008, p18

<sup>154</sup> “In the climate context for example, international law would not support a conclusion that a State emitting GHGs and thus contributing to global climate change should be held responsible for damage occurring per se, simply because it has emitted such gases.” Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage”, WWF-UK, 2008, pg16

<sup>155</sup> Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage”, WWF-UK, 2008, p18

<sup>156</sup> United Nations, “Report of the International Law Commission Sixty-first session (4 May-5 June and 6 July-7 August 2009)”, United Nations, New York, 2009

potentially harmed state to be protected against injury”<sup>157</sup>

Contributing to the breach of the criteria of the opportunity to act and the foreseeability of the harm are the availability of a series of IPCC reports, which provide scientific evidence and estimations of the type of harm to be expected, and identify those groups which will be most impacted if global greenhouse gas emissions are not abated. Furthermore, to reduce these articulated and scientifically foreseen harms, agreements, such as the Paris Agreement, articulate targets in terms of the limiting of GHG emissions with Nationally Determined Contribution (NDC) reports also act as a yardstick to measure actual state progress. Undertaking a comparison of commitment to actuality highlights a state’s opportunity to act and the proportionality of measures undertaken. Yet under a voluntary regime such as the climate regime, falling short of NDC commitments yields little to no economic, legal or reputational ramifications.

In applying these 3 criteria, Verheyen and Roderick (2008) concluded that there was a measure of guilt to be applied to developed countries as they “have failed to take proportionate measures to prevent damage to other States resulting from domestic GHG emissions which they knew, or should have known, contributed to the risk of transboundary damage”.<sup>158</sup>

Despite the position of Verheyen and Roderick (2008) regarding the potential for financing and compensation from the breach of the no-harm rule, Mayer (2016), in his paper, is not convinced of the realistic application. Mayer (2016) identifies several difficulties that can arise from the application of the no-harm rule as a regulator for responsibility in the climate regime. One difficulty that is foreseen is the consensual nature of international litigation.<sup>159</sup> International law is built on the foundation of State consent – and hence either AOSIS or a group of States which are climate victims, in the spirit of this consensual nature, will be hard-pressed to advance a dispute at the international level without agreement by other parties. Another difficulty, despite steady advancements made discussed in the next section, is the attribution of liability or the pinpointing of guilty states which have caused harm – as the principle will only apply if GHGs emitted by a

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<sup>157</sup> Mengstie, Yitages, “The Legal Basis Of Reparation Claim For Climate Change Damage Under International Law: The Perspective Of Vulnerable Developing Countries”, 2010, Addis Ababa University, Ethiopia p69

<sup>158</sup> Verheyen, Roda and Roderick, Peter, “Beyond Adaptation: The legal duty to pay compensation for climate change damage”, WWF-UK, 2008, p18

<sup>159</sup> Mayer, Benoit, “The relevance of the no-harm principle to climate change law and politics”, 2016, 19, Asia-Pacific Journal of Environmental Law, p100

State(s) or can be proven to be injurious to affected States. The Legal Response Initiative (2012) supports this notion by explaining that climate change does not fit into the typical mould as characterised by transboundary pollution<sup>160</sup> and highlights that one of the challenges of applying the no-harm rule within a climate context stems from the need to establish direct causation to be able to determine a measure of legal liability.<sup>161</sup> Based on this conclusion, how might an individual developing country or group of countries prove that it has suffered, or will suffer, harm as a direct result of GHG emissions emitted by a particular State or group of States? The multiplicity of states contributing to climate change complicates the application of the no-harm rule, as precedence will show that successful cases tend to center around activities around a shared border where the polluter and victim are obvious.<sup>162</sup> Furthermore, the application of the no-harm rule would also require scientific assessment to ascertain whether L&D experienced can be attributed solely to anthropogenic climate change and not from a ‘random climate occurrence’.<sup>163</sup> On a more sensitive matter, emerging economies such as India and China are recording emissions exceeding that of developed countries and hence perpetuating the persistent global challenge of global warming. Would these countries be then required to also provide financial redress? Or would responsibility be attributed from a baseline year?

In my opinion, although using the no-harm rule may be seen as one of the most obvious pathways to formulating a response toward financing pathways for L&D under customary international law, the pursuit will be fraught with many challenges due to the nuanced nature of the problem. The collective and long-standing nature of climate change introduces many variables that take a step further than climate science being able to determine which country emitted how much GHGs. Taking into consideration all that has been described by Mayer (2016) above, the newly formed Commission of Small Island States on Climate Change and International Law may also find itself hamstrung in its determination of ‘who is responsible and what share should each party pay?’. Another limitation in line with dissecting if utilising the no-harm rule would be sufficient to advance financing is that the no-harm rule is restricted in its scope of application. As Voigt (2021)

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<sup>160</sup> Legal Response Initiative, “No harm rule and climate change”, 2012, LRI, Columbia University, New York, p3

<sup>161</sup> Ibid p 6

<sup>162</sup> Simlinger, Florentina and Mayer, Benoit, “Legal Responses to Climate Change Induced Loss and Damage”, in In: Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) Loss and Damage from Climate Change, Climate Risk Management, Policy and Governance, Springer Open, 2019, p 187

<sup>163</sup> Mayer, Benoit, “The relevance of the no-harm principle to climate change law and politics”, 2016, 19, Asia-Pacific Journal of Environmental Law, p79-104

puts forth “not all types of damage must be prevented, but only significant or even serious damage”.<sup>164</sup> In the same line of logic is there a threshold for harm to be considered significant? Are there agreed-upon limits of significant loss and damage to which climate victims will be owed financing? And can this significant harm be attributed to anthropogenic GHG emissions? The conditions to be considered in applying the no-harm rule are extensive and in a multilateral environment seemingly impossible to answer.

#### *4.1.2 ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)*

An example of customary law in practice that could bear weight, and interacts with the no-harm rule, is the Articles on the Responsibility of States for Internationally Wrongful Acts. Adopted by the International Law Commission in 2001, the Articles cover a range of topics including “attributing conduct to the State; defining when there has been a breach of international law and the excuses or justifications for breaches; reparation for injustices; the invocation of responsibility, especially standing of States in the public interest; and the rules relating to countermeasure”.<sup>165</sup> The applicability of how this article can be wielded is showcased in September 2011 when the President of Palau asked the General Assembly for an advisory opinion from the International Court of Justice on the responsibility of states for climate change. However, the ICJ judgement has been hampered due to the weight of countries such as the US and China being against it.<sup>166</sup> As a result, of this powerful show of resistance the necessary outcome towards a judgement has been hampered.<sup>167</sup>

The core ethos of the ARSIWA which can find firm footing in the climate regime includes Article 1 which presents the foundation of the cause-and-effect relationship of State behaviour where “every international wrongful act of a State entails the international responsibility of that State”.<sup>168</sup> Article 2 moves on to define an internationally wrongful act and highlights this as where there is non-compliance or an omission that is attributable under international law or shows a breach of an

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<sup>164</sup> Voigt, Christina, “State responsibility for damages associated with climate change” in Meinhard Doelle and Sara L. Seck (eds), *Research Handbook on Climate Change Law and Loss & Damage*, Edward Elgar Publishing, 2021, p177

<sup>165</sup> GA /RES/56/83 of 28 January 2002, “Responsibility of States for Internationally Wrongful Acts”,

<sup>166</sup> Beck, Stuart and Burleson, Elizabeth, “ Inside the System, Outside the Box: Palau’s Pursuit of Climate Justice and Security at the United Nations”, 2014, 3, *Transnational Environmental Law*, pp 17-29

<sup>167</sup> Beck, Stuart and Burleson, Elizabeth, “ Inside the System, Outside the Box: Palau’s Pursuit of Climate Justice and Security at the United Nations”, 2014, 3, *Transnational Environmental Law*, p 26

<sup>168</sup> GA /RES/56/83 of 28 January 2002, “Responsibility of States for Internationally Wrongful Acts”, p1

international obligation.<sup>169</sup> Article 28 which outlines that once a breach occurs, an attraction of legal responsibility is automatic and hence the attraction of legal consequences. Articles 30 and 31 speak to the obligation of states to not only cease but, to provide reparations where there is injury. The ARSIWA also provides that once a breach has been established, the offending State must cease the activity “and make full reparation for injury caused, including for “any damage, whether material or moral”<sup>170</sup>. Full reparation “shall take the form of restitution<sup>171</sup>, compensation<sup>172</sup> and satisfaction<sup>173</sup>, either singly or in combination”.<sup>174</sup>

Despite its firm footing, the same challenges which persist for the no-harm rule as identified by Mayer (2016) such as the consensual nature of international litigation, attribution of liability, and the multiplicity of states involved also arise here, with some others pinpointed by (Le Moli 2021). Le Moli (2021) puts forward the opinion that despite the ARSIWA provides for, within its Articles<sup>175</sup>, the capturing of obligations owed due to a group of States when there is a breach, ambiguities in the practical application remain. For example, due to the cumulative nature of GHG emissions, how does one distinguish the level of guilt for those states that have been advancing their mitigation agenda aggressively, despite historically contributing to the issue of climate change, from other states who have been underperforming. Will there be a difference in legal liability based on a historical or current context? Another obscurity that Le Moli (2021) identifies, is the irregular nature of developmental related GHG emissions. As stated, “should a State that

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<sup>169</sup> “There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State” – GA /RES/56/83 of 28 January 2002

“Responsibility of States for Internationally Wrongful Acts”

<sup>170</sup> Article 31, GA /RES/56/83 of 28 January 2002 “Responsibility of States for Internationally Wrongful Acts”

<sup>171</sup> “...to re-establish the situation which existed before the wrongful act was committed...”

<sup>172</sup> “...to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.”

<sup>173</sup> “...Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”

<sup>174</sup> GA /RES/56/83 of 28 January 2002 “Responsibility of States for Internationally Wrongful Acts”

<sup>175</sup> “Articles 15(1) (composite acts), 46 (plurality of injured States) and 47(1) (plurality of responsible States)” Le Moli, Geneva, “State Responsibility and the Global Environmental Crisis”, Blog of the European Journal of International Law, 2021, <https://www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/> Accessed March 30 2022

adds the straw that breaks the camel's back be responsible for placing an additional straw or for breaking the camel's back".<sup>176</sup>

However, outside of a bilateral mechanism where the polluter and victim can be pinpointed, such as in the landmark decision<sup>177</sup> of *Costa Rica v Nicaragua/Nicaragua v Costa Rica*<sup>178</sup>, the inability to effectively apply the no-harm rule and the ARSIWA in a collective environment persists. It is due to these obscurities and the need to demonstrate causation, that has spurred the emergence of litigation using parallel pathways which express synergies within the climate regime. The thrust to examine all pathways to gain any modicum of redress is also embedded with the activities of the newly formed Commission within Article 1(3) of the Agreement where the Commission is authorized to investigate breaches stemming from state responsibility and the protection of the marine environment.<sup>179</sup> The ambiguities which exist to pursue litigation under the climate regime as put forth by Mayer (2016), Le Moli (2021) and others have resulted in the trend of leveraging regime interaction and the 'fragmented state of the law'<sup>180</sup>, to mobilise arguments under complementary agreements such as human rights, state responsibility, law of the sea, etc.<sup>181</sup>

From the discussion above and in the discussion in section 4.1.1 on the no-harm rule, the determination of causation and the advancement of attribution science would represent a breakthrough for vulnerable states in the determination of the share of responsibility for climate change and hence contributes to propelling financing negotiations. The question of who should pay and how much? is a crux of the L&D financing and compensation debate. Furthermore, the ability of injured states to demonstrate a direct "connection between defendants' actions and

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<sup>176</sup> Le Moli, Geneva, "State Responsibility and the Global Environmental Crisis", Blog of the European Journal of International Law, 2021, <https://www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/> Accessed March 30 2022

<sup>177</sup> "The Court of the ICJ noted that 'damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law' Voigt, Christina, "State responsibility for damages associated with climate change" in Meinhard Doelle and Sara L. Seck (eds), *Research Handbook on Climate Change Law and Loss & Damage*, Edward Elgar Publishing, 2021, p 181

<sup>178</sup> *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgement, ICJ Reports Judgment of 16 December 2015

<sup>179</sup> "Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law", entry into force 31 October 2021

<sup>180</sup> Peters, Anne, "The refinement of international law: From fragmentation to regime interaction and politicization", *International Journal of Constitutional Law*, 2017, 15(3), p 671–704

<sup>181</sup> Mayer, Benoit, "The relevance of the no-harm principle to climate change law and politics", 2016, 19, *Asia-Pacific Journal of Environmental Law*, p79-104

plaintiffs' injuries"<sup>182</sup> is also a cornerstone of admissibility and also contributes to the burden of proof to be presented before international courts. In light of this need there has been emerging research on this topic, which could contribute the discussions on determining a state's contribution to GHG emissions and the modality to allocate financial responsibility according to these emissions.<sup>183</sup> This research has yielded findings based on historical (1880–2010) and more recent (1980–2010) emissions, thus providing the necessary overview of the GHG emissions of developed countries and their share to global temperature increases.<sup>184</sup>

Considering the importance of this type of research to the definition of attribution and the advancement of the L&D financing debate, it is curious as to why these breakthroughs have not been sufficiently mobilised in the re-evaluation of the approach of the UNFCCC as well as in climate litigation proceedings. Within the preamble of the UNFCCC, it gives latitude for the reformulation of activities to address climate change based on the emergence of verifiable and reliable scientific findings.<sup>185</sup> Despite the emergence of breakthroughs in GHG emission studies and attribution research, there has been little evidence of the effort to leverage this new information to lobby for precise and prescriptive financial obligations under the UNFCCC for L&D. It is understandable, however, that this type of novel research may be subject to curtailment by strong opposition. Firstly, as it relates to scientific findings, reports by the IPCC are the sole source that negotiating bodies utilise at the international level. Furthermore, due to the consensual nature of the UNFCCC process, disagreeable research can be vetoed if there is dissention between parties. It is a realistic expectation that if this type of research is brought to the negotiating table - pinpointing states and their allocated financial responsibilities - it will cause upheaval in the governance and diplomatic structures of the climate regime and will be subjective to strong opposition.

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<sup>182</sup> Stuart-Smith, Rupert.F., Otto, Friederike.E.L., Saad, Aisha.I. et al., "Filling the evidentiary gap in climate litigation", 2021, 11, *Nature Climate Change*, p 651–655

<sup>183</sup> Ekwurzel, B., Boneham, J., Dalton, M.W. et al., "The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers", 2017, 144, *Climatic Change*, p580

<sup>184</sup> *Ibid*

<sup>185</sup> "Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas" United Nations, "United Nations Framework Convention On Climate Change", 1992, United Nations, New York

In terms of litigation challenges, according to Rosenblum (2009), one challenge with the use of the attribution science is the challenge of linking a state's emissions and individual contribution to climate change directly to a specific significant event.<sup>186</sup> If the Caribbean islands sought compensation through the courts for L&D suffered during the 2017 hurricane season, would the islands of the Pacific in turn challenge the same group of states for their part in sea level rise? Or for another slow or fast onset event that occurs in the future? Alternative viewpoints also provide some brief insight and give some opinion on some of the shortcomings which exist in the application of this novel science. Although it has been pointed out that the attribution science for individual actors' GHG emissions is available for existing and projected impacts<sup>187</sup>, the use of these studies in litigation in proving causality is little to non-existent.<sup>188</sup> Academics have been left to speculate the reason for this. One reason provided is the lack of use highlights a practical example of the disconnectedness and between novel findings in science and law which hampers interpretation and accessibility.<sup>189</sup> Furthermore, Stuart-Smith (2021) also demonstrated that although there is an ability to determine culpability, individual emitters however, contribute marginally to slow and fast onset events.<sup>190</sup> Thus, if the contributions to 'extreme weather events and slow-onset changes' are admittedly marginal, should the financing made available also then be marginal? This links directly to one of the previously identified challenges of the maturity and thoroughness of climate science. Is it mature enough to quantify non-climatic contributions to climate impacts – including L&D – in order to prove that impacts experienced were not from an anomalous weather pattern? This also refers to the conclusion arrived under section 4.1.1 where vulnerable states may be asked to prove whether L&D experienced can be attributed solely to anthropogenic climate change and not from an irregular weather pattern.

Once there is a breakthrough in the use of recent research in establishing legal causation and attribution, and the fine-tuning of the pinpointed shortcomings in said research are addressed, injured States may prove to have more firm footing to prove that States have breached their

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<sup>186</sup> Rosenblum, Ann-Charlotte, "Claiming State Responsibility for Climate Change Damages", University of Lund, 2009, p58

<sup>187</sup> Stuart-Smith, Rupert.F., Otto, Friederike.E.L., Saad, Aisha.I. et al., "Filling the evidentiary gap in climate litigation", 2021, 11, Nature Climate Change, p653

<sup>188</sup> Ibid

<sup>189</sup> Stuart-Smith, Rupert.F., Otto, Friederike.E.L., Saad, Aisha.I. et al., "Filling the evidentiary gap in climate litigation", 2021, 11, Nature Climate Change, p 651–655

<sup>190</sup> Ibid



responsibility. However, until then, its power and application are limited to declarations within the Framework Convention for climate change.<sup>191</sup>

#### *4.1.3 Treaties*

Efforts have been made to take advantage of regime interaction and overlap to advance a myriad of issues that finds their roots within the climate regime. Recognising the fragmentation of international law, there have been varied approaches posited in the presentation of potential arguments to advance redress for L&D. This section will present and briefly investigate some of the legal logic which have been proposed as legal pathways to address L&D.

#### **The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol**

Notwithstanding the potential applicability of alternative international conventions to solve a persistent challenge within the climate change system, the application will be limited in scope as it will be applied to the discrete issue presented. For example, the application of the 1951 Refugee Convention is the case in point of this occurrence. The Refugee Convention was borne out of cooperation in the humanitarian field and was drafted in response due to State-persecution post World War Two. The Convention and its Protocol represent the formalisation of minimum (humanitarian) international standards, which are adopted at the universal level<sup>192</sup>, to which refugees should be treated. These standards adopt a core principle of *refoulement* which means “that a refugee should not be returned to a country where they face serious threats to their life or freedom”.<sup>193</sup> In the application of this principle, one would then assume that native Barbudans and islanders from Kiribati who are on the receiving end of permanent loss of territory, would thus be able to immigrate and seek protection under the principle of *refoulement*. However, a major stop-gap to many of these claims is outlined in Article 1(2) of the Convention which defines a refugee as a person who has not remained in their home country out of “fear of being persecuted for reasons

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<sup>191</sup> When the Convention was opened for signature: a number of small island states made declarations to the effect that their ratification 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 as derogating from the principles of general International Law.” UNFCCC, “Status of Ratification”, 2009, United Nations, New York

<sup>192</sup> “...adopted at the universal level under the United Nations, or within the framework of regional organizations such as the Council of Europe, the Organization of African Unity and the Organization of American States” UN High Commission for Refugees, “UNGA Res 2198 (XXI) 16 December 1966 Protocol relating to the status of refugees, entered into force 4 October 1967

<sup>193</sup> UNHCR, “The 1951 Refugee Convention”, n.d <https://www.unhcr.org/1951-refugee-convention.html> Accessed February 1 2022

of race, religion, nationality, membership of a particular social group or political opinion”.<sup>194</sup> Climate-induced asylum is thus not recognized by the Convention. In practice, the limitations were highlighted in the case of *Teitiota vs New Zealand*<sup>195</sup> which spanned 10 years. From the island of Kiribati, which has been at the forefront of climate impact negotiations due to SLR, Ioane Teitota made an application for refugee status in New Zealand – with the risk attributable to climate change impacts. This application was declined by the New Zealand Immigration and Protection Tribunal (2013), High Court (2013) and Supreme Court (2015)<sup>196</sup>. Subsequently, escalated to the UN Human Rights Committee (HRC) after Teitota was deported in 2015. In 2020 the HRC Decision is said to have forged a new path by recognizing that there may be a violation rights in climate-induced asylum cases.<sup>197</sup>

However, this Decision does not amend the law as written in the Refugee Convention. As such, as long as this Decision is not applied in a way to amend the international law governing this regime, then states can continue to exercise their sovereignty and opt to follow the principle of refoulement to the letter. Moreso, and as mentioned above, approaching L&D from the angle of the Refugee Convention and the principle of refoulement limits the scope of the application of climate justice considering it disregards the physical and non-physical impacts of L&D. Notwithstanding the promise of resettlement for victims - who will be subject to a rigorous legal process, there is no possibility for compensation for infrastructure, culture, livelihoods and revenue lost due to these fast or slow onset events if this avenue is taken.

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<sup>194</sup> UNGA Res 2198 (XXI) 16 December 1966 Protocol relating to the status of refugees, entered into force 4 October 1967

<sup>195</sup> Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC)

<sup>196</sup> OpinioJuris, “The Historic Case of Teitiota: Climate-Induced Asylum and Its Future”, 2020 <http://opiniojuris.org/2020/10/12/the-historic-case-of-teitiota-climate-induced-asylum-and-its-future/> Accessed February 1 2022

<sup>197</sup> “Without robust national and international efforts, the effects of climate change in receiving states [of returned climate-induced asylum seekers] may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending states”, Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), paragraph. 9.11, p12

## United Nations Convention on the Law of the Sea (UNCLOS)

Another potential option for legal redress has presented itself under the United Nations Convention on the Law of the Sea (UNCLOS). Opportunities to make claims may arise from damages endured to coastal states due to sea-level rise or non-compliance with the UNCLOS pollution control obligations. In terms of coastal inundation authors such as Sands (2015) questions the level of State responsibility<sup>198</sup> for undertaking mitigation actions towards preventing SLR as per Article 139(2)<sup>199</sup> UNCLOS. This has direct consequences for loss and damage negotiations. Although there is no record of SLR induced L&D litigation which has been brought before the ICJ or the International Tribunal for the Law of the Sea, its knock-on effects such as forced displacement and human mobility have been brought before the courts as discussed above under the 1951 Refugee Convention as discussed above. However, taking into consideration the questions put forth above by Sands (2015), and recognizing that states are not obliged to stop emitting GHGs completely as Voigt (2021) has indicated, then resultingly how can a UNCLOS party prevent SLR? Are they legally obligated to halt SLR? Especially in the context that there is no expectation that countries eliminate GHG emissions? As the sea is a common sink, it is my opinion that pursuing this course of action of the UNCLOS to mobilise financing through legal means would yield little success in the short term. The gaps identified in attribution science as discussed above, including differentiating that current glacial melt and resulting SLR are no different than the conditions which caused the end of the last ice age, persist. The burden of proof arises again.

Beyond the impacts of SLR, the UNCLOS also allows vulnerable states to pursue an argument that there has been non-compliance as it relates to marine pollution. Vulnerable states may claim losses and damages related to fisheries and the tourism product, as according to LRI (2012), “the effects of climate change on the oceans...as well as the associated financial implications (e.g., damage to fish stocks or loss of territory) are becoming increasingly clear and measurable in monetary terms”.<sup>200</sup> However, the same issues with the use of novel attribution science arise. Can

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<sup>198</sup> Sands, Phillipe, “Climate change and the Rule of Law: Adjudicating the Future in International Law (public lecture), 2015, United Kingdom Supreme Court, p 10

<sup>199</sup> “*Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability.*” Article 139(2)

Convention on the Law of the Sea, 1833 U.N.T.S. 397, December 10, 1982, entry into force 16 November 1994

<sup>200</sup> Legal Response Initiative, “No harm rule and climate change”, 2012, LRI, Columbia University, New York, p5

the research which allows island nations to pinpoint which states are responsible for the loss of territory, ecology and economy be understood and mobilized accordingly? Would climate victims be able to prove that the resultant impacts are anthropogenic at its source versus the outcome of a weather pattern? Would powerful negotiating states acquiesce to being brought before international courts? Or would there be efforts to discredit and downplay the attribution science as ‘uncertain’ due to its novelty or to censor its use within negotiation processes? There is indeed a viable argument for L&D impacts on coastal communities which result in loss of tourism products, offshore protection, food stock, infrastructure and culture. The activity of quantifying a variety of non-economic losses such as culture and artefacts needs to be undertaken in order to determine the scale of the loss and hence the quantum of the request. Would requests for financing also take into consideration past and forecasted L&D? Or would it be that after each event, climate victims would need to launch a new round of litigation? Despite the science now being available, there is work that vulnerable States will need to do in terms of accessing and understanding the science, as well as quantifying the argument sufficiently before embarking on a path that will agitate the diplomacy structures surrounding climate change.

## **Human rights**

L&D affects human rights in various ways – including rights such as “the right to life, liberty and property, economic, social and cultural rights such as the right to work, education, social security”.<sup>201</sup> Since the founding of the UNFCCC, through the explicit inclusion in the treaty text, there has been the recognition that States must fulfil the human rights obligations for those individuals within their jurisdiction<sup>202</sup> under the climate regime. The recognition of this right is articulated clearly, in a non-obligatory manner, in the preamble of the Paris Agreement<sup>203</sup>, and is featured as goals 3, 6, 11, 12, 13, 14, 15 under the 2030 Agenda for Sustainable Development. It

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<sup>201</sup> Toussaint, Patrick & Blanco, Adrian Martínez, “A human rights-based approach to loss and damage under the climate change regime”, 2020, 20(6), *Climate Policy*, p744

<sup>202</sup> Simlinger, Florentia, and Mayer, Benoit., “Legal Responses to Climate Change Induced Loss and Damage”, In: Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) *Loss and Damage from Climate Change, Climate Risk Management, Policy and Governance*, Springer Open, 2019 p179-203

<sup>203</sup> *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity

is also highlighted in regional frameworks such as Article 24<sup>204</sup> of the African Charter on Human and Peoples' Rights.

Toussaint and Blanco (2009) believe that adopting a human rights approach within the climate context can be utilized to leverage further international discussion and policy decisions on the climate-human rights nexus as it relates to L&D.<sup>205</sup> An example of this can be taken from the Universal Declaration of Human Rights (UDHR), as within its Articles, it establishes several rights which may be used as case arguments such as the right to property (Article 17), health and well-being (Article 25), and to not be arbitrarily deprived of one's nationality (Article 15). Significant advancements in formalizing the link between a healthy environment and human rights have been made through the issuance of the Report of the Special Rapporteur on Human Rights and the Environment<sup>206</sup> in 2019. One of the main mandates of the Special Rapporteur is to "examine the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment".<sup>207</sup> The report, after its examination, makes substantive conclusions as it relates to human rights obligations as well as the provision of L&D financing for climate victims. Firstly, the Special Rapporteur stands firmly in its position of the causal link between human rights and climate change stating that "a failure to fulfil international climate change commitments is a prima facie violation of the State's obligations to protect the human rights of its citizens".<sup>208</sup> Secondly, and as it relates to the provision of L&D finance, the Rapporteur reinvigorates the call for the need to establish financing pathways for vulnerable states<sup>209</sup> and also provides a range of recommendations on how these pathways can be funded including the use of fuel levies and air travel levies.

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<sup>204</sup> All peoples shall have the right to a general satisfactory environment favourable to their development.

<sup>205</sup> Toussaint, Patrick & Blanco, Adrian Martínez, "A human rights-based approach to loss and damage under the climate change regime", 2020, 20(6), *Climate Policy*, p744

<sup>206</sup> United Nations Human Rights Office of the Commissioner, "Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment" A/74/161, 2019, United Nations, New York

<sup>207</sup> United Nations Human Rights Office of the Commissioner, "Special Rapporteur on human rights and the environment", n.d., <https://www.ohchr.org/en/special-procedures/sr-environment> Accessed April 13 2022

<sup>208</sup> Ibid p34

<sup>209</sup> "States must establish one or more new financing mechanisms that generate revenue to fund payments for loss and damage suffered by vulnerable developing countries, such as small island developing States, because of climate change." United Nations Human Rights Office of the Commissioner, "Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment" A/74/161, 2019, United Nations, New York p40

This position articulated in 2019 represents an immediate pivot in position on the topic of human rights obligations and climate change. Unlike the Report of the Special Rapporteur mentioned above which firmly linked the causal relationship, 10 years prior, a 2009 report of the Human Rights Council<sup>210</sup> cautioned that in terms of the interaction of climate change and human rights that “it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense”.<sup>211</sup> It is yet to be determined how the most recent position of the Report of the Special Rapporteur can be leveraged in future negotiations for L&D finance. However, from the lack of substantive and tangible outcomes for L&D arising out of the COP26, confidence may be low in this regard.

In terms of litigation before the courts, the argument regarding the human right to a clean environment has been utilised more frequently in seeking climate justice in local and international courts with varying measures of success. In the successful Leghari vs Federation of Pakistan<sup>212</sup> case, the argument centred around attributing government responsibility for their inaction to address adaptation and mitigation challenges and the potential threatening impacts to its population which may arise due to this inaction. In its judgement, the Lahore High Court in its order of 4 September 2015 saw climate change as “‘a defining challenge’ and a ‘clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court’”.<sup>213</sup> Another case that is pending, involves the claim by six Portuguese teenagers in front of the European Court of Human Rights. They too also seek to challenge governments through a human rights lens by citing that the thirty-three European Union (EU) Countries are culpable in violating their right to life as the negotiating block of states have not been doing enough to mitigate against climate change.<sup>214</sup>

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<sup>210</sup>OHCHR, “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights”, A/HRC/10/61, 2009, United Nations, New York

<sup>211</sup> Ibid, p20

<sup>212</sup> Asghar Leghari vs. Federation of Pakistan, etc., Case No: W.P. No. 25501/2015

<sup>213</sup> Jeffrey, Tahseen (eds), “Routledge Handbook of Climate Justice”, 1<sup>st</sup> edition, Routledge, 2019, p140

<sup>214</sup> Climate Home News, “Six Portuguese youth file ‘unprecedented’ climate lawsuit against 33 countries”, 2020, <https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/> Accessed February 13 2022

Further research has identified that the use of human rights based arguments as a stop-gap in advancing a myriad of legal arguments is not new.<sup>215</sup> The rationale which supports a human rights-based argument denotes that a state's human rights obligation is to ensure that the individuals under their jurisdiction are not harmed by activities, policies or legislation which may be carried out within its borders.<sup>216</sup> This broad rationale has spurred action by civil society groups and organisations to mobilise the responsibility of their state to protect the population against the activities of non-state actors and multinational companies which have been pinpointed as key emitters of GHG emissions.<sup>217</sup> Moreover, the mixed success of using human rights as a foundation pillar of climate change litigation has thus encouraged lobbyists, human rights advocates and interest groups to seek this route towards claiming redress.

However, even as the most likely option, the threshold of success to which the human rights argument may be used as a primary argument has its limits. The Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment A/HRC/25/53 mentions that “the obligation to protect human rights from environmental harm does not require States to prohibit all activities that may cause any environmental degradation”.<sup>218</sup> This aligns directly with the rationale that no harm and SLR are not linked to the cessation of activities that produce GHGs as described above.

Furthermore, despite the popularity of the opportunity to make headway in advancing the human rights approach, there are several obstacles. A shortcoming, which is also articulated within treaty text, is that States are only responsible to prevent human rights abuses to individuals within their own jurisdiction.<sup>219</sup> Thus, from a legal perspective, a state like Germany would have no obligation to take into account the effects of their policies on the enjoyment of human rights in Barbados. This is further solidified by statements made by Sands (2015) who stated that despite there being

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<sup>215</sup> Savaresi, Annalisa and Auz, Juan, “Climate Change Litigation and Human Rights: Pushing the Boundaries”, 2019, *Climate Law*, p1

<sup>216</sup> *Ibid* p4

<sup>217</sup> Heede, Richard, “Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010”, 2014, 122, *Climate Change*, p229-241

<sup>218</sup> UN General Assembly, “Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council”, A/HRC/25/53, 2013, United Nations, New York

<sup>219</sup> Simlinger, Florentia, and Mayer, Benoit., “Legal Responses to Climate Change Induced Loss and Damage”, In: Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) *Loss and Damage from Climate Change, Climate Risk Management, Policy and Governance*, Springer Open, 2019 p179-203

a right to nationality<sup>220</sup>, there is no explicit human right to the ground that the property, well-being and health depend upon.<sup>221</sup>

In addition, despite the potential for success of using the human rights approach, the uncertain outcome is also reflected in the Inter-American Commission on Human Rights dismissal of an application that was lodged on behalf of the Inuit of the United States and Canada. For the Inuit, rising temperatures threaten food sources, loss of terrain and jeopardises their established way of life and culture<sup>222</sup> - which reflect similar scenarios in SIDS. As a result, the community lodged a petition to obtain “relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States”.<sup>223</sup> The analysis undertaken by the Commission also highlighted the challenges that lay ahead with this approach. Questions regarding attribution of responsibility<sup>224</sup>, targeting of concrete actions<sup>225</sup> as well as the establishment of best-practice<sup>226</sup> will arise for the global SIDS community as it did for the Inuit community if the research available is not mobilized and leveraged. Adopting a human rights approach to L&D is an uncertain pathway that is littered with the obstacles highlighted throughout this text. Despite its measured success in domestic litigation, its performance in an international court using a collective approach may not reap the benefits sought by the SIDS and LDC community.

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<sup>220</sup> Article 15, United Nations, “Universal Declaration of Human Rights”, 1948, United Nations, New York

<sup>221</sup> Sands, Phillipe, “Climate change and the Rule of Law: Adjudicating the Future in International Law (public lecture), 2015, United Kingdom Supreme Court

<sup>222</sup> Center for International Environmental Law, “Inuit Petition and the IACHR”, n.d., <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/#:~:text=The%20petition%2C%20Violations%20Resulting%20from,climate%20control%20because%2C%20as%20exemplified> Accessed April 13 2022

<sup>223</sup> Earth Justice, “Petition to the Inter American Commission On Human Rights “Violations Resulting From Global Warming Caused By The United States: Summary of the Petition”, December 7, 2005, p1

<sup>224</sup> “How should the responsibility among states in the region (or even states that are not members of the OAS) be attributed or divided?”

<sup>225</sup> “Could violations allegedly suffered by the Inuit be tied more closely to concrete acts or omissions of specific states?”

<sup>226</sup> “What examples of good practices undertaken by states could guide the Commission in making its recommendations”



## 4.2 The applicability of international law for mobilizing L&D finance

Whilst, the legal logic and approaches described above are not exhaustive, they represent the most popular options as presented by authors in the field who have undertaken their own analysis and provided an opinion on the effectiveness of such approaches.

Notwithstanding the appeal of utilising customary international law such as the no-harm rule or treaty law to advance the position of L&D, it is my opinion that taking these approaches will do little more than popularizing and fortifying lobby efforts for further inclusion of L&D within the climate regime. Toussaint (2020) also shares this opinion and offers that the undertaking of climate litigation can potentially result in energising L&D negotiations.<sup>227</sup> To undergo litigation before international courts on such a salient topic of climate change represents a form of reputational harm. However, if the main intent with the establishment of the Commission during the COP26 would be to successfully mount an argument before an international court (versus increase visibility and popularity for the topic) to gain compensation or agree upon financing arrangements, then the road will be fraught with challenges. The challenges in the application of these different approaches require substantive scientific and political inputs which the recently formed Commission would need to provide.

Furthermore, these challenges are exacerbated by the multilateral nature of climate change. Unlike typical bilateral transboundary pollution cases, there are a multitude of actors that can wield diplomacy and negotiation strengths against any attempts to lay financial responsibility for L&D at their feet. Taking this into consideration, the responsiveness and willingness of states to be taken before the ICJ or the ITLOS for their activities towards climate mitigation efforts and financing efforts to be scrutinized is also doubtful – given the experience of Palau and the request for the advisory opinion. A further challenge is, is there a way to enforce, at the international level, a human rights approach to climate change?<sup>228</sup> Especially when states can only be held accountable for the welfare of those individuals under their jurisdiction? The nuanced nature of the logic provided above highlights that there are limitations in the application and enforcement of

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<sup>227</sup> Toussaint, Patrick, “Loss and damage and climate litigation: The case for greater interlinkage”, 2020, 30, *Review of European and Comparative International Environmental Law*, p17

<sup>228</sup> Toussaint, Patrick and Blanco, Adrian M, “A human rights-based approach to loss and damage under the climate change regime”, 2020, 20(6), *Climate Policy*, p750

each potential argument. For example, within the human rights-based framework, States are legally obliged to adhere to two parameters. Firstly, that States protect the human rights of those within their jurisdiction and secondly, although there is a responsibility to protect human rights, this responsibility does not require States to prohibit all activities that may cause any environmental degradation.

As discussed above, there is an opportunity to ease the persistent issue of attribution of legal responsibility as outlined above. Methodologies can now be employed to answer some of the questions, posed by the Inter-American Commission on Human Rights persist. However, to be able to provide relief, the methods must be adopted by the international community and be made part of that process. If undertaken under the processes of the UNFCCC, these methodologies will most likely be the subjugation of the rigour of diplomatic lobbying and discontent. In front of the ICJ, once those in breach are identified, there must also be an accompanying rationale which can prove that the L&D impacts are due to anthropogenic emissions versus an arbitrary natural occurrence. Victims should have at hand a quantification or methodology to assign liability. Market share theory<sup>229</sup> could be an option to determine weight of responsibility, as this is an approach utilized with precedence in litigation surrounding the pharmaceutical and tobacco industries. The Commission, in order to fulfil its mandate on behalf of vulnerable SIDS, will thus be charged with the challenge of articulating and applying, with precision, the methodology for L&D attribution to states, L&D attribution to anthropogenic emissions and the share of financial liability which is attached before approaching a Court or Tribunal. Without these considerations in place, the Commission may also find itself as restrained as the WIM and the SN in concluding financing arrangements for L&D.

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<sup>229</sup> Stuart-Smith, Rupert.F., Otto, Friederike.E.L., Saad, Aisha.I. et al., "Filling the evidentiary gap in climate litigation", 2021, 11, Nature Climate Change, p 651–655

## 5. Supportive approaches for L&D financing in SIDS and LDCs

It has been demonstrated thus far that although efforts have been made, the actual implementation of financing measures to address climate-induced L&D has been lacking under the UNFCCC. This has left vulnerable nations in a most precarious position as they are continuously and persistently exposed to physical threats, many of which cannot be quantified. However, all is not completely lost.

It has been pointed out throughout this work, that the UNFCCC regime and L&D express synergies with adjacent regimes such as DRR and its supportive tools, mechanisms and financing structures. As there is no legal obligation for States to provide financing specifically for addressing L&D, (minor) relief can be achieved where the DRR and climate regime intersect. IGOs, such as the UNDRR and the World Bank, institutions such as the CCRIF SPC and States have mobilised technical assistance, tools and financing which provide for vulnerable states to financially recoup (partially) for any damages after a hazardous fast onset event such as a tropical cyclone or flooding. Notwithstanding these partial advancements towards the securing of tangible assets throughout much of the developing regions, there still exists a substantial gap between the financing to address resiliency and actual strengthening efforts. In closing this body of work, I will use the evidence published from various reports and case studies to highlight the quantum of the financing gap provided to developing countries and briefly discuss how this gap has been infinitesimally closed.

### 5.1 The loss and damage financing gap

The potential economic impacts of loss and damage are in no way minor. Reports published by Climate Analytics (2015)<sup>230</sup> and work done by Markandya and González-Eguino (2019)<sup>231</sup> indicate estimates of the projected cost of damage of between US 290 and 580 billion dollars by 2030 in developing regions.<sup>232</sup> A shortcoming of the abovementioned studies, which would have positively contributed to further discussion in this chapter, is the lack of disaggregated data in order to determine forecasted damages in SIDS. Instead, the studies favour the articulation of damages by

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<sup>230</sup> Baarsch, Florent and de Bruin, Kelly and Granadillos, Jessie et al, "Impacts of low aggregate INDCs ambition: Research Commissioned by OXFAM", Climate Analytics, London, 2015

<sup>231</sup> Markandya, Anil and González-Eguino, Mikel., "Integrated Assessment for Identifying Climate Finance Needs for Loss and Damage: A Critical Review", in Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance, Springer Open, 2019, p343-362

<sup>232</sup> Middle East and North Africa, Sub-Saharan Africa, Latin America and the Caribbean, East Asia and South Asia

regions versus by vulnerability index or island versus continent. Another shortcoming in studies of L&D is the ease at which (potential) losses can be quantified. Losses include elements which can be projected based on precedent such as tourism revenue, but it also includes elements which are typically intangible such as culture or territory or artefacts. How does one quantify an element such as the loss of culture? Notwithstanding the modality chosen, there is no doubt that the magnitude of economic impact has the serious potential to negatively impact SIDS and LDC economies which are vulnerable to external shocks.

As a result of these types of impacts, vulnerable states have not only been shouldering the shortfall costs to undertake adaptation, but also those which are considered ‘beyond adaptation’. The cumulative cost of undertaking these two modes of operation, if taken from a GDP perspective, is significant. In addition to the estimates of the project cost of damage, the UNEP (2020) identifies that the cost of adaptation could cost developing countries cumulatively “US\$140 billion to US\$300 billion annually by 2030”.<sup>233</sup> Considering that the average GDP of global SIDS in 2011 was US\$13.7 billion dollars<sup>234</sup>, the quantum of investment needed to safeguard the well-being and livelihoods of the nationals of developing countries highlights the surmountable challenge of adapting while also acting beyond adaptation to climate events.

As discussed previously in Chapter 2.3, financing obligations do exist for developed countries to undertake mitigation and adaptation finance – however, falling short of commitments or outright non-compliance yields little to no ramifications –reputational or otherwise. In practice, the mobilisation of financing has not met its milestones in two main ways. Firstly, the pledged commitments themselves fall short of published needs as outlined above by the UNEP estimates. As part of the 2009 Copenhagen Accord, developed countries pledged to mobilize US\$100 billion annually by 2020<sup>235</sup> which represents 1/3 of the “top-end” estimates of adaptation finance (rather than a combination of mitigation and adaptation). In addition, and secondly, the actual contributions fall short further of the pledges. It would appear that from these figures, developed states have shirked some measure of their legal financing obligation under the UNFCCC. This

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<sup>233</sup> UNEP, “Adaptation gap report 2020”, 2021, United Nations, Nairobi p1

<sup>234</sup> UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS), “Small Island Developing States: In numbers”, United Nations, New York, 2013, p20

<sup>235</sup> UNEP, “Adaptation gap report 2020”, 2021, UNEP, Nairobi p1

scenario is further confirmed in a 2020 study for the United Nations, in which after analysing the flows of climate finance for developing countries the only conclusion that could be arrived at was that the \$100 billion target will not be attained.<sup>236</sup> The climate finance flows under study indicated “that total climate finance counting towards the \$100 billion reached \$78.9 billion in 2018 compared to \$71.2 billion in 2017”.<sup>237</sup> As a result, the financing gap from the outset has been frightfully expansive. This calls to attention the further constraints that developing countries face as it relates to accessing sufficient finance flows to undertake adaptation and mitigation actions – which remain the two main pillars of the UNFCCC.

Comparatively, L&D financing remains voluntary based and largely unaccounted for – this is where the work of the WIM and SN could potentially assist in laying the foundation of knowledge-gathering on this topic. However, if there are shortfalls of approximately 30% and 22% in 2017 and 2018 respectively in articulated commitments for adaptation and mitigation finance which developed countries are obligated to provide, then one can surmise the scale of financing available for L&D voluntarily.

## **5.2 Bridging the gap: overlapping regimes**

Notwithstanding the proven deficiencies in the supply of available funding, as well as the protracted bureaucratic procedures that climate victims must endure to access this funding, a piecemeal approach to leverage financing assistance from complementary regimes has been employed. These complementary regimes, namely those under DRR and humanitarian assistance (for those states which qualify for Overseas Development Assistance (ODA)), can mobilise financing, financial products and technical assistance which directly contribute to aspects of the work of the WIM, the activities of the Bali Action Plan and the L&D modality as envisaged and submitted by the AOSIS negotiating body.

### *5.2.1 The role of Disaster Risk Reduction in L&D*

As was discussed in previous chapters, within the frame of the Bali Action Plan and the 2008 AOSIS proposal to the AWG-LCA, a logic was presented for the inclusion of insurance and rehabilitation components as part of resilience-building and restoration efforts. It is in these two

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<sup>236</sup> Averchenkova et al, “Delivering On The \$100 Billion Climate Finance Commitment And Transforming Climate Finance: Independent expert group on climate finance”, United Nations, New York, 2020 p7

<sup>237</sup> Ibid p32

components that a measure of relief has been found through regime interaction under DRR and humanitarian assistance pursuant to extreme or triggering events. The synergies of activities stem from the overarching intent to pursue ‘risk-informed sustainable development’<sup>238</sup> within the frameworks that guide the implementation of the climate and DRR agendas respectively. Intriguingly enough, unlike the climate regime, disaster response is not currently guided by an international treaty or legally binding document nor a specific Secretariat.<sup>239</sup> This is because the DRR regime is governed through individual international frameworks, mainly the previously discussed Sendai and Hyogo Frameworks, several international institutions such as the UNDRR, and the International Federation of the Red Cross, and a patchwork of regional strategies such as the Comprehensive Disaster Management Strategy guiding DRR in the Caribbean Region and the Strategy for Resilient Development in the Pacific region.

The inputs to the international DRR frameworks, action agendas and regional strategies are derived from the deployment of climate science and forecasts and the resultant outcome reports such as the Global Assessment Report on Disaster Risk Reduction. The Assessment Report calls for the implementation of “transdisciplinary, collaborative approaches that build resilience”<sup>240</sup> to meet the common goals of reducing inherent vulnerabilities and reducing the magnitude of exposure to L&D.<sup>241</sup> This transdisciplinary approach thus attempts to merge and leverage synergies in the DRR regime, the humanitarian regime and the climate regime to advance resilience building and secure future socio-economic development. However, L&D, due to its destructive nature and ability to halt all forms of development, undermines all three of these inter-related agendas. Out of the three regimes highlighted above, only DRR, as part of its ex-ante approaches and ex-post relief interventions, include implementable activities which express clear synergies with components of the AOSIS submission and supports the preparatory work being undertaken by the WIM and SN. These include:

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<sup>238</sup> UNDRR, ‘GAR Distilled: 2019 Global Assessment Report on Disaster Risk Reduction’, United Nations, Geneva 2019

<sup>239</sup> Bartolini, Giulio, “A universal treaty for disasters? Remarks on the International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters”, 2017, 99(3), International Review of the Red Cross p1104

<sup>240</sup> UNDRR, ‘GAR Distilled: 2019 Global Assessment Report on Disaster Risk Reduction’, United Nations, Geneva, 2019 p11

<sup>241</sup> Ibid

- a. Technical assistance in assessing disaster risk, loss and damage ex-post and risk management schemes
- b. The institution of insurance mechanisms, which, upon the triggering of an event will trigger payouts. These include social protection schemes including cash transfers and micro-insurance products for vulnerable individuals and sectors.

### **Technical assistance**

In meeting their developmental commitments under the DRR agenda, governments from developing countries, have been able to mobilise relevant expertise from representative regional organisations and IGOs to assist with the determination of national risk profiles for various types of harmful events as well as quantify the loss and damage attributed to these types of events. In terms of synergies, much of the work done under the technical assistance arm of understanding and enhancing risk knowledge and capacity under the DRR framework is directly relevant to the work and functions of the WIM.<sup>242</sup>

Resultingly, as the UNDRR accelerates their risk management activities through the use of technology transfer, capacity building and other activities, these tools and mechanisms become useful in potentially reducing the scale of L&D, and also quantifying the financing burden borne by these countries as a result of L&D. In the Caribbean, IGOs such as the United Nations Development Programme (UNDP), UNECLAC and the WFP as well as regional bodies such as CDEMA operate to provide this type of assistance. As an example, the UNDP and the UNECLAC have developed their own methodologies to calculate L&D when there is an event in-country. Typically, post or during an event, the government(s) of the affected Member country must make a formal request to the IGO to provide this data. The UNDP Post Disaster Needs Assessment and the UNECLAC Damage and Loss Assessment methodology thus provide an ex-post estimate of L&D across several sectors. This includes the effects on the health sector, transportation, education, water and sanitation, tourism, the affected population and many other inputs. Additionally, these IGOs, in order to equip member governments with the tools to undertake these types of post-disaster evaluations also offer training to representatives from national disaster management agencies and ministries of finance.

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<sup>242</sup> UNFCCC, “Decision2/CP.19, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013”

Another example of an IGO operating in the Caribbean region is the World Bank and its work in understanding risk. Initiatives include the development of an interactive online global forum for communities, training in disaster risk identification and the convening of conferences.<sup>243</sup> These types of interventions on the part of the World Bank have resulted in the engendering of “new ideas and partnerships that have improved risk assessments and the communication of risk information, helping to integrate them into policy and development planning”.<sup>244</sup> There are benefits derived from participating countries in accessing technical assistance under the DRR framework due to the intersection of the climate and DRR regime. Disaster risk identification and mapping involve the inclusion of risk due to climate variances and potential hazard-related outcomes that may arise due to emerging climate science.

Through the implementation of technical assistance programmes which improve the capacity of states to institute adaptation actions as well as respond to and recover from disruptive events, the intersection between DRR and climate change is clear. The dissemination of best practice, the creation of fora to strengthen cooperation and collaboration towards knowledge exchange and sharing, as well as the facilitation of activities to improve disaster risk mapping and knowledge gathering under the DRR regime all fit squarely within the articulated functions of the WIM as articulated in 5(a)<sup>245</sup> of Decision 2/CP.19 and hence supports the fulfilment of the overarching role of the WIM.

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<sup>243</sup> World Bank, “What is Understanding Risk?”, n.d. <https://www.understandrisk.org/about/> Accessed April 6 2022

<sup>244</sup> Ibid

<sup>245</sup> “Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts, by facilitating and promoting: Action to address gaps in the understanding of and expertise in approaches to address loss and damage associated with the adverse effects of climate change, including, inter alia, the areas outlined in decision 3/CP.18, paragraph 7(a); (ii) Collection, sharing, management and use of relevant data and information, including gender-disaggregated data; (iii) Provision of overviews of best practices, challenges, experiences and lessons learned in undertaking approaches to address loss and damage”, UNFCCC, “Decision2/CP.19, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013”



## Insurance

Notwithstanding the importance of disaster insurance as part of the sustainable development, climate and DRR regimes, in terms of its application, insurance is used as a tool to protect assets and is meant to be deployed as a responsive, protectionary measure. Insurance, as a type of compensatory tool is used to mitigate against the financial burdens realized by vulnerable countries worsened by fast onset events. Typically to finance rehabilitation efforts, these countries rely on budget reallocation, contingency funds or insurance coverage – which may be underestimated or understated. In this way, “if insurance payouts are viewed as compensation for losses and damages, then insurance can be seen as a ‘preventative and curative instrument’<sup>246</sup> - thus also delivering on one of the overarching functions of the WIM<sup>247</sup> discussed in Chapter 3.

Several insurance mechanisms have been deployed in the Caribbean region to provide some measure of relief. These mechanisms, which exist under the DRR and humanitarian regimes, in the aftermath of an event, are quickly able to effect payouts to countries depending on the structure of the insurance mechanism. The CCRIF SPC boasts of being able to make payouts 14 days to Member States, whereas, the World Bank, under its facilities<sup>248</sup> also makes payouts from its disaster insurance cover. In terms of social protection, the United Nations Children's Fund (UNICEF)<sup>249</sup> as part of its resilience-building portfolio is able to make cash transfers to identified vulnerable populations after an event is triggered. The World Food Programme in the Caribbean also mobilized technical assistance and financial support to islands such as Dominica, pursuant to Hurricane Maria in 2017, through the institution of an emergency cash transfer programme providing unconditional cash transfers to almost 25000 people and 6000 children supported by the UNICEF.<sup>250</sup>

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<sup>246</sup> Linnerooth-Bayer, Joanne et al , “Insurance as a response to Loss and Damage?”, in in Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance, Springer Open, 2019, p483 - 512

<sup>247</sup> “Enhancing action and support, including finance, technology and capacity building...”

<sup>248</sup> For example, “the World Bank’s Pacific Catastrophe Risk Assessment and Financing Initiative”, The World Bank, “Pacific Islands Take the Lead on Financial Protection from Disasters”, 2017, <https://www.worldbank.org/en/news/press-release/2017/03/31/pacific-islands-take-the-lead-on-financial-protection-from-disasters> Accessed April 22 2022

<sup>249</sup> UNICEF, “Preparing social protection systems for shock response”, UNICEF, Geneva, 2021 p1-14

<sup>250</sup> UNICEF, “Process Review of the UNICEF-WFP Joint Emergency Cash Transfer (JECT) Programme in Dominica FINAL REPORT”, UNICEF Office for the Eastern Caribbean Area, Bridgetown, 2018

However, despite insurance being a widely used tool, its paltry performance to meet the L&D financing needs in developing countries is obvious. Between 2007 and 2017 the CCRIF SPC made payouts of US\$100 million in payouts to its members.<sup>251</sup> Despite this milestone, it represents an example of the unsuitability of insurance as a lone solution for L&D financing. This is made apparent in the case of Antigua and Barbuda after Hurricane Irma which made landfall in 2017. The payout to the island state in 2017 by CCRIF SPC was approximately US\$6.8 million.<sup>252</sup> Yet, the cumulative costs associated with L&D and reconstruction were estimated at US\$377.2 million<sup>253</sup> – insurance payouts representing a dismal 1.59% of the necessary financing needed.

Despite these less than stellar ratios, insurance and risk pooling financing schemes represent another area where the synergies between several regimes collide, but, more substantively, remain one of the few financial tools at the disposal of climate victims to address L&D.

### **5.3 Realities of existing support**

Notwithstanding the evidence that funding can be mobilized where there are extremely destructive events, the reality is that the provided cash transfers, insurance and microinsurance schemes fall short in providing substantive relief and firm footing to begin restoration efforts. The temporary cash transfers provided by the UNICEF on the island of Dominica, whilst largely successful as a humanitarian and disaster response effort, failed to take into consideration the devastating impacts on a national scale. The negative impacts on country revenue, livelihoods, tourism products, and food security cannot be covered by the assistance provided by the UNICEF/WFP. The assistance also did not seek to provide substantive redress to the other islands impacted by Hurricane Maria. Furthermore, looking at the more subtle characteristics of L&D, insurance as a tool is not effective against due to progressive slow onset negative impacts such as ocean acidification, terrestrial and ocean temperature increases.<sup>254</sup> Although these events do not impart the abrupt devastation of tropical cyclones and floods, their occurrence still results in negative long-term losses. As a result,

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<sup>251</sup> CCRIF SPC, “CCRIF Reaches US\$100 million Milestone in Payouts”, n.d. [https://www.ccrif.org/node/11915?language\\_content\\_entity=en](https://www.ccrif.org/node/11915?language_content_entity=en) Accessed April 22 2022

<sup>252</sup> Ibid

<sup>253</sup> Global Facility for Disaster Reduction and Recovery (GFDRR), “Hurricane Irma and Maria Recovery Needs Assessment for Antigua and Barbuda”, n.d. <https://www.gfdr.org/en/publication/hurricane-irma-and-maria-recovery-needs-assessment-antigua-and-barbuda> Accessed April 22 2022

<sup>254</sup> Richards, Julie-Ann and Schalatek, Liane, “Financing Loss and Damage: A Look at Governance and Implementation Options”, Heinrich Böll Stiftung North America, Washington, 2017

physical triggers for which insurers would look to, to dispense a payout, are noticeably absent for slow onset events. The argument for the unsuitability of insurance is compounded further by pointing out that climate science and the IPCC reports have proven that events will become more frequent and intense. Increasing frequency and intensity of fast onset events would increase the magnitude of L&D, making climate insurance increasingly impractical.<sup>255</sup> The limitations of insurance are clear and absolute –it should not be expected that insurance provides financial protection against all impacts from climate change.<sup>256</sup>

From the discussion above, other sources of funds must be found and the development of innovative financing schemes be undertaken. Durand (2016) has also stressed the explicit need that other sources of funds for L&D, beyond insurance and ad-hoc bilateral means, be founded to secure the well-being and development of vulnerable countries.<sup>257</sup> Insurance as a (partially) restorative mechanism, is the closest path to financial compensation as requested by SIDS and LDCs and contributes to the WIMs work in meeting its overarching objective of “loss reduction and equitable compensation”<sup>258</sup> for developing countries. As mentioned in Chapter 3, the WIM and SN remain hamstrung in making steps to the design, provision and promotion of financing tools to support L&D recovery. Although work is being undertaken to understand the quantum of finance being provided voluntarily for L&D, based on the shortfalls experienced under mitigation and adaptation as legal obligations, I hold no hope that voluntary financing for L&D will (miraculously) be equitable to the financing provided for mitigation or adaptation or even exceed insurance payouts for fast onset events that the CCRIF SPC currently provides. In terms of the mobilisation of financing, the shortfalls are clear. Insurance mechanisms as they stand presently are not enough and do not cover the spectrum of climate-induced disasters that vulnerable countries face.

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<sup>255</sup> Durand, Alexis and Hoffmeister, Victoria, et al., “Financing Options for Loss and Damage: a Review and Roadmap”, German Development Institute, Bonn, 2016, p22

<sup>256</sup> Linnerooth-Bayer, Joanne et al , “Insurance as a response to Loss and Damage?”, in in Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance, Springer Open, 2019

<sup>257</sup> Durand, Alexis and Hoffmeister, Victoria, et al., “Financing Options for Loss and Damage: a Review and Roadmap”, German Development Institute, Bonn, 2016, p22

<sup>258</sup> Linnerooth-Bayer, Joanne et al , “Insurance as a response to Loss and Damage?”, in in Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance, Springer Open, 2019, p483

Finally, why should the victims who contribute the least to climate change pay their own premiums for their own protection at a 0.2% or 1.59% return? Shouldn't the polluter(s) pay? Resolution of the challenges that currently inhibit the use of customary international law as a launching point as discussed in Chapter 4.1.1 and 4.1.2 are critical to influencing discussions surrounding the provision of financing for disaster insurance and other financing mechanisms. The position that the polluter should pay as it relates to insurance is also supported by previous proposals which have been made by the AOSIS negotiation block in 2012.<sup>259</sup> I believe this to be a viable proposal, as under the DRR regime, the institutions which facilitate payouts are already in existence and operational with sound reputation. By providing direct contributions, the aim would be to considerably increase the ratio of restorative payouts to a minimum level to be determined. States which are attributed responsibility for L&D can and should directly inject funding on an annual basis to institutions such as the CCRIF SPC – thus buttressing the efforts being made by vulnerable countries. Operationally, this is indeed possible as in 2021, the CCRIF SPC received a (voluntary) grant of US\$1.16 million from Irish Aid to support fisheries insurance.<sup>260</sup> However, recalling that the DRR regime is not governed by a treaty agreement, can the novel attribution science be utilised in climate litigation to oblige developed states to pay into DRR frameworks? Also, considering that insurance does not encompass slow onset events, how will those events be addressed? Even with the exploration of these alternative pathways, financing gaps persist.

It is clear that climate victims cannot stand alone in this effort of insurance. This is more so apparent since not only is there the challenge of growing unsuitability of insurance due to more intensive events, but it highlights (again) the important need to close the gaps further in the attribution science to formally answer and determine obligations of: who pays the premium and how much?

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<sup>259</sup> Proposals have been made to allow for contributions from developed countries to fund insurance in vulnerable. For example, an Alliance of Small Island States proposal to the Ad Hoc Working Group on Long-term Cooperative Action suggests that contributions from developed countries fund insurance in countries that “lack the financial means to adapt to the adverse effects of climate change and the capacity to manage financial risks from the direct impacts of climate change” Durand, Alexis and Hoffmeister, Victoria, et al., “Financing Options for Loss and Damage: a Review and Roadmap”, German Development Institute, Bonn, 2016, p7

<sup>260</sup> CCRIF SPC, “CCRIF Welcomes Grant of €1 million (US\$1.16 million) from Irish Aid, Allowing Five Additional Caribbean Countries to Access Fisheries Insurance”, November 10 2021, <https://www.ccrif.org/news/ccrif-welcomes-grant-eu1-million-us116-million-irish-aid-allowing-five-additional-caribbean> Accessed April 23 2022

## 6. Conclusion

Notwithstanding the evidence provided throughout this work to undertake and conclude the legal reasoning for the provision of L&D financing, limitations do exist. To further backstop the work presented, as well as advance L&D negotiations at the international level, data gaps need to be resolved. For example, whilst damage estimates are available for the collective of ‘developing countries’, considering that SIDS have been at the forefront of the L&D lobby efforts, the accessibility options of damage estimates for SIDS alone as a grouping were limited. Estimates of losses for SIDS were non-existent. The quantification of losses however, is admittedly more challenging as it includes non-tangible elements to which a value must be attached. However, who would be responsible for the quantification of loss of culture, or family lands and legacies? Depending on the response received, issues of colonisation, subjugation, pilfering and subjectivity amongst others may arise -which are outside the scope of this work. Another limitation arose such that despite the availability of studies on attribution and its contributory outputs to the L&D debate, there have been no documented reasons on why UNFCCC negotiating parties or plaintiffs have not mobilised the data to support their cases. As a result, I was left to speculate based on other published works and professional experience in bridging the gap between science and policy as well as anticipating the response to this type of research in a consensual negotiation process. Finally, and admittedly, although not achieving the outputs as expected, the work being undertaken by the WIM and SN in recording the quantum of financing made available through L&D is crucial. Considerable, yet disjointed financing efforts are being made and an assumption in elaborating chapter 5 was that the voluntary financing for L&D does not match the quantum of funds available under mitigation and adaptation. Notwithstanding this assumption, I believe the inference is true.

It is undeniable that L&D represents a persistent, repetitive cycle that threatens not only the well-being of populations but the fundamental sovereignty of climate victims - impacting territory and thus statehood. Whereas strides have been made in the towards formally recognizing L&D as a challenge, the climate regime still exhibits many ambiguities that create obstacles to treatment and limits its advancement and resolution across borders.

Firstly, what is L&D? How is it defined? Despite its stated importance and eventual global reach, there is yet a commonly agreed-upon and accepted definition of what L&D is. It is important to define L&D as this reduces obscurity when framing actions that support L&D efforts and assists

in tempering expectations as to how it should be approached by developed and developing country parties. This is tantamount as developed country parties may view L&D as another financing burden, whereas developing parties may see L&D as a critical step towards securing their own development efforts. Opinion in support of this states that “funding loss and damage response is a contentious issue that will be made only more unwieldy if Parties’ conceptions of loss and damage are at odds”.<sup>261</sup>

Secondly, and as discussed in section 2.2.1 although L&D is a by-product of excessive GHG emissions which stem from polluting industries<sup>262</sup>, there is no expectation that GHG emissions can be completely avoided in the undertaking of activities in a country’s own sovereign space. This position is emphasized in international treaties, across several regimes as well as declarations that speak to sustainable development and the environment. Taking this into consideration then there should be an expectation that L&D will be a permanent feature of the climate fabric of many countries. Although it is hoped that with the advancement of mitigation and adaptation efforts, coupled with L&D finance, the overall impact will not be as devastating to victims.

Thirdly, as pointed out in Chapter 2.3, climate finance obligations under the UNFCCC, as it currently stands, accommodate obligatory financing only under the mitigation and adaptation workstreams. However, not only are the obligations underrepresented in terms of commitments, but they are also inadequate in terms of the quantum of actual financing provided with consistent and significant shortfalls annually. Despite these insufficiencies there are no legal consequences and limited reputational impacts to Parties. Unlike complementary regimes where there are consequences attached to non-compliance such as the ozone regime and its Montreal Protocol, it highlights the flexibility and soft handed nature as it relates to supportive financing obligations under climate change. At the time of this work, financing for L&D is still voluntary with no clear indication of how much financing is mobilised through these networks.

Fourthly, and somewhat intangible is the negotiating power demonstrated by opponents to the inclusion of L&D as a legal responsibility attributed to developed countries and hence attracting additional financial obligations for these parties. Typically, although open to cooperation and

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<sup>261</sup> Durand, Alexis and Hoffmeister, Victoria, et al., “Financing Options for Loss and Damage: a Review and Roadmap”, German Development Institute, Bonn, 2016, p22

<sup>262</sup> Heede, Richard, “Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010”, 2014, 122, *Climate Change*, p229-241

dialogue on climate L&D, the US has been an opponent to the inclusion of L&D as a financing obligation under the climate regime. Whether it is due to prevailing domestic law in the US or the avoidance of opening pathways towards litigation, the reasons may be numerous. This opposition has been demonstrated in numerous ways including by the US' opposing actions surrounding the ICJ advisory opinion requested by Palau in 2011 and 10 years later in 2021 with US representatives still resisting the development of a funding facility specifically to address L&D.<sup>263</sup> As mentioned previously, providing a universally accepted definition for L&D may assist in managing expectations and responsibilities in this regard. The message should be that, despite being a main pillar, L&D is more than another request for funding by climate victims and can only serve to buttress complementary activities under the DRR and humanitarian regimes.

Finally, and equally challenging is the consideration of the use of novel attribution research and studies as a key component to advancing the L&D finance discussions. The presentation and support of factual, scientific data will serve to provide documented evidence for the calls being made by the SIDS and LDC community. However, it is expected that non-IPCC reports will be suppressed by strong negotiating blocks at the UNFCCC level – especially where there is potential for reputational harm and the cementing of legal basis to challenge developed countries for L&D finance. The mobilisation of the information related to attribution can also open up potential pathways towards litigation and the crafting of methodologies to determine distribution and share of financial liability. Previously, the methods of establishing definitive legal causation directly linked to a country's GHG emissions were unavailable to plaintiffs as demonstrated by the questions asked by the court in the Inuit petition against the United States to the IACHR.<sup>264</sup> However, breakthroughs in research, as presented in Chapter 4, can transition the plaintiffs' arguments from theory to evidence-based – thus contributes as an essential part of establishing legal causality for L&D.

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<sup>263</sup> BBC, "Who will pay for the damage caused by climate change?", December 13 2021, <https://www.bbc.com/future/article/20211213-who-will-pay-for-the-damage-caused-by-climate-change> Accessed April 24 2022

<sup>264</sup> Center for International Environmental Law, "Inuit Petition and the IACHR", n.d., <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/#:~:text=The%20petition%2C%20Violations%20Resulting%20from,climate%20control%20because%2C%20as%20exemplified> Accessed April 13 2022

However, notwithstanding the snapshot of challenges, one cannot say that no progress in resolving L&D financing has been made under the climate regime. The institution of the WIM represents a step forward in terms of moving beyond the acknowledgement of the issue of L&D and towards the eventual implementation of supporting measures. In addition, regime interaction with DRR provides a consequential opportunity to mobilise greater voluntary contributions. The existence of regional insurance mechanisms which have a history of administering financial relief for fast-onset events should be leveraged such that SIDS can cover more than of 0.2% and 1.59% of their national assets. Despite the limitation of its (non)relevance to slow-onset events, additional deposits into the pool of funds will only serve to provide further relief for victim states. Furthermore, the move by Antigua and Barbuda and Tuvalu in establishing a Commission of Small Island States on Climate Change and International Law also represents an alternative conduit by which negotiations for financing can be advanced. The strong advocacy for L&D as well as the drafting of the Glasgow Climate Pact<sup>265</sup> and its section VI as part of the negotiations under the frame of the 2021 COP26 also signals that through developing party efforts, the topic of L&D can remain at the forefront of discussion items.

The next section will examine the author's opinion on what the short to medium future hold for L&D finance options for climate victims.

### **6.1 Looking ahead: Financing for climate victims**

The outlook for a short-term resolution to L&D financing under climate negotiations looks bleak. Reasons are multitudinous and varied. However, they are driven by ambiguous and unknown variables as well as the protracted action caused not only by the nature of diplomacy and international governance, but by outright opposition to the inclusion of L&D as a workstream by developed countries. From the rigidity of the framework convention and the continued lack of inclusion for L&D as a third pillar, to the inability of the institutions set up to deliver any tangible and usable outputs, the obstacles to resolving L&D seem insurmountable. This section will present my outlook on the unlikelihood that any help will be extended to climate victims in the short term under the UNFCCC.

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<sup>265</sup> UNFCCC, "Decision -/CP.26, Glasgow Climate Pact", United Nations, New York, 2021, p5



The AOSIS proposal, in my opinion, represents a holistic, reasonable, multi-pronged framework under which L&D could be addressed. In spite of the existence of the proposal, the problem of climate change continues to be tackled through two specific workstreams. By a) imposing GHG emission reduction targets on States (mitigation) and b) undertaking actions that promote the reduction of inherent vulnerabilities to climate change (adaptation). Loss and Damage, despite the repetitive efforts by developing countries, does not feature as a third workstream under the climate regime. Based on the responses by developed countries and the non-committal nature of the Glasgow Climate Pact as it relates to the inclusion of L&D as a third pillar, as well as the provision of the commitment of financing, it would seem to me that L&D will continue to be a periphery item in the short term. Expanding the scope of climate action to include L&D would require consensus amongst parties and based on recent history, including the COP26, there has been a concerted effort on the part of developed countries to reject the insertion of L&D as a mandated action.

Institutionally, despite this glimmer of promise towards resolution, the success of the institution of the WIM and the SN has been stunted and marred by the absence of tangible and usable outputs. The main functions of the WIM speak to the enhancement of knowledge, and action and the provision of coordination support, yet 10 years later, the only output achieved thus far, as in section 3.1 has been the setting-up of institutional arrangements. Although important for the functioning of the WIM and SN, any direct contribution to enhancement and support especially as it relates to financing has yet to be realised. Would it be another 10 years until actual enhancement and support are realised? It is clear through the text in this work that thus far, the climate regime has failed in its textual narrative and institutionally in providing avenues for the provision of financing support for climate victims. This has resulted in the suppression of negotiations on the inclusion of L&D as a legal obligation and extinguished avenues under climate treaty law to establish legal claims for climate victims. This has resultantly prompted the leveraging of regime fragmentation and the application of legal reasonings and mobilisation of complementary treaties to advance the financing sought after.

These obvious failings spanning decades as described above have resulted in the emergence of an institution such as the Commission, which promises to utilise and leverage regime fragmentation and interaction to deploy financing. From the analysis provided in Chapter 4, not only should

inconsistency in its success be expected but the ability to use the flexibility of legal logic to gain redress to cover the full scope of L&D is highly dubious. As presented previously, there are mixed views on whether these pathways can deploy financing for all aspects of L&D - which are indeed multipronged and encompass social (including health and culture), economic and ecological considerations - in a multilateral context. Additionally, where there may be success before the courts, the piecemeal nature of each application will yield piecemeal results. A human rights approach finding success at the international level, would not see financing for loss of biodiversity, infrastructure or GDP. Considering the partial relief that may be achieved using these approaches, vulnerable states will need to determine if there will be satisfaction with partial remuneration. However, there is the potential benefit that cases of this consequence and stature will accelerate visibility of the L&D challenge and enhance lobby efforts.

Furthermore, the ability of the Commission to undertake its function is still unknown. Launched in 2021, the Agreement establishing the Commission of Small Island States on Climate Change and International Law was signed by Antigua and Barbuda and Tuvalu with invitations for all AOSIS members to become parties to the Agreement. To date, Antigua and Barbuda and Tuvalu remain the only signatories. Is this a signal of the reticence of SIDS and LDCs to agitate the climate governance network? Aversion to the institutional, human resource and commitment costs which are associated with becoming party to another Agreement? Or hesitancy to take on countries such as the United States – which has a history of wielding unilateral trade measures to advance their own agendas. I am unsure of the reasons. However, in April 2022, no other AOSIS member has signed on or signalled their intention to sign on to an Agreement that touts itself as a solution to resolving L&D financing. The longer the two founding parties remain as the only parties to the Agreement, the more confidence waivers in the ability of the Commission to meet its mandate.

Looking at strengthening climate litigation arguments, there is a flicker of light at the end of the tunnel. Previously, plaintiffs found it challenging to prove before the courts that the degradation of their immediate environment was a direct result of a country's GHG emissions and, in some cases, their inadequate activities to curb same. Whilst the progression in attribution science will doubtlessly provide support in establishing legal causality, outstanding considerations persist which will impact the strength of the argument and the scope of the resolution. As discussed in

Chapter 4, a snapshot of these challenges as described by Mayer (2016) and Voigt (2021) which institutions and state parties will have to overcome include:

- The multiplicity of the nature of climate change – using the attribution science advanced, how does one apportion who is liable to contribute what magnitude of financing? Is market share theory an appropriate methodology to utilise?
- Proof that impacts are from anthropogenic sources and not from the natural variances of the climate. If marginal contributions to GHG emissions are made, how should financing be awarded?
- The consensual nature of climate litigation. Will powers such as the US and China be willing to be brought before the courts? Could a polluting state still be held responsible even if it has complied with its commitments?
- What is the acceptable threshold where L&D can be considered significant? What is the agreed-upon trigger or threshold at which financing is owed to victims? Without these agreed-upon limitations, financiers may argue that claimants for financing will cite any form of inundation as a reason to receive financing.

The presentations provided above are only a few of the considerations which must be rationalized before I can confidently opine that financing specifically for climate victims will be formalized under the UNFCCC in the near future.

Furthermore, from the assessment of the climate finance obligations, I have also determined that to give L&D the adequate attention and latitude that it needs to be introduced as a legally binding obligation, a new treaty agreement should be negotiated under the UNFCCC. The Paris Agreement, notwithstanding its mentioning of the importance of L&D and the need for cooperation to provide relief within its Article 8, not only lacks the flexibility and opportunity for the insertion and inclusion of L&D as an obligation but also reflects the opinion of strong negotiating parties such as the US. This is made more evident through accompanying Decisions such as Decision 3/CP.18<sup>266</sup> discussed in Chapter 3.1. A ‘clean slate’ is therefore needed, which removes all textual and procedural obstacles. Climate change is not static, and hence the dynamism

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<sup>266</sup> Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation” UNFCCC, “Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015”, FCCC/CP/2015/10, 2015

of this phenomenon must be treated similarly. Thus, it should be expected that the instruments which support the climate regime not only be nimble but should be a representation of changing circumstances. As with the discussion on the future relevance of insurance, as science becomes more explicit and the physical impacts become more widespread and intense, parties may realise that the Paris Agreement does not meet their evolving needs. As it stands currently, only developing parties are consistently signalling the shortcomings of the Agreement. Based on the global trajectory of carbon dioxide emissions, it is but only a matter of time before these shortcomings are unignorable by developed parties. However, this is a monumental task, which is not easily achieved. Considering the elusive nature of the inclusion of L&D as an obligation under the existing climate regime, concluding a new agreement or amending the Framework Convention to include L&D as a third pillar will not be achieved in the short term if the discussions surrounding COP26 are to be used as a baseline. Developing countries and developed countries are simply not in accord on the matter of L&D. In addition, the substantive products of the WIM, the SN and the advancement of the necessary attribution science must be sound and contributory to propel this process. However, based on the outputs achieved thus far, the finish line for rationalizing L&D at the international level seems far away.

## **6.2 Author's conclusion**

In my opinion, the best course of action for SIDS and LDCs is multi-pronged, spanning from short to long term but also piece meal in its approach and benefit. Currently there is no sound legal basis to which L&D finance can be deployed for climate victims under the climate and DRR regimes. However, based on the analysis presented in chapter 4, a patchwork of litigation options exists using regime interaction to articulate a myriad of arguments including human rights and ARSIWA. An effective multi-pronged approach would include and leverage the pathway of litigation in tandem with other negotiating efforts to maximise the coverage of financing and visibility options.

Firstly, in the short term, I would suggest that vulnerable states organise and strengthen lobby efforts at the international level and vigorously elevate the visibility of the issue of L&D financing. These moves would only serve to support existing lobby efforts underway by groups such as the Climate Action Network International. Additionally, in mobilizing the only legal basis currently available, SIDS members must mobilise quickly to support the establishment of the Commission of Small Island States on Climate Change and International Law ensuring that the Secretariat is

fully functioning and equipped. This will allow for the necessary closing of gaps as identified in available attribution research and the ventilation of ‘undiscovered’ research to contribute to the framing of the varied legal arguments to be utilised at the level of the ICJ or ITLOS. The Commission will thus be free to explore the range of legal arguments which can be utilised to compensate climate victims for L&D. Further research into the most suitable methodology for determining the share of responsibility also needs to be developed and advanced. All options available to climate victims should be explored before the necessary climate litigation is launched – with the expressed recognition that success at the courts may not be forthcoming or financially fulfilling.

In the medium term, an alternative window of opportunity for the provision of financing exists through directly encouraging countries to make direct, voluntary, financial contributions to L&D and rehabilitation under the DRR regime – with the express understanding that these contributions do not represent a ‘silver bullet’ to L&D and more financing will be required to address slow onset events. This can be done through established institutions such as the CCRIF SPC or the African Development Bank’s Africa Disaster Risk Financing Program. Although no treaty mechanism exists under DRR to propel this action, contributing states can be confident that financing will be directed solely towards the payment of insurance premiums – directly underpinning L&D and rehabilitation efforts by reputationally sound institutions. Advancements have already been made in this regard in terms of direct contributions being pledged.<sup>267</sup> Scaling-up is what is necessary to provide substantive financing support to climate victims. Increasing the ratio of total payout to total L&D recorded will reduce pressure on victim governments who hastily source financing from other sources or increase national debt to provide relief. Furthermore, as these regional insurance programmes are able to develop innovative, new products which are responsive to the needs of their membership, it is not unimaginable that triggers and coverage for some slow-onset events may be developed in the future.

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<sup>267</sup> “The United States Agency for International Development and the U.S. State Department pledged financial support to African Development Bank’s Africa Disaster Risk Financing Program, at a COP26 side event promoting disaster and climate risk financing in Africa”. African Development Bank Group, “African Development Bank’s Africa Disaster Risk Financing Program receives \$2.5 million pledge from United States”, November 10 2021, <https://www.afdb.org/en/news-and-events/press-releases/african-development-banks-africa-disaster-risk-financing-program-receives-25-million-pledge-united-states-46718> Accessed April 23 2022

In the long-term SIDS and LDCs should prepare for the proposition of the elaboration of a new treaty agreement under the UNFCCC. Although it is not evident (and I am not confident) on when this will occur, nor if discussions will centre around the inclusion of L&D as a legally binding third pillar under the UNFCCC, it is in the best interest of climate victims to be equipped with the scientific and legal basis to advance negotiations in their favour – the backing of non-state actors will only advance this tactic. It is assumed that the elaboration of a treaty agreement, which includes L&D and the provision of appropriate financing, will negate the patchwork effort – blending fragmented litigation approaches with persuasion - that SIDS and LDCs will undertake in the short and medium term.

As a result of the above discussion, the focus of SIDS and LDCs should thus be multifaceted based on short to long term goals: between climate litigation, lobby efforts and UN level negotiations for further financing under DRR. For SIDS and LDCs, the resolution to the L&D challenge sits squarely in their collective negotiation power and motivation. Whether their action is done in a conference room or courtroom will only help in advancing the L&D agenda. Without the demonstration of their collective ability to intercede and stall opposing narratives as well as display strength on this topic, the mechanisms established and employed at the multilateral level under the umbrella of climate diplomacy, will continue to leave the most vulnerable on uneven footing, struggling to maintain their very existence.

## References

- ABC News. *Ida updates: Over 50 dead in Northeast after flooding as death toll continues to rise*. 4 September 2021. 1 November 2021. <<https://abcnews.go.com/US/idas-remnants-deluge-york-jersey-flooding-rain-tornadoes/story?id=79780365>>.
- Adelman, Sam. "Climate justice, loss and damage and compensation for small island developing states." *Journal of Human Rights and the Environment* 7.1 (2006): 32-53.
- African Development Bank Group. *African Development Bank's Africa Disaster Risk Financing Program receives \$2.5 million pledge from United States*. 10 November 2021. 23 April 2022. <<https://www.afdb.org/en/news-and-events/press-releases/african-development-banks-africa-disaster-risk-financing-program-receives-25-million-pledge-united-states-46718>>.
- "Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, entry into force 31 October 2021." n.d.
- Alliance of Small Island States. "Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16." 2012.
- Association of Caribbean States. *The Broken Window Fallacy: Economic, Investment and Disaster Risk Reduction*. 2015. 20 December 2021. <<http://www.acs-aec.org/index.php?q=disaster-risk-reduction/the-broken-window-fallacy-economics-investment-and-disaster-risk-reduction>>.
- Averchenkova, Alina, Amar Bhattacharya and Richard et al Calland. *Delivering On The \$100 Billion Climate Finance Commitment And Transforming Climate Finance: Independent expert group on climate finance*. New York: United Nations, 2020.
- Baarsch, Florent and de Bruin, Kelly and Granadillos, Jessie et al. *Impacts of Low Aggregate INDCs Ambition: Research commissioned by Oxfam*. London: Climate Analytics, 2015.
- Bartolini, Guilio. "A universal treaty for disasters? Remarks on the International Law Commission's Draft Articles on the protection of persons in the event of disasters." *International Review of the Red Cross* 99 (2017): 1103-1137.
- BBC. *Who will pay for the damage caused by climate change?* 13 December 2021. 24 April 2022. <<https://www.bbc.com/future/article/20211213-who-will-pay-for-the-damage-caused-by-climate-change>>.
- Beck, Stuart and Elizabeth Burleson. "Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations." *Transnational Environmental Law* 3 (2014): 17-29.
- Brunnee, Jutta. "The Stockholm Declaration and the Structure and Processes of International Environmental Law." *The Future of Ocean Regime Building; Essays in Tribute to Douglas M Johnston*. Ed. Aldo Chircop and Ted McDorman. Kluwer Law, 2009. 41-62.
- Burkett, Maxine. "Loss and Damage." *Climate Law* 4.1-2 (2014): 119-330.

- . "Rehabilitation: A proposal for climate compensation mechanism for small island states." *Santa Clara Journal of Law* 13.1 (2015): 81-124.
- CCRIF SPC. *CCRIF Reaches US\$100 million Milestone in Payouts*. n.d. 2022 April 2022. <[https://www.ccrif.org/node/11915?language\\_content\\_entity=en](https://www.ccrif.org/node/11915?language_content_entity=en)>.
- . *CCRIF Welcomes Grant of €1 million (US\$1.16 million) from Irish Aid, Allowing Five Additional Caribbean Countries to Access Fisheries Insurance*. 10 November 2021. 23 April 2022. <<https://www.ccrif.org/news/ccrif-welcomes-grant-eu1-million-us116-million-irish-aid-allowing-five-additional-caribbean>>.
- Center for International Environmental Law. *Inuit Petition and the IACHR*. n.d. 13 April 2022. <<https://www.ciel.org/project-update/inuit-petition-and-the-iachr/#:~:text=The%20petition%2C%20Violations%20Resulting%20from,climate%20control%20because%2C%20as%20exemplified>>.
- "Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgement, ICJ Reports Judgment of 16 December 2015." 2015.
- Climate Action Network International. *COP26 Must Deliver On Loss And Damage Finance*. n.d. 23 April 2022. <<https://climatenetwork.org/cop26/cop26-must-deliver-on-loss-and-damage-finance/>>.
- Climate Home News. *Six portuguese youth file 'unprecedented' climate lawsuit against 33 countries*. 2020. 13 February 2022. <<https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/>>.
- Commissioner, United Nations Human Rights Office of the. *"Safe Climate: A Report of the Special Rapporteur on human rights and the environment A/74/161*. New York: United Nations, 2019.
- "Convention on the Law of the Sea, 1833 U.N.T.S. 397, December 10, 1982, entry into force 16 November 1994." n.d.
- Durand, Alexis, Victoria Hoffmeister and et al. *Financing Options for Loss and Damage: a Review and Roadmap*. Bonn: German Development Institute, 2016.
- EarthJustice. "Petition To The Inter American Commission On Human Rightsseeking Relief From Violations Resulting From Global Warmingcaused By Acts And Omissions Of The United States. Summary Of The Petition ." December 2005. 14 April 2022.
- Ekwurzel, B., Boneham, J., Dalton, M.W. et al. "The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers." *Climatic Change* 144 (2017): 579-590.
- Farbotko, Carol and Heather Lazrus. "The first climate refugees? Contesting global narratives of climate change in tuvalu." *Global Environmental Change* 22.2 (2012): 382-390.
- FEMA. *Federal Disaster Assistance in Louisiana Exceeds \$2 Billion Two Months after Hurricane Ida*. 28 Octoner 2021. 1 November 2021. <<https://www.fema.gov/press-release/20211028/federal-disaster-assistance-louisiana-exceeds-2-billion-two-months-after>>.
- GA /RES/56/83 of January 2002. "Responsibility of States for Internationally Wrongfull Acts." 2002.



- GA /RES/62/61 of 8 January 2008. "Responsibility of States for internationally wrongful acts." (2008).
- "GA/RES/70/1 21 October 2015 Transforming our world: the 2030 Agenda for Sustainable Development." n.d.
- Global Facility for Disaster Reduction and Recovery. *Hurricane Irma and Maria Recovery Needs Assessment for Antigua and Barbuda*. n.d. 22 April 2022. <<https://www.gfdr.org/en/publication/hurricane-irma-and-maria-recovery-needs-assessment-antigua-and-barbuda>>.
- Hagenlocher, Michael, David Cotti and Jennifer et al Denno Cissé. "Disaster risk and readiness for insurance solutions in Small Island Developing States." 2020.
- Handl, Gunther. "Declaration Of The United Nations Conference On The Human Environment (Stockholm Declaration), 1972 And The Rio Declaration On Environment And Development, 1992." 2012. 3 November 2021. <[https://legal.un.org/avl/pdf/ha/dunche/dunche\\_e.pdf](https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf)>.
- Heede, Richard. "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010." *Climate Change* 122 (2014): 229-241.
- Hirsch, Thomas. *Climate Finance for addressing loss and damage: How to Mobilize Support for Developing Countries to tackle loss and damage*. Berlin: Brot fur die Welt, 2019.
- Preventionweb. <https://www.preventionweb.net/sendai-framework/Hyogo-Framework-for-Action>. *Sendai Framework for Disaster Risk Reduction 2015-2030*. New York: United Nations, 2015.
- Huang, Jennifer and Wenger, Catherine and Guilanpour, Kaveh. *Loss and Damage: Issues for COP26*. Virginia: Centre for Climate and Energy Solutions, 2021.
- IFRC. "Emergency Appeal Final Report: Antigua and Barbuda and Saint Kitts & Nevis: Hurricane Irma." 27 February 2020. *IFRC*. 10 December 2021.
- ILO. "Constitution of the International Labour Organisation (ILO)." 1919. Adopted by the Peace Conference in April 1919, the ILO Constitution became Part XIII of the Treaty of Versailles (28 June 1919).
- IPCC. *Climate Change 2007: Synthesis Report. Contribution of Working Groups I,II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. Pachauri, R.K; Reisinger, A. Geneva, Switzerland: IPCC, 2007.
- . *Summary for Policymakers In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group 1 to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge and New York: Cambridge Univeristy Press, 2007.
- . "Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change." 2021.
- Island Innovation. *Antigua-Barbuda, Tuvalu to seek justice for climate change damage before international courts*. n.d. 29 November 2021. <<https://islandinnovation.co/antigua-barbuda-tuvalu-to-seek-justice-for-climate-change-damage-before-international>-

courts/?utm\_source=rss&utm\_medium=rss&utm\_campaign=antigua-barbuda-tuvalu-to-seek-justice-for-climate-change-damage-before-international-cour>.

Jeffrey, Tahseen (eds). *Routledge Handbook of Climate Justice*. Routledge, 2019.

Kreikenkamp, Julia and Lisa Vanhala. "Climate Change Loss and Damage." Policy Brief. 2017. 9 October 2021. <<https://www.ucl.ac.uk/global-governance/sites/global-governance/files/policy-brief-loss-and-damage.pdf>>.

Kuyper, Jonathan and Heike Schroeder. "The Evolution of the UNFCCC." *Annual Review of Environment and Resources* 43 (2018): 343-368.

Le Moli, Ginevra. *State Responsibility and the Global Environmental Crisis*", *Blog of the European Journal of International Law*. 2021. 30 March 2022. <<https://www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/>>.

Linnerooth-Bayer, Joanne et al. "Insurance as a response to Loss and Damage?" *Loss and Damage from Climate Change: Climate risk management, policy and governance*. Ed. Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. Mechler R. Springer Open, 2019. 483-512.

Mace, M.J and Verheyen, Roda. "Loss, damage and legal responsibility after COP21: All options open for the Paris Agreement." *Review of European, Comparative & International Environmental Law* 25.2 (2014): 197-214.

Markandya, Anil and González-Eguino, Mikel. "Integrated Assessment for Identifying Climate Finance Needs for Loss and Damage: A critical review." *Loss and Damage from Climate Change: Climate Risk Management, Policy and Governance*. Springer Open, 2019.

Martyr-Koller, Rosanne, et al. "Loss and damage implications of sea-level rise on Small Island Developing States." *Environmental Sustainability* 50 (2021): 245-529.

Mayer, Benoit. "The Relevance of the No-Harm Principle to Climate Change Law and Politics." *Asia-Pacific Journal of Environmental Law* 19 (2016): 79-104.

MDPI. *Environmental Pollution and Climate Change*. 2019. 1 September 2021. <[https://www.mdpi.com/journal/climate/special\\_issues/environment\\_pollution\\_climate\\_change#info](https://www.mdpi.com/journal/climate/special_issues/environment_pollution_climate_change#info)>.

Mechler, Reinhard, Swenia Surminski and et al. *Loss and Damage from Climate Change: Concepts, Methods and Policy options*. Springer Open, 2019.

Mengstie, Yitages. *The Legal Basis Of Reparation Claim For Climate Change Damage Under International Law: The Perspective Of Vulnerable Developing Countries*. Ethiopia: Addis Ababa University, 2010.

OHCHR. *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*", A/HRC/10/61. New York: United Nations, 2009.

- OpinioJuris. *The Historic Case of Teitiota: Climate-Induced Asylum and Its Future*. 2020. 1 February 2022. <<http://opiniojuris.org/2020/10/12/the-historic-case-of-teitiota-climate-induced-asylum-and-its-future/>>.
- Pacific Coastal and Marine Science Centre. *The Impact of Sea-Level Rise and Climate Change on Pacific Ocean Atolls*. 2020. 28 November 2021. <[Procedia: Social and Behavioural Sciences 156 \(2014\): 304-309.](https://www.usgs.gov/centers/pacific-coastal-and-marine-science-center/science/impact-sea-level-rise-and-climate-change#:~:text=Sea%20level%20in%20the%20western,to%202.0%20meters%20by%20100.>https://www.usgs.gov/centers/pacific-coastal-and-marine-science-center/science/impact-sea-level-rise-and-climate-change#:~:text=Sea%20level%20in%20the%20western,to%202.0%20meters%20by%20100.></a>>.</p>
<p>Palekienė, Oksana and Bruneckienė, Jurgita and Simanavičienė, Zaneta. )
- Peters, Anne. "The refinement of international law: from fragmentation to regime interaction and politicization." *International Journal of Constitutional Law* 15.3 (2017): 671-704.
- Ranger, Nicola et al. "Open questions about how to address 'loss and damage' from climate change in the most vulnerable countries: a response to the Cancún Adaptation Framework." 2011.
- Reuters. *Don't make them wait: Pressure grows at COP26 for new funding for climate change*. 7 November 2021. 20 November 2021. <<https://www.reuters.com/article/us-climate-un-finance-adaptation-idUSKBN2HT04V>>.
- Richards, Julie-Ann and Liane Schalatek. *Financing Loss and Damage: A look at governance and implementation options*. Washington: Heinrich Böll Stiftung North America, 2017.
- Roberts, Erin and Mark Pelling. "Climate change related loss and damage: translating the global policy agenda for national policy processes." *Climate and Development* 10.1 (2018): 4-17.
- Rosenblom, Ann-Charlotte. *Claiming State Responsibility for Climate Change Damages*. Lund: University of Lund, 2009.
- Russell, Miller. "Trail Smelter Arbitration." *Max Planck Encyclopedia of Public International Law*. 2007.
- Sands, Phillippe. "Climate change and the Rule of Law: Adjudicating the Future in International Law (public lecture)." 2015.
- Savaresi, Annalisa and Juan Auz. "Climate Change Litigation and Human Rights: Pushing the Boundaries." *Climate Law* (2019): 1-15.
- Shawoo, Zoha, Maltais, Aaron, Bakhtaoui, Ines, and Kartha, Sivan. *Designing a fair and feasible loss and damage finance mechanism*. Oxford: SEI, 2021.
- Simlinger F., Mayer B. *Legal Responses to Climate Change Induced Loss and Damage*. Ed. Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. Mechler R. Springer, 2019.
- Sint Maarten Trust Fund. *PJIAE N.V. and Ballast Nedam International Projects B.V. conducts official signing to signify the start of the Airport Terminal Reconstruction Project*. 2021. 20 December 2021. <<https://www.sintmaartenrecovery.org/official-signing-signify-start-airport-terminal-reconstruction-project>>.

- Stuart-Smith, Rupert.F., et al. "Filling the evidentiary gap in climate litigation." *Nature Climate Change* 11 (2021): 651-655.
- Subidiary Body on Implementation. "Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16." 2012. 30 October 2021. <[https://unfccc.int/sites/default/files/aosis\\_submission\\_on\\_loss\\_and\\_damage\\_submission\\_2\\_october\\_2012.pdf](https://unfccc.int/sites/default/files/aosis_submission_on_loss_and_damage_submission_2_october_2012.pdf)>.
- The World Bank. *Pacific Islands Take the Lead on Financial Protection from Disasters*. 31 March 2017. 22 April 2022. <<https://www.worldbank.org/en/news/press-release/2017/03/31/pacific-islands-take-the-lead-on-financial-protection-from-disasters>>.
- . *What is understanding risk?* n.d. 6 April 2022. <<https://www.understandrisk.org/about/>>.
- Tignino, Mara and Christian Brethaut. "The role of international case law in implementing the obligation not to cause significant harm." *International Environmental Agreements* 20 (2020): 631-648.
- Tokuç, Ayca. "Rio Declaration on Environment and Development (UN)." *Encyclopedia of Corporate Social Responsibility*. Ed. Capaldi N., Zu L., Gupta A.D Idowu S.O. Berlin: Springer-Verlag Berlin Heidelberg, 2013. 76 - 101.
- Toussaint, Patrick and Adrian Martinez Blanco. "A human rights-based approach to loss and damage under the climate change regime." *Climate Policy* 20.6 (2020): 743-757.
- Toussaint, Patrick. "Loss and damage and climate litigation: The case for greater interlinkage." *Review of European and International Environmental Law* 30 (2020): 16-33.
- UN . *United Nations Framework Convention on Climate Change*. New York: United Nations, 1992.
- UN. "Convention on International Liability for Damage Caused by Space Objects, London, Moscow, Washington 1972); adopted 29 March 1972, in force 1 September 1972." n.d.
- UN General Assembly. *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council", A/HRC/25/53, 2013*. New York: United Nations, 2013.
- UN Human Rights Committee. "Ioane Teitiota v. New Zealand (advance unedited version), CCPR/C/127/D/2728/2016." 2016.
- UN Human Rights Office of the Commissioner. *Special Rapporteur on human rights and the environment*. n.d. 13 April 2022. <<https://www.ohchr.org/en/special-procedures/sr-environment> >.
- UN. *Message on the 20th Anniversary of the entry into force of the United Nations Framework Convention on Climate Change*. Bonn: United Nations, 2014. 30 October 2021. <[https://unfccc.int/files/timeline/application/pdf/sg\\_unfccc\\_20th\\_en.pdf](https://unfccc.int/files/timeline/application/pdf/sg_unfccc_20th_en.pdf)>.
- UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS). *Small Island Developing States: In Numbers*. New York: United Nations, 2013.

UNDRR. *GAR Distilled: 2019 Global Assessment Report on Disaster Risk Reduction*. Geneva: United Nations, 2019.

UNEP. *Adaptation Gap Report 2020*. Nairobi: United Nations , 2021.

— . *What does COP26 mean for adaptation*. 2021. 5 December 2021. <<https://www.unep.org/news-and-stories/story/what-does-cop26-mean-adaptation#:~:text=Back%20in%202009%2C%20developed%20nations,US%20%2480%20billion%20in%202019.&text=The%20boost%20for%20adaptation%20funding,as%20one%20of%20COP26's%20successes.>>.

UNFCCC. "A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change." Note FCCC/SBI/2012/INF.14. 2012.

— . *Addendum: Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts*. New York: UNFCCC, 2021. FCCC/SB/2021/4/Add.1.

— . *AWG-LCA bodies page*. n.d. 1 February 2022. <<https://unfccc.int/awg-lca-bodies-page>>.

— . *Background and chronology of the Standing Committee on Finance, including updates from each annual Conference of the Parties*. n.d. 30 November 2021. <UNFCCC, "Background and chronology of the Standing Committee on Finance, including updates from each annual Conference of the Parties", n.d >.

— . *Chronology L&D Excom*. n.d. 22 December 2021. <<https://cop23.unfccc.int/process-and-meetings/bodies/constituted-bodies/wim-excom/chronology#eq-8>>.

— . *Decision -/CP.26, Glasgow Climate Pact*. New York: United Nations, 2021.

— . *Decision 1/CP.21, Adoption of the Paris Agreement*. New York: UNFCCC, 2015. FCCC/CP/2015/10/Add.1.

— . "Decision 3/CP.18, Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity." 2012. FCCC/CP/2012/8/Add.1.

— . "Decision 2/CP.19, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013." 2013.

— . *Elaboration of the sources of and modalities for accessing financial support for addressing loss and damage. Technical paper by the secretariat*. New York: UNFCCC, 2019. FCCC/TP/2019/1.

— . *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan: Submission from Parties*. New York: UNFCCC, 2008.

— . *Mechanisms to manage financial risks from direct impacts of climate change in developing countries: A technical paper FCCC/TP/2008/9*. . New York: United Nations, 2008.

— . "Note by the Secretariat at 4.-5, 37th Sess Nov 26-Dec 1." 2012.

- *Paris Agreement to the United Nations Framework Convention on Climate Change*. New York: UNFCCC, 2015.
  - *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Decision 1/CP.13*. New York: United Nations, 2008.
  - *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*. New York: UNFCCC, 2015. FCCC/CP/2015/10.
  - *Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts FCCC/SB/2021/4*. New York: UNFCCC, 2021.
  - *Stats of Ratification*. New York: United Nations, 2009.
  - "Submission of Nauru on behalf of The Alliance of Small Island States: Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16." 2012.
  - *Subsidiary Body for Implementation*. n.d. 8 February 2022. <<https://unfccc.int/process/bodies/subsidiary-bodies/sbi>>.
  - *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*. New York: UNFCCC, 2010.
  - *Workplan-Executive Committee of the Warsaw International Mechanism for Loss and Damage*. n.d. 29 November 2021. <<https://unfccc.int/process/bodies/constituted-bodies/executive-committee-of-the-warsaw-international-mechanism-for-loss-and-damage-wim-excom/workplan>>.
- UNFCCC, Subsidiary body for implementation. "A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change." Note by the Secretariat. 2012. 23 September 2021.
- UNGA. " 2198 (XXI) 16 December 1966 Protocol relating to the Status of Refugees." n.d.
- UNHCR. *The 1951 Refugee Convention*. n.d. 1 February 2022. <<https://www.unhcr.org/1951-refugee-convention.html>>.
- UNICEF. *Preparing social protection systems for shock response*. Geneva: UNICEF, Europe and Central Asia Regional Office, 2021.
- *Process review of the UNICEF-WFP Joint Emergency Cash Transfer (JECT) Programme in Dominica: Final Report*. Bridgetown: UNICEF Office for the Eastern Caribbean Area, 2018.
- United Nations. *Agenda 21 : programme of action for sustainable development, Rio Declaration on Environment and Development, statement of forest principles*. A/CONF.151/26/Rev.1. New York: United Nations, 1992.
- United Nations. "Declaration of the United Nations Conference on the Human Environment." 1972.

- United Nations Economic Commission for Latin America and Caribbean. *Irma and Maria by Numbers*. Port of Spain: UNECLAC Subregional Headquarters for the Caribbean, 2018.
- United Nations Environment Programme. *Liability & Compensation Regimes Relating to Environmental Damage: A Review*. Nairobi: UNEP, 2003.
- United Nations General Assembly. *Report of the Global Conference on the Sustainable Development of Small Island Developing States*. Bridgetown, 1994. 26 September 2021. <[https://www.un.org/esa/dsd/dsd\\_aofw\\_sids/sids\\_pdfs/BPOA.pdf](https://www.un.org/esa/dsd/dsd_aofw_sids/sids_pdfs/BPOA.pdf)>.
- United Nations. "International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (London)); adopted 3 May 1996, but not yet in force,." n.d.
- United Nations Office for Disaster Risk Reduction. *Hyogo Framework for Action*. n.d. 20 December 2021. <<https://www.preventionweb.net/sendai-framework/Hyogo-Framework-for-Action>>.
- . *Our Work*. n.d. 22 December 2021. <<https://www.undrr.org/about-undrr/our-work>>.
- United Nations. *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados A/CONF.167/9*. United Nations: New York, 1994.
- . *Report of the International Law Commission: Sixty-first session (4 May-5 June and 6 July-7 August 2009) A/64/10*. New York: United Nations, 2009.
- . *Universal Declaration of Human Rights*. New York: United Nations, 1948.
- UNOCHR. *Hurricane Irma: Regional Response Plan For The Caribbean Region (September to December 2017)*. New York: United Nations, 2017.
- UNOHRLLS. "Small Island Developing States in numbers: climate change edition." 2015.
- Vanhala, Lisa and Cecilie Hestbaek. "Framing Climate Change Loss and Damage in UNFCCC Negotiations." *Global Environmental Politics* 16.2 (2016): 111-129. 20 October 2021. <[https://www.researchgate.net/publication/309306910\\_Framing\\_Climate\\_Change\\_Loss\\_and\\_Damage\\_in\\_the\\_UNFCCC\\_Negotiations](https://www.researchgate.net/publication/309306910_Framing_Climate_Change_Loss_and_Damage_in_the_UNFCCC_Negotiations)>.
- Verheyen, Roda and Peter Roderick. "Beyond Adaptation: The legal duty to pay compensation for climate change damage." 2008.
- Voigt, Christina. "'State responsibility for damages associated with climate change.'" *Research Handbook on Climate Change Law and Loss & Damage*. Ed. Meinhard Doelle and Sara L. Seck. Edward Elgar Publishing, 2021.
- Wagner, Wagner and Donald M. Goldberg. "An Inuit Petition To The Inter-American Commission On Human Rights Of Climate Change ." 2015.
- Watson, Charlene and Liane Schalatek. *Climate finance regional briefing: small island developing states*. Washington DC: Heinrich Böll Stiftung Washington, 2021.

World Food Programme. *2020- R4 Rural Resilience Initiative Factsheet*. July 2021. 20 December 2021. <<https://www.wfp.org/publications/2020-r4-rural-resilience-initiative-factsheet>>.

WWF. "Beyond Adaptation: The legal duty to pay compensation for climate change damage." 2008. 15 October 2021.

Yamineva, Yulia. "A Legal Perspective on Climate Finance Debates: How Constructive Is the Current Norm Ambiguity?" *Debates in climate law*. Ed. Benoit Mayer and Alexander Zahar. Cambridge University Press, 2021. 365-378.

Zahar, Alexander. *Climate Change Finance and International Law*. Taylor and Francis Group, 2016. Proquest Ebook Central. 13 September 2021. <<https://ebookcentral-proquest-com.ezproxy.uef.fi:2443/lib/uef-ebooks/detail.action?docID=4756234>>.