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# Why Explore “Transitional Justice” in the Climate Context?

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Climate  
Strategies

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**Climate Strategies** convenes networks of senior climate policy researchers to produce innovative, cross cutting and policy relevant analysis, aimed at opening new perspectives.

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The Paris Agreement was a remarkable achievement. However, the rapid emission reductions needed remain an immense challenge, while climate impacts are already posing increasing demands on vulnerable communities and countries.

Justice disputes have always been central to the climate context and profound disagreements remain about how responsibility for accumulated emissions should factor into future obligations. The Paris Agreement did not solve these justice tensions - it bypassed them. However, these tensions have the potential to intensify as the full scope of the mitigation and climate impact challenges becomes apparent. Can the depth of collective action and solidarity needed to achieve the objective of the Convention be realised if these justice tensions are left unaddressed? History suggests that if fundamental justice issues remain unresolved, the existing “settlement” can potentially unravel over time.

Climate change negotiations are unique in many ways. But this is not the first time humans have had to navigate complex historically rooted tensions about the ideal relationship between responsibility for past and future action. The Climate Strategies project on “Evaluating peace and reconciliation to address historical responsibility within international climate negotiations” explored what the climate context could learn from other attempts to manage backwards oriented justice debates in the context of building solidarity.

“Transitional justice” refers to theory and practice aimed at enabling purposeful transitions from periods of injustice and into more peaceful regimes. One recent estimate counts over 1500 individual transitional justice mechanisms used in over 60 countries (Olsen, Payne, and Reiter 2010). However, this vast experience has never systematically been examined to see what, if any, lessons could be applied to the climate context.

This project identified five primary similarities between the international climate and traditional transitional justice contexts:

- 1 Simultaneous backwards and forward oriented claims:** A central tension in both climate and transitional justice contexts is the need to both acknowledge historically rooted injustice, while also laying the ground-work for a future-oriented regime. Achieving a forward-oriented mutually beneficial arrangement may require meaningful engagement with the past.
- 2 Unavoidable interdependences:** Many transitional peace processes emerge when interdependent parties – usually because of shared geography – decide that the costs of continued conflict are too high. Interdependencies within the climate context are not bound within country boundaries but extend across them. Failed climate policy will result in losses for all countries, although distributional differences will continue. No country can address climate change alone. And sufficient emission reduction efforts will necessarily involve efforts from more actors than ever, including developing countries.
- 3 Limited judicial capabilities:** While efforts to use domestic and international legal systems continue, these institutions do not perfectly fit the contours of either the climate or transitional justice challenge. “Victims” and “perpetrators” are not always easy to identify and are connected through complex causal and systemic structures.
- 4 Managing economic and profound loss:** Climate impacts and possible limits to development stemming from previously consumed atmospheric space engender both economic and profound losses such as loss of life, place, and culture. Transitional justice processes have similarly had to recognise a range of harms, including systemic economic disadvantage, human rights abuses, and loss of life, culture and identity.
- 5 Power imbalances and political processes:** Both the climate and transitional justice processes are embedded in contentious politics often characterised by power imbalances. A benefit of using transitional justice experiences as a source of insight is that it is politically attuned to the realities of negotiating justice claims in an uneven playing field.

## Key Lessons:

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Several overarching lessons about facilitating forward movement within mutually interdependent but conflict-ridden situations have emerged through this project:

- Efforts to **acknowledge responsibility** emerge as essential in order to allow societies to rebuild trust in the underlying system and move forward. Addressing responsibility is about creating legitimacy and buy-in for a future-oriented regime as well as looking backwards.
- Actors with historical responsibility are unlikely to cooperate without some **protection from retribution**. Simultaneously, if justice concerns are entirely excluded to the benefit of powerful actors, agreements can disintegrate over time. Successful resolutions have balanced backwards- and forwards-oriented measures.

- There is **no standard transitional justice approach**. Practitioners must tailor the strategy to each particular context. This has resulted in a wealth of different experiences to draw on.
- Multiple **mechanisms are needed from the transitional justice “tool-box”**. Combining mechanisms can help generate movement across negotiating Parties locked into stalemates and address the range of concerns and fears involved in difficult transitions.

Movement from conflict to solidarity does not happen automatically or by ignoring past justice claims. The international climate regime cannot afford to ignore lessons about how to build solidarity, repair damaged relationships, and build trust and cooperation. Focussing on either only the past or only the future is unlikely to be a winning strategy. Of the mechanisms examined through the project those considered most immediately relevant in the climate context included discussions of liability and amnesty; reparations and truth commissions. These are discussed in the accompanying briefs.

The Climate Strategies project “Evaluating peace and reconciliation to address historical responsibility within international climate negotiations” took place in 2015-16. It was led by Climate Strategies member Sonja Klinsky, an Assistant Professor at the School of Sustainability of Arizona State University.

As part of the project, Climate Strategies held three international expert workshops to explore how transitional justice experiences could inform efforts to navigate the political territory between complex, historically rooted justice claims and a future that demands solidarity and collective action. The briefs in this series provide an overview of key outcomes from this project.

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# **Managing Legal Liability: Prosecutions and Amnesties**

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There are three broad categories of attempts to manage past harms in transitional justice contexts: truth commissions, prosecutions, and amnesties<sup>1</sup>. Unlike truth commissions, both prosecutions and amnesties explicitly use the legal system to either ‘punish’ or ‘forgive’ infractions. When applied to the climate context, lessons from transitional justice suggest that although litigation could be part of a broader political strategy aimed at generating pressure on powerful actors, it alone is unlikely to be a sufficient means for addressing past actions. Similarly, although amnesties are politically appealing – and to some extent already in use in the climate context – they can erode regime legitimacy and effectiveness if not matched with substantial forms of reparations or forward-oriented supports.

## Litigation and Prosecutions

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In both the transitional justice and the climate context, the complex and systemic nature of the harms pushes the limits of domestic and international law. Understanding how, when and why transitional justice processes have included prosecutions (or not) is useful for the climate context. Although there is an obvious difference between the prosecution of individuals for human rights abuses and the litigation used for climate harms, we are in both cases considering the strategy of relying on legal punishment to resolve calls for justice generally.

Prosecutions are commonly used to punish individuals responsible for committing or facilitating past harms. Obstacles to this approach include the cost of extensive and lengthy trials, the limited capacity of domestic legal systems and suspicion of international courts, inaccessibility to those most affected by past harms, and the perceived ‘injusticiability’ and complex nature of indirect or systemic injustices and harms, such as socioeconomic rights abuses.

Because of these limitations – all of which resonate with the climate context – prosecutions are carefully targeted, usually focusing on a few high-profile cases. Prosecutions are also leveraged by pairing them with other mechanisms such as amnesties, reparations, truth commissions and institutional change in order to create a balance between repairing the past and addressing the future.

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<sup>1</sup> Some regimes have also used processes like lustration in which prominent individuals are removed from powerful situations. This was common in the transitions to democracy in Central and Eastern Europe.

Existing legal systems similarly cannot handle the majority of climate harms due to mis-matches between their capacity, the nature of harms, and jurisdictional boundaries. However, legal pressure can facilitate recognition of a “hurting stalemate” by imposing costs and risks to those actors who may otherwise feel insulated from climate impacts or justice claims of those with less power.

Just as human rights advocates continue to apply pressure for prosecutions, climate litigation efforts seem unlikely to cease as long as there is some feeling that questions of responsibility are being avoided. To make litigation part of a productive effort toward including historical injustice in a future-oriented climate regime, other mechanisms such as truth-seeking mechanisms, reparations and institutional reforms need to be pursued in concert.

## Amnesties

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Amnesties formally recognise and forgive harms and are common in transitional justice processes (*Olsen, T. D., Payne, L. A. & Reiter, A. G. 2010*) due to the political need to provide protection for powerful actors who could otherwise ‘spoil’ a compromise, the costs of prosecution, and the opportunity costs of alienating those with useful resources in a period of transition.

All of these reasons for using amnesties resonate in the climate context. Many actors who could be (and have been) the subject of litigation are also those with the political, financial and technological capabilities needed for effective global climate action. Just as in the transitional justice context, explicit ‘forgiveness’ of historical emissions could be one strategy for partially including those who might otherwise avoid or subvert justice processes entirely in exchange for cooperation in other elements of an agreement.

Amnesties have recently been adopted in the climate context, although they are not framed as such. In the Paris Agreement a protection from legal liability was insisted upon by several developed countries as a condition for including ‘loss and damage’ as a distinct element (*UNFCCC 2015*). Compensation has for many years been known as a ‘red line’ for the United States and the European Union, while others have promoted it as a just solution to historical emissions (*Khan et al. 2013*). Paragraph 51 of the Paris decision text could be seen as an amnesty for countries with causal responsibility for climate impacts in order to secure their cooperation and support in addressing climate change.

Even as some form of amnesty may be politically irresistible or unavoidable in the climate context, it is worth learning from their pitfalls. Granting amnesties is particularly sensitive to concerns about elite co-optation, and without sufficient contributions in other ways, amnesties can undermine solidarity and delegitimise the regime. In multiple cases amnesties have been overturned years later, often because of perceptions that the promised changes or supports that facilitated the bargain had not been met.

The implications for the post-Paris regime are two-fold. First, the **potential for amnesties to delegitimise a regime** if perceived as unfair, or as allowing impunity for past responsibilities, **should be taken seriously**. This is particularly true as the new regime is established.

Second, amnesties can and have been overturned or used as a source of political tension long after they have been granted if the associated changes to the social contract are not perceived as sufficient. Both of these lessons suggest that the long-term political legitimacy of the amnesty approach would require **significant support for adaptation and ‘loss and damage’, and long-term institutional change designed to systematically benefit those who have most to lose**.

Interestingly, both amnesties and litigation are already being used in some form in the climate context. As demonstrated in many transitional justice processes, these two mechanisms can support each other. But to be successful in the long-term they likely need to be augmented with other mechanisms.

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# **Reparations: Lessons for the Climate Debate**

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Repairing relationships is at the heart of transitional justice processes and typically includes acknowledging harms. Efforts to provide redress for historically rooted harms are commonly referred to as “reparations” and have included country-to-country and in-country agreements. Reparations are intended to provide benefits to those harmed and to demonstrate the regime’s forward-oriented intent to better include those previously harmed or excluded. Both kinds of actions aim to build legitimacy and social trust.

Transitional justice experiences with reparations are useful in the climate context in two ways. First, they widen the scope of consideration to include non-monetary forms of reparation. Second, these experiences emphasise the importance of appropriate reparations efforts within successful transitions. If reparations are not seen as sincere or are insufficient over time they can be destructive to social trust and erode regime legitimacy. The table below highlights five principles for reparation and identifies their potential to inform complementary applications in the climate context.

Types of Reparations	Potential Climate Applications
<p><b>Restitution</b> efforts restore victims to their original situation in terms of freedom, property, or employment</p>	<p>This approach could be used to address concrete, specific losses with high attribution to climate change such as land lost due to sea-level rise. This could involve provision of substitutive resources (such as land, fishing rights etc. located elsewhere), or material contributions designed to “make up” for lost wellbeing.</p>
<p><b>Rehabilitation</b> investments in social services are designed to revitalise collective life</p>	<p>Reparations for diffuse or systemic harms often require efforts directed at entire groups of people, as is most likely in the climate context. Rehabilitation efforts could include assistance with education and healthcare nationally or construction of schools and clinics in affected communities. These efforts can be complimented by satisfaction efforts. A rehabilitation approach may be of most use when considering internal or transboundary climate induced displacement.</p>
<p><b>Material compensation</b> for suffering and lost opportunities can be directed to individuals or groups.</p>	<p>Compensation is politically difficult in the climate context, although some element of material address for systemic adaptation and “loss and damage” is likely to become essential. Across transitional justice experiences, compensation is very rarely possible in full, leading some to recommend framing such efforts as <b>contributions to well-being</b> for those negatively impacted, rather than as ‘compensation,’ which can build expectations that cannot be met (<i>de Greiff, P 2007</i>). The central focus here is on designing efforts that materially improve the wellbeing of those most impacted.</p>
<p><b>Satisfaction</b> efforts include broader symbolic measures such as apologies, memorialisations, or truth-seeking processes.</p>	<p>Many reparations are not monetary in nature, in part because there are harms for which financial or material address would be insufficient or inappropriate. In the climate space this could include apologies; memorialisations focused on cultural, territorial or spiritual loss; and truth-seeking (see truth commission brief). The key to satisfaction efforts is that they must be seen as proportional and genuine by those they are directed toward.</p>
<p><b>Guarantees of non-repetition</b> are typically linked to forward-oriented institutional or socio-economic structural change efforts.</p>	<p>Non-repetition reparations attempt to chart a course that demonstrates why future arrangements will result in a fundamentally different pathway than that which resulted in the injustices. In the climate context this resonates directly with efforts to support low-carbon human development which is systematically pro-poor.</p>

## Overarching lessons for the climate context

In addition to concrete suggestions for how reparations might be designed, a range of overarching lessons about the role of reparations in transitions also emerge.

### **Calls for reparations unlikely to “go away”:**

Communities facing historically rooted harms have typically placed great importance on reparations. In many cases calls for reparations have occurred decades after the initial harm occurred, and repeatedly emerge if they are not addressed. These persistent efforts suggest that such claims will not “go away” so that addressing them is a central component of building a new regime that is seen as genuinely legitimate by all, including those who were previously excluded, disadvantaged or actively harmed.

**Successful reparations are appropriate:** The central element of successful reparations is the ability to meaningfully address the self-identified needs of those harmed and their families. Designing and implementing appropriate reparations necessarily involves the participation of recipients. In the “loss and damage” context this could be operationalised through the use of site-specific scoping studies which could identify concrete elements that would meaningfully contribute to the well-being of those harmed. Governance of any reparations funding would have to be designed to reflect the bottom-up nature of the identification of appropriate efforts.

**Multiple forms of reparations:** As seen in the table above, reparations can take multiple forms and these can be used in concert to create a more complete attempt to repair relationships. In the climate context this could include future-oriented investments in local well-being and economic development; debt forgiveness; support for locally identified needs; or long-term investments in capacity building ideally combined with formal apologies or symbolic acknowledgment of historical responsibility. Importantly, such reparations must not be framed as in exchange for mitigation efforts but as acts of repair in a future-oriented regime.

**Non-material reparations are important:** pulling on ideas of satisfaction, non-material efforts could also be important in the climate context. Countries could include forms of apology phrased in ways that do not raise legal liability concerns (*Hyvarinen, J. n.d.*). Commitments to memorialisation and documentation of profound loss could be something that is considered over time as is already been suggested by some groups (*Pocantico Signatories 2016*). Truth-seeking mechanisms have also been included within symbolic reparations programs.

Overall it appears that some form of reparation, even if not framed as such, is likely necessary in the climate context. As de Greiff argues, because reparations are focused on the concrete needs of those most severely impacted they have a special, and symbolically powerful, place within transitional processes. Based on transitional justice experience it seems most desirable to use a combination of reparation efforts, including both material and symbolic elements, along with other transitional justice mechanisms including amnesties, litigation and truth commissions. Moving forward into greater collective and solidarity may be impossible if the persistent claims of those most grievously impacted by climate change are not explicitly considered.

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# Truth Commissions in the Climate Context

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Traditionally truth commissions are undertaken by new governments to establish their legitimacy by formally breaking with the past and to create an opportunity for reconciliation or unification. Truth commissions can avoid some of the limitations and political difficulties of pursuing legal punishments for past actions. However, by acknowledging the past they can also reduce the risks associated with amnesties. This project identified several possible truth commission-inspired pathways in the climate context which would create a politically pragmatic middle path between ignoring harms stemming from past action and pursuing legal liability.

Truth commissions investigate, document and raise awareness of past harms as a form of acknowledgement, and recommend strategies for addressing these harms, avoiding future recurrence, and supporting particular victims. Compared to prosecutions, truth commissions can more easily engage with systemic bases for harm. Usually set up by governments, several have been established by international actors and civil society groups. Ideally, the commissioners are high-profile individuals widely recognised for being fair, objective, and non-political.

These mechanisms aim to be as inclusive about harms and those responsible as possible, investigating the role played by all actors, including those considered to be the most affected by harms. Perceived legitimacy is a crucial element of success, especially as the findings are usually non-binding.

This project identified several ways to use insights from truth commissions to inform global climate negotiations. In the climate context a truth commission-inspired approach would include high-profile and neutral commissioners, consideration of all actors' actions and responsibility, documentation of lived harms, and development of forward-oriented recommendations.

The table below summarises the primary options for developing a truth commission approach as suggested by participants in the Climate Strategies workshops for this project. They are divided into three large categories: processes that would reside within the UNFCCC; those that would be explicitly linked to the UNFCCC; and those that would sit entirely outside the UNFCCC.

Relationship to UNFCCC	Truth-Seeking Options	Key Considerations
<p><b>Internal to UNFCCC</b></p> <p><i>These processes would be housed within UNFCCC mechanisms or bodies.</i></p>	<p>UNFCCC could include an explicit process of receiving and deliberating on evidence for past emissions, attribution for impacts, and identifying harm.</p> <p>An alternative strategy could be a UNFCCC request for an external body to conduct the process (see options below).</p> <p>Parties could be encouraged or required to include statements about historical responsibility in their NDCs as a form of voluntary accountability. This would include few truth-telling elements but would support a 'soft' accountability mechanism.</p>	<p>Due to political experience to date, this option seems unlikely and could intensify existing tensions without providing additional value. In addition, it would require substantial scientific expertise (especially around attribution), resulting in a stretch of existing mechanisms, unless it were designed as an extended expert dialogue.</p> <p>This approach has been contentious in the past, but with increased pressure (including legal) it could become feasible. Some Parties, such as Switzerland, already use this approach. If it remained entirely voluntary it would be less contentious, but would also be less likely to be widely used, as is the case now.</p>
<p><b>External but linked to UNFCCC</b></p> <p><i>These processes are explicitly created for truth-telling and are not housed within the UNFCCC although they could be requested or noted by the COP</i></p>	<p>A high-profile panel of past COP presidents or other senior individuals are asked to preside over an international process that elicits perspectives on historical responsibility and attribution, and documents experiences of climate impacts. It could provide reflections on accountability in addition to non-binding forward-oriented recommendations.</p> <p>Existing civil society efforts to do 'equity assessments' could be expanded and formalised through the use of a high-profile mechanism to investigate and document claims of harm and contributions.</p>	<p>This option would be symbolic only but could be useful for easing tensions and providing opportunities for formal acknowledgment of climate-induced harm in a legally non-threatening forum. Utmost attention to representation would be needed to generate legitimacy and buy-in.</p> <p>Long-term utility would depend on the ability and interest of various actors to use or follow up on the materials produced.</p>

<p><b>External to UNFCCC</b></p> <p><i>These processes are entirely separate from the UNFCCC</i></p>	<p>The International Court of Justice (ICJ) could be asked to provide a (non-binding) settlement.</p> <p>This type of process could be requested or noted by the UNFCCC as a non-binding input.</p>	<p>Palau in addition to some civil society actors are already exploring strategies for engaging the ICJ in navigating historical responsibility claims. Although the ICJ is a legal entity, a settlement would likely not raise concerns about legal liability as it is outside the UNFCCC. It could however, be used to generate political pressure to formally acknowledge past responsibility.</p>
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While any of these pathways could be pursued, efforts to change the internal processes of the UNFCCC seem least likely, especially due to the multiple demands already facing the regime post-Paris. In addition, using the ICJ could have some benefits but settlements emerging from this body are likely to be more backwards than forwards oriented, and would be structured strongly by the existing rules of the ICJ which may not fit the contours of the climate context well.

Accordingly, based on this project’s workshop discussions, the middle pathway in which a high-profile commission is created appeared to be more contextually appropriate and politically feasible. This commission’s primary source of influence would be its soft-power legitimacy so it would be essential that these individuals are perceived as neutral, informed and respected. Such a commission could be set up by an NGO or coalition of NGOs and Parties, and could be granted greater leverage through efforts by Parties to utilize the outcomes in submissions, or possibly to have them recognised by the COP. Suggestions that such a commission be pursued emerged repeatedly from project participants.

By being able to include diverse voices, from those bearing witness to the realities of living with climate impacts to those articulating the challenges of implementing climate policies, a truth commission-like approach could be a powerful mechanism for trust-building and for identifying potentially productive forms of future-oriented supports. However, without concrete action to accompany it, even the most well-intentioned effort risks alienating its supporters over time. As with the other transitional justice mechanisms, a truth commission process alone is unlikely to meet the challenges of the post-Paris regime.

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