

# COMPENSATION FOR LOSS AND DAMAGE: *Law and Justice Perspective*

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## Key Messages

- Due to inadequate mitigation and adaptation efforts, loss and damage associated with climate change is now a reality
- Loss and damage usually equates with "tort" or "liability", and results in some form of compensation, either through financial compensation or/and corrective measures
- A compensation regime needs to be developed on the basis of casual liability related to the contribution to the cause of climate change
- Each State should take all necessary measures to ensure that prompt and adequate compensation is available for the victims of climate impacts
- It needs to establish an autonomous international mechanism with micro level institutional arrangements
- A compensation fund needs to be established at the international level to resource the international mechanism
- A Quasi-judicial Authority, such as an independent tribunal or commission, should be formed to respond to claims for loss and damage



**Centre for Climate Justice-Bangladesh (CCJ-B)**, a non-profit, non-governmental organization, is working to promote climate Justice.

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## Introduction

Due to inadequate mitigation and adaptation efforts, loss and damage associated with climate change is now a reality.<sup>1</sup> Some recent studies reveal the empirical evidence on existing loss and damage resulting from the adverse impacts of climate change.<sup>2</sup> These impacts, including increased frequency and intensity of disasters and slow-onset processes like sea-level rise and saline water intrusion, have continued to devastate the lives and livelihoods of millions of people and inflict huge economic and non economic losses, particularly in developing countries. Bangladesh, for example, is experiencing frequent disasters such as floods, tropical cyclones and storm surges, which cause loss of lives and livelihoods, damage to infrastructure and ecology and force the affected people to migrate.<sup>3</sup>

the loss of life and livelihood, loss of property, loss of territory, loss of culture, heritage and values. Such a compensation regime needs to be developed on the basis of casual liability related to the contribution to the cause of climate change. This briefing paper takes into account the current debate on loss and damage in the climate negotiations but argues for a compensation regime on the basis of general international law and justice.

## Compensation for serious harm attributable to climate change

States have the sovereign right to exploit their own resources but also 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 (e.g. the high seas or



Loss of infrastructure: Cyclone Aila, 2009 in Bangladesh, Photo by Snigdha Chakraborty/CRS

The scientific research also provides the projection of potential loss and damage associated with climate impacts.<sup>4</sup> Mitigation and adaptation measures can reduce and manage the potential loss and damage. However, their limitations demand a compensation regime to deal with residual loss and damage – including

outer space). Explicitly referred to in the preamble of the UN Framework Convention on Climate Change (UNFCCC) this is described as the ‘principle of prevention’ or the ‘no-harm rule’. Its existence has been authoritatively confirmed by the International Court of Justice (ICJ).<sup>5</sup>

In a recent case the Court found that “[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.<sup>6</sup>

As climate change results from a multitude of emissions from various sources that alter the composition of the Earth’s atmosphere it may not fit the traditional conception of transboundary pollution. However, science increasingly attributes damages to anthropogenic greenhouse gas emission and there are few reasons why the general principle should not apply to climate change and its adverse impacts. States, therefore, have an obligation to take all appropriate measures to anticipate, prevent or minimize the causes of climate change, especially through effective measures to reduce greenhouse gas emissions.

Whether a particular State is responsible for an unlawful act under public international law also depends on several other legal and scientific questions. For example: the available capacity and resources to act with due diligence or its need for economic development and poverty alleviation. But if, on balance, a State is found to have committed an international legal wrong it is obliged to discontinue the wrongful act, offer guarantees of non-repetition and provide full reparation for the consequences. The purpose of reparation is to wipe out, as far as possible, all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if the act had not been committed.

***The reparation for climate change may be limited to a reasonable and equitable amount. But the bottom line is that loss and damage results in a right and obligation to compensation.***

This can take the form of restitution in kind or, if this is not possible, payment of damages, satisfaction or any combination of the three. The claim for reparation may be limited by the requirement for the proportionality of measures. Thus reparation for climate change may be limited to a reasonable and equitable amount. But the bottom line is that loss and damage results in a right and obligation to compensation.

### **Access to prompt and adequate compensation**

While the principle of prevention has been repeatedly invoked to argue that industrialized countries are liable vis-à-vis the developing world for loss and damage associated with climate change, there are also other relevant norms of public international law. The International Law Commission’s (ILC) 2006 Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, for example, state: “Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.”<sup>7</sup>

The Draft Principles reflect the expected development of public international law

and at present there is probably no substantive right to compensation for individual claimants (in the sense of the polluter pays principle). The concept of prompt and adequate compensation, however, appears to enjoy increasing recognition within the international community.<sup>8</sup> States may at least be obligated to gradually develop the necessary legal frameworks on liability and compensation for environmental damage to areas outside their jurisdiction.<sup>9</sup> The ILC Draft principles envisage, in particular, the establishment of international arrangements and funds (to supplement industry-based funds) if only global efforts can tackle a problem.<sup>10</sup>

***Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims .....***

There are examples of such arrangements by the international community: the international oil pollution compensation funds (the 1971 Fund, the 1992 Fund and the Supplementary Fund) providing compensation for oil spills from tankers, and the liability regime for nuclear accidents under the Convention on Third Party Liability in the Field of Nuclear Energy (Paris), the Supplementary Convention (Brussels) and the IAEA Vienna Convention on Civil Liability for Nuclear Damage. The UN Security Council established a Compensation Commission in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait.<sup>11</sup>

Other international arrangements to

ensure adequate compensation include the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, the International Convention on Civil Liability for Bunker Oil Pollution Damage and the Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. The “Hull Doctrine” of international investment law employs a similar standard of prompt, adequate and effective compensation being owed to investors whose property or rights are diminished by a host state.

### **Equal rights and justice**

The history of compensation arrangements and funds established by the international community to date usually began with major incidents in the North. For example: oil spills polluting the UK, French, Spanish and Portuguese coastlines.<sup>12</sup> The Chernobyl accident in the Ukraine which subsequently led to major improvements of the existing nuclear liability regime affected mostly other European countries (e.g. Belarus, Austria, Ukraine, Finland, Sweden, Moldova, Slovenia, Switzerland, Austria and the Slovak Republic).

***Compensation fund needs to be established at the international level. There are examples of such arrangements formed by the international community.***

There are huge disparities in the ecological footprint inflicted by rich and poor countries on the earth because of the significant differences in consumption

patterns. It has been estimated that the environmental damage caused by the world's richest countries to developing nations by far exceeds the financial debt owed by the developing world. At least to some extent, the rich nations have developed at the expense of the poor.<sup>13</sup> Those wrongs cannot be undone. But they can be recognized and dealt with in a fair and equitable manner.

## Loss and damage in the climate negotiations

The Conference of the Parties (COP 18) to UNFCCC, at its 18<sup>th</sup> session in Doha in 2012, acknowledged that further work needs to be done, for example, to understand how loss and damage associated with climate change will affect the most vulnerable groups of society, and to possibly develop risk reduction, risk



Ecological Damage, Cyclone Aila, 2009: - Crop lands lost its productivity due to saline water intrusion.  
Photo: M. Hafijul Islam Khan, 28, Feb, 2012

Liability and compensation are the natural consequences of causing harm without good reasons. Why should this be any different if it is predominately poor people in developing countries who are affected? Farmer, fisher folk or slum dwellers in Bangladesh already carry a heavy burden. Without their being effectively compensated for additional loss and damage caused by the wealthy societies in the North there is no justice – and no new agreement on climate change!

***.....the rich nations have developed at the expense of the poor. Those wrongs cannot be undone. But they can be recognized and dealt with in a fair and equitable manner.***

sharing and risk transfer tools as well as approaches to rehabilitation. This provides a potential entry point to raise the issue of liability and compensation for loss and damage resulting from climate change in the future.

The Decision of COP 18 (Doha Decision) also acknowledges the necessity of strengthening institutional arrangements at national, regional and international levels to address loss and damage. It further decided to establish institutional arrangements, such as an international mechanism, to address loss and damage in developing countries that are particularly vulnerable to the adverse effects of climate change.<sup>14</sup> The said Decision mandates the establishment of such institutional arrangements and their functions

and modalities in accordance with the UNFCCC's role as defined in paragraph 5 of the same decision at COP19 to be held at the end of 2013 in Warsaw.

For the time being, however, it appears that liability and compensation have been excluded from the mandate of developing the new institutional arrangements in accordance with the Doha Decision. Functions and modalities of the arrangements that Parties decided to establish at COP 19 in Warsaw are confined to, amongst other things, risk management approaches, the coordination of stakeholders and enhancement of support activities (e.g. finance, technology and capacity-building). Nevertheless, a holistic approach of mitigation, adaptation and the compensation is needed to deal with loss and damage associated with climate change.

***A bottom-up approach to assess and to redress the loss and damage needs an autonomous international mechanism with micro level institutional arrangements.***

## Conclusion

In terms of law, loss and damage usually equates with “tort” or “liability”, and results in some form of compensation for adverse impacts either through financial compensation or/and corrective measures.<sup>15</sup> But in addition, complex legal and administrative procedures are also needed to deal with other climate change impacts such as resettlement and rehabilitation for migration or non-

economic losses. A bottom-up approach to assess and redress the loss and damage associated with climate change as experienced by the victims needs to be enabled and formalized. It is therefore required to establish an autonomous international mechanism with micro level institutional arrangements!

***.....loss and damage usually equates with “tort” or “liability”, and results in some form of compensation for adverse impacts either through financial compensation or/and corrective measures.***

A compensation fund needs to be established at the international level to resource the international mechanism (including micro-level institutions at the national level) sufficiently to accomplish its mandate. A Quasi-judicial Authority, such as an independent tribunal or commission, should be formed to respond to claims for loss and damage cases by way of compensation and remedial measures. In this connection the UNFCCC in collaboration with other relevant actors has an important role to play. UNFCCC is still struggling to set up governance mechanisms for mitigation and adaptation to climate change<sup>16</sup>, and realistically the establishment of an autonomous international mechanism for loss and damage will take time. However, the basic foundation must to be built by 2015, when a new legal instrument will be adopted under the Durban Platform.

**Endnotes:**

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8. Patricia Birnie and Alan Boyle, International Law and the Environment (Oxford: Oxford University Press, 2nd ed., 2002), p. 113.
9. 1992 Rio Declaration, Principle 13; UNEP 2009 Draft Guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, Guideline 8.
10. ILA, Draft Principles, Principle 7 - Development of specific international regimes
11. Security Council resolution 687 of 3 April 1991
12. An updated incident map of the IOPC Fund is available at: [www.iopcfunds.org/incidents/incident-map](http://www.iopcfunds.org/incidents/incident-map)
13. See, for example, the Guardian article at: [www.theguardian.com/science/2008/jan/21/environmental.debt1](http://www.theguardian.com/science/2008/jan/21/environmental.debt1)
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CCJ-B is working to promote the climate justice through evidence based research on legal and policy issues related to environment, natural resource and climate change. Working areas of CCJ-B include:

- Research and Policy Advocacy
- International Law-making and Diplomacy
- Litigations and Alternative Dispute Resolutions (ADR)
- Community Legal Services
- Training and Capacity Building
- Youth Campaign for Climate Justice

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