Loss, Damage and the Quest for Climate Reparations Beyond COP27

By:

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In the climate regime, 'loss and damage' (with lowercase letters) can be defined as "actual and/or potential manifestation of impacts associated with [anthropogenic] climate change in developing countries that negatively affect human and natural systems" (para. 2). Countries have increasingly sought for greater acknowledgement for loss and damage in their pursuit of climate justice and have particularly sought compensation for the harm caused by greenhouse gas emissions over the last two centuries - also referred to as 'climate reparations'.

Approaches to loss and damage have thus far mainly consisted of enhancing knowledge and strengthening dialogue. However, the term 'damage' refers to "negative impacts in relation to which reparation or restoration is possible" (para. 2), thereby laying the groundwork for either civil liability (of private entities) or State liability (i.e., state responsibility). State responsibility has been the focus of debates, and while satisfaction may be a viable avenue in the climate context, compensation - an obligation for that which cannot be "made

good by restitution" (Article 36 ARSIWA) - is the most commonly sought form of reparation in international practice (p. 99).

While COP27 was marked by the establishment of a Loss and Damage Fund in the Sharm El-Sheikh Implementation Plan (para. 24), resistance from the Global North over climate reparations lingers, stemming from their fear to be framed as limitlessly liable and potentially pay trillions of dollars. Certain countries such as Scotland, Germany and Belgium have pledged to contribute to the new Fund. However, the failure of the 2010 Green Climate Fund - where industrialized countries would finance less developed countries' climate mitigation efforts - to meet its target of $100 billion a year by 2020 casts doubt over whether the Loss and Damage Fund will be any different. It reinforces mistrust felt by the Global South.

This piece contextualizes the quest for climate reparations in light of recent events to argue that it is likely to keep gaining momentum. Indeed, the absence of any pledge to phase out/down fossil fuels in the Sharm El-Sheikh Implementation Plan indicates that the historical quest for climate reparations through loss and damage (1) is far from achieved. Other reasons for the interest in climate reparations include the increasing phenomenon of climate litigation (2) and drawn connections between colonialism and climate (3). This piece discusses these developments in turn.

Background: The quest for climate reparations

In 1991, the then-newly formed Alliance of Small Island States (AOSIS) proposed the establishment of an international insurance pool based on the polluter pays principle, "to compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage resulting from sea level rise" (emphasis added). It also wanted the UNFCCC to mention that it is "without prejudice to (...) rules governing international liability for damage to people, property and the environment" (p. 22). Such proposals were rejected, but the intention to "give full consideration (...) to actions related to funding [and] insurance" to meet the needs of developing countries was retained in Article 4.8 UNFCCC, also echoed in Article 3.14 of the Kyoto Protocol (1997). AOSIS still attempted to connect loss and damage with compensation in COP14 (2008) where it proposed the establishment of a 'Multi-Window Mechanism to

address loss and damage' (p. 13), in which insurance and compensation were separated: the insurance component would help manage financial risk, while the compensation component would "address the progressive negative impacts of climate change (...) which result in loss and damage." This was not reflected in the outcome decision, nor in the breakthrough Warsaw International Mechanism for Loss and Damage (WIM) established in 2013.

In Paris at COP21, the US's ratification hinged in part on the absence of any reference to "liability and compensation" (first spotted in Principle 13 of the 1992 Rio Declaration), with other developed nations being adverse to it as well. Article 8 of the Paris Agreement therefore acknowledges loss and damage and the Warsaw mechanism as a means of "enhancing understanding, action and support (...) on a cooperative and facilitative basis", with an annexed Decision 1/CP.21 "agree[ing] that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation" (para. 51).

Courts and climate change

Still, decision 1/CP.21 para. 51 does not legally exclude climate litigation in pursuit of compensation for loss and damage, insofar as it is a COP decision, generally considered by scholars (here, here and here) to not constitute binding rules under international law. Further, while Article 8 may not "provide a basis for" liability and compensation, other clauses of the Paris Agreement may do so, as well as other treaties with a connection to climate obligations, or customary international law. What is critical is for such cases to request for compensation for a breach of climate obligations by industrialized nations. While no climate case in international law so far has demanded compensation, it cannot be ruled out given the ever-growing practice.

This may be particularly difficult to achieve in inter-state cases before the ICJ for example - due to foundational obstacles such as consent to jurisdiction or the Monetary Gold principle. Possibly for this reason, Vanuatu - a staunch proponent of loss and damage - has circulated a draft resolution in the UN General Assembly to request an ICJ advisory opinion on climate change instead, and a similar request to ITLOS. The questions posed to both courts could nonetheless illuminate the responsibilities of industrialized nations, which could be quoted in further litigation and cases on domestic/regional levels.

Compensation could possibly be more achievable in the human rights realm, where judicial and quasi-judicial bodies have arguably shown more flexibility in climate cases. For example, they have confirmed the existence of collective responsibility (Sacchi, para. 10.8) and have identified - through climate science - the causal link between greenhouse gas emissions of the defendant state, and impacts on the applicant/plaintiff (Sacchi, para. 10.14; Torres Strait Islanders, para. 7.10). Most importantly, they have established that states have extraterritorial climate obligations (Sacchi, para. 10.9). Such a finding expands the breadth of the public able to litigate on the international stage to defend their interests. Communities in a developing country could, in theory, sue an industrialized nation for its carbon emissions and claim reparations.

Colonialism and climate

Another development reinforcing the pursuit of climate reparations is the recent connection drawn in policy reports identifying colonialism as a root cause of inequality accentuating the climate crisis. In its 2022 report, the Intergovernmental Panel on Climate Change (IPCC) listed “historical and ongoing patterns of inequity such as colonialism” as an explanation for the substantial differences in vulnerability of ecosystems and people to climate change among and within regions (p. 12, 53, 594, 659). On 25 October 2022, the newly-appointed UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance published a report explaining the connection between the climate crisis and “the historic and contemporary racial legacies of colonialism and slavery”.

Such perspectives reinforce the notion of ‘loss and damage’ and its desire to shed light on historical injustice, thereby building a greater case for climate reparations. This will be amplified by this wider political struggle for colonial reparations, where former colonies have increasingly demanded compensation from Western nations (the latest success story being New Zealand). To this end, the CARICOM (Caribbean Community) famously adopted a Ten-Point Plan for Reparatory Justice in 2014.

The way forward

While the preamble of the 2021 Glasgow Climate Pact merely notes “the importance for some of the concept of climate justice when taking action to

address climate change" (emphasis added), COP27 may have indicated that more than some consider it to be a critical component to address climate change. With the establishment of the WIM at COP16, it was acknowledged that loss and damage "in some cases involves more than that which can be reduced by adaptation". This has positioned 'loss and damage' as a strand separate from mitigation and adaptation, thereby drawing more attention to concerns of vulnerable countries and communities in the multilateral climate regime.

Of course, addressing loss and damage can involve a number of approaches, including the creation of dedicated funds, and certainly does not have to imply adversarial proceedings. After all, the pursuit of climate reparations raises delicate questions. Is it practically feasible? How do we account for historical emissions? Regardless, COP27's failure to phase out fossil fuels combined with increasing climate disasters makes it likely that the discourse on climate reparations will keep gaining momentum. The judicial avenue of courts being fraught with certain obstacles, the best way forward might be to at least couple this approach with amplifying political pressure in the multilateral setting. Placing loss and damage at the forefront of COP27 was one way to do this, setting the tone for COPs to come.

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