

**Loss &
Damage**

Loss & Damage Associated with Climate Change:

The Legal and Institutional Context in Bangladesh

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Acronyms

AOSIS	Alliance of Small Island States
AWG-LCA	Ad hoc Working Group on Long-term Cooperative Action under the Convention
AWG-ADP	Ad Hoc Working Group on the Durban Platform for Enhanced Action
BCCRF	Bangladesh Climate Change Resilience Fund
BCCSAP	Bangladesh Climate Change Strategic Action Plan
BCCTF	Bangladesh Climate Change Trust Fund
CCDMC	City Corporation Disaster Management Committee
COP	Conference of the Parties
CCU	Climate Change Unit
DRR	Disaster Risk Reduction
GEF	Global Environmental Facility
GoB	Government of Bangladesh
LDCF	Least Developed Countries Fund,
MDBs	Multilateral Development Banks
MoEF	Ministry of Environment and Forest
MDTF	Multi-Donor Trust Fund
MP	Member of Parliament
NGOs	Non-governmental Organisations
NAPA	National Adaptation Plan of Action
PKSF	Palli Karma Shahayak Foundation
SCCF	Special Climate Change Fund
SPCR	Strategic Programme for Climate Resilience
UNFCC	United Nations Framework Convention on Climate Change
UP	Union Parishad

Executive Summary

There is now no serious scientific dispute about the cause and consequences of anthropogenic climate change. Mitigation and adaptation approaches have been agreed on under the United Nations Framework Convention on Climate Change (UNFCCC) process to deal with climate change. However, due to delayed and inadequate efforts on both fronts, the adverse impacts of climate change are causing harm to the lives and livelihoods of millions of people all over the world and inflicting significant economic losses. As such, Parties of the Convention (as the UNFCCC is known) decided at the eighteenth Conference of the Parties (COP) to establish institutional arrangements, such as an international mechanism, to address loss and damage associated with the impacts of climate change at COP 19 in November of 2013 at COP 19. However, there is a long way to go before it will be possible to establish a required institutional framework for addressing loss and damage within the UNFCCC process.

While negotiations on loss and damage are taking place at the global level, loss and damage resulting from (*inter alia*) climate change impacts is happening at the local level. Therefore, vulnerable countries like Bangladesh need to develop national policies and legal frameworks to deal with loss and damage without waiting for agreed outcomes on loss and damage from the UNFCCC process. Against this backdrop, this study examines the scope and limitations of existing regulatory frameworks and explores options to develop national legal and institutional frameworks in Bangladesh to deal with loss and damage stemming from climate change impacts.

The study concludes that existing legal and policy frameworks provide a limited scope to assess and address both the current and potential future risk of loss and damage associated with the adverse impacts of climate change. However, the provisions of existing policies and laws related to addressing environmental harm, disaster risk management, resettlement and relocation as well as climate change and adaptation finance provide the basis to establish a legal and institutional framework to deal with loss and damage in Bangladesh. Taking into account existing and potential future loss and damage associated with climate change, this study outlines elements of legal and institutional mechanisms that will need to be developed in order to assess the risk of and address loss and damage. A compensation mechanism as well as a livelihood

restoration and rehabilitation process will require a well-framed mechanism with coherent institutional arrangements from the local to national level. To reduce potential loss and damage it will be necessary to take protection measures including planned relocation and building infrastructure within an anticipatory adaptation, i.e. damage prevention framework.

This study also assesses the existing financial mechanisms in Bangladesh related to adaptation to climate change and finds current mechanisms inadequate to address future loss and damage. The paper recommends establishing a specific funding window within existing financial mechanisms or a developing a separate financial mechanism to compensate communities affected by loss and damage from climate change impacts. In order to manage the required financial resources to support such a compensation fund, the study suggests the means for which the Government of Bangladesh (GoB) could access current or potential funding mechanisms within the UNFCCC based on the polluter pays principle and in the context of climate justice. Developing the regime at the national level does not necessarily mean that the governments of least developed countries (LDCs) like Bangladesh are liable for compensation towards their citizens. Rather it pre-supposes that a government is responsible for the protection of its citizens and should thus adopt the necessary policy frameworks at the national level. However, ultimately the countries that have contributed most to climate change must – not only ethically but also under international law – assume responsibility to assist such national efforts with required financial and technical support.

Chapter One

1. Introduction

1.1. Context of the Study

There is now no serious scientific dispute about the cause and consequences of anthropogenic climate change. Although mitigation and adaptation approaches have been agreed under the United Nations Framework Convention on Climate Change (UNFCCC) process to attempt to address the impacts of climate change, due to delayed and inadequate efforts on both fronts, the adverse impacts of climate change are causing harm to the lives and livelihoods of millions of people all over the world and inflicting significant economic losses.

There is consensus that some impacts of climate change will not be avoided, that damage “beyond adaptation” is to be expected

Climate change increases the frequency and intensity of natural hazards¹, which is adding to the vulnerability of poor communities in developing countries, particularly in least developed countries (LDCs), small island developing states (SIDS) and African countries.² *There is consensus that some*

impacts of climate change will not be avoided, that damage “beyond adaptation” is to be expected.³

While many open questions remain, slow onset processes like sea-level rise, and changes in meteorological extremes like heat waves and droughts can be attributed to human-induced climate change. Moreover, attribution science is rapidly developing and over the coming decades, methods and models will improve drastically. Some scientists have concluded that our scientific understanding today already allows for the design and implementation of a mechanism to address loss and damage.⁴

Bangladesh, an LDC, has historically dealt with significant weather and climate related losses and damages and recent evidence shows an increase in frequency and intensity of climate related disasters. For example, two consecutive floods occurred in 2007, which caused economic damage in the amount of approximately USD 1.1 billion, followed by Cyclone *Sidr* which hit the western border of Bangladesh in November of the same year, killing 3500 people and leading to estimated economic damage of USD 1.7 billion.⁵ In addition, Cyclone *Aila* displaced 201,982 people initially, with a further 60,000 people having since migrated to other areas of the country in search of employment.⁶

In addition to its vulnerability to extreme events such as cyclones, Bangladesh is also vulnerable to slow onset processes of climate change - like sea level rise, salinisation, land degradation and the loss of biodiversity. Together these climate change impacts will affect the livelihoods of tens of millions of people, lead to further displacement as well as the loss of territory.

¹Summary for Policymakers: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, IPCC, 2012, p. 5: In the absence of the clear scientific attribution SREX, report of IPCC, 2012 stated that, a changing climate leads to changes in the frequency, intensity, spatial extent, duration, and timing of extreme weather and climate events, and can result in unprecedented extreme weather and climate events.

²Dr. Sumaya Ahmed Zakiudeen and Dr. Koko Warner, Loss and Damage in the context of Adaptation to Climate Change, ECBI Background Paper, p.1: In accordance with the figures from the international disaster database of the Centre for Research on the Epidemiology of Disasters, the number of disasters in the last seven years of the 21st century has doubled in comparison to 1987–1997. Developing countries, where over 95 per cent of deaths from natural disasters in the past 25 years have occurred, have borne the brunt of this increase.

³ See IPCC, Fifth Assessments Report, Working Group II: Limits to adaptation and adaptive capacity, draft as of March 2013, www.ipcc.ch

⁴See for a summary: Coumou/ Schaeffer, Loss and Damage - Climate Change Today and under Future Scenarios, 2012, available at www.lossanddamage.net

⁵S M Munjurul Hannan Khan, Saleemul Huq and Md Shamsuddoha, ‘The Bangladesh National Climate Funds, A brief history and description of the Bangladesh Climate Change Trust Fund and the Bangladesh Climate Change Resilience Fund’, LDC paper series

⁶In-depth Recovery Needs Assessment of Cyclone Aila Affected Areas, Conducted by International agencies (ActionAid, Concern WorldWide, DanChurchAid, MuslimAid, Islamic Relief, Oxfam-GB and Save the Children-UK) currently involved in Aila response programme funded by ECHO

Bangladesh perceives itself as a “victim” of climate change as it has not contributed significantly to anthropogenic greenhouse gas emissions ...

Even if adequate mitigation measures are taken now, given the levels of greenhouse gases (GHGs) that have already been released into the atmosphere, some climate change impacts and associated losses and damages are inevitable. While adaptation measures can reduce loss and damage resulting from climate change to some extent, there will be some unavoidable or residual loss and damage.⁷

As such, along with mitigation and adaptation approaches, many policymakers in Bangladesh believe that approaches are required to specifically address loss and damage resulting from climate change, which cannot be avoided through mitigation and adaptation. While Bangladesh is often perceived as a “victim” of climate change as it has not contributed significantly to anthropogenic greenhouse gas emissions in the past and still has one of the lowest per capita emissions in the world there is a lot being done nationally to address climate change.

understanding national systems and legal frameworks will inform any further process at the international level and help countries improve their own settings

The Cancun Agreements⁸ recognised the need to strengthen international cooperation and expertise in order to understand and reduce loss and damage

associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset processes.⁹ The same decision also established a work programme on loss and damage. During discussions at COP 18 in Doha Parties decided to continue work on loss and damage.¹⁰ The decision recognises that, to address loss and damage, different approaches and processes at the national, regional and international levels will be needed, including “institutional arrangements” at the international level.¹¹ In this context, it is essential that States explore different approaches to address loss and damage associated with the adverse effects of climate change, which may include risk reduction strategies, social security and legal protection measures, risk transfer options, as well as rehabilitation measures to help communities and individuals recover from severe disasters which are (partly) due to climate change.¹² Initiatives to develop such mechanisms at the national level would also provide the required guidance for developing an international mechanism to address loss and damage. In addition, understanding national systems and legal frameworks will inform any further process at the international level and help countries improve their own settings.

The establishment of a specific institutional framework or mechanism to address loss and damage at the international level will be challenging given the fact that the international legal framework on climate change, which began in 1992 with the adoption of the United Nations Framework Convention on Climate Change (UNFCCC), is still struggling to set up governance mechanisms to oversee mitigation and adaptation activities.

⁹ Decision 1/CP.16, Para 25

¹⁰ 3/CP 18, preamble, para-8: Appreciating the progress made in the implementation, and the importance of the continuation, of the work programme to address the loss and damage associated with the adverse effects of climate change.

¹¹ Decision 3/CP.18, Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity

¹² Submission by the Gambia on behalf of the Least Developed Countries Group on Loss and Damage, available at: http://unfccc.int/files/adaptation/application/pdf/submission_by_the_gambia_on_behalf_of_the_least_developed_countries_on_loss_and_damage.pdf

⁷ Roda Verheyen and Peter Roderick, ‘Beyond Adaptation: the Legal duty to pay compensation for climate change damage’, November 2008, p. 11.

⁸ Decision 1/CP.16.

However, while negotiations on loss and damage are taking place at the global level, loss and damage resulting from or being added to by anthropogenic climate change is already being incurred at the local level. Therefore, the analysis and development of national frameworks including policy and legal norms is essential to deal with loss and damage in order to protect the lives and livelihoods of national populations. Against this backdrop, this study attempts to explore the options to develop national legal and institutional frameworks in Bangladesh to deal with loss and damage associated with climate change.

...this study aims to provide legal and policy analysis on existing laws and policies related to environmental harm, disaster risk management, micro-insurance, social safety nets and climate change and adaptation finance...

An initiative to develop required legal and institutional frameworks to address and redress loss and damage in the context of a particular country needs to start with reviewing and assessing the existing related legislation and policies in order to explore the scope, gaps, and constraints to introducing a mechanism to address loss and damage. Therefore, suggestions for integrating the issue of loss and damage into existing governance processes or the creation of new regulatory frameworks should be tailored to the national context.

As such, this study aims to frame loss and damage conceptually and provide legal and policy analysis on existing laws and policies related to environmental harm, disaster risk management, microinsurance, social safety nets, and climate change and adaptation finance with a view to suggesting legal and institutional mechanisms for addressing and redressing loss and damage.

1.2. Research Questions

The research questions those are addressed in this study include:

1. What are the relevant legal, policy, and institutional frameworks existing in Bangladesh to deal with climate induced loss and damage?
2. How does adaptation finance work in Bangladesh? Does it use a "right based" approach?
3. What are the gaps and constraints in the existing regulatory framework?
4. What are the new policies and regulatory frameworks needed at the national level in order to address climate induced loss and damage?
5. What kind of national "body" might need to be created to provide compensation for loss and damage at the national level?

1.3. Research Methodology

The study is mainly based on an analytical approach. In order to gain insights into loss and damage and how it might be addressed in a legal and policy framework, a desk review of relevant literature and international instruments on climate change as well as interviews with key stakeholders working on issues relevant to loss and damage were carried out. During the course of this study, the provisions of environmental laws and policies on loss and damage at the national level were reviewed and the related provisions adopted under UNFCCC process were examined.

Chapter Two

2. Conceptualisation of Loss and Damage Associated with Climate Change

2.1. Introduction

Loss and damage associated with climate change is a complex issue and needs to be conceptualised in order to develop the required legal and policy frameworks. Although the impacts of climate change have been discussed for at least two decades under the UNFCCC - and in other arenas for even longer - a widely agreed upon definition of loss and damage related to those climate change impacts does not exist. Recently, the Loss and Damage in Vulnerable

Countries Initiative¹³ provided a working definition of loss and damage related to climate change with a view to support on-going discussions and further conceptual framing of the issue as follows:

*Loss and Damage represents the actual and/or potential manifestation of climate impacts that negatively affect human and natural systems. 'Damage' can be seen as negative impacts that can be repaired or restored (such as windstorm damage to the roof of a building, or damage to a coastal mangrove forest from coastal surges which affect villages). 'Loss' can be characterised as negative impacts that cannot be repaired or restored (such as loss of geologic freshwater sources related to glacial melt or desertification, or loss of culture or heritage associated with potential population redistribution away from areas that become less habitable over time with climate change).*¹⁴

From the legal point of view, a definition of loss and damage has been given in the following way:

*In legal terms, loss and damage are not separate concepts. Rather, loss is a specific term to describe a particular type of damage such as loss of earnings or loss of office. Damage is a legal concept equated with "tort" or "liability", which often leads to a claim for damages, with monetary or in kind compensation as a remedy, but is also the generic term for harm afflicted to a legal entity or person or other systems (e.g. a particular ecosystem) which may give rise to a legal claim.*¹⁵

In the scholarship on loss and damage three types of loss and damage related to climate change are categorised. First, there are foreseeable loss and

damage that may be avoided through the mitigation of GHG emissions. Second, some foreseeable loss and damage can be reduced and managed through appropriate adaptation measures. Finally, some loss and damage is unavoidable, regardless of future adaptation measures to be undertaken.¹⁶ For this latter type of loss and damage, the term "residual damage" has also been used in order to emphasise the fact that these are impacts that cannot be avoided through mitigation or adaptation.

...one could conclude that loss and damage is a result of inaction and not in itself an activity

Loss and damage is not defined under the UNFCCC, just as there is no definition of adaptation, though it is essentially an adjustment in natural or human systems in response to actual or expected climate stimuli or their effects.¹⁷ From the interviews and discussions in Bangladesh it appears, however, that many stakeholders understand "loss and damage" to be mostly a result mitigation inaction by the international community. Therefore, one could conclude that loss and damage is a result of inaction and not in itself an activity.

...a need to understand the different impacts of sudden onset events and

¹³ The Loss and Damage in Vulnerable Countries Initiative a project implementing by a consortium of Germanwatch, United Nations University-Institute for Environmental and Human Security (UNU-EHS), International Centre for Climate Change and Development (ICCCAD) and Munich Climate Insurance Initiative (MCII) to carry out this work.

¹⁴ Framing the Loss and Damage Debate, available at <http://germanwatch.org/en/download/6673.pdf>

¹⁵ Dr. Roda Verheyen, "Tackling Loss and Damage- A new role for the climate regime?" November 2012, available at <http://www.loss-and-damage.net/download/6877.pdf>

¹⁶ Roda Verheyen and Peter Roderick, 'Beyond Adaptation: the Legal duty to pay compensation for climate change damage', November 2008, p. 11.

¹⁷ The IPCC states: "Adaptation to climate change takes place through adjustments to reduce vulnerability or enhance resilience in response to observed or expected changes in climate and associated extreme weather events. Adaptation occurs in physical, ecological and human systems. It involves changes in social and environmental processes, perceptions of climate risk, practices and functions to reduce potential damages or to realise new opportunities. Adaptations include anticipatory and reactive actions, private and public initiatives, and can relate to projected changes in temperature and current climate variations and extremes that may be altered with climate change. In practice, adaptations tend to be on-going processes, reflecting many factors or stresses, rather than discrete measures to address climate change specifically. IPCC FAR 2007, WG II, Section 17.1.

slow onset processes of climate change and to clarify loss and damage that result from these two different kinds of events

However, the topic of loss and damage is still not properly understood and there is not yet any agreed consensus on what the terms should mean. Activities under the UNFCCC Work Programme on Loss and Damage made it clear that there is a need to understand the different impacts of rapid onset events and slow onset processes of climate change and to clarify loss and damage that result from these two different kinds of events.¹⁸

Therefore, understanding loss and damage in the context of a vulnerable country like Bangladesh can facilitate an understanding of loss and damage in a broader context and contribute to its conceptualization.

2.2. Understanding Loss and Damage: The Context of Bangladesh

Bangladesh is widely recognised to be one of the most climate vulnerable countries in the world, experiencing frequent natural disasters, which cause loss of life, damage to infrastructure and economic assets, and adversely impact lives and livelihoods, especially of poor people¹⁹ Bangladesh is susceptible to floods, tropical cyclones, storm surges, and droughts and empirical data shows that the frequency and intensity of these hazards has already increased in Bangladesh. The frequency and intensity of extreme events has already increased and the impacts of slow onset processes are increasingly evident in Bangladesh.²⁰

more than 20 million people could be displaced in the near future in Bangladesh

Climate induced natural hazards in Bangladesh can be broadly categorised as rapid onset or extreme events and slow onset processes. A rise in sea level and salinity in the coastal regions falls under the category of slow onset processes whereas flood, drought, cyclone and associated storm surge, heat stress and other extreme hydro-meteorological events are rapid onset events.²¹ Sea level rise – a slow onset process – would lead to the submergence of low-lying coastal areas and saline water intrusion of coastal rivers into groundwater aquifers, reducing freshwater availability; damage to the Sundarban's mangrove forest, and drainage congestion inside coastal polders, which will adversely affect agriculture.²² Therefore, sea level rise and salinity will adversely impact the agrarian economy in the coastal regions and induce migration as livelihoods become unviable.

A recent report by the International Organisation of Migration (IOM) identified at least four causes of migration induced by environment and climate change. The first of these was “the intensification of natural disasters – both sudden and slow-onset-leading to increased displacement and migration”²³. The Bangladesh Climate Change Strategy and Action Plan (BCCSAP) stated that it is now evident that the “population in many parts of the country will be so adversely affected by climate change that they will have to migrate permanently.”²⁴ It is estimated that more than 20 million people will be displaced in the near future and acknowledged that resettlement of this magnitude will be challenging given that Bangladesh is densely populated. Hence, the planned relocation and resettlement of the climate

¹⁸ FCCC/SBI/2012/29: Activities to be undertaken under the work programme, Report on the regional expert meetings on a range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events, available at, <http://unfccc.int/resource/docs/2012/sbi/eng/29.pdf>

¹⁹ Bangladesh Climate Change Strategy and Action Plan, 2009, p.3

²⁰ Project Facts- Bangladesh, UNDP, http://www.undp.org/content/dam/undp/library/crisis%20prevention/disaster/asia_pacific/erf_bangladesh_feb_2011.pdf

²¹ Draft Technical Paper, A range of approaches to address loss and damage associated with adverse effects of climate change, including related to extreme weather events and slow onset events, Centre for Climate Change and Environmental Research, BRAC University, 2012

²² Bangladesh Climate Change Strategy and Action Plan, 2009 (BCCSAP), para 21.

²³ Assessing the Evidence Environment, Climate Change and Migration in Bangladesh, IOM, Dhaka, 2010.

²⁴ The Bangladesh Climate Change Strategy and Action Plan, (BCCSAP), 2009, available at <http://www.sdnbd.org/moef.pdf>

vulnerable people of Bangladesh will require international cooperation and international mechanisms for third country relocation.

It could well be argued that such loss cannot be adapted to in situ but only be compensated by monetary means or by providing other means of earning an income

In the absence of clear attribution related to extreme events in Bangladesh and anthropogenic climate change, general empirical data suggests that the growing frequency and intensity of extreme weather events are leading to the increased vulnerability and exposure to risks of affected populations, in particular in developing countries.²⁵ In Bangladesh the frequency and intensity of cyclones and storm surges in the Bay of Bengal is predicted to increase.²⁶ Cyclone *Aila*, which hit the coastal areas of Bangladesh in May 2009, was a particularly intense event, displacing over 100,000 people.²⁷

A recent study found that increasing sea surface temperatures (SST) fulfil one of the major preconditions for the formation of an increased number of depressions and low-pressure systems in the Bay of Bengal, which then create increasing episodes of rough sea conditions.²⁸ The increasing frequency and intensity of rough sea events in Bangladesh has caused the loss of lives and livelihoods as well as damage to property and other assets of coastal fishers. The destruction of settlements and the reduction of livelihood opportunities can also cause displacement. It could

²⁵ Dr. Sumaya Ahmed Sakieldeen and Dr. Koko Warner, Loss and Damage in the context of Adaptation to Climate Change, ECBI Background Paper, 11 August 2011.

²⁶ Ahsan Uddin Ahmed and Sharmin Neelormi, 'Livelihoods of Coastal Fisherman in Peril: In Search of early Evidence of Climate Change Induced Adverse Impacts in Bangladesh, CSRL 2007, Reprinted in April 2009.

²⁷ Jane Mc Adam and Ben Saul, 'Displacement with Dignity: International Law and Policy Responses to Climate Change' Migration and Security in Bangladesh, p. 239

²⁸ Supra Note 21.

well be argued that such loss cannot be adapted to in situ but instead can only be compensated by monetary means or by providing other means of earning an income. At the same time, economic and human losses due to extreme events, such as hurricanes, will often – to some extent – be avoidable through best-practice adaptation measures. However, if these are not provided, which will often be the case due to inefficient management or lack of resources, loss and damage will occur.

Climate induced losses and damages caused both by extreme events and slow onset processes are already evident in Bangladesh. Understanding these how these losses and damages arise provides insight into what response measures fall within the adaptation framework and which fall beyond adaptation. It is this realisation – that the best efforts of adaptation will not be able to prevent damage altogether – which leads policy makers to the conclusion that separate approaches to remedy and compensate losses incurred by communities and individuals – at least partly caused by climate change - are needed. This of course is set against the backdrop of adaptation – as a legal obligation with associated practical and financial needs.

2.3. The “Non-issue”: Compensation

Loss and damage has become synonymous with a call for compensation and for many, compensation for loss and damage incurred from the adverse impacts of climate change is the ultimate aim. As it most severely affects developed countries like Bangladesh, which have not contributed to climate change, compensation demands should be easy to make and be answered. However, given the uncertainties in climate change science (lack of clear attribution) and the multiple causes underlying damage, the issue is more complicated.

...it could be argued that loss and damage must be tackled by “polluters”, those countries historically responsible for the vast majority of GHGs

The issue of compensation can be approached from both an international and a national perspective. While state responsibility and compensation are

much talked about issues at the international level, they have received little attention at the national level. The expression “loss and damage”, as already stressed above, certainly has legal connotations. From the point of view of international law, it could be argued that loss and damage must be tackled by “polluters”, those countries historically responsible for the vast majority of GHGs. The notion of state responsibility for climate change has been discussed academically²⁹ but has been firmly rejected politically by Parties to the UNFCCC loss and damage negotiations.

Loss and damage associated with climate change may also raise the question of the “liability” of national governments to compensate affected communities and individuals. The need for establishing liability regimes at the national level is clearly explicated under the Rio Declaration of 1992. Principle 13 of the Rio Declaration, 1992 specifically states that, “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”³⁰

Who will compensate? Who will be compensated? How will compensation be made?

However, any proposition of a liability regime for loss and damage due to climate change at the national level may face many conceptual difficulties including: Who will compensate? Who will be compensated? How will compensation be made? These questions need to be addressed to formulate a potential compensation scheme at the national level. Litigation through civil and private law avenues has its own limitations. Establishing litigation for claims of compensation may face problems of proof as well as evidentiary issues. Traditional means of

compensation such as tort litigation processes can be costly, time consuming, and involve complex procedures.

Moreover, poor and vulnerable climate victims can hardly afford tort litigation. In addition, the global nature and complexity of climate change makes it extremely difficult to pinpoint responsibility. Thus, case-by-case litigation or mass tort litigation for climate change impact compensation would be extremely ineffective. Furthermore, the unprecedented scale and scientific complexity of climate change raises the question of whether courts are equipped to wrestle with such an issue.³¹ Consequently, litigation is currently not a viable option for addressing loss and damage in Bangladesh. Also, as has become clear from the work undertaken in the context of the Work Programme on Loss and Damage, much work on preventive measures remains to be done before compensation for damage may be appropriate. This overview has elucidated some of the conceptual issues around loss and damage. We will now examine existing legal, policy and institutional responses to assess whether feasible mechanisms to address loss and damage already exist and can be expanded and utilised.

Chapter Three

3. Legal, Policy and Institutional Responses to Adaptation and Loss and Damage in Bangladesh

3.1. Introduction

As discussed above, there will be loss and damage from climate change that cannot be adapted to, especially in vulnerable countries like Bangladesh and thus, the need to develop an appropriate legal regime to address and redress loss and damage in Bangladesh has been voiced.

However, the issue of loss and damage must also be incorporated into existing national institutional and financial arrangements on climate change as mentioned in the COP 18 decision on loss and damage which emphasises the need for strengthening institutional arrangements and enhancing capacity-building at the national levels to address loss and damage. At the national level

²⁹ Verheyen, *Climate Change Damage in International Law*, 2005; Voigt, *State Responsibility for Climate Change Damages*, *Nordic Journal of International Law*, Vol. 77, Nos. 1-2, pp. 1-22, 2008, Roderick/Verheyen, *Beyond Adaptation*, 2008.

³⁰ The Rio Declaration, 1992.

³¹ Melissa Farris, ‘Compensating Climate Change Victims: The Climate Compensation Fund as an Alternative to Tort Litigation’, *Sea Grant Law and Policy Journal*, Vol. 2, No. 2 (Winter 2009/2010), p. 49 at 50.

Careful pro-active policies can minimise climate risks and maximise community resilience to cope with climatic hazards. However, a re-active legal response is also needed to redress unavoidable climate induced loss and damage. Therefore, for the purposes of regulatory responses to loss and damage, policy and legal frameworks should be both anticipatory and reactionary.

At some point, a legal regime may be needed to effectively provide compensation (financial or in-kind) to affected individuals and communities. From the Bangladesh perspective, a legal regime will be needed to tackle climate-induced migration, both internal and international. However, an initiative to develop required national legal and policy frameworks to address and redress loss and damage needs to start with reviewing and assessing the existing related various pieces of legislations and policies in order to explore the scope, gaps, and constraints. The following section examines the existing regulatory frameworks of Bangladesh in order to explore the potential legal and policy frameworks needed to address loss and damage.

3.2. Legal and Policy Frameworks on Loss and Damage in Bangladesh

The present legal system of Bangladesh owes its origin mainly to 200 years of British rule and the legacy of the common law system. British-era legislation applied in Pakistan after 1947 and post-partition legislation enacted in Pakistan continued to form the basis of Bangladeshi personal status laws, but legal developments since 1972 have been distinct. A Constitution was adopted in 1972 and part three of the Constitution guarantees basic human rights including the *Right to Life*³² which has been extended to include *Right to Safe Environment* through judicial activism in 1997.³³ Under the right to a safe environment, some public interest litigations (PILs) were filed and environmental harm was frequently discussed and elaborated on by the higher judiciary in such PIL cases.

In 1995, the GoB adopted a comprehensive environmental law to address environmental harm

³² Article 31 of the Constitution of Bangladesh, 1972

³³ The appellate Division (1997) 49 DLR(AD) stated Art. 31 and 32 of the constitution... encompass within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto would be violating of the said right to life.

and also developed redress mechanisms including an environmental court. These PILs, laws on environment, disaster management, resettlement and rehabilitation, and climate change are examined to explore the scope to address loss and damage associated with climate change in Bangladesh.

Environmental Law

Currently there is no specific legal framework that addresses the issue of loss and damage associated with climate change within Bangladesh's environmental legislation. The Bangladesh Environment Conservation Act 1995, which is the main piece of environmental legislation, does not contain any provisions on climate change. However, the Act contains provisions on environmental harm, which provides for the possibility of taking into consideration the harm caused by climate change. Section 8 states that any person affected or likely to be affected by pollution or environmental degradation may apply to the Director General of the Department of Environment (DoE) in the manner prescribed by the rules, for remedying the damage or apprehended damage.

...provisions on environmental harm which provides for the possibility of taking into consideration the harm caused by climate change

The Director General may choose to adopt any measures - including public hearings - for settling an application made under this section. In addition, Section 7 outlines the procedures to determine and provide compensation for environmental and ecological harm including remedial measures for harm done to ecosystems.³⁴

³⁴ Section 7: (1): If it appears to the Director General that any act or omission of a person is causing or has caused, directly or indirectly, injury to the ecosystem or to a person or group of persons, the Director General may determine the compensation and direct the person to pay the same or in appropriate cases to take corrective measures, or do both and the person so directed shall be bound to comply with the direction. (2) If a person upon whom a direction has been issued under sub-section (1) fails to comply with the same, the Director General may file a suit for compensation in the competent court or file a criminal case for failure to comply with the direction or

Section 17 allows litigation by a person, a group of people or the public, or the DoE on behalf a person, a group of people or the public before the Environment Court for loss suffered caused by environmental harm.

In addition the Environmental Court Act of 2000 established special environmental courts to deal with environmental harm. The Environment Conservation Act was supplemented by the Environmental Conservation Rules, adopted in 1997, which provides detailed rules for addressing environmental harm.

...administrative and judicial mechanisms exist in Bangladesh to address loss and damage caused by environmental injury provides the opportunity to address loss and damage associated with climate change

Thus, administrative and judicial mechanisms exist in Bangladesh to address loss and damage caused by environmental injury provides the opportunity to address loss and damage associated with climate change.

Judicial Development on Environmental Harm and Loss and Damage

In South Asia, public interest litigation (PIL) has emerged as a pivotal legal instrument to realise collective rights of the marginalised sections of society and protect the environment. In Bangladesh, many environmental PILs have been lodged, which has developed environmental jurisprudence significantly. Although the issue of loss and damage associated with climate change is yet to be directly invoked in PIL cases, environmental harm is

frequently discussed and built on by the higher judiciary in such PIL cases, which have some ramifications on the conceptualising of loss and damage.

The judiciary of Bangladesh allowed PIL for the first time in the case *Dr. Mohiuddin Farooque vs. Bangladesh*,³⁵ which concerned environmental protection but was not directly related to climate change. The cause which the appellant espoused in the writ petitions was the apprehended environmental ill-effect of a flood control plan affecting the life, property, livelihood, vocation and environmental security of more than a million people in the district of Tangail of Bangladesh. In formulating and implementing the scheme, the plight of local communities was not taken into consideration. The court ordered the District Authority to assess loss and damage caused by the project. Following the judgement, the initial project was suspended and the government and donors reformulated the project. In addition, they also introduced an environmental impact assessment plan, which consulted the local people in the project area. This was the first case that touched the issue of ecological damage caused by development projects.

...judicial developments highlight the fact that loss and damage caused by both non-climatic and climatic factors should be appropriately remedied and help develop environmental jurisprudence on the issue of loss and damage

Recently in another PIL case of *Bangladesh Environmental Lawyers Association vs. Bangladesh*³⁶, the petitioner sought directions upon the government by the court to declare the Cyclone *Aila* affected areas as "distress areas" – to indicate their vulnerability - and to support the repair and reconstruction of damaged embankments and

file both the of cases, (3) The Director General may impose duties upon any specialist and other persons to determine compensation or for adopting corrective measures under sub-section (1). (4) The Government may direct the Director General to adopt any measure under this section and submit report thereon.

³⁵ 44 DLR (AD) (1997)

³⁶ A petition filed by Bangladesh Environmental Lawyers Association (BELA), January, 2010.

rehabilitation of displaced persons. The High Court Division of the Supreme Court of Bangladesh passed an interim order directing the respondents to provide winter clothes to the people affected by Cyclone Aila as early as possible. This case is still pending. However, these judicial developments highlight the fact that loss and damage caused by both non-climatic and climatic factors should be appropriately remedied and help develop environmental jurisprudence on the issue of loss and damage. Moreover, these judicial interventions provide the guidance to develop appropriate national legal and policy frameworks to deal with the loss and damage associated with climate change.

Laws on Disaster Management

It is understood that not every extreme weather event or hazard will lead to a disaster. Hazards – such as extreme weather events – are potentially damaging events but by themselves do not cause disasters. Instead, it is the combination of an exposed, vulnerable, and ill-prepared population or community hit by such an event that results in a disaster.³⁷ This implies that the legal framework on disaster management cannot be applicable as such to loss and damage due to climate change.

It is understood that not every extreme weather event or hazard will lead to a disaster

Still, this framework can provide important clues and disaster management has been clearly identified as a tool to address loss and damage by the recent decisions of the COP³⁸ and the entire loss and damage work programme.

The Standing Orders on Disaster Management³⁹ outlines the responsibilities of the government vis-à-vis rehabilitation and disaster management when disasters strike. The latest Standing Order on Disasters, adopted in 2010 by the Ministry of Food and Disaster Management, is influenced by the Hyogo Framework for Action (HFA). The document outlines the disaster management arrangements in

Bangladesh and describes the detailed roles and responsibilities of different government agencies involved in disaster risk reduction (DRR) and emergency response management. It also suggests establishing several institutional arrangements at different levels – national and local.

The Disaster Management Act of Bangladesh, adopted in 2012,⁴⁰ marks an important shift in recognising climate-induced loss and damage as within the ambit of the definition of disaster. The Act aims at setting up an institutional mechanism for disaster management, reducing vulnerabilities, rehabilitation, and providing humanitarian assistance to the victims of both disasters and climate change impacts.⁴¹ The Act defines disasters as phenomena caused by natural disasters, man-made disasters or climate change and includes examples such as cyclones and saline water intrusion.⁴² The Act contains a definition of rehabilitation, which includes the rehabilitation of livelihood and repairing of infrastructure. It also includes provisions for the resettlement and planned relocation of those affected - if needed - after a disaster.⁴³

The Disaster Management Act also established the National Disaster Management Council to formulate policy and strategy on disaster management and to provide and implement guidelines on disaster management.⁴⁴ In addition, the Act also envisaged the establishment of a Department of Disaster Management to implement the strategies of disaster management, which replaced the Relief and Rehabilitation Department.⁴⁵ Finally, the Act established a Disaster Management Fund, which will operate at both national and district levels and will be utilised to support disaster management efforts and provide humanitarian assistance to affected people.⁴⁶

The Disaster Management Act allows a

⁴⁰ Act, No. 34, 2012.

⁴¹ The Act is adopted in Bangla and there is no official translation of it in English yet. The Act is available at: <https://docs.google.com/file/d/0B2StS6S56ReqUDB3VINQYmSYWUE/edit?pli=1>

⁴² Section 2(11) of the Act.

⁴³ Section 2 (15) of the Act.

⁴⁴ Section 4 of the Act.

⁴⁵ Section 7 (2) of the Act.

⁴⁶ Section 32 of the Act.

³⁷ United Nations International Strategy for Disaster Reduction (UNISDR) Secretariat Evaluation, February, 2010.

³⁸ Dec.3/CP.18, preamble and para. 6.

³⁹ Standing Orders on Disaster Management, 1973, 2010

person or organisation negatively affected by a disaster to sue for compensation from a person or organisation responsible for such disaster...

The Disaster Management Act allows a person or organisation negatively affected by a disaster to sue for compensation from a person or organisation responsible for such disaster before a competent court in accordance with the Civil Procedure Code and the court will determine the amount of compensation to be paid and pass the order on accordingly.⁴⁷ However, this provision needs to be elaborated and further rules or guidelines adopted on the assessment of loss and damage, determination of compensation, and liability for related loss and damage and linked with the aforementioned disaster management fund. Nevertheless, the Act is an important legal milestone to recognise loss and damage associated with climate change as a consequence of disaster and the linkage between natural and climate induced disaster.⁴⁸ Moreover, the Act has been adopted very recently and needs to be applied in practice through the suggested institutional arrangements.

Legal and Policy Frameworks on Rehabilitation and Relocation

The devastating tidal bore and cyclone of 1970 displaced large numbers of people in Bangladesh and left millions homeless. Subsequently, after the independence of Bangladesh, the GoB introduced programs to rehabilitate people. Since then, cluster villages have been built with the support of the government and NGOs to facilitate resettlement and rehabilitation for disaster-induced displaced people and also for families without assets or land. A similar approach is found in the recent government project entitled *Guchhogram* (CVRP) project, which aims to settle climate victims, the landless and homeless and those displaced by riverbank erosion. In Phase I and II, the government rehabilitated

45,647 families and 25,385 families respectively.⁴⁹ The concept of “climate victims” in this project has provided a new categorisation of people forcibly displaced. However, the term “climate victims”, remains vague and needs to be defined.

In the context of development-induced displacement, the first resettlement and rehabilitation program was the Kaptai Hydroelectric project. The Kaptai hydro dam, built in 1962, rendered 18,000 families homeless and displaced 100,000 tribal people.⁵⁰ Subsequently, many development projects, including large projects like the construction of bridges, displaced a significant number of people in Bangladesh. Most of these projects were financed by different international finance institutions. Therefore, in addition to domestic laws the policies of the relevant financing institutions were taken in account under different projects to regulate resettlement and rehabilitation schemes.

...a comprehensive legal and institutional framework is required for the relocation/resettlement and rehabilitation of involuntary displaced people in Bangladesh

Existing policy and legal frameworks related to resettlement and rehabilitation in Bangladesh have been developed primarily in the context of disaster and development-induced displacement. Project based ad-hoc policies were applied in all the cases, based on mainly the *State Acquisition and Tenancy Act 1950* and the *Acquisition and Requisition of Immovable Property Ordinance II* (1982) and subsequent amendments of the Ordinance II (1989, 1993, and 1994). The legal frameworks presently in use in Bangladesh are not adequate to deal with the adverse impacts associated with disaster and development induced displacements since

⁴⁷ Section 49 of the Act.

⁴⁸ Section 2(11) of the Act.

⁴⁹ Saila Parveen & I. M. Faisal, *People versus Power: The Geopolitics of Kaptai Dam in Bangladesh*, *Water Resources Development*, Vol. 18, No. 1, 197–208, 2002, available at, http://www.ichtarchive.com/attachments/003_bigger%20dam.pdf

⁵⁰ *Ibid.*

associated complex issues are not addressed within the older legal instruments.

In addition, environment and climate change issues are currently causing the forced displacement of huge numbers of people. Most instances of migration, in which environmental factors play a role in Bangladesh, are internal rather than international. Therefore, initially national policy interventions are needed to respond to climate-induced migration. Nonetheless, the possible causal impact of environmental degradation and the magnitude of cross-border migration is likely to be increasingly discussed in policy circles in South Asia.⁵¹ Policy responses require an adaptive strategy or as a last resort to cope with rapid onset disasters, ensuring that emergency responses are undertaken in an orderly and planned fashion, so that all parties involved – migrants, source and destination communities – benefit.⁵² Therefore, taking into account all these underlying factors, a comprehensive legal and institutional framework is required for the relocation/resettlement and rehabilitation of involuntarily displaced people in Bangladesh.

Policy Framework on Climate Change, Disaster Management and Loss and Damage

Bangladesh prepared a National Adaptation Plan of Action (NAPA) in 2005⁵³ to address the adverse impacts of climate stimuli including climate variability and extreme events and to promote sustainable development. The NAPA outlined 15 priority activities and identified some important project ideas. Its first project aiming to reduce the vulnerability of coastal communities to the impacts of climate change is under implementation with support from the UNFCCC finance regime.⁵⁴

The NAPA process has been advanced through the adoption of the Bangladesh Climate Change Strategy and Action Plan (BCCSAP)⁵⁵ of 2008 (reviewed in

2009), which provides the climatic context, an analysis of socio-economic realities, and outlines policies promoting the well-being of vulnerable groups and elaborates a set of programmes based upon broad areas of intervention. The document identifies 45 adaptation measures based on the following six pillars: (1) food security, social security and health, (2) disaster management, (3) infrastructure, (4) research and knowledge management, (5) reducing greenhouse gas emissions and a conversion to low-carbon development, (6) capacity development.

Loss and damage is covered in the BCCSAP, under different programmes. For example, the Strategy proposes responses necessary for livelihood protection in ecologically fragile areas and the protection of livelihoods of vulnerable socio-economic groups in order to ensure equitable and sustainable development. In some cases, the activities are aimed at providing protection for the loss of employment and income and property from various sources to persons, households, and enterprises through devising an effective insurance system by the government.

In addition the BCCSAP recognises the need to protect displaced people and provide support for their rehabilitation in a new environment through capacity building. In line with the attempts to define “loss and damage” it could thus be said that the BCCSAP already includes in its scope loss and damage to some extent, in addition to its emphasis on adaptation.

In line with the attempts to define “loss and damage” it could thus be said that the BCCSAP already includes in its scope loss and damage to some extent, in addition to its emphasis on adaptation

⁵¹ Assessing the Evidence Environment, Climate Change and Migration in Bangladesh, IOM, Dhaka, 2010, Pp. xiii.

⁵² Ibid, p. vi.

⁵³ National Adaptation Programme of Action (NAPA), 2005, Ministry of Environment and Forest Government of the People's Republic of Bangladesh.

⁵⁴ UNFCCC website:

http://unfccc.int/cooperation_support/least_developed_countries_portal/items/6497.php

⁵⁵ MoEF, 2009, Bangladesh Climate Change Strategy and Action Plan 2008, Ministry of Environment and Forests,

Government of the People's Republic of Bangladesh, Dhaka, Bangladesh.

The implementation of the BCCSAP will be financed through the GoB's own resources, though external support that may be available from development partners and international funds created for the purpose of funding climate change projects.⁵⁶ The BCCSAP will be reviewed and revised, as necessary, in line with national development priorities, emerging scientific and technical knowledge, and the outcomes of global negotiations under the UNFCCC.⁵⁷

Thus, there is a general mandate to specifically tackle loss and damage under the Action Plan as well

In 2010 Bangladesh adopted the National Plan for Disaster Management for addressing DRR and climate change adaptation (CCA) in a comprehensive way. The main objective of the Plan is to identify environmental and man-made hazards including climate change, determine who is vulnerable to these threats; investigate what measures exist to prevent the occurrence of disasters, undertake prevention, mitigation, and preparedness planning and action, and make provisions in the national budget for funding activities related to DRR. The Plan outlined some strategic goals including mainstreaming DRR and climate change adaptation issues into all sectoral policies and plans with a view to reduce "sectoral damage and loss from disaster and climate change". It also suggested developing a standard sector specific damage and loss assessment methodology⁵⁸ and proposed enacting the aforementioned Disaster Management Act adopted in 2012. Thus, there is a general mandate to specifically tackle loss and damage in DRR plans as well.

3.3. Institutional Frameworks for Loss and Damage

As revealed above, is no specific institutional framework in Bangladesh to address loss and damage. However, institutional frameworks on environmental harm, disaster management, and

climate change can be useful to deal with loss and damage associated with climate change.

Addressing Environmental Harm

In 1989, the Ministry of Environment and Forests (MoEF) was established under which the DoE started to work on environmental issues, subsequently mandated by the Environment Conservation Act 1995.

...mechanisms to address loss and damage associated with climate change can be developed through adopting rules in accordance with the Conservation Act 1995 in Bangladesh

Furthermore, the Environmental Conservation Rules 1997 provide detailed administrative guidance to the DoE to act in response to environmental harm. Section 5 of the Environment Conservation Rules 1997 outlines how to deal with an application for remedy of damage from pollution or environmental degradation, while the Environment Conservation Act 1995 authorises the DoE to assess environmental harm and determine corrective measures or compensation for environmental injury (see discussion above).

However, the DoE did not develop comprehensive methodology to assess environmental damage and determine remedial actions and compensation nor an administrative process for dealing with claims of loss and damage. That said, mechanisms to address loss and damage associated with climate change can be developed by adopting rules in accordance with the Conservation Act 1995 in Bangladesh.

Loss and Damage and DRR

Regulatory frameworks have established institutional arrangements from the local to national levels on disaster management and DRR. The Standing Order on Disaster Management (SOD) 2010⁵⁹ established the National Disaster

⁵⁶ Preface, *Ibid* .

⁵⁷ BCCSAP, 2009, para. 53.

⁵⁸ *Ibid*, Disaster Management Action Matrix, 2010-2015, p. 60 & 80.

⁵⁹ Standing Order on Disaster Management, Government of the People's Republic of Bangladesh, 2010.

Management Council (NDMC) at the national level and aims to provide policy guidance on DRR and emergency response management in Bangladesh. The SOD also reviews national disaster management systems and provides strategic advice for DRR and emergency response management, promotes awareness on DRR among top policy makers, evaluates disaster preparedness measures, provides strategic advice, and facilitates coordination of multi-hazard and multi-sectoral measures in relation to DRR and emergency response management.

At the local or sub-national level, there are several tiers of institutional frameworks on disaster management

The City Corporation Disaster Management Committees (CCDMC) were established to carry out all disaster management activities (prevention, mitigation, preparedness, and response and relief) at the municipal level. Similarly at *Upazila*, *Pourashava* and *Union Parishad* level (micro level administrative tiers), Disaster Management Committees (DMCs) were established to oversee vulnerability and risk analysis at the local level, identify communities at risk, prepare short, medium and long-term vulnerability reduction action plans, undertake capacity building activities for people at high risk, and establish a local fund for the implementation of risk reduction action plans. The Union Disaster Management Committee, under the responsibility of the lowest tier of administrative unit, has the responsibility to assess loss and damage.

The SOD outlines well-structured institutional arrangements and the recently adopted Disaster Management Act 2012 provided the legal basis for those institutional arrangements.

...the institutions suggested by the regulatory regime of disaster management can be useful to deal with loss and damage associated

with climate change while mechanisms assessing, addressing, and redressing loss and damage need to be developed

The Act also recommends establishing a particular fund to facilitate activities related to disaster management. However, those institutions have not yet been established. In addition, disaster management committees at the local level suffer from many shortcomings such as weak institutional frameworks, lack of resources, and a lack of training and capacity. Nevertheless, the institutions suggested by the disaster management regulatory regime can be useful in dealing with loss and damage associated with climate change though mechanisms for assessing, addressing, and redressing loss and damage need to be developed.

Chapter Four

4. Adaptation Funds in Bangladesh: The Scope to Address Loss and Damage

4.1. Introduction

As discussed in Chapter 2, loss and damage from the impacts of climate change will in all likelihood create a situation in which an individual or a community will seek funds either to compensate for loss and damage or to protect assets and livelihoods. Because of the obvious overlaps with activities that can be defined as adaptation to climate change, it is useful to look in more detail at the way adaptation finance is currently organised, distributed, and administered in Bangladesh. Policy makers have already voiced the need to establish a dedicated fund to finance compensatory payments to people affected by particular climate change impacts, which might overlap with adaptation funding streams. Therefore, this chapter examines the existing adaptation funding mechanisms in Bangladesh along with ad-hoc funding mechanisms for disaster recovery and insurance mechanisms such as risk sharing.

4.2. Legal Basis, Structure and Disbursement of Adaptation Funding in Bangladesh

The main objectives of adaptation funding are to reduce vulnerability and build the resilience of

vulnerable communities to cope with the adverse impacts of climate change. The GoB spends a significant amount of money annually on climate change related activities. Over the past five years, 77 percent of the funding for the climate change related activities has come from domestic resources and 23 percent from foreign donor resources.⁶⁰ Around 97 percent of spending on climate change is related to adaptation measures ranging from infrastructure to social protection.

The Bangladesh Climate Change Trust Fund (BCCTF)

The GoB adopted legislation called the Climate Change Trust Fund Act in 2010⁶¹ with the view to establish the Bangladesh Climate Change Trust Fund (BCCTF) to fund activities to address the adverse impacts of climate change.⁶² The Fund is financed from the national budget of Bangladesh as well as donor funds and used for implementing short-, medium-, and long-term goals and actions relating to climate change.

The composition of the Fund's Board of Trustees has been criticised for the fact that it is overwhelmingly dominated by Ministers and other government officials and has no representation from civil society.⁶³ A technical committee to assist the Board is also composed of government officials and has no civil society representatives. The technical committee has not been given any mandate to assess loss and damage or establish baselines for assessing it in the future.

⁶⁰ World Bank, *Economics of adaptation to climate change: Bangladesh case study*. World Bank Nov. 2010.

⁶¹ Climate Change Trust Act, 2010, Law No. 57 of 2010 .

⁶² According to section 6 of the Act, the main objectives of the Trust Fund include: to utilise the funds to combat the risk of climate change outside the development budget of the government; to undertake effective plans for realisation of special tasks relating to climate change and ensure sustainable development; to enhance capacity building and development of human resources at local level; to undertake action research and disseminate research findings in the field of adaptation, mitigation, technology transfer and finance and investment in relation to climate change; to take adaptation measures; to assist the climate change unit established in the Ministry of Environment and Forestry and climate change cell formed in the Department of Environment in playing their effective role; and to create awareness about potential natural disaster due to climate change.

⁶³ See section 9 of the Act.

Although the Act does not contain any explicit provision to address loss and damage associated with climate change, the broad mandate of the Fund includes the implementation of the BCCSAP, which lists programmes on addressing loss and damage associated with climate change

Under the Climate Change Trust Fund Act, the MoEF has established the Climate Change Unit (CCU) to operationalise the BCCTF. The CCU is responsible for ensuring efficient implementation of the projects undertaken by ministries, departments, and NGOs. Although the Act does not contain any explicit provisions to address loss and damage associated with climate change, the broad mandate of the Fund includes the implementation of the BCCSAP, which lists programmes on addressing loss and damage associated with climate change. Thus, the Act has a mandate to address loss and damage associated with climate change in a roundabout way.

In March 2010, the GoB issued guidelines for how NGOs can access funding from the BCCTF. According to these guidelines, only NGOs that are duly registered and have experience in climate change, environment protection, and livelihood issues as well as adequate capacity can apply for funding. No individual or community is eligible to apply for the project.⁶⁴ Projects are examined and approved by the Board of the BCCTF.

The Bangladesh Climate Change Resilience Fund (BCCRF)

The GoB created the Bangladesh Climate Change Resilience Fund (BCCRF), originally called the Multi-Donor Trust Fund, in 2009 to implement the six

⁶⁴ Bangladesh Gazette, Ministry of Environment and Forest, 15th March, 2010.

pillars identified in the BCCSAP. This fund became operational in 2010.

The purpose of the BCCRF is to provide funding for climate change projects, primarily on adaptation but also mitigation, being implemented by both government agencies and NGOs

The purpose of the BCCRF is to provide funding for climate change projects, primarily on adaptation but also mitigation, being implemented by both government agencies and NGOs. In total 90 percent of the allocated funds will be utilised for government projects and the remaining 10 percent for the implementation of NGO-led projects.

The BCCRF funds activities and would therefore not be able to provide compensation for actual loss – financially or through in kind provision

The BCCRF has a two-tier governance system consisting of a governing council and a management committee. Proposals are primarily verified and reviewed by the Management Committee and then assessed by the World Bank with final approval provided by the Governing Council. According to the BCCRF implementation manual,⁶⁵ the Governing Council is mandated to prepare policy, provide strategic direction and guidance, and final approval of projects in proper alignment with the BCCSAP. The Management Committee is responsible for the work programme, ensuring that the BCCRF is implemented in line with the agreed implementation manual and considers grant requests submitted by various ministries and other eligible institutions. The World Bank has been

appointed primarily to provide fiduciary management and technical assistance in project implementation as well as to ensure transparency, accountability, efficiency, and effectiveness in its operations. Both the Governing Council and the Management Committee are chaired by a representative of the GoB and include representatives of ministries, development partners, and civil society. However, the assessment of the projects submitted to the BCCRF is carried out according to World Bank procedures, which is often a lengthy process. This Fund is envisaged for adaptation measures and is not explicitly mandated to cover loss and damage though will carry out projects in line with the goals of the BCCSAP. That said, the BCCRF could not provide compensation for actual losses and damages – either financially or through in kind provisions.

The Strategic Programme for Climate Resilience Bangladesh

The Strategic Programme for Climate Resilience (SPCR) is a component of the World Bank's multi-country Pilot Programme for Climate Resilience (PPCR). An amount of USD 110 million, in the form of grants (USD 50 million) and concessionary loans (USD 60 million) from multilateral development banks (MDBs), was approved in October 2010 for piloting adaptation activities in climate vulnerable areas and mainstreaming climate resilience in policies at different levels in Bangladesh.⁶⁶ The SPCR has three thematic areas for investment: promoting climate resilient agriculture and food security; coastal embankments improvement and afforestation, and coastal climate resilient water supply, sanitation and infrastructure improvement. In addition there are two areas for technical assistance: climate change capacity building and knowledge management and feasibility study for a pilot program for climate resilient housing in the coastal region.⁶⁷ This fund is more transparent than the two trust funds described above in terms of governance and how the funds are spent.⁶⁸

However, the SPCR compliments the existing funds providing funding for adaptation measures in Bangladesh and will enable the country to make

⁶⁶ Merylyn Hedger, 'Climate Finance in Bangladesh: Lessons for Development Cooperation and Climate Finance at National Level', Working Paper, Institute of Development Studies, March 2011, p. 28.

⁶⁷ Ibid, p. 29.

⁶⁸ Ibid, p. 29.

⁶⁵ BCCRF Operational Manual adopted on 2 Oct 2011.

strategic investments in critical areas of adaptation and climate resilient development in a manner consistent with its poverty reduction and sustainable development objectives.

4.3. Legal Basis and Institutional Structure for Dealing with Victims of Catastrophes

Bangladesh has a long history of providing disaster relief and rehabilitation to the victims of disasters. However, the practice of providing relief is based on charity, not on a rights-based approach in the line with constitutionally guaranteed fundamental rights like the right to life or property. There are two kinds of *ex post* disaster measures: providing relief and financial support for disaster affected people and social safety net programmes. A recent example is the financial support provided to the victims of Cyclone *Aila*. The GoB provided 250 USD to each *Aila* affected family.⁶⁹ The money was directly provided to the bank account of each family to compensate for the loss of agricultural output or income.

Bangladesh has a well-developed system of social safety nets operated by different ministries and some NGOs covering various target groups to reduce their vulnerabilities to hazards

Bangladesh has a well-developed system of social safety nets operated by different ministries and some NGOs covering various target groups to reduce their vulnerabilities to hazards. Some of these programs are food based, others are cash based. The government has allocated 15 percent of the total national budget towards social protection programmes, which was 2.5 percent of the GDP in the 2011-12 financial year.⁷⁰ The main objectives of

these programs are: (a) food transfer to create employment for the poor in the rainy season to provide emergency food and other necessities to the victims of natural calamities; (b) employment generation for disaster-affected people and (c) providing aid to destitute women and their dependents. These programmes have achieved some success in enabling targeted poor people to improve their livelihood conditions and making them less vulnerable⁷¹

4.4. Insurance as a Mechanism to Address Loss and Damage

Insurance has played a significant role in the discussions about loss and damage at the international level, with Article 4.8 of the UNFCCC expressly referring to insurance.⁷² It is now discussed as a risk management and risk transfer tool, mainly in the context of adaptation.

At the national level, insurance has long been used in many countries as a tool for offsetting the financial impacts of extreme events on individuals and small businesses. Insurance can play a role in helping individuals and communities cope and recover in the case of major losses caused by extreme events and disasters. In particular, index insurance is used to insure against hazards including climate change to help mitigate potential economic losses like the loss of income.⁷³ However, there are problems with this approach including difficulties in reaching out to a larger proportion of the vulnerable population due to a lack of knowledge about risk management.

In Bangladesh, some NGOs such as the Grameen Bank, BRAC, and other microfinance organisations have established microinsurance programmes to reduce the social and economic vulnerability of Bangladesh's poorest communities. These programmes mainly cover the loss of small-scale assets, livestock, and crops in the event of a flood, drought or other disaster. However, most of the flood schemes are limited in scope and not effective and people are hardly aware of these schemes. However, insurance is considered in the on-going UNFCCC negotiation process as one of the most

⁶⁹ 34,000 Aila-hit people hold low-cost bank accounts to get aid, available at http://www.newstoday.com.bd/index.php?option=details&news_id=6104&date=2010-08-29 .

⁷⁰ Ibid.

⁷¹ Md. Munir, Research Report on a 'Comparative Study of Disaster Risk Reduction and Post Disaster Livelihood Recovery Programme in Japan and Bangladesh', 2012.

⁷² See Verheyen, note 15.

⁷³ See, Rocio Besar, Philine Oft and Lesly Vilcherres, 'Financial Mechanisms for climate change adaptation', Technical Note 1, GIS, August 2012.

important tools for risk transfer mechanisms related to addressing loss and damage associated with climate change. Thus, these initiatives can be useful for developing further insurance mechanisms in Bangladesh, but they need policy guidance.

Chapter Five

5. Key Findings

The preceding chapters examined the scope and limitations of existing regulatory frameworks related to loss and damage. This chapter provides a brief analysis of the key findings.

While the international negotiations on loss and damage are taking place at the global level, losses and damages are being incurred at the local level. Vulnerable countries like Bangladesh should give greater priority to developing national policies and legal norms to deal with loss and damage without waiting for agreed outcomes from UNFCCC. In addition, the GoB has an obligation to protect the rights of its citizens under the constitution and human rights treaties that Bangladesh has acceded to or ratified.

Chapter 2 of this study conceptualised the issue of loss and damage, outlined the definitions provided by recent literature and contextualised the issue in the Bangladesh context. The frequency and intensity of extreme events has already increased and the impacts of slow onset processes are increasingly evident in Bangladesh. Loss of lives and livelihoods as well as damage to property and other assets is already occurring. The disruption of settlement and the reduction of livelihood opportunities are leading to displacement and migration. However, it is still difficult to identify a particular case of loss and damage based on a mono-casual linkage to climate change. Nevertheless, these cases of losses and damages provided insights into what response measures fall within the adaptation framework and which fall beyond adaptation.

At the national level, a careful pro-active policy can minimise climate risks and maximise community resilience to cope with climatic hazards. However, a re-active legal response is also needed to redress unavoidable climate induced loss and damage. Therefore, for the purposes of regulatory responses to loss and damage, policy and legal frameworks should be both anticipatory and reactionary. At some point, a legal regime will be needed to effectively provide compensation (financial or in-kind) to affected persons and communities and to

manage the effects of climate change. From the Bangladesh perspective, a legal regime will be needed to tackle forced migration, both internal and international.

Chapter 3 of this study assessed the existing legal, policy, and institutional frameworks related to loss and damage. Currently, there is no specific legal framework that addresses the issue of loss and damage associated with climate change in Bangladesh and hence it examined related provisions on environmental harm, disaster management, displacement and migration, and climate change. The 1972 Constitution of Bangladesh guarantees basic human rights including the *Right to Life* which has been extended to include the *Right to a Safe Environment* through judicial activism in 1997. Under the right to a safe environment, some public interest litigations (PILs) were filed and environmental harm was frequently discussed and elaborated on by the higher judiciary. These judicial developments highlight the fact that loss and damage caused by non-climatic or climatic factors should be appropriately remedied and that environmental jurisprudence on the issue of loss and damage needs to be developed. Moreover, these judicial interventions provided guidance on developing appropriate national legal and policy frameworks to deal with the loss and damage associated with climate change.

The Bangladesh Environment Conservation Act 1995, which is the main piece of environmental legislation, does not contain any provisions on climate change. The Act was supplemented by the Environmental Conservation Rules, adopted in 1997, and provided detailed rules for addressing environmental harm. The Department of Environment was formed to deal with environmental protection and environmental harm in accordance with the Act. Furthermore, the Environmental Court Act 2000 established special environmental courts to deal with environmental harm. Thus, laws regulating environment and ecology in Bangladesh provide legal, institutional, and judicial means to address loss and damage related to environment and ecology. However, due to the absence of tools and methodologies to assess loss and damage resulting from environmental pollution and in absence of required mechanisms to determine remedial actions and compensation, the regulatory regime on environmental harm is ineffective. However, the existing legal basis for environmental harm can be useful for addressing loss and damage associated with climate change.

While there is a need to amend the Environmental Conservation Act 1995, the Rules of 1997 and the Environment Court Act 2000 to include climate change related loss and damage, it is also important to review the mandates of the DoE so that it can adequately address the adverse impacts of climate change.

Laws, policies, and institutional arrangements related to disaster management in Bangladesh provide some scope to deal with loss and damage associated with climate change. The Disaster Management Act of Bangladesh, adopted in 2012, marks an important shift in recognising climate induced loss and damage within the ambit of the definition of disaster. The Act defines disasters as phenomena caused by environmental or man-made events including cyclones and saline water intrusion. The Act also contains a definition of “rehabilitation” which includes livelihood recovery and the repair of infrastructure. Provisions for the resettlement and planned relocation of affected people if needed after a disaster are also included in the Act. In addition, the Act established the National Disaster Management Council to formulate policy and strategy on disaster management and to provide and implement guidelines on disaster management. The Disaster Management Fund, which operates at both national and district level and will be utilised for disaster management and humanitarian assistance to those affected, was also established.

The Disaster Management Act allows a person or organisation negatively affected by a disaster to sue for compensation from a person or organisation responsible for the disaster before a competent court in accordance with the Civil Procedure Code. The court will determine the adequate compensation and pass the order accordingly. However, this provision needs to be enhanced with the adoption of rules guiding the assessment of loss and damage, determination of compensation and the liability for related loss and damage - linking with the aforementioned Disaster Management Fund. However, the Act is an important legal milestone to recognise loss and damage associated with climate change as a consequence of disasters. It should be noted, however, that the Disaster Management Act has been adopted very recently and needs to be applied in practice through the suggested institutional arrangements.

The National Adaptation Plan of Action (NAPA) was established in 2005 to identify priority projects to address the adverse impacts of climate stimuli,

including climate variability and extreme events. The NAPA process has been advanced through the adoption of the BCCSAP in 2008 - reviewed in 2009 and identified the six pillars for main basis of efforts to be taken to combat climate change in Bangladesh. In line with the attempts to define “loss and damage” it could thus be said that the BCCSAP already includes in its scope loss and damage to some extent, in addition to a focus on adaptation. The BCCSAP will be reviewed and revised, as necessary, in line national development priorities, emerging scientific and technical knowledge and the outcomes of global negotiations under UNFCCC. In the review process, the BCCSAP should be amended to ensure that it incorporates mechanisms to address loss and damage in Bangladesh.

Existing financial mechanisms related to climate change in Bangladesh aim to facilitate activities related to mitigation and adaptation and do not provide resources for remedial and compensation approaches to redress loss and damage resulting from climate change. However, these financial windows - particularly those provided by the BCCTF - could be used to fund initial activities to address loss and damage, including planned relocation and resettlement. However, to provide compensation to those who incur losses and damages, the Bangladesh Climate Trust Fund Act would need to be amended to develop mechanisms for assessing loss and damage - as well establishing baselines - and to determine the scope for remedy and compensation.

In interviews undertaken for this study, relevant stakeholders suggested the establishment of a specific compensation fund with micro level institutional arrangements to provide remedy and compensation to climate-affected people. Others suggested utilising the existing funding mechanisms and institutions to address loss and damage and to compensate the affected communities - including resettlement and relocation. Laws regulating resettlement and relocation in Bangladesh will likely need to be reviewed taking into account the loss and damage associated with climate change. As the international debate on loss and damage develops, there is a need for public dialogue in Bangladesh to address the question of decision making on limits of adaptation and acceptance of loss and damage resulting from climate change.

Concluding Remarks

Laws regulating environment and ecology and disaster management in Bangladesh provide the legal, institutional and judicial means to address loss

and damage related to environment and disaster related loss and damage - including resettlement and relocation.

Recently developed climate policies like the BCCSAP provided the opportunity to initiate projects and programs on loss and damage. The BCCTF will support these programs and activities. However, a dedicated fund to provide compensation and remedial measures to those that incur loss and damage from the adverse impacts of climate change could be established within this system. In addition, the Disaster Management Fund could also be used to provide compensation and remedial measures. That said, a more detailed analysis of the related provisions of these laws and policies is needed as this study identified the gaps and scopes in a broader context. Moreover, for the establishment of new measures to address loss and damage – such as a compensation fund - governance structures with legal mandates to address loss and damage at the national level need to be explored and developed. A further, more comprehensive study will be required to enhance understanding of how to structure a national regulatory regime of loss and damage associated with climate change.

While Parties of the UNFCCC were working to structure financial mechanisms, Bangladesh established the BCCTF, utilizing its own resources and supplementing them with donor support. Following the example of Bangladesh, many countries are currently trying to establish national climate change funds. That said, the GoB should take the further initiative to adopt comprehensive legal and policy frameworks to address loss and damage at the national level. This will most probably require a specific financial mechanism to provide protective measures to reduce the risk of loss and damage and to compensate the climate-affected communities that incur loss and damage. Such action could ultimately pave the way for other LDCs to create their own national mechanisms to address loss and damage. This bottom up approach could also influence the UNFCCC process in its work to develop a separate institutional framework to deal with loss and damage associated with climate change at the international level.

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The Loss and Damage in Vulnerable Countries Initiative

Accepting the reality of unmitigated climate change, the UNFCCC negotiations have raised the profile of the issue of loss & damage to adverse climate impacts. At COP-16, Parties created a Work Programme on Loss and Damage under the Subsidiary Body on Implementation (SBI). The goal of this work programme is to increase awareness among delegates, assess the exposure of countries to loss and damage, explore a range of activities that may be appropriate to address loss and damage in vulnerable countries, and identify ways that the UNFCCC process might play in helping countries avoid and reduce loss and damage associated with climate change. COP-18, in December 2012, will mark the next milestone in furthering the international response to this issue.

The “Loss and Damage in Vulnerable Countries Initiative” supports the Government of Bangladesh and the Least Developed Countries to call for action of the international community.

The Initiative is supplied by a consortium of organisations including:

Germanwatch

Munich Climate Insurance Initiative

United Nations University – Institute for Human and Environment Security

International Centre for Climate Change and Development

Kindly supported by the Climate Development and Knowledge Network (CDKN)

For further information: www.loss-and-damage.net

International Centre for Climate Change and Development (ICCCAD)

Based in the Independent University, Bangladesh (IUB), the International Centre for Climate Change and Development’s aim is to develop a world-class institution that is closely related to local experience, knowledge and research in one of the countries that is most affected by climate change. ICCCAD supports growing capacity of Bangladesh stakeholders, as well as enabling people and organizations from outside the country to benefit from training in the field, where they are exposed to the adaptation “experiments” and increasing knowledge. Through the expertise and research outputs of ICCCAD and its local partners, international organizations will be able to continue to share and transmit knowledge of climate change and development challenges around the world for the benefit of other LDCs, and their governments, donors and international NGOs. ICCCAD has begun running regular short courses for NGOs, donors, the media, government staff, private sector, etc. As well as initiating courses for local participants and Bangladeshi stakeholders, it provides tailor-made courses for organizations and departments that are seeking to enhance their capacity in regard to climate change.

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