

Supplemental Information for Workshop Participants

Workshop “Balancing Responsibility and solidarity in international climate negotiations”

Wednesday 02 March 2016
09h00 – 17h30

KAS European Office Brussels
11, Av. de l’Yser
B-1040 Brussels

In order to facilitate an engaged dialogue around the somewhat unusual pairing of transitional justice and climate policy we have prepared this supplemental note. The Climate Strategies Working Paper outlines some of the main ideas of why transitional justice may be interesting to examine in this context and provides an overview of the juxtaposition of the two areas. This *supplemental note* adds to this by laying out an initial range of potential applications of transitional justice to the climate context. This range of potential applications will be presented in the workshop to initiate discussion and deliberation but we wished to provide you all with some information ahead of time to allow for a deeper discussion on the actual day.

Why Might there be Analogies between Climate and Transitional Justice?

Historical responsibility has always been a difficult element within climate negotiations and this could intensify as climate impacts become more severe, developing countries face mounting pressure to take mitigation action, and the UNFCCC

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workstream on loss and damage is reviewed in 2016. Although the Paris agreement formalized a flexible approach to differentiation, the essential problem of equity remains.

The challenge is to find ways of acknowledging inequities while increasing solidarity in the face of climate impacts and facilitating ambitious climate action globally. This challenge is not easy. Tensions about differing degrees of responsibility for emissions and climate impacts are deeply rooted and can be highly divisive. However, Climate change is not the only time humans have been faced with historically rooted, collective action challenges involving justice disputes. Transitional justice is one set of tools that has been adapted to many specific conflicts at the interface of historical responsibility and imperatives for new collective futures.

As discussed in more depth in the Discussion Paper (<http://climatestrategies.org/publication/transitional-justice-in-the-climate-context/>), climate change does share four key structural similarities with transitional justice. Briefly, these are:

1. *Interdependence and hurting stalemates*

A common element in both the transitional justice and climate context is that all Parties are forced to acknowledge their interdependence, even if this is uncomfortable. It is the desire to avoid separation, civil war or other outcomes that would make the situation worse, that convinces Parties to pursue transitional justice processes. Similarly, in the climate context all Parties are essentially 'locked together', and failing to address conflict and inequity could result in worse outcomes for everyone.

2. *Limited ability of judiciary to address core issues*

Many transitional justice contexts have limited judicial abilities to address the problem entirely – either due to the nature of the claims, complex causality, or insufficient institutional capabilities and resources. Similarly, while a range of work continues to explore the boundaries of law in the climate context, judicial 'solutions' have typically not fit the claims being raised particularly well, especially at the international level.

3. *Profound disagreement about ideal relationship between past and future in period of transition*

Just as a core tension within transitional justice has been to adjudicate claims between backwards-oriented justice and forward oriented change, the climate context is marked by clear divisions about the extent to which actions and omissions in the past ought to direct future actions and commitments (both in terms of mitigation and in terms of supports for adaptation and loss and damage).

4. *Unclear how to address profound losses*

Loss of life, culture, territory and social cohesion are some of the losses experienced in both the transitional justice and climate contexts. Both situations feature profound losses and both have to come to terms with the need to find strategies – almost certainly incomplete – to navigate them.

What processes and mechanisms are commonly part of Transitional Justice?

There are a wide range of processes and mechanisms often used in transitional justice. Of these we have chosen to focus on those that seem particularly likely to be useful in the climate context. One part of the workshop will focus on techniques used for managing responsibility, and another will look at the range of reparations and institutional changes that have been included in efforts to build greater solidarity and collective action moving forward. These ideas are meant to serve as seeds for creative thinking about the climate context, rather than complete policy proposals.

Managing Responsibility

A common feature across transitional justice contexts has been the need to manage responsibility for harm. Interestingly, many actual processes have used more than one of these approaches simultaneously. For instance, co-operation with an accountability-based mid-range approach, such as truth commissions, might be motivated by the possibility of facing charges through the legal system. Not every iteration has been discussed below, instead the focus has been to provide the range of options that might be considered.

	Full legal liability through the use of	Mid-range responsibility and “soft” accountability measures	Amnesty
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	trials	Lustration	Accountability measures	
Common manifestation in Transitional Justice	Extensive use of international and national legal means such as international human rights law, and/or domestic legal mechanisms that either pre-exist or are created specifically for the purpose of holding those responsible to account	Key people – such as officials or leaders – are removed from power and/or prevented from taking on roles under the new regime	Mid-range responsibility measures might include things like truth commissions in which there are soft accountability mechanisms (acknowledgement, contribution to shared recognition of responsibility)	Perpetrators, individually or en masse, are granted amnesties
Logic of Mechanism	Legal trials can ‘punish’ perpetrators, and serve as an incentive to other forms of cooperation	Responsibility lies with specific individuals (i.e. in positions of leadership), removing them will facilitate new regime without costs of full trials	In some situations legal trials of individuals would be unwieldy (too many individuals, or crimes are too vague to fit into human right law), or too expensive. Middle range approaches may be useful for collective responsibility, or when the judiciary is limited in capacity	Amnesties may be used in cases in which there is concern that powerful actors could be ‘spoilers’ if held to account. In several situations (including Chile, Argentina) amnesties have been overturned and individuals sought for legal trials years afterwards (such as through arguments that amnesties violated international laws).

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<p>Possible Climate Applications</p>	<p>1) pursuing legal efforts through existing international law (including torts and /or human rights law)</p> <p>2) pursuing domestic or international law to hold non-state entities accountable (such as corporations)</p>	<p>No obvious applications internationally</p>	<p>1) Formal acknowledgment of historical responsibility by historically high emitters (such as in INDCs)</p> <p>2) Use of equity indicator bundles in historical responsibility is included</p> <p>3) 'back door' acknowledgement through increased means of implementation (MOI) and/or promises of non-recurrence</p>	<p>Full or partial amnesty for historical responsibility.</p> <p>This might be difficult to actually implement, as such an agreement might be beyond the powers of any organization (including the UNFCCC).</p>
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Managing Change: Forms of Support and Institutional Changes

Any transitional justice system is necessarily a transition from one state of affairs to a preferable one. Merely managing responsibility may not be enough to actively support the kinds of changes that are needed, or to deal with the claims of victims. Instead a range of supports and/or institutional changes are often included in transitional justice processes.

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Within transitional justice we might think of three large categories of efforts to support forward oriented change. The first is composed of direct supports to those impacted. Within traditional transitional justice the focus here has been on addressing the actual losses experienced by victims. In this tradition the term ‘reparations’ is often used, but the central focus of these processes is trying to understand what is needed to remedy – as far as possible – the losses experienced, and to create the conditions for long-term improvements for those who were most impacted. These forms of support can either be distributed directly to victims, or collectively.

The second large category is composed of broader institutional changes which may be needed in order to establish the foundation for the diversity of changes (including economic) that are required. For example, with the transition out of apartheid in South Africa a wide range of domestic institutional changes were sought, not only the to constitution in general but also to many specific sectors including the education system and local employment and investment requirements.

Finally, cultural efforts can also be an important part of the symbolic and foundational change that may be required to facilitate initial change and embed it culturally and socially (such as through changes of attitudes; recognition of harms; commitments to long-term solidarity etc.)

	Supports to Those Impacted		Institutional Changes	Cultural Efforts
	Individual	Collective		
Common manifestation in Transitional Justice	Individual victims are granted some – usually minimal – financial compensation or support. This may be money, free or preferential access to particular services (health care, education), or non-	Broader supports through increased public services generally to groups of victims of harm. This might include building schools, hospitals or other kinds of support as identified by those whose rights have been	Large-scale institutional changes are made in order to change underlying structures that were caused by or resulted in the atrocities. These changes could be national in scope (such as the anti-apartheid	Projects that explicitly focus on long-term cultural change in ways that lay foundations for avoidance of further atrocities. This may include memory projects, changes in school curricula, or public apologies.

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	financial compensations such as exclusion from mandatory military service	damaged.	South African constitution) or targets towards specific sectors or areas of public policy.	
Logic of Mechanism	Individual victims should be compensated for particular, identifiable harms and/or should receive preferential levels of support that directly result in individual well-being improvements.	When collective or group harms have been imposed it may be difficult to identify specific victimized individuals and/or the overall cost of allocating individual compensation may be too high for a new regime to manage. Collective supports may be better able to achieve the broad-based improvements of wellbeing desired.	Changing the underlying institutions is seen as essential to demonstrating and enabling permanent, 'real' change. A challenge is identifying which institutions exactly need changing, especially when harms may be systemic and economic (instead of or in addition to political)	Long-term cultural shifts and re-integration or reconciliation among groups requires cultural and social changes.
Possible Climate Applications	Difficult to apply in the climate context	This could take the form of specific supports targeted to particular communities. For instance, community or region specific loss and	Institutional changes depend on arguments about WHICH underlying institutions are responsible for the problem and/or would have greatest leverage	Countries could more actively engaged with Article 6 of the UNFCCC and seriously commit to public education, including information about historical

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		<p>damage scoping studies, in which concrete needs are identified could form the basis for collective claims to support.</p>	<p>in supporting a new system.</p> <p>Possible candidates might include: international debt forgiveness; significant international support for MOI in order to support domestic institutional developments that enable changes that benefit those most impacted by climate change; developing of procedural justice mechanisms capable of dealing with cross-scalar justice dimensions arising from some climate policies.</p>	<p>responsibility and the global ramifications of emissions.</p> <p>Formal apologies could be developed within the international arena</p> <p>Memorializing projects documenting the human costs of climate change could be underwritten by responsible Parties.</p>
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Transitional Justice in Climate Context?

Debates about the role of historical responsibility run very deep, and failing to recognize them in the design of forward-oriented action could ultimately erode the potential for global cooperation in a regime with sufficient mitigation and an adequate response to climate impacts. While designed for a different kind of conflict, transitional justice may hold potential for providing a different lens and toolkit to the climate problem.

In general, transitional justice arrangements have had to manage a balance between addressing injustices and laying the foundations for future-oriented solidarity. Common components of these arrangements have included formal acknowledgement of responsibility; guarantees of non-recurrence formalized within institutional or structural changes that give more voice and power to victims; forms of compensation or support preferentially directed towards those most impacted by the injustices; and efforts aimed at changing broad social and cultural narratives.

Importantly, each transitional justice arrangement must be designed to address the specific dimensions of each conflict. There is no one pathway for managing complex, historically rooted justice dilemmas, although the recognition that failing to address injustices can erode the ability for people to move forward is a key motivating argument for considering transitional justice in many conflict situations. In this workshop we invite all participants to think creatively and explore how transitional justice experiences and processes could inspire ways of acknowledging inequities and supporting solidarity and collective action in the climate context.