
11. A rights-based approach to loss and damage due to climate change

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1. INTRODUCTION

It is now well recognized that anthropogenic climate change is causing harm to populations around the world. If not abated, the effects of climate change will continue to grow in severity and scope. The Intergovernmental Panel on Climate Change (IPCC) predicts with high confidence that projected trends of climate change will increase the number of people suffering death, disease, hunger, malnutrition and injury from heat waves, floods, storms, fires and droughts, resulting in devastating loss and damage to communities and ecosystems across the world.¹ Moreover, the IPCC has concluded that ‘people who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable’ to the detrimental effects of climate change due to their lower adaptive capacities.²

In response to these threats, there has been a sustained effort on the part of climate activists, lawyers and experts to respond to climate change on the basis that it violates human rights.³ In 2005 Watt-Cloutier, the Chair of the Inuit Circumpolar Conference, brought a petition to the Inter-American Commission on Human Rights (IACHR) against the United States on behalf of the Inuit of Canada and the United States. The petition argued that greenhouse gases emitted by the United States were already having a dangerous impact on the Inuit and other people in the Arctic, and that projected impacts would be far worse.⁴ It further argued that ‘[m]any of the dangers currently facing the Inuit – retreat of protective sea ice, impaired access to vital resources, loss of homes and other infrastructure – rise to the level of human rights viola-

¹ Martin Parry and others (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability* (Intergovernmental Panel on Climate Change, Cambridge University Press 2007); JT Houghton and others (eds), *Climate Change - The IPCC Scientific Assessment* (Intergovernmental Panel on Climate Change, World Meteorological Organization, United Nations Environment Programme, Cambridge University Press 1990). See also Hans Joachim Schellnhuber and others (eds), *Avoiding Dangerous Climate Change* (Cambridge University Press 2006); Neil Adger and others, ‘Cultural Dimensions of Climate Change Impacts and Adaptation’ (2013) 3(2) *Nature Climate Change* 112.

² Rajendra K Pachauri and others (eds), *Climate Change 2014: Synthesis Report Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Intergovernmental Panel on Climate Change 2014) 54, 151.

³ Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (1st edn, Routledge 2017).

⁴ ‘Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States’ (7 December 2005) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf> accessed 15 February 2021 (IACHR Inuit Petition). See also Meinhard Doelle, ‘From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law’ (Doctor in the Science of Law, Dalhousie University 2005) 281, for a general account on the viability of human rights claims under the IAHR regime.

tions'.⁵ Although the petition was ultimately deemed inadmissible by the IACHR, it generated an influential understanding of climate change as a human rights issue that has inspired climate advocacy, policy and litigation around the world.⁶

While the human rights dimensions of climate change have primarily been discussed in relation to mitigation and adaptation, much less has been written about the interlinkages between human rights and loss and damage due to climate change.⁷ In this chapter, we argue that a human rights-based approach should play a greater role in the development and implementation of policies in the field of loss and damage.⁸ We contend that a framework focused on human rights opens the door for a broader, more transformational answer to loss and damage, capable of addressing underlying causes and vulnerabilities that increase risk. Section 2 of this chapter provides a brief overview of the relationship between human rights and climate change in international law. Next, in section 3, we discuss the extent to which ongoing discussions relating to loss and damage within the United Nations Framework Convention on Climate Change (UNFCCC) have addressed or could address human rights principles and standards. In section 4 we outline a rights-based approach to loss and damage, examining the use of a human rights framework for risk evaluation and transfer processes; the assessment of loss and damage, including non-economic loss and damage; the attribution of responsibility; and the identification of appropriate remedies for harms suffered on the basis of existing domestic and international law. We conclude by discussing the potential and limitations of employing a rights-based approach to loss and damage and offer recommendations as to how such approaches should evolve with the law in the future.

2. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

In the past 15 years, numerous linkages have emerged between the fields of human rights and climate change. In what follows, we review how climate change has been addressed under international human rights law and assess how human rights principles are increasingly integrated into the field of climate governance.

⁵ IACHR Inuit Petition (n 4).

⁶ Sébastien Jodoin, Shannon Snow and Arielle Corobow, 'Realizing the Right to Be Cold? Tracing the Impact of the 2005 Inuit Petition on Human Rights and Climate Justice' (2020) 54(1) *Law & Society Review* 168. See also IACHR Inuit Petition (n 4).

⁷ Notable exceptions include: Sven Harmeling, 'Climate Change Impacts: Human Rights in Climate Adaptation and Loss and Damage' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2017) 90–109; Patrick Toussaint and Adrian Martínez Blanco, 'A Human Rights-based Approach to Loss and Damage under the Climate Change Regime' (2019) *Climate Policy* 1. For an early exploration of the issue, see Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Carswell 2005).

⁸ We focus specifically on how a human rights approach should inform state responsibility for loss and damage. For more on the human rights obligations of private actors in this context, see Chapter 20, Benjamin.

2.1 Climate Change and International Human Rights Law

Within the United Nations human rights system, several bodies, experts and organizations have recognized the importance of human rights for understanding and responding to climate change. Since 2008, the United Nations Human Rights Council (UNHRC) has adopted nine resolutions on human rights and climate change. In what follows, we will briefly highlight the most significant of these resolutions. In 2009, in Resolution 10/4, the UNHRC noted that

climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation and in no case may a people be deprived of its own means of subsistence.⁹

In doing so, the Council also recognized that climate change has disproportionate impacts for certain communities that are already vulnerable due to systemic factors such as geography, poverty, gender, age, race and disability.¹⁰ In 2011, in Resolution 18/22, the UNHRC affirmed that ‘human rights obligations, standards and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes’.¹¹ In 2014, in Resolution 26/27, the Council emphasized the importance of international dialogue and cooperation, including through capacity-building, finance and technology transfer, to address the adverse impact of climate change on the enjoyment of human rights in developing countries.¹² Finally, through a series of resolutions adopted from 2016 to 2019, the UNHRC has recognized the importance of protecting and promoting the rights of children, migrants and displaced persons, women and persons with disabilities in the context of climate change.¹³

The UNHRC has also requested that the Office of the United Nations High Commissioner for Human Rights (OHCHR) produce analytical studies on different aspects of the relationship between international human rights law and climate change. The first of these reports emphasizes that ‘a human rights approach in preventing and responding to the effects of climate change serves to empower individuals and groups, who should be perceived as active

⁹ UNHRC, *Human Rights and Climate Change* (10th Session A/HRC/RES/10/4 2009) Preamble.

¹⁰ Ibid.

¹¹ UNHRC, *Human Rights and Climate Change* (18th Session A/HRC/RES/18/22 2011) Preamble.

¹² UNHRC, *Human Rights and Climate Change* (26th Session A/HRC/RES/26/27 2014) para 5.

¹³ See, for example, UNHRC, *Rights of the Child: Empowering Children with Disabilities for the Enjoyment of Their Human Rights, Including Through Inclusive Education* (40th Session A/HRC/40/L.20/Rev.1 2019); UNHRC, *Recognizing the Contribution of Environmental Human Rights Defenders to the Enjoyment of Human Rights, Environmental Protection and Sustainable Development* (40th Session A/HRC/40/L.22/Rev.1 2019), on the rights of children. See UNHRC, *Human Rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants* (34th Session A/HRC/RES/34/21 2017), on the rights of migrants. See United Nations Security Council (UNSC), *Adopted by the Security Council at its 8514th Meeting, on 23 April 2019* (S/RES/2467 2019); UNSC, *Adopted by the Security Council at its 8649th Meeting, on 29 October 2019* (S/RES/2493 2019), on the rights of women. See UNHRC, *Rights of Persons with Disabilities – Report of the Special Rapporteur on the Rights of Persons with Disabilities* (43rd Session A/HRC/43/41 2020); UNHRC, *Rights of Persons with Disabilities – Note by the Secretary-General* (74th Session A/74/186 2019), on the rights of persons with disabilities.

agents of change and not as passive victims'.¹⁴ In addition, the report identifies the risk that certain climate policies could impinge on human rights¹⁵ and thus stresses that 'human rights standards and principles should inform and strengthen policy measures in the area of climate change'.¹⁶ While the report concludes that the impacts of climate change negatively affect the enjoyment of human rights, it stops short of affirming that these impacts can in and of themselves be defined as a violation of human rights under international law:

The physical impacts of global warming cannot easily be classified as human rights violations, not least because climate change-related harm often cannot clearly be attributed to acts or omissions of specific States. Yet, addressing that harm remains a critical human rights concern and obligation under international law. Hence, legal protection remains relevant as a safeguard against climate change-related risks and infringements of human rights resulting from policies and measures taken at the national level to address climate change.¹⁷

In subsequent studies the OHCHR specifically addressed the right to health, children's rights, gender inclusion and disability rights in the context of climate change. These studies provide an overview of the multifaceted human rights impacts of climate change for the health and safety of populations, including those stemming from heat waves and increases in temperature, air pollution, extreme weather events and natural disasters, expansion of vector-borne and infectious diseases, threats to food security, water scarcity, impacts on mental health and indirect effects on displacement, forced migration and armed conflicts.¹⁸

The studies also provide the main elements of a rights-based approach to climate governance. First, such an approach should ensure that climate policies and programmes in the field of mitigation and adaptation aim to realize human rights and abide by all relevant international human rights obligations and standards. In doing so, it is important to consider the rights and special circumstances of certain groups whose rights are disproportionately affected by climate change.¹⁹ Second, a rights-based approach seeks to empower rights-holders and strengthen their capacity to participate in decision-making processes that concern them, and to access justice in cases where their rights have been undermined. This requires that states adopt measures that provide affected communities 'with effective remedies when they suffer harm

¹⁴ Office of the High Commissioner of Human Rights (OHCHR), *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, (10th Session A/HRC/10/61 2009) para 94.

¹⁵ Ibid paras 65–68.

¹⁶ Ibid para 80.

¹⁷ Ibid para 96.

¹⁸ See OHCHR, *Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone to The Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (33rd Session A/HRC/32/23 2016); OHCHR, *Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights of the Child* (35th Session 2017); OHCHR, *Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women* (41st Session A/HRC/41/26 2019); OHCHR, *Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change* (44th Session A/HRC/44/30 2020).

¹⁹ See, for example, OHCHR, *Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women* (n 18) para 5; OHCHR, *Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities* (n 18) para 7.

from climate action and inaction'.²⁰ Third, a rights-based approach stresses the importance of clarifying the obligations of governments and private actors in terms of respecting, protecting and fulfilling human rights in the context of climate impacts, including through their duties to provide international cooperation, assistance and capacity-building.²¹

In addition, human rights treaty bodies – such as those of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child – have identified and addressed issues relating to climate change in the interpretation and application of their mandates.²² Drawing on the work of these bodies, David Boyd, the Special Rapporteur on human rights and the environment, issued a report in 2019 that clarified the procedural and substantive obligation of states in relation to climate change (see Table 11.1 below).²³ It should be noted that in addition to these, states owe special obligations towards those in vulnerable situations, namely women, children, young people, Indigenous peoples and local communities, persons living in poverty, persons with disabilities, older persons, migrants, displaced people and other potentially at-risk communities.²⁴

Multiple regional human rights bodies have also addressed the issue of climate change.²⁵ Two developments are worth mentioning here. First, the African Commission on Human and Peoples' Rights has adopted several resolutions on the relationship between climate change and human rights. In a 2009 resolution, the Commission urged the Assembly of Heads of State and Government of the African Union 'to ensure that human rights standards, safeguards, such as the principle of free, prior and informed consent, be included in any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations'.²⁶ It also called for the inclusion of measures to protect vulnerable groups such as children, women, Indigenous groups, the elderly and victims of natural disasters and conflicts in any international agreement on climate change.²⁷ In a subsequent 2016 resolution, the Commission urged member states to strengthen regional and international cooperation in order to achieve comprehensive climate action to

²⁰ See OHCHR, *Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone* (n 18) paras 47–50; OHCHR, *Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights of the Child* (n 18) para 45; OHCHR, *Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change* (n 18) paras 9–41.

²¹ OHCHR, *Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone* (n 18) para 46; OHCHR, *Analytical Study on Gender-Responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women* (n 18) para 45.

²² OHCHR, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change* (Special Procedures of the United Nations Human Rights Council 2014).

²³ United Nations General Assembly, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment* (74th Session A/74/161 2019) paras 62–70.

²⁴ *Ibid* para 61.

²⁵ For a more thorough review, see Sumudu Atapattu, 'Climate Change under Regional Human Rights Systems' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 128.

²⁶ African Commission on Human and Peoples' Rights (ACHPR), *Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa* (46th Session ACHPR/RES 153 2009) para 1.

²⁷ *Ibid* para 2.

Table 11.1 State Obligations to Protect Human Rights from Environmental Harm Identified by the Special Rapporteur on Human Rights and Environment

Type of Obligation	Identified Obligations
Procedural	<p>Provide the public with accessible, affordable and understandable information regarding causes and consequences of climate change by incorporating climate change into the educational curriculum at all levels.</p> <p>Enable affordable and timely access to justice, as well as effective remedies for everyone to hold states and businesses accountable for fulfilling their climate change obligations.</p> <p>Assess the potential climate change and human rights impacts of all plans, policies and proposals, including both upstream and downstream effects of emissions.</p> <p>Integrate gender equality into all climate actions, enabling women to play leadership roles.</p> <p>Respect the rights of Indigenous peoples in all climate actions, particularly their right to free, prior and informed consent.</p> <p>Provide strong protection for environmental human rights defenders working on all climate-related issues, from land use to fossil fuels, especially from harassment, intimidation and violence.</p>
Substantive	<p>Not violate the right to a safe climate through their own actions or the actions of third parties, especially businesses.</p> <p>Establish, implement and enforce laws, policies and programmes to fulfil that right.</p> <p>Ensure policy decisions avoid discrimination and retrogressive measures.</p> <p>Cooperate and allocate the maximum available resources to achieve a low-carbon, climate-resilient and sustainable future. This entails sharing information; the transfer of zero-carbon, low-carbon and high-efficiency technologies from wealthy to less wealthy states; building capacity; increasing spending on research and development related to the clean energy transition; honouring international commitments; and ensuring fair, legal and durable solutions for migrants and displaced persons.</p> <p>Wealthy states in particular must contribute their fair share towards the costs of mitigation and adaptation in low-income countries, in accordance with the principle of common but differentiated responsibilities.</p>

Source: United Nations General Assembly, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment* (74th Session A/74/161 2019) paras 62–70.

safeguard the human rights of African people. This resolution also included reference to the need for special measures to protect vulnerable groups.²⁸

Similarly, in 2017, the Inter-American Court of Human Rights published a landmark Advisory Opinion on the Environment and Human Rights that provides detailed guidance on the interaction of international human rights law and international environmental law. In its opinion, the Court recognizes the existence of a right to a healthy environment under the American Convention on Human Rights and interprets this right as encompassing a duty to prevent transboundary environmental harm.²⁹

²⁸ ACHPR, *Resolution on Climate Change and Human Rights in Africa* (58th Session ACHPR/RES 34 2016).

²⁹ Inter-American Court of Human Rights (IACHR), ‘Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)’ (in Spanish, Advisory Opinion OC-23/17 2017) <www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf> accessed 4 August 2020.

2.2 Human Rights and International Climate Law and Governance

Further linkages have been established between human rights and climate change in the field of climate law and governance. Using similar language, governments have acknowledged the importance of human rights in the decisions and agreements adopted under the UNFCCC. The preamble to the 2010 Cancun Agreements, for example, was one of the first to acknowledge the ‘direct and indirect’ implications of climate change on human rights and its acute effects on populations that are already vulnerable due to their geographic location, ethnicity, gender and age.³⁰ The Agreements further stated that ‘Parties should, in all climate change-related actions, fully respect human rights’.³¹ Importantly, however, the COP did not elaborate on how countries should fulfil these goals. Since 2010, many scholars, civil society actors and practitioners have called on the COP to incorporate human rights considerations into its decisions and agreements.

More recently, the preamble to the 2015 Paris Agreement acknowledges that

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.³²

Beyond the formal decisions of the UNFCCC, numerous governments have also adopted declarations recognizing the importance of human rights for climate change. In February 2015, 18 countries pledged to promote and protect human rights in climate action by signing the Geneva Pledge on Human Rights and Climate Action.³³ The pledge is a voluntary initiative undertaken by countries to facilitate the sharing of best practices and knowledge between human rights and climate experts at the national level.

In addition, policy-level decisions that reflect domestic action on climate change – whether through adaptation or mitigation – may also reflect human rights principles. In relation to adaptation, a number of UN Special Rapporteurs have further expanded upon the measures that states should take to protect human rights in the context of climate-related disasters and slow-onset degradation. These include obligations around urban planning and warning systems, displacement and resettlement and access to food.³⁴ In relation to mitigation, for example, the former Special Rapporteur on Adequate Housing asserted that ‘human rights standards require all countries to seek to reduce their harmful emissions to the global atmosphere, with a view to reducing their negative effect on the enjoyment of human rights’.³⁵

³⁰ UNFCCC, Conference of the Parties, Adoption of the Cancun Agreement, UN Doc FCCC/CP/2016 (4 December 2010) Preamble.

³¹ *Ibid* para 8.

³² UNFCCC, *Conference of the Parties, Adoption of the Paris Agreement* (21st Session FCCC/CP/2015/L.9/Rev.1 12 December 2015) Preamble.

³³ ‘Geneva Pledge on Human Rights and Climate Action announced’ (*Mary Robinson Foundation*, 13 February 2015) <<http://www.mrfcj.org/resources/geneva-pledge-human-rights/>> accessed 8 July 2020.

³⁴ UNEP, *Climate Change and Human Rights* (2015) 22.

³⁵ Raquel Rolnik, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context* (United Nations A/HRC/10/7 4 February 2009) 45.

Finally, human rights standards have also been integrated into numerous multilateral, bilateral and non-governmental initiatives relating to climate change, as well as in the design and implementation of climate mitigation and adaptation policies and programmes. For instance, the rights of Indigenous peoples and local communities have been recognized in varying degrees in the safeguards developed by the UNFCCC, international organizations and non-governmental certification programmes to govern REDD+ activities, which aim to channel international funding to reduce carbon emissions from forest-based sources in developing countries.³⁶ Under the Cancun Agreements adopted through the UNFCCC, developing countries that develop and implement REDD+ activities must provide information on '[r]espect for the knowledge and rights of indigenous peoples and members of local communities' and '[t]he full and effective participation of relevant stakeholders'.³⁷ While far from perfect vehicles for protecting Indigenous rights,³⁸ the creation of these safeguards may be seen as reflecting an emerging global practice to the effect that climate action should be consistent with, and not undermine, human rights.

2.3 A Human Rights Framework for Climate Change

In our view, these developments offer insight into what a human rights approach to climate change should reflect. Foremost, a rights-based approach to climate governance centres the human rights of individuals and communities in the development and implementation of climate policies and practices by identifying the entitlements of rights-holders and the corresponding obligations and duties incumbent upon states and other actors. Although there is no single definition of a human rights-based approach, we can identify several key principles that underpin the framework – namely, participation, accountability and transparency, non-discrimination and equality, empowerment of rights-holders and legality.³⁹ These principles are interlinked, and each is grounded in international law.⁴⁰ Specifically, we contend that this involves both procedural and substantive obligations on the part of state actors. According to UNEP (2015), states should ensure that communities are '(i) adequately informed about the impacts of climate change and the measures undertaken to both mitigate and adapt to

³⁶ Sébastien Jodoin, *Forest Preservation in a Changing Climate: REDD+ and Indigenous and Community Rights in Indonesia and Tanzania* (Cambridge University Press 2017) 1, 60, 189–98.

³⁷ See language in UNFCCC, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (Decision 1/CP.16) Appendix 1 para 2(c), (d).

³⁸ See, for example, Mucahid Mustafa Bayrak and Lawal Mohammed Marafa, 'Ten Years of REDD+: A Critical Review of the Impact of REDD+ on Forest-Dependent Communities' (2016) 8(7) *Sustainability* 620; Susan Chomba and others, 'Roots of Inequity: How the Implementation of REDD+ Reinforces Past Injustices' (2016) 50 *Land Use Policy* 202.

³⁹ These principles are known by some as the PANEL principles (see, for example, 'Human Rights-Based Approach' (European Network of National Human Rights Institutions 2016) <<http://ennhri.org/Applying-a-Human-Rights-Based-Approach>> accessed 11 July 2020). While the contours of human rights-based approaches vary somewhat depending on the activity or process to which they are applied, the PANEL principles generally capture the essence of what such an approach entails. See also Toussaint and Blanco (n 7) 2.

⁴⁰ UNHRC, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (35th Session A/HRC/37/59 2018).

climate change; (ii) adequately involved in public decisions about climate change; and (iii) given access to administrative, judicial, and other remedies when rights are violated as a result of climate change and responses to it'. Substantively, governments must ensure that they '(i) protect human rights from climate-related harms; (ii) respond to the core drivers of climate change by regulating GHG emissions within their jurisdiction; (iii) cooperate internationally to protect human rights against climate-related harms; (iv) address the transboundary impacts of climate change; and (v) safeguard human rights in all mitigation and adaptation activities'.⁴¹ These obligations will guide our analysis below. In the next sections we introduce the concept of loss and damage, then discuss how a human rights-based approach might be used to address it.

3. NEGOTIATIONS OVER LOSS AND DAMAGE UNDER THE UNFCCC

In the past decade there have been steady developments concerning loss and damage within the UNFCCC climate negotiations.⁴² The initial UNFCCC Work Programme on loss and damage was established in 2009 at COP16 in Cancun, where parties recognized the need to strengthen international cooperation and expertise in order to understand and reduce loss and damage. The Work Programme also established approaches to address loss and damage in developing countries particularly vulnerable to the adverse effects of climate change.⁴³ At COP17, Parties agreed to continue technical work in three thematic areas and to pursue a set of activities under each thematic area. Parties also presented the need to explore a range of approaches and mechanisms, including an 'international mechanism' to address loss and damage. At COP18, Parties again acknowledged the necessity of strengthening institutional arrangements at all levels and decided to establish institutional arrangements and mechanisms to address loss and damage, particularly in vulnerable developing countries. This decision also mandated the establishment of such 'institutional arrangements and its functions and modalities' at COP19.⁴⁴

In 2013, at COP19, the UNFCCC responded to these calls and established the Warsaw International Mechanism (WIM) to respond to loss and damage in the Global South, as well as the Executive Committee (ExCom) of the WIM to guide its implementation.⁴⁵ The ExCom has three functions: (i) to enhance knowledge and understanding of comprehensive risk management approaches to address loss and damage; (ii) to strengthen dialogue, coordination,

⁴¹ UNEP (n 34) ix.

⁴² Erin Roberts and Sumaya Ahmed Zakieldean, *Pocket Guide to Loss and Damage under the UNFCCC* (ECBI 2018).

⁴³ Decision 1/CP.16 (n 37) 6 paras 25–26.

⁴⁴ UNFCCC, *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* (Decision 3/CP.18).

⁴⁵ UNFCCC, *Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts* (Decision 2/CP.19). Under decision 2/CP.19, parties agreed to promote the 'implementation of approaches to address loss and damage' by increasing knowledge and understanding; strengthening dialogue amongst stakeholders; and enhancing action and support, including finance and technology. See also Linda Siegele, 'Loss and Damage (Article 8)' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 224, 225; UNFCCC, *Work Programme on Loss and Damage* (Decision 7/CP.17).

coherence, and synergies among relevant stakeholders; and (iii) to enhance action and support, including finance, technology and capacity-building, to address the problem.⁴⁶

The current work plan has five strategic workstreams that address loss and damage associated with climate change impacts. These include: (i) slow-onset events; (ii) non-economic losses; (iii) comprehensive risk management approaches; (iv) human mobility; and (v) action and support.⁴⁷ To date, the WIM ExCom has produced a number of concrete outcomes that have progressed work on loss and damage, including the establishment of the Fiji Clearinghouse for Risk Transfer, a Task Force on Displacement and an expert group on non-economic losses. The ExCom has also developed knowledge products focused on organizations working on slow-onset events, financial instruments to address the risk of loss and damage and challenges, risks and lessons learned in addressing non-economic loss and damage.⁴⁸

The work of the WIM is anchored in Article 8 of the 2015 Paris Agreement, which serves as ‘direct confirmation that the WIM would continue to exist’.⁴⁹ The article recognizes the importance of addressing loss and damage, and not merely averting and minimizing it; however, it should be noted that the provision focuses explicitly on risk and does not address permanent and irreversible loss and damage associated with climate change.⁵⁰ A handful of provisions in Article 8 are action-oriented, including the establishment of a clearing house on risk transfer, a task force on climate change-related displacement and an obligation to enhance understanding, action and support taking into account the areas listed in Article 8.4, which include early warning systems, emergency preparedness and non-economic losses.⁵¹

Progress on loss and damage is in its early stages, and success will depend on political will. According to Siegele, ‘it is too early to determine whether the loss and damage provisions of the Paris Agreement will deliver on climate justice for the most vulnerable – and the answer may well depend on the mitigation and adaptation efforts the Paris Agreement is able to mobilize’.⁵²

Despite the growing recognition of their importance in efforts to combat climate change, human rights have received little attention in discussions relating to loss and damage under the UNFCCC. The OHCHR has recognized that loss and damage involves ‘not only the immediate impact of climate change but also its long-term impact on development, the ability of States to promote and protect human rights, and the availability of development assistance following losses related to climate change’, recommending the improvement of institutional arrangements and increased financing for the WIM.⁵³ The UN Special Rapporteur on the Right to Food has also noted the ‘long-term and deeper impacts on food insecurity’ caused by

⁴⁶ Siegele (n 45) 234. See also Decision 2/CP.19 (n 45). See also Roberts and Zakieldein (n 42).

⁴⁷ United Nations, ‘Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM)’ <<https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage-ld/warsaw-international-mechanism-for-loss-and-damage-associated-with-climate-change-impacts-wim>> accessed 16 July 2020.

⁴⁸ Siegele (n 45) 235. See also Adelle Thomas, Inga Meke and Olivia Serdeczny, ‘Loss and Damage Costing and Financing Mechanisms: Caribbean Outlook’ (Climate Analytics IMPACT Report 2018) 3.

⁴⁹ Siegele (n 45) 229.

⁵⁰ Ibid 228.

⁵¹ Ibid 230, 233.

⁵² Ibid 237–38. For a more in depth discussion of the evolution of loss and damage under the UNFCCC, see Chapters 5, Siegele and Chapter 6, Siegele.

⁵³ UNHRC, *Summary of the Panel Discussion on Human Rights, Climate Change, Migrants and Persons Displaced Across International Borders* (37th Session A/HRC/37/35 2017) para 58.

climate change, calling for increased finance for developing countries to tackle adaptation and loss and damage.⁵⁴ However, to date there have been no explicit references to human rights in any of the COP decisions on loss and damage.⁵⁵

This general lack of concern for human rights within the loss and damage framework is all the more surprising given that the ExCom is addressing issues that are clearly amenable to a human rights approach. For instance, Action Area 1 of the ExCom's initial two-year work-plan mandates that the ExCom enhance

understanding of how loss and damage associated with the adverse effects of climate change affect particularly vulnerable developing countries, segments of the population that are already vulnerable owing to geography, socioeconomic status, livelihoods, gender, age, indigenous or minority status or disability, and the ecosystems that they depend on, and of how the implementation of approaches to address loss and damage can benefit them.⁵⁶

Similarly, the issue of climate-induced displacement and migration falls within the mandate of the WIM and entails obvious human rights concerns. The ExCom's initial two-year work-plan included Action Area 6 on '[e]nhanc[ing] the understanding of and expertise on how the impacts of climate change are affecting patterns of migration, displacement and human mobility',⁵⁷ while the ExCom's five-year rolling workplan includes '[e]nhanced cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation' among its five strategic workstreams.⁵⁸ The ExCom's Task Force on Displacement considers displacement and migration – issues that engage a range of human rights implications. As Thomas notes, '[t]he threat that climate change presents to human rights is amplified for displaced persons', who are 'highly vulnerable to exploitation, abuse and other human rights violations, including lack of access to adequate shelter, food, safe drinking water, healthcare and education'.⁵⁹

⁵⁴ UNHRC, 'Report of the Special Rapporteur on the Right to Food' (37th Session A/HRC/37/61 2018) para 107.

⁵⁵ Harmeling (n 7) 99. Note however that a technical paper on non-economic losses, prepared at the request of the Conference of the Parties, does address rights to some extent, including the right to life and the right to self-determination; see UNFCCC, *Non-Economic Losses in the Context of the Work Programme on Loss and Damage: Technical paper* (FCCC/TP/2013/2). Another technical paper addresses gaps in existing institutional arrangements to address loss and damage also makes note of climate change impacts on human rights (UNFCCC, *Gaps in Existing Institutional Arrangements Within and Outside of the Convention to Address Loss and Damage, Including Those Related to Slow Onset Events: Technical paper* (FCCC/TP/2013/12)).

⁵⁶ UNFCCC, *Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts* (FCCC/SB/2014/4, 24 October 2014) 7.

⁵⁷ Ibid 11.

⁵⁸ UNFCCC, *Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts Addendum* (Forty-Seventh Session Bonn, 6–15 November 2017, FCCC/SB/2017/1/Add.1) 13.

⁵⁹ Alice Thomas, 'Human Rights and Climate Displacement and Migration' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 110. See also Sébastien Jodoin, Kathryn Hansen and Caylee Hong, 'Displacement Due to Responses to Climate Change: The Role of a Rights-based Approach' in Benoît Mayer and François Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law* (Edward Elgar Publishing 2017) 205–37.

This relative lack of attention to human rights in the sphere of loss and damage, despite clear overlaps with the mandate of the ExCom, may be due to the fact that human rights impacts tend to be associated with non-economic loss and damage, which is difficult to measure and has frequently been left out of estimates of climate risk and cost.⁶⁰ It may also be due to the ambiguity that has surrounded the concept of loss and damage. While there is no formal definition of loss and damage under the UNFCCC, the concept is frequently defined as those climate change impacts that have not been avoided through mitigation and adaptation.⁶¹ This definition is not without controversy, however, as the line between those impacts that fall on the continuum of adaptation and those that are ‘beyond adaptation’ continues to be disputed.⁶²

It is also likely that human rights principles have largely been excluded from the loss and damage discussion because they remain controversial among some states in the international climate regime.⁶³ In particular, states are reluctant to integrate human rights in the negotiations over loss and damage in the UNFCCC due to concerns over state responsibility. This is a general concern of developed countries with respect to loss and damage more broadly: developed states have taken pains to limit discussions of liability and compensation, instead seeking to frame the issue as a matter of risk management or adaptation.⁶⁴ Conversely, the application of a human rights framework entails both rights-holders and duty bearers, as well as a range of remedies when rights are violated and duty bearers fail to fulfill their obligations (see section 4.3 below).⁶⁵

4. ADOPTING A RIGHTS-BASED FRAMEWORK TO LOSS AND DAMAGE FOR CLIMATE CHANGE

As discussed above, a rights-based approach to climate governance centres the human rights of individuals and communities in devising and implementing responses to climate change.

⁶⁰ Olivia Serdeczny, Eleanor Waters and Sander Chan, ‘Non-Economic Loss and Damage: Addressing the Forgotten Side of Climate Change Impacts – Briefing Paper’ (German Development Institute 2016); David J Wrathall and others, ‘Problematising Loss and Damage’ (2015) 8(2) *International Journal of Global Warming* 274; Samuel Fankhauser and Simon Dietz, ‘Non-economic Losses in the Context of the UNFCCC Work Programme on Loss and Damage’ (Grantham Institute 2014) 4, 6; Kees Van der Geest and Koko Warner, ‘Loss and Damage from Climate Change: Emerging Perspectives’ (2015) 8(2) *International Journal of Global Warming* 2, 135; Olivia Serdeczny, ‘Non-economic Loss and Damage and the Warsaw International Mechanism’ in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change* (Springer 2019) 205; Thomas Schinko and Reinhard Mechler, ‘Applying Recent Insights from Climate Risk Management to Operationalize the Loss and Damage Mechanism’ (2017) 136 *Ecological Economics* 296, 296–98; Harmeling (n 7) 100.

⁶¹ Roberts and Zakieldeen (n 42) 1.

⁶² Lisa Vanhala and Cecilie Hestbaek, ‘Framing Climate Change Loss and Damage in UNFCCC Negotiations’ (2016) 16(4) *Global Environmental Politics* 111, 112, 121. See also Meinhard Doelle and Sara Seck, ‘Loss and Damage from Climate Change: A Maturing Concept in Climate Law?’ (2019) *Climate Policy* 1752.

⁶³ Harmeling (n 7) 99; Sam Adelman, ‘Human Rights in the Paris Agreement: Too Little, Too Late?’ (2018) 7(1) *Transnational Environmental Law* 17, 26–27.

⁶⁴ Julia Kreienkamp and Lisa Vanhala, ‘Climate Change Loss and Damage: Policy Brief’ (Global Governance Institute 2017) 1 <www.ucl.ac.uk/global-governance/sites/global-governance/files/policy-brief-loss-and-damage.pdf> accessed 16 July 2020.

⁶⁵ See Chapter 9, Voigt.

This involves procedural and substantive obligations on the part of state actors. It also requires special attention to the human rights of different vulnerable and minority groups, who may be disproportionately affected. In our view, the principles underpinning a human rights-based approach provide a strong normative basis to guide future responses to loss and damage, as well as a toolkit of established best practices upon which to draw, as the remainder of this section will explore.

4.1 Human Rights and the Governance of Loss and Damage

A rights-based approach to loss and damage would embed human rights considerations in risk assessment and risk management processes under the WIM. For instance, alignment with human rights norms would ensure that the WIM does not operate in a discriminatory manner. Policies and programmes adopted for loss and damage should not lead to direct or indirect discrimination in the treatment or compensation offered to different groups based on gender, age, ethnicity, religious affiliation or any other ground prohibited under international law.

Moreover, a rights-based approach would help prevent negative impacts on the enjoyment of human rights caused by measures to address loss and damage themselves. In some cases, adaptation and mitigation actions have already negatively affected human rights, including the rights to culture, family life, livelihood, food, access to safe drinking water and sanitation and Indigenous peoples' self-determination, as well as a range of procedural rights.⁶⁶ For example, concerns over the adverse implications of REDD+ for the rights of Indigenous peoples and local communities led to the adoption of safeguards in order to minimize the negative impacts of the mechanism.⁶⁷ Adopting a rights-based approach to actions addressing loss and damage would help prevent this kind of perverse outcome in the future.⁶⁸

A rights-based approach would also protect participatory rights in addressing loss and damage. Article 6(a) of the UNFCCC requires Parties to promote and facilitate, at the national, subregional and regional levels, public access to information on climate change and its effects, and public participation in addressing climate change and developing adequate responses. These participatory rights apply not only to UNFCCC processes but also to the work of the WIM itself, and to the ways in which states interact with the mechanism. Currently, affected persons wishing to participate in the WIM face a number of constraints; for example, ExCom meetings are only open to UNFCCC Parties, invited experts and observers nominated by one of the nine constituencies.⁶⁹ Notably, a rights-based approach would require the effective inclusion of vulnerable communities in the loss and damage deliberations under the UNFCCC and the WIM.⁷⁰ It would also require that such processes be non-discriminatory, especially with respect to those who are most marginalized⁷¹ and those who are disproportionately impacted

⁶⁶ Stephen Humphreys, 'Competing Claims: Human Rights and Climate Harms' in Stephen Humphreys and Mary Robinson (eds), *Human Rights and Climate Change* (Cambridge University Press 2009) 37.

⁶⁷ Jodoin (n 36) 189–198.

⁶⁸ Adelman (n 63).

⁶⁹ Patrick Toussaint, 'Voices Unheard – Affected Communities and the Climate Negotiations on Loss and Damage' (2018) 3(5) *Third World Thematics* 765, 772.

⁷⁰ *Ibid* 765.

⁷¹ See, for example, Marie-Lena Hutfils, 'A Human Rights-based Approach to Climate Risk Insurance Making Insurance-related Instruments for Climate Risk Management Beneficial to the Poor

by disasters, including the poor, children and young people, women, persons with disabilities, older persons and ethnic minorities.⁷² These groups have unique knowledge, insight and sources of resilience that can enrich loss and damage discussions, ultimately leading to more effective policies and response measures. Finally, ensuring participatory rights also requires improved access to justice to enable those most vulnerable to climate change to hold their governments and other actors accountable. Access to justice entails a range of remedies that will be discussed in greater detail in section 4.4 below.

4.2 Human Rights and the Assessment of Loss and Damage

A rights-based approach would also contribute to the assessment of climate change loss and damage in several ways. First, human rights can serve as indicators for the non-economic aspects of loss and damage. As discussed above, non-economic loss and damage is difficult to quantify, and can thus be difficult to assess and evaluate. Yet in order ‘to manage a process of change directed at meeting certain socially desirable objectives, there is a need to articulate targets consistent with those objectives’.⁷³ Adopting human rights indicators, which take the form of ‘specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights’,⁷⁴ could help to overcome these difficulties and facilitate a more holistic assessment of loss and damage that takes into account impacts that are otherwise difficult to quantify.

Recent innovations in human rights impact assessments are helpful in this regard. A human rights impact assessment (HRIA) can be defined as ‘an instrument for examining policies, legislation, programs and projects and identifying and measuring their effects on human rights’.⁷⁵ There has been growing interest in HRIAs from a number of different actors, including within the UN and among international institutions and individual states.⁷⁶ HRIAs share a number of principal elements: they are based on a normative framework of international human rights law; they centre public participation, equality and non-discrimination, transparency, access to information and accountability; and they adopt an intersectoral approach.⁷⁷ The principles,

and Vulnerable’ (*Germanwatch*, 2018) 5 <<http://www.germanwatch.org/en/16050>> accessed 16 July 2020.

⁷² OHCHR, *Analytical Study on the Relationship Between Climate Change and the Human Right of Everyone* (n 18) paras 23–30; OHCHR, *Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights of the Child* (n 18) paras 20–27.

⁷³ OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (HR/PUB/12/5 2012) 1 <http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed 16 July 2020.

⁷⁴ *Ibid* 16.

⁷⁵ ‘Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development’ (Nordic Trust Fund and The World Bank February 2013) 1 <<http://documents.worldbank.org/curated/en/834611524474505865/Human-rights-impact-assessments-a-review-of-the-literature-differences-with-other-forms-of-assessments-and-relevance-for-development>> accessed 16 July 2020.

⁷⁶ *Ibid* 4.

⁷⁷ *Ibid* 11–20.

methodologies and insights from this developing practice could be fruitfully applied to the assessment of loss and damage.

Finally, focusing attention on human rights in loss and damage assessment also highlights the need to prioritize the concerns of vulnerable groups and communities, including women, children, Indigenous peoples and persons with disabilities. As discussed above, vulnerable groups are at particular risk from climate change harms. Employing a rights-based approach in the assessment of loss and damage ensures that the well-being of vulnerable groups is taken into account, and in so doing also opens the possibility of positive discrimination measures to further equality rights.

4.3 Human Rights and Responsibility for Loss and Damage

International human rights law can also be understood as offering an alternative regime to the UNFCCC for establishing the responsibility of states for loss and damage due to climate change. To begin with, in accordance with the principle of international cooperation that is embedded in several human rights treaties, states hold a shared responsibility for the realization of human rights.⁷⁸ For instance, under the International Covenant on Economic, Social and Cultural Rights, while both developed and developing countries must comply with their human rights obligations at the domestic level, developed states are further obliged to assist developing countries with the implementation of economic, social and cultural rights.⁷⁹ The general responsibility of developed states to provide international assistance for the realization of human rights can thus be understood as extending to loss and damage to the extent that this mechanism seeks to fulfil the human rights of individuals and communities in developing countries affected by climate change. In his report on a safe climate, the Special Rapporteur on human rights and the environment has thus concluded that ‘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’.⁸⁰

⁷⁸ Sigrun I Skogly, ‘Global Responsibility for Human Rights’ (2009) 29 *Oxford Journal of International Law* 827, in which the role of international cooperation in the promotion of human rights is explicitly mentioned in multiple human rights law instruments: see, for example, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966, Entered into force 3 January 1976, 993 UNTS 3) Arts 2(1), 2(11), 2(15), 4(22), 4(23); UN General Assembly, *Convention on the Rights of the Child* (20 November 1989, Entered into force 2 September 1990, 1577 UNTS 3) Arts 4, 24(4); UN General Assembly, *Convention on the Rights of Persons with Disabilities: Resolution/Adopted by the General Assembly* (61st Session A/RES/61/106 2007) Art 32; UN General Assembly, *Declaration on the Right to Development* (41st Session A/RES/41/128 1986) Arts 3, 4, 6.

⁷⁹ Committee on Economic, Social, and Cultural Rights (CESCR), ‘General Comment No 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)’ (5th Session E/1991/23 1990) paras 13-14. See also CESCR, ‘General Comment No 12: On the Right to Adequate Food (Art. 11)’ (21st Session E/C12/1999/5 1999); CESCR, ‘General Comment No 13: The Right to Education (Art. 13 of the Covenant)’ (21st Session E/C12/1999/10 1999); CESCR, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)’ (22nd Session E/C12/2000/4 2000); CESCR, ‘General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)’ (E/C12/2002/11 2002). See also OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights* (n 14) paras 75–77, 84–86.

⁸⁰ United Nations General Assembly, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment* (n 23) para 91.

While climate change clearly threatens the enjoyment of a range of human rights and triggers the general responsibility of states to provide international assistance for their realization, holding states responsible for human rights violations caused by climate change is a complex matter under international human rights law. As is discussed in depth by Voigt in her chapter in this volume, the ordinary principles of state responsibility provide that states can be held liable for their acts and omissions, as well as those of actors under their jurisdiction or effective control, when these result in breaches of their obligations under international law and there is a sufficient causal link between state conduct and the loss and damage caused by climate change.⁸¹ Similarly, in the context of international human rights law, holding a state responsible for climate-related harms would require a demonstration that its conduct (or its failure to regulate the conduct of private actors) has violated the human rights obligations that the state owes to individuals and communities within its territory or falling within its power or control.⁸² As such, in a purely domestic context, it is increasingly recognized that states do have obligations in relation to climate-related human rights violations experienced by individuals on their territories or falling within their jurisdiction.

The leading case in this respect is *Urgenda Foundation v State of the Netherlands*.⁸³ In that case, the Urgenda Foundation, along with 900 Dutch citizens, sued the Dutch government on the basis that it had not taken sufficient action to prevent global climate change. Deciding in favour of the petitioners, the District Court found that the government's existing mitigation pledge was insufficient to meet the Netherlands' fair share of emissions reductions in line with the UNFCCC goal of keeping global temperature rise within 2 degrees Celsius above pre-industrial levels. This decision was upheld on appeal by the Court of Appeal and the Supreme Court, both of which relied on the conclusions of the IPCC to find that the Netherlands had failed to fulfil its duty of care under the European Convention of Human Rights 'by not adopting a target of reducing emissions by at least 25 percent by end-2020'.⁸⁴ The Dutch Supreme Court held that governments have a duty of care to protect their citizens from harm caused by climate change and are thereby obliged to achieve reductions in greenhouse gas emissions in order to avoid dangerous climate change that will jeopardize the lives and well-being of people all over the world.⁸⁵

Meanwhile, the limited extra-territorial reach of human rights obligations could be seen as imposing clear limitations on the role that the human rights regime could play in holding governments accountable for transboundary loss and damage associated with climate change.⁸⁶ However, the work of several human rights bodies and scholars suggests an emerging trend

⁸¹ Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (Bloomsbury 2019).

⁸² John Knox, 'Climate Change and Human Rights Law' (2009) 50(1) *Virginia Journal of International Law* 163, 202.

⁸³ *Urgenda Foundation v The Netherlands* [2015] HAZA C/09/00456689 (24 June 2015), affirmed (9 October 2018), affirmed (20 December 2019) (District Court of The Hague, The Hague Court of Appeal, and the Supreme Court (on appeal)). See also 'Urgenda Foundation v. The State of the Netherlands' (Environmental Law Alliance Worldwide) <<https://elaw.org/nl/urgenda.15>> accessed 16 June 2020.

⁸⁴ *Urgenda Foundation v The Netherlands* (Court of Appeal) (n 83) para 73 for quotation.

⁸⁵ *Urgenda Foundation v The Netherlands* (Supreme Court decision) (n 83) at para 5.6.1–5.6.4.

⁸⁶ Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67(4) *International and Comparative Law Quarterly* 759. On the problematic invocation of extra-territoriality in the context of climate change, see Sara Seck, 'Moving Beyond the E-word in the Anthropocene' in Daniel S

towards a broader understanding of the extra-territorial application of human rights obligations.⁸⁷ In a 2017 advisory opinion, the Inter-American Court of Human Rights held that ‘a person is subject to the jurisdiction of the State of origin if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory’.⁸⁸ In the context of climate change, this approach would imply that states should be held liable for failing to protect the human rights of individuals affected by climate change where it can be attributed to the acts or omissions of the state in question.

Yet this raises another complexity that comes with establishing state liability within an international human rights framework: the need to disentangle causal relationships between state conduct and the human rights impacts of climate change.⁸⁹ This may be particularly challenging given the multiplicity of states that have directly or indirectly contributed to the accumulation of GHG emissions in the atmosphere. Here again, the *Urgenda* decision offers guidance on the attribution of state responsibility for loss and damage in a human rights-based approach. For one thing, the Dutch Supreme Court emphasized that the principle of common but differentiated responsibility should inform analysis of the Netherlands’ duties in this context, stating that ‘a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale.’⁹⁰ The court further stated:

[...] the defence that [...] a country’s own share in global greenhouse gas emissions is very small and that reducing emissions from one’s own territory makes little difference on a global scale, [cannot] be accepted. Indeed, acceptance [...] would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC.⁹¹

Similar reasoning was provided in 2018 by the Supreme Court of Justice of Colombia in *Demanda Generaciones Futuras v Minambiente*, when it ruled in favour of a legal action filed by 25 children and youth alleging that deforestation in the Amazon and the increase of the average temperature in the country threaten their rights to a healthy environment, life, health, food and water. The Colombian Supreme Court held that the government had a duty ‘to reduce deforestation to zero and mitigate greenhouse gas emissions’ on the basis of its international commitments and in accordance with the principle of intergenerational justice. The Court further stated:

Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019) 49–65.

⁸⁷ Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (n 81) 34–40.

⁸⁸ IACHR (n 29) paras 101–102.

⁸⁹ Eric A Posner, ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’ (2007) 155 *University of Pennsylvania Law Review* 1925; Sumudu Ataputtu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016).

⁹⁰ *Urgenda Foundation v The Netherlands* (Supreme Court) (n 83) para 4.

⁹¹ *Ibid* para 5.7.7.

The principle of solidarity, for the specific case, is determined by the duty and co-responsibility of the Colombian state to stop the causes of the GHG emissions from the abrupt forest reduction in the Amazon; thus, it is imperative to adopt immediate mitigation measures, and to protect the right to environmental welfare, both of the plaintiffs, and to the other people who inhabit and share the Amazonian territory, not only nationals, but foreigners, together with all inhabitants of the globe, including ecosystems and living beings.⁹²

Ultimately, domestic human rights litigation may offer more fertile ground for the pursuit of climate justice than international bodies, and the various rights-based climate cases launched around the world⁹³ are instructive for thinking about different approaches to attributing responsibility for the human rights impacts of climate change.⁹⁴ While decisions like those in the Netherlands and Colombia represent promising developments in the constructive role that human rights litigation can play in attributing responsibility for loss and damage due to climate change, their influence on how other courts and tribunals apply human rights in the context of climate litigation remains an open question.

4.4 Remedies for Loss and Damage

A rights-based approach is also instructive in the design and application of remedies for loss and damage within the UNFCCC.⁹⁵ In modern times, nearly every international organization, regional and global, has embraced human rights standards and responded to human rights violations by creating possibilities of redress for people whose rights have been breached.⁹⁶ According to the OHCHR, remedies for violations of international human rights law include the victim's right to (i) equal access to an effective judicial remedy and proceedings conducted in accordance with domestic law; (ii) adequate, effective and prompt reparation for harm suffered through national programmes designed for reparation, guarantees of non-repetition and compensation for economically assessable damage; and (iii) access to relevant information concerning violations and reparation mechanisms.⁹⁷ In addition, according to the International Court of Justice, 'for a remedy to be effective it must be prompt, accessible, before an independent legal authority and capable of leading to the cessation of the violation and reparation for any injury'.⁹⁸

The UN General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

⁹² *Demanda Generaciones Futuras v Minambiente*, STC4360-2018, para 11.3 (translated).

⁹³ Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law* 244.

⁹⁴ See Chapter 9, Voigt, as well as Chapters 16–21.

⁹⁵ Mingde Cao, Qi Wang and Yu Cheng, 'Remedies for Loss and Damage Caused by Climate Change from the Dimension of Climate Justice' (2016) 14(4) *Chinese Journal of Population Resources and Environment* 258.

⁹⁶ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015) 1.

⁹⁷ OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (60th Session A RES/60/147 2005).

⁹⁸ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability* (2008) 94.

Violations of International Humanitarian Law provide examples of appropriate remedies.⁹⁹ Although the guidelines do not apply specifically to loss and damage associated with the adverse impacts of climate change, they seek to ensure compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. In the context of climate change, assurance of non-repetition would require steps to stop recurring violations, public acknowledgement of the damage or injury and enhanced mitigation and adaptation efforts to prevent severe adverse climate change impacts, among other measures. Restitution would seek to restore victims of climate loss and damage to their original situation before the violations occurred (such as restoring citizenship or property, where possible), while compensation would be monetary in nature, particularly when restitution is not possible or desirable.¹⁰⁰ In the context of climate litigation, court redress to date has tended to focus on mitigation. For example, in *Urgenda*, the Supreme Court of the Netherlands upheld lower court decisions in 2015 and 2018 requiring the national government to ‘reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990’.¹⁰¹ In *Demanda Generaciones Futuras*, the high court ordered the municipalities of the Amazon to update their Land Management Plans within a five-month period and to develop an action plan to reduce deforestation to zero with measurable strategies. The Court also ordered the environmental authorities in the region to issue an action plan to reduce regional deforestation.¹⁰²

In designing responses to loss and damage, states should therefore draw inspiration from the practices relating to remedies adopted in international and domestic human rights law.¹⁰³ Wewerinke-Singh writes: ‘in the context of climate change, providing individual and general redress requires not only the highest level of ambition in reducing emissions but also “urgent support to ramp up adaptation among the most vulnerable populations and ensure compensation for those affected”, that is, “ex-ante social transformations and ex-post reparations”’.¹⁰⁴ This is particularly true when domestic remedies are not available or are inadequate for victims of climate change. According to Wewerinke-Singh, precedents such as the UN Compensation Commission can be used as a model for a reparations mechanism to address loss and damage resulting from climate change.¹⁰⁵

⁹⁹ OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation* (n 98).

¹⁰⁰ Harpreet Kaur Paul, ‘Market Solutions to Help Climate Victims Fail Human Rights Test’ (Action Aid Reports 2019) 18.

¹⁰¹ *Urgenda Foundation v The Netherlands* (Supreme Court) (n 83) 11.

¹⁰² *Demanda Generaciones Futuras v Minambiente* (n 93).

¹⁰³ Margaretha Wewerinke-Singh, ‘Remedies for Human Rights Violations Caused by Climate Change’ (2019) 9(3) *Climate Law* 224, who writes about options under the African Commission on Human and Peoples’ Rights, African Court on Human and Peoples’ Rights, the Inter-American Court of Human Rights, European Court of Human Rights, etc.

¹⁰⁴ Wewerinke-Singh, ‘Remedies for Human Rights Violations Caused by Climate Change’ (n 103) 242–243.

¹⁰⁵ *Ibid* 243. See also Maxine Burkett, ‘Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States’ (2015) 13(1) *Santa Clara Journal of International Law* 81.

4.5 Human Rights, Accountability and Transitional Justice in the Context of Climate Change

Finally, the field of transitional justice can offer lessons for a more transformative approach to loss and damage. The International Centre for Transitional Justice defines transitional justice as ‘the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.’¹⁰⁶

While there are significant differences between the situation of countries emerging from periods of violent conflict and that of those populations suffering most from the impacts of climate change, there are also important similarities. Loss and damage also entails human rights violations on a massive scale, which – particularly in the case of non-economic loss and damage – can be extremely difficult to quantify. As Hyvarinen points out, ‘climate change is causing an unprecedented global injustice, with unprecedented implications for human rights, which demands new global responses. Learning from transitional justice could help the international community to achieve an effective and just response to climate change, informed by the need to respect and protect human rights.’¹⁰⁷ Such an approach goes hand in hand with a growing body of literature on the need for criminal accountability for climate harms.¹⁰⁸

Of course, climate change is not the only cause of such injustice; expanding social and economic inequalities and underlying vulnerabilities are also to blame. Loss and damage is occurring in contexts where human rights are already being violated through poverty and marginalization.¹⁰⁹ To this end, a rights-based approach to loss and damage must foreground the importance of economic, social and cultural rights, as well as distributive justice. Indeed, the role of pre-existing structures of oppression in generating or exacerbating vulnerability to climate change is a key component of emerging feminist, disability and youth rights approaches to climate justice.¹¹⁰

¹⁰⁶ ICTJ (2014) quoted in Joy Hyvarinen, ‘Respect and Protect Human Rights: Lessons from Transitional Justice’ in Mary Robinson Foundation Climate Justice, *The Many Faces of Climate Justice: An Essay Series on the Principles of Climate Justice* (2014) 3 <www.mrfcj.org/wp-content/uploads/2015/09/JoyHyvarinen_Respectandprotecthumanrights_lessonsfromtransitionaljustice.pdf> accessed 21 July 2020.

¹⁰⁷ Hyvarinen (n 106) 2.

¹⁰⁸ Rob White, ‘Climate Change, Ecocide and Crimes of the Powerful’ in Gregg Barak (ed), *The Routledge International Handbook of the Crimes of the Powerful* (Routledge 2015) 211; Selina Rose O’Doherty, ‘Pre-emptive Justice for Future Generations: Reframing Climate Change as a “Humanitarian Climate Crime”’ in Paul Harris (ed), *A Research Agenda for Climate Justice* (Edward Elgar Publishing 2019) 131; Geoff Gilbert, ‘International Criminal Law Is Not a Panacea – Why Proposed Climate Change “Crimes” Are Just Another Passenger on an Overcrowded Bandwagon’ (2014) 14(3) *International Criminal Law Review* 551.

¹⁰⁹ See, for example, Toussaint (n 69) 768.

¹¹⁰ Rebecca Pearse, ‘Gender and Climate Change’ (2017) 8(2) *Wiley Interdisciplinary Review Climate Change* 1; Sébastien Jodoin, Nilani Ananthamoorthy and Katherine Lofts, ‘A Disability Rights Approach to Climate Governance’ (2020) 47(1) *Ecology Law Quarterly* 73–116; Elizabeth D Gibbons, ‘Climate Change, Children’s Rights, and the Pursuit of Intergenerational Climate Justice’ (2014) 16(1) *Health Human Rights* 19.

Of particular importance in the context of loss and damage is what Klinsky refers to as ‘forward-oriented structural change’ – that is, ‘[s]ignificant structural shifts to promote well-being for those who have been particularly impacted by climate change, and to fundamentally support long-term mitigation action in all countries’.¹¹¹ Actions falling into this category would include efforts such as debt relief and trade policy reform. This concept aligns with calls within the transitional justice community for a more transformative, redistributive conceptualization of reparations – one which seeks to remedy the types of structural injustices that have in part led to the occurrence of violations in the first place.¹¹² Similarly, in order for a loss and damage mechanism to truly begin to redress the harms of climate change, it must transform the very conditions that have allowed for such harms and violations to occur.

The foundational injustice at the heart of climate change, and the core of calls to address loss and damage, is the fact that those least responsible for the accumulation of greenhouse gases in the atmosphere are those who will bear the brunt of the impacts of climate breakdown. Thus, a human rights-based approach that ignores material and economic inequalities will be insufficient to adequately address the injustices of climate change and the tremendous challenges that lie ahead. In order to be truly transformative, loss and damage policies and projects must have redistributive aims.

5. CONCLUSION

Climate change threatens the human rights of populations all over the world and its impacts will disproportionately affect the most vulnerable segments in society.¹¹³ As we have shown in this chapter, a rights-based approach has a critical role to play in the development and implementation of loss and damage policies for climate change, including by guiding, informing, and shaping the governance of risk assessment and responses; the evaluation of loss and damage; the attribution of responsibility; and the identification of appropriate remedies.

At the same time, our chapter also illustrates that the application of human rights law to climate-related loss and damage comes with certain limitations. There are clear hurdles that must be overcome in establishing state responsibility for transboundary harm associated with climate change. In addition, there are difficulties associated with applying an international human rights framework to a problem like climate change due to the fact that it results from the accumulative actions of multiple actors. Finally, while we have discussed how human rights apply to loss and damage that has already occurred, it is important to recognize that an

¹¹¹ Sonja Klinsky, *Transitional Justice in the Climate Context? Discussion Paper* (Climate Strategies 2015) 8.

¹¹² Anne Saris and Katherine Lofts, ‘Reparation Programmes: A Gendered Perspective’ in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill-Nijhoff 2009) 79; Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ (2014) 8(3) *The International Journal of Transnational Justice* 339; Matthew Evans, ‘Structural Violence, Socioeconomic Rights, and Transformative Justice’ (2015) 15(1) *Journal of Human Rights* 1.

¹¹³ UNGA, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (74th Session A/74/161) para 26; S. Nazrul Islam and John Winkel, *Climate Change and Social Inequality – DESA Working Paper No. 152* (2017) <https://www.un.org/esa/desa/papers/2017/wp152_2017.pdf> accessed 8 November 2020.

approach grounded in international human rights framework does not adequately protect the rights of future generations.¹¹⁴

Notwithstanding these difficulties, we argue that a rights-based approach may offer a more transformative basis upon which to conceive of the field of loss and damage, connecting it to more far-reaching conceptions of transitional and redistributive justice. Indeed, human rights norms could be used to disrupt current understandings of loss and damage under the UNFCCC,¹¹⁵ where Vanhala and Hestbaek argue discussions have been dominated by an ‘insurance and risk transfer’ frame.¹¹⁶ This frame focuses much more on the idea of risk than on that of harm, and shifts attention away from questions of blame, causality and accountability. It also minimizes any relationship between the ‘perpetrators’ and ‘victims’ of climate change.¹¹⁷ In addition, this frame emphasizes uncertainty, which may be at odds with the increasing predictive power of climate science concerning slow-onset impacts.¹¹⁸

Thus far, this traditional approach has eclipsed an alternative ‘liability and compensation’ frame.¹¹⁹ While the insurance and risk-transfer framing is more technocratic in nature, the liability and compensation frame addresses the question of who is culpable for climate change and who will be most impacted. It also takes account of the justice dimensions of climate change loss and damage, including the fact that those least responsible for historic emissions are those who are most vulnerable to the effects of climate breakdown. Vanhala and Hestbaek point out that the actors who advocate for this framing have so far ‘been unsuccessful in achieving a specific, legally embedded understanding of loss and damage that includes acknowledgment of culpability or the possibility of compensation’.¹²⁰ Ultimately, they argue that a more ambiguous, undefined understanding of loss and damage has been a key factor in allowing actors to make minimal progress on this issue under the UNFCCC.¹²¹

In 2019, more than four hundred human rights, development and environmental groups pledged to ‘demand effective and adequate access to justice for individuals and communities whose rights are impacted by the climate crisis or lack of climate action’, according to the Declaration of the Peoples’ Summit on Climate, Rights and Human Survival.¹²² This declaration represents a growing consensus among human rights, development, labour and environmental groups on holding governments to account for the consequences of the actions that contribute to the climate crisis. Given the established set of principles, standards and practices that constitute the field of international and comparative human rights law, the greatest potential of a rights-based approach might lie in providing the legal and normative basis for designing a just and fair mechanism for the loss and damage caused by climate change.

¹¹⁴ Bridget Lewis, ‘The Rights of Future Generations within the Post-Paris Climate Regime’ (2018) 7(1) *Transnational Environmental Law* 69.

¹¹⁵ Toussaint and Blanco (n 7) 7.

¹¹⁶ Vanhala and Hestbaek (n 62) 120.

¹¹⁷ Ibid 122.

¹¹⁸ Ibid 123.

¹¹⁹ Ibid 122.

¹²⁰ Ibid 127.

¹²¹ Ibid 127.

¹²² AIDA, ‘Peoples’ Summit on Climate, Rights and Human Survival: Declaration’ (Aida-Americas 2019) <https://aida-americas.org/sites/default/files/publication/peoples_summit_declaration_en.pdf> accessed 21 July 2020.