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Article *in* Third World Quarterly - Journal of Emerging Areas · February 2021

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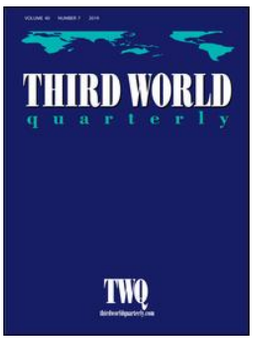

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Third World Quarterly

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/ctwq20

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Stacy-ann Robinson & D'Arcy Carlson

To cite this article: Stacy-ann Robinson & D'Arcy Carlson (2021): A just alternative to litigation: applying restorative justice to climate-related loss and damage, Third World Quarterly

To link to this article: https://doi.org/10.1080/01436597.2021.1877128

Published online: 10 Feb 2021.

THIRD WORLD QUARTERLY
https://doi.org/10.1080/01436597.2021.1877128

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VIEWPOINT

A just alternative to litigation: applying restorative justice to climate-related loss and damage

Stacy-ann Robinson and D'Arcy Carlson

Environmental Studies Program, Colby College, Waterville, ME, USA

ABSTRACT

Climate litigation is increasingly a feature of international climate policy. However, loss and damage cases have mostly been unsuccessful due to tensions around uncertainty, attribution, and the relationship between climate change and extreme weather events. While there is consensus that Annex I Parties to the United Nations Framework Convention on Climate Change (UNFCCC) have contributed more to historical greenhouse gas emissions than non-Annex I Parties have, there is great reluctance on their part to take responsibility for loss and damage. Considering the shortcomings of climate litigation and the impasse in the UNFCCC, we propose an alternative, non-judicial approach to addressing loss and damage – restorative justice. Applying a four-stage framework, we draw on the experience of non-Annex I Parties in the Caribbean with Hurricanes Irma and Maria in 2017 to (1) argue that existing attribution models can help identify restorative justice cases; (2) scope a role for the Warsaw International Mechanism in process design and preparation; (3) make a case for truth and reconciliation conferences, and restitution, as part of the restorative dialogue; and (4) call for the integration of restorative justice norms into global climate governance as a pathway for progressing negotiations.

ARTICLE HISTORY
Received 19 February 2020
Accepted 12 January 2021

KEYWORDS
Burden sharing
compensation
court
government
liability
small island developing states (SIDS)

Introduction

Against the backdrop of weak, non-binding international agreements and insufficient governmental action in many instances, climate litigation is becoming a prominent feature of international climate policy. Referring to the 'rapidly growing body of lawsuits in which climate change and its impact are either a contributing or key consideration in legal argumentation and adjudication' (Ganguly, Setzer, and Heyvaert 2018, 843), there has been a significant increase in both climate litigation cases and literature (Beauregard et al. 2021). These cases, including constitutional, public law and civil cases, have been utilised in a range of ways, and landmark cases such as *Urgenda v. The Netherlands*, *Juliana v. United States (US)* and *Demanda v. Minambiente* have had successes in holding governments and corporations accountable, securing human rights and driving broad-scale climate action at local and national levels (Beauregard et al. 2021). Despite this, there remains contention around the

CONTACT Stacy-ann Robinson stacy-ann.robinson@colby.edu

effectiveness of climate litigation with respect to loss and damage cases, particularly in compensating claimants for actual and/or potential climate change and its effects.

Within the context of the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, loss and damage informally refers to 'the actual and potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems' (UNFCCC 2012, 4). Loss occurs when it is not possible to repair or restore negative climate impacts; damage occurs when it is possible (Huq, Roberts, and Fenton 2013). Loss and damage cases in the courts have generally been unsuccessful, for a number of reasons (Doelle and Seck 2020). First, it is difficult to differentiate between loss and damage caused by anthropogenic climate change and existing harm that is potentially enhanced but not solely caused by climate change (Doelle and Seck 2020). Second, while observed loss and damage can be easily attributed to rapid-onset weather events such as hurricanes, extending that attribution to climate change, and holding governments and corporations accountable for the impacts, is challenging. Third, there are questions around who has sufficient cause to 'stand' before the court and advocate (ie legal standing) – claimants have to prove their climate change-related injury, that their harms can be remedied and that the wrongs committed by the defendants are actionable (Doelle and Seck 2020). Fourth, only some loss and damage harm can be sufficiently resolved financially, and there have been few examples of alternative remedies (Doelle and Seck 2020). As a result, there have been mixed rates of success at the domestic level and even less success at the international level (Pekkarinen, Toussaint, and van Asselt 2019). Thus, in light of these complexities, climate litigation in the context of loss and damage may be more of a symbolic action, especially for vulnerable countries (Pekkarinen, Toussaint, and van Asselt 2019), including small island developing states (SIDS).

There are limits to the judicial authority of courts (ie justiciability), which signal the need for an alternative paradigm where it concerns loss and damage cases. While the compensation that loss and damage litigation pursues can address a wide range of climate-induced effects, including relocation, resilience costs and emergency finances (Wewerinke-Singh and Salili 2020), many climate litigation cases have been dismissed or denied (Beauregard et al. 2021). Attempts by climate-vulnerable SIDS to utilise litigation to secure compensation for loss and damage, in particular, either have not progressed or have been unsuccessful. In 2002, Tuvalu announced its intention to bring the US and Australia, two major greenhouse gas (GHG) emitters, before the International Court of Justice for failing to address climate change and not ratifying the Kyoto Protocol under the UNFCCC (Jaschik 2014). The case was later dropped due to a change in government and national priorities (Wewerinke-Singh and Salili 2020). A few years later, in 2005, Micronesia threatened legal action against the Czech Republic for its plans to expand its coal-fired power plant that would emit 40 times more carbon than Micronesia per year (Kahn 2010). They argued that the plant would fail to minimise adverse effects such as defying thermal efficiency and the best available technology required under European Union (EU) law (Lopes 2010). The case resulted in a review of the original environmental impact assessment of the power plant (Rousek 2010). However, the plant was ultimately built. In 2018, Vanuatu threatened legal action against fossil fuel companies, governments and financial institutions that contribute significantly to GHG emissions, and therefore, to climate change (Wewerinke-Singh and Salili 2020). The case, which is yet to be filed, would seek to address loss and damage by sharing the burden of finance and action with these groups who have most benefitted from climate change. For SIDS with

documented capacity constraints (Robinson 2018b, 2020), 'legal action is not an ideal strategy to address loss and damage', and with the potential risks that come with such legal action, it no better addresses loss and damage than a comprehensive international agreement would (Wewerinke-Singh and Salili 2020, 688).

Theory and practice of restorative justice

In view of the limitations of climate litigation, we propose an alternative, non-judicial approach: restorative justice. While action through the courts can pursue several types of justice, eg procedural, recognition, neoliberal, distributive, compensatory and corrective (see Khan et al. 2020), restorative justice is an alternative to conventional justice systems, which are inadequate (Van Ness and Heetderks Strong 2010), fail to address society's interconnectedness (Sherman and Strang 2007) and are ignorant of victims' needs (Gavrielides 2007). Used both within and outside the criminal justice system, restorative justice is widely understood as 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future' (cited in Gavrielides 2007, 44). It responds to a plurality of meanings, theories and cultural processes (Ashworth 2002). Broadly, though, there is agreement that restorative justice shifts the focus from just the offender and their crime, to an inclusion of the victim and their vulnerabilities (McCauley and Heffron 2018). In this approach, victims are active and offenders take responsibility for their wrongs (Uprimny and Saffon 2005).

The principles of restorative justice vary in the literature (Gavrielides 2007). The Restorative Justice Consortium (2005) identifies several: empowerment, honesty, respect, engagement, voluntarism, healing, restoration, personal accountability, inclusiveness, collaboration and problem-solving. Moralising, healing, empowering and transforming are other principles noted in the literature (see Gavrielides 2007). Normative values have been suggested as alternatives to these broad principles: peaceful social life, respect, solidarity and active responsibility (Van Ness and Heetderks Strong 2010). A peaceful social life centres on restoring and maintaining the peace, security and well-being of communities, supported by resolution, and the protection of their physical and psychological needs (Van Ness and Heetderks Strong 2010). The victims are respected and inflicted wrongs are addressed (Ashworth 2002). Solidarity expands the support and interconnectedness of those involved. Three factors build solidarity: encounter (parties are able but not required to participate); assistance (supported reintegration into communities after the wrong); and moral education, in which 'community standards are reinforced as values and norms' (Van Ness and Heetderks Strong 2010, 49). Active responsibility centres on accountability, repairing harms and restoring relationships, among which collaboration among parties and the making of reparations by offenders are fundamental (Van Ness and Heetderks Strong 2010). Together, these normative values position restorative justice as a 'bottom-up approach to restoring community' (Braithwaite 2000, 331).

There are several typologies of restorative justice and, in practice, this results in several programmatic possibilities. Fully restorative programmes involve three primary stakeholders – victims, offenders and their communities of care – working towards decisions to take responsibility and make amends (McCold and Wachtel 2003). Group conferences and peace circles are two examples (Gavrielides 2007; McCold and Wachtel 2003). Mostly restorative programmes involve two primary stakeholders but exclude their communities of care (McCold

and Wachtel 2003). Two examples are victim–offender mediation and restitution (Daicoff 2015; McCold and Wachtel 2003). Partly restorative programmes involve one primary stakeholder (McCold and Wachtel 2003). Community service and victim compensation funds are two examples. Overall, fully, mostly or partly restorative programmes specifically support the victims or offenders in restoring their lives after the wrong has been committed.

There have been many instances where restorative justice has been applied outside the criminal justice system (Daicoff 2015; Gavrielides 2007). The Canterbury Regional Council in New Zealand, for example, has had four 'environmental restorative justice' cases (Jenkins 2018). City and district councils, discharging harmful substances into waterways, were the offenders in two cases while the community and environment were the victims (Jenkins 2018). One case established that 'funds that would have been spent on [the] legal process were [to be] invested in environmental mitigation and restoration' (Jenkins 2018, 3). In both cases, the impacts were mitigated and the public's interests addressed (Jenkins 2018). The other two cases were commercial. In one case, it was determined that a dairy farm owner harmed the local community by contaminating the groundwater with farm sewage. In the other case, a company victimised the local community through contamination from relining culverts. In both cases, the offenders took responsibility and updated their environmental plans (Jenkins 2018). These four Canterbury cases demonstrate that restorative justice can redress environmental harms, and support the environment, the community and their relationships.

Applying restorative justice to climate change and climate-related loss and damage

McCauley and Heffron (2018) suggest that restorative justice can also be applied to redress negative climate impacts on individuals, communities and the environment, including past, present and future loss and damage. Climate change violates basic human rights, including the right to be free of harm (Schlosberg and Collins 2014), and many countries have come to recognise the right to enjoyment of healthy environments as constitutional or statutory rights (Bruch 2019). However, the current global climate regime inadequately supports climate justice (Khan et al. 2020; McCauley and Heffron 2018) – climate justice considerations are relegated to the non-binding portions of the 2015 Paris Agreement, for example, with only a note in the preamble of their 'importance for some' (cited in Beauregard et al. 2021, 2). Restorative justice, with its focus on the protection of the most vulnerable from further harm (Bruch 2019), can help fill this gap in the governance architecture. Its 'web of relationships' approach requires the involvement of all stakeholders, including those who are often otherwise excluded (Motupalli 2018, 351). It considers potential violations against stakeholders and ensures that the 'true cost' of decisions is understood (Heffron and McCauley 2017).

To illustrate how restorative justice can be applied to climate-related loss and damage, we use a four-stage framework developed by Schormair and Gerlach (2020) for restorative remediation of corporate human rights abuses (see Figure 1). In Stage 1 (discovery), key questions to be addressed include: Who are the victims? Who are the offenders? In Stage 2 (process design and preparation), important questions include: Are the victims and offenders willing to participate in the process? Do the victims and offenders have sufficient support to participate in the process? In Stage 3 (restorative dialogue), the critical question is: What repairs can be made? In Stage 4 ([re]integration), a vital question is: How can changes made

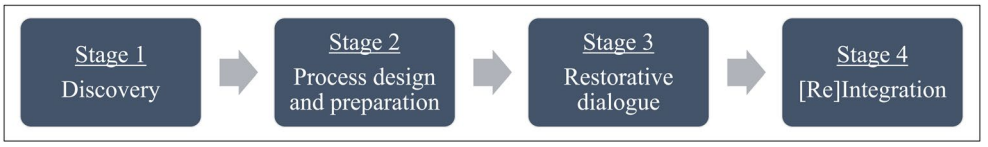

Figure 1. A restorative justice framework.
(Source: Authors, modified from Schormair and Gerlach 2020, 483–484).

be sustained? We answer these questions in the context of the theory and practice of restorative justice described above. By drawing on the experience of non-Annex I Parties in the Caribbean with hurricanes Irma and Maria in 2017, we (1) argue that existing attribution models can help identify restorative justice cases; (2) scope a role for the UNFCCC's Warsaw International Mechanism (WIM) in process design and preparation; (3) make a case for truth and reconciliation conferences, and restitution as part of the restorative dialogue; and (4) call for the integration of restorative justice norms into global climate governance as a pathway for progressing climate negotiations.

Stage 1 (discovery): identifying primary stakeholders – victims, offenders and communities of care

Who are the victims? In this case, the victims are Caribbean SIDS that are non-Annex I Parties to the UNFCCC. The 2017 North Atlantic Hurricane Season is the costliest on record. The Season's 18 tropical depressions, 17 storms and 10 hurricanes resulted in over US$300 billion in loss and damage across the Caribbean and the US, with at least 3000 fatalities (NOAA 2020). Over the past 15 years, the five costliest earth system hazards affecting the US have been hurricanes, three of which occurred in the 2017 Season – Harvey, Irma and Maria (NOAA 2020). While there was significant loss and damage in the US, two key factors differentiate the Caribbean experience – physical and human geography (eg small land area; low-lying, dense coastal populations), and the role of colonial history in shaping vulnerability (high exposure, high sensitivity and low adaptive capacity) (see Robinson 2018a). A prime example of this difference is Puerto Rico. Despite being a US territory, the impacts of Hurricane Maria were experienced differently there than in mainland areas (Bonilla 2020). But as Puerto Rico is not a non-Annex I Party to the UNFCCC, we use the example of Dominica to illustrate the extent of economic and non-economic loss and damage during the 2017 Season, and to justify it and other Caribbean SIDS being considered victims in the context of a restorative justice framework.

Hurricane Maria made landfall in Dominica at near-peak intensity, making it the first Category 5 hurricane to hit the island, affecting 66,926 residents (93% of the population), and resulting in 30 deaths (Government of Dominica 2017). Roads, bridges, and public utility systems were destroyed, bringing economic activity to a halt. There was a 100% agricultural crop loss and significant loss of trees and livestock. Tourism, another key sector, also sustained substantial losses – the rainforests, the main tourist attraction, were destroyed (Government of Dominica 2017). Approximately 3.1 million work days were lost, which likely led to the 25% decline in consumption, the increased poverty rate of 36.2% (up from 28.9% in 2009), and increased income inequality (Government of Dominica 2017). The Government's

post-disaster needs assessment estimated loss at US$380.2 million, damage at US$930.9 million and recovery needs at US$1.37 billion (Government of Dominica 2017). The combined value of the disruption was 226% of the country's gross domestic product (GDP) (Government of Dominica 2017).

Who are the offenders? They are Annex I Parties to the UNFCCC and others. There is consensus that Annex I Parties to the UNFCCC, such as the US and the EU Member States, along with corporations have contributed more to historical GHG emissions than non-Annex I Parties, particularly SIDS (see Althor, Watson, and Fuller 2016). Recent attribution studies are strengthening the body of evidence quantifying the impact of human-induced climate change on weather observations and accumulations. Hannart et al. (2015) modelled the 2013 heat wave in Argentina and attributed a 400% increase in the risk of warming to historical GHG emissions. A follow-up study (Otto et al. 2017) attributed a 28–31% increase in risk to emissions from the US, and a 31–37% increase in risk to emissions from the EU. These and similar advances in climate attribution can, therefore, be used to identify offenders through testing the influence of historical global warming on single weather events, and linking emissions to specific emitters from whom redress can be sought and claims for compensation honoured.

Who constitutes the communities of care? These are public and private organisations at sub-national, national, regional and international levels, particularly those in the global climate change governance architecture. At the regional level, for example, they include the Caribbean Community Climate Change Centre, which has had documented successes with climate adaptation-related process inputs and outputs such as research and stakeholder engagement (Robinson and Gilfillan 2017). At the international level, they include the Conference of Parties (COP) to the UNFCCC (ie all Parties) and the WIM, which was established at COP19 in 2013 'to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change' (UNFCCC 2014, 6).

Stage 2 (process design and preparation): scoping a role for the WIM

Are the victims and offenders willing to participate in the process? On the one hand, the victims will likely be willing to participate if there is a prospect of resolution. SIDS, especially those in the Caribbean, 'have not had the opportunity to pursue, in earnest, a just, legal remedy' for climate change (Burkett 2015, 435). Pacific SIDS such as Tuvalu, Micronesia and Vanuatu have led the way in pursuing redress for climate impacts, though their attempts have largely been unsuccessful to date. On the other hand, the offenders may not be willing. There has been great reluctance on the part of Annex I countries to take responsibility for loss and damage (Huq, Roberts, and Fenton 2013). Taking responsibility implies liability, which further implies compensation. This removes the basis for responsibility allocation and perhaps the basis for involvement in a restorative process. Additionally, efforts to legally connect loss and damage with liability and compensation in the Paris Agreement have so far failed. Paragraph 51 of Decision 1/CP. 21, relating to the adoption of the Agreement, in effect, severs the connection between the two by establishing that Article 8 does not imply any form of legal redress or financial reparations (UNFCCC 2016). As a result, despite the significant past and future loss and damage resulting from climate-induced or climate-amplified weather events, no comprehensive international framework exists. Considering this

and the respective positions of the victims and offenders, there is a need for trust building, which we believe can be achieved through facilitated restorative dialogue.

Do the victims and offenders have sufficient support to participate in the process? Yes, they do, through the WIM, which was created to promote the 'implementation of approaches to address loss and damage' (UNFCCC 2020). The WIM acts as an overarching mechanism for the global climate regime under the UNFCCC and the Paris Agreement, and is crucial for ensuring human rights (Toussaint and Martínez Blanco 2020). Engaging the WIM in this way would be a strategic move. First, the WIM resulted from the involvement of those vulnerable, developing countries, particularly Members of the Alliance of Small Island States (Calliari 2018). Its establishment marked a shift in the framing of loss and damage as being 'beyond adaptation', as opposed to being 'part of adaptation', a move that is supported by non-Annex I Parties (Vanhala and Hestbaek 2016). Its involvement in process design and preparation (as well as supporting the victims and offenders) would, therefore, directly align with its founding objectives and build on its track record of inclusive stakeholder engagement.

The WIM's involvement would be guided by either its Executive Committee (ExCom) or a specially created task force, and should form part of its work plan. The ExCom is made up of 20 member states – 10 from Annex I Parties and 10 from non-Annex I Parties, including one SIDS member. Its strategic work streams focus on slow-onset events, non-economic losses, risk management approaches, human mobility, and action and support to address climate-induced loss and damage (UNFCCC 2017). In designing the process, the WIM would determine how to proceed through dialogue and engagement with the victims and offenders and their communities of care (each separately) using independent, trained facilitators (following Schormair and Gerlach 2020). The optimal outcome would be an agreement on the key facts of the grievance, as well as on the appropriate way forward (following Schormair and Gerlach 2020). In preparing for the process, the WIM would create preconditions for the restorative dialogue (following Schormair and Gerlach 2020). Here, a nondirective style of facilitation will be required. The optimal outcome would be an agreement on the specific terms and conditions of entering into a restorative dialogue (following Schormair and Gerlach 2020).

Stage 3 (restorative dialogue): pursuing truth and reconciliation conferences, and restitution

What repairs can be made? Such repairs can encompass truth and reconciliation conferences, and restitution as part of a process that is complementary to the UNFCCC negotiations. Truth and reconciliation conferences, connoted by facilitated restorative dialogue, are less punitive than litigation. They are more likely to emphasise partnerships and cooperation on liability and compensation. In the past, there have been concerns that their time-consuming nature will likely shift focus away from reaching agreements on ambitious and equitable climate targets. However, the establishment of truth and reconciliation conferences will create the opportunity for SIDS to directly address and receive financial and technical compensation from those with historical responsibility for modern-day extreme weather events. The offenders would give their account of the circumstances, and the victims their account of how they were affected, including through photographs and videos. Other stakeholders, for example from the communities of care, would also be able to share their experiences, and all parties involved would have the chance to ask questions (following

Schormair and Gerlach 2020). The focus should, however, be on the victims' needs, which should be met following a demonstration of remorse on the part of the offenders (following Schormair and Gerlach 2020). This should go beyond a mere apology and feature, for example, invitations to the victims to identify requests, along with consideration of opportunities for post-conference learning.

Restitution as part of the restorative dialogue should take a monetary form but could also be non-monetary – for example, technology transfer or capacity-building. We argue that ability-to-pay principles should apply – holding countries that are better able to contribute to solutions accountable. This focuses action on finding effective measures to address loss and damage, as opposed to merely allocating responsibility. We also argue that monetary restitution should be paid to all Caribbean victims, regardless of their gross national income (GNI). A prime example here is Antigua and Barbuda, another non-Annex I Party in the region. With a 2016 per capita GNI of US$13,560, the country is classified as a high-income economy (World Bank 2018). As a result, it finds itself in a peculiar position of losing its eligibility for many concessional financing streams, including official development assistance. Following Hurricane Irma, the country received a payout of just US$6.8 million from the Caribbean Catastrophe Risk Insurance Facility (now called the CCRIF SPC) (CCRIF SPC 2017), despite requiring US$222.2 million for recovery efforts (Government of Antigua and Barbuda 2017). Eligibility for post-disaster assistance (or loss and damage-related compensation) based on per capita GNI is not an appropriate benchmark for postcolonial countries because it does not consider their historical context, vulnerability, exposure or sensitivity, or the added economic strain of responding to and recovering from extreme weather events associated with climate change. It also does not correct the injustice inherent in countries such as Antigua and Barbuda that have reached a certain level of development – despite colonialism – having to take on commercial debt to tackle the impacts of human-induced climate change to which they made a negligible contribution.

Stage 4 ([re]integration): adopting restorative justice norms in global loss and damage negotiations

How can changes made be sustained? First, changes can be sustained by adopting restorative justice norms at the global level. To achieve this, it will be important to clarify what the norms are. On the one hand, the criminal justice system achieves norm clarification through law enforcement and the courts. On the other hand, restorative justice achieves it through a reliance on conversations about the norms in the context of specific wrongdoing. Normative values such as a peaceful social life, respect, solidarity and active responsibility would, therefore, need to serve as alternatives to broad restorative justice principles (Van Ness and Heetderks Strong 2010). This would help position restorative justice as a 'bottom-up approach to restoring community' (Braithwaite 2000, 331). Second, reaching written and binding victim–offender agreements will help foster the integration of restorative justice norms into global loss and damage negotiations (following Schormair and Gerlach 2020). These would outline the measures to which the parties have agreed, such as restitution. Here, the WIM ExCom could provide support in terms of enforcement and compliance. And, if the offenders do not meet their contractual obligations, then litigation could become an option for the victims, but only as a last resort.

Conclusion

Burkett (2015, 435) acknowledges that there is a 'justice paradox' wherein 'the current international legal regime forecloses any reasonable attempts at a just remedy for the victims of climate change who are the most vulnerable and the least responsible'. Some SIDS, particularly those in the Pacific, have threatened and/or pursued litigation as an avenue for delivering climate justice. They have, however, largely been unsuccessful because the process and outcome of climate litigation are driven by a variety of factors, including the legal standing of claimants and justiciability. As a result of these and other factors, contention remains around whether litigation is an appropriate tool for influencing decision-making.

This paper presented a unique viewpoint: restorative justice is a just alternative to climate litigation, especially with respect to loss and damage in SIDS. There are important distinctions between the traditional criminal justice system, in which climate litigation would reside, and restorative justice. On the one hand, the traditional criminal justice system defines and seeks to protect individuals' rights and responsibilities through formal, adversarial processes (Centre for Justice & Reconciliation 2020). It seeks fairness through procedural protections, and gives a great deal of discretion to law enforcement, including judges, to decide how cases should be handled (Centre for Justice & Reconciliation 2020). On the other hand, restorative justice places a high value on the satisfaction of the parties that justice was delivered, and also seeks to be guided by the interests and desires of the parties (Centre for Justice & Reconciliation 2020). Its application in the criminal justice system has shown that, among other things, it reduces repeat offending for some offenders, doubles the offences brought to justice and helps reduce the costs of the process (Restorative Justice Consortium 2005). The four 'environmental restorative justice' cases in Canterbury, New Zealand, described earlier, demonstrate that it can be used to redress environmental (and climate-related) harms as well as to support the environment, the community and their relationships.

Building support for the integration of restorative justice norms at the international level will be crucial. SIDS can advocate through the Alliance of Small Island States in the UNFCCC, banding together on the basis of their shared identity and shared experience with loss and damage during the 2017 North Atlantic Hurricane Season. Of note is that Antigua and Barbuda, which experienced some of the worst damage across the region, will next assume the Chair of the Alliance. Also, the Talanoa Dialogue provides good proof of concept for the restorative dialogue. At COP21 in Paris, a decision was taken to convene a Facilitative Dialogue to take stock of the collective efforts of Parties in the implementation of the Paris Agreement. Later renamed the Talanoa Dialogue, after a Fijian term for an inclusive dialogue based on a process of story sharing, empathy building and pooling of ideas, the first Talanoa coincided with the 2018 UNFCCC Bonn intersessional, but with a different objective and mixed success.

Acknowledgements

The authors thank Bennett Walkes for research assistance, as well as several colleagues who provided helpful comments on earlier versions of the article.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Notes on contributors

Stacy-ann Robinson is an Assistant Professor of environmental studies at Colby College in the United States. Her scholarship investigates the human, social and policy dimensions of climate change adaptation in small island developing states, with a special focus on adaptation finance, an area in which she is a certified expert. She is a contributing author to Chapter 15 (Small Islands) of Working Group II's contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, due to be published in 2021.

D'Arcy Carlson is an environmental science major at Colby College. Her multidisciplinary coursework and research on climate change and marine sciences have driven her interest in global climate policy. Outside of Colby, she has interned with the Baltimore National Aquarium and Six Senses Maldives.

ORCID

Stacy-ann Robinson http://orcid.org/0000-0003-3163-8771

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