



Applying Restorative Justice to Climate-related Loss and Damage in Small Island Developing States

Dr Stacy-ann Robinson, Assistant Professor of Environmental Studies, Colby College

This paper is partly an abridged version of an earlier article, “A just alternative to litigation: applying restorative justice to climate-related loss and damage” co-authored by Stacy-ann Robinson and D’Arcy Carlson, and published in Third World Quarterly. The earlier article may be accessed here: <https://doi.org/10.1080/01436597.2021.1877128>.

Summary

The governance of loss and damage through the United Nations Framework Convention on Climate Change (UNFCCC) has been marked by tensions over loss and damage financing, which is viewed as being necessary when mitigation and adaptation are insufficient for preventing climate change and its negative impacts. An increasing number of affected parties have resorted to litigation as a means of holding the major emitters responsible for climate change, and for compensating damages. Despite this, loss and damage cases in the courts have mostly been unsuccessful because of issues around uncertainty, attribution, and the relationship between climate change and extreme weather events. This paper, which is partly an abridged version of an earlier article, proposes an alternative to litigation - the application of restorative justice to resolving loss and damage claims. For small island developing states, which are disproportionately vulnerable to the impacts of climate change, and which are already experiencing loss and damage from tropical cyclones and sea-level rise, facilitated restorative dialogue could provide a viable avenue to build and restore

trust in the UNFCCC process.

Background

Small island developing states (SIDS) are a special grouping of 58 small islands and low-lying coastal countries located across three main geographic regions—the (1) Atlantic, Indian Oceans, Mediterranean and South China Seas, (2) Caribbean, and (3) Pacific (Robinson, 2018). The SIDS categorization, formalized in the outcome of the 1992 United Nations Conference on Environment and Development, fosters a strong awareness of the shared environment and development challenges that these countries face, including managing climate change risk. Chapter 15 (Small Islands) of Working Group II’s contribution to Sixth Assessment Report (AR6) of the Intergovernmental Panel on Climate Change (IPCC), which was released in February 2022, confirmed that small islands “are already reporting loss and damage particularly from tropical cyclones and increases in sea-level rise” (Mycoo et al., 2022, p. 1). Loss and damage to natural and cultural heritage sites impact tourism and, as a result, have significant economic impacts for small island economies (Mycoo et al., 2022). For SIDS, in particular, loss and damage has negative implications for sustainable development (Benjamin et al., 2018). It can also deplete national incomes and capital reserves, especially in the case of extreme weather events (Edmonds and Noy, 2018). Across different sectors and domains, therefore, loss and damage leads to an “unvirtuous cycle of climate-induced erosion of development and resilience”

(cited in Benjamin et al., 2018, p. 332).

The road to formalize the governance of loss and damage in the UNFCCC has been long and arduous. Historically, the UNFCCC has centered global climate policy around mitigating greenhouse gas emissions and more recently, adapting to climate change (Schipper, 2006; McNamara et al, 2021). SIDS have been among the strongest and most consistent advocates for loss and damage. In 1991, the Alliance of Small Island States (AOSIS) proposed an international insurance pool that would compensate low-lying islands for loss and damage associated with sea-level rise. The proposal, however, faced considerable opposition and, ultimately, was not included in the text of the UNFCCC when it was adopted in 1992. Since then and even with the establishment of the Warsaw International Mechanism (WIM) in 2013, loss and damage financing has faced an impasse in the climate negotiations, between developed and developing countries, between the countries that are responsible for historical emissions and those that have been disproportionately impacted.

Increasingly, affected parties are resorting to climate litigation as a means of holding the major emitters responsible, and for compensating damages. However, loss and damage cases in the courts have mostly been unsuccessful because of issues around uncertainty, attribution, and the relationship between climate change and extreme weather events. Attempts by climate-vulnerable SIDS to utilize litigation to secure compensation for loss and damage have not progressed significantly. In 2002, for example, Tuvalu signaled its intention to bring Australia and the United States to the International Court of Justice for their failure to address

climate change as two major emitters (Jaschik, 2014). A change in government and national priorities stalled the progress of the case (Wewerinke-Singh and Salili, 2020). As another example, Vanuatu threatened legal action against major emitting national governments, fossil fuel companies, and financial institutions in 2018 (Wewerinke-Singh and Salili, 2020). The case, which is yet to be filed, would seek to share the burden of finance and action with the primary beneficiaries of climate change. These and similar outcomes illustrate the need for an alternative to litigation - one that can deliver justice to the countries that are affected most.

Proposal

In view of the limitations of climate litigation and the outcomes of previous attempts at litigation by SIDS, restorative justice can be a useful approach to redress the impacts of climate change on individuals, communities, and the environment in SIDS. Restorative justice is generally defined as “a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future” (cited in Gavrielides, 2007, p. 44). Though most commonly applied in the traditional criminal justice system, it is generally more adequate for addressing the interconnectedness of society, thereby being able to better meet the needs of victims (Gavrielides, 2007; Sherman and Strang, 2007). On the one hand, justice through the courts is pursued through formal, adversarial processes that seek to define and protect the rights and responsibilities of individuals (Centre for Justice and Reconciliation, 2020). Fairness is sought through procedural protections

and accords discretion to judges and other law enforcement officials to decide how to depose cases (Centre for Justice and Reconciliation, 2020). In this respect, very rarely are communities protected. On the other hand, restorative justice seeks to be guided by the interests of the parties and places a high value on whether parties believe that justice has been delivered (Centre for Justice and Reconciliation, 2020). Its normative values of respect, solidarity, and active responsibility position restorative justice as a “bottom-up approach to restoring community” (Braithwaite, 2000, p. 331). For individuals, communities, and the environment in SIDS, applying restorative justice would mean that they are recognized as bearing the brunt of past, present, and future loss and damage. Their vulnerabilities would be included and centered, and the offenders would take responsibility for their wrongdoing (following McCauley and Heffron, 2018; Uprimny and Saffon, 2005).

The first step in the restorative justice process would be to identify the victims, offenders, and their communities of care. Though some SIDS such as the Seychelles have been vocal in resisting this characterization, in the context of loss and damage claims, the victim here is merely the injured party and would not represent the demonstration of helplessness. Considering the loss and damage experienced by Caribbean SIDS from the extreme weather events during the 2017 North Atlantic hurricane season, injured parties would include Antigua and Barbuda, The Bahamas, and Dominica. Dominica, for example, lost 224% of its 2016 gross domestic product to Category 5 Hurricane Maria (Government of Dominica, 2017). Identifying the offenders

would require detailed attribution studies to link single weather events such as Hurricane Maria to both historical emissions and specific emitters, as previously done with extreme heat waves in South America (e.g. see Hannart et al., 2015). It is easy to imagine that the United States, United Kingdom, and countries in the European Union would be high on the list of offenders. The communities of care would include those public and private organizations contributing to climate action in SIDS and at various scales. An example is the Caribbean Community Climate Change Centre, which coordinates the region’s climate change response. The victims, offenders, and communities of care would be brought together for a restorative dialogue.

The second step would be for the restorative process to be designed. Here, the WIM and its 20-member Executive Committee could play a role by (1) commissioning attribution studies in order to strengthen the scientific bases for action, (2) encouraging participation, (3) determining how to proceed with the process through dialogue, (4) separately engaging the victims, offenders, and their communities of care through the use of independent, trained facilitators, and (5) supporting the adoption of restorative justice norms in the UNFCCC. This role would be in line with its mandate—the WIM was established to enhance knowledge, understanding, and action for loss and damage. It specifically aims to strengthen dialogue, coordination, coherence, and synergies among relevant stakeholders, and increase support for financing, technology transfer, and capacity-building. There is, however, recognition that the WIM cannot provide full redress for SIDS, which are already

experiencing increasingly intense hurricanes and rising sea-levels, compromising lives and livelihoods in these countries. Therefore, designing a restorative process would require an expansion of its current loss and damage framing, from an outsized focus on comprehensive risk management, to liability and compensation.

The third step would be to implement the restorative dialogue, which could take the form of truth and reconciliation conferences, and restitution. As part of the truth and reconciliation conferences, affected individuals and communities in Antigua and Barbuda, The Bahamas, and Dominica would give detailed accounts of the loss and damage experienced during the 2017 North Atlantic Hurricane Season, for example. This would create a forum in which questions can be asked and answered, and in which attention can be rightly focused on the needs of the affected individuals and communities. By nature, truth and reconciliation conferences are less punitive than litigation, and are much more likely to emphasize cooperation and partnerships, which are the hallmarks of multilateralism. Restitution, as part of the restorative dialogue, could take either a monetary or non-monetary form, including capacity-building or technology transfer initiatives. As Antigua and Barbuda and The Bahamas are high-income economies, for example, questions may emerge about their eligibility. A SIDS' national income should, in no way, determine its eligibility to either receive restitution or participate in the dialogue altogether. Due to the scale of loss and damage being experienced, these countries should not be excluded from the restorative dialogue as its purpose is to transcend the allocation of responsibility, and to find effective

measures for addressing climate-related loss and damage in SIDS.

The fourth step would be adopting and integrating restorative justice norms in loss and damage negotiations in the UNFCCC. Restorative justice achieves norm clarification through conversations in the context of specific wrongdoing, as opposed to the traditional criminal justice system that achieves it through the courts. Its normative values of respect, solidarity, and active responsibility position restorative justice as a “bottom-up approach to restoring community” (Braithwaite, 2000, p. 331). This is in line with the general bottom-up approach of the 2015 Paris Agreement, which relies on pledging, and which calls for the inclusion of an expanded set of stakeholders, including corporations and affected communities. Here, the WIM Executive Committee could also provide compliance support (i.e. implementation, enforcement, and dispute settlement). If these attempts fail and the offenders renege on their obligations emerging out of the restorative dialogue, then litigation could become a last resort for SIDS.

Conclusion

Given the disproportionate vulnerability of SIDS, it is important for the international community to find effective measures for addressing climate-related loss and damage in these countries. Several SIDS, including Tuvalu and Vanuatu, have either threatened or attempted to get redress through the courts. These and similar efforts by non-SIDS countries have largely been unsuccessful because of the difficulty in attributing extreme weather events to climate change. This paper, which is partly an abridged version of an earlier article, proposes an alternative to litigation - the

application of restorative justice to resolving loss and damage claims. It argues that liability and compensation are best addressed at the global level and through multilateral processes, and carves out a role for the WIM and its Executive Committee that involves (1) commissioning attribution studies in order to strengthen the scientific bases for action, (2) encouraging participation, (3) determining how to proceed with the process through dialogue, (4) separately engaging the victims, offenders, and their communities of care through the use of independent, trained facilitators, and (5) supporting the adoption of restorative justice norms in the UNFCCC. This approach could provide a viable avenue to build and restore trust in the UNFCCC process.

Endnotes

Benjamin, L., et al. (2018). An ‘Islands’ COP? Loss and damage at COP23. *Review of European, Comparative & International Environmental Law*, 27(3), 332-340. doi:10.1111/reel.12255.

Braithwaite, J. (2000). Restorative Justice. In M. Tonry (Ed.), *The Handbook of Crime and Punishment* (pp. 323–344). Oxford: Oxford University Press.

Centre for Justice and Reconciliation. (2020). About Restorative Justice. Retrieved from <https://bit.ly/3qPQh0Y>.

Edmonds, C., & Noy, I. (2018). The economics of disaster risks and impacts in the Pacific. *Disaster Prevention and Management: An International Journal*, 27(5), 478-494. doi:10.1108/DPM-02-2018-0057.

Gavrielides, T. (2007). *Restorative Justice Theory and Practice: Addressing the Discrepancy*. Monsey, NY: Criminal Justice Press.

Government of Dominica. (2017). *Post-Disaster Needs Assessment Hurricane Maria September 18, 2017: A Report by the Government of the Commonwealth of Dominica*. Rouseau: Government of the Commonwealth of Dominica. <https://bit.ly/33RXfqE>.

Hannart, A., et al. (2015). Causal Influence of Anthropogenic Forcings on the Argentinian Heat Wave of December 2013. *Bulletin of the American Meteorological Society*, 96(12), S41- S45. doi:10.1175/BAMS-D-15-00137.1.

Jaschik, K. (2014). Small States and International Politics: Climate Change, the Maldives and Tuvalu. *International Politics*, 51(2), 272–293. doi:10.1057/ip.2014.5.

McCauley, D., & Heffron, R. (2018). Just Transition: Integrating Climate, Energy and Environmental Justice. *Energy Policy*, 119(C), 1–7. doi:10.1016/j.enpol.2018.04.014.

McNamara, K. E., et al. (2021). Exploring climate-driven non-economic loss and damage in the Pacific Islands. *Current Opinion in Environmental Sustainability*, 50, 1-11. doi:10.1016/j.cosust.2020.07.004.

Mycoo, M., et al. (2022). Small islands. In H. O. Pörtner, et al. (Eds.), *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge: Cambridge University Press.

Robinson, S.-a. (2018). Climate change adaptation in small island developing states: Insights and lessons from a meta-paradigmatic study. *Environmental Science & Policy*, 85, 172- 181. doi:10.1016/j.envsci.2018.03.030.

Schipper, E. L. F. (2006). Conceptual History of Adaptation in the UNFCCC Process. *Review of European Community & International Environmental Law*, 15(1), 82-92. doi:10.1111/j.1467-9388.2006.00501.x.

Sherman, L. W., & Strang, H. (2007). *Restorative Justice: The Evidence*. <https://bit.ly/37hlP8t>.

Uprimny, R., & Saffon, M. P. (2005). Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case. *Dejusticia*, 1–24. <https://bit.ly/3kaVrkm>.

Wewerinke-Singh, M., & Salili, D. H. (2020). Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change. *Climate Policy*, 20(6), 681–692. doi:10.1080/14693062.2019.1623166.