



Loss and damage from climate change: Climate vulnerable groups in Arctic States

Linnéa Nordlander
University of Copenhagen

January 2021

The author, Linnéa Nordlander was a visiting researchers at the Raoul Wallenberg Institute in Lund, Sweden, during the period **March 2020 – September 2020**

RWI supported the above research through its capacity building programs worldwide. These publications reflect the authors' views and are not necessarily endorsed by RWI. This research is part of RWI's publication platform that aims to improve visibility scholars in the Global South and networking opportunities among researchers. <https://rwi.lu.se/rwi-supported-publications/>



Loss and damage from climate change:

Climate vulnerable groups in Arctic states¹

Linnéa Nordlander²

1. Introduction

The negative impacts that climate change has on human and natural systems³ has led to calls for the inclusion of measures to address these impacts under the title “loss and damage” in international climate change law since the negotiation and adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. While loss and damage has figured in negotiations by the Conference of the Parties (COP) through the years, it was not until 2015 that loss and damage was formally included in treaty law, when it was incorporated through article 8 of the Paris Agreement. Yet, article 8 is elusive, as it fails to define the notion of loss and damage and imposes only soft or non-obligations on states.⁴

One of the many issues that remains elusive is who the subjects of loss and damage are. In this respect, it is not clear whether only those impacts that take place in developing states can qualify as loss and damage or if the adverse impacts of climate change that manifest in developed states can also be said to constitute loss and damage. This paper focuses on that question, looking into the state of the law and the disconnect that appears to exist between the law and the

¹ This paper is draws on material included in my PhD thesis. For further discussion of how a human rights perspective can support understandings of loss and damage and the legal implications of article 8 of the Paris Agreement, see my PhD thesis “*Clarifying the Loss and Damage of Climate Change from a Human Rights Perspective: Scope and Implications Beyond Paris*” (forthcoming 2021). For further information, contact me at: linnea.nordlander@jur.ku.dk.

² University of Copenhagen Faculty of Law, CILG (Centre for International Law and Governance).

³ Climate change is associated with slow onset events like temperature rise, melting glaciers, and ocean acidification as well as the increased occurrence and/or severity of extreme events like heatwaves, cyclones, and floods. See Ove Hoegh-Guldberg and others, 'Chapter 3. Impacts of 1.5°C of Global Warming on Natural and Human Systems' in Intergovernmental Panel on Climate Change (ed), *Special Report: Global Warming of 15 °C* (2019) throughout and Catherine Blampied, *Weathering a Risky Climate: The Role of Insurance in Reducing Vulnerability to Extreme Weather* (2016) 6, citing Engineering National Academies of Sciences, and Medicine, *Attribution of Extreme Weather Events in the Context of Climate Change* (2016).

⁴ Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28 *Journal of Environmental Law* 345-346, 348, and 356.



international institutional arrangements on loss and damage in this respect. The paper highlights the issues that arise if only those impacts that occur in developing states count as loss and damage, considering particularly the obfuscation of the adverse impacts of climate change that affect Arctic indigenous peoples.

In order to look into the question of where loss and damage can be said to take place, the paper is divided in four sections. Section 2 frames the paper by providing a brief overview of loss and damage in the UNFCCC. Section 3 contextualises the discussion by outlining the association of loss and damage with developing countries seen to date. Section 4 delves into the issues that this framing raises, focusing on how a developing country framing obscures the harms that climate-vulnerable communities in developed countries experience, such as those in Arctic states. Finally, section 5 summarises and concludes the key arguments presented in the paper.

2. Loss and damage in international climate change law

This section provides a brief overview of loss and damage under the UNFCCC system.⁵ Loss and damage was first introduced into the international climate change fora in 1991 in the lead up to the adoption of the UNFCCC, with a proposal by the Alliance of Small Island Developing States (AOSIS). The proposal highlighted the need for responses to climate-induced loss and damage to be developed by laying out an insurance-based compensation scheme backstopped by international finance.⁶ Ultimately, the AOSIS proposal was dismissed and loss and damage only made its way into negotiation outcomes in 2007 through the Bali Action Plan.⁷ The Plan called for enhanced action on adaptation, including on “means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”.⁸ Institutional arrangements were then made to address loss and damage in 2013 through the establishment of the Warsaw International Mechanism for Loss and Damage

⁵ For a more comprehensive overview of the history of loss and damage in the UNFCCC system, see for instance Julia Dehm, 'Climate change, 'slow violence' and the indefinite deferral of responsibility for 'loss and damage' (2020) Griffith Law Review.

⁶ Alliance of Small Island Developing States, *Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16* (2012) 4.

⁷ COP, *Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007* (2008) paragraph 1(c)(iii).

⁸ *Ibid.*



(WIM) and its Executive Committee under the Cancun Adaptation Framework. The WIM is tasked with addressing “loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change”.⁹

A landmark moment came in 2015 with adoption of the Paris Agreement, which incorporated loss and damage into international climate change treaty law through freestanding article 8. The independence of the article distinguishes loss and damage from adaptation,¹⁰ with which it was previously associated, arguably establishing a third pillar of the climate regime.¹¹ Although this distinction indicates that loss and damage is a concept separate from adaptation, thus requiring the adoption of response measures distinct from adaptation measures, the article does not define loss and damage or clarify what types of climate change impacts “loss and damage” is intended to refer to. It also does not appear to mandate the adoption of any particular response or remedy to those impacts, but rather provides an illustrative list of areas of cooperation and facilitation for loss and damage. Some of the areas identified are actually adaptation responses,¹² again blurring the boundaries between loss and damage and adaptation. Article 8 is accompanied by paragraph 51 in COP Decision 1/CP.21, which specifies that article 8 does not “involve or provide a basis for any liability or compensation”.¹³ The caveat marks a clear departure from the original concept of loss and damage proposed by AOSIS in 1991, which centred on the need for compensation for climate change-related harm.

⁹ COP, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013* (2014) paragraph 1.

¹⁰ Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International climate change law* (First edn, Oxford University Press 2017) 239.

¹¹ Kees Van der Geest and Koko Warner, 'Loss and damage in the IPCC Fifth Assessment Report (Working Group II): a text-mining analysis' (2020) 20 *Climate Policy* 1, MJ Mace and Roda Verheyen, 'Loss, Damage and Responsibility after COP21: All options open for the Paris Agreement' (2016) 25 *Review of European, Comparative and International Environmental Law* 206-207, and Morten Broberg, 'Interpreting the UNFCCC's provisions on 'mitigation' and 'adaptation' in light of the Paris Agreement's provision on 'loss and damage'' (2020) *Climate Policy* 2.

¹² Bodansky, Brunnée and Rajamani, *International climate change law* 239.

¹³ COP, *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015* (2016) Decision 1/CP.21 paragraph 51.



3. *Developed/developing country divide*

Loss and damage has typically been associated with developing countries, which is possibly attributable to the fact that loss and damage has primarily been driven as a policy item in international climate change negotiations by developing countries.¹⁴ Despite the negotiation history, article 8 does not specify that loss and damage applies exclusively to impacts that occur in developing countries. This contrasts with the mandate of the WIM, which is to address loss and damage “in *developing countries* that are particularly vulnerable to the adverse effects of climate change”.¹⁵ Similarly, the Subsidiary Body for Implementation (SBI) has adopted a working definition of loss and damage as “the actual and/or potential manifestation of impacts associated with climate change *in developing countries* that negatively affect human and natural systems”.¹⁶ However, climate change impacts also manifest in developed countries. Indeed, despite the apparent institutional association of loss and damage with developing countries under the UNFCCC framework, the Intergovernmental Panel on Climate Change’s Fifth Assessment report associates loss and damage with developed regions to a greater extent than developing ones.¹⁷ This contrast raises the question of whether loss and damage as a legal concept applies exclusively to adverse impacts of climate change manifesting in developing states.

Generally, there is no clear indication in the loss and damage literature of whether the notion is to be understood to apply exclusively to developing countries. As mentioned above, SBI working definition limits loss and damage to “impacts associated with climate change in developing countries”,¹⁸ which is widely cited throughout the literature.¹⁹ Often when scholars

¹⁴ Though, it should be noted that not all developing states have pursued this policy item in the international climate change negotiations. See Elisa Calliari and others, 'Article 8: Loss and Damage' in Leonie Reins and Geert van Calster (eds), *Commentary on the Paris Agreement* (Edward Elgar Publishing 2021 (forthcoming)).

¹⁵ COP, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013* (2014) Decision 2/CP.19 paragraph 1. Emphasis added.

¹⁶ UNFCCC, *A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change* (2012) 3. Emphasis added.

¹⁷ Van der Geest and Warner, 'Loss and damage in the IPCC Fifth Assessment Report (Working Group II): a text-mining analysis' 6.

¹⁸ UNFCCC, *A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: a range of approaches to address loss and damage associated with the adverse effects of climate change* 3.

¹⁹ See Maxine Burkett, 'Loss and Damage' (2014) 4 *Climate Law* 119, Maxine Burkett, 'Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States' (2015) 13 *Santa Clara Journal of International Law* 81, Katie McShane, 'Values and harms in loss and damage' (2017) 20 *Ethics, Policy & Environment* 129, Linta M Mathew and Sonia Akter, 'Loss and Damage Associated with Climate Change Impacts' in Wei-Yin Chen, Toshio Suzuki and Maximilian Lackner (eds), *Handbook of Climate Change Mitigation and Adaptation* (Springer 2017),



associate loss and damage with developing countries, it is done in the context of discussions on questions of the allocation of responsibility and the prospect of securing remedy for developing states for climate change harm provided by developed states.²⁰ At the same time, some scholars argue or simply state that loss and damage can be said to occur in both developed and developing states.²¹ Notably, however, most of the loss and damage literature is silent on where loss and damage can be said to occur. Since there is no clear consensus as regards this issue, it seems possible that loss and damage may occur in both developed and developing countries, but that international institutional (SBI and WIM) arrangements focus on addressing impacts occurring in developing countries only, as they will be disproportionately adversely affected by the adverse impacts of climate change.²² The implications of limiting loss and damage to developing countries only is discussed in the next section.

4. Climate vulnerable groups in developed states

While institutional arrangements focus on developing countries, the neutral language of article 8 indicates that, as a legal construct, loss and damage may not be limited to developing countries alone. While the negative impacts of climate change manifest in both developed and developing countries and may affect anyone in the populations of either category of state, certain communities are disproportionately impacted. In developed states, indigenous communities, such

Hannah R. Parker and others, 'Implications of event attribution for loss and damage policy' (2015) 70 *Weather* 268, and Rachel James and others, 'Characterizing loss and damage from climate change' (2014) 4 *Nature Climate Change* 938.

²⁰ See for instance Rosemary Lyster, 'A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change' (2015) 4 *Transnational Environmental Law*, Benoit Mayer, 'Whose 'Loss and Damage'? Promoting the Agency of Beneficiary States' (2014) 4 *Climate Law*, and Richard SJ Tol and Roda Verheyen, 'State responsibility and compensation for climate change damages – a legal and economic assessment' (2004) 32 *Energy Policy*.

²¹ See for instance Florentina Simlinger and Benoit Mayer, 'Legal Responses to Climate Change Induced Loss and Damage' in Reinhard Mechler and others (ed), *Loss and Damage from Climate Change* (Springer 2019) 185, Erin Roberts and Mark Pelling, 'Climate change-related loss and damage: translating the global policy agenda for national policy processes' (2018) 10 *Climate and Development* 7, and Noémi Rachel Kugler and Pilar Moraga Sariago, 'Climate change damages', conceptualization of a legal notion with regard to reparation under international law' (2016) 13 *Climate Risk Management* 106.

²² Kugler and Sariago, 'Climate change damages', conceptualization of a legal notion with regard to reparation under international law' 106, Van der Geest and Warner, 'Loss and damage in the IPCC Fifth Assessment Report (Working Group II): a text-mining analysis' 6, and Simlinger and Mayer, 'Legal Responses to Climate Change Induced Loss and Damage' 185.



as Arctic indigenous peoples, can be particularly vulnerable to the impacts of climate change, in part due to their ways of living but also as a consequence of marginalization.²³ Arctic nations are invariably classed as industrialised countries or as economies in transition under the UNFCCC system, suggesting that they are developed states under the new Paris Agreement framing.²⁴ If loss and damage applies exclusively to developing countries, the climate change harms experienced by individuals/communities in the Arctic will be overlooked. The Special Rapporteur on human rights and the environment highlighted the manifestation of one such harm in Sámi communities in Norway, Sweden, and Finland, finding that “[c]limate change exacerbates the multiple challenges facing Sámi reindeer herders, as changing weather and shifting precipitation patterns affect the availability of the reindeer’s food supply”.²⁵ Climate change thus interferes with Sámi culture by disrupting reindeer husbandry practices that are central to their traditional way of life and livelihoods.²⁶ Challenges of this nature which result from or are associated with climate change would likely qualify as loss and damage to a non-economic asset²⁷ if it were to take place in a developing country under the current framing of loss and damage in the SBI and WIM.²⁸ Yet, if loss and damage is limited to developing countries only, these non-economic harms experienced by Sámi people would not constitute loss and damage. This approach therefore obscures the climate change-induced harm experienced by climate-vulnerable groups in developed states.

The above triggers the question whether climate harms that occur in developed countries should qualify as loss and damage. If loss and damage is understood in the context of what remedy might result from its incurrence only, then it is arguable that individuals or groups of individuals

²³ Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples: Impacts of climate change and climate finance on indigenous peoples’ rights* (2017) 3.

²⁴ Of the eight Arctic nations (United States, Canada, Finland, Denmark, Norway, Sweden, Iceland, and Russia), all are Annex II countries, except Russia which is only in Annex I. It should be noted that the Paris Agreement did not include lists of which country parties are developed and which are developing and there are many ways to differentiate between development status. For detailed discussion of differentiation in international climate change law see Bodansky, Brunnée and Rajamani, *International climate change law*, Lavanya Rajamani, *Differential treatment in international environmental law* (Oxford monographs in international law, Oxford University Press 2006), and Beatriz Martinez Romera and Harro Van Asselt, 'The International Regulation of Aviation Emissions: Putting Differential Treatment into Practice' (2015) 27 *Journal of Environmental Law*.

²⁵ David Boyd, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Visit to Norway* (2020) 16.

²⁶ Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland* (2016) throughout, e.g. 3 and 11.

²⁷ For more on non-economic loss and damage see Linnéa Nordlander, Melanie Pill, and Beatriz Martinez Romera, 'Insurance schemes for loss and damage: fools’ gold?' (2019) *Climate Policy*.

²⁸ It should be noted that the interference may also count as economic loss and damage due to the interference with the possibility to use reindeer for commercial purposes.



in developed states should not be considered to incur loss and damage, if the remedy is to come from a pool of international financing.²⁹ Indeed, applying the Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) principle, developed states have a heightened duty to respond to climate change, including through provision of finance.³⁰ Entitling developed states and their populations to benefit from an international financing pool for loss and damage could therefore be construed as misaligned with the CBDRRC principle, as developed states typically have greater capabilities to address climate change harms occurring within their territories than developing states do.

While those negatively affected by climate change impacts in developing states may need to be prioritized in the provision of international loss and damage remedies, there may nevertheless be a need or desire for the climate-vulnerable in developed states to have their harms remedied. This calls for consideration of whether and how bodies of law outside the international climate change regime can provide legal avenues for such redress. One body of law with potential in this respect is (international) human rights law. The types of harms that Arctic indigenous communities experience and may come to experience may well fall within the scope of the international and regional human rights treaties that the Arctic states have ratified. Indeed, it is well established that climate change interferes with the enjoyment of a wide range of rights and that these interferences are potentially heightened for indigenous groups, including Sámi groups.³¹ While treaty ratification varies between the Arctic states, all have ratified at least one international human rights treaty³² and several are party to the European Convention of Human Rights, including the states where the Sámi people reside.³³ As such, there appears to be potential of human rights law to fill the remedial void left by loss and damage rules. This potential may, however, vary between the states, both due to the substance of the treaties, as well as their respective enforcement mechanisms (or lack thereof). This determines a need for further research into the potential of human rights law

²⁹ Meinhard Doelle and Sara Seck, 'Loss and damage from climate change: from concept to remedy?' (2019) *Climate Policy* 1 5.

³⁰ UNFCCC, *United Nations Framework Convention on Climate Change* (1992) article 3(1).

³¹ Catalina Devandas Aguilar and others, *The Effects of Climate Change on the Full Enjoyment of Human Rights* (2015) 1, 55, and 70.

³² OHCHR, 'Status of Ratification: Ratification of 18 International Human Rights Treaties' (2021) <<https://indicators.ohchr.org/>> accessed 14 January 2021.

³³ Norway, Sweden, Finland, Denmark, and Russia have all ratified the Convention. See Council of Europe, 'Chart of signatures and ratifications of Treaty 005' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=mwzdhxJ1> accessed 15 January 2021.



to deliver remedies to the climate-vulnerable in Arctic states (and developed states more generally) for their climate harms, which lies beyond the scope of this paper.

5. Conclusion

Although remedies may be a critical element of loss and damage response, loss and damage must be seen as more than the remedy that may come to be implemented in response to such harms, especially as no international loss and damage remedy is presently in place under the international climate change regime. Recognising harms that occur within developed states because of climate change as loss and damage may be important for three reasons. First, depending on the legal consequences of article 8 of the Paris Agreement, impacts qualifying as loss and damage may impose duties upon (developed) states to address loss and damage occurring within their own state territories. Such duties may well interlink and reinforce with domestic human rights duties, stemming from international, regional, or domestic law. Second, if developed state do owe duties to address loss and damage domestically, this may incentivize them to adopt more ambitious climate change mitigation and adaptation commitments and encourage a proactive approach. Third and finally, recognition of harms as loss and damage may serve an important symbolic function. Recognising the experience of harm can be reparative, and thus remedial, in and of itself, and such recognition acknowledges that the climate-harms suffered by some are no less legitimate than the harms suffered by others.

While addressing loss and damage occurring in developing states calls for international action, with an associated need for international financing to assist developing states in addressing loss and damage, omitting the harms experienced by climate-vulnerable groups in developed states unjustifiably obscures the full range of adverse impacts caused by climate change. Accordingly, while international institutional responses need not necessarily be tailored towards harms experienced in developed states, this does not need to prevent the harms from being recognised as loss and damage as a matter of law. Loss and damage should then not be defined depending on the level of development of the state in whose territory impacts occur, but on other criteria which are yet to be determined.