Transnational Environmental Law (2024) **13**(1), 134–159
doi:10.1017/S2047102523000237

TEL CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward

Patrick Toussaint

Center for Climate Change, Energy, and Environmental Law (CCEEL), University of Eastern Finland, Joensuu (Finland)
Email: pcktou@gmail.com

(First published online 4 December 2023)

Abstract

After more than three decades of negotiations, the international response to climate change under the United Nations Framework Convention on Climate Change (UNFCCC) appears to have come full circle. At COP27, parties to the UNFCCC agreed to establish a multilateral fund to address loss and damage from global temperature rise, an idea that was initially put forward by the Alliance of Small Island States (AOSIS) in the early 1990s. Employing a historical critique, which draws upon archival and doctrinal research and interviews with key informants who participated in the early days of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, this article examines the AOSIS proposal in its wider historical context, and provides reflections for the renewed endeavour to negotiate a multilateral fund on loss and damage, in particular with a view to achieving justice for climate victims.

Keywords: Climate change; Climate victims; International law; Loss and damage; Alliance of Small Island States (AOSIS)

> There should be established, as an integral part of the Framework Convention on Climate Change, an International Climate Fund to finance measures to counter the adverse consequences of climate change, and a separate International Insurance Pool to provide financial insurance against the consequences of sea level rise. The resources of the International Insurance Pool should be used to compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise.
>
> *Vanuatu on behalf of the Alliance of Small Island States*, *17 Dec. 1991, paras 1(1) and 1(5)*[1]

[1] Vanuatu, on behalf of the Alliance of Small Island States (AOSIS), 'Insurance Mechanism', in Intergovernmental Negotiating Committee, 'Negotiation of a Framework Convention on Climate Change: Elements related to Mechanisms, Vanuatu: Draft Annex relating to Article 23 (Insurance) for Inclusion in the Revised Single Text on Elements relating to Mechanisms (A/AC.237/WG.II/Misc.13)

> The Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, …
> *Decide* to establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, and that these new arrangements complement and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement.
> *Also decide*, in the context of establishing the new funding arrangements referred to in paragraph 2 above, to establish a fund for responding to loss and damage whose mandate includes a focus on addressing loss and damage.
> *UNFCCC, Decision 2/CP.27, adopted 20 Nov. 2022, paras 2 and 3*[2]

1. Introduction

After more than three decades of multilateral negotiations, the international response to climate change under the United Nations Framework Convention on Climate Change (UNFCCC)[3] appears to have come full circle: 30 years of failing to solve the problem it is mandated to address, failing to keep global greenhouse gas (GHG) emissions at a level deemed not dangerous for humans and the planet;[4] 30 years of stalling on meaningful action and support to address the most adverse consequences of climate change, now long inevitable and so frequent and severe that merely helping people to adapt is becoming no longer an option;[5] 30 years of undermining the demands for justice by climate victims from the most vulnerable communities who bear the brunt of adverse climate impacts. The world is now in an era of loss and damage – an ambiguous policy term,[6] which essentially denotes that after three decades of failing to contain the

submitted by the Co-Chairmen of Working Group II)', 17 Dec. 1991, UN Doc. A/AC.237/WG.II/CRP.8, available at: https://unfccc.int/resource/docs/a/wg2crp08.pdf.

2 UNFCCC, Decision 2/CP.27, 'Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage', 17 Mar. 2023, UN Doc. FCCC/CP/2022/10/Add.1.

3 New York, NY (United States (US)), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int.

4 Ibid., Art. 2. A recent study by the World Resources Institute (WRI) finds that parties' nationally determined contributions under the Paris Agreement would lead to only a 7% reduction in GHG emissions by 2030 from 2019 levels, falling drastically short of the 43% required to limit global warming to 1.5°C: T. Fransen et al., 'The State of Nationally Determined Contributions: 2022', WRI, Mar. 2023, available at: https://www.wri.org/research/state-nationally-determined-contributions-2022.

5 H. Lee et al., 'Longer Report', in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2023), p. 28, para. 2.3.2, available at: https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf.

6 There exists, to date, no internationally agreed definition of the concept, leading to often diverging interpretations. For an overview of different perspectives see E. Boyd et al., 'A Typology of Loss and Damage Perspectives' (2017) 7 *Nature Climate Change*, pp. 723–9, at 723.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

problem, we are now dealing with the consequences where questions of reparative justice, long subsumed but never forgotten, are coming back to the fore.

Those old enough to remember, and those eager enough to research, will recall that back in 1991, when states convened under the Intergovernmental Negotiating Committee to negotiate what would become the UNFCCC, Vanuatu, on behalf of the Alliance of Small Island States (AOSIS), tabled a proposal for an International Insurance Pool to address climate loss and damage, specifically sea-level rise.[7] While unsuccessful, this proposal has often been credited as the birthing moment of loss and damage under the climate regime.[8] Over 30 years later, at the 27th meeting of the Conference of the Parties (COP27) held in Sharm el-Sheikh (Egypt) at the end of 2022, UNFCCC parties breathed new life into the idea by agreeing to establish funding arrangements, including an international fund, to address loss and damage.[9]

This article takes a closer look at the content, rationale, and negotiation context of the AOSIS proposal in order to explore what can be learnt from it for the development of the new loss and damage fund. For this purpose, I employ a historical critique, which draws upon archival and doctrinal research, secondary literature, and interviews with key informants who participated in the INC meetings.[10] This historical approach accepts Orford's invitation for international legal scholars to historicize international law with a clear purpose and relevance for political engagement.[11] Rather than conducting neoformalist, technical historiography, Orford calls on international legal scholars to 'take responsibility for actively constructing accounts of the law's past when we argue about law in the present'.[12]

Legal scholars, policy analysts, and civil society organizations are racing to provide their views on what the new loss and damage fund should look like and how it should operate. This article offers a brief respite, an invitation to pause and reflect, to look backward as we look forward. Connecting the present with the past allows us to contextualize key aspects and arguments in the ongoing policy discussions related to loss

[7] AOSIS, n. 1 above.

[8] See, e.g., E. Roberts & S. Huq, 'Coming Full Circle: The History of Loss and Damage under the UNFCCC' (2015) 8(2) *International Journal of Global Warming*, pp. 141–57, at 149; L. Vanhala & C. Hestbaek, 'Framing Climate Change Loss and Damage in UNFCCC Negotiations' (2016) 16(4) *Global Environmental Politics*, pp. 111–29, at 115; R. Mechler et al., 'Science for Loss and Damage: Findings and Propositions', in R. Mechler et al. (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer, 2019), pp. 3–37, at 4 ; M. Rao, 'A TWAIL Perspective on Loss and Damage from Climate Change: Reflections from Indira Gandhi's Speech at Stockholm' (2022) 12(1) *Asian Journal of International Law*, pp. 63–81, at 67.

[9] Decision 2/CP.27, n. 2 above.

[10] To supplant the archival and doctrinal research, I interviewed 6 key informants during the summer of 2020 who participated in the INC meetings as representatives of small island delegations, civil society, and industrialized country delegations, to obtain a better sense of the historical context of the AOSIS proposal, including the political camps, the atmosphere in the negotiation rooms, the personalities behind the proposal, how it was received (and dismissed), and the understanding/framing of climate impacts at the time.

[11] A. Orford, 'International Law and the Limits of History', in W. Werner, M. de Hoon & A. Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2017), pp. 297–320, at 311.

[12] A. Orford, *International Law and the Politics of History* (Cambridge University Press, 2021), p. 9.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

and damage finance. More specifically, the INC context has been chosen as it represents a critical moment in the formation of the UNFCCC regime. The AOSIS proposal was selected both because it is the most cited point of origin of loss and damage and because of its topicality for the new fund. Heeding Orford's warnings, the aim is not to attempt an impossibly neutral or objective historiography of loss and damage devoid of purpose. Rather, the analysis presented in this article provides an opportunity to take stock of how far the international community has come in addressing loss and damage. It provides several reflections for the renewed endeavour to negotiate a multilateral fund, in particular with a view to achieving justice for climate victims.

The remainder of this article is structured as follows. Section 2 provides an overview of the present state of the international policy response to loss and damage. Section 3 examines the AOSIS proposal in its wider historical context, and provides reflections for the renewed endeavour to negotiate a multilateral fund on loss and damage, in particular, with a view to achieving justice for climate victims. Finally, Section 4 offers some conclusions.

2. The Loss and Damage Policy Response: Where Do We Stand?

Before exploring how we originally came to be speaking of loss and damage under the UNFCCC, it is useful to understand where we are in terms of loss and damage policy today. To construe the present moment of international loss and damage policy I will illuminate its content, structures, and current sites of contestation. To date, UNFCCC parties have not agreed on an official definition of loss and damage, leaving ambiguity as to its precise scope and delimitation from adaptation. While some understand loss and damage as relating to adverse impacts of climate change that are beyond the limits of adaptation[13] or the residual impacts of climate change, others hold the view that it falls within the scope of adaptation.[14] Furthermore, loss and damage is included in the Paris Agreement[15] through Article 8, but subject to a COP decision that excludes liability and compensation as flowing from this provision (under the infamous paragraph 51).[16]

Institutionally, the mandate to address loss and damage at the multilateral level lies chiefly under the umbrella of the UNFCCC regime. It is articulated primarily through the Warsaw International Mechanism (WIM), a technical sub-process established under the Convention in 2014.[17] The WIM has three overarching mandates: (i) to

[13] R. Verheyen & P. Roderick, 'Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage', World Wildlife Fund–UK Climate Change Program Discussion Paper, Nov. 2008, pp. 8–13, available at: https://wwfint.awsassets.panda.org/downloads/beyond_adaptation_lowres.pdf. See also UNFCCC, Decision 2/CP.19, 'Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts', 31 Jan. 2014, UN Doc. FCCC/CP/2013/10/Add.1, Preamble.

[14] See Boyd et al., n. 6 above, p. 724.

[15] Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

[16] UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement, 29 Jan. 2016, UN Doc. FCCC/CP/2015/10/Add.1, para. 51. For relevant discussion see M.J. Mace & R. Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25(2) *Review of European, Comparative and International Environmental Law*, pp. 197–214, at 206.

[17] Decision 2/CP.19, n. 13 above.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

enhance knowledge and understanding; (ii) to strengthen dialogue and coordination; and (iii) to enhance action and support, including finance, technology and capacity building.[18] It is governed by a regionally balanced Executive Committee (Excom), which meets twice a year with participation from observers, and reports annually to the COP. The WIM has been subject to two reviews (2016 and 2019) with a third planned in 2024, and has started to implement its five-year workplan for 2023–2027.[19]

In addition to the WIM, several sessions related to its work have taken place under the UNFCCC subsidiary bodies, including the Suva Expert Dialogue in 2017. This dialogue was intended to identify sources of and mobilize financial support for vulnerable countries suffering loss and damage. At COP25, the Santiago Network for averting, minimizing, and addressing loss and damage associated with the adverse effects of climate change was created as a platform to facilitate access to technical assistance for vulnerable developing countries to address loss and damage.[20] At COP26, momentum was kept up through the first Glasgow Dialogue, bringing together parties and stakeholders to discuss funding arrangements, although many developing countries and observers were disappointed with the lack of concrete outcomes from the dialogue.[21] Moreover, a proposal from 134 developing countries convening under the G77 and China to establish a loss and damage finance facility at COP26 was rejected.[22]

Between the Glasgow (Scotland) and Sharm El-Sheikh COPs, a broad coalition of developing countries and civil society heavily advocated the inclusion of loss and damage finance as a formal item on the agenda of the COP and CMA. Following a proposal from the G77 and China during SB56 in June 2022, lengthy formal and informal consultations in the interim period and long nights in the days preceding COP27, parties agreed on the first day of the Conference to formally adopt the following sub-item under Agenda item 8f: 'Matters relating to funding arrangements responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage'.[23] Its adoption was subject to several caveats, read out by COP27 President Shoukry when introducing the text in plenary. The most relevant of these for the purposes of this analysis is that the agenda item would be 'based on

[18] Ibid., para. 5.

[19] UNFCCC Secretariat, 'Second Five-Year Rolling Workplan of the Executive Committee of the Warsaw International Mechanism', 11 Jan. 2023, UN Doc. FCCC/SB/2022/2/Add.2.

[20] At the time of writing the Santiago Network is yet to be fully operationalized. Although parties agreed on institutional arrangements for the network at COP27, no agreement was reached during the Bonn meetings in June 2023 on the host organization.

[21] K. Raffety et al., 'What Happened at COP 27 on Loss and Damage and What Comes Next?', *Loss and Damage Collaboration*, 2023, p. 4, available at: https://uploads-ssl.webflow.com/605869242b205050a0579e87/6388a7def333e344ab5f98c3_L%26DC_WHAT%20HAPPENED_AT_COP_27_%26_WHAT_NEXT.pdf.

[22] Z. Weise & K. Mathiesen, 'EU, US Block Effort for Climate Disaster Funding at COP26', *Politico*, 13 Nov. 2021, available at: https://www.politico.eu/article/eu-us-block-financial-support-climate-change-cop26.

[23] It included a footnote noting that '[t]his sub-item and the outcomes thereof are without prejudice to the consideration of similar issues in the future': UNFCCC Secretariat, 'Provisional Agenda and Annotations', 6 Nov. 2022, UN Doc. FCCC/CP/2022/1/Add.2.

cooperation and facilitation and [would] not involve liability or compensation'.[24] This caveat demonstrated that the spirit of paragraph 51 remains influential nearly a decade since its adoption.

The major historical achievement, in policy terms, was that at COP27 industrialized and developing countries agreed to establish 'new funding arrangements' to assist developing countries that are particularly vulnerable to the adverse effects of climate change in addressing loss and damage, and 'a fund' to support the most vulnerable countries already incurring loss and damage.[25] The text of the decision – in particular, the references to both *funding arrangements* and a *fund*, and the repetitive language around the 'focus on addressing loss and damage' – may seem overkill. However, they are the products of lengthy negotiations preceding COP27 and reflect a compromise between demands for concrete language on the new fund and considering other options besides a fund to finance support for loss and damage.[26] The COP established and mandated a Transitional Committee to provide recommendations on the operationalization of the new funding arrangements, including the fund, for consideration and adoption at COP28. The details of the fund are yet to be negotiated, including the sources of funding, access and pay-out modalities, and the governance of the fund. This process is expected to culminate in an outcome in 2024. UNFCCC parties are also expected to agree on a new collective quantified goal on climate finance prior to 2025, from a floor of US$ 100 billion per year, taking into account the needs and priorities of developing countries.[27] Several developing countries are advocating a sub-goal on loss and damage finance. Whether this will be politically feasible and what relationship such a sub-goal would have with the new loss and damage fund remains to be seen.

3. Unpacking the AOSIS Proposal

Most scholarship on the topic of climate loss and damage traces the origins of the concept back to the early 1990s when the UNFCCC regime was being negotiated under the auspices of an Intergovernmental Negotiating Committee (INC). The majority of literature reviewed identifies a proposal submitted by AOSIS ahead of the fourth INC meeting, held in December 1991 in Geneva (Switzerland), as the birthing moment of loss and damage under the UNFCCC.[28] In this proposal AOSIS suggested creating an International Insurance Pool, a funding mechanism paid for by industrialized countries to compensate small islands and low-lying coastal developing countries for loss and

[24] While interpretative statements such as this do not carry legal weight, they may be taken into account as context in future considerations of the issue. Notably, several industrialized countries sought to codify the statement in the decision text – albeit unsuccessfully.

[25] Decision 2/CP.27, n. 2 above, particularly paras 2 and 3.

[26] See Raffety et al., n. 21 above, p. 5 (for a discussion of similar tussles over the language around 'addressing' or 'responding to' loss and damage).

[27] UNFCCC Secretariat, 'New Collective Quantified Goal on Climate Finance', available at: https://unfccc.int/NCQG#Ad-hoc-work-programme.

[28] See n. 8 above for relevant commentary. Note that the proposal itself was submitted ahead of INC4; the text was later circulated as a conference room paper at the fourth session, which is now available in the UNFCCC digital archives; see AOSIS, n. 1 above.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

damage resulting specifically from sea-level rise. The proposal was modelled on the nuclear liability conventions and funds,[29] and was further inspired by the oil spills regime.[30] While it survived into the draft consolidated texts at INC4 and INC5, following strong resistance from industrialized countries it was omitted from the final text of the Convention adopted in 1992, alongside other detailed annexes.[31]

The idea for an International Insurance Pool should be read in conjunction with a proposal made by Vanuatu on behalf of AOSIS, in June 1991 before INC2, to create a Climate Fund financed by developed countries 'to compensate developing countries (i) in situations where selecting the least climate sensitive development option involves incurring additional expense; and (ii) where insurance is not available for damage resulting from climate change'.[32] That proposal emerged as the AOSIS response to competing ideas among countries about the scope and purpose of a possible climate fund. Where some delegations preferred the fund to focus on supporting developing nations' mitigation or adaptation efforts, the AOSIS fund proposal clearly focuses on compensating damage. Ultimately, like the Insurance Pool, the proposal failed to gain traction, primarily because of heavy opposition from industrialized countries.

The drafting of the AOSIS Insurance Pool proposal has been credited largely to maritime and insurance lawyer Michael Wilford, who at the time worked as consultant for the Foundation of International Environmental Law and Development (FIELD), a public interest organization that provided *pro bono* legal expertise and represented AOSIS in the negotiations.[33] Although it was not possible to interview Wilford for this

[29] Paris Convention on Third Party Liability in the Field of Nuclear Energy, Paris (France), 29 July 1960, in force 1 Apr. 1968, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201519/volume-1519-I-13706-English.pdf; Brussels Supplementary Convention on Third Party Liability in the Field of Nuclear Energy, Brussels (Belgium), 31 Jan. 1963, in force 4 Dec. 1974, available at: https://www.oecd-nea.org/upload/docs/application/pdf/2020-08/brussels_supplementary_convention_bilingual.pdf; Vienna Convention on Civil Liability for Nuclear Damage, Vienna (Austria), 21 May 1963, in force 12 Nov. 1977, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201063/volume-1063-I-16197-English.pdf (and related protocols).

[30] International Convention on Civil Liability for Oil Pollution Damage, Brussels (Belgium), 29 Nov. 1969, in force 19 June 1975, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20973/volume-973-I-14097-English.pdf; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (later superseded by the 1992 Fund Convention), Brussels (Belgium), 18 Dec. 1971, in force 16 Oct. 1978 (1978 Fund Convention), available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201110/volume-1110-I-17146-English.pdf (and related protocols). For the sake of brevity, only the 'old regime' prior to 1992 has been included here, as these are the instruments that Wilford references in his texts on the AOSIS proposal.

[31] See R. Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Nijhoff, 2005), p. 53. Wilford notes that at the final INC session the Insurance Pool annex was dropped along with other detailed proposals because of time constraints and based on the arguments of some countries that the Convention should not be concerned with detailed mechanisms: Wilford, n. 36 below, p. 5, and n. 35 below, p. 182. A trace of the proposal remained in Art. 4(8) of the Convention, which asks parties to 'give full consideration … to actions related to funding [and] insurance' in meeting the needs of developing countries.

[32] Vanuatu on behalf of AOSIS, 'Set of Informal Papers provided by Delegations, related to the Preparation of a Framework Convention on Climate Change', 20 June 1991, UN Doc. A/AC.237/Misc.1/Add.3, p. 30, draft Art. 19.3, available at: https://digitallibrary.un.org/record/196859?ln=en.

[33] While Wilford has been identified as the 'brains behind the proposal', the Insurance Pool should be considered part of a broader effort by a team of FIELD/Centre for International Environmental Law (CIEL)

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

research, his written work at the time provides unique insights into the thinking behind and the framing of the proposal.[34] In 1993, Wilford contributed a chapter on insuring against sea-level rise in a book by Hayes and Smith[35] and an article in *Environment*,[36] in which he essentially lays out the rationale behind the International Insurance Pool (which is also appended to the chapter).

Several elements of the AOSIS proposal stand out that are particularly relevant to the present effort to develop a loss and damage fund. In the following I offer six reflections to explore what can be learned from the 1991 proposal for the development of the new fund. These reflections take a closer look at the content and rationale of the proposal, situating it, where relevant, in its wider historical context. Ultimately, these reflections offer an opportunity to take stock of how far the international community has come in addressing loss and damage, and may inform the renewed endeavour to negotiate a multilateral fund.

3.1. Loss and Damage: A Reality, not a Distant Threat

The Wilford pieces demonstrate that even in the early 1990s loss and damage was not some abstract intellectual term or mere placeholder for future harm, but was based on scientific projections and on the lived experiences of natural disasters, which even at the time had seen an increase in frequency and severity.[37] This is reinforced by the fact that small islands had early access to scientific information on climate change in the late 1980s and successfully secured their participation in the Intergovernmental Panel on Climate Change (IPCC) process towards the First Assessment Report released in 1990. However, historical data comparable with that of industrialized countries was not widely available for most developing countries.[38] Consequently, in developing

lawyers (who included Durwood Zaelke, Philippe Sands, James Cameron and Jake Werksman), and AOSIS delegates under the leadership of Robert van Lierop, then Ambassador of Vanuatu to the UN: Informant interview, online, 3 June 2020. The AOSIS team also worked with David Pearce from University College London (United Kingdom), an environmental economist, who, with data from reinsurance companies Swiss Re and Munich Re, helped to develop the underlying formula for progressive liability for sea-level rise: ibid.

[34] An interview request was declined given Mr Wilford's advanced age. However, the author had the opportunity to speak with some of his former colleagues from around the time of the proposal who were interviewed among the key informants for this article.

[35] M. Wilford, 'Insuring against Sea-Level Rise', in P. Hayes & K. Smith (eds), *The Global Greenhouse Regime: Who Pays?* (United Nations University Press, 1993), pp. 169–90 (formerly M. Wilford, 'Insuring Against the Consequences of Sea Level Rise', CIEL-AOSIS Background Paper 4, June 1991).

[36] M. Wilford, 'Sea-Level Rise and Insurance' (1993) 35(4) *Environment*, pp. 2–5, at 2. An earlier draft of this article is cited abundantly by J.W. Ashe, R. Van Lierop & A. Cherian, 'The Role of the Alliance of Small Island States (AOSIS) in the Negotiation of the United Nations Framework Convention on Climate Change (UNFCCC)' (1999) 23(3) *Natural Resources Forum*, pp. 209–20.

[37] It should be noted that the latest IPCC report at the time was rather inconclusive on this issue, stating that 'although the theoretical maximum intensity is expected to increase with temperature, climate models give no consistent indication whether tropical storms will increase or decrease in frequency or intensity': IPCC, 'Policymakers Summary of Working Group I (Scientific Assessment of Climate Change)', in *Climate Change: The 1990 and 1992 IPCC Assessments* (IPCC, 1992), pp. 63–85, at 78, para. 5.4.2.

[38] S. Mazhin et al., 'Worldwide Disaster Loss and Damage Databases: A Systematic Review' (2021) 10 *Journal of Education and Health Promotion*, pp. 329–42.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

the proposal, the AOSIS team relied heavily on projections and estimates from the IPCC and the insurance industry.[39]

For the purposes of the proposal, the AOSIS strategy was to focus on sea-level rise and its associated impacts, such as storm surges and inundations, which, according to Wilford was the 'more easily measurable indicator'.[40] This is not to say that AOSIS turned a blind eye to other types of climate impact in 1991. Wilford, for example, suggested that a similar, parallel compensation scheme could be developed for countries most vulnerable to desertification and droughts.[41] Similarly, a key informant working with AOSIS at the time noted that sea-level rise 'was the most clearly articulated consequence at that time. And obviously it goes with other physical consequences. We were particularly focused on it because of who we were working with, and … it provided quite a good visual image of vulnerability'.[42] The fund would only pay out ten years after the Framework Convention was adopted and only when both the rate and absolute level of mean sea-level rise reached agreed figures. According to Linnerooth-Bayer, Mace and Verheyen, this period was chosen to allow time for attribution science to advance sufficiently to successfully assess such claims in the future.[43] It was estimated that 'no claim might arise for several decades, even on a "business as usual" scenario'.[44] While these circumstances applied to sea-level rise, the same would not have worked for other, more immediate types of loss and damage already being experienced by climate victims at the time. The focus on sea-level rise also allowed the proposal to be forward-looking in its calculation of damage in that the valuation of assets was to take place *ex ante* before an actual claim against the Insurance Pool would arise.[45] Here, the proposal distinguished between retreat (such as abandoning an area), accommodation (such as elevating buildings, shifting to flood-resistant crops), and protection (such as seawalls and vegetation). The first two would be treated as losses that could be covered by the Insurance Pool, whereas protection was deemed a matter of adaptation and thus to be covered under the proposed Climate Fund.[46] Thus, quite early on a distinction was drawn between adaptation and loss and damage, which was understood to exceed the limits of adaptation.

Fast-forward 30 years and both the science and policy work on loss and damage under the UNFCCC have advanced significantly. We now have a more solid understanding of the different types of loss and damage and their adverse impacts. On the policy side, there

[39] Wilford, n. 36 above, p. 2.
[40] Ibid., p. 5.
[41] AOSIS, n. 1 above, Explanatory notes, p. 7, para. a. As one informant pointed out, just a year later, Category 5 Hurricane Andrew wreaked havoc in the Bahamas, and the US states of Florida and Louisiana, as both the strongest landfalling hurricane and costliest to hit in decades: Informant interview, online, 28 Aug. 2020.
[42] Informant interview, online, 9 July 2020.
[43] J. Linnerooth-Bayer, M.J. Mace & R. Verheyen, 'Insurance-Related Actions and Risk Assessment in the Context of the UNFCCC', May 2003, Background paper for UNFCCC workshops – commissioned by the UNFCCC Secretariat, p. 3, available at: https://unfccc.int/files/meetings/workshops/other_meetings/application/pdf/background.pdf.
[44] AOSIS, n. 1 above, p. 8.
[45] Verheyen, n. 31 above, p. 51.
[46] Linnerooth-Bayer, Mace & Verheyen, n. 43 above, p. 4.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

is still disagreement on the formal political definition of loss and damage, which could hamper the operationalization of the new fund.[47] The funding arrangements, including the fund to be operationalized in 2024, are expected to encompass the whole suite of extreme weather events and slow-onset events, with many calling for the inclusion of non-economic loss and damage (discussed further at Section 3.5).

Crucially, attribution science has evolved to a great extent, with probabilistic 'extreme event attribution' (EEA) making it possible to draw connections that advocates could only dream of in 1991.[48] Of course, attribution science is no silver bullet and recent studies have highlighted the importance of assessing vulnerabilities before attributing damage to climate change.[49] This is because pre-existing vulnerabilities (and their root causes) are key determinants for the scale and types of loss and damage experienced. Attributing damage to climate change alone risks producing inadequate responses that fail to consider underlying causes and contributes to the diffusion of responsibility.[50] Moreover, EEA has been met with mixed levels of acceptance among policymakers within the UNFCCC, which dampen prospects of relying on this approach for the new funding arrangements.[51] After all, proponents of EEA would need to overcome the same political hurdles that have made the task of attributing responsibility so difficult over the past 30-plus years.[52] Jackson and co-authors further highlight the danger of linking EEA to loss and damage, which could lead to attribution evidence becoming a 'prerequisite for finance or compensation' for such losses.[53] Even as the first loss and damage-related cases succeed (see Section 3.5 for a

[47] Industrialized countries, in particularly the US, have long relied on the concept's definitional ambiguity to argue that loss and damage falls under adaptation and, by extension, adaptation finance; see J.T. Roberts et al., 'How Will We Pay for Loss and Damage?' (2017) 20(2) *Ethics, Policy & Environment*, pp. 208–26, at 209. The political quarrel over a mutually agreed definition stands in stark contrast to the lived experience of affected communities who generally do not use this politicized framing but refer to disasters as what they are – a drought, a hurricane, flooding. Soderberg relevantly notes: 'For people on the ground, the label doesn't matter. They are concerned about whether any support for them exists at all': M. Soderberg, 'Identifying Loss and Damage Is Tough – We Need a Pragmatic but Science-based Approach', *Climate Home News*, 5 July 2023, available at: https://www.climatechangenews.com/2023/07/05/identifying-loss-and-damage-definition-war. Or, as one informant put it: 'If you went to Tuvalu and asked them "What do you think of the success of the negotiations on Article 6 in Katowice or in Glasgow?", they do not know what planet you are from. But if you talk about climate change and the impacts, they know what you are talking about': Informant interview, 26 Aug. 2020.

[48] See F. Otto, 'Attribution of Weather and Climate Events' (2017) 42(1) *Annual Review of Environment and Resources*, pp. 627–46; and most recently G.J. Van Oldenborgh et al., 'Pathways and Pitfalls in Extreme Event Attribution' (2021) 166(13) *Climatic Change*, pp. 1–27.

[49] M. Lahsen & J. Ribot, 'Politics of Attributing Extreme Events and Disasters to Climate Change' (2022) 13(1) *WIREs Climate* Change, pp. 1–11, at 4

[50] On the pitfalls of climate reductionism, see M. Hulme, 'Reducing the Future to Climate: A Story of Climate Determinism and Reductionism' (2011) 26 *Osiris*, pp. 245–66.

[51] A. Jézéquel, P. Yiou & J.-P. Vanderlinden, 'Comparing Scientists and Delegates Perspectives on the Use of Extreme Event Attribution for Loss and Damage' (2019) 26 *Weather and Climate Extremes*, article 100231, p 6.

[52] Ibid.

[53] G. Jackson et al., 'An Emerging Governmentality of Climate Change Loss and Damage' (2023) 2(1–2) *Progress in Environmental Geography*, pp. 33–57, at 39. See also L. Olsson et al., 'Ethics of Probabilistic Extreme Event Attribution in Climate Change Science: A Critique' (2022) 10(3) *Earth's Future*, article e2021EF002258 (for a critique of the objectivity of EEA and its ethical implications).

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

discussion of the *Torres Strait Islanders* petition), the role and limits of attribution science in such cases remain subject to ongoing research.

3.2. Private Finance and Insurance Cannot Be a Substitute for Public Funding

The AOSIS proposal did not envisage private/commercial insurance as a multilateral solution for loss and damage.[54] Wilford argued that the inevitable consequence of sea-level rise and the increased likelihood of associated adverse impacts such as inundation (will) constitute a new normal that would render traditional risk insurance approaches unsuitable, and potentially unprofitable for insurance and reinsurance companies.[55] This is understandable as, compared with sudden-onset events, sea-level rise is both gradual and predictable, and thus anathema to insurable risks. The proposal leaves a gap in the door by encouraging claimant countries seeking to claim against the International Insurance Pool to arrange commercial insurance on their own. At the same time, the proposal makes it clear that loss and damage to commercially insured property would not be recoverable through the Pool.[56]

Reflecting broadly on the insurability of losses, Wilford concludes that 'any state compensation regime will have to be internationally funded'.[57] The AOSIS proposal thus envisaged public funding from industrialized countries as the primary vehicle to deliver loss and damage finance. The proposal specified that the financial burden 'shall be distributed in an equitable manner amongst the industrialized developed countries'.[58] Their contribution would be levied at 50% based on gross national product and 50% based on total carbon dioxide (CO_2) emissions in the year prior to their contribution. This formula was modelled on the 1963 Brussels Supplementary Convention on Third Party Liability in the Field of Nuclear Energy.[59] Although the AOSIS proposal specifically called on industrialized countries to pay, in line with a polluter-pays approach, it did not consider their historical emissions as part of calculating their contribution – the base year being that prior to the year of contribution. Neither Wilford nor other AOSIS texts provide an explicit reason for considering only (then) present emissions levels. It is tempting to assume that this was a strategic choice, allowing AOSIS to side-step controversial discussions around apportioning historic responsibility. More plausibly, the proposal simply follows the approach of the International Oil Pollution Compensation Fund, which calculated annual contributions

[54] Over the years, AOSIS grew more supportive of the idea of insurance as part of a comprehensive compensation mechanism and submitted another proposal in 2008 that included an insurance component: AOSIS, 'Proposal to the AWG-LCA: Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts', 2008, available at: http://unfccc.int/files/kyoto_protocol/application/pdf/aosisinsurance061208.pdf.

[55] Wilford, n. 36 above, p. 3.

[56] AOSIS, n. 1 above, Explanatory notes, p. 10, para. l.

[57] Wilford, n. 35 above, p. 179.

[58] AOSIS, n. 1 above, para. 3(1).

[59] Brussels Supplementary Convention, n. 29 above.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

by contracting states based on oil quantities received in the calendar year preceding an incident (provided that state was a party at that date).[60]

Against the AOSIS approach, the modern discourse on loss and damage finance has increasingly shifted to exploring private finance and private insurance models as part of the multilateral solution, downplaying the role of public finance.[61] Proponents of index-based insurance argue that it provides an important tool for managing risks proactively rather than reacting *ex post*, reducing unpredictable financial costs on the insured, thereby providing a safety net to absorb shocks through timely and reliable payouts.[62] However, they also acknowledge the limits of insurance in dealing with high-frequency extreme weather events as well as high-certainty, foreseeable slow-onset events (such as loss of glaciers).[63] Another problem with insurance is that payouts tend to be vastly insufficient to cover the direct costs of loss and damage (let alone indirect costs). For example, the government of Antigua and Barbuda received US$ 6.79 million from the Caribbean Catastrophe Risk Insurance Facility, equivalent to only 3% of recovery costs in Barbuda resulting from Hurricane Irma; while Malawi received US$ 8.1 million from the Africa Risk Capacity scheme (equivalent to 2.2% of US$ 365.9 million in estimated economic losses).[64]

In developing its recommendations to operationalize loss and damage funding arrangements, including the new fund, by COP28, the Transitional Committee has a clear mandate to consider innovative sources of finance.[65] A recent study found that several Committee members from both the global north and south recommended use of innovative sources such as taxes and levies.[66] Similarly, a number of civil society organizations called on parties to include innovative sources of funding to cover the likely shortfall in public finance.[67] Some of the concrete ideas proposed, which are based on the polluter-pays and/or beneficiary-pays principle, include levies on air passengers and on emissions from international shipping, redirected fossil fuel subsidies, as well as debt cancellation.[68] Other innovative sources include cross-border carbon

[60] 1978 Fund Convention, n. 30 above, Art. 12.2(a) and (b). Under the Brussels Supplementary Convention (n. 29 above) the formula for contributions considers a contracting party's GNP in the preceding year and the thermal power of its reactors at the date of the nuclear incident: ibid., Art. 12(a)(i–ii).

[61] J. Gewirtzman et al., 'Financing Loss and Damage: Reviewing Options under the Warsaw International Mechanism' (2018) 18(8) *Climate Policy*, pp. 1076–86.

[62] L. Schäfer, K. Warner & S. Kreft, 'Exploring and Managing Adaptation Frontiers with Climate Risk Insurance', in Mechler et al., n. 8 above, pp. 317–41, at 324, 325.

[63] Ibid., p. 330.

[64] J.-A. Richards, 'Global Shield: Solution or Distraction', *The Loss and Damage Collaboration*, 14 Nov. 2022, available at: https://www.lossanddamagecollaboration.org/pages/global-shield-solution-or-distraction.

[65] Decision 2/CP.27, n. 2 above, para. 6(e). Para. 5(c) of the same decision states more strongly that the Committee's recommendations 'shall consider … identifying and *expanding* sources of funding' (emphasis added).

[66] L. Schultheiß et al., 'Operationalising the Loss and Damage Fund: Learning from the Funding Mosaic', *Germanwatch*, July 2023, p. 14, available at: https://www.sei.org/wp-content/uploads/2023/07/operationalizing-loss-damage-fund-1.pdf.

[67] CIEL & Amnesty International, 'Human Rights as a Compass for Operationalizing the Loss and Damage Fund', Submission to the UNFCCC Transitional Committee, 26 Apr. 2023, p. 9, available at: https://unfccc.int/sites/default/files/resource/HR%20as%20a%20compass%20LD%20Fund%20-%20TC2%20submission%20Amnesty%20and%20CIEL%20-%20April%202023.docx.pdf.

[68] Ibid.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

adjustments and a levy on financial transactions. Another idea tabled is a global loss and damage tax, requiring oil and gas companies to contribute a share of their profits to the fund.[69]

In principle, support from any source should be welcomed to help in remediating the problem created by industrialized countries and exacerbated by market-driven approaches. However, an over-reliance on private finance and private insurance marks a further step in the diffusion of responsibility for loss and damage. Insurance approaches, in particular, have been criticized for passing on the costs of addressing loss and damage to climate victims. This essentially requires affected communities to pay a premium they cannot afford; or, in the words of Avinash Persaud, Special Envoy to the Prime Minister of Barbados on Climate Finance, 'it is victim pays, just in instalments'.[70] This view has been expressed time and time again by civil society organizations participating as observers in the UNFCCC. In their recent submissions to the Transitional Committee, for example, they categorically state that 'private sector solutions that prioritise profit making and require vulnerable people to pay premiums, such as insurance, have no place in addressing loss and damage in an equitable way'.[71]

One proposed solution to this dilemma would be to subsidize premiums, which appears to be the preferred mode of some industrialized countries to tackle loss and damage finance. In their review of active index-based insurance schemes, Nordlander, Pill and Martinez Romera found that private insurance cannot replace finance as a primary tool in responding to loss and damage.[72] They further argue that private insurance runs counter to equity principles of the UNFCCC and might distract from sourcing new and additional finance for loss and damage. Recent initiatives such as the Global Shield (formerly InsuResilience Partnership), launched by the G7 and the V20 (Vulnerable Twenty) countries during COP27[73] and its Solutions Platform launched in June

[69] The idea also featured in Mia Mottley's opening remarks at COP27: S. Quartucci, 'Mia Mottley, Prime Minister of Barbados, Speaks at the Opening of COP27', *Latina Republic*, 8 Nov. 2022, available at: https://latinarepublic.com/2022/11/08/mia-mottley-prime-minister-of-barbados-speaks-at-the-opening-of-cop27. For a recent study looking to quantify reparations for the top 21 fossil fuel companies, see M. Grasso & R. Heede, 'Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages' (2023) 6(5) *One Earth*, pp. 459–63.

[70] A. Persaud, 'Breaking the Deadlock on Climate: The Bridgetown Initiative', *Groupe d'Études Géopolitiques*, Nov. 2022, available at: https://geopolitique.eu/en/articles/breaking-the-deadlock-on-climate-the-bridgetown-initiative.

[71] 'Cross-constituency CSO Coordinated Response on Guiding Questions by the Co-Chairs of the Transitional Committee on Matters related to Paragraph 5 a of Decision 2/CP.27 and 2/CMA.4', Cross-constituency Submission from Civil Society Organizations to the UNFCCC Transitional Committee, 26 May 2023, p. 6, available at: https://unfccc.int/sites/default/files/resource/Cross-Constituency%20Comments%20on%20Co-Chairs%20Guiding%20Questions%20on%20the%20new%20fund_para%205%28a%29.pdf.

[72] L. Nordlander, M. Pill & B. Martinez Romera, 'Insurance Schemes for Loss and Damage: Fools' Gold?' (2020) 20(6) *Climate Policy*, pp. 704–14, at 711.

[73] Federal Ministry for Economic Cooperation and Development of Germany, 'Global Shield against Climate Risks', 14 Nov. 2022, available at: https://www.bmz.de/en/issues/climate-change-and-development/global-shield-against-climate-risks. See also Federal Ministry for Economic Cooperation and Development of Germany, 'Global Shield against Climate Risks: German G7 Presidency and V20 Concept for Consultation', 21 Sept. 2022, available at: https://www.bmz.de/resource/blob/127498/global-shield-against-climate-risks-concept-barrierefrei.pdf.

2023,[74] are being billed as a one-stop shop for climate risk finance and insurance solutions. The Global Shield enjoys widespread support among industrialized countries as the preferred vehicle for providing financial support for loss and damage – with 65% of the US$ 300 million in voluntary pledges being committed towards the Shield.[75] Established outside the UNFCCC, the initiative is not bound by equity principles of the Convention – such as the polluter-pays principle and common but differentiated responsibilities and respective capabilities (CBDR-RC) – and is not subject to oversight and review by the COP. From the perspective of climate victims, the initiative may be criticized as yet another link in a long chain of delay and distraction tactics by industrialized countries to shield themselves from responsibility for the real costs of loss and damage.[76]

3.3. Liability Remains Off-Limits

While the AOSIS proposal was modelled on conventions relating to liability for nuclear and oil spills, the proposal itself did not expressly seek to establish liability for loss and damage.[77] This is important as traditionally liability and compensation regimes have been designed to allow affected countries to claim the costs of responding to a major oil spill or nuclear disaster from a strictly liable public or private entity, thus enabling them to avoid the burden of proving fault and collecting compensation.[78] Both the oil spill and nuclear conventions are multi-tier regimes, meaning they impose strict liability backed by further tiers of compensation to cover losses and damage that exceed agreed limits of liability. The AOSIS proposal essentially adopts the Insurance Pool tier, which acts as a collective loss-sharing arrangement without imposing liability.[79] This would have been a strategic choice given the strong opposition from the US and other industrialized countries to agreeing to any form of liability and compensation mechanism forming part of the climate regime. In his explanatory texts, Wilford explicitly rules out relying on 'ordinary legal criteria of liability or responsibility' under the Convention because of the difficulty of attributing causality when it comes to loss and damage from climate change. Rather, he argues, any loss and damage mechanism, such as that proposed by AOSIS, would have to be based on a broader criterion of responsibility.[80] The answer, according to Wilford, thus lies in the very nature of the proposal, namely risk pooling. Conveniently, rather than finger pointing, risk pooling

[74] Global Shield Solutions Platform, available at: https://global-shield-solutions.org.
[75] Richards, n. 64 above.
[76] For an in-depth analysis and typology of obstruction tactics in the loss and damage context see D. Falzon et al., 'Tactical Opposition: Obstructing Loss and Damage Finance in the United Nations Climate Negotiations' (2023) 23(3) *Global Environmental Politics*, pp. 95–119.
[77] Wilford notes that rather than providing an exact model, some elements from both were adopted in developing the AOSIS proposal: Wilford, n. 36 above, p. 4.
[78] Linnerooth-Bayer, Mace & Verheyen, n. 43 above, p. 32.
[79] In its explanatory notes, the proposal refers to limiting liability (AOSIS, n. 1 above, Explanatory notes, p. 10, para. k) but elsewhere this is written as 'limitations on the amount of compensation payable by the Pool' (ibid., p. 3, para. 2), and hence not to be interpreted as imposing liability in a legal sense.
[80] The formula for 'responsibility' or contributions under the compensation scheme envisaged under the AOSIS proposal was based on a ratio of gross national product and total annual emissions of CO_2; see Wilford, n. 36 above, p. 4.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

diffuses responsibility for climate harm among a broader category of industrialized countries that provide funding for the Pool – and can operate even without an express acknowledgement of responsibility. As will be explored below, this diffusion and obscuration of responsibility has important ramifications for the prospect of justice for climate victims.

It would be wrong, however, to assume that the idea of liability and compensation was prima facie off the table in the early negotiation phase. By design, the INC was convened as a process to give expression to the full range of committee members' expectations for the design and content of the new climate agreement. Over the course of the various INC sessions, it became clear which elements would stick and which were unlikely to garner enough backing to survive into the final text for adoption in Rio. At the very first INC session, the UNEP Executive Director at the time, Mostafa Tolba, emphasized that decision-making processes under the Convention 'must be based on equity between North and South' and that the negotiations should address pivotal issues such as 'liability and compensation'.[81] Several delegations highlighted the relevance of the polluter-pays principle as an appropriate legal framework in this regard.[82] The reliance, in particular, by vulnerable countries on the polluter-pays principle and their attempts to integrate provisions on liability and compensation into the climate regime can be seen as part of a broader strategy to ground moral justice and equity arguments in the language and practice of international law. The support that AOSIS received from legal consultants, including those working for CIEL/FIELD, appears to have been a major contributing factor to this trend.[83] As one informant noted:

> We were well-qualified lawyers from respected institutions and we weren't intimidated by other lawyers. … A lot of the bullying that gets done by larger powers against smaller powers gets done through having more people, and by having people who can talk in a very authoritative way about the law. And none of that made much difference to me. … Also it was a new space. Why should someone older know more than us.[84]

In the same spirit, AOSIS argued for the inclusion of a disclaimer to indicate that the treaty would be 'without prejudice to the existing rights under international law, including rules governing international liability for damage to people, property and

[81] Report of the INC, 1st session, 4–14 Feb. 1991, 8 Mar. 1991, UN Doc. A/AC.237/6, para. 9.

[82] Verheyen, n. 31 above, p. 48. See, e.g., Malaysia, 'Draft Text on a Framework Convention on Climate Change', 21 Aug. 1991, UN Doc. A/AC.237/Misc.1/Add.11, pp. 2, 7. Note that also some industrialized countries supported references to the polluter-pays principle; see, e.g., Austria, 'Proposal for Elements to be Included in a Framework Convention on Climate Change', 26 July 1991, UN Doc. A/AC.237/Misc.1/Add.10, p. 7; Norway, 'Proposals on Principles and Commitments', 16 Sept. 1991, UN Doc. A/AC.237/Misc.1/Add.13, p. 4.

[83] Informant interviews, online, 3 June and 9 July 2020. For relevant discussion see C. Klöck, '"Borrowing" Power to Influence International Negotiations: AOSIS in the Climate Change Regime, 1990–1997' (2010) 30(3) *Politics*, pp. 131–48; and S. Riley-Case, 'On Being Companions and Strangers: Lawyers and the Production of International Climate Law' (2019) 32(4) *Leiden Journal of International Law*, pp. 625–51, at 630.

[84] Informant interview, online, 9 July 2020.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

the environment'.[85] While it did not make it into the final text adopted in Rio, several small island states reiterated this reservation in declarations upon signing the Convention.

Throughout the INC, industrialized countries maintained their strong opposition to accommodating any notion of responsibility, liability or compensation, and remained unswayed both by moral and formalistic legal arguments.[86] With the primary goal of securing participation of the US in the future climate regime as the *then* largest GHG emitter, developing countries were slowly forced to soften their stance on responsibility. A G77 preparatory meeting was held in Kuala Lumpur (Malaysia) in early 1992, ahead of the meeting of the Extended Bureau, where G77 countries led by India, China and Brazil agreed to moderate their position around 'guilt' and 'historical responsibility'.[87] This led to the dropping of a paragraph that had included the polluter-pays principle and compensation obligations on the North.[88] In essence, the United States (US) was willing to compromise by allowing the 'Principles' section of the (then) draft Rio Declaration to be used as a basis for the Principles section of the Convention – despite denouncing it as non-binding soft law. Far from a clean copy-and-paste, the 27 draft Rio principles were reduced to a mere five. Importantly, references to 'different contributions to global environmental degradation' under Principle 7 – which implied responsibility of industrialized countries – were removed, while the aspect of common but differentiated responsibilities (CBDR) survived. Until the very last days of negotiations, the US continued to oppose any implications of historical responsibility.[89] As a direct result of this effort, even the surviving reference in the Convention that calls on developed countries to take the lead in combating climate change and its adverse effects was left without its causal corollary: that developed countries would do so because of their 'large share of global emissions of greenhouse gases'.[90] Consequently, the matter was transformed from one of moral responsibility into a narrative based exclusively on capacity and goodwill. As one key informant noted:

[85] AOSIS, n. 1 above, p. 22.

[86] Notably, only one developed country acknowledged the need to prevent and contain 'climate-related damage' in its submission, albeit without any implications of responsibility, liability or compensatory justice. See Non-Paper by Germany, 'Set of Informal Papers provided by Delegations, related to the Preparation of a Framework Convention on Climate Change', 22 May 1991, UN Doc. A/AC.237/Misc.1/Add.1, p. 21, para. 6; and INC Secretariat, 'Compilation of Possible Elements for a Framework Convention on Climate Change', 13 June 1991, UN Doc. A/AC.237/Misc.2, p. 21.

[87] J. Steffek, 'Incomplete Agreements and the Limits of Persuasion in International Politics' (2005) 8 *Journal of International Relations and Development*, pp. 229–56, at 245.

[88] It read: '[8. Those [developed] countries [identified as] [directly] responsible for causing damage to the environment through inducing climate change]/[which are mainly responsible for emissions of greenhouse gases into the atmosphere] should bear the responsibility for rectifying that damage [. [By openly demonstrating their direct responsibility or negligence, those countries]/[and] shall compensate for environmental damage suffered by other countries or individuals in other countries].]': UNFCCC Secretariat, 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held at New York from 18 to 28 February 1992', 10 Mar. 1992, UN Doc. A/AC.237/18 (Part I), p. 29, Art. 2(8), available at: https://unfccc.int/documents?f%5B0%5D=session%3A3780.

[89] Steffek, n. 87 above, p. 246.

[90] UNFCCC, n. 3 above, Art. 3.1.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

> The concept of responsibility is actually in the Convention, or is more in the guise of industrialised country leadership. So a positive rather than a negative, which again lip service was paid to. But there was a strong determination to avoid anything to do with liability which we see up until now.[91]

What could be interpreted as a classic case of constructive ambiguity that helped to broker the compromise to save the treaty's adoption amounted to a gutting defeat from the perspective of climate victims.[92]

Fast-forward 30 years and the political picture remains largely unchanged. Most developed countries continue to oppose any references to liability and compensation. At COP21, at which the Paris Agreement was adopted, this opposition culminated in the now infamous paragraph 51 of the accompanying COP decision. Paragraph 51 expressly excludes liability and compensation in relation to Article 8 of the treaty. Negotiators remain divided over the question of whether the new funding arrangements and fund should be governed by the UNFCCC COP or the Paris Agreement's CMA or both. This seemingly technical question has important ramifications, since putting the fund exclusively under the direction and control of the CMA would potentially subject it to the exclusion clause under paragraph 51 while also limiting the applicability of Convention principles such as CBDR-RC.[93]

3.4. Climate Reparations Appear Out of Reach

Neither the AOSIS proposal nor Wilford's explanatory texts on the proposal refer to how the legacy of imperialism contributed to the vulnerability of climate victims.[94] It could be argued that directly referencing colonialism was deemed too politically sensitive for a nascent multilateral process based on decision making by consensus. Rather, the AOSIS strategy, as was that of several other vulnerable countries, was to couch it in the more politically palatable terms of 'historical responsibility' (which remains the subject of debate[95]). At the second INC session, Vanuatu suggested, for example, that 'responsibility for the problem lies historically with industrialized

[91] Informant interview, online, 7 July 2020.

[92] For a different interpretation, see Ashe, Van Lierop & Cherian n. 36 above, p. 215.

[93] Note that similar discussions were previously raised in relation to the governance of the WIM; see Legal Response International, 'Moving the Warsaw International Mechanism for Loss and Damage', 1 May 2019, available at: https://legalresponse.org/legaladvice/moving-the-warsaw-international-mechanism-for-loss-and-damage.

[94] See also texts by other observers at the time, notably Grubb, who managed to write a 34-page article on fairness in the international climate regime without losing a word on the colonial past: M. Grubb, 'Seeking Fair Weather: Ethics and the International Debate on Climate Change' (1995) 71(3) *International Affairs (London)*, pp. 463–96; and similarly Zaelke and Cameron, who were closely involved with AOSIS: D. Zaelke & J. Cameron, 'Global Warming and Climate Change: An Overview of the International Legal Process' (1990) 5(2) *American University Journal of International Law and Policy*, pp. 249–90.

[95] See A. Zahar, 'Historical Responsibility for Climate Change Is Political Propaganda', Debate 7 in B. Mayer & A. Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021), pp. 190–205 (arguing that 'HR [historical responsibility] is a politicized thesis through and through' and points to the lack of state-level data on GHG emissions prior to 1990: ibid., pp. 199 and 203, respectively).

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

countries'.[96] This reference survived into final text of the Convention, which recognizes that the 'largest share of historical and [then] current global emissions of greenhouse gases has originated in developed countries', and calls on parties to protect the climate system 'on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities', with developed countries taking the lead.[97] The distinction is significant, because historical responsibility for historical emissions or atmospheric appropriation is only one side of the coin. The other crucial aspect involves acknowledging how imperialist expansion and its subjugation of peoples and exploitation of natural resources left generations of affected communities vulnerable to the ravages of climate change, and rendered them susceptible to loss and damage in the first place. Somewhat less explicitly, several INC delegations invoked arguments over unequal international economic relations following decolonization and criticizing sovereign debt.[98] Weinger argues that by subsuming stronger arguments into the more palatable term of historical responsibility, the consensus process of the INC negotiations effectively 'sanitized' and 'sterilized' more overt calls for responsibility and compensation for 'environmental damage'.[99]

Today's climate justice advocates appear to be significantly more vocal both about the role of colonialism as one of the root causes of the climate crisis, and the ways in which false solutions to the crisis may constitute a form of 'carbon colonialism'.[100] They identify as false solutions carbon trading and carbon offsetting strategies, including pledges towards 'net zero' emissions, geoengineering, bioenergy and carbon and capture and storage (BECCS), and nature-based solutions (NbS), arguing that these amount to a distraction and, worse, serve as an excuse 'allowing for continued emissions and profit generation from fossil fuel extraction'.[101] Reflecting on his participation at COP27, Chief Ninawa Huni Kui, hereditary Chief and elected President of the Huni Kui People of Acre in the Amazonas region in Brazil, remarked that 'the vast majority of the discussions reproduce colonial patterns of unsustainable economic growth, ecological destruction and Indigenous dispossession that have been responsible for climate destabilization in the first place'.[102] In an impactful speech at the Leaders Summit at COP27, Mia Mottley, Prime Minister of Barbados, aptly stressed that 'this world looks still too much like it did when it was part of an imperialistic empire.

[96] INC Secretariat, n. 86 above, p. 17.
[97] UNFCCC, n. 3 above, Preamble, para. 4 and Art. 3(1), respectively.
[98] B.K. Weinger, 'Thirty Years On: Planetary Climate Planning and the Intergovernmental Negotiating Committee' (2023) 80 *Global Environmental Change*, article 102669, p. 5.
[99] Ibid.
[100] J. Dehm, 'Carbon Colonialism or Climate Justice: Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33(3) *Windsor Yearbook of Access to Justice*, pp. 129–61, at 130.
[101] G. Cortés Valderrama et al., 'Transformative Pathways: Climate and Gender-Just Alternatives to Intersecting Crises', *Women Engage for a Common Future*, 2022, available at: https://www.wecf.org/wp-content/uploads/2022/10/WECF_libro_Transformative_Pathways_221018_compressed.pdf.
[102] Chief Ninawa Huni Kui & V. Andreotti, 'Views from COP27: How the Climate Conference Could Confront Colonialism by Centring Indigenous Rights', *The Conversation*, 9 Nov. 2022, available at: https://theconversation.com/views-from-cop27-how-the-climate-conference-could-confront-colonialism-by-centring-indigenous-rights-194223.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

… we believe that the multilateral development banks have to reform. Yes, it is time for us to revisit Bretton Woods'.[103]

The role of colonialism in exacerbating vulnerability has recently found recognition in multilateral settings outside the UNFCCC. In its sixth and most recent assessment report, the IPCC refers explicitly to 'historical and ongoing patterns of inequity such as colonialism' as a key factor that is exacerbating vulnerability to climate change. Similarly, Tendayi Achiume (UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance) recently highlighted how 'the global South and colonially designated non-white regions of the world … are most affected and least able to mitigate and survive global ecological crisis, in significant part owing to the colonial processes that caused historical emissions in the first place'.[104] Reflecting on the UNFCCC response to loss and damage since the adoption of the Paris Agreement, the Special Rapporteur observed a 'transition away from confronting historical responsibility'.[105]

Even if the UNFCCC parties succeed in operationalizing funding arrangements, including the new loss and damage fund, it is extremely unlikely that industrialized countries would agree to basing any of its provisions on compensation or reparation terms (let alone liability). Though somewhat symbolic, the adoption of paragraph 51 marked the final nail in the coffin on the admissibility of liability aspirations (at least formally, under Article 8 of the Paris Agreement).[106] When pressed about potential obligations arising from the new loss and damage fund during a recent appearance before Congress, US Climate Envoy John Kerry stated unequivocally that the US would not pay climate reparations.[107] Paradoxically, the further the UNFCCC policy response to loss and damage 'progressed' by setting up sub-process after sub-process, the further it moved away from the prospect of compensation or reparations. Opposition from industrialized countries, including the US, has led some advocates to adopt a more moderated stance that reframes loss and damage finance in terms of international solidarity. Avinash Persaud, Special Envoy on Climate Finance to the Prime Minister Mottley of Barbados, cautioned against an 'unhelpful conflation', suggesting that 'reparations imply payment for past deeds' whereas 'the loss and damage fund finances a resilient recovery'.[108]

[103] Quartucci, n. 69 above.

[104] UN General Assembly, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume: Ecological Crisis, Climate Justice and Racial Justice', 25 Oct. 2022, UN Doc. A/77/549, para. 4.

[105] Ibid., para. 72.

[106] Notably, at COP25 the US made attempts to expand the application of para. 51 UNFCCC as a whole beyond its express focus on Art. 8 under the Paris Agreement: CarbonBrief, 'COP25: Key Outcomes Agreed at the UN Climate Talks in Madrid', 15 Dec. 2019, available at: https://www.carbonbrief.org/cop25-key-outcomes-agreed-at-the-un-climate-talks-in-madrid.

[107] 'US "Under No Circumstances" Will Pay Climate Reparations, Kerry Says', *Reuters*, 13 July 2023, available at: https://www.reuters.com/world/us/us-under-no-circumstances-will-pay-into-loss-damage-fund-kerry-2023-07-13.

[108] W. Worley, 'Bridgetown Agenda Author Rejects Idea of Climate Reparations', *Devex*, 24 July 2023, available at: https://www.devex.com/news/bridgetown-agenda-author-rejects-idea-of-climate-reparations-105911.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

Contrast this with the demand for climate reparations stipulated by international legal scholar Burkett in 2009. According to Burkett, to be successful, climate reparations must satisfy three elements: (i) an apology, which is essentially an acknowledgement of wrongdoing; (ii) a compensatory award (monetary or other) to give real or symbolic weight to that apology; and (iii) a guarantee by the perpetrator of non-repetition of the offending act.[109] Climate reparations can be understood as a deliberative process of healing that looks *backward* to address past harm and *forward* by addressing the ongoing injustices stemming from that past harm. Importantly, climate reparations entail a paradigmatic shift as they are based on moral argument and place the focus on climate victims.[110] Building on Burkett's work, Riley-Case and Dehm highlight the potential of climate reparations to offer very different, and potentially transformative outcomes that allow us to think outside the box of existing legal doctrines.[111] I would further argue that climate reparations are particularly seductive as a concept because they allow one to break free from the confines of reified legal processes and institutions. At the same time, they ground legal responses to climate change in the lived experiences of climate victims. Only by engaging meaningfully with the material reality of loss and damage on the ground can we as international lawyers shift from treating the symptoms to addressing the root causes of the injustices that our legal tools have been hitherto unable to rectify. This may appear somewhat utopian, but I align myself with Riley-Case and Dehm, who remark that it is 'no less utopian than expecting an International Court of Justice opinion or judgment to meaningfully address the problem at hand'.[112]

There is, of course, a legitimate question to be asked: Does there need to be a reference to the colonial past and to compensation or reparations? Would the new fund/funding arrangements not serve the same purpose without referring to either? Arguably, whether by any other name, a fund without an admission of wrongdoing remains exactly that – a fund. The moral reasons of why polluters should pay into the fund would thus be obscured and risk being co-opted into a narrative of greater capacity, goodwill, international solidarity or, more specifically, humanitarian relief. Setting aside their framing, it is doubtful that the scale of contributions into the new loss and damage fund will be sufficient to address loss and damage globally.[113] The low track record on adaptation finance, complex access modalities under the Adaptation Fund and Green Climate Fund, as well as the unfulfilled US$ 100 billion per year target for mitigation finance by 2020, have sown mistrust among vulnerable

[109] M. Burkett, 'Climate Reparations' (2009) 10(2) *Melbourne Journal of International Law*, pp. 509–42, at 526.

[110] Ibid., p. 534.

[111] S. Riley-Case & J. Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present', in B. Mayer & A. Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021), pp. 170–89, at 171.

[112] Ibid., p. 189.

[113] Not accounting for non-economic losses (NELs), costs of residual damages are estimated to reach US$ 290–580 billion per year in 2030 and US$ 1.1–1.7 trillion in 2050; see A. Markandya & M. González-Eguino, 'Integrated Assessment for Identifying Climate Finance Needs for Loss and Damage: A Critical Review', in Mechler et al., n. 8 above, pp. 343–62, at 349.

developing countries that a new loss and damage fund will deliver.[114] Some may fear a repeat in the negotiations of the new collective quantified climate finance goal to be agreed under the UNFCCC next year ('prior to 2025'). This is further reinforced by the fact that, at the time of writing, most loss and damage finance pledges have gone to the Global Shield. Although there is the possibility that the Global Shield will find recognition among the funding arrangements to be developed, for the time being, its governance arrangements and relationship with the UNFCCC remain uncertain.

3.5. Still No Solution for Non-Economic Loss and Damage

The AOSIS proposal struggled to account for what in the modern discourse is known as non-economic losses (NELs). NELs essentially denote losses that cannot be valued in purely economic terms, ranging from loss of cultures, traditional knowledge, personal livelihoods and territory to loss of life, among many others.[115] The proposal acknowledged that such losses can 'in no way' be adequately reflected in traditional insurance definitions, giving the examples of loss of homeland and development potential.[116] AOSIS proposed that any 'non-marketed interests shall be valued on the basis of formulae to be agreed' and that countries should be allowed to consider also the existence and option value of their assets.[117] While this would allow for a more realistic valuation of assets to be compensated under the proposed Insurance Pool, it still did not provide a satisfactory answer to valuing NELs. Here the proposal deferred to individual negotiations between the Authority – a body administering claims against the Pool – and the claiming country. This notwithstanding, the proposal was quite forward-thinking for including both human *and ecological* loss and damage.[118]

Shifting to the modern discourse on loss and damage, a comprehensive approach to dealing with NELs has yet to be found. Addressing NELs continues to be problematic, in particular, because of the many ways in which they affect underlying complex socio-ecological systems.[119] Furthermore, given their non-monetary value, NELs continue to be a blind spot for insurance approaches. That said, recent studies found that in some local contexts, affected communities do not distinguish between economic and non-economic loss and damage.[120] Solutions for NELs would also need to account

[114] On the importance of simplifying accreditation processes see, e.g., Schultheiß et al., n. 66 above, p. 17.

[115] Serdeczny defines NELs as 'climate-related losses of items both material and non-material that are not commonly traded in the market, but whose loss is still experienced as such by those affected': O. Serdeczny, 'Non-economic Loss and Damage and the Warsaw International Mechanism', in Mechler et al., n. 8 above, pp. 205–220, at 205.

[116] AOSIS, n. 1 above, Explanatory notes, p. 9, para. j.

[117] Ibid., Explanatory notes, p. 9, para j. Environmental economics and insurance terms to denote the value derived from knowing that a particular environmental asset exists (existence value) and valuing the opportunity to use it in the future (option value).

[118] E.g., the proposal refers to 'vulnerable ecosystems': ibid., p. 7, para. c.

[119] K. McNamara et al., 'Understanding and Responding to Climate-Driven Non-economic Loss and Damage in the Pacific Islands' (2021) 33 *Climate Risk Management*, article 1003336.

[120] M. Pill, 'Re-Framing Non-economic Losses to Non-economic Impacts for Effective Policymaking: Evidence from the Caribbean' (2021) 14(8) *Climate and Development*, pp. 770–79. See also P. Tschakert et al., 'One Thousand Ways to Experience Loss: A Systematic Analysis of Climate-related

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

for losses resulting from policies and measures aimed at addressing climate impacts that lead to, for example, loss of cultural heritage, territory, language, and social structures resulting from forest conservation or disaster displacement measures.[121] Jackson and co-authors, moreover, highlight that while the concept of NELs includes biodiversity and ecosystem services, these are still framed in anthropocentric terms rather than based on their intrinsic value.[122] As noted earlier, the Transitional Committee is expected to cover both economic and non-economic losses in its recommendations. It could thus be expected that the financing instruments recommended by the Committee for specific types of NEL may differ significantly from those for economic loss and damage.[123] It is likely that some types of NEL will fall outside the scope of loss and damage finance.

The inability of the climate regime to adequately address NELs may inspire further legal actions for loss and damage against national governments.[124] In a world first, the Indigenous inhabitants of the Torres Strait Islands recently succeeded in their petition against Australia before the UN Human Rights Committee for inaction on climate change.[125] The complainants argued successfully that insufficient action by the Australian government to mitigate and adapt to climate change (such as by reducing emissions and upgrading seawalls) violated their right to culture and right to be free from arbitrary interference with privacy, family, and home under the International Covenant on Civil and Political Rights.[126] In its decision the Committee required Australia, among others, to compensate the complainants adequately for harm suffered, engage in meaningful consultations with the complainants' communities to assess their needs, and implement measures to secure their communities' safe existence on their islands.[127] What is interesting is that the compensation requested by the Committee was limited to actual harm incurred, excluding prospective harm.[128] The

Intangible Harm from Around the World' (2019) *55 Global Environmental Change*, pp. 58–72 (for a comprehensive analysis of people-centred and location-specific experiences with non-economic losses).

[121] See O. Serdeczny, S. Bauer & S. Huq, 'Non-economic Losses from Climate Change: Opportunities for Policy-oriented Research' (2018) 10(2) *Climate and Development*, pp. 97–101, at 97.

[122] Jackson et al., n. 53 above, p. 44.

[123] For relevant discussion, see Schultheiß et al., n. 66 above, p. 20.

[124] For a broader discussion of the potential and limits of interlinkage between the rising tide of climate litigation and the loss and damage negotiations, see P. Toussaint, 'Loss and Damage and Climate Litigation: The Case for Greater Interlinkage' (2020) 30(1) *Review of European, Comparative and International Environmental Law*, pp. 16–33 (note that this precedes the Committee's decision in the *Torres Strait Islanders'* petition, discussed here).

[125] UN Human Rights Committee (UNHRCttee), 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 3624/2019', 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F135%2FD%2F3624%2F2019&Lang=en (*Billy et al.* v. *Australia*).

[126] New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. Note the complainants were not successful in their claim under Art. 6 on the right to life with dignity.

[127] *Billy et al.* v. *Australia*, n. 125 above, para. 11.

[128] This can be contrasted with the Committee's dismissal of *Teitiota* v. *New Zealand*, where the complainants had invoked a risk that had not yet materialized: UNHRCttee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 2728/2016', 24 Oct. 2019, UN Doc. CCPR/C/127/D/2728/2016, especially para. 9.12, available at: https://digitallibrary.un.org/record/3979204?ln=en.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

Committee further noted that the state party is obligated to prevent similar violations in the future, which, while not specified, implies mitigation.[129] In its response the Australian government interpreted the compensation aspect as part of 'remedial recommendations [that] are aimed at adaptation measures'.[130] Further, the government points to its close collaboration with the Torres Strait Islander communities as the appropriate remedy, not addressing further the Committee's request for compensation. Pending further developments, the petition thus marks a missed opportunity to explore different types of compensation for and valuation of NELs in human rights cases. That said, the case provides a strong signal that even in the absence of UNFCCC policy advances on NELs, the courts stand ready to award compensation for such losses.

3.6. Loss and Damage as the Defining Issue of the Climate Regime

In the early 1990s, when AOSIS tabled the Insurance Pool proposal, loss and damage was not even on the map. Yet, as noted earlier, when the concept was introduced, certain types of extreme weather event were already being felt and climate science provided relevant projections of future harm. Policymakers and INC negotiators were thus fully aware of the potentially devastating impacts of climate change. It was clear that something needed to be done to limit future loss and damage. Imagine a world where we thought we could still prevent climate harm and help people in adapting to warming – which appears inconceivable today. Conceptually, there is a strong case to be made that the language around stabilizing GHG concentrations at a non-dangerous level under Article 2, the core objective of the Convention, was ultimately concerned with future loss and damage.[131]

The developments in loss and damage policy at COP27 have opened the door for a meaningful engagement with loss and damage beyond dialogues and technical work. Now that loss and damage finance has formally landed on the UNFCCC agenda and a new loss and damage fund has been agreed, the discourse on this critical issue appears finally to be gaining political traction. However, the room for political ambiguity is dwindling. The development of the new fund and funding arrangements will put the multilateral climate regime to its biggest challenge yet. That is because there is a bitter irony in relying on the UNFCCC process to address the complex problematic of loss and damage, which is reminiscent of a Catch 22: if parties were to address loss and damage in earnest, they would essentially admit that the climate regime has failed its principal objective of stabilizing GHG emissions at a non-dangerous level, thus

[129] C. Voigt, 'UNHRC is Turning Up the Heat: Human Rights Violations due to Inadequate Adaptation Action to Climate Change', *EJIL:Talk!*, 26 Sept. 2022, available at: https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change.

[130] Response of Australia to the Views of the Human Rights Committee in Communication No. 3624/2019 (Billy et al. v Australia), para. 59, available at: https://www.ag.gov.au/sites/default/files/2023-03/3624-2019_australian-government-response.PDF.

[131] For relevant discussion see Verheyen, n. 31 above, pp. 55–61, especially 61.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

undermining its *raison d'être* and, by extension, its legitimacy. Yet, if parties continue to defer responsibility and meaningful support for loss and damage, the regime is very likely to result in failure.[132] As one key informant relevantly observed:

> The loss and damage case can never be settled inside the climate negotiations. But it also can never be dismissed. It is a continuous claim on the whole process, and it can only be partially resolved through things that are never fully explicit. … It is as if there is a kind of constant play being enacted where the moral cause is acknowledged but never formally settled and manifests itself in either guilt driven processes or some side arrangements on finance, or insurance or some other accommodations that is less than full and proper accountability for past harms.[133]

Given the difficulty of achieving climate justice within the framework of the negotiations, climate victims are having to resort to other means to enforce their claims. The rise of transnational climate solidarity movements and a surge in domestic, regional, and transnational climate litigation[134] are prominent examples of this effort. They are an important reminder that the UNFCCC does not operate in a vacuum. The victorious *Torres Strait Islanders* petition and the successful bid by Vanuatu for an advisory opinion from the International Court of Justice (ICJ) are testimony that climate-vulnerable countries and affected communities have not given up their faith in the international legal system. A strong advisory opinion from the ICJ that clarifies states' obligations to protect the climate and spells out their legal consequences for climate-vulnerable states and affected persons (present and future) could bolster legal mobilization efforts in domestic and regional courts. That said, judging from the limited impact of successful climate litigation on international climate policy to date,[135] it is doubtful that a non-binding advisory opinion could sway industrialized countries to admit liability or frame loss and damage finance as compensation under the UNFCCC.

[132] The notion of regime failure in international environmental law and politics has been surprisingly understudied. For relevant accounts that touch upon the climate regime pre- and post-Paris see R. Gordon, 'The Triumph and Failure of International Law' (2011) 34(1) *North Carolina Central Law Review*, pp. 63–80; R. Dimitrov, 'Empty Institutions in Global Environmental Politics' (2020) 22(3) *International Studies Review*, pp. 626–50; and generally the works of Oran Young on regime effectiveness, such as O. Young, 'Effectiveness of International Environmental Regimes: Existing Knowledge, Cutting-Edge Themes, and Research Strategies' (2011) 108(50) *Proceedings of the National Academy of Sciences of the United States of America*, pp. 19853–60. Curiously, perhaps, 'dissent, dysfunction, and disengagement' over loss and damage does not form part of the Paris Agreement's failure scenarios predicted in N. Sachs, 'The Paris Agreement in the 2020s: Breakdown or Breakup?' (2019) 46(1) *Ecology Law Quarterly*, pp. 865–910.

[133] Informant interview, online, 9 July 2020.

[134] United Nations Environment Programme (UNEP), *Global Climate Litigation Report: 2023 Status Review* (UNEP, 2023), available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf.

[135] Specifically on loss and damage see Toussaint, n. 124 above, p. 27. For a perspective from Vanuatu see M. Wewerinke-Singh & D. Hinge Salili, 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change' (2020) 20(6) *Climate Policy*, pp. 681–92, in particular 688.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

4. Conclusions

Early attempts by AOSIS to introduce the concept of loss and damage into the nascent multilateral climate regime via an International Insurance Pool hit a brick wall. All too often, the 1991 AOSIS proposal is glossed over as the point of origin of loss and damage under the UNFCCC. However, as the historical analysis presented in this article has demonstrated, there is a wealth of relevant insights to be gleaned from the proposal's content, rationale, and its broader historical context. There is value in looking back as we look forward. The reflections provided in this article are by no means exhaustive, but aim to enrich and contextualize academic and policy discussions regarding the development of the new loss and damage fund.

At a broader level, the analysis reveals how normative and legal arguments by climate-vulnerable countries for liability, compensation, and for more meaningful engagement with loss and damage were suppressed during the INC meetings, a practice which continued under the subsequent 30 years of climate negotiations under the UNFCCC. Three decades on, the key demand of climate victims, for industrialized states to bear liability for loss and damage, remains off the table. Instead, as Dehm reflects, 'responsibility is displaced to those who are most vulnerable to the impacts of climate change who are increasingly called on to take responsibility for adapting to, preparing for and reducing the risk of climate related harms'.[136] Similarly, demands for climate reparations remain unheard and there is no evidence of engagement with the colonial past. The prospects are low that the UNFCCC will coalesce around a consensual framing of the new funding arrangements and the new loss and damage fund as compensation.

There are legitimate fears that if the loss and damage fund does materialize, it will be insufficient. Financial assistance disbursed would be neither comparable with nor adequate to satisfy the demand for compensation – or reparations, for that matter. Moreover, it would be very likely to be framed as a matter of greater capacity, international solidarity, charity, and humanitarian relief rather than moral responsibility born out of a history of colonialism and excessive resource exploitation. This would imply, in the words of Burkett, that 'the developed world would need not meaningfully confront the suffering of the climate vulnerable, nor understand how its current systems have produced such an uneven state of affairs'.[137]

In an attempt to fill this gap, climate victims have launched legal initiatives in a variety of fora. As the article has noted, these come with their own limitations. However, they provide important spaces for climate victims to be heard. Such spaces allow climate victims to share their lived experiences of loss and damage, and require perpetrators to engage meaningfully with these accounts. These are spaces that, as I have argued elsewhere,[138] remain foreclosed in the multilateral climate negotiations. With loss and damage now firmly on the agenda, the key question going forward will be whether

[136] J. Dehm, 'Climate Change, "Slow Violence" and the Indefinite Deferral of Responsibility for "Loss and Damage"' (2020) 29(2) *Griffith Law Review*, pp. 220–52, at 223.
[137] Burkett, n. 109 above, p. 521.
[138] P. Toussaint, 'Voices Unheard: Affected Communities and the Climate Negotiations on Loss and Damage' (2018) 3 *Third World Thematics: A TWQ Journal*, pp. 765–84.

https://doi.org/10.1017/S2047102523000237 Published online by Cambridge University Press

the UNFCCC has the potential to transform its approach to this critical issue, for both its legitimacy and identity hang in the balance.

Acknowledgements. Mindful that these events took place now over 30 years ago, I owe a great debt to the interviewees for sharing their often very personal memories and impressions from the INC period. Special thanks to Azucena Morán, Adrian Martinez, Harro van Asselt, David Rossati, and Freya Doughty-Wagner for their helpful guidance. I would also like to express my gratitude to the four anonymous *TEL* reviewers for their engaging comments and feedback.

Funding statement. Not applicable.

Competing interests. The author declares none.

Cite this article: P. Toussaint, 'Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward' (2024) 13(1) *Transnational Environmental Law*, pp. 134–159. https://doi.org/10.1017/S2047102523000237