

# CLIMATE CHANGE REPARATIONS: AN ANALYSIS UNDER INTERNATIONAL LAW

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## ABSTRACT

*The biggest irony relating to climate change related risks is that, the weaker the stakeholders facing such threats are, the severe their impacts become. This distressing scenario demands innovative solutions. The world does not only need more technological discoveries to combat climate change. It is also imperative that a working legal framework backed by ethics and empathy makes such solutions available for everyone. The developing nations struggling to protect their citizens against climate change induced disasters, who have in fact made meager contribution toward increasing its fatality, are in urgent need of assistance from the developed countries. Despite the existence of strong legal grounds establishing such responsibility, the climate change regime has propelled very little progress regarding availability of such assistance; financial and technical. One of the novel attempts in addressing this crisis has been made through the introduction of 'Climate Change Reparations'. The aim of this paper is to establish the importance of proper institutionalisation of such reparations under international law. Possible mechanisms of availing climate change reparations face certain practical barriers within the climate regime. Through identification of such difficulties, this paper briefly explores the possible implementation methods in this regard.*

## I. INTRODUCTION

When we attempt to visualise the worldwide conflict concerning the issue of impacts caused by climate change, it would not be rare if a wide division between two contesting parties appear in our mind. One of those parties would be suffering from poverty. People who are still struggling for an improved technological know-how in combating the evils of climate change. We would also be aware that these are the same communities who face serious threat to their very existence after experiencing visible climate disruptions. In contrast, we would come across the idea of a smaller number of elites who are used to a lifestyle full of indications of affluence. They might also appear to be less concerned about the sufferings of the previously mentioned group of people. Due to the blessings of prior technological advancement, these communities can garner the ability to minimise most climate change related setbacks by creating a 'safety net' for them.

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However, such division is logically dismissible. It is an unavoidable truth that: no life on earth is safe when the climate is disrupted. The reach of its possible devastation becomes unlimited. Then one may ask why such a divided scenario, as described above, still seems plausible to us easily? Is it some subtle subconscious division that we make between wealthy and poor nations? Or is this division a concrete one? Who bears the highest cost of climate change damage? It has already been established that not only because of the geographical distribution of the impacts of climate change but mostly due to the vulnerability of communities and individuals in developing countries, those who are already poor and have contributed little to the anthropogenic greenhouse effect, face most damage.<sup>1</sup> In other words, the poorer the country is, the bigger the risk of extinction is due to climate change.

Therefore, legal instruments have formalised a balanced set of norms in addressing the imminent dangers of global warming leading to serious consequences of climate change. Such balance has primarily been depicted through establishment of an important primary norm<sup>2</sup> in the United Nations Framework Convention on Climate Change (UNFCCC).<sup>3</sup> In light of the objective of preventing anthropogenic interference with the climate system put forward in Article 2 of UNFCCC,<sup>4</sup> Article 4.2 declares that it is the duty of the industrialised countries to modify or reverse harmful emissions trends in the medium and long term. The developed countries have agreed to abide by those as well. Commitments have been made in adopting national policies. Moreover, corresponding measures on the mitigation of climate change by limiting anthropogenic emissions of greenhouse gases and protecting and enhancing greenhouse gas sinks and reservoirs were also promised. The leaders of those developed countries have also explicitly committed in taking the lead in modifying long-term trends in anthropogenic emissions through this

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<sup>1</sup> Verheyen, R., *Climate Change Damage and International Law*, Leiden, 2005, at p. 333.

<sup>2</sup> *ibid*, at p. 334.

<sup>3</sup> The UNFCCC is a “Rio Convention”, one of three adopted at the “Rio Earth Summit” in 1992. The UNFCCC entered into force on 21 March 1994. Today, it has near-universal membership. The 197 countries that have ratified the Convention are called Parties to the Convention.

<sup>4</sup> Article 2 of UNFCCC reads: “The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

Convention. Therefore it appears that, the extent of duty on industrialised countries in combating climate change is quite far reaching. This article aims to present that such duty can be performed prominently through the mechanism of 'Climate Change Reparations.'

In literal terms, climate change reparations indicate damage related to climate change that is repairable under international law.<sup>5</sup> However, it is yet not a widely familiar term in the climate regime.<sup>6</sup> Rather a distinctly different term known as 'loss and damage' has been commonly used in addressing the impacts of climate change in international level. A brief look at the history of loss and damage shows that it was first proposed by the Alliance of Small Island States (AOSIS) in 1991 which went on to make its first appearance in a UNFCCC document in the Bali Action Plan as a result of negotiations during the 13<sup>th</sup> Conference of Parties (COP 13) in 2007.<sup>7</sup> It was not until COP 19 in 2013 when the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts was adopted to promote the institutional nature of loss and damage. Nonetheless, this concept is urgently required to be replaced with a clearer and practical terminology which can bring legal solution to the affected ones. This paper suggests that such replacement should be brought forward with the institutionalisation of climate change reparations.

The replacement of 'loss and damage' with 'climate change reparations' is necessary for the following reasons. Firstly, loss and damage has no formal definition available in legal instruments. Despite the absence of this term in the UNFCCC and the Kyoto Protocol, the Conference of Parties (COP)<sup>8</sup> has been considering loss and damage as a medium of addressing the liabilities of polluters. Its only definition available in an informal document of the Subsidiary Body for Implementation is as follows: "loss and damage is the actual and/or potential manifestation of impacts associated with climate change in developing countries

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<sup>5</sup> Kugler, N., Sariago, P., "Climate change damages, conceptualization of a legal notion with regard to reparation under international law" 13(2016) *Climate Risk Management*, pp. 103-111, at p. 107.

<sup>6</sup> An international regime is the entirety of rules and practices associated with the management and implementation of one or several, interrelated, international treaties through special institutions that are used to further develop the treaty rules.

<sup>7</sup> Huq, Saleemul and Roberts, Erin Louise, "Coming full circle: the history of loss and damage under the UNFCCC" 8(2015) *International Journal of Global Warming*, pp. 141-157.

<sup>8</sup> The COP is the supreme decision-making body of the UNFCCC. All States that are Parties to the Convention are represented at the COP, at which they review the implementation of the Convention and any other legal instruments that the COP adopts and take decisions necessary to promote the effective implementation of the Convention, including institutional and administrative arrangements.