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**Transitional Justice in the
Climate Context?**
Discussion paper

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About the Project

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1. INTRODUCTION

The sharpest inequity within the climate change context is that those who are most vulnerable to and most seriously threatened by climate impacts are typically those who have contributed least to the problem. Although this underlying characteristic of the climate problem is not always directly referred to, it is widely acknowledged and is at the heart of debates about historical responsibility.

Historical responsibility has always been a difficult issue within climate negotiations, and is likely to remain contentious for two key reasons. First, continued inadequacy of mitigation action is steadily increasing the potential for profound losses from climate impacts, predominantly experienced by those who have contributed little to the problem (as alluded to above) and who are already facing ongoing development challenges. Second, the urgency of global mitigation and shifting locus of the production of emissions has resulted in mounting pressure for mitigation action by countries with increasing emissions despite continued human development challenges. Despite some softening of the firewall between Annex 1 and non-Annex 1 countries during the 2015 negotiations, tensions about the extent and implications of historical responsibility in the face of increasing climate losses and mitigation pressure are likely to be central during the scheduled review of the workstream on loss and damage at COP22 in Marrakesh -- if not before.

Several approaches to historical responsibility have emerged within the climate regime. For example, one approach has been to explicitly include it in proposed allocations for emissions space – such as in the ‘Brazilian proposal’¹ or in proposals for ‘Equitable Access to Sustainable Development’². The strength of these proposals is their clear articulation of the importance of historical responsibility to some countries, but they may feed political stalemates. A second approach has avoided historical responsibility by stressing win-win opportunities within “green growth” strategies³. The benefit of the green growth approaches is that they actively support constructive climate action. However, if they appear to be sweeping historical responsibility “under the carpet”, they could erode long-term solidarity and trust. Importantly, neither of these approaches have directly tackled the question of loss and damage despite increased understanding of the potential severity of climate impacts as documented in the fifth IPCC assessment.

The crux of the tension is that a global agreement capable of achieving sustained, deep mitigation targets and an adequate response to climate impacts may have to integrate backwards-looking claims of historical responsibility, and forward-oriented

¹ Emilio LaRovere, Laura Valente de Macedo and Kevin Baumert, ‘The Brazilian Proposal on Relative Responsibility for Global Warming’, in *Building on the Kyoto Protocol: Options for Protecting the Climate*, ed. by K. A. Baumert and others (World Resources Institute, 2002), pp. 157–73.

² BASIC experts, (2011) *Equitable Access to Sustainable Development: Contribution to the Body of Scientific Knowledge*.

³ Global Commission on the Economy and Climate, ‘Better Growth, Better Climate: The New Climate Economy Report’ (Global Commission on the Economy and Climate; C/O World Resources Institute, Washington D.C., 2014).

promotion of low-carbon development pathways. What would an approach to global climate policy capable of addressing the tension between these forces look like?

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. However, lessons from these processes have not been examined for the climate context, although they could provide useful insights for developing acceptable approaches for reconciling past-oriented concerns about historical responsibility with future-oriented desires for broader and deeper collective action. This working paper is not proposing a full “transitional justice” process for climate policy: it is initiating a discussion about which, if any, particular strategies or tools developed within the transitional justice arena might be applicable to the climate problem. This first working paper is focused on the international level, but it is possible that transitional justice experiences may also be useful within domestic policy arenas when dealing with issues such as negative impacts of inappropriate mitigation action, or when trying to design policies that share compensation or benefits.

2. TRANSITIONAL JUSTICE AND THE CLIMATE CONTEXT

‘Transitional justice’ refers to theory and practice aimed at enabling purposeful transitions from periods of deep injustices into more peaceful regimes. A range of transitional justice processes emerged as many countries, often with recent colonial pasts, were faced with the challenge of re-building society after periods of violence, oppression and civil war. **The goal of these processes is to recognize and at least partially remedy past injustices while also building a sense of unity or solidarity.** Such processes include a variety of practices and tools including trials, truth commissions, reparation, acknowledgement and pardon to name a few⁴. Originally focused on political rights, attention to social and economic rights has expanded^{5,6}, which has refocused attention from legal arrangements towards concrete opportunity shifts and investments to enable human flourishing.

Transitional justice processes may seem like an unusual inspiration for climate change policy-making. The limitations of this analogy are explored in section six. However, international climate policy dilemmas share four similarities with conflicts in which transitional justice processes have been useful. These elements include:

- a) unavoidable interdependence and potential costs of not finding an agreement for all Parties;

⁴ Chandra Lekha Sriram, ‘Resolving Conflicts and Pursuing Accountability: Beyond ‘Justice versus Peace’, in *Palgrave Advances in Peacebuilding* - Oliver P. Richmond, ed. by Oliver Richmond, 2010.

⁵ Evelyne Schmid and Aoife Nolan, “‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice”, *International Journal of Transitional Justice*, 8.3 (2014), 362–82.

⁶ e.g. Paul Gready and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’, *International Journal of Transitional Justice*, 8.3 (2014), 339–61.

- b) inadequacy of existing judicial processes for addressing the scope and type of injustices and harms involved;
- c) deep disagreements about how past actions should relate to future obligations and actions in a transition period; and
- d) growing recognition of the importance of, and challenges to providing, social and economic human rights.

2.1. Unavoidable Interdependence and ‘Hurting Stalemates’

Peace processes generally are rarely the first choice of any party because they necessarily propose a compromise. A key lesson has been that parties need a “hurting stalemate” in order to commit to the process⁷. These “hurting stalemates” emerge from juxtapositions between conflict and unavoidable current and future interdependences.

Due to continued emissions, increasing proportions of which are now coming from developing countries, adequate mitigation requires substantial action from a larger number of countries. Simultaneously, climate impacts are being observed, and will only increase with continued inadequate mitigation⁸. Climate change imposes interdependencies that extend beyond the borders of single societies and despite almost three decades of negotiations, equity debates remain largely unchanged. While a “hurting stalemate” is a value judgment, it appears that the climate context could qualify -and without major increases in mitigation this could deepen as impacts intensify.

2.2. Inadequacy of Judicial Processes

A challenge of the climate context is that the ‘victims’ and ‘perpetrators’ are not always easy to identify, may not be exclusive categories, and are indirectly connected. The mismatch between climate change and existing legal institutions has been demonstrated in the continued difficulties of using litigation⁹. Currently judicial processes do not neatly fit the contours of the climate problem.

Climate change is not unique in this regard. For example, South Africa chose to use their Truth and Reconciliation Commission (TRC) partially because the pursuit of justice for all victims individually would have overwhelmed the justice system, and because the link between specific victims and perpetrators was often difficult to prove in a legal sense¹⁰. Loosening the requirement of direct causation allowed the TRC to acknowledge victims of structural, generalized violence without having to identify

⁷ I William Zartman, ‘The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments’, *Global Review of Ethnopolitics*, 1.1 (2001), 8–18.

⁸ ‘IPCC Fifth Assessment Report: Working Group I: Summary for Policy Makers’, 2013.

⁹ Richard Lord, Silke Goldberg and Lavanya Rajamani, *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012).

¹⁰ Paul Van Zyl, ‘Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies’, in *Looking Back, Reaching Forward*, ed. by Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town, South Africa: University of Cape Town, 2000), pp. 42–57.

single perpetrators for particular crimes or demand that they compensate their victims individually¹¹. This strategy had the dual advantages of acknowledging more victims than would have otherwise been possible, and of focusing attention on the structural shifts required to prevent further injustices. The question this raises for climate change is, “what institutional arrangements would address historical injustice, and facilitate collective action in the context of legal limitations?”

2.3. Disagreements about the ideal link between past and future action

The UNFCCC explicitly calls for leadership from developed countries due to causal responsibility and capabilities. However, disagreements about the extent to which historical emissions should be used to delineate specific obligations are long-standing. In addition to debates about using past emissions to determine future-oriented emission allocations, liability for climate impacts has been extremely contentious.

A core component of transitional justice is navigating the elastic tension between past injustices and a future of coexistence. Focusing too firmly on the past may prevent cooperative construction of a new future: for instance, perpetrators are unlikely to cooperate if they fear deep repercussions. Focusing only on the future will leave injustices unaddressed which can undermine attempts to move forward: long-term solidarity cannot be constructed if participants feel unacknowledged in the process of crafting a new regime.

These oppositional pulls result in a dual set of requirements for a transitioning regime. From the perspective of the ‘victims’, acceptance of an agreement is motivated by the desire for fundamental change, and must include substantial changes that will result in improved circumstances. From the perspective of ‘perpetrators’, agreement may be motivated by the psychological and material costs of the continued tension, but they may also require some boundaries of retributive justice. Specifically, for perpetrators liability for injustice may need to exist within some set boundaries and there may have to be a point at which responsibility ends¹². Simultaneously, the new regime must offer genuine changes that offer victims acknowledgement and provisions for non-recurrence and structural change. The question in the climate context is what specifically is needed in order to satisfy both the need for historical justice and structural change, and to create conditions in which all can participate without fear of retribution.

¹¹ Richard Goldstone, ‘Foreward’, in *Looking Back, Reaching Forward*, ed. by Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town, 2000), pp. viii – xiii.

¹² *Peace versus Justice: Negotiating Forward- and Backward-Looking Outcomes*, ed. by I. William Zartman and Viktor Aleksandrovich Kremeniuk (Lanham, Md: Rowman & Littlefield, 2005).

2.4. Challenge of addressing lost opportunities and deep loss

A key challenge facing all transitional justice situations is that some injustices cannot be easily addressed including human rights abuses and the loss of life. In the climate context there may be ambiguous losses from forgone opportunities (such as use of atmospheric space), in addition to human loss from severe climate impacts including loss of life, culture and, in some cases, all or some national territory. As in traditional transitional justice contexts, these losses can be both individual and collective; will have multi-generational effects; and can be economic and cultural in nature.

Dealing with deep loss has been difficult for transitional justice, although several mechanisms including public acknowledgement, apologies, and various forms of reparations have been used. Many of these mechanisms are designed to acknowledge injustices even if these efforts do not immediately change material circumstances.

3. COMMON TRANSITIONAL JUSTICE PRACTICES

Applying a transitional justice lens suggests several concrete practices which could be useful when trying to balance past and future oriented concerns in the climate context. Several common practices which could be used as inspiration for efforts in the climate context include guarantees of non-recurrence; reparations; institutional changes; limited liability; and a formal peace building process.

3.1. Guarantees of Non-Recurrence

Guarantees of non-recurrence are key to transitional justice processes and can take multiple forms, including political and institutional reform, legal protections, and efforts to support cultural or social shifts such as educational programmes explaining past injustices.

3.2. Reparations

Reparations are common in transitional justice practice. These vary and can be monetary or non-monetary. Monetary reparations are usually less than the 'real' cost of compensation, but are intended both as an expression of commitment to change and as a practical attempt to improve the lives of those most impacted by the injustice. Symbolic efforts, such as apologies, can be important but may also be perceived as empty (potentially intensifying conflict) if not accompanied by other substantive changes.

3.3. Institutional Changes

Either as a guarantee of non-recurrence or as a form of reparation, another relatively common feature of transitional justice arrangements (either as a formal part of the process, or as a result of the co-occurring social transition) are institutional investments such as support for social security or education or large-scale changes

such as constitutional shifts. In some situations, such as in South Africa, these have attempted to include regulations intended to redistribute opportunities to those previously excluded.

3.4. Limited Liability

Many transitional justice processes include some form of limited liability such as partial pardons or incentives to cooperate by limiting legal prosecution. Such processes have been controversial, but are often included as a means of gaining cooperation from those who would otherwise be too scared of retribution to support a transition and who are necessary to include due to their power in the system.

Importantly, in many transitional justice arrangements limited liability has been combined with the threat of full liability. For instance, cooperation in the South African TRC was partially encouraged by promises that those who provided information would not face full judicial action. Similarly, not all those involved in human rights abuses are always fully prosecuted for international war crimes, but the possibility of this prosecution can be used to negotiate deeper cooperation. To what extent limited liability is a meaningful tool in the climate context remains open for discussion. An alternative framing may be to pursue some boundaries on potential liability but this would also require further investigation.

3.5. Formal Peace Process

A transitional justice shift does not happen by accident but requires systematic efforts. Peacebuilding processes are unique to each situation, but often include opportunities to increase meaningful dialogue, guarantees of safety, third party support or mediation, clear rules of engagement, context specific rituals to facilitate social and emotional resolution of conflict, and explicit trust-building strategies and efforts to name a few. While the specific strategies used in any given peace process may not easily transfer across contexts, the transferable component is the purposeful attention to the needs of the context and the desire to identify and implement a productive process.

4. HOW MIGHT CLIMATE LEARN FROM TRANSITIONAL JUSTICE?

Although climate change differs in important ways from traditional transitional justice contexts (see next section), there may be ways of using the common practices discussed above to inform international climate negotiations. Some potential applications of these concepts could include the following:

Mechanisms for Non-recurrence: It seems absolutely essential that a transitional justice approach would include very strong mechanisms for non-recurrence. Although developed countries are already supposed to take leadership on mitigation, this obligation is emphasized in this approach, resulting in very strong mitigation

requirements for historically high emitters. The challenge of guaranteeing non-recurrence in the climate context is that current emissions trajectories – even with significant pledges for reductions – will lead to inevitable damage at this point. Even if high historical emitters reduced dramatically, anthropogenic emissions would still create damages which makes it difficult to clearly identify who should be responsible for guaranteeing non-recurrence or what this would look like. One starting point for using non-recurrence as a building block within a broader agreement would likely include deep domestic reductions for historically high emitters in addition to strong supports for rapid reductions in more recent emitting countries. The goal would be to proactively shift to a low-carbon economy; and part of the commitment to non-recurrence would be to support this shift as deeply and rapidly as possible. While rapid decarbonization would help meet the call of non-recurrence, it would not entirely solve the problem due to the inevitability of damage from existing and ‘locked in’ emissions.

Mechanisms to manage historical responsibility: There are at least two integral elements to managing historical responsibility. The first includes some boundaries to liability. This could take the form of an agreed limit to emissions responsibility for historically high emitters when negotiating mitigation obligations. However, in the face of loss and damage other strategies may be needed. One option would be to develop supports for each developing country to conduct a loss and damage scoping study, allowing for increasing recognition of specific needs which could then be negotiated for support directly. These loss and damage scoping studies would be a relatively minor extension of activities already supported by the Warsaw International Mechanism for Loss and Damage (WIM), but would aim to identify specific needs as the basis for negotiations about support. This would change the focus from undefined calls for finance to concrete actions which may help mediate fears of unlimited liability while also addressing the needs of the most vulnerable.

A second potentially important element of managing historical responsibility would be formal acknowledgement of it, beyond that which is already enshrined in the UNFCCC. This could take multiple different forms including some type of an apology or formal recognition, or commitments to domestic education. While such symbolic gestures alone are unlikely to be insufficient, they could play a role.

Forward-Oriented Structural Change: Significant structural shifts to promote wellbeing for those who have been particularly impacted by climate change, and to fundamentally support long-term mitigation action in all countries (including those facing significant development challenges) would be an essential element of a transitional approach. A range of elements could include: debt relief within finance packages; increased focus within core areas such as the technology support and capacity building to examine how to design these to enable deep, sustained change domestically that will support long-term mitigation while actively benefitting those who are least well off. Some of these elements – specifically arguments for low carbon development and inclusive ‘green growth’ approaches may already be developing mechanisms for facilitating this. However, a transitional approach would

push the conversation further to ask how specific mechanisms – such as the technology mechanism or support for capacity building – are designed to result in fundamental improvements in wellbeing for those who face the most intense human development challenges in the face of climate change. To the extent that loss and damage scoping studies were included as described above, this mandate could also include proactive measures wherever possible to build specific forms of capacity identified as potentially useful in specific contexts.

Explicit Peace Process: To date there has been limited overlap between those with experience in peacebuilding and those working on the climate context. In addition, the UNFCCC already has a suite of formalized rules and processes which are unlikely to be easily shifted. Identifying which specific peacebuilding tools would be most helpful in the climate context is an open question but could include explicit trust-building efforts; additional informal dialogues (including processes and open meetings outside the UNFCCC); or open discussions of transitional justice options.

5. POTENTIAL LIMITATIONS AND PITFALLS

Despite their similarities there are several limitations and pitfalls to consider when evaluating the utility of transitional justice as a source of lessons for the climate context.

First, timing matters. Some aspects of historical injustice have already occurred, such as the consumption of finite atmospheric space by a global minority. However, others, such as losses from climate impacts, have only begun or may not have yet fully emerged although they are extremely likely due to past and continuing emissions. Does it make sense to use elements of transitional justice when the full scope of injustice is not yet apparent? If so, based on the argument that those who have and will suffer injustice should not have to wait for more to suffer, how could future injustices be factored into this framework?

Second, most transitional justice processes happen within communities or a single country. The fundamental premise is that there is a social unit with sufficient investment in building or maintaining unity that all parties will be willing to cooperate. Is the international community a sufficiently strong ‘society’ that these processes make sense?

Third, all transitional justice arrangements have a potential for co-optation and not all processes have resulted in benefits for those who are least well-off. There remains a risk that powerful actors will be able to reap the benefits of peace processes without committing to significant change. What would be needed to ensure genuine structural changes benefit those who are most vulnerable and who face the sharpest injustices in the climate context? Simultaneously, there is a multi-scalar element to the climate problem. What mechanisms would be needed to ensure that national governments who received benefits from this process actually passed these on to those suffering greatest injustice within their borders?

Fourth, traditional justice processes are inherently messy, complicated and controversial. They have rarely unanimously ‘resolved’ a conflict or resulted in a fully peaceful regime. They are not a panacea, and are unique to each situation. Does this model offer enough to be seen as useful in the climate context without creating false expectations?

Despite these limitations, components of transitional justice approaches have been used in over 30 countries and continue to be developed. The climate context may push the transitional justice framework to its boundaries, but ongoing and possibly increasing tensions between historical responsibility and the need for stronger collective action than ever before may warrant stepping back and assessing what lessons the climate community could reap from the depth of experience and theoretical development within this field

6. SUMMARY AND NEXT STEPS

Debates about historical justice 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. To date efforts to manage issues of climate equity have not resulted in decreased tension about historical responsibility, and while new evidence that low-carbon development is both possible and can result in concrete benefits, it runs the risk of ‘papering over’ rifts about historical responsibility that could, in the long run, diminish the extent and stability of change.

This working paper is part of a larger project, “Evaluating peace and reconciliation to address historical responsibility within international climate negotiations” which aims to explore the potential for applying lessons for the climate context from transitional justice experiences. This working paper emerged out of the results from an initial scoping workshop and is a direct input to a second workshop designed to more substantively explore which lessons or tools from transitional justice could be used in the international climate context.

A second workshop is being planned in order to more fully explore these ideas from theoretical, political and practical perspectives. Details for this workshop are still being formalized but we expect to hold it in early March 2016. Please do not hesitate to contact the Climate Strategies secretariat for more information or to express interest in attending on: info@climatestrategies.org



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