

# **Lost and Damaged? Opportunities, limitations, and gaps of loss and damage finance, looking into science and the law**

Jameela Joy Reyes, Ma Laurice Jamero, Hazel Acero, Domnina Rances, Antonio La Viña

## **Abstract**

More than three decades since first proposed by Pacific Island states, loss and damage finally became part of the international climate negotiations. During the Conference of Parties 27 (COP27) in Sharm el-Sheikh in Egypt, country Parties agreed not only to include loss and damage in the agenda, but also decided to establish a Loss and Damage Fund. Further, a Transitional Committee was established to draw recommendations on how to operationalize the LDF for consideration and adoption by the Conference of Parties at its twenty-eight session which will take place in Dubai at the end of 2023.

With loss and damage officially taking up space in the climate negotiations, questions now abound on how to translate loss and damage not just into actionable international policies, compatible both within the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement processes and outside of it, but as well as into local, national, and regional climate actions.

This paper, therefore, will historicize loss and damage as well as the mechanisms related to it in the years leading up to COP27, look at the science and laws that relate to loss and damage, including currently existing loss and damage financing regimes, all with the eventual goal of laying down solutions to operationalize and implement loss and damage on the ground, taking the Philippine experience as a jumping point.

## **Introduction**

### **a. A History of Loss and Damage**

In 1991, the Association of Small Island States (AOSIS) called for an insurance pool to compensate vulnerable, low-lying coastal small island nations for losses and damages as a consequence of rising sea levels, including Mauritius and Seychelles. In 1992, during the Earth Summit<sup>1</sup> in Rio de Janeiro, the United Nations Framework Convention on Climate Change (UNFCCC) was established, which had for one of its goals the combatting of dangerous human interference with the climate system.

In subsequent years, more developing countries realized the need for a mechanism to address losses and damages resulting from climate impacts that were getting increasingly harder to adapt to. Despite this, loss and damage did not gain traction until 2010 when COP16 established a work programme on loss and damage found in the Cancun Adaptation Framework, which paved way for the establishment of the Warsaw International Mechanism for Loss and Damage (WIM) at COP19 in 2013. Among its roles, which were initially discussed during COP18 in Doha, were to fulfill the role under the Convention to promote implementation of approaches to address loss

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<sup>1</sup> Officially the United Nations Conference on Environment and Development (UNCED)

and damage associated with the adverse effects of climate change. In COP19, this role was elucidated further and more exhaustively.<sup>2</sup>

The decision stated that the WIM, which was established under the Cancun Adaptation Framework, is established to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change. The decision also established an executive committee.

Par. 5 of the decision provided, among others, the roles of the WIM, which are:

- (a) Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts;
- (b) Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders; and
- (c) Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change

Since its establishment, the WIM has become “the main vehicle in the UNFCCC process to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change, in a comprehensive, integrated and coherent manner.”<sup>3</sup>

In 2015, during COP21, country Parties negotiated the Paris Agreement, Article 8 of which talked exhaustively about loss and damage, thereby creating it as the third pillar of climate action, after adaptation and mitigation. It also provided that Parties “should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.”

While it did not establish a working definition for loss and damage (and in fact none yet exists as of writing), the Paris Agreement was fundamental in making sure that loss and damage is mainstreamed in the climate negotiations.

COP25 in Madrid established the Santiago Network to “catalyze the technical assistance of relevant organizations, bodies, networks, and experts, for the implementation of relevant approaches for averting, minimize and addressing” loss and damage “at the local, national and regional level, in developing countries that are particularly vulnerable to the adverse effects of climate change.”<sup>4</sup>

In November 2021, during the first COP since the pandemic started in 2020, Parties in COP26 in Glasgow agreed on the Glasgow Climate Pact. The decision, among others, acknowledged loss and damage as a result of climate change, and the role that stakeholders played in averting, minimizing, and addressing loss and damage associated with the adverse effects of climate change.

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<sup>2</sup> *Nineteenth Session - UNFCCC*. FCCC/CP/2013/10/Add.1. (2014, February 4).

<https://unfccc.int/sites/default/files/resource/docs/2013/cop19/eng/10a01.pdf>

<sup>3</sup> Pishmisheva, P. (2020, February 18). *Loss and damage ONLINE GUIDE - UNFCCC*. Online Guide on Loss and Damage. [https://unfccc.int/sites/default/files/resource/Online\\_Guide\\_feb\\_2020.pdf](https://unfccc.int/sites/default/files/resource/Online_Guide_feb_2020.pdf)

<sup>4</sup> *About the Santiago Network*. Unfccc.int. (n.d.). <https://unfccc.int/santiago-network/about>

Further, it reiterated the urgency of scaling up action and support, including finance, technology transfer, and capacity-building, for implementing approaches to avert, minimize, and address loss and damage; urged developed country Parties, the operating entities of the Financial Mechanism, United Nations entities and intergovernmental organizations, as well as non-governmental organizations and private sources, to provide enhanced and additional support for activities relating to loss and damage; recognized the importance of demand-driven technical assistance in building capacity to implement approaches to avert, minimize and address loss and damage; and operationalized further the Santiago network<sup>5</sup>.

Perhaps one of the biggest contributions of the COP is the establishment of the Glasgow Dialogue between Parties, relevant organizations, and stockholders “to discuss the arrangements for the funding of activities to avert, minimize and address loss and damage associated with the adverse impacts of climate change, to take place each year at the first session of the Subsidiary Body for Implementation until it is concluded at its sixtieth session (June 2024).<sup>6</sup>

In June 2022, therefore, the first Glasgow Dialogue took place. Its goal was to bring together a broad range of stakeholders to discuss funding arrangements on loss and damage, with the mission of giving visibility to the frontline communities and those most vulnerable to the adverse effects of climate change. Questions that participants were asked included the following:

1. What are the arrangements for the funding of activities to avert, minimize and address loss and damage associated with the adverse impacts of climate change?
2. What support has been effective at averting, minimizing, and addressing loss and damage? What lessons learned could improve funding, and what practices should be replicated or scaled up?
3. What are the barriers and challenges countries face in accessing these arrangements for funding?
4. What can be done to improve and utilize synergies and complementarities among the arrangements for the funding of activities to avert, minimize and address loss and damage?

While many advocates bemoaned the creation of the Glasgow Dialogue as opposed to a Fund dedicated to loss and damage, the Glasgow Dialogue was eventually acknowledged to be a good step in the right direction, particularly as regards the discussion on best practices and probable next steps.

In October 2022, just before COP27 in Sharm el-Sheikh in Egypt, the Scottish government led by First Minister Nicola Sturgeon hosted a conference which brought together experts and practitioners on loss and damage to discuss best practices and explore innovative ways to mobilize finance for loss and damage.<sup>7</sup>

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<sup>5</sup> This includes the provision of funds for the Santiago Network to support technical assistance for the implementation of relevant approaches to avert, minimize and address loss and damage, and the decision on modalities for the management of these funds. It also urged developed country Parties to provide funds for the operationalization of the network.

<sup>6</sup> UNFCCC. (2022, March 8). Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its second session, held in Glasgow from 31 October to 12 November 2021. Addendum - UNFCCC. [https://unfccc.int/sites/default/files/resource/cma2021\\_10\\_add1\\_adv.pdf](https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf)

<sup>7</sup> The Scottish Government. (2022, November 8). *Addressing loss and Damage Conference - Practical Action: Summary Report*. Scottish Government. <https://www.gov.scot/publications/addressing-loss-damage-practical-action-summary-report-scottish-governments-conference-loss-damage/pages/12/>

COP27, therefore, was met with high expectations in the weeks prior to its opening. Many individuals and organizations demanded that loss and damage be put in the agenda, with Professor Saleemul Huq of the International Centre of Climate Change and Development in Bangladesh saying that if it was not included in the agenda, he would be prepared to call the COP a failure even before it begins. To everyone's surprise, however, the country Parties agreed on putting loss and damage at the COP27 agenda, and, in the final moments of the COP, agreed on the creation of a loss and damage fund, adopted in what is now known as the Sharm el-Sheikh Implementation Plan.<sup>8</sup>

The decision, which alluded to the reports released by the Working Groups (WG) of the Intergovernmental Panel on Climate Change, underlined the importance of an adequate and effective response to loss and damage, and expressed deep concern regarding the significant financial costs associated with loss and damage for developing countries, which has resulted in a growing debt burden as well as an impaired realization of the Sustainable Development Goals. COP27 also established the institutional arrangements of the Santiago Network and adopted the decision on the creation of a transitional committee on loss and damage, the main objective of which is to come up with suggestions on how to operationalize the newly created loss and damage fund.

While a clear win on the loss and damage front, many questions still remain on how the Fund should look like, including the mechanisms of accessing and ownership. In the lead-up to, and after the COP27, there have been many suggestions on these. During the Edinburgh Conference, the Stockholm Environment Institute (SEI) presented its initial recommendations on how to design a fair and feasible loss and damage mechanism<sup>9</sup>. The five principles SEI forwarded included the following:

1. No strict liability or contribution, at least in the near term;
2. Solidarity and common but differentiated outcomes;
3. No exemption from liability;
4. National ownership and accessibility for the vulnerable; and
5. Additionality

In November 2022, the Manila Observatory, with partners Chiang Mai University – School of Public Policy and The Samdhana Institute, released a policy brief specific to loss and damage in the region, entitled “Loss and Damage: Perspectives from Southeast Asia”<sup>10</sup>, which, like the earlier document released by SEI, laid down suggestions as to how a loss and damage financing facility should look like, that would put at the forefront the needs of vulnerable communities. The financing facility should:

1. Be additional to existing financing for adaptation and mitigation;
2. Be accessible, and requirements to access the fund should be as least onerous as possible;

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<sup>8</sup> Frizen, K. (2022, November 20). Decision -/CP.27 Sharm el-Sheikh implementation plan - UNFCCC. [https://unfccc.int/sites/default/files/resource/cop27\\_auv\\_2\\_cover%20decision.pdf](https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf)

<sup>9</sup> Stockholm Environment Institute: Bridging science and policy. (2021, October 26). <https://www.sei.org/wp-content/uploads/2021/10/211025c-davis-shawoo-loss-and-damage-finance-pr-2110l.pdf>

<sup>10</sup> La Viña , A., Jamisolamin, J., Sacramento, N. J. J., Inthapat , B., Chaityapa , W., Batino, L., Jamero , Ma. L., & Reyes , J. (2022, December 6). Loss and damage: Perspectives from Southeast Asia - Observatory. [https://www.observatory.ph/wp-content/uploads/2022/12/Policy-Brief\\_Loss-and-Damage\\_ManilaObservatory.pdf](https://www.observatory.ph/wp-content/uploads/2022/12/Policy-Brief_Loss-and-Damage_ManilaObservatory.pdf)

3. Not impose additional burdens on the communities;
4. Build on the capabilities and accountability of vulnerable communities; and
5. Be founded on equity and justice

Other organizations, such as the International Center for Climate Change and Development (ICCCAD), have also forwarded how the funding should look like in the context of loss and damage.

During COP27, in addition to the creation of a loss and damage fund, V20 as well as the G7 launched the Global Shield Against Climate Risks. The V20 Communique released in April 2022 provided that the Global Shield is “a centralized mechanism for adaptation and resilience” that “can build domestic, regional and international markets in order to avert, minimize and address losses and damages.”<sup>1112</sup> Germany, Austria, and Ireland, among others, have pledged several amounts to the Shield, and the first beneficiaries of the assistance will be Bangladesh, Costa Rica, Fiji, Ghana, Pakistan, the Philippines, and Senegal. However, it has received plenty of criticism from civil society,<sup>1314</sup> and much of the hesitation revolves around the prepayment of sometimes onerous premiums, the payouts that are not commensurate to the damage experienced, and the difficulty in operationalizing an insurance mechanism. Adequacy of funding is important as well.

## How to Think of Loss and Damage Finance

Perhaps the biggest issue surrounding loss and damage is the lack of a working definition. Such absence creates a vacuum as regards formulating what finance flows should look like, or, more particularly, how to ensure that the money goes to where it is needed. While the Sharm el-Sheikh Implementation Plan created the Loss and Damage Fund, questions still abound, as earlier stated, as to what the money would look like, where it will come from, who can access it, and other similar issues involving operationalization.

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<sup>11</sup> *Working towards a global shield against climate risks*. V20: The Vulnerable Twenty Group. (2022, October 28). <https://www.v-20.org/global-shield-against-climate-risks>

<sup>12</sup> The Global Shield’s Vision and Objectives are such:

The Global Shield (GS) will increase protection for poor and vulnerable people by substantially enhancing pre-arranged finance, insurance and social protection mechanisms against disasters. Greater financial protection, and faster and more reliable disaster preparedness and response, will help to cost-efficiently and effectively minimize and address losses and damages exacerbated by climate change.

To achieve its objective, the GS will close urgent protection gaps in countries by designing, funding, and facilitating interventions. All interventions will be based on national ownership. The GS will ensure more systematic, coherent, and sustained financial protection.

<sup>13</sup> ActionAid International, for instance, has called the Shield a “distraction” and should not be mistaken for loss and damage funding. See more: <https://actionaid.org/news/2022/global-shield-initiative-just-distraction-and-should-not-be-mistaken-loss-and-damage>

<sup>14</sup> Harjeet Singh, member of the Climate Action Network, criticized the lack of detail on the spending of the funds, and whether the fund will be beneficial to the affected communities. See more: <https://www.eco-business.com/news/explainer-what-is-the-global-shield-initiative/>

It is estimated that by 2030 and 2050, the average annual estimated cost of loss and damage to developing countries will be \$435 billion and \$1 trillion respectively<sup>15</sup>, which makes the need for finance flows both urgent and critical.

In this part of the paper, therefore, we will discuss the three (3) main recommendations as to how finance flows should look like, and discuss the merits and disadvantages of all. At the outset, it is to be noted that while these are yet to be discussed thoroughly in the multilateral UNFCCC discussions (and in fact these are not the only ones being considered)<sup>16</sup>, these are those that have come up in conversations – within and without the global climate negotiation meetings. These are: contribution from developed countries, establishment of liability (through litigation), and restitution, which is distinguished from the first two as the mechanism by which developing countries and vulnerable communities are given financial aid to the extent that they are brought back to their original state.

## I. Contribution

For the purposes of this paper, contribution is the umbrella term used by developed countries to provide money to developing countries, as a result of goodwill, solidarity, or an innate desire to provide aid. Therefore, it does not include money that has onerous requirements attached to it, such as loans. Subsumed under this is the compensation, which is what is given by developed countries upon realization and acknowledgment of historical responsibilities. That is, where these countries understand that much of the progress and development they now enjoy are the results of colonization, natural resource extractivism that started with the Industrial Revolution, or both.

Contribution, therefore, under this section, comes in many forms, including, but not limited to, direct funding allocations, donations, grants, or the pooling of financial resources into one body which will then release the amounts on an as-needed basis.

At COP 26 in Glasgow, Scotland, through First Minister Nicola Sturgeon, initiated this endeavour by committing \$8.5 million (or £7 million) specific to loss and damage, allocated to climate vulnerable countries, as well as loss and damage research. She rationalized such amount as “not about charity, but about reparation” and invited other developed countries to do the same thing. It is to be noted that as of 24 February 2023, the money provided by Scotland has been critical in aiding Malawi as the African country battles the worst effects of the climate crisis.

In the months since, and amidst similar contributions made by developed countries, individuals and organizations who lobby for loss and damage funding go back to their main calls, and have now been calling for the fulfillment of four (4) main attributes of such funding: new, additional, predictable, and adequate (NAPA). New means that the funding should be created in the last two (2) years, and is specific to loss and damage; additional means that the funding should be separate and distinct from existing financial mechanisms for adaptation and mitigation; predictable means that the finance flows have a continuous source which climate vulnerable nations can access; and adequate means that the funding given is sufficient to meet the needs of those who suffer losses and damages.

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<sup>15</sup> Huq, S., Naushin, N., & Joshi, M. (2023, February 6). *Everything you need to know about the Loss and Damage Fund*. International Center for Climate Change and Development (ICCCAD). <https://www.icccad.net/daily-star-articles/everything-you-need-to-know-about-the-loss-and-damage-fund/>

<sup>16</sup> There have been other propounded suggestions which can either be separate suggestions or can accrue to the funding, such as additional taxes on international travel, carbon pricing, excise taxes, national legislation on funding arrangements, etc.

After Scotland, several other countries have begun making similar initiatives, including, but not limited to, the Government of Wallonia (which pledged \$2.15 million dollars), Denmark (\$17.7 million dollars), and Belgium (\$2.5 million dollars).<sup>17</sup> It is to be noted that the funds allocated will be separately managed, and will have separate allocations, thus the need for a centralized loss and damage financial flow. For instance, Wallonia's allocation is for climate vulnerable countries and will be managed by the Climate Vulnerable Forum as well as the V20, while Denmark's fund will be managed by the Government of Denmark, and will be for insurance and civil society efforts, with focus in the Sahel region of Africa.

Contribution is, at its core, a result of global solidarity. It is a realization of the fact that the climate crisis affects everyone but will affect everyone in a myriad of ways, and those most affected are not just vulnerable countries, but, more importantly, vulnerable communities.

Using the NAPA guide, therefore, will be a good, if yet insufficient, guide for governments in the amount of funding they would allocate – the problems with the contribution mechanism, however, lie in its operationalization: (1) who gets what and how much do they get?, (2) who decides these things?, and (3) how do we ensure that the funding given is adequate for the needs of the vulnerable countries and communities? With climate impacts worsening with every incremental increase in global warming levels, concerns abound as to whether the global goodwill is already too little too late. These questions remain unanswered in the international climate negotiations, but perhaps there is merit in asking these questions as the transitional committee (TC) created under the Sharm El-Sheikh Implementation Plan is set to present their plans and suggestions on how the created loss and damage fund should look like. As of writing,<sup>18</sup> the TC membership has already been finalized, and the members are set to meet in April 2023.

## II. Establishment of liability

Another way to get the money where it is needed is through the establishment of liability, which is commonly done through litigation.

There are no decided cases as of yet that can set precedence in loss and damage liability, and one of the main drawbacks is because of the difficulty surrounding evidence-gathering, which is done through attribution science.

### *a. Liability in the national level*

In the Philippines, loss and damage falls under the concept of quasi-delicts, which is found in Article 2176 of the New Civil Code. The Article provides that

“Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.”<sup>19</sup>

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<sup>17</sup> The International Centre for Climate Change and Development made a very informative graphic on loss and damage by the numbers, which can be accessed at <https://lossanddamageforum.org/publications/the-daily-star-oped/everything-you-need-to-know-about-the-loss-and-damage-fund/>

<sup>18</sup> March 2023

<sup>19</sup> Additionally, the Chapter provides in Article 2192 thereof that:

The establishment of liability, at least with regard to loss and damage, can also be found much earlier in the Philippines' New Civil Code, in its chapter on Human Relations, which is composed of Articles 19 to 36. The most relevant are Articles 19 to 23:

“Article 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

Article 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.

Article 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

Article 22. Every person who through an act of performance by another, or any other means, acquires or comes into possession of something at the expense of the latter without just or legal ground, shall return the same to him.

Article 23. Even when an act or event causing damage to another's property was not due to the fault or negligence of the defendant, the latter shall be liable for indemnity if through the act or event he was benefited.”

Another provision under the Civil Code that we may want to consider is Article 2191 which provides:

Proprietors shall also be responsible for damages caused

- (1) By the explosion of machinery which has not been taken care of with due diligence, and the inflammation of explosive substances which have not been kept in a safe and adequate place;
- (2) By excessive smoke, which may be harmful to persons or property;
- (3) By the falling of trees situated at or near highways or lanes, if not caused by force majeure;
- (4) By emanations from tubes, canals, sewers or deposits of infectious matter, constructed without precautions suitable to the place.

To date, there has not been a single case decided by the Supreme Court based upon this provision. Yet, the clear import of the article, especially subparagraph 2, indicates that it is available to a claimant seeking redress for damage caused by acts which pose great environmental risks. Such claimant would then be entitled to actual damages, or adequate contribution only for such pecuniary loss suffered as duly proved

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- (4) By emanations from tubes, canals, sewers or deposits of infectious matter, constructed without precautions suitable to the place.”



Another statute that also provides an action to the establishment of liability is The Philippine Clean Air Act of 1999 (RA 8749) which recognizes the principle that “polluters must pay”. Section 41 which provides that

Section 41. *Citizen Suits*. - For purposes of enforcing the provisions of this Act or its implementing rules and regulations, any citizen may file an appropriate civil, criminal or administrative action in the proper courts against:

(a) Any person who violates or fails to comply with the provisions of this Act or its implementing rules and regulations; or

(b) The Department or other implementing agencies with respect to orders, rules and regulations issued inconsistent with this Act; and/or

(c) Any public officer who willfully or grossly neglects the performance of an act specifically enjoined as a duty by this Act or its implementing rules and regulations; or abuses his authority in the performance of his duty; or, in any manner, improperly performs his duties under this Act or its implementing rules and regulations: *Provided, however*, that no suit can be filed until thirty-day (30) notice has been taken thereon.

The court shall exempt such action from the payment of filing fees, except fees for actions not capable of pecuniary estimations, and shall likewise, upon prima facie showing of the non-enforcement or violation complained of, exempt the plaintiff from the filing of an injunction bond for the issuance of a preliminary injunction.

Within thirty (30) days, the court shall make a determination if the complaint herein is malicious and/or baseless and shall accordingly dismiss the action and award attorney's fees and damages.

A drawback to this is the fact that litigation is jurisdiction-specific, and that there is a limitation on who can be charged with a violation. Cases filed in national courts can only hold liable those who, by virtue of their existing contracts, can be charged under Philippine laws, which will hold accountable not countries, but individuals and groups, including corporations.

Another drawback is the technical nature of climate change which might make evidence-appreciation difficult for courts. While the country has Administrative Order No. 23-2008, which designates special courts to hear, try, and decide environmental cases<sup>20</sup> as well as A.M. No. 09-6-8-SC released in 2010, otherwise known as the Rules of Procedure for Environmental Cases, there remains a lot of difficulty in pursuing climate litigation. Issues include the highly technical and scientific nature of climate litigation, the length of time litigation takes, and attribution science. Attribution science will be further discussed below.

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<sup>20</sup> ADMINISTRATIVE ORDER NO. 23-2008 RE : DESIGNATION OF SPECIAL COURTS TO HEAR, TRY AND DECIDE ENVIRONMENTAL CASES. (2008, February 1).

[https://law.pace.edu/sites/default/files/IJIEA/primary\\_sources/Jamaica\\_Natural\\_Resources\\_Conservation\\_Authority\\_Act\\_1991.pdf](https://law.pace.edu/sites/default/files/IJIEA/primary_sources/Jamaica_Natural_Resources_Conservation_Authority_Act_1991.pdf)

For instance, while the Rules of Procedure for Environmental Cases was released over a decade ago, which had, among its provisions, the introduction of the Strategic Lawsuit Against Public Participation (Section 4(g)), the Writ of Kalikasan (Rule 7), the Writ of Continuing Mandamus (Rule 8), and the Precautionary Principle (Rule 20), there are still very few cases elevated to the Supreme Court which have been successful under these grounds. This perhaps is borne out of several reasons, but the difficulty relating to establishing causality, and, eventually, liability cannot be underplayed.

However, there have been some steps moving forward, including the acknowledgment that there are other arenas that exist to establish said liability. Internationally, this means going through the United Nations processes instead of just the International Court of Justice, among others; nationally, this means also looking into other agencies that can establish liability.

In a novel pronouncement by the Commission on Human Rights through its Report on the National Inquiry on Climate Change, the CHR noted that carbon majors can now be held liable for the human rights violations they have caused as a result of their operations. It also noted, among others, that climate justice is a human rights issue. The Report was released as a result of a petition lodged within the Commission seeking to “establish how climate change is related to the increasing frequency and severity of natural disasters and how human rights of the Filipinos are affected by them.”<sup>21</sup> The petition was filed by individuals, organizations, and groups, many of whom were survivors of Typhoon Yolanda (international name Typhoon Haiyan) which devastated the country in 2013. Its defendants were so-called carbon majors, 47 oil, gas, and cement companies<sup>22</sup> whose activities have been studied as the largest contributors of carbon dioxide and methane emissions since the Industrial Revolution.

After years of multi-city and intercontinental hearings, the CHR released its decision in May 2022. The Commission pronounced that climate change was a grave and urgent human rights concern, and that a changing climate would pose difficulties for the sets of rights under the umbrella of human rights, such as the right to food, water and sanitation, adequate housing, and preservation of culture, among others. It also noted that states had the duty to protect its citizens’ human rights as the primary duty-bearers for upholding human rights obligations under treaties and customary international law,<sup>23</sup> and that business enterprises have the concurrent obligation and responsibility to respect human rights as well.<sup>24</sup>

While not legally binding, the importance of the CHR Report must be underscored. It was a pronouncement from a National Human Rights Institution (NHRI) that can be used as precedent in domestic or international cases, it provided policy recommendations for all levels of government as well as non-government actors, and it provided an entry point for climate litigation in the country. The Report also zeroed in on the importance of the creation of a loss and damage fund, as it recognized that the Philippines is a country highly impacted by increasing global warming

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<sup>21</sup> *National Inquiry on Climate Change*. Commission on Human Rights. (n.d.). <https://chr.gov.ph/nicc-2/>

<sup>22</sup> Chevron, ExxonMobil, BP, Royal Dutch Shell, Conoco Phillips, Peaboy Energy, Total, Consol Energy, BHP Billiton, Anglo American, RWE, ENI, Rio Tinto, Arch Coal, Anadarko, Occidental, Lukoil, Rosneft, Sasol, Repsol, Marathon, Hess, Glencore, Alpha Natural Resources, Freeport McMoran, Encana, Devon Energy, BG Group, Westmoreland Mining, Suncor, Kiewit Mining, North American Coal, RAG, Luminant, Lafarge, Holcim, Canadian Natural Resources, Apache, Murrill Coal, UK Coal, Husky Energy, Heidelbergcement, CEMEX, Italcementi, Murphy Oil, Taiheiyō, and OMV Group

<sup>23</sup> p. 63

<sup>24</sup> p. 79

levels, and will be on the receiving end of further losses and damages unless urgent steps are taken to avert, minimize, and address the same.

*b. Liability in the international level*

*i. Litigation*

As earlier noted, countries have already started to file cases to seek accountability and hold corporations and countries liable for their climate impacts. International landmark cases, therefore, like *Urgenda* and *Miliedefensie* have discussed the responsibilities of countries and liabilities of corporations in the context of an ever-warming world.

*Urgenda Foundation v. State of Netherlands*<sup>25</sup>

The main issue in *Urgenda*<sup>26</sup> is whether or not the State of Netherlands is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so.<sup>27</sup> The petition, brought forth by almost a thousand petitioners, was premised on the dangers posed by climate change and the need to protect human rights based on the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Court discussed thoroughly the obligations of the Dutch government, basing off of the UNFCCC processes as well as the Dutch constitutional system, the ECHR, and the commitments that the country has made thus far. The Court of Appeals decided (which the Court subsequently affirmed) that the State's policy regarding greenhouse gas reduction is insufficient to meet the requirements pursuant to Articles 2<sup>28</sup> and 8<sup>29</sup> of the ECHR.

*Miliedefensie et al v. Royal Dutch Shell plc.*

*Miliedefensie*<sup>30</sup>, on the other hand, was a case that built upon *Urgenda*. Plaintiffs alleged that Shell violated its duty of care under Dutch law and human rights obligations because of its contributions to climate change, and sought a ruling that Shell must reduce its CO<sub>2</sub> emissions by 45% by 2030 compared to 2010 levels and to zero by 2050, in line with the Paris Agreement.

In the suit, the plaintiffs extended the *Urgende* argument to private companies, Shell in particular, and said that Shell had a duty of care based off of Article 6:162 of the Dutch Civil Code as further informed by Articles 2 and 8 of the ECHR. Plaintiffs said that Shell had a long and extensive knowledge of climate change and yet misled the public on climate.

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<sup>25</sup> Since *Urgenda* came out, many other groups have started filing cases as against either their respective countries or other organizations, usually looking into human rights or the duty of care as their main arguments

<sup>26</sup> Climate Change Litigation. (n.d.-a). [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113\\_NA\\_judgment.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_NA_judgment.pdf)

<sup>27</sup> Page 2

<sup>28</sup> Right to life

<sup>29</sup> Right to a private life, family life, home, and correspondence

<sup>30</sup> Supplemental brief for the constitutional complaint by “youth 4 climate ... (n.d.-b). [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210126\\_NA\\_na.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210126_NA_na.pdf)

On May 2021, the District Court of the Hague, after a discussion on procedure, discussed and interpreted the unwritten standard of care “on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.”<sup>31</sup> The Court concluded that Shell is obliged to reduce its emissions through the group’s corporate policy; this related to the group’s entire energy portfolio and the aggregate volume of all emissions. It further held that “[t]his is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO<sub>2</sub> emissions generated by the business relations, and to use its influence to limit any lasting consequences as much as possible.”<sup>32</sup>

### *Sharma v. Minister of Environment*

However, not all international climate litigation has succeeded. The case, for instance, of *Sharma v. Minister of Environment* lays down the problem surrounding environmental and climate litigation, especially when it comes to establishing specific liabilities, again because of issues surrounding attribution science.

In *Sharma v. Minister of Environment*, youth representatives filed a case against Australia’s Minister for the environment and Vickery Coal Pty Ltd. The case was brought to court because Whitehaven Coal Pty Ltd sought to seek approval under Australia’s Environment Protection and Biodiversity Conservation Act of 1999 to increase its total coal extraction from its Vickery mine from 135 to 168 megatonnes (known hereafter as the “Extension Project”). The petitioners claimed that the coal, if extracted, will be emitted as carbon dioxide, and will be destructive not just to the environment, but to the health of the children. The submission provided in Pars 9 and 10 thereof that

“9 As temperature rises to 2°C above the pre-industrial level and beyond, the risk of feedback processes increases, as does the prospect that a tipping cascade may be activated, leading to an uncontrollable trajectory to a much hotter Earth.

10 There is, of course, a spectrum of possible future worlds, depending (apart from feedback) on how much more CO<sub>2</sub> humans emit by burning coal and other fossil fuels. At the other end of the spectrum, if temperature increases to  $\geq 4^\circ\text{C}$  above the pre-industrial level, the phenomena described above will change accordingly. In the last few decades of this century, the respondents, and other Australian children today, will live in significantly altered conditions. Each is more likely to suffer personal injury or death directly caused by heat and fire (or smoke), and as a group, more of them will suffer personal injury or death from heat and fire (or smoke). xxx”<sup>33</sup>  
(Citations omitted)

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<sup>31</sup> Par 4.1.3

<sup>32</sup> Par 4.1.4

<sup>33</sup> Commonwealth of Australia Federal Court of Australia. (2023, August 9). *Public interest cases (online files)*. Federal Court of Australia. <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files>

The petitioners therefore questioned the Minister of Environment's decision to allow the corporation to extract the coal.

In its first decision dated 05 October 2021, the Court ruled in Sharma et al's favour, declaring that the Minister "has a duty to take reasonable care, in the exercise of her powers under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) xxx to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere."<sup>34</sup>

However, upon appeal, the court overturned its earlier pronouncement. Its second judgment on appeal related to procedural reasons (i.e., the case being a representative case as the petitioners were children at the time the case was filed in court), however, its reversal was mainly hinged on the connection between the harm and the potential damage alleged.

There, the Court, through its three-judge panel, discussed the duty of care requirement, and how the duty of care failed because one or more of its requisite elements have not been established, which are reasonable foreseeability, control, vulnerability, nature of the relationship, and indeterminacy. The Court understood that climate change is a threat, but that the duty of care argument necessarily failed which merits a reversal of the decision.

On reasonable foreseeability, the Court said that while it is not a test of causation, the inquiry as to reasonable foreseeability has a causal element,<sup>35</sup> and that "one cannot say that there is no reasonable foreseeability of harm to the Children from the release of emissions caused by the combustion of the coal mined."<sup>36</sup> As to control, Chief Justice Allsop said that the control of the Minister of the harm is not present considering the nature of the harm is a worldwide global climate catastrophe, but that the Minister did have almost exclusive control over any risk created by the approval of the extension of the mine.<sup>37</sup>

Vulnerability was inapplicable in the case as the findings of the primary judge were inadequate to characterize the Children as vulnerable,<sup>38</sup> and the nature of relationship was not sufficiently direct or proximate to establish the Duty. Finally, as to indeterminacy, Chief Justice Allsop said that "[t]here is a lack of proportionality between the tiny contribution to the increased risk of harm, the lack of control of the harm, and liability for all damage by heatwave, bushfires and rising sea

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<sup>34</sup> *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774. Sharma by her litigation representative sister Marie Brigid Arthur v minister for the environment (no 2) [2021] FCA 774. (2021, July).

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0774>

<sup>35</sup> In Par 329, the Court said "At the level of duty, causation does not have to be proved, but some causal relationship between the act and the harm looking forward must be real and not fanciful. A contribution to the risk of harm occurring can be seen as part of that relationship. It may not be the whole of that causal relationship. At this level of generality and at this level of abstraction, the real question for the imposition of the duty or not is whether the increase in risk of the harm from this act can be seen to be so small that it is not reasonably foreseeable, that is, it is not real but is fanciful, that the act will or may have any causal relationship to harm to the Children in the future."

<sup>36</sup> Par. 332

<sup>37</sup> Par 334

<sup>38</sup> In Par 338 CJ Allsop also said that "[t]he Children are in the same position as everyone in the world who is or will be alive at the future times at which the harm is posited. The lack of relevant control in any relationship further undermines the notion of vulnerability."

level to the whole of the Australian population under 18, ongoing into the future.”<sup>39</sup> This was echoed by Judge Beach who agreed with the Minister and said that “the concern is with rolling events potentially causing damage where there is no meaningful limit on how many of the claimant cases will suffer harm and how many times they will be so harmed, when that damage will occur over the next century or so, and the extent of that damage.”<sup>40</sup> In this vein, Judge Beach noted that “in the present case indeterminacy is a powerful salient feature against the duty of care being owed.”<sup>41</sup>

While more focused on the duty of care than a question of causality the Court eventually decided against *Sharma et al.* However, while undoubtedly a blow to climate activists and climate litigants the world over, *Sharma* still proves to be helpful as it puts into the forefront the need for further discussions on causation and foreseeability of harm. It also discussed climate science very strongly, and established a precedent as to the level of technicality and scientific knowledge future climate decisions should possess.

Litigation has also developed a new approach. Just this year, the world’s first derivative action in the High Court of England and Wales was filed by ClientEarth. The claim alleges that the Board of Directors of Shell mismanaging climate risk amounted to a breach in company law. The Board failed to adopt and implement an energy transition strategy that aligns with the Paris Agreement.

ClientEarth is asking the High Court for an Order requiring the Board to adopt a strategy to manage climate risk in line with its duties under the Companies Act, and in compliance with the Dutch Court judgment. It is now up to the High Court to decide whether to grant ClientEarth permission to bring the claim.<sup>42</sup>

Litigation, however, as earlier noted, is just one way to establish liability and pecuniary responsibilities. Another way to do so is through asking for international bodies to decide on requests, similar to the CHR inquiry.

#### *Other processes*

In 2023, Vanuatu, leading a coalition of other developing countries, submitted a Request to the International Court of Justice (ICJ) for an advisory opinion on the obligation of States in respect of climate change. Known now as the Vanuatu ICJ Initiative, the coalition is composed of more than 105 nations calling for an Advisory Opinion “to gain clarity how existing International Laws can be applied to strengthen action on climate change, protect people and the environment and save the Paris Agreement.”<sup>43</sup>

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<sup>39</sup> Par 343

<sup>40</sup> Par 745

<sup>41</sup> Par 748

<sup>42</sup> *ClientEarth files climate risk lawsuit against Shell’s board with support from institutional investors* . ClientEarth. (2023, February 9). <https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/>

<sup>43</sup> Vanuatu ICJ Initiative. (n.d.). <https://www.vanuatuicj.com/home>

The Request<sup>44</sup>, now backed by more than 100 nations<sup>45</sup> recognized the unprecedented challenge that climate change brings and the need for immediate and urgent response to the same. It also noted with profound alarm

“that emissions of greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change and that those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effects xxx”<sup>46</sup>

In addition, it noted with utmost concern the scientific consensus expressed in the Intergovernmental Panel on Climate Change reports which, among others, discussed

“that **human-induced climate change**, including more frequent and intense extreme events, **has caused widespread adverse impacts and related losses and damages to nature and people**, beyond natural climate variability, and that across sectors and regions **the most vulnerable people and systems are observed to be disproportionately affected.**” (Emphasis supplied)

As well, it expressed serious concern regarding the fact that the goal of developed countries to jointly mobilize USD 100 billion dollars yearly by 2020 in the context of mitigation and transparency on implementation had not yet been met.

Having laid down all this context in the earlier paragraphs, the group therefore asked the ICJ, in accordance with Article 96 of the Charter of the United Nations, and pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,<sup>47</sup>

- (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

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<sup>44</sup> United Nations. (n.d.). *UN official documents*. United Nations. <https://www.un.org/en/delegate/page/un-official-documents>

<sup>45</sup> As of writing, the Philippines has yet to join the list of countries to seek for the Advisory Opinion

<sup>46</sup> 2/4-3/4

<sup>47</sup> Author’s note: All these are also applicable sources of obligations that can establish liability

- (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
- (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specifically affected by or are particularly vulnerable to the adverse effects of climate change?
  - (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?<sup>48</sup>

While the ICJ Opinion, like the Report of the CHR, will not be legally binding, it will still be an important Opinion that will lay down the responsibilities of States, particularly developed countries, as regards the climate crisis. It is hoped that a clearer decision in the form of the Advisory Opinion will better guide policymaking, legislation-crafting, and decision making on matters that involve establishing liability and creating obligations.

Further, as States commit to strengthening their respective Nationally Determined Contributions (NDCs) as part of their obligations under the Paris Agreement, the same can perhaps be used to remind countries of their commitments with regard to climate. This, in addition to treaties and other international conventions that States have entered into.

### *c. Attribution science*

All said, the establishment of liability through judicial processes, while a very good instrument for loss and damage, has its own issues. On one hand it holds individuals, corporations, and countries liable for specific violations; on the other hand, litigation takes a lot of time and resources, and oftentimes the remedy prayed for (or granted) is not commensurate to the level of harm done. Worse, the speed of the litigation process may mean sometimes that the individuals or communities have already had to leave their homes, or have lost their lives and livelihoods, before any decision is released.

IPCC AR6 defines attribution as “the process of evaluating the relative contributions of multiple causal factors to a change or event with an assessment of confidence”<sup>49</sup>. However, whereas Working Group I (the physical science basis of climate change) focuses on *climate attribution* where ‘an observed change in a climate-related system is attributed to anthropogenic climate forcing’, Working Group II (impacts, adaptation and vulnerability) focuses on *impact attribution* where ‘changes in natural, human or managed systems are attributed to this change in the climate-related system’<sup>50</sup>. Both climate attribution and impact attribution are important for the discussion of losses and damages, especially with regards to understanding causality.

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<sup>48</sup> 3/4-4/4

<sup>49</sup> see Glossary of WGI

([https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_AnnexVII.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_AnnexVII.pdf)) and WGII ([https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_Annex-II.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Annex-II.pdf))

<sup>50</sup> see IPCC AR6 – WGII Chapter 16



However, attribution science is a relatively new field of climate science that is still faced with serious scientific constraints such as lack of high-quality historical observational data, well-verified climate models and local meteorological experts especially in developing countries who also suffer the most losses and damages.<sup>51</sup> At present, pioneering projects in attribution science such as the World Weather Attribution initiative<sup>52</sup> which conduct rapid extreme event attribution research mainly focus on the most extreme events in developed countries, with developing countries historically having substantially fewer attribution studies especially compared to the number of attributable events that have occurred<sup>53</sup>. Furthermore, attribution science still only mainly accounts for hazards – and to a very limited extent exposure and vulnerability, despite these two also being integral components of risk<sup>54</sup>.

Given the current state of scientific research, the most common application for attribution science is supporting decision-making in the direct aftermath of an extreme event when there is a window of opportunity to “build back better”<sup>55</sup>, and enabling communities to prioritize investments in adaptation by clarifying which everyday weather conditions are likely to become more common in the future<sup>56</sup>. However, attribution science is *not* a requirement for making disaster response and climate adaptation decisions as these are rather determined by societal and governance factors<sup>57</sup>.

In the same vein, attribution science is *not* necessarily a requirement for establishing liability<sup>58</sup> – nor is the lack thereof an excuse for stalling much-needed discussions on Loss and Damage financing<sup>59</sup>. While there is a need to discuss the precise role of attribution science in supporting Loss and Damage policies<sup>60</sup>, ultimately there is a need to explore whether *establishing liability* is itself

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<sup>51</sup> Otto, F. E. L., Harrington, L., Schmitt, K., Philip, S., Kew, S., Oldenborgh, G. J. van, Singh, R., Kimutai, J., & Wolski, P. (2020, November 2). *Challenges to understanding extreme weather changes in lower income countries*. AMETSOC. <https://doi.org/10.1175/BAMS-D-19-0317.1>

<sup>52</sup> see [www.worldweatherattribution.org/](http://www.worldweatherattribution.org/)

<sup>53</sup> Gilford, D. M., Pershing, A., Strauss, B. H., Haustein, K., & Otto, F. E. L. (2022, June 13). *A multi-method framework for global real-time climate attribution*. Advances in Statistical Climatology, Meteorology and Oceanography. <https://doi.org/10.5194/ascmo-8-135-2022>

<sup>54</sup> Huggel, C., Stone, D., Auffhammer, M., & Hansen, G. (2013, July 26). *Loss and damage attribution*. Nature News. <https://www.nature.com/articles/nclimate1961>

<sup>55</sup> Otto, F. E. L., Harrington, L., Schmitt, K., Philip, S., Kew, S., Oldenborgh, G. J. van, Singh, R., Kimutai, J., & Wolski, P. (2020a, November 2). *Challenges to understanding extreme weather changes in lower income countries*. AMETSOC. <https://doi.org/10.1175/BAMS-D-19-0317.1>

<sup>56</sup> Gilford, D. M., Pershing, A., Strauss, B. H., Haustein, K., & Otto, F. E. L. (2022a, June 13). *A multi-method framework for global real-time climate attribution*. Advances in Statistical Climatology, Meteorology and Oceanography. <https://doi.org/10.5194/ascmo-8-135-2022>

<sup>57</sup> Otto, F. E. L., Harrington, L., Schmitt, K., Philip, S., Kew, S., Oldenborgh, G. J. van, Singh, R., Kimutai, J., & Wolski, P. (2020a, November 2). *Challenges to understanding extreme weather changes in lower income countries*. AMETSOC. <https://doi.org/10.1175/BAMS-D-19-0317.1>

<sup>58</sup> Huggel, C., Stone, D., Eicken, H., & Hansen, G. (2015, June 17). *Potential and limitations of the attribution of climate change impacts for informing loss and damage discussions and policies - climatic change*. SpringerLink. <https://link.springer.com/article/10.1007/s10584-015-1441-z>

<sup>59</sup> James, R. A., Jones, R. G., Boyd, E., Young, H. R., Otto, F. E. L., Huggel, C., & Fuglestad, J. S. (1970, January 1). *Attribution: How is it relevant for loss and damage policy and practice?*. SpringerLink. [https://link.springer.com/chapter/10.1007/978-3-319-72026-5\\_5](https://link.springer.com/chapter/10.1007/978-3-319-72026-5_5)

<sup>60</sup> Parker, H. R., Cornforth, R. J., Boyd, E., James, R., Otto, F. E. L., & Allen, M. R. (2015, September 3). *Implications of event attribution for loss and damage policy*. <https://doi.org/10.1002/wea.2542>

a necessary requirement for *addressing loss and damage* within the climate regime (i.e., UNFCCC, WIM) which is the real issue at hand as opposed to the uncertainties of attribution science<sup>61</sup>.

In the case of climate financing for mitigation and adaptation, climate science currently plays a major role for accessing much-needed finance, with the so-called “climate rationale” often making or breaking a funding proposal<sup>62</sup>. Developed based on rigorous climate analysis of observed trends and future projections, the climate rationale distinguishes the proposed project from “development as usual” for which separate development assistance is also available. Due to a strong interest to ensure that development assistance is not used as a substitute for climate finance<sup>63</sup>, funding organizations have promoted this technocratic approach to climate financing<sup>64</sup>. However, research on community-based adaptation (CBA) has long found that, in practice, adaptation is hard to distinguish from development, especially as sustainable development often increases adaptive capacity<sup>65</sup>. Furthermore, due to this steep technical requirement, local communities especially those who do not have sufficient or good quality climate data have struggled to access climate financing. Recent studies show that very little climate financing goes directly to local communities and locally led adaptation<sup>66</sup>, with the preparation of the climate rationale being one of the largest barriers to accessing climate finance. This has prompted smaller funding organizations like BASE Initiative to start exploring alternatives to the climate rationale requirement including acknowledging the role of local knowledge and indigenous knowledge in understanding climate risk<sup>67</sup>. For the same reason, there is a strong push for Loss and Damage financing to be more accessible with no overly burdensome requirements, and more transparent and accountable with the priority being the vulnerable communities’ needs rather than just the funders’ requirements<sup>68</sup>. This may necessitate switching from a technocratic approach to a pro-poor approach (e.g., ‘adaptation as development’) to accessing climate financing.

### III. Restoration

Restoration, for the purpose of this paper, refers to the layman definition of bringing individuals and communities back to their original state. It can be devolved further into two – restitution,

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<sup>61</sup> Verheyen, R. (2015, September 30). *Loss and damage due to climate change: attribution and causation - where climate science and law meet*. Inder Science Online.

<https://www.inderscienceonline.com/doi/abs/10.1504/IJGW.2015.071968>

<sup>62</sup> Example: GCF climate rationale <https://www.greenclimate.fund/document/gcf-b33-05>

<sup>63</sup> Ayers, J. M., & Huq, S. (2009, October 9). Supporting Adaptation to Climate Change: What Role for Official Development Assistance? <https://onlinelibrary.wiley.com/doi/10.1111/j.1467-7679.2009.00465.x>

<sup>64</sup> e.g., ‘adaptation plus development’ or ‘climate-proofing’ development, Sherman, M., Berrang-Ford, L., Lwasa, S., Ford, J., Namanya, D. B., Llanos-Cuentas, A., Maillet, M., Harper, S., & IHACC Research Team. (2016, July 14). *Drawing the line between adaptation and development: a systematic literature review of planned adaptation in developing countries*. Wiley Interdisciplinary Reviews. <https://doi.org/10.1002/wcc.416>

<sup>65</sup> Ayers, J. M., & Huq, S. (2009, October 9). Supporting Adaptation to Climate Change: What Role for Official Development Assistance? <https://onlinelibrary.wiley.com/doi/10.1111/j.1467-7679.2009.00465.x>

<sup>66</sup> Marek Soanes, N. R. (2017, March). *Delivering real change: Getting international climate finance to the local level*. International Institute for Environment and Development. <https://www.iied.org/10178iied>; Coger, T., Dinshaw, A., Krishnan, N., Cook, M., Brown, A., Chu, E., & Illick-Frank, E. (2022, August 7). *Tracking and reporting finance for locally led adaptation to climate change*. World Resources Institute. <https://doi.org/10.46830/wriwp.20.00100>

<sup>67</sup> see BASE Initiative <https://baseinitiative.net/registerfirstcallgrants/#about-base>

<sup>68</sup> Person, Inès, Bakhtaoui, Zoha.shawoo@sei.org, Zoha, Shawoo, & Scientist. (2022, December 19). *Operationalizing finance for loss and damage: From principles to modalities*. SEI. <http://doi.org/10.51414/sei2022.045>

which “is the restoring to the rightful owner what has been lost or taken away,” and reparation, which “is the restoring to good condition of something that has been damaged.”<sup>69</sup>

Traditionally, restitution has always been used through the lenses of unjust enrichment<sup>70</sup>, which was eventually widened into also including restitution for wrongdoing. In the Philippines, restitution is usually used in the context of criminal law, specifically in the context of restorative justice, and is defined as the “process upon which the offender accepts accountability for the financial and/or non-financial losses he/she may have caused to the victim. Restitution is a “core” victim’s right which is very crucial in assisting the redirection of the victim’s life.”<sup>71</sup>

In the same vein, reparation has been generally defined as “the process and result of remedying the damage or harm caused by an unlawful act.”<sup>72</sup> More broadly, reparation

“is generally understood to reestablish the situation that existed before the harm occurred. It can also serve as a measure to end ongoing breaches and to deter future ones, as a vehicle for reconciliation or to restore relations between the violator and injured parties, as well as a basis to rehabilitate physical and psychological integrity and dignity. In international law, a breach of an international obligation gives rise to a duty to repair the harm caused. The obligation to make reparation follows a determination that a particular act caused, or sufficiently contributed to, the harm or damages and implies a level of wrongfulness. However, *certain international law agreements may also impose an obligation to afford reparation for losses irrespective of fault*. It has been recognized that reparation must “fully” repair any injury, including any material or moral damage caused by the wrongful act. It must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation that would, in all probability, have existed if that act had not been committed.”<sup>73</sup> (Emphasis supplied)

Restitution and reparation, therefore, in the context of the loss and damage conversations, mean that individuals and communities who experience natural disasters as a result of climate change are given financial assistance in order that they are able to rebuild, recover, and rehabilitate, as the case may be, and be restored to their lives prior to the disaster. This also includes, among others, schools, businesses, and clinics and hospitals. It means, as far as practicable, reinstituting workers

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<sup>69</sup> May, L. (2012, May 5). *Reparations, restitution, and Transitional Justice (Chapter 2) - morality, jus post bellum, and international law*. Cambridge Core. <https://www.cambridge.org/core/books/abs/morality-jus-post-bellum-and-international-law/reparations-restitution-and-transitional-justice/EC8D9065B98535666C60DBA4F92354BA>

<sup>70</sup> In the English and Welsh jurisdictions, restitution is defined as “[a] remedy based upon the principle of unjust enrichment. For the claimant to bring a restitutionary claim, the defendant must have been unjustly enriched at the expense of the claimant. A restitutionary remedy seeks to reverse that unjust enrichment, by restoring the relevant benefit or enrichment to the claimant. Claims in restitution are frequently contrasted with claims (in contract or tort) for compensatory damages, which focus upon the damage suffered by the claimant, rather than the unjust enrichment of the defendant.”

<sup>71</sup> Restorative justice - parole and probation administration. (n.d.-b). <https://probation.gov.ph/restorative-justice/>

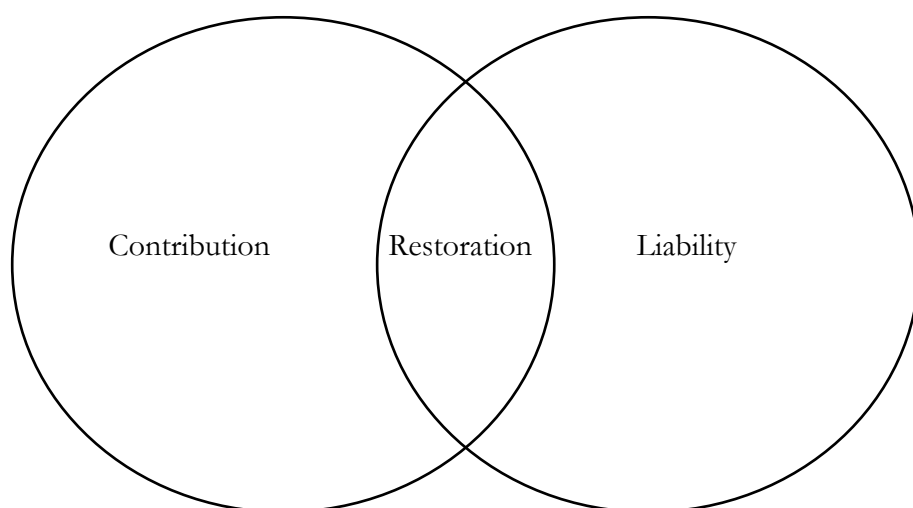
<sup>72</sup> Ferstman, C. (2012, March 23). *Reparations*. Reparations - International Law - Oxford Bibliographies. <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0003.xml>

<sup>73</sup> Ibid.

to their original jobs after the reopening of establishments, and, if this is not possible, being paid the amount equivalent to the wages owed to the worker had the damage not taken place, taking into consideration the length of time it took between the damage taking place and the recovery process.

Restoration is the process that understands that if not for the harms caused by Global North countries, Global South countries would not be experiencing the brunt of the climate crisis, and that there is a reasonable connection (whether or not it is judicially declared) between the damage caused and the subsequent consequences such damage has brought. Therefore, restoration mixes both contribution as well as the concept of establishing liability.

In the context of this paper, thus, while restoration does fall under the general umbrella of contribution, contribution is much wider in that it also includes goodwill and solidarity between and among Global North and South countries. In that same vein, restoration refers specifically to bringing back those who experienced losses and damages to their original state, and is more needs-based. On the other hand, while establishment of liability creates a duty on the part of the violator to pay for losses and damages caused, restoration does not always need a judicial decree or a similar decision for the repayment to take place. For these reasons, it seems restoration is the best among the three.



### **The issue of valuation**

All said, whether it is contribution, establishment of liability, or restoration, each has their merit and each, ideally, would, in the greater context of the loss and damage conversations, create a pool of funding that individuals and communities that face loss and damage may be able to seek.

Another problem, however, that comes into the fray, is valuation.

Economic losses and damages are commonly understood as loss of resources, goods, and services that are commonly traded in markets.<sup>74</sup> These include, but are not limited to, income and physical assets. The former includes business operations, agricultural production, and tourism, while the

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<sup>74</sup>Pishmisheva, P. (2017, July 12). *Online Guide on Loss and Damage*. Unfccc.int.  
[https://unfccc.int/files/adaptation/cancun\\_adaptation\\_framework/loss\\_and\\_damage/application/pdf/online\\_guide\\_id\\_nov\\_2016.pdf](https://unfccc.int/files/adaptation/cancun_adaptation_framework/loss_and_damage/application/pdf/online_guide_id_nov_2016.pdf)

latter includes infrastructure and property. Due to their intrinsic nature, these economic losses and damages can be valued – wages lost, the amount spent for construction and rebuilding, financial impacts on tourist sites, and harvest count, among others. These can be mathematically quantified and be assigned a numerical amount.

Non-economic losses and damages, however, are a little more complicated. According to the UNFCCC, non-economic losses include individual, social, and environmental loss. Individual non-economic L&D includes losses and damages to life, health, and human mobility; societal L&D includes losses and damages to territory, cultural heritage, indigenous knowledge, and societal and cultural identity; finally, environmental L&D includes losses and damages to biodiversity and ecosystem services, among others. The very nature of these losses and damages, and the difficulty with them, is that they are difficult to value. The destruction of entire territories due to slow-onset or rapid events, for instance, or the migration of indigenous peoples from mountainous areas to low-lying lands as a result of land and forest degradation, or impacts on physical and mental health as a result of the climate crisis, all these cannot be measured in quantifiable amounts. It is then doubly difficult to decide on an amount that will be sufficient to cover the extent of the losses and damages; for some, the question even is whether any amount will be sufficient at all.

Despite these difficulties, it is important to note that such should not serve as neither barrier nor excuse for those who have obligations (whether they be Global North countries, corporations, or others) to pay up for loss and damage, and, more importantly, to bring the money to where it is needed most.

## **The Philippine Context**

The Philippines is, at the outset, one of the countries most at risk for natural hazards because of its archipelagic geography and location. The climate crisis has exacerbated this vulnerability, with the Global Climate Risk Index listing the country as 4<sup>th</sup> among the ten most at-risk countries to climate-related extreme weather events from 2000 to 2019.<sup>75</sup> As the world continues to warm up, so will the frequency or intensity of climate hazards, and the Philippines will continue to face the brunt of an increasingly heating world. Since 2020, the Philippines has been ravaged yearly by Category 5 typhoons, and it is predicted that these events, whether extreme or slow-onset, will increase in intensity unless urgent steps are made to adapt to or mitigate them. It is also predicted that these events will lead to further losses and damages unless concrete, immediate actions are taken to avert, minimize, and address the same.

In 2013, the world began to witness a shift in how to look at climate hazards when the country was ravaged by Super Typhoon Yolanda (international name Haiyan), one of the most powerful tropical cyclones ever recorded, one of the deadliest typhoons to have hit the country, leaving in its wake at least 6,300 dead, and one of the costliest Philippine typhoons.<sup>76</sup> It affected approximately 3.42 million households, composed of 161 million people, and damaged 1,084,762 buildings.<sup>77</sup> Typhoon Yolanda, which largely hit the central part of the country, has been widely

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<sup>75</sup> See Eckstein, D., Kunzel, V., & Schafer, L. (2021). Global Climate Risk Index 2021. Berlin: Germanwatch

<sup>76</sup> del Rosario, Eduardo D. (April 2014). [FINAL REPORT Effects of Typhoon YOLANDA \(HAIYAN\)](#) (PDF) (Report). NDRRMC. Retrieved March 14, 2015.

<sup>77</sup> MURAO, O., USUDA, T., SUGIYASU, K., & HANAOKA, K. (2015, October 13). Building damage due to 2013 typhoon Yolanda in Basey, the Philippines. [https://sheltercluster.s3.eu-central-1.amazonaws.com/public/docs/o.murao\\_t.usuda\\_k.sugiyasu\\_et\\_al.\\_building\\_damage\\_due\\_to\\_2013\\_typhoon\\_yolanda\\_in\\_basey\\_the\\_philippines.pdf](https://sheltercluster.s3.eu-central-1.amazonaws.com/public/docs/o.murao_t.usuda_k.sugiyasu_et_al._building_damage_due_to_2013_typhoon_yolanda_in_basey_the_philippines.pdf)

regarded as the climate hazard that catalyzed a more intense and thorough look into loss and damage, as one of the most cataclysmic hazards that took place in the 21<sup>st</sup> century.

Since, the country has been on the other end of many similarly-disastrous climate events. On average, the Philippines is hit by 20 storms and typhoons, and it has been observed that these typhoons have grown progressively more destructive, with the ten costliest ones having taken place in the last 15 years, the latest of which (and second most costly) being Super Typhoon Odette (international name Rai) in 2021, which damages cost up to \$1.02 billion. Super Typhoon Yolanda tops the list at \$2.2 billion in damages caused.

It is with this context in mind that the Philippines ought to be a leader in loss and damage conversations, including loss and damage finance. The country is a middle-income, developing country, ravaged by annual storms and typhoons leading to costly losses and damages; it does not contribute significantly to global greenhouse gas emissions, yet its citizens and biodiversity are the first to suffer from the worsening effects of an increasingly warming world.

In August 2022, still reeling from the impacts of Super Typhoon Odette, the Manila Observatory held a regional workshop on loss and damage in Bohol, one of the hardest-hit areas of the typhoon. The workshop was attended by government officials, civil society, youth, women, and indigenous peoples representatives from nine of the 11 Southeast Asian countries, both online and in-person. During the three-day event, the participants were able to (1) understand loss and damage from the international, historical, and contextual perspectives, (2) visit island communities and see how they are amidst the process of rebuilding and recovery, and (3) agree on the need of a financing facility dedicated to loss and damage considering the specific vulnerabilities of Southeast Asian nations, culminating in the release of a list of recommendations on how this facility should look like.

Three months subsequent to the workshop, the project proponents Manila Observatory, with partners The Samdhana Institute and Chiang Mai University School of Public Policy, released the policy brief mentioned briefly above.

It is estimated that Odette caused up to Php 5 billion in damages in Bohol alone, which came after two successive landfalls in the province.<sup>78</sup> Many other areas have experienced massive destruction in the wake of the typhoon, with the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) releasing a document dated February 2022<sup>79</sup> providing an overview of the humanitarian needs and priorities of communities affected by the typhoon; it remains so far one of the most comprehensive reports on the extent of losses and damages caused by Typhoon Odette.

Many other areas of the country are highly vulnerable to the climate crisis; now, even those that are not usually affected by climate hazards are increasingly being exposed to risks, which was the case with Palawan during Odette. Thus, there is a need for stronger climate finance mechanisms to provide pathways for the funding to go to individuals and communities who need the money most, whether it be for recovery, rebuilding, or rehabilitation.

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<sup>78</sup> Cator, C. (2021, December 17). *Damage in Odette-hit Bohol to reach ₱5 billion*. cnn. <https://www.cnnphilippines.com/regional/2021/12/17/Bohol-damage-Odette.html>

<sup>79</sup> *Philippines: Super Typhoon Rai (odette) humanitarian needs and priorities revision (Dec 2021 - Jun 2022) (2 Feb 2022) - Philippines*. ReliefWeb. (2022, February 2). <https://reliefweb.int/report/philippines/philippines-super-typhoon-rai-odette-humanitarian-needs-and-priorities-revision>

While the People's Survival Fund (PSF) under Republic Act No. 10174 exists (which is the amendatory legislation to Republic Act No. 9729 or the Climate Change Act), it is a fund specific to adaptation. It is "an annual fund intended for local government units and accredited local/community organizations to implement **climate change adaptation projects** that will better equip vulnerable communities to deal with the impacts of climate change."<sup>80</sup> (Emphasis supplied) By its very nature, therefore, the PSF, since it is for adaptation, involves a slower process, and has more bureaucratic requirements prior to its grant approval. This includes the submission of project proposals, proof of accreditation, and adaptation references.<sup>81</sup>

On the other hand, loss and damage is more immediate, and therefore its finance flows should adequately reflect its urgency. While country Parties during the COP agreed on the creation of a loss and damage fund, what matters now is how to operationalize such fund in a way that can be used by vulnerable individuals and groups. Locally, an initiative that could potentially bridge this gap is the drafting of the CLIMA Bill spearheaded by the Legal Rights and Natural Resources Centre – Friends of the Earth Philippines as well as Greenpeace Philippines. The draft, which has since been endorsed to the Chairman of the House Committee on Climate Change and Bohol Representative Congressman Edgar Chatto, is potentially a loss and damage bill that will be the first of its kind. Prescinding from the NICC released by the CHR, LRC and Greenpeace drafted a bill that would hold carbon majors accountable for their climate violations, including greenwashing, climate denialism, and releasing of greenhouse gases beyond the standards set by law. It also imposed additional obligations on businesses including financial disclosures as well as monitoring of human rights impacts, in view of the United Nations Guiding Principles on Business and Human Rights. Lastly, it created a Climate Change Victims Fund (CCVF) and a concurrent Board to handle such fund; the fund will be the pool of funding available to individuals, groups, and communities who have faced climate hazards. Penalties imposed on businesses will accrue to such Fund, but it can also be the local counterpart to the created loss and damage fund in the multilateral level. It is expected that the Bill, which had been mentioned by Cong. Chatto in a privileged speech twice, the latest of which was during the Climate Change Consciousness Week in November 2022, will be filed soon.

Due to the many complexities of loss and damage, and similar to adaptation and mitigation, it is then important to look at loss and damage financial flows as having more than one source, and more than one way to access the same. Contribution, whether through North-South or South-South collaborations; establishment of liability, whether through judicial decisions, legislation, or international agreements or treaties; or restoration, whether through restitution or reparation, are but some of these ways. Imposition of wealth taxes and other excise taxes, as well as fuel surcharges, are also some other ways. Insurance mechanisms are also one of the options, however this will not apply to those insurance mechanisms and other financial instruments that seek to profit from the climate crisis by shifting the responsibility for finance to vulnerable countries and thus resulting in greater debt burdens. While restoration, because of its very nature, can be most applicable in the Philippine context, it is not the only way that loss and damage finance flows should be made; in fact, for something as important and urgent as loss and damage, the more flows there are (and the more accessible they are), the better.

## Climate justice as a human rights issue

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<sup>80</sup> Niccdies | People's Survival Fund. (n.d.-b). <https://niccdies.climate.gov.ph/climate-finance/people-survival-fund>

<sup>81</sup> *Climate Change Commission*. PSF Proponents Handbook. (2107, November 21). <https://www.climate.gov.ph/files/PSF-Proponents-Handbook-V3.pdf>

As always, any conversation on loss and damage necessitates a deep dive into climate justice. Loss and damage is, at its core, a climate justice issue. It comes from an understanding that those who have experienced the most devastating impacts of climate change are also those who have contributed the least to its worsening, and therefore they have to be assisted in order to make sure that they can address these losses and damages in the way that they know how and can sustain. Whether this aid comes from contribution, liability establishment, or restoration, is not so much the need so much as receiving the aid.

Moreover, in recent years, and especially in the last decade, climate justice has been considered as inseparable, and in fact a major component, of human rights. The ever-changing climate has caused substantial impacts on peoples' human rights everywhere, and will continue to do so in the next months, years, and decades to come – already this has been noticeable in food and water systems, displacement and resettlement, and culture and identity. To look deeper, therefore, into loss and damage as part and parcel of climate discussions, is to also, at the same time, understand the need to protect and promote the human rights of people the world over.

## **Conclusion**

Loss and damage is within our midst. Every day that the world emits greenhouse gases into our atmosphere, we are moving closer and closer toward a world that is no longer sustainable and inhabitable for all. The IPCC has already noted that the window for climate action is closing rapidly, and urgent and immediate steps have to be made; it also warned that even effective adaptation can no longer address loss and damage.

The Philippines is no stranger to these warnings; every year since 2020 (and amidst a ranging pandemic), it has been facing stronger typhoons, and it is believed that these typhoons will just ravage the country more and more, leaving in its wake costlier and more destructive losses. Therefore, the Philippines needs to be a leader in climate discussions on loss and damage, and not just a passive observer, as its future, both as a nation and of its people, are put in greater peril everyday.

However, all is not lost. The creation of the loss and damage fund is a good reminder that countries understand that there is much work to be done, and many other initiatives everywhere have begun cropping up to bring the money where it is needed most. The work, as always, continues.