

Paris Agreement and Climate Justice

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Abstract: *The Paris Agreement is ground breaking yet contradictory. In an era of fractured multilateralism it achieved above and beyond what was considered politically possible – yet it stopped far short of what is necessary to stop dangerous climate change. The Paris Agreement is the first international agreement to explicitly incorporate the concept ‘climate justice’. Climate change is one of the greatest injustices to have confronted humanity.*

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1. Introduction

The Paris Agreement 2015 is ground breaking yet contradictory. In an era of fractured multilateralism it achieved above and beyond what was considered politically possible – yet it stopped far short of what is necessary to prevent dangerous climate change. In the Paris Agreement countries agreed to pursue efforts to limit warming to 1.5C, yet the mitigation pledges on the table at Paris will result in roughly 3C of warming, with insufficient finance to implement those pledges. The Paris Agreement was widely acknowledged to signal the end of the fossil fuel era, yet it does not mention the need to phase out fossil fuels, nor does it contain any binding commitments to reduce carbon emissions or to implement science - based climate recovery policy. Importantly, the preamble provides the first international recognition of the concept of climate justice. The Paris Agreement deals with climate loss and damage as a separate and stand - alone element, effectively adding a third pillar to the climate change regime alongside mitigation and adaptation, and acknowledging that climate change is already causing impacts that poor communities cannot adapt to. Yet the Decision states that Article 8 ‘does not involve or provide a basis for any liability or compensation’. These elements seem to simultaneously suggest a rejection by the international community of liability for climate loss and damage, yet also contribute to the growing momentum towards climate litigation. This paper outlines these key aspects of the Paris Agreement, including the key question of whether the Paris Agreement excludes liability and compensation. This vast gap between the best possible outcome from the Paris climate summit and the climate action necessary has resulted in many recognizing that there needs to be a more comprehensive, systemic and binding approach. Climate litigation has become an increasingly popular topic of conversation amongst those who want to see science - based climate action. As 21 years of talks within the United Nations Framework Convention on Climate Change (UNFCCC) have resulted in inadequate climate action, it is not surprising that more and more individuals, communities, organizations and some countries are beginning to consider climate litigation. The Paris Climate Agreement was hailed as an historic agreement, the culmination of 21 years of discussions and achieving more politically than most thought possible. Yet, despite its significance, the Paris Agreement makes clear the vast gap between the current politics of the UNFCCC, and the action necessary to prevent

catastrophic climate change. A yawning chasm of empty ambition exists between the need to keep warming well below 1.5C and the non - binding pledges made by the parties in Paris – forecast to lead to 3C of warming. Even higher levels of warming are possible as many of the emission reduction pledges from poorer countries are contingent upon financing from rich countries – and this financing is currently inadequate for the task. Temperature records are being smashed on a regular basis and sending shockwaves through the climate science community and vulnerable people are experiencing extreme events – typhoons, floods, droughts - like never before. This paper explores the background of climate justice and the UNFCCC, including the ‘new’ topic of loss and damage. It considers the implications of the Paris Agreement on loss and damage and on compensation and liability.

a) Towards climate justice

The Paris Agreement is the first international agreement to explicitly incorporate the concept ‘climate justice’. The preamble notes: ‘the importance for some of the concept of “climate justice”, when taking action to address climate change’. This hard fought yet miserly acknowledgement is built upon a long standing history. Initial considerations on ‘justice’ date back to Socrates and Plato’s – *The Republic* and *Law* – which arose from dissatisfaction with the excessive individualism and political selfishness threatening the survival of Athens. Over time, new theories concerning justice have expanded to include distributive justice concerning the just distribution of wealth, power, opportunities or property and on what basis, whether based on needs, rights or entitlements. Social justice and notions of fairness and equality of rights to basic liberties and arranging social and economic inequalities to the benefit of the least advantaged are core considerations. Retributive justice is also at the heart of the concept considering punishment for the purpose of deterrence, rehabilitation or security or restorative justice to assist recovery of victims of crime. Justice is defined by Rawls as the ‘first virtue of social institutions’. One of the more recent concepts of justice is environmental justice, which is defined by the US Environmental Protection Agency (EPA) as: ‘The fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards

and equal access to the decision - making process to have a healthy environment in which to live, learn, and work'. Environmental justice has underpinned a global shift in legal theory, law making and litigation where injustices are being caused through environmental mismanagement, against people and communities with little power. In the US these have often been communities of colour.

It is not surprising that 'justice' increasingly takes a more central place in relation to climate change. Climate change is one of the greatest injustices to have confronted humanity. Wealthy countries and large multinational fossil fuel companies, have gained their wealth and security at the expense of billions of poor people living in highly vulnerable circumstances around the world, and have shown no intention to compensate for the harm caused and have little enthusiasm for mitigating the harm by reducing emissions. Climate change creates a huge intergenerational justice issue as the harms resulting from climate change will disproportionately burden youth and future generations relative to present generations. Whilst various groups have put forward definitions of climate justice, all of them have at their core the inherent unfairness that the people who have done the least to cause climate change are the ones who are facing the worst impacts. The voices of those calling for climate justice were amongst the first and loudest calling out the fossil fuel industry, and the governments and corrupt systems that entrench their power and their profits at the expense of the poorest and most vulnerable, whilst perpetuating false solutions to solve the climate crisis.

There are interconnected and complementary concepts of 'climate justice.' The concept is used to understand climate change as an ethical, legal and political issue, incorporating issues of environmental and social justice. Climate justice recognizes that those who are least responsible for climate change suffer the gravest consequences, and that fair and just solutions must recognize issues of equality, human rights, collective rights and historical responsibility for climate change. 'Justice' also has a specific legal meaning, and the phrase climate justice can also be used to mean actual legal action on climate change issues, that draws from and aims to achieve these values. There is some irony in the fact that all those years ago, Plato's theory of justice rejected previous theories that justice was 'the interests of the stronger' or 'might is right'. Plato's vision of justice speaks directly to the injustice at the heart of climate change. Now that climate justice is enshrined as a concept in the Paris Agreement we must turn our efforts to achieve it.

b) Loss and damage

The injustice of climate change is most obvious in the issue of 'loss and damage'. Loss and damage is the term used in climate policy for the worst impacts of climate change - those that go beyond people's ability to cope and adapt. Loss and damage includes extreme events, like droughts and tropical storms, and slow - onset events like sea - level rise, increasing temperatures, glacial retreat causing flooding and eventual drought, and desertification. Already, at one degree⁹ of warming, the poorest and most vulnerable communities are paying for loss and damage - with their lives, their homes, or their ability to grow food. Three specific cases of loss and damage are outlined below. In

November 2013 Typhoon Haiyan (or Yolanda as it was called locally) devastated the Tacloban region of the Philippines. As a country that has frequent typhoons and storms, the government and locals had many coping mechanisms in place. However, with sustained wind speeds up to 195mph (314kph), Typhoon Haiyan was the strongest ever tropical storm to make landfall. So traditional coping mechanisms were blown away. Typhoon Haiyan forced four million people from their homes, destroyed or damaged one million houses and killed 7, 354 people. The International Disaster Database (EM - DAT) quantified the damage of Typhoon Haiyan at \$10 billion, of which very little - only USD \$300-700 million - was likely to be covered by insurance. The devastation of Typhoon Haiyan was a catalyst for a pioneering legal action against the fossil fuel industry. The 6, 000 people who live on the Carteret Islands¹¹ and three neighboring island atolls, are finding their home increasingly untenable due to rising sea levels, and the resulting land loss, salt water inundation, and food insecurity as traditional crops won't grow. The community group Tulele Peisa (which means 'sailing the waves on our own') is working to relocate 50% of the population by 2020 and 'maintain our cultural identity and live sustainably wherever we are.' With the support of the Roman Catholic Church and the PNG Government, Tulele Peisa is slowly relocating Carteret Islanders to Bougainville. It was estimated by Tulele Peisa in a report by Displacement Solutions that USD \$5.3 million is required from 2009 to 2019 to ensure the basic needs for a successful resettlement are met - USD \$6, 500 for land and housing for each family.

Climate change poses an ongoing and serious threat to Kenya's economy. Already, it accounts for a loss of approximately US\$0.5 billion per year, which is equivalent to 2% of the country's GDP. This cost is expected to rise and could eventually claim 3% of Kenya's GDP by 2030. From 2008 to 2011 the Horn of Africa suffered the worst drought in 60 years. At its peak it left 13.3 million people with food shortages and led to a large number of people dying. Across the four year period of drought, the Government of Kenya estimated losses of \$12.1 billion in total. Major areas of loss included: agriculture \$1.5bn; livestock \$8.7bn; water and sanitation \$1.1bn; and other areas including agro - industry, fisheries, nutrition, health, education and energy. In Kenya, it was the poorest people who suffered the greatest losses. As the drought lasted more than four years, poverty increased in both qualitative and quantitative terms, and the Government of Kenya had to divert funds and significantly increase its efforts to reduce poverty in the medium - to long - term. Loss and damage from climate change is more than economics - the non - economic costs are likely to be more significant than the economic costs. For instance - if a low lying island nation is overwhelmed by rising sea levels they are at risk of losing their connection to their ancestral land and to where their ancestors are buried, their traditional way of life including access to the fisheries, their sense of community, their language and their sovereignty.

The more mitigation we undertake and the more adaptation finance is made available - the less loss and damage there will be. But at this stage loss and damage is unavoidable. And it is already costly. A review of estimates of loss and

damage allows a conservative estimate of USD \$50bn per year in the near term, increasing to USD \$70 - \$100bn by 2050, for the group of 48 Least Developed Countries (LDCs). Loss and damage for all vulnerable developing countries can conservatively be estimated as at least double - USD \$100bn per year in the near term, increasing to at least USD \$200bn by 2050. Climate Action Tracker, for Oxfam, estimate that loss and damage will cost all developing countries \$400bn per year by 2030 and over one trillion dollars each year by 2050. All of these estimates assume warming is kept below 2 degrees – costs will rise to be much higher if warming is greater. And we are currently on track for roughly 3 degrees of warming.

c) Loss and damage and the Paris Climate Agreement

Loss and damage has long been one of the most contentious issues in the already highly political climate negotiations. Throughout the history of the negotiations rich countries have objected to including loss and damage. It is widely perceived that rich countries are driven by concerns about paying for loss and damage. They have argued that loss and damage should form a part of adaptation – and therefore any funds should come from the extremely small amount of international finance provided for adaptation (currently \$3 to \$5 billion per year according to Oxfam¹⁹) or should fall within the disaster risk reduction area. Whereas the countries on the front line of climate change – in particular the small island developing states and the least developed countries – have considered it essential that the international community support them as they face the worst impacts of climate change especially as they had no significant part in causing the problem of climate change. The history of ‘loss and damage’ negotiations stretches back to 1991, when the Alliance of Small Island States called for the establishment of an international insurance pool to compensate victims of sea - level rise. However, such elements were left out of the UNFCCC and the Kyoto Protocol instead focusing on mitigation, or reducing emissions. As global emissions have continued to increase and the impacts of climate change have been increasingly felt, the international community has paid more attention to adaptation to climate change. In 2001 (at COP 7), countries agreed to begin work on the adverse effects of climate change on particularly vulnerable developing countries. From this work came Decision 1/CP.10 in 2004, which kicked off the Buenos Aires programme of work on adaptation²⁴ and adaptation became the ‘second pillar’ of the international climate negotiations alongside mitigation. The UNFCCC negotiations began to seriously address the issue of loss and damage with the establishment of a work programme at the Cancun COP in December 2010. This work programme resulted in the Warsaw International Mechanism for Loss and Damage being agreed in November 2013, but it was still agreed ‘under’ the adaptation framework. At Paris this conflict manifested itself in negotiations over whether to include loss and damage in the Paris Agreement *at all*; whether to include it as a stand - alone element, or as a subset of adaptation; whether to articulate a need for loss and damage funding; and whether to create a new mechanism, entrench the Warsaw Mechanism, or not specify any institutional framework for loss and damage.

A large part of the tension is driven by the concern from the US and other developed countries that loss and damage would lead to liability and compensation – often referred by those countries to as a ‘blank check’. As the Paris negotiations were about establishing a new way forward for the international community to deal with climate change, it was essential that these opposing schools of thought be reconciled. The reconciliation came in the form of an agreement to treat loss and damage as a separate and stand - alone element of the Paris Agreement in Article 8 the ‘loss and damage article’.

The effect was to add a ‘third pillar’ to the climate change regime alongside mitigation and adaptation. Within Article 8 countries agreed to provide support – which means finance, technology transfer and capacity building – for loss and damage. The international community also agreed to enshrine the Warsaw International Mechanism for Loss and Damage within the Paris Agreement, mandating that it address a range of loss and damage issues including irreversible and permanent loss and damage, non - economic loss, slow onset events, resilience, early warning systems and risk management (including, but not limited to, insurance). This significantly increases the institutional importance of the Warsaw International Mechanism. This was seen as groundbreaking and a significant achievement in favor of the vulnerable developing countries. Complementarily, but separately within the COP Decision, a task force on displacement from climate change is to be established with the Paris mandate. During the Bonn inter - sessional held in April 2016, it was decided that a group of champions would continue to work intersessionally on the draft Terms of Reference for the task force.

d) Does the Paris Agreement exclude liability and compensation?

However, in addition to these positive moves to enhance and entrench action and support on loss and damage from climate change, developed countries insisted on including paragraph 51 of the Decision: *Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation; (Decision 1/CP.21 Paragraphs 48–52 (FCCC/CP/2015/L.9/Rev.1.28)*

This disclaimer or waiver was demanded by the US, and other developed countries, as a condition of them accepting the inclusion of loss and damage in the Paris Agreement. The statement is contained within paragraph 51 of the Decision – a document that has a lesser status than the Paris Agreement. It amounts to an interpretative provision, in that it provides context through which Paragraph 8 of the Paris Agreement can be interpreted, and gives guidance as to what countries were thinking when they made the Paris Agreement. This interpretation of the Paris Agreement, could conceivably be adjusted in future by another, different Decision and interpretation. It must also be viewed within the context of declarations made by the Marshall Islands, Nauru and Tuvalu that the Paris Agreement does not amount to a renunciation of any rights under other laws, including international law.

The text of paragraph 51 does not specify whether the reference to liability encompasses state liability, private

liability or both. Given that the history of the negotiations suggest opposition by the US and other developed countries in accepting *state* liability, it would appear that this is a reference to state liability and not private liability. Further, the UNFCCC agreements have only ever referred to states, which strongly indicate that the reference here is to state liability. Therefore, the language of Paragraph 51 clearly provides that the Parties' interpretation of Article 8 is that it does not provide a basis for liability or compensation, and thus could not be relied upon in the context of a legal dispute for this purpose, as long as paragraph 51 remains in place. Paragraph 51 does not limit rights to liability or compensation for loss and damage that have already occurred. This interpretative text is limited to Article 8 and does not extend to other parts of the international climate regime or to other areas of international law. International law establishes clear obligations upon states not to cause harm to another state (the no harm rule). States are also bound by other areas of international law, including human rights law, world heritage law and the law of the sea. These are not diminished by paragraph 51. There is widespread reluctance among states to pursue interstate claims for environmental liability of other states. Paragraph 51 pushes discussion of liability and compensation outside of the UNFCCC for now. It makes it clear that the proponents of paragraph 51 are unwilling to discuss liability and compensation for climate - change - related loss and damage. Given that the UNFCCC is the primary international arena in which to address climate change, and indeed began with discussions of compensation for disappearing islands, this is quite an indictment on wealthy countries.

Despite paragraph 51 'ruling out' compensation, Articles 8.3 and 8.4 of the Paris Agreement clearly specify that the international community will provide support for loss and damage. 'Support' is a term of art used in the international climate change negotiations and generally refers to finance, technology transfer and capacity building. As Article 8 is a stand - alone article, separate and distinct to the article on adaptation (Article 7), it can therefore be interpreted that loss and damage finance should be additional to adaptation finance. As outlined in Part 1.3 of this report it is clear that loss and damage will require finance beyond that which has been promised for adaptation to date loss and damage. Now that developed countries have 'ruled out' liability and compensation from Article 8 of the Paris Agreement, yet have specified that support will be provided for loss and damage, we can move to a more serious discussion about how to generate finance for loss and damage, and how to get this support to the most vulnerable countries and communities on the front line of the worst impacts of climate change.

Beyond these issues around state liability, the provision arguably does not in any way affect the responsibilities and potential liability of the fossil fuel industry. In fact, paragraph 51 implicitly suggests that it is time for the international community to shift focus to private liability and the fossil fuel industry. We expect this discussion will take many forms, we have proposed a Carbon

Levy on fossil fuel extraction and to be paid into the loss and damage mechanism. This approach is supported by international law, exists in other fields (for example oil spills) and could raise \$50 billion initially, increasing over time. Given the responsibility of the fossil fuel industry for emissions, it is an appropriate future direction for the climate regime.

2. Conclusion

The Paris Agreement is an historic agreement, which established loss and damage as the third pillar of the international climate regime and the first international recognition of the concept of climate justice. However, there is a yawning chasm between the need to keep warming well below 1.5C and the non - binding and inadequate pledges agreed in Paris. Article 8 of the Paris Agreement established loss and damage as the third pillar of the international climate regime. The associated Decision which provides that Article 8 of the Agreement does not provide a basis for liability or compensation was a compromise pushed by developed countries who clearly want to de - emphasize the importance of state liability for the consequences of harmful activities within the context of international environmental agreements. These efforts do not displace existing international law governing state responsibility for breaches of international law, nor do they displace the application of other substantial international law upon the problem of climate change. International human rights law, world heritage law and the law of the sea continue to apply to the threats of climate change to human rights, world heritage and the marine environment.

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