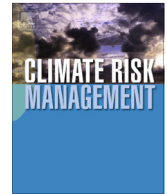




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## “Climate change damages”, conceptualization of a legal notion with regard to reparation under international law



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### ABSTRACT

The damages related to climate change are a concerning issue for the international community, as no country will escape the impacts of climate change. Indeed, it is a preoccupation for the countries (mostly vulnerable) that will suffer those damages, but also for the States that emitted greenhouse gases which fear to have to repair them. That's why the international negotiation related to the climate regime use the ambiguous term “loss and damage” to design the impacts related to climate change.

The purpose of this article is to know if the term “loss and damage” is a useful one in view of reparation under international law or if it is necessary to conceptualize the “climate change damage” notion employed by the doctrine. More precisely, the central question is the following: why is it necessary to conceptualize the “climate change damage” notion?

Even though “loss and damage” could formally be a legal concept, it is substantially useless with regard to reparation under international law because it is too ambiguous.

Therefore, we judged necessary to clarify the concept of “climate change damage” used by the doctrine but that unfortunately defines it insufficiently. Indeed, it could be useful for the doctrine but also for the lawyers of vulnerable countries and the judges to dispose of a legal notion in order to consider the reparation of the damages related to climate change under international law. Consequently, we propose in this article a definition of climate change damage that could be useful with regard to reparation under international law.

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**Abbreviations:** AOSIS, Alliance of Small Island States; COP, Conference of the Parties; ILC, International Law Commission; IPCC, Intergovernmental Panel on Climate Change; LDC, Least Developed Countries; SBI, Subsidiary Body for Implementation; UN, United Nations; UNFCCC, United Nations Framework Convention on Climate Change; WIM, Warsaw international mechanism for loss and damage.

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## 0. Introduction

“Maybe it is true that words hide from us more the invisible things than they reveal of the visible ones<sup>1</sup>” wrote Albert Camus. This is particularly true of the notion of “climate change damage”. What does the “climate change damage” notion mean and may it lead to legal consequences?

Before contemplating the notion of “climate change damage”, it is necessary to clarify the terminologies that constitute this concept, which are “climate change” and “damage”. Firstly, the term “climate change” is defined, in the article 1 of the United Nations Framework Convention on Climate Change (UNFCCC), as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.<sup>2</sup> The UNFCCC established the climate regime in 1992 which primarily aimed to mitigate greenhouse gases in order to avoid the impacts of climate change. Despite mitigation efforts, climate change has had and will continue to have impacts, necessitating a focus on adaptation. From adapting to the impacts of climate change, the discourse at the international level and more particularly the Conference of the Parties (COP) has begun to consider the “loss and damage”. “Loss and damage” is not mentioned in the UNFCCC or the Kyoto Protocol but is used by the COP and defined, in an informal document of the Subsidiary Body for Implementation, as “the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems”.<sup>3</sup> This definition is really different from the definition of “damage” in international law, that it is necessary to understand before focusing on “climate change damage”. Therefore, secondly, it seems that classic Roman law – the root of continental European (civil) law – did not contain a general concept of damage, but rather factual situations differentiated by the actual nature of the harm.<sup>4</sup> The general concept of damage appeared more recently in the Justinian Code and especially in the common Roman law of the Middle Ages.<sup>5</sup> Despite the tendency to formulate a general concept of damage in civil codifications, the concept has taken shape in two different forms.<sup>6</sup> In legal systems in which only anti-judicial damage is redressed, injury of a subjective right is generally required in order to obtain compensation.<sup>7</sup> In contrast, in a broader definition that dates back to “las Siete Partidas” (the Seven-Part Code), damage is defined as every “detriment, harm or injury suffered in the heritage or the person because of the fault or wrongdoing of someone else”.<sup>8</sup> In international law, and more particularly according to the International Law Commission (ILC), “injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”.<sup>9</sup> However, these definitions alone do not enable us to understand the entire scope of the concept of “climate change damage”. And as the lecturer might have reasonably noticed, “climate change damage” is not the notion used within the international negotiations related to climate change but it is “loss and damage”.

If “loss and damage” is the notion used within the climate regime, why write an article about the “climate change damage” term that does not appear in the UNFCCC and other legal instruments? The main reason is that damages related to climate change are an issue of growing importance for the international community, as no country will escape the impacts of climate change<sup>10</sup> and there are not legal solutions associated to “loss and damage” for the moment. To illustrate this idea, in the Paris agreement, adopted during the COP 21 in December 2015, it is specifically written that “loss and damage” does not involve or provide a basis for any liability or compensation.<sup>11</sup> In the meanwhile, research suggests that the limits of adaptation are

<sup>1</sup> Authors’ translation of the French quote by Albert Camus “Il est vrai peut-être que les mots nous cachent davantage les choses invisibles qu’ils ne nous révèlent les visibles”.

<sup>2</sup> United Nations (1992, art. 1, p. 3).

<sup>3</sup> Subsidiary Body for Implementation (2012b, § 2).

<sup>4</sup> Barros (2006, p. 219).

<sup>5</sup> Barros (2006, p. 219).

<sup>6</sup> Barros (2006, p. 220).

<sup>7</sup> Barros (2006, p. 220).

<sup>8</sup> Barros (2006, p. 220).

<sup>9</sup> International Law Commission (2001, art. 31 al. 2, p. 91).

<sup>10</sup> UNEP Global Environmental Alert Service (2014, p. 1) and IPCC (2014a,b).

<sup>11</sup> Conference of the Parties (2015, § 51, p. 8).

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