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The Warsaw International Mechanism for Loss and Damage: The Economical-political Blockade and Future Prospects for Reparations Against Climate Change Impacts

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Abstract

The present study aims at analysing the Warsaw International Mechanism, as first international mechanism for dealing with Climate Change Loss & Damage issues. In particular, it focuses in researching the constraints that contribute preventing the transformation of the WIM from a mere information gathering initiative into a comprehensive approach for tackling L&D caused by anthropogenic climate change.

The key argument of this work is that the non-fulfilment of the measures promoted by the WIM so far can be associated to the economic and political blockades coming from developed states any time the L&D enters the climate negotiations. Developed countries continue to completely refuse any kind of dialogue that could lead them to admit liability and compensation obligations for the adverse effects of climate change. Developing countries, even if not ready to renounce to a loss-and-damage perspective, realized that continuing to advocate for it in the International Climate Regime could mean that no money or effort from developed countries will materialize and they started to choose other avenues.

While scientists urge states to change political and economic decisions, many populations are already facing global changes that put their health and survival at risk and, in some cases, resulting in forced migrations or internal conflicts.

Introduction

In the last few years the whole world has experienced an increase in the frequency and intensity of weather-related hazards along with the long-term adverse impacts of climate change associated to anthropogenic actions. This subject has become one of the most controversial and global issues of this century because it crosses the human and environmental conditions of the entire planet. Existing mitigation and adaptation commitments are not enough to prevent dangerous climate change related impacts. In other words, the climate change effects that we are not able to *adapt* and *mitigate* will be part of the future response to climate change that we can include in the field of loss and damage (L&D).

Addressing these climatic losses and damages is today a controversial aspect of the international climate change negotiations. However, at the 19th Conference of the Parties (COP) meeting of the United Nations Framework Convention on Climate Change (UNFCCC) in Warsaw, a step forward has been made. In fact, in 2013 the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) was established. The WIM has, among the others, the task of "Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change, so as to support countries [...]"¹.

The WIM recognized that L&D involves more than what can be reduced by adaptation² paving the way for the agreement on a common principle that include aid from those who contributed the most to climate change (the developed countries) towards those who suffered it more (the poorest countries). Since then, however, this broad theoretical principle has remained unchanged and no concrete step forward from the international community has been made. In fact, the Paris Agreement states that "[the adoption of the WIM] does not involve or provide a basis for any liability or compensation"³. State parties have not included in the WIM any indications on how the international community should provide assistance to those countries that are trying to implement L&D policies.

While time passes without a sustainable solution, many people in the world are already suffering climate change related impacts that have strong implications in their health and life's conditions. Among the consequences of climate change impacts we can include internal conflicts and migrations, where often the second one is triggered by the first one. Numerous studies in the past have highlighted a strong correlation between climate change and conflict. In fact, the restrictions on access to the various resources normally present in a territory - such as food, water and energy - combined with political and economic pressures, can lead to the intensification of inequalities and possible social clashes⁴.

Already in 1987, with the Report of the World Commission on Environment and Development (Brundtland Report)⁵, political or military causes were identified just as some of the causes of wars, and it has been included the environmental degradation as another triggering factor. Thus, the reduction of the environmental threat was defined as a priority that need not only the use of military methods but also different protection and prevention measures. Furthermore, risks that are global in nature cannot be

¹United Nations Framework Convention on Climate Change (UNFCCC), January 2014, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013. Addendum. Part two: Action taken by the Conference of the Parties at its nineteenth session.*, [FCCC/CP/2013/10/Add.3](#).

² Ibidem, p.3.

³ UNFCCC, 2015, *Decision 1/CP.21, Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1.

⁴ UNESCO, *Climate change raises conflict concerns*, 2018, <https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns>.

⁵ United Nations, *Our Common Future (1987). Report of the World Commission on Environment and Development (Brundtland Report)*. UN Documents A/42/427, <http://www.un-documents.net/ocf-11.htm#l>.

mitigated, or even solved, at national level. On the contrary, it would be necessary to operate internationally even if it is clear that the scarcity of resources linked to climate change has shown an increase in the difficulty of cooperation between states to reach a compromise on competing interests.

Today, many are the examples of the nexus between climate and conflicts that continue to be at the centre of the international attention. Among these, we can include the many clashes arising in the Middle East and North Africa Region (MENA)⁶ but also the many small island of the Pacific such as the Solomon Islands or Vanuatu, which for their nature and geographical location, are strongly affected by climate change impacts.

These examples are not left behind. In fact, at the 2019 Peace Day - with the theme "Climate Action for Peace" - the EU High Representative for Foreign and Security Policy, Federica Mogherini, once again highlighted the "climate change multiplies threats to peace and security as pressure to already fragile livelihoods and destabilises local communities and their environments"⁷. This was also followed by the demand of action coming from Civil Society⁸.

1. Loss and Damage for Climate Change Impacts

1.1. Strategies for Tackling Climate Change

Climate change is a multi-factorial issue which is driven by several interrelated causes. It derives from a series of political, economic and personal choices and it entails several ecological systems and natural changes of our planet. Although we have always experienced a climate change phenomenon, there are scientific evidence that demonstrate that the climate changes of mid-20th century were generated by human activities related to the emission of greenhouse gasses (GHG)⁹. It is therefore true that the term climate change refers to natural changes, but of course what we will refer to will be, most of all, the climate change provoked directly or indirectly by humans.

We are in front of many different consequences of climate change which are increasing in intensity and danger for the population of the Earth. We can mention the rise of the level of the sea, the ice melts, the occurrence of extreme events, the rise of temperature both of the oceans and the Earth, and the disappearance of snow. In particular, the consequences of climate change can be divided in two categories. On one hand we can find the slow-onset events which include sea level rise, glacial retreat, desertification, and others; on the other, we can identify the sudden-onset events which refer to all kinds of environmental disasters such as floods and hurricanes¹⁰.

Alongside these effects we will deal with a series of problematics directly or indirectly connected with climate change. We can mention some of them: the scarcity of water due to changes of rainfalls, extreme meteorological events, and the reduction of glaciers and river flows; the rise of the number of the so-called "environmental migrants" who are those persons that are forced to move from their territories because climate change made impossible continuing to live there. In addition, we can mention the pressures on existing and scarce resources that are (and will be) exacerbating conflicts among countries. In particular,

⁶ Saghir Jamal, 2019, *Climate Change and Conflicts In The Middle East And North Africa*, Working Paper, Issam Fares Institute for Public Policy and International Affairs.

⁷ European Union External Action, 21/09/2019, *Statement by High Representative/Vice-President Federica Mogherini for the International Day of Peace*, Brussels.

⁸ A shared statement by peacebuilding organizations International Day of Peace, available at: <https://www.cordaid.org/en/news/people-planet-peace>.

⁹ National Aeronautics and Space Administration (NASA), *The effects of Climate Change*, NASA online: <https://climate.nasa.gov/effects>.

¹⁰ UNFCCC, 2012, *Report of the Conference of the Parties on its eighteenth session, held in Doha from 26 November to 8 December 2012. Addendum Part Two: Action taken by the Conference of the Parties at its eighteenth session*, UN Doc FCCC/CP/2012/8/Add.1.

these tensions are leading (and will continue to lead) to a large-scale migration that will threaten the stability of many states¹¹. Finally, we will deal with new medical risks which will affect in particular the most vulnerable population, both physically and mentally¹².

1.2. Mitigation & Adaptation

Adaptation and mitigation are two concepts that emerged at international level for tackling climate change adverse effects. Since we are already involved in climate change phenomena, both mitigation and adaptation approaches are needed to respond to them.

At the origin of the UNFCCC and of the Conferences of the Parties the focus was on mitigation approaches. These refer to the actions for tackling the causes of climate change, which means the reduction of the greenhouse gases emissions that contribute to climate change. NASA refers to mitigation by stating that “[it] involves reducing the flow of heat-trapping greenhouse gases into the atmosphere”¹³ in order to avoid that the humans’ activities interfere significantly in the capacity of ecosystems to naturally adapt to climate change¹⁴.

Even if the term adaptation emerged in science and policy making sphere at the same moment of the term mitigation thanks to the UNFCCC 1992, at the beginning it was not really defined in this document. The term did not acquire importance in the first phase because it was perceived as a political challenge and extremely connected to something inevitable which required a passive acceptance of climate changes¹⁵.

In the first decade of the 21st century, when it seemed clear that there were important difficulties in achieving international agreements for the reduction on the emission of anthropogenic greenhouse gases, the focus shifted to adaptation measures¹⁶. These, differently from mitigation ones, refer to the efforts to prepare the population to deal with climate change impacts¹⁷. The idea is that, thanks to this kind of measures, populations are able to adapt and adjust their behaviour to better cope with climate change. In order to reduce the vulnerability of the populations, some measures can be put in place, such as: providing for more secure facilities, increasing the flexibility and the diverse cultivation in order to be prepared for natural catastrophes, and providing for preventive and precautionary plans based on well-designed studies¹⁸.

Mitigation and Adaptation approaches are fundamental measures for continuing to tackle climate change. However, as the time passed and the climate change impacts increased, countries have noticed that those instruments were not enough anymore and they started to shape a third pillar for adverse climate change effects: Loss & Damage.

¹¹ Zannier L., 2016, *Climate change and security in the Mediterranean region* in Union from the Mediterranean *Key players’ perspective on climate change in the Mediterranean*, Sectoral Report 2016.

¹² Godrej D., 2003, *I cambiamenti climatici*, Roma, Carocci.

¹³ NASA, *Responding to Climate Change*, available at: <https://climate.nasa.gov>.

¹⁴ IPCC, 2014, *Climate Change 2014: Mitigation of Climate Change*, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

¹⁵ Burton I., 2009, *Deconstructing adaptation & reconstructing* in E. L. F. Schipper E. L. F. and Burton I. (Eds.), *The Earthscan Reader on Climate Change Adaptation* (pp. 11–14). London: Earthscan.

¹⁶ Schmidt-Thomé, P. 27 Feb. 2017, *Climate Change Adaptation*, *Oxford Research Encyclopaedia of Climate Science*. Retrieved 2 Nov. 2019.

¹⁷ NASA, *Responding to Climate Change*, Op. Cit.

¹⁸ Neil Adger W. et al., 2003, *Adaptation to Climate Change in the Developing World*, *Progress in Development Studies* 3,3 (2003) pp. 179–195.

1.3. Defining Loss and Damage

The Loss and Damage (L&D) is a multi-factorial concept based on political, legal, ethical and scientific questions. According to the developing countries, it can be considered the third pillar for tackling climate change impacts after mitigation and adaptation¹⁹. However, although it has been part of the UN agenda since 2010, it has not a unique and universal definition. In fact, there is still an open debate on whether it should be defined in a narrow way for allowing to set some specific policy responses or it should be left as broad as possible in order to favour flexibility and compromise between countries. However, the UNFCCC Subsidiary Body for implementation uses the following definition:

*"The actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems"*²⁰.

This definition is supplemented by many others coming from different authors that tried to provide narrower definitions. Some defined it as a "damage that cannot be avoided through mitigation or adaptation"²¹.

In addition, in order to understand completely this pillar, another conceptual distinction between the terms loss and damage needs to be made. As it was for the comprehensive definition of the principle, even in regard to these two terms there is not a common and universal definition. Nevertheless, if under the UNFCCC framework they are practically used as synonymous, many authors distinguish them. One example looks at losses as irrevocable and complete losses that cannot be restored at their initial state and this in reference to human lives, habitats and species; on the other hand damages refers to something that can be brought back even after the harm, such as roads or buildings²². This distinction is fundamental for understanding the kind of approach needed to address all situations related to L&D through ad hoc policies.

To this purpose, some authors thought it was important to discuss about avoidability. Verheyen distinguished between avoided, unavoided, and unavoidable damages²³; this definition was then expanded by Pinninti which divided it into four categories: avoidable, residual, irreducible, and irreversible effects where "avoidable L&D" are "adverse effects, especially disasters" that may be reduced through mitigation and adaptation efforts. "Residual L&D" refer to "the portion that accrues after adjusting for the effects of [climate change adaptation] in the context of adverse impacts"; "Irreducible damage" is "the quantum of L and D, after allowing for the positive effects of [adaptation] and various hazard mitigation (including capacity building, prevention, and governance activities)"; "Irreversible damage" is described as "when there is loss of life and/or the likelihood of regaining the original asset and income base ... is very low"²⁴. From 1991, thanks to the work made by the Alliance of Small Island States (AOSIS) for proposing insurance assistance to the victims of sea-level rise, the slow-onset events were included in the definition; while the migration and displacement themes have emerged more recently since they started to achieve a key role in the negotiation process.

19 Kreienkamp J., Vanhala L., 2017, *Climate Change Loss and Damage*, Global Governance Institute - Policy Brief.

20 UNFCCC, November 2012, *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*, UN Doc FCCC/SBI/2012/INF.14.

21 Verheyen, R. 2012, *Tackling Loss & Damage - A new role for the climate regime*, The Loss and Damage in Vulnerable Countries Initiative.

22 Huq S., 20 October 2014, *Loss and damage: a guide for the confused*, Climate Home News.

23 Verheyen, Op. Cit.

24 Pinninti, K. R. , 2013, *Climate Change Loss and Damage*, Economic and Legal Foundations. Springer.

2. The Warsaw International Mechanism for Loss and Damage

2.1. The Political Negotiations around the Warsaw International Mechanism

As previously mentioned, neither mitigation nor adaptation efforts have been enough to oppose some of the climate change impacts and L&D. However, the IPCC stresses how supporting developing countries with finance, technology and capacity building is fundamental for strengthening mitigation and adaptation abilities even if there will still be losses and damages²⁵.

The formulation of the WIM has a long political history of negotiations. The establishment of the WIM was not, in fact, a last-minute achievement, but it was the culmination of a long work of negotiations among developing and developed countries and supported by many different actors. One of the most important actors involved in the discussion over the L&D debate at the beginning of 1990s was the AOSIS.

Yet in 1989, at the Caracas Summit of the G77, greater states decided that the major responsibility in the research of a long-term solution for the global environmental protection should have been attributed to the most developed countries, responsible for the greater production and emission of GHG²⁶. This opened the way to the AOSIS which submitted a proposal for a sort of international insurance scheme needed for addressing L&D and therefore useful for the compensation of the most vulnerable small islands and low-lying coastal developing countries damaged by the sea-level rise. According to the proposal, this instrument should have been funded by mandatory contributions from industrialized countries on the base of their emission of GHG²⁷. Unfortunately, the proposal did not reach the attention required and was not included in the UNFCCC Convention of 1992, but from that moment on the UNFCCC started to focus more on how to address these kinds of permanent and irreversible impacts of climate change²⁸. After a series of institutional arrangements, the Doha negotiations, finally opened the way for the establishment of the WIM, a subsidiary body of the UNFCCC²⁹.

In adopting the WIM, the COP has also underlined the functions it should undertake. The first one states that the WIM is responsible of "enhancing knowledge and understanding of comprehensive risk management approaches to address L&D associated with the adverse effects of climate change, including slow onset impacts"³⁰. The second function provides to the WIM the role of facilitator of relations by stating that it should be "strengthening dialogue, coordination, coherence and synergies among relevant stakeholders"³¹. Its last task refers to the "Enhancement of action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change, so as to enable countries to undertake actions pursuant to decision 3/CP.18, paragraph 6"³².

²⁵ IPCC, 2014, *Climate Change 2014: Synthesis Report, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Geneva.

²⁶ Caracas Declaration, 1990, *Conference on the Restructuring of Psychiatric Care in Latin America within the Local Health Systems*, Pan-American Health Organization [PAHO]/World Health Organization [WHO], Venez., paras. 11-34.

²⁷ UNFCCC, *Elements relating to mechanisms. Vanuatu: Draft annex relating to article 23 (insurance) for inclusion in the revised single text on elements relating to mechanisms submitted by the Co-chairmen of Working Group II*, UN Doc A/AC.237/WG.II/Misc.13.

²⁸ Mace M.J., Verheyen R, 2016, Loss, damage and responsibility after COP21: all options open for the Paris agreement. *RECIEL* 25(2).

²⁹ UNFCCC, 2013, *Decision 2/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts*, UN Doc FCCC/CP/2013/10/Add.1.

³⁰ UNFCCC, 2014, *Report of the Conference of the Parties on its Nineteenth Session, Warsaw, 11–23 November 2013, Warsaw international mechanism for loss and damage associated with climate change impacts, Addendum*, UN Doc FCCC/CP/2013/10/Add.1.

³¹ Ibidem.

³² Ibidem.

Together with the establishment of the WIM, the Executive Committee of the Warsaw International Mechanism for Loss and Damage (ExCom) was created in order to support the implementation of the functions defined. The COP established also a two-year work-plan for guiding the implementation of the WIM's functions and a following five-year rolling work plan based on the findings of the two-year work-plan. During the two-year work-plan, the ExCom continued to implement the activities of the WIM, and among the major achievements there are the Task Force on Displacement (TFD) "to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change"³³ and the finalization of the concept of a Clearing House for Risk Transfer which was then launched at the COP23 at the Fiji³⁴.

In March 2017, the Task Force on Displacement (TFD) was entrusted with the task of providing recommendations on different possible approaches for dealing with displacement related to climate change impacts³⁵. To this aim, at the COP24 in Katowice, the TFD provided with a document including a series of recommendations that served at supporting people being displaced by climate change impacts. The COP recognized the important work of the TFD, appreciated the full involvement of different stakeholders and of the many civil society organizations, and agreed to include its guidelines in the final report. according to Benjamin Schachter, Human Rights Officer of the United Nations High Commissioner for Human Rights (OHCHR), the recommendations provided by the TFD are a very important step forward because they are the only example of how human rights are included in the L&D framework³⁶.

At the same way, at the 23rd session of the Conference, the UNFCCC decided to launch an information hub that had the aim of gathering information on risk transfer and risk management making it available to everyone. In this way, every State-party could be helped and facilitated in the implementation of risk management approaches and strategies³⁷. Although its strong potential, some countries such as Bangladesh, claimed that the Clearing House would have pushed "the poor people of the poor countries to pay the insurance premiums from their limited resources"³⁸. Harjeet Singh (global lead on climate change for ActionAid International) emphasized how even if insurance can sometimes help people affected by climate change impacts, it cannot face all kind of losses emerging.

2.2. Criticalities of the Warsaw International Mechanism

It is undeniable that the WIM is an important international instrument. However, at the same time, it is clear that it is still characterized by some structural issues that need to tackle in order to be effective and be able to address all the controversies around the L&D topic that are still unsolved.

Firstly, although the establishment of the WIM in 2013 through the decision 2/CP.19 of the WIM ExCom, the same aforementioned decision was not followed by any provision on how to fund the WIM ExCom or the WIM's activities. This made it difficult to understand how the WIM could be funded and sustained in the long term³⁹. In fact, the WIM and the ExCom are bodies that are established only by the COP decisions and this

33 UNFCCC, 2015, *Decision 1/CP.21 - Adoption of the Paris Agreement para. 49*, UN Doc FCCC/CP/2015/10/Add.1.

34 UNFCCC, *Fiji clearing house for risk transfer*, see UNFCCC online: <http://unfccc-clearinghouse.org>.

35 UNFCCC, 2015, *Decision 1/CP.21 - Adoption of the Paris Agreement para. 49*, UN Doc FCCC/CP/2015/10/Add.1.

36 Mr. Benjamin Schachter, *Skype interview by the author on the 2th of Sept. 2019*.

37 UNFCCC, 2015, *Decision 1/CP.21 - Adoption of the Paris Agreement para. 48*, UN Doc FCCC/CP/2015/10/Add.1.

38 Bangladeshi officials in Siddique A., Darby M., 10 Nov. 2017, *Climate insurance website to be launched at Bonn talks*, Climate Home News.

39 Mace M.J., Verheyen R., Op. Cit.

means that they cannot be considered independent legal entities and therefore cannot be paid by funds coming from contracts or disburse funds⁴⁰.

Moreover, since 2013 the WIM has had the chance of establishing expert groups, conferences and panels, however concrete actions for increasing the technical expertise of the vulnerable countries were very few. This is very far from the idea that developing countries had of a L&D mechanism; developing countries wanted an entity, not only able to increase the awareness on L&D and to enhance information on this topic, but also to address it in a concrete and tangible way. They sought a strong mechanism that could support vulnerable developing countries in facing those permanent and irreversible impacts of climate change with financial and technical support⁴¹. However, unfortunately, for the moment the WIM remains a space where discussing L&D but “without teeth”⁴² for achieving concretely its mandates.

In other words, despite the important analytical work made by the WIM on L&D, it has not been able to translate it into something concrete yet. This is due to the fact that none of the funds created by the UNFCCC is able to support L&D⁴³. Since the Doha negotiations, there has always been the unwillingness of the most industrialized countries to open any kind of compensation and liability discourse. Already then, the US and Europe opposed to that idea because they feared that it would have led to never ending financial claims⁴⁴. In recent years, the situation has not changed and in fact it sees the US and other developed states - not only not able to meet the Paris Agreement goals -but also unwilling to do it and blocking its progresses in the Climate Negotiations⁴⁵.

Even in terms of the inclusion of human rights in the L&D debate, the WIM is characterized by important gaps. According to Schachter of the OHCHR, even if people are legally entitled to access to effective remedy when their human rights are affected - and climate change is one of the situations that includes massive human rights impacts - broader discussions on human rights in the context of the WIM have not been included so far. He stressed that, if in the UNFCCC we can find the preamble language of the Paris Agreement which calls upon states to consider the human rights obligations when formulating climate actions, we cannot find operational human rights language with respect to the WIM⁴⁶. As we already mentioned, the only part where human rights are included are the recommendations of the TFD⁴⁷; still, in order to better include human rights, the TFD should have explicit objectives to work on and protect the rights of people that have been displaced due to climate change. However, having specific human rights in these documents does not guarantee a better advancement in the future agreements. In fact, having an excessively closed and specific human rights framework within the context of the WIM may lead to even more discussions and blockades. Moreover, it is interesting to reflect on why it should be necessary to introduce an operational human right language in these specific documents on climate change L&D. In fact, the mere existence of the Universal Declaration of Human Rights should be sufficiently detailed to guarantee that human rights are taken into consideration when formulating climate actions. However, this cannot be taken for granted and there is a need of having a specific human rights language.

⁴⁰ UNFCCC, 19 March 2009, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its fourth session*, held in Poznan from 1 to 12 December 2008 Addendum Decision 1/CMP.4, Adaptation Fund - paragraph 11, UN Doc FCCC/KP/CMP/2008/11/Add.2.

⁴¹ Mace M.J., Verheyen R, Op. Cit.

⁴² Mr. Benjamin Schachter, *Skype interview by the author on the 2nd of Sept. 2019*.

⁴³ Mr. Christopher Bartlett, *Skype interview by the author on the 19th of Sept. 2019*.

⁴⁴ Vidal J., 3 Dec. 2012, *Climate change compensation emerges as major issue at Doha talks*, The Guardian.

⁴⁵ Radio New Zealand, 13 Dec. 2018, *Vanuatu exposes US climate change denial at COP24*.

⁴⁶ Mr. Benjamin Schachter, *Skype interview by the author on the 2nd of Sept. 2019*.

⁴⁷ Task Force on Displacement, 17 September 2018, *Report of the Task Force on Displacement*.

The aforementioned financial issue is linked to a second one, which concerns the effectiveness of the WIM activities. The initial two-year work-plan was the first step able to specify the general areas agreed for the WIM. However, in general there is still a lot of work that needs to be done regarding the explication of the concrete steps needed for implementing the WIM's activities established and compliant with its mandates. So far, the WIM has not decided clear and precise strategies, goals and purposes for its functions, nor it has established the time frames within which carrying them out. The Climate & Development Knowledge Network explains that normally, when in the international climate discussions emerges a new topic, a process of four stages starts to be developed. The latter includes, firstly, the awareness on the topic but without enough understanding and definitions on the issue, secondly the collection of knowledge and information, thirdly the implementation of decisions on the issue and lastly its total integration and mainstreaming. According to the historical evidence, finalizing all the four stages takes more or less ten years, but for what concerns L&D - after 20 years of researches and collection of information - we are still trying to define some issues and only few concrete decisions have been taken⁴⁸. To be effective, the WIM needs to decide on more ambitious long-term strategies and the future key steps to be taken⁴⁹.

A third important issue concerns a more specific problem. While the initial two-year work-plan established by the ExCom worked effectively on the implementation of the first and second functions of the WIM, namely the enhancement of knowledge on L&D and the facilitation of synergies between different actors, it was harshly criticized because it focused merely on these first two functions. In fact, it addressed only superficially the third activity of the WIM, which tries to find solutions to increase the support (also financial) to developing countries affected by climate change L&D⁵⁰. The ExCom contributed to this last function merely by mentioning some existing approaches for financing L&D. In addition, we can notice a shift from the original mandate included in the Decision 2/CP.19 of the UNFCCC⁵¹. In fact, while in the original mandate of the ExCom the response to L&D was to be searched in both private finance and non-market approaches, the report provided after the two-year work-plan by the ExCom only stressed private sector and market-based solutions. Due to this shift, the private insurance sector acquired a central role compared to the public sector interventions, taxation and transfers from developed countries to vulnerable ones. This also implied a change of mentality because, if public finance and non-market approaches are defined solidarity-based approaches - where the fiscal responsibility is given to the international community - when we refer to market-based solutions we automatically give the responsibility to the communities who are suffering the climate change impacts, expecting them to pay for an insurance premium, for example⁵².

However, the ExCom proposed a list of financial instruments for financing L&D, which consists in "comprehensive risk management capacity with risk pooling and transfer; catastrophe risk insurance; contingency finance; climate-themed bonds and their certification; catastrophe bonds; and financing approaches to making development climate resilient"⁵³. The list included some constraints such as the fact that it contained insurance schemes, which are funded by voluntary contributions and therefore cannot be always reliable. Moreover, private insurance schemes are not accessible and affordable to everyone and this

⁴⁸ Climate & Development Knowledge Network, *Loss and Damage – From Defining to Understanding to Action*.

⁴⁹ Mace M.J., Verheyen R, Op. Cit.

⁵⁰ Richards, J., Schalatek, L., 2017, *Financing loss and damage: A look at governance and implementation options*, Heinrich Böll Stiftung North America.

⁵¹ UNFCCC, 2013, Decision 2/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts, UN Doc FCCC/CP/2013/10/Add.1.

⁵² Gewirtzman J., et al., 2018, *Financing loss and damage: reviewing options under the Warsaw International Mechanism*, Climate Policy.

⁵³ UNFCCC, 24 Oct. 2014, *Report of the executive committee of the Warsaw International mechanism for loss and damage associated with climate change impacts*, FCCC/SB/2014/4.

is often typical of those situations where people live in vulnerable areas⁵⁴. Furthermore, it did not include any financial solution applicable to slow-onset events. In fact, traditional insurance included by the ExCom as one of the financial solutions to address L&D, can only be used when sudden - unpredictable and infrequent - disasters cause monetary damages. When climate change impacts increase in intensity and become not predictable, the insurance schemes will become too costly to be used and people will no longer be able to pay to be insured⁵⁵. Finally, insurance-based solutions cannot be applied to NELD (loss of heritage, culture, languages and ecosystems) and this limits consistently the use of this kind of response. In fact, insurance schemes are not able to give a proper value to NELD, being not useful in this kind of situations⁵⁶.

3. Migration under a Loss and Damage Perspective

3.1. The Relation between Climate Change and Migration

For almost all the 20th century, migration has been attributed to political and economic factors, religious oppressions, cultural discriminations or also voluntarily and personal motivations that pushed people to move⁵⁷. Since the 1980s, the nexus between environmental factors and migration started to become clearer⁵⁸. At the beginning of the 1990s the IPCC expressed its concern on the increasing connection between the two phenomena: "Migration and resettlement may be the most threatening short-term effects of climate change. People may decide to migrate in any of the following cases: loss of housing (because of river or sea flooding or mudslides), loss of living resources (like water, energy and food supply or employment affected by climate change); loss of social and cultural resources (loss of cultural properties, neighbourhood or community networks, particularly in the case of a devastating flood)"⁵⁹.

Moreover, in 1992, the IOM warned that the number of climate change related migrants could increase dramatically in the future years as consequence of the fact that many areas would become inhabitable due to climate change adverse impacts⁶⁰. Already in the 1980, the environmentalist Norman Myers predicted the movement of 250 million of people affected by climate change by 2050⁶¹. The IOM, although clarifying that reliable estimates do not exist, confirmed that the widely estimates reported were of 200 million people and that future forecasts can vary from 25 million to 1 billion climate induced migrants by 2050⁶².

Climate change impacts can result in both temporary and permanent displacement of people. These kinds of impacts can be sudden events such as cyclones, volcanoes, flooding, hurricanes, earthquakes, tsunamis, forest fires, and also industrial accidents or chemical leakages. These ones have a deep impact on the humans and eco-systems of the area concerned, affecting the agriculture, the food security and the

54 Munich Climate Insurance Initiative (MCII), 2012, *Insurance solutions in the context of climate change-related loss and damage: Needs, gaps, and roles of the Convention in addressing loss and damage*, SBI Work Program on Loss and Damage.

55 Weingartner, L., Simonet, C., Caravani, A., 2017, *Disaster risk insurance and the triple dividend of resilience*, London, Overseas Development Institute.

56 Gewirtzman J. et al., Op. Cit.

57 Mayer B., 2016, *The concept of climate migration: Advocacy and its Prospects*, Edward Elgar publishing, p. 8.

58 Piguet E., 2013, *From "Primitive Migration" to "Climate Refugees: The Curious Fate of the Natural Environment in Migration Studies*, Annals of the Association of American Geographers, pp. 148–62.

59 IPCC, 1990, *Climate Change - the IPCC Impacts Assessment*, World Meteorological Organization - United Nations Environment Programme.

60 IOM, 1992, *Migration, Environment and Climate Change - Assessing the Evidence*.

61 Mayer B., Op. Cit.

62 International Organization of Migration, *Migration and Climate Change - What are the estimates?*, see IOM online: <https://www.iom.int>.

livelihood of millions of people and increasing the risks and vulnerabilities already present in the majority of the countries affected. These kinds of climate change impacts cause immediate displacement of people which can then be permanent or temporary resettled.

Climate change can also result in slow-onset events such as the sea-level rise, drought, desertification and epidemic diseases. Sea-level rise, for example, is one of the most relevant climate change adverse impacts; it is particularly dangerous for those living in low-lying areas or small islands because it will increase the possibility of inundations and result in coastal erosion⁶³. The IPCC have forecasted that, between 1990 and 2100, sea levels would raise a total of 0.18 to 0.6 meters⁶⁴. Considering that around two-thirds of people in the world are located within 100 km from the ocean⁶⁵, a huge part of the population involved may be forced to migrate permanently and be relocated internally or outside the country. Similarly, droughts are another important climate change driver for migration. This time, however, we talk about inland migration. In particular, droughts have huge impacts in the agriculture production fundamental for the subsistence of many people living in the poorest and most vulnerable countries of the world. According to some studies, since it is expected an increase in the global temperature, by 2050 the area that it is in constant drought is expected to increase from 2% to 10%⁶⁶. Of course, if people will be not able to live of agriculture products, they will be forced to migrate in other parts of the country or outside of it in order to survive⁶⁷.

It must be taken into consideration that the connection between climate change and migration is still nebulous due to the fact that migration is often triggered by many interrelated causes⁶⁸. Although it could be analysed separately, the economic and political situation of a country can have an important role in the movement of a person or a community⁶⁹. In different occasions it has been noticed that the migration has been triggered by the strong impacts of climate change on the availability of the existing resources of a territory, causing conflicts and pushing people to leave their homes⁷⁰. Between 1990 and 2009 there have been 18 armed conflicts that can be directly linked to the resources' control (i.e. water or energy resources)⁷¹. Recent researches on existing conflicts have underlined how the lack of water, the frequent droughts, and the scarcity of other kinds of resources - united to the scarce management capacities and the already delicate economic situation - have created very difficult living conditions resulting in mass migration of entire communities from the rural to the urban areas⁷². The instability arising from this emergent condition

⁶³ Pragnya P.J., 2018, *Climate Change and Forced Migration*, IOSR Journal Of Humanities And Social Science (IOSR-JHSS). vol. 23 no. 06, pp. 35-43.

⁶⁴ Church, J. A., 2013, *Sea level change*, in: Stocker, T. F., et al. *Climate change 2013: The physical science basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge; New York, pp. 1137-1216.

⁶⁵ McGranahan G. et al., 2007, *The Rising Tide: Assessing the Risks of Climate Change and Human Settlements*, in *Low Elevation Coastal Zones Environment and Urbanization* 19, no. 1, 17-37.

⁶⁶ Pragnya P.J., Op. Cit.

⁶⁷ Hoegh-Guldberg et al., 2018, *Impacts of 1.5°C Global Warming on Natural and Human Systems*. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*.

⁶⁸ Leal-Arcas, R., 2012, *Climate Migration and International Trade*, *Vienna Journal of International Constitutional Law*, Vol. 6, No. 3-4, pp. 410-440, Queen Mary School of Law Legal Studies Research Paper No. 124/2012.

⁶⁹ Lonergan, S., 1998, *The role of environmental degradation in population displacement*, *Environmental Change and Security Project Report*, Issue 4, Spring, p. 8.

⁷⁰ Kolmannskog V., 2008, *Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration*, Norwegian Refugee Council.

⁷¹ De Pierri M., *Crisi Ambientale e Migrazione forzate, da: Il Secolo Dei Rifugiati Ambientali? Analisi, Proposte, Politiche* - Convegno internazionale organizzato da Barbara Spinelli e dal Gruppo parlamentare della Sinistra Unitaria Europea (GUE/NGL).

⁷² Abel G. J. et al., 21 Jan. 2019, *Climate, conflict and forced migration*, *Global Environmental Change*.

in the urban area - considering overcrowding, inequalities, scarcity of resources and services - results then in political and economic issues that could trigger new violent conflicts⁷³. Conflicts, as we know, create relevant negative impacts on the populations involved, proving to be a push factor for migrations. In this sense, since climate change may lead to conflicts, it can indirectly lead to forced migration.

According to Salvatore Altiero⁷⁴, in a broader perspective, if we look at the climate migrations in terms of socio-economic justice, we realize that there is a strong inequality in the enjoyment of the resources. In fact, the highly populated parts of the planet are those where the majority of the resources are extracted but that do not enjoy of the wealth produced by those resources; on the contrary, these resources are enjoyed by the least populated parts, where fewer resources are extracted. Altiero stresses that at this point it would be fundamental understanding if the resources on the planet are limited or if they are "just" inequitably distributed. In other words, the absence of resources should not forcibly lead to conflicts, but to a different economic organization that - not only contrasts climate change - but provides also for an equitable distribution of the world's resources⁷⁵.

However, at present, scientific connections between climate change and conflicts, and therefore between climate change and migrations, are still very limited. Despite the lack of empirical studies supporting this connection, increasing studies have started to track this path, linking climate change to conflicts and to cross-border migrations⁷⁶. According to Altiero, one of the reasons why we might not have data on this - and more generally on international migrants - can be the fact that migrants, knowing that they would not receive protection for climate consequences, are more likely not to define themselves as climate migrants. In his opinion, until a legal recognition of climatic/environmental migrants including the related responsibilities is not established, it will not be possible to protect this category of people⁷⁷.

3.2. Understanding Migration under a Loss and Damage Perspective

Human mobility is often understood differently in the climate change regime. Its different formulation also creates the opportunity for framing the policies in a different way accordingly to the relation between climate change induced migration and the L&D taken into consideration⁷⁸.

The first one indicates that the climate induced displacement can be a way - adopted by a single individual or an entire community - for improving a life condition, avoiding the deterioration of a situation or adapting to new changes emerged⁷⁹. Similarly, climate migration can be used as a strategy for reducing the L&D produced by climate change. In this sense, people can decide to move before a certain event takes place - due to the high probability of occurrence of the event - or they can decide to move after its occurrence in order to avoid the deterioration of their living condition and the increase of the L&D expected⁸⁰.

73 IPCC, 2014: *Climate Change 2014: Synthesis Report*. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

74 PhD in environmental law and freelance journalist. He deals with research, communication and cooperation for ASud and the CDCA.

75 Mr. Salvatore Altiero, *Skype interview by the author on the 8th October 2019*.

76 Abel G. J. et al., Op. Cit.

77 Mr. Salvatore Altiero, *Skype interview by the author on the 8th October 2019*.

78 McLeman, R., 2011, *Climate Change, Migration, and Critical International Security Considerations*, IOM Migration Research Series No. 42, International Organization for Migration (IOM), Geneva, Switzerland, 50 pp.

79 Crépeau F., 13 Aug. 2012, *Report of the UN Special Rapporteur on the Human Rights of Migrants to the General Assembly*, UN Doc. A/67/299.

80 Mayer B., 2016, Op. Cit.

From this kind of framing, the policies emerging for addressing this phenomenon were either of protection of migrants or of migration control and they imply the use of a series of economic incentives or border surveillance. However, suggestions for a response to climate induced migration include the formulation of policies that respond to both adaptation and L&D efforts. The idea of a community that decides to move because of the possible deterioration of its living condition responds exactly to an adaptation measure. Nevertheless, addressing those L&D - that cannot be adapted or mitigated - needs the research of other kinds of responses that should be implemented, not only at community-level, but more at international level. The responses should be then implemented with the support of a financial mechanism based on causal responsibility⁸¹.

A second way for understanding climate induced migration is to frame it as a source of L&D for migrants⁸². Great climate change impacts produce massive migrations with related vulnerabilities and needs to be addressed. So far, states have not demonstrated their willingness to protect international migrants' rights. However, on some occasions migration has already been understood as damage for migrants giving them the possibility of receiving help and compensation from the international aid⁸³. One of these occasions is represented by the fact that the UN Compensation Commission established the possibility of remedies for those who were obliged to move from their country and not able to return. In this sense, it was guaranteed a compensation for the mere displacement and its many related losses and damages⁸⁴. In fact, several vulnerabilities emerging directly from the climate induced displacement can be considered L&D. Among these we can mention the loss of security which includes: the loss of legal rights; the loss of health as a lack of well-being and loss of social networks; and the loss of property and possession⁸⁵. So conceived, we may refer to the right to human security which states that:

*"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality"*⁸⁶.

In the article, the human security is associated to the implementation of economic, social and cultural rights which are necessary to the human dignity and the free development of the individual personality. The article stresses the responsibility of the state to establish a social security system able to ensure protection against social risks. It also indicates that, whenever the state is able to provide for it under its own power, it is its duty to be active and to involve the multilateral organisms in order to ensure social justice and the enjoyment of human rights to its citizens⁸⁷. However, the applicability of this article to the climate induced migration is not straightforward. When referring to climate change responsibility, if we agree on the fact that every state is - differently, according to the level of emissions - responsible for the climate change impacts, we agree also in saying that every state has the duty to act for ensuring protection and a social security system for its citizens⁸⁸. However, not all states can have the economical capacity for addressing climate change impacts and we risk of saying that climate change impacts should be paid more, even in

⁸¹ Mayer B., 2016, Op. Cit. pp.116-117.

⁸² Heslin A. et al. 2018, *Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration*, In: Mechler R. et al. Loss and damage from climate change. Concepts, methods and policy options. Springer, Cham. pp. 237-258.

⁸³ Mayer B., 2016, Op. Cit. pp.117.

⁸⁴ UN Compensation Commission, 17 Mar. 1992, *Decision 7 of the Governing Council of the UN Compensation Commission taken during its Third Session, 'Criteria for Additional Categories of Claims'*, UN Doc. S/JAC.26/1991/7/Rev.1.

⁸⁵ Mayer B., 2016, Op. Cit. pp.117.

⁸⁶ UN General Assembly, 10 Dec. 1948, *Universal Declaration of Human Rights - Article 22 - Social security*, 217 A (III).

⁸⁷ Papisca A., 17 July 2009, *Articolo 22 - Sicurezza Umana*, La Dichiarazione Universale dei diritti umani commentata dal Prof. Antonio Papisca, Unipd-Centro Diritti Umani.

⁸⁸ Mr. Salvatore Altiero, *Skype interview by the author on the 8th October 2019*.

economic terms, by the most vulnerable and poorest countries of the world (that is exactly what the L&D framework tries to avoid). In fact, as we know, the majority of climate change impacts have been experienced by the most vulnerable states and it seems not “fair” and “easy” to state that they should pay the total costs of it. On the contrary, there are states - even those most vulnerable - that allow private corporations and companies to carry out actions that violate human rights and have strong impacts on the environment. In these cases, if we had an international law targeting these violations, we could target both the private company and the states that do not protect their communities⁸⁹.

Coming back to this second kind of framing, it should not - however - preclude the first one. In fact, migrants should be free of using migration as a normal strategy for adapting their general living conditions. The migration process must be associated, as the Paris Agreement indicates⁹⁰, with the obligation for states to protect the rights of migrants. In fact, losses and damages are always present where legally or institutionally international protection is not guaranteed⁹¹.

A third way conceives climate induced migration as a situation that can provoke L&D on the host states and communities⁹². Although some studies already state that migration contributes to the economic and social conditions of the country of arrival⁹³, the massive arrival of a migrant population can trigger several L&D perceived by the host community. This happens because the arrival community has the responsibility to guarantee assistance and support to the arriving migrants. Consequently, this may reduce the availability of public services and the funds already dedicated to national services⁹⁴.

In different cases, the burden faced by the host community was recognized as a L&D for the community itself. For instance, we can mention the Refugee Convention of 1951 that recognized the obligation of providing asylum as a burden for the host community⁹⁵. Moreover, massive migration has often been understood as a threat to the peace and security for the state of destination⁹⁶. This has usually pushed the developed states to create policies aiming at controlling migration flows or at preventing migrants to enter the country.

This whole concept was also used within UNFCCC system for pushing developed states to increase their commitment and their actions towards the concept of L&D. In particular, the AOSIS used this argument for stressing that the inaction of developed states in addressing climate change impacts through adaptation and mitigation measures could have resulted in massive migrations coming from vulnerable states⁹⁷. Of course, the use of this argumentation for pressing the international commitment to intervene in support of the climate change induced migrations needs to be limited because it risks of reinforcing the normally negative conceptualization that migration has. In fact, excessively pushing on the negative impacts of the international massive migration for the communities of arrival can create hostility towards migrants, if not a general sense of xenophobia coming from the host communities. Consequently, this can result in intensive policies for managing and controlling the migratory flows. All of this can have a negative impact on the

⁸⁹ Ibidem.

⁹⁰ UNFCCC, Decision 1/CP.21, Op. Cit.

⁹¹ Mayer B., 2016, Op. Cit. pp.118.

⁹² Mayer B., 2016, Op. Cit. pp.119.

⁹³ OECD, May 2014, *Is migration good for the economy*, Migration policy debate.

⁹⁴ Ibidem.

⁹⁵ UN General Assembly, 28 July 1951, *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137.

⁹⁶ Weiner, M., 1992, Security, Stability, and International Migration. *International Security*, 17(3), 91-126.

⁹⁷ AOSIS, 8 Oct. 2012, *Nauru on behalf of AOSIS: Views and Information on Elements to be Included in the Recommendations on Loss and Damage in accordance with Decision 1/CP.16,14*, p. 9, UN Doc. FCCC/SBI/2012/MISC.

vulnerable populations, preventing them to use migration as adaptation measure and increasing their L&D. Excessively pressing on this argumentation can prevent displaced people of their only possible shelter⁹⁸.

3.3. The Vanuatu Island, an Example of Climate Change Human Mobility

Vanuatu, as many other countries of the world, is already facing climate change L&D emerging from both slow-onset events and extreme-events⁹⁹. The country is indicated as a Least Developed Country (LDC) because of its vulnerable conditions. In fact, it is composed by 82 small islands that are daily subjected to earthquakes, and eruptions of volcanoes, other than, cyclones, tsunamis and flooding of coasts and rivers¹⁰⁰. It is located in the Melanesian sub-region of Oceania and its islands are inhabited by around 271,000 people that, for the majority, depend on agriculture, fisheries and marine resources. More than the 75% of the population living in rural areas still bases its agriculture activity on rotation and cultivation techniques that are becoming increasingly unsustainable and threatened by climate change adverse impacts.

The rural communities that live near the coast are at daily risk of droughts and floods increasingly hitting the islands due to the intensification of the tropical cyclones like *El Niño* and *La Niña*¹⁰¹. The geographical location, combined with the low elevation of the largest portion of the coasts (merely 0,9m) has contributed to determine it as the most at-risk country to natural hazards in the world. Indeed, on one hand, it is extremely high exposed to disaster events and, on the other, there is a high frequency of occurrence of these events¹⁰².

Moreover, climate change creates a ripple effect of direct and indirect consequences for the population (the so-called ni-Vanuatu). For example, tsunamis and sea level rise can produce coastal erosion and heavy rainfall events that create difficult living conditions for the population of the coastal areas; and, in the worst case, it can prevent the population from continuing to live there forcing it to move and increasing the risk of substantial social conflicts¹⁰³.

Over the years, Vanuatu has perceived an increase in the frequency and magnitude of the adverse impacts of climate change. For example, cyclone Pam, which hit Vanuatu in 2015 weighted out the 64% of the Vanuatu GDP in a very short period¹⁰⁴.

Some studies demonstrate that climate change will increase both in droughts and extreme weather such as hurricanes and cyclones¹⁰⁵. These, together with other climate change impacts, will have a strong impact on crop production and food security too.

According to a report, aiming at conducting a financial analysis on Vanuatu present and future L&D, in the next 50 years, there will be the 50% of probability that the islands will spend around US\$ 330 million for

⁹⁸ Mayer B., 2014, Op. Cit. pp. 19–41.

⁹⁹ Republic of Vanuatu, 29 Jan. 2018, *Submission by the Republic of Vanuatu To the Executive Committee of the Warsaw International Mechanism for Loss and Damage of the UNFCCC*.

¹⁰⁰ Wewerinke-Singh M., Hinge Salili D., 10 June 2019, *Between negotiations and litigation: Vanuatu's perspective on loss and damage from climate change*, Climate Policy.

¹⁰¹ Prime Minister's Office, September 2010, *Millennium Development Goals 2010 Report for Vanuatu*.

¹⁰² United Nations University, 25 Aug 2016, *World Risk Report 2016: Inadequate infrastructure pushes up the risk of disaster: World Risk Report 2016 on the consequences of possible extreme natural events in 171 countries*, ScienceDaily.

¹⁰³ Davies K., March 2019, *Social Implications of Climate Change in Vanuatu: Potential for Conflict, Avenues for Conflict Prevention, and Peace Building*, Toda Peace Institute, Policy Brief No.35.

¹⁰⁴ Republic of Vanuatu, 2018, Op. Cit.

¹⁰⁵ Hugo, G.J., Bedford, R.D., 2012, *Population movement in the Pacific: a perspective on future prospects*, Wellington: Department of Labour.

covering only a single event¹⁰⁶. The territory will face, in fact, an increase of the average temperatures and extreme temperatures, a higher level of precipitations, and the intensification of the sea-level rise and coastal erosion phenomena¹⁰⁷.

3.4. Vanuatu: Leader for L&D in the Climate Change Regime

Since 1991, Vanuatu was one of the leader-states demanding that L&D became a key element in the framework of the Climate Change Conventions and that contributed to the efforts of creating an international mechanism aiming at addressing climate change L&D. As we mentioned, the WIM was finally established in 2013 and since the beginning, the idea of the Vanuatu Government was that those who contributed the most to climate change should assume more responsibility towards those who are suffering the most¹⁰⁸. However, Vanuatu has soon realized that, although the efforts for creating the WIM, the instrument was never sufficiently financed. According to Christopher Bartlett, Adviser to Minister Ralph Regenvanu of Vanuatu, *"All we really had from the WIM was a workplan with five areas and an Executive Committee, but there has never been an obligation - other than adaptation and mitigation - to have any funds allocated for any actions associated to the WIM"*¹⁰⁹.

Although the country recognizes and appreciates the important analytical work made by the WIM, especially in elaborating slow-onset L&D and highlighting the extreme events that produce L&D, it feels that this is woefully insufficient and that the scale of actions that is required for addressing L&D has not properly been resourced under the WIM. In other words, Vanuatu agrees on the fact that there is no translation of the analytical work made by the WIM in concrete and real actions so far. In fact, the ExCom of the WIM has not made any progresses after its creation, especially for what concerns the implementation of the 3rd WIM task, referring to the enhancement of concrete financial actions and support to address L&D¹¹⁰. *"None of the financial mechanism of the UNFCCC has supported L&D"* - stated Bartlett - *"the Adaptation Fund does not fit, the Green Climate Fund does not fit, the Special Least Developed Countries Fund does not fit, and the Special Climate Change fund does not fit. None of them will actually address some of the issue brought by the WIM. It is a head without arms or legs, or body"*¹¹¹.

Vanuatu, for a long time, has fought to include financial elements for implementing the actions and the support of the WIM but it has always been pushed back. For example, already when the Paris Agreement was signed, the issue of compensation was explicitly excluded from anything related to L&D¹¹². Moreover, the WIM does not have any kind of enforcement or monitoring mechanism. In fact, even when it was developed the Global Stocktake and the transparency mechanism processes last year, the developed countries refused to even consider L&D and to include the term in any progress-checking mechanism. This because they were afraid of the responsibilities they would bear for covering the costs of providing actions and support.

In the last Submission of Vanuatu to the ExCom, the country pointed out again how all of this is due to the strong pushback and blocking actions coming from some of the developed countries, members of the

¹⁰⁶ Pacific Catastrophe Risk Assessment and Financing Initiative, 2011, *Country risk profile: Vanuatu*.

¹⁰⁷ World Bank. 2017. *Vanuatu - Increasing Resilience to Climate Change and Natural Hazards Project: restructuring (English)*. Washington, D.C.: World Bank Group.

¹⁰⁸ Wewerinke-Singh M., Hinge Salili D., 2019, Op. Cit.

¹⁰⁹ Mr. Christopher Bartlett, *Skype interview by the author on the 19th of Sept. 2019*.

¹¹⁰ Republic of Vanuatu, 2018, Op. Cit.

¹¹¹ Mr. Christopher Bartlett, *Skype interview by the author on the 19th of Sept. 2019*.

¹¹² Mace M.J., Verheyen R., 2016, Op. Cit.

ExCom¹¹³. The foreign minister of the Pacific island of Vanuatu Mr. Regenvanu, indicated the US and Saudi Arabia as being the most obstructive in the talks of the last COP in Katowice, stating that this made him feel depressed and disappointed and adding *"We thought we would be somewhere else by now, and not just back here"*¹¹⁴. For the Government of Vanuatu, this is all due to economic and financial reasons. Developed countries are claiming that they are including their L&D funds into their humanitarian budgets. However, according to the Vanuatu government, and in general to the Pacific countries, the humanitarian budgets provided by developed countries are just a fraction of the whole amount of money needed for addressing L&D. For example, the L&D incurred from only one cyclone was of 550 million US dollars, while the amount of the humanitarian support Vanuatu received was about 50 million dollars¹¹⁵.

3.5. The Climate Change Displacement

Climate change disasters create enormous difficulties for the people living in Vanuatu in terms of physical security and well-being¹¹⁶. One of the major climate driven consequences for these people is the obligation of leaving their own homes for searching a safer and secure place where continuing their life. In particular, as for other countries, Vanuatu can be characterized by different kinds of human displacement. Normally sudden-onset events (cyclones, volcanoes, tsunamis, etc.) can provoke both temporary and permanent displacement, while slow-onset events (sea-level rise, or land erosions), can result in the relocation of an entire community. In fact, many times relocation can be just temporary allowing people to return to their homes after the conditions are improved and secured. However, there are occasions where, for safety reasons, it is no more possible for people to live in those places and they are forced to move permanently, abandoning their homes and lands forever. Despite the lack of national a comprehensive data on displacement in the country, it was possible to calculate the number of people impacted by the singular sudden-events. For example, the tropical cyclone Pam of 2015 had an impact on 188,000 people and had more than 65,000 people displaced¹¹⁷.

The population of Vanuatu is already facing the harsh consequences of climate change in terms of displacement. In fact, whatever kind of impact climate change produces - whether it is on fishing, ecosystem health, food security, or resulting in issues on coastal areas and groundwater - it creates consistent difficulties in the environmental systems and governance increasing the risk of internal displacement¹¹⁸.

Moreover, the internal migration is itself, the trigger for several other negative impacts on the Vanuatu communities. Whether it is prepared or not, the population of Vanuatu is daily forced to decide whether to stay in its original place and being affected by strong climate change impacts or to move and change location. In both situations, however, it will face several important risks and vulnerabilities that need to be addressed. Indeed, although migration can be a positive adaptation plan for some people, it is not without consequences¹¹⁹.

The issues related to migration are strongly connected to the fact that in Vanuatu, as in many Pacific island countries, there is a strong connection between the population and the land. The land has, not only a

¹¹³ Republic of Vanuatu, 2018, Op. Cit.

¹¹⁴ Teffer P., 13. Dec 2018, *COP24: Vanuatu in 'constant state of emergency' on climate*, EuObserver - Climate and Environment, Katowice, Poland.

¹¹⁵ Mr. Christopher Bartlett, *Skype interview by the author on the 19th of Sept. 2019*.

¹¹⁶ United Nations, *The Permanent Mission of the Republic of Vanuatu to the United Nations - Climate Change*.

¹¹⁷ Vanuatu National Disaster Management Office NDMO, 2018, *National Policy on Climate Change and Disaster-Induced Displacement*.

¹¹⁸ Davies K., 2019, Op. Cit.

¹¹⁹ Vanuatu National Disaster Management Office NDMO, 2018, Op. Cit.

fundamental relevance in economic terms, but it is a permanent presence in the lives of the ni-Vanuatu in psychological and cultural terms¹²⁰. Even the name of the country derives from "vanua" that means "land" in Vanuatu's language exactly because the population and the land are inseparable. In fact, many people depend directly from the land for their livelihood and rely on the high level of biological diversity existing on the islands. This creates several problems for what concerns climate change migration. In Vanuatu, the relocation of the climate change affected populations requires a complex path of negotiations with the local chiefs and the traditional landowners on the availability of the land, its transfer and ownership from one person to another. This is due to the fact that it exists only a customary ownership of the lands and there is no governmental ownership or any national guidance on the negotiation process¹²¹. This has caused many problems with each piece of land that needed to be under negotiation. There have always been many unclear points on how the relocation should have worked; in fact, for many years it has not been clear how it should be funded, who should be compensated, in which areas people should be placed, by when and for how long, and who should have been responsible for providing the services and the utilities for these people. So far, the lack of international and national guidance has increased the conflicts among the communities of arrival and those people that needed relocation. In particular, the points of discussions regarded some existing vulnerabilities connected to the scarcity of the resources and food insecurity¹²². An example of these conflicts is represented by the case of the island of Embryon. Almost 60 years ago, the population needed to be resettled due to a strong earthquake and, after several complex negotiations, it was relocated in an area near the capital city. For many years, it seemed that the situation has been settled and that the affected people were well integrated. Nevertheless, recently there have been cases of disputes that saw - on one hand - the children and grandchildren of the Embryon population claiming for their own land, and on the other, from the arrival communities strongly requesting of having the Embryon communities evict from the island. All of this has created strong conflicts and violence¹²³.

In addition, generally, people tend to move from the rural areas - the majority of which comes from the provinces of Tafea, Malampa and Penama - towards the urban area, normally in the Shefa Province which is in the main Island of Efate and where the national capital city, Port Vila, is located. Over the years, this had the side effect of generating informal settlements around the urban areas, where climate displaced people have the opportunity to settle down. These settlements are normally not safe, without proper access to water and electricity and composed by houses that are not disaster-resilient. In Port Vila, this situation has reached around 15,400 people and it has emerged also in other parts of the country: Blacksands, Mele and Mele Maat, Freshwota, Seaside town and Eratap¹²⁴.

This situation is only destined to escalate in the future years: "*global warming will drive increasingly severe humanitarian crises, forced migration, political instability and conflict...*"¹²⁵. In a small country as Vanuatu, the loss of land due to extreme or slow-onset events can create important issues to sovereignty and territorial integrity. In the coming period, many people risk becoming displaced and, as we have mentioned, will be subject to many vulnerabilities that need to be address - not only nationally - but also through international commitment¹²⁶. All these problems have strongly prevented the relocation of people affected by climate change impacts and need to be taken into consideration when formulating permanent solutions for the

¹²⁰ Campbell J., Warrick O., 2014, *Climate Change and Migration Issues in the Pacific*, Fiji: United Nations Economic and Social Commission for Asia and the Pacific - Pacific Office (UN-ESCAP).

¹²¹ Davies K., 2019, Op. Cit.

¹²² Schaar J., 2018, *The relationship between climate change and violent conflict*, Working paper, Sida.

¹²³ Mr. Christopher Bartlett, *Skype interview by the author on the 19th of Sept. 2019*.

¹²⁴ Vanuatu National Disaster Management Office NDMO, 2018, Op. Cit.

¹²⁵ Dunlop I., Spratt D., 2017, *Climate Change Conflict and Risk*, Disaster Alley, Report, Breakthrough National Centre for Climate Restoration.

¹²⁶ Davies K., 2019, Op. Cit.

relocation of the affected populations both in Vanuatu, but also in other vulnerable countries. Defining a stable solution for climate change affected people in Vanuatu is a delicate process that involves, not only complex issues related to the land, but also problems involving other different areas such as the infrastructure system, the health, the education area and the utilities and services for the population¹²⁷. For this reason, it requires the involvement of many different actors and agencies of the different levels of governance¹²⁸.

The migration phenomena result complicated in Vanuatu - not only because of the complex path of negotiations with the original landowners and chief of the village for each piece of land - but also because of the strong connection of the affected communities with their lands. For a ni-Vanuatu person, the land represents its identity and leaving it would mean the rupture of this connection. For a ni-Vanuatu community, losing its land would implicate the loss of its culture, costumes and traditional knowledge which are the fabric of its life¹²⁹.

Many ni-Vanuatu communities appear not to be concerned about moving if the climate change impact is not imminent. Slow-onset events are not perceived as potential danger for their lives and, for this reason, unless they are not affected by an upcoming natural disaster, they do not move¹³⁰. Moreover, many inhabitants claim that it is difficult for them leaving their homes because they are deeply-rooted to the land, they were born there and they have grown in that territory.

A recent research aiming at understanding the community perspective in the climate related migration¹³¹ has confirmed that a relevant part of the population would prefer not to leave its territory even if that means to be affected by extreme consequences. In this research, fourteen people out of fifteen have manifested how they feel their culture and livelihood would change and be impacted by climate-change migration. However, it is fundamental to keep in mind that this does not mean that ni-Vanuatu are not flexible and not adaptable to movements. They are not a sedentary population. Indeed, even if they are characterized by a long story of migration, in their mind the migration exists only when they have the opportunity to return to their land whenever they decide¹³². On many occasions, the ni-Vanuatu have used migration as a strategy for adapt to different kind of adverse conditions, demonstrating to have a strong resilience capacity¹³³. For this reason, internal migration is an already used strategy for the ni-Vanuatu population. Nevertheless, it is exactly the permanent loss of the land and the fact that there would be no compensations or remedies for that loss, that make the ni-Vanuatu communities - as the other communities of the Pacific islands - less likely to migrate and to leave their land¹³⁴.

All of this is important because international and national interventions for climate change vulnerable population in Vanuatu, as in other vulnerable countries, should take into consideration the community-based perspective respect to migration. Actions should be built keeping in mind the complexities of the negotiations among villages' chiefs and landowners and the difficulties of ni-Vanuatu communities in leaving permanently their land. Moreover, they should be shaped knowing that there is a strong aversion of

127 Campbell J. and Warrick O., Op. Cit.

128 Vanuatu National Disaster Management Office NDMO, 2018, Op. Cit.

129 Campbell J. and Warrick O., Op. Cit.

130 Taylor L., 20 Dec. 2017, *For remote Vanuatu islanders, fleeing climate disasters is an uphill battle*, Thomson Reuters Foundation.

131 Perumal N., 2018, *The place where I live is where I belong": community perspectives on climate change and climate-related migration in the Pacific island nation of Vanuatu*, Institute of Island Studies, University of Prince Edward Island, Human Rights Department, Canada, 13(1), pp. 45-64.

132 Campbell, J., Warrick, O., Op. Cit.

133 Barnett, J., Campbell, J., 215, *Climate change and small island states: power, knowledge and the South Pacific*, New York: Routledge.

134 Farbotko, C., Lazrus, H., 2012, *The first climate refugees? Contesting global narratives of climate change in Tuvalu*, Global Environmental Change, 382-390.

being relocated outside the islands even if it is for escaping climate change adverse impacts. Internal migration would be always the preferable solution according to the majority of the ni-Vanuatu because this would allow them to maintain the connection with their land, culture and identity¹³⁵. Policies and interventions that do not take into consideration these information risk to be detached from the reality and rejected by the population. In fact, there were cases where people were relocated without being involved in the relocation process that failed exactly because people were not included and informed and this created rejection and reluctance during the moving. On the contrary, building the policies and the interventions with a community-based approach can help identify a concrete and permanent solution for the resettlement of the vulnerable communities, without being at risk of failure. Vulnerable people, empowered and listened, respond better to changes and relocation¹³⁶. In particular, when the affected communities can express a preference on where and how to be resettled, they feel heard and respected and there is no risk of maladaptation. In fact, since ni-Vanuatu often have relatives and families also in other islands, leave them decide where to be relocated (reaching their families) would help the resettlement because it would give them the possibility of maintaining their culture, knowledges, ties and identities. Building actions based on a community-based approach would not only guarantee the successful on the relocation but also create a more meaningful intervention¹³⁷.

Concerning the international intervention, for example, the ni-Vanuatu are well aware and united in what they claim. For the ni-Vanuatu community, the responsibility of the international community should emerge as technical and financial support under the WIM. Moreover, as we understood, since the cross-border migration is not the preferable solution for this population, what they ask is a higher commitment from those countries that contributed the most to climate change in providing funds and expertise for the implementation of more adaptation projects. According to the Vanuatu population, this is the only way that climate change migration in Vanuatu can be addressed. On the basis on these requests, the international community should shape its response by formulating the relocation policies with a community-based lens and by addressing the climate change migration through adaptation measures rather than seeing migration as the sole and only choice.

4. The Emerging Strategies for a New International Debate on Loss and Damage

4.1. Increasing the international commitment on L&D through litigation

Many people around the world are already facing concretely climate change L&D. At the same time, despite several negotiations over the years under the UNFCCC framework, there is no sufficient financial support addressing L&D and this has started pushing the most vulnerable states in searching other solutions for tackling L&D.

At the international level, there are three different principles that guide the financial (and not only) support towards affected countries to address L&D. Firstly, the *Polluter-Pays Principle (PPP)*, which indicates that those who contributed the most to the occurrence of the harm are also responsible for providing compensations to the affected ones¹³⁸. The second one is the *No-harm rule* which states that countries have the duty of preventing and controlling the occurrence of the harm to other states and compensate them, if

¹³⁵ Perumal N., Op. Cit.

¹³⁶ Barnett, J., O'Neill, S. Islands, 2012, resettlement and adaptation. *Nature Clim Change* 2, 8–10.

¹³⁷ Perumal N., Op. Cit.

¹³⁸ United Nations, May 1992, Op. Cit. *Principe 16*.

there is the presence of some injuries¹³⁹. Finally the *Common but differentiated responsibilities and respective capabilities* stating that "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof"¹⁴⁰. These three international agreed principles show how states are legally obliged to avoid inflicting harms to the affected populations, to protect them and - whether the harm is inevitable -to provide them with remedies¹⁴¹.

In order to be compliant with these obligations, states agreed under the UN climate regime to firstly act with mitigation and adaptation measures, and then to create the WIM. However, despite these international steps, the progresses in supporting the most vulnerable countries in addressing L&D are still limited, or even inconsistent. So far, the third action of the WIM mandate, related to the technical and financial support, has not been followed by any kind of financial fund making it impossible to be implemented. In fact, as we have seen, after almost six years, the WIM is still only discussing the modalities and activities needed to guarantee the technical and financial support to the affected countries.

Many affected people, not supported by any kind of action coming from the WIM, have decided to try to hold states accountable for their harms through the legal avenue¹⁴². If it is true that the Paris Agreement does not "provide a basis for any liability or compensation"¹⁴³, this does not apply to the general rules that shape the liability and compensation among countries which include the international duties, international law and national legal systems. Over the years, states, municipalities, NGOs, activists, and single individuals have started bringing climate change related cases before the courts¹⁴⁴. The increasing trend gives us the idea that the affected countries no longer intend to wait for having the L&D addressed as it should be. Dr Saleemul Huq describes how using litigation is already an "admission of failure"¹⁴⁵. Indeed, the UNFCCC Framework Convention was formulated for providing states the opportunity of discussing and agreeing on actions by avoiding vulnerable countries to having to use litigations. However, developed states - that agreed on being the ones causing the harm and that needed to take the lead in combating climate change and helping other countries¹⁴⁶ - failed in this task obliging affected states to take the avenue of the litigation¹⁴⁷.

It seems to be the most positive aspect of the climate litigation is the fact that it seems it will allow producing a public debate around the topic of climate-induced L&D. In other words, by using the litigation tool for addressing L&D vulnerable countries has the chance to firmly express how the issue of L&D is something that is already affecting people and not something that will need to be tackled in the future¹⁴⁸. Moreover, it provides the possibility to singular individuals - who directly experienced the consequences of climate

¹³⁹ Ibidem, Principle 2. This principle is also recognized as principle of customary international law.

¹⁴⁰ Ibidem, p. 4.

¹⁴¹ Schäfer L., Künzel V., Bals C., 2018, *The significance of climate litigation for the political debate on Loss&Damage*, Germanwatch.

¹⁴² Setzer J., Byrnes R., 2019, *Global trends in climate change litigation: 2019 snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

¹⁴³ UNFCCC, 2015, *Decision 1/CP.21, Adoption of the Paris Agreement - para. 51*, UN Doc FCCC/CP/2015/10/Add.1.

¹⁴⁴ Schäfer L., Künzel V., Bals C., Op. Cit.

¹⁴⁵ Cambridge Climate Lecture Series, Dec. 2018, *Interview to Dr. Saleemul Huq - Loss and Damage and Climate Litigation*.

¹⁴⁶ United Nations, May 1992, Op. Cit. *Annex I*.

¹⁴⁷ Cambridge Climate Lecture Series, Op. Cit.

¹⁴⁸ Peel, J., Osofsky, H. M., 2015, *Climate change litigation: Regulatory pathways to cleaner energy*, Cambridge: Cambridge University Press.

change - to be heard and to explain their cases¹⁴⁹. Legal cases on climate-induced L&D affecting singular individuals could be a strong tool for increasing the interest on L&D in the international debate providing for a new perspective from which looking at the issue and resulting in new actions for preventing it and addressing it¹⁵⁰. In the cases that try to link the emissions coming from the GHG emitters and the climate change harm, climate science is essential. The progresses making by the attribution science are an important part for establishing this connection and many new litigation cases are based on them¹⁵¹.

Even if further researches and data need to be collected, according to Setzer and Byrnes, "*climate change litigation might aim at and/or result in increased climate change action, or at undermining climate change protection or supporting climate policy deregulation*"¹⁵². The majority of the litigation cases are against the government and they aim at strengthening the mitigation and adaptation goals already established. They also try to push the national governments to change policies or to adopt new ones that are more climate change sensitive. On the other hand, climate change litigations against major emitters have the aim of receiving compensations for L&D¹⁵³. These cases can stress the reiterative conduct of a state with the possibility of resulting in compensatory and reparative binding obligations for the harm inflicted by the wrongful conduct¹⁵⁴. Similarly, although not binding, the advisory opinion could better indicate to states their rights and obligations under the L&D framework, giving to the vulnerable countries a new space in the international climate negotiations¹⁵⁵. Finally, also the litigations against fossil fuel companies seem to have pushed companies to act for revising their conduct and, in some cases, reducing their emissions¹⁵⁶. In other words, the several litigation cases against the fossil fuels companies can motivate them to support a liability regime within the UNFCCC framework where all polluters pay rather than having singular litigation cases focused only on some companies. In this way, litigations can indirectly stress the lack of a political interest in addressing L&D and promote the need of a political solution that can hold all the emitters accountable for their emissions¹⁵⁷.

The integration of the legal avenue with the political response could provide for a new opportunity at global level to concretely address L&D, guaranteeing for the proper reparations and compensations of the climate harm¹⁵⁸.

4.2. The Human Rights Based Approach for addressing L&D

The ineffectiveness of the WIM in finding sustainable financial solutions for addressing L&D is making the situation of the affected people very unclear and leaving them in a sort of limbo. L&D constitutes a threat to the human rights of the most vulnerable populations. However, the international community has not

149 Duffy, H., 2018, *Strategic human rights litigation: Understanding and maximizing impact*, Oxford: Hart Publishing.

150 Wewerinke-Singh M., Salili D. H., Op. Cit.

151 Setzer J., Byrnes R., Op. Cit.

152 Ibidem.

153 Ibidem.

154 Wewerinke-Singh, M., Van Geelen, T., 2019, *Protection of climate displaced persons under international law: A case study from Mataso Island, Vanuatu*, Melbourne Journal of International Law, 19(2), 1–37.

155 Wewerinke-Singh M., Salili D. H., Op. Cit.

156 United Kingdom Sustainable Investment and Finance Association and Climate Change Collaboration, 2018, *Not long now: survey of fund managers' responses to climate-related risks facing fossil fuel companies*.

157 Schäfer L., Künzel V., Bals C., Op. Cit.

158 Wewerinke-Singh M., Salili D. H., Op. Cit.

responded adequately to this threat, not taking into account human rights in the formulation of policies and strategies for addressing L&D.

According to Benjamin Schachter, Human Rights Officer of the OHCHR, there is a clear need of including human rights in the L&D policy framework in order to address those human rights violations related to L&D¹⁵⁹.

Recently, the Human Rights-Based Approach (HRBA), has been taken into consideration - not only because it would guarantee the protection of the human rights of the affected communities - but also because it would give the opportunity to make progresses in the L&D political debate, opening the possibility of agreements between member states over the compensation and liability discourse¹⁶⁰.

The HRBA is a conceptual framework that aims at integrating human rights principles and obligations into policies and governance. It refers also to the task of empowering people to recognize and claim for their own human rights and to guarantee that those responsible for the respect, protection and fulfilment of human rights meet these obligations and can be held accountable for them. In particular, there are six important principles that need to be followed for a correct implementation of the HRBA: universality and inalienability; indivisibility; inter-dependence and inter-relatedness of human rights; equality and non-discrimination; participation and inclusion; and accountability and the rule of law¹⁶¹.

According to Adrian Martínez Blanco and Patrick Toussaint¹⁶², for adopting the HRBA policy-makers need to recognize the interdependence between L&D and human rights obligations by integrating them within the international and regional human rights instruments¹⁶³. Even if not completely, the attribution science has made it easier to attribute the consequences of a particular climate change impact to a particular natural disaster, making it also easier to identify the kind of human rights impacted by the disaster¹⁶⁴. In this way it has been possible to attribute a climate impact (for example the extreme weather event of tropical cyclone), to the related impact produced on people (such as the displacement of populations), and to the related human right implicated (in this case, for example, to the right to adequate standard of living or the right to adequate and secure housing¹⁶⁵).

The HRBA indicates to states that there are already set international and regional human rights obligations and includes climate policies under these obligations, specifically under human rights law. In this way, even without a compensation and liability framework agreed among States parties under the L&D regime, international human rights law gives the opportunity to damaged populations to benefit from a judicial recourse. In this sense, the HRBA provides for a preventive solution that, rather than addressing the violations of human rights emerged by L&D, tries to tailor the L&D regime to the human rights obligations¹⁶⁶.

Moreover, through its action, the HRBA allows the affected populations and the civil society to re-build and re-shape the political debate and the public opinion on L&D in the climate regime. In fact, thanks to it the

159 Mr. Benjamin Schachter, *from a Skype interview issued to undersigned on the 2th of Sept. 2019*.

160 Ibidem.

161 UN Practitioners' Portal on Human Rights Based Approaches to Programming, *What is a human rights-based approach?*, see the UN Practitioners' portal on Human Rights Based Approaches to Programming online.

162 Adrian Martínez Blanco is the director of the "La Ruta del Clima" and Patrick Toussaint is a Research Associate of the "Institute for Advanced Sustainability Studies e.V." (IASS).

163 Toussaint, P., Martínez Blanco, A., Op. Cit.

164 Marjanac S., 30 Aug. 2018, *Client Earth witness statement to the Philippines Commission on Human Rights' national inquiry on climate change*, Client Earth.

165 The United Nations General Assembly. (1966). *International Covenant on Economic, Social, and Cultural Rights*, art. 22, Treaty Series, 999, 171.

166 Toussaint P., Martínez Blanco A., Op. Cit.

international political debate on L&D can be traced back to focus on the fundamental rights of the singular individuals. In particular, "adopting an HRBA could remedy a central deficiency of the ongoing policy debate, which frames loss and damage in abstract, state centric terms as a developing country issue"¹⁶⁷. By focusing on the rights of the singular individuals, states should increase the protection of vulnerable groups guaranteeing, among the others, the right to participation and inclusion. In this sense, under the HRBA, states would ensure the participation of the most vulnerable communities in the formulation and application of the L&D policies¹⁶⁸. This is why we can say that the HRBA demonstrates to be a fundamental instrument for strengthening the international response to L&D in relation to human rights, being able to create an institutionalized cooperation and dialogue framework between states and those people who are more affected by L&D¹⁶⁹.

In particular Mr. Martínez Blanco and Mr. Toussaint provided for a possible example of how adopting the HRBA in the L&D regime should work. The process should include, as first, an assessment of the climate change impacts on human rights in order to facilitate the formulation of L&D policies and actions; a second step concerns the development of guidelines for applying human rights to L&D policies and governance and monitoring this application; the third step should include a periodic control undertaken by the human rights bodies or by the WIM itself¹⁷⁰.

4.3. A National Mechanism on L&D for Developing an International Mechanism on L&D

A third avenue that could serve as a valuable lesson for the development of the international mechanism on loss and damage is the National Mechanism on L&D. Last December (2018), the Government of Bangladesh has decided to start a pilot project for the development of a National Mechanism on Loss and Damage. The pilot project will last two years and will try to address different aspects of L&D. In particular, it will deal with both slow and onset events, the possibility of concretely use insurance as mechanism for tackling L&D, the several complexities around the non-economic L&D, the climate-induced migration and etc.¹⁷¹.

Being one of the most climate change affected countries, Bangladesh have decided to be the first country in trying this solution. At the side-event organized during the COP24 in Katowice, Bangladesh invited the international research community to come to the country for studying the progresses of the project and for understanding and detecting the good practices¹⁷². We are not sure that the Bangladesh National Mechanism on L&D will provide for a flawless mechanism for addressing L&D, but undoubtedly it will be the first example of a national mechanism and it will provide for understanding and knowledge on how an effective mechanism for L&D should work¹⁷³.

National experiences will not substitute the work made at international level, but it will be a valid support coming directly from the ground. The lessons emerged from the national level could help making progresses

¹⁶⁷ Toussaint, P., 2019, *Voices unheard – affected communities and the climate negotiations on loss and damage*, Third World Thematics: A TWQ Journal, 1–20.

¹⁶⁸ Toussaint P., Martínez Blanco A., Op. Cit.

¹⁶⁹ Broberg, M., Sano, H.O., 2018, *Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences*, the International Journal of Human Rights, 22(5), 664-680.

¹⁷⁰ Toussaint P., Martínez Blanco A., Op. Cit.

¹⁷¹ Climate Action Network International, 1 May 2018, *Bangladesh National Mechanism on Loss and Damage?*.

¹⁷² Natson S., Bahlman L.A., Op. Cit.

¹⁷³ Huq S., 2012, *Loss and damage in Bangladesh from the front line of climate change*, Climate and Development Knowledge Network.

in the international negotiations. Some researches, made at national level, have indicated how those lessons can be transferred to other countries¹⁷⁴. The link between national and international process will be fundamental for addressing in a more comprehensive way L&D within the national territory. The process can be enriched by both the top-down and bottom-up process; on one hand the international perspective and knowledge can support the national process¹⁷⁵, on the other the national information and expertise can increase the understanding of L&D¹⁷⁶. This link will need to be country-specific and based on the national policies and legislations. At the same time, however, it could become an important forum for sharing best practices and experiences among countries¹⁷⁷.

Moreover, Bangladesh was the first state to start a national process for increasing knowledge and understudying of L&D. Since 2012, it started preliminary researches for addressing L&D with the aim of better understanding the concept within the country and provide a basis for developing national approaches to address it. The research intended to provide an overview of the existing national policies to tackle L&D. This ongoing work aimed at providing the proper instruments to policy makers and at informing them about the existing national policies needed for creating a solid system for addressing L&D¹⁷⁸.

Once again, the adoption of a national mechanism on L&D cannot guaranty us that the topic will acquire a new space in the international debate. Only the time will provide us the full understanding on that. However, it seems more certain that the national experience will give the opportunity to the international community to be an observer and to increase the understanding on how L&D will be addressed at both the international and national level.

General Conclusions

The present work investigates the reasons that prevent the WIM from pursuing its goals in addressing L&D. In other words, by presenting the process of inclusion of L&D within the International Climate Regime - combined with the WIM creation process and the analysis of its achievements and failures - these pages give an answer to the question of what prevented the implementation of the WIM's concrete actions so far. In this regard, the work argues that the current advancement of the L&D debate is constantly freeze by the economic and political blockade of the developed countries that prevent the real and concrete implementation of the WIM's mandate.

This work is built with the idea of exploring, first internationally and then nationally, the concept of L&D and it has the objective of emphasizing the need to find a solution to L&D that could be sustainable in terms of time and economic resources. For many years, the IPCC¹⁷⁹ has published several reports highlighting the dramatic consequences of the climate change adverse impacts perceived by the most vulnerable populations of the world. The strong commitment of the developing countries, and especially of the AOSIS, has proven to be fundamental for the achievement of an international mechanism for L&D. However, the mere formulation of the WIM cannot be considered a sufficient result for concretely address L&D. The WIM

174 International Centre for Climate Change and Development, Nov. 2013, *Loss and damage: from the global to the local*, at Independent University, Bangladesh in partnership with BCAS and IIED.

175 Nishat, A. et al., *A Range of Approaches to Address Loss and Damage Impacts from Climate Change in Bangladesh*, Dhaka: ICCCAD, 2013.

176 Al Faruque, A., 2013, M.H.I. Khan, *Loss and Damage Associated with Climate Change: The Legal and Institutional Context in Bangladesh*, Dhaka: ICCCAD.

177 International Centre for Climate Change and Development, Op. Cit.

178 Roberts E., Huq S., Hasemann A., Roddick S., Nov.2013, *Early Lessons from the Process to Enhance Understanding of Loss and Damage in Bangladesh*, International Centre for Climate Change and Development.

179 Intergovernmental Panel on Climate Change, online page: <https://www.ipcc.ch/reports/>.

remains an important information initiative but without the effective capacities for translating this information in a tangible support.

It is time for the WIM to define clear and precise strategies and actions plans for implementing its functions concretely. In particular, one of its first steps must be establishing a separate financial arm with the relative indications in terms of contribution's responsibility. In fact, the WIM's mandate requires that methods to remedy losses - including recovery and rehabilitation - are established. Clear information on the source of L&D finance, on the modalities of the financial access and on the estimates of L&D costs in the most vulnerable countries need to be urgently provided. Of course, nothing of all this will be possible without a change of direction of the actions carried out by the developed countries. The latter cannot continue to avoid the financial topic and to implement obstructive measures during the international climate negotiations. It is time they assume their responsibilities towards the internationally shared objectives of the WIM. Especially considering that, even those states that have been always afraid to criticize the UNFCCC process because they staked their future in climate change negotiations, have decided to entrust their future to the legal justice system for trying to achieve more concrete outcomes.

The final point of this work shows how, within this standoff, it becomes fundamental that the debate on L&D acquires a new boost thanks to the use of new national and international strategies. In particular, the legal avenue, the Human Rights Based Approach, and the National Mechanism for L&D, show to have the potential to push the international community to react actively towards a more equitable sharing of the responsibilities and burdens of L&D. In this regard, a recommendation for further future researches could be to monitor how these emerging strategies affect the political debate on L&D, analysing its possible positive outcomes in addressing it. This would surely provide a relevant support to those who chose to take those paths.

To conclude, there is still a lot to do to effectively support with concrete and tangible actions those countries that are daily suffering climate change L&D. Unfortunately, the outcomes of the 25th COP held in Madrid last December were not positive for the L&D debate. However, regardless of its results, I think it is a turning point for the L&D discourse. Developing countries have already started pursuing new avenues for addressing L&D giving the developed countries a clear message that they will face any kind of blockade.

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