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Compensation in Civil Liability/Tort Law Climate Lawsuits Against a State at Domestic Courts

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ABSTRACT:
This paper examines the evolving landscape of compensation claims against States in domestic climate litigation, focusing on States' failure in mitigation and adaptation and on climate Loss and Damage.
Using doctrinal, case-law and empirical analysis, it explores how courts address compensation requests and the challenges associated with causation, quantification, and legal standing. Firstly, we will start by explaining the difference between climate mitigation and climate adaptation claims and climate-induced Loss and Damage claims. Since climate-induced Loss and Damage do not have a unique definition around scholars, law practitioners and in international treaties, this article will delve into the various concepts and elements that compose this notion. Then, it will analyse the few compensation claims filed in adaptation and mitigation lawsuits and in Loss and Damage lawsuits. Furthermore, it will refer to the challenges in determining compensation in lawsuits against a State for climate Loss and Damage, namely the establishment of causal link, the quantification of harm, legal standing, etc.. The paper concludes that compensation claims against States remains uncommon but may become increasingly significant as a strategic mechanism to encourage States to strengthen climate justice.

Keywords: climate adaptation; climate litigation; climate mitigation; compensation; Loss and Damage; State litigation at domestic courts; quantification.

1. Introduction

In mitigation and adaptation lawsuits, Claimants do not usually accompany their initial pleadings with a request for financial compensation, as their main objective is not monetary. In these lawsuits, Claimants rather seek to induce States to change their behaviour and to comply with their mitigation and adaptation obligations. In mitigation lawsuits, Claimants seek State to adopt measures to reduce greenhouse gas emissions and in adaptation lawsuits, Claimants request the State to implement measures and policy revisions addressing and preventing the negative and adverse impacts of climate change. This, combined with the fact that reparation, in most jurisdictions, is primarily obtained through reparation *in natura*, explains the rarity of compensation claims in the mitigation and adaptation lawsuits that have thus far been brought against States.

Determining compensation in mitigation and adaptation lawsuits is easier than in Loss and Damage claims. Claimants can only request for compensation for Loss and Damage if they manage to determine, quantify and monetise the Loss and Damage suffered. Therefore, compensation therein is only possible for economic Loss and Damage. Besides, in most jurisdictions, compensation claims for climate-induced Loss

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and Damage, just like in mitigation and adaptation lawsuits, can only be established if reparation *in natura* is not possible. To our knowledge, no State has yet been held liable by a domestic court for Loss and Damage[1].

2. Differences between climate mitigation and adaptation and Loss and Damage claims

The three pillars of the United Nations Framework Convention on Climate Change are Climate Mitigation, Climate Adaptation and Climate Loss and Damage. In short, mitigation corresponds to greenhouse gas emissions reduction while adaptation involves all the actions and practices to adapt, moderate and deal with potential negative and adverse impacts resulting from climate change that are foreseeable through best available science.

Distinguishing climate adaptation and Loss and Damage is not as easy as distinguishing climate mitigation from climate adaptation. Loss and Damage differ from adaptation because the first consists in the negative and adverse effects of climate change that are not possible to be prevented by mitigation and adaptation measures. In fact, scholars consider Loss and Damage as those who go beyond adaptation, which produce impacts that go beyond what is possible for States to adapt to. Loss and Damage are the harms caused by human-induced global warming which cannot be prevented by greenhouse gas emissions reductions and that cannot be mastered despite adaptation measures (Adelman, 2016).

Climate adaptation lawsuits against States are currently being filed essentially based on public law frameworks. In these lawsuits, Claimants are challenging a State for failure in adopting adaptation measures or national climate plans based on foreseeable climate risks and impacts according to best available science. In short, Claimants are challenging States for failure in preventing and/or preparing to the negative and adverse impacts of climate change under the grounds of breach of legal obligations or the standard of care.

Whereas in Loss and Damage lawsuits, Claimants are seeking compensation from the State through civil liability/tort law, public nuisance, *inter alia*.. These compensation requests, to be successful, require at least a quantification of damages, demonstration of historical emissions of greenhouse gas emissions and of the causal link between past emissions and a specific localized harm.

3. The concept of Loss and Damage

There is no formal definition for Loss and Damage (Burke et al., 2026). Paris Agreement does not define Loss and Damage, mentioning only in its article 8(1) that by referring to Loss and Damage, it includes Loss and Damage coming from the negative effects of climate change. United Nations Framework Convention on Climate Change does not refer to Loss and Damage (Toussaint, 2024), but we can extract from its Decision

[1] In this paper we will refer to Loss and Damage as all the negative adverse effects of climate change that cannot be avoided through mitigation or adaptation measures.

2/CP.19 which established the Warsaw International Mechanism, that Loss and Damage correspond to climate impacts from both sudden-onset extreme events and slow-onset events.

Some doctrine consider Loss and Damage as what is left after pooling insufficient mitigation with inadequate adaptation (Mechler et al., 2019). Determining what can be considered as a tolerable risk is very subjective because it depends on a case-by-case judgement made by domestic courts who are confronted with these types of climate change adverse impacts(Broberg & Romera, 2020).

Other scholars distinguish between avoidable, avoided, unavoided and unavoidable losses and damages(Mechler et al., 2019). Avoidable damages are all those that can still be avoided through more robust mitigation and adaptation measures(Doelle & L. Seck, 2021). They consider avoided damages all adverse impacts and risks that have been prevented through climate change mitigation or adaptation measures, whereas unavoided damages are those adverse impacts of climate change that were not avoided, even though it could have been possible to avoid them. These impacts could have been in theory addressed by mitigation and adaptation measures but were not adequately addressed by climate mitigation or adaptation measures due to socio-economic, political or financial reasons, for instance. Unavoidable damages are therefore Loss and Damage that are inevitable.

Many scholars and analysts (Mechler et al., 2019) separate Loss from Damage, by considering that losses are irreversible, and that damages are not irreversible, as they can be reduced or repaired. Loss and Damage are material or immaterial and are economic (market traded or those that can have monetary value (Boyd et al., 2021)) or non-economic (non-market traded, such as loss of biodiversity, loss of cultural heritage, forced displacement of communities (Omer, 2023), non-reversible extinction of species (Balzter et al., 2023), loss of agricultural productivity (Poudel & Ahmad, 2025), *inter alia*). From all that has been set above, it follows that climate Loss and Damage can involve many types of Loss and Damage categorization. Therefore, law practitioners shall be very careful when categorizing the type of Loss and Damage in Court because that categorization may be decisive for determining the legal grounds under which the compensation may be requested and granted by the Court.

In our perspective, if the Loss and Damage was avoidable, Claimant should seek compensation from States based on tort law, invoking negligence. When the damage was avoided, compensation should be requested under the grounds of the State "duty of care", to compensate the cost with the preventive measures that were implemented by private actors. This compensation could be supported from the State National Budget, or, even from Climate Adaptation Funds. Moreover, in unavoided damage, the request for compensation shall be grounded in state responsibility and international law. Nonetheless, it is very hard to determine who should grant the compensation because in most situations developing countries did not have the resources to avoid that avoidable damage. Finally, in our view, if the Loss and Damage is unavoidable, International Climate funds, like the United Nation Funds for responding to Loss and Damage Fund, or solidarity and climate justice mechanisms, could, eventually, be a possible option to grant compensation for these unavoidable damages.

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4. Compensation claims
4.1 Mitigation and adaptation lawsuits

As mentioned before, the usual request in mitigation and adaptation lawsuits is the adoption of measures or of damage repair and not the monetary request, as Claimants normally request the adoption and implementation of measures from the Defendant States. Domestic courts have already ordered States to comply with such measures. In the case *Ashgar Leghari v. Federation of Pakistan*, Pakistan was ordered to develop and implement climate adaptation measures under the supervision of an *ad hoc* panel of experts who had to report to the court Pakistan's actions and progresses.

Compensation claims have already been filed against a State at domestic courts in mitigation and adaptation lawsuits, as happened in the *Notre Affaire à Tous v. France* case. On the 3rd February 2021, the French Administrative Court ordered the French State to pay to the Claimants the amount of one euro each in compensation for moral prejudice and dismissed the payment of one euro for ecological damage.

Firstly, compensation is not always decided as the adequate form of reparation because usually reparation for ecological damage shall be carried out by priority in kind in most legal administrative national frameworks. For that reason, the Court did not grant the one-euro compensation for ecological damage. The Court considered that Claimants did not demonstrate that the French State was unable to repair in kind the ecological damage for which this judgement recognizes it as responsible. Firstly, under the terms of article 1249 of the French Civil Code, reparation for ecological damage shall be carried out by priority in kind and it is only in the event of impossibility or insufficiency of reparation measures *in natura* that Court shall order the responsible person for the damage to pay a compensation to the Claimant. Therefore, compensation is only granted if reparation *in natura* of the situation before the damage is not possible. The Court considered in that case that Claimants did not demonstrate that the French State was unable to repair in kind the ecological damage, from one hand, and that, on the other end, this symbolic request of one euro in reparation had no relation to the extent of the damage as it did not reflect the scale of climate change and of the ecological damage that needed to be repaired.

Secondly, determining the amount of compensation may not be the aim of Claimants in mitigation and adaptation claims. As a matter of fact, in the above-mentioned case *Notre Affaire à Tous v. France*, Claimants decided to request a symbolic compensation of one euro from the French State to point out the government's failure to adopt adequate adaptation measures and promote political and legislative changes to combat the occurrence of negative and adverse climate impacts. In fact, symbolic remedies, such as satisfaction, rehabilitation (Onifade et al., 2026), inter alia, can contribute to changes that sometimes financial compensation cannot grant by providing reparative justice (Rocha & Tigre, 2025). If compensation is granted, it does not guarantee that the State's conduct will change. For that reason, symbolic remedies such as a State declaration or even one-euro symbolic compensation, are considered to be more effective when compared to financial compensation. Symbolic compensation, if granted, forces the State to adapt its conduct, change its climate legal and policy frameworks, especially bearing in mind that the separation of powers' principle prevents Courts from ordering the content for State's legal frameworks and policy instruments.

Thirdly, compensation may be difficult to determine. In fact, if Claimants had not decided in *Notre Affaire à Tous* & Others *v. France* case to request a symbolic monetary compensation of one euro to highlight the French State's lack of adoption of climate adaptation measures, it would have been difficult for Claimants to quantify and monetise the right amount of compensation to request. Consequently, by requesting symbolic compensation, lawyers avoid all the issues with quantification and monetization of Loss and Damage, which makes more possible the granting of compensation by Court. Moreover, non-Economic Loss and Damage cannot be quantified or monetized. In Non-Economic Loss and Damage, such as forced displacement, loss of biodiversity, loss of cultural heritage has no market value financial compensation is not possible to be determined.

Fourthly, and as mentioned above, despite the numerous advances in attribution science, establishing causation in climate-induced Loss and Damage lawsuits is extremely hard.

For all these reasons, symbolic compensation, or symbolic remedies, can be effective in granting reparative justice to the affected communities or individuals.

4.2 Loss and Damage

Plaintiffs are starting to seek compensation at courts for climate Loss and Damage, i.e., climate-related damages such as loss of property, forced displacement, loss of biodiversity, *inter alia*. For instance, In Uganda two lawsuits were filed with a compensation request against the Ugandan state.

In the first case, *Mbabazi and Others v. The Attorney General and National Environmental Management Authority, Civil Suit No. 283 of 2012* case, filed in 2012 in the High Court at Kampala and still pending, Claimants sought, among other requests, compensation for Loss and Damage from the Ugandan State. In concrete, Claimants requested the Court to order the Ugandan government to grant compensation to climate change victims and to implement actions to prevent re-occurrence.

Secondly, in the *Tsama William & Others v. Uganda* case, which was filed in High Court at Mbale against the Ugandan government, the Ugandan Environmental National Authority and the local government of Bududa and is still pending, Claimants invoked that the landslides that occurred in the Bududa district in Eastern Uganda, in 2019, resulted in their displacement from their homes, in the destruction of property and of environment, *inter alia*. Claimants consider that even though this District has recurrently many landslides, climate change has contributed to its more frequent occurrence, increasing the risk of landslides in that region. Claimants are seeking protective measures and 6.8 billion Ugandan Shillings for loss of life, property damage, physical and mental harm and for resettlement to safer areas.

It should be noted that there is a very limited number of domestic lawsuits against States involving compensation for Loss and Damage. To our knowledge only the case *Notre Affaire à Tous v. France* was concluded, as several proceedings are currently pending or did not grant the requested compensation.

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5. Challenges in determining compensation in future lawsuits against a State for climate Loss and Damage

Compensation is much more challenging in Loss and Damage claims comparing to mitigation and adaptation claims, especially when it comes to quantification. Traditional civil liability or tort-based lawsuits for Loss and Damage face currently some specific insurmountable evidentiary obstacles and legal hurdles (Giakoumakis, 2024).

It should be noted that due to the very limited number of domestic lawsuits against States, and especially of concluded cases and cases in which was granted the requested compensation, the challenges identified in this article as well as the final conclusions, are based on the emerging trends and future perspectives that we consider to be reflected in the future compensation requests for Loss and Damage and the respective Court decisions.

5.1 Causation

One of the first challenges corresponds to the high probability of dismissal of the case based on the lack of causality as the latter is required to connect the Loss and Damage suffered and the state's act or omission. The causal link is also difficult to establish because climate change does not cause or produce a specific weather event but makes the latter more frequent. Another challenge is to separate harm caused from climate natural variability and anthropogenic action.

It should be noted that the progresses in attribution science and probabilistic causation can hinder the difficulties in determining causality in Loss and Damage claims. Event attribution science can quantify all the greenhouse gas emissions produced since the industrial revolution and show how they have influenced the occurrence of an extreme weather event. Nonetheless, attribution science does not identify who specifically caused those specific events and Courts are still resisting to probabilistic causation.

The causal link is also hindered because a specific harm may be attributed to an activity or an agent that did not act on the same territory where the harm was suffered and the damage produced.

When causation is difficult to establish and multiple actors (multiple individuals, companies, states, etc.) are potentially responsible for the damage, Courts will have to ascertain who exactly shall be responsible and in what measure. These can vary from the type of liability established in the domestic law in case of multiple actors acts or omissions. Joint and several liability will allow Claimants to recover in full of one of the Defendants and then that Defendant can recover from the other Defendants who are also responsible. Nonetheless when there is only a unique State as Defendant this regime shall not be applicable. Market share liability, if provided in domestic law, will attribute responsibility to the defendants based on their share of global emissions.

For instance, in *Pabai Pabai & Another v. Australia* (Torres Strait Islander case), the Federal Court of Australia dismissed Claimants' request to Australia for protective measures and to adopt mitigation and adaptation measures in accordance with the most updated available science and for a Loss and Damage compensation, because it considered that Claimants did not prove several elements such as duty of care, causation and damages.

Courts are now starting to deal with the complexities of calculating both economic and non-economic Loss and Damage resulting from the State's failure. Calculating damage is already difficult in mitigation and adaptation claims, but in Loss and Damage is extremely difficult. Currently, only harm resulting from economic Loss and Damage is possible to be quantified, even if it still is very hard to provide that quantification and monetize it. Some scholars consider that the Warsaw International Mechanism, if further developed, can be useful to address L&D that cannot be financially compensated (Elisa Calliari & Eni Enrico Mattei, 2014).

5.2 Quantification

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5.3 Legal standing

Legal standing for all non-state actors legal standing to claim for a remedy or compensation is also not possible in all domestic jurisdictions.

Firstly, environmental associations and NGOs do not have legal standing in all jurisdictions. In some jurisdictions, such as Portuguese jurisdiction, these associations can sue the State through *actio popularis* and seek compensation for Loss and Damage. Other jurisdictions, like the Dutch contemplate collective future generations interest which concedes legal standing to these associations. For instance, though in a climate mitigation case, Dutch Court recognized in the *Urgenda Foundation v. The Netherlands* case, the legal standing of the NGO Urgenda through its bylaws which are directed for the protection of the environment for present and future generations.

Nonetheless, some jurisdictions do not contemplate *actio popularis* or an equivalent form, and for that reason, do not provide legal standing to the associations. These jurisdictions, such as the United States, allow only affected victims or communities to launch climate lawsuits, which prevents environmental associations and NGOs to seek in Court compensation for climate-induced Loss and Damage. Moreover, since Aarhus convention is not applicable to the Global South countries and North America, NGOs cannot invoke the regime provided in article 9(2) of Aarhus Convention in these jurisdictions, to sue the State for climate failure or harm.

In European Human Rights Court, in the *KlimaSeniorinnen* decision, the European Court of Human Rights issued a very important decision stating that while individual humans face several difficulties demonstrating that they are imminent "victims" of climate policy, associations can have a special standing before European Human Rights Court and that the association does not have to prove the victim condition of its members. In line with the Aarhus Convention, the European Court of Human Rights recognised that an association has standing provided that it is legally established within the jurisdiction of the

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State concerned, its objectives are aimed at protecting the human rights of its members or other affected individuals, and it is able to demonstrate that it is genuinely qualified to act as a representative of its members or the affected individuals. However, the European Human Rights Court did not accept the standing of citizens, who are the very people the association represents.

Furthermore, naturally, we also anticipate that whether vulnerable non-state actors such as women, children, elder people, indigenous communities will more likely be recognized in the future as Claimants to seek a remedy or compensation in most jurisdictions that do not provide for *actio popularis* or equivalent mechanisms for a broader legal standing will be very much discussed.

Moreover, we anticipate that legal standing for future generations(Doelle & L. Seck, 2021) will also keep being discussed, even though it is a more complex discussion because they are yet to be born and bear the harm.

Another question that will probably also be analysed is the admissibility of a class-action, in which a Claimant can file a lawsuit on behalf of himself and others who have a similar situation. The solutions to these issues will certainly not be the same from one jurisdiction to another.

In our perspective, it would be interesting for future research to compare how different jurisdictions approach legal standing for vulnerable populations, future generations and collective actions, bearing in mind all these different approaches.

5.4. State Funds

In some jurisdictions, the discussion for the creation of climate and environmental state funds to be compensate the victims is increasingly relevant. When it comes to state funds or international funds, issues may also rise from the fact that those who contribute to the fund may not exactly be those that indeed caused that specific harm, in the case of no-fault liability state funds. Besides, in some situations, it is not always possible to ascertain the amount of contribution to the harm suffered by the Claimant. Non-economic loss and damage cannot be directly compensated by insurance payouts or government response funds (McNamara & Jackson, 2019).

5.5 Insurance mechanisms

Finally, and from another perspective, request for compensation against states at domestic courts may be also hindered when Claimants have insurance mechanisms to cover climate catastrophes or catastrophe bonds or climate-related bonds. In these situations, the financial burden will not be on those who did the harm, in complete disregard of the polluter-pay principle (Doelle & L. Seck, 2021).

6. Compensation claims as a strategic mechanism to compel States' action

Compensation claims, besides bringing monetary redress to Plaintiffs, are a strategic mechanism to compel States to more ambitious action in the pursuit of their climate obligations and targets. Claimants also use compensation requests to compel States to adopt more rigorous Nationally Determined Contributions pursuant to article 8 of Paris Agreement. Symbolic compensation requests, such as the claim made in the *Notre Affaire*

à Tous case, illustrate the importance of compensation requests as a strategic request rather than a financial request, as mentioned above.

Conclusion

While State injunctive relief requests are more frequent and have been determined by Courts, compensation claims against states have already been filed, either with symbolic or with a determined financial amount. For most jurisdictions, compensation requests are seen as the end of the line request, which may only be granted after reparation *in natura* is not possible or quantification and monetization of Loss and Damage is also impossible.

Compensation can serve as financial reparation for Claimants ensuring that the State is also being responsible for its failure in mitigation and adaptation and for not preventing Loss and Damage. Financial compensation can compel States to adopt more mitigation and adaptation measures and to invest in preventing climate change adverse impacts that can cause Loss and Damage.

Symbolic requests, like those in the *Notre Affaire à Tous v. France* case, highlight government failure and Claimants intention to promote political change rather than just seeking financial gain. If Courts rule that a State is liable for failure to mitigate and adapt, States are compelled to act. States will robust its legal frameworks and national climate plans and policies to protect themselves against future lawsuits and court decisions.

To our knowledge, no State has yet been condemned at domestic courts to pay compensation for failure in mitigation and adaptation and for Loss and Damage, since the Ugandan claims are both still pending. Nonetheless, it is expected that in the close future, domestic jurisdictions will increasingly be required to deal with massive compensation requests, filed by those that were harmed and request compensation. And it is anticipated that climate-induced Loss and Damage compensation claims in climate lawsuits against States will progressively be more frequent.

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