Briefing paper 1/2021

Climate focused transitional justice

The Covid 19 pandemic has created human suffering on a global scale, but also a strange window of opportunity to rethink how we live, work and play. For the time being, calls for a green recovery that builds back better by cutting greenhouse gas emissions, protecting the environment and creating a fairer, more equitable society have become commonplace. This could help to build new momentum in international efforts to combat climate change and rebuild lost trust and goodwill between parties in the intergovernmental negotiations through new collective approaches.

If we are serious about creating a better future, transitional justice can provide some important guidance on the way forward. It would provide a framework to deal with past inequitable use of the global environment in a transparent and inclusive manner and shape a new path of international solidarity and collaboration. This paper provides a brief overview of the concept of transitional justice, its techniques and potential relevance in the climate negotiation context.

Transitional justice

The UN defines transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation" (Secretary-General, Guidance Note, United Nations' Approach to Transitional Justice, March 2010). Over 1500 individual transitional justice mechanisms have been used in over 60 countries to date. This includes, for example, Cambodia, Northern Ireland, Peru, Rwanda, South Africa, Tunisia and the former Yugoslavia.

In a wider sense, transitional justice aims to enable purposeful transitions from a period of injustice to a more peaceful regime. It manages backwards-oriented justice debates in the context of building solidarity for the future. So it addresses concerns about past, current, and future injustices to provide the basis for future-oriented cooperation. Transitional justice offers both a conceptual framework and a set of mechanisms that have come to be used around the world to redress harms that occurred in the past, as well as to address their repercussions in the present and for the future.

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As part of a transitional justice process, a variety of techniques are employed to reach a range of goals: holding those responsible for past harms accountable; generating an authoritative record of the harms done and their causes; providing remedies to those most affected; and reforming institutions so as to signal a regime change and prevent future harms. By raising awareness of the depth and extent of past injustices, transitional justice encourages even those who were not directly affected to acknowledge what happened and take responsibility for it not happening again.

Transitional justice is characterized by the following set of mechanisms, which individually have specific mandates and short time frames but usually are implemented in combination as part of a longer-term process:

Amnesty, or impunity from prosecution or other form of punishment. This can be a blanket amnesty for all actors and harms; a limited amnesty for specific actors or harms; or a conditional amnesty, usually granted in exchange for disclosing the details of past abuses. Amnesty is commonly de jure, meaning granted by law, although it is also often de facto, meaning effectively granted through lack of action. Although amnesty is widely used, international norms increasingly work against amnesties for grave harms. For this reason, it often is not listed as a transitional justice mechanism per se.

Prosecutions, or individual criminal accountability. Prosecutions have been launched through the permanent International Criminal Court; the ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia; hybrid courts that combine international and domestic law and actors; national courts on the territory where abuses were committed; or via universal jurisdiction for abuses committed elsewhere. In some cases, individual accountability has been pursued through indigenous, traditional, or community-based mechanisms that have been adapted to deal with mass harms. In addition, individual accountability has been pursued via civil litigation and through international, regional, and domestic human rights mechanisms, some of which have also been used to establish the responsibility of states and non-state actors for past harms.

Truth commissions, or ad hoc and temporary commissions of inquiry on specific harms inflicted within a specific period. Truth commissions investigate past harms and seek to generate an authoritative record of how and why they occurred, who was responsible, and the impact they have had on those most affected. Run by states or subnational governmental bodies, as international or bilateral initiatives, and/or by civil society, they may have public or closed hearings, make general statements concerning responsibility or print detailed lists of perpetrators' names, and rely on publicly accessible documents or use subpoenas to uncover classified evidence, among other options.

Reparations, for those affected by past harms. These may be individual or collective, and be either material (e.g. cash payments, the building of a school

Based on African countries' extensive experience with transitional justice (TJ) over the past decades, the African Union in 2019 adopted a transitional justice policy that enables African states to develop "their own context-specific comprehensive policies, strategies and programmes towards democratic and socio-economic transformation, and achieving sustainable peace, justice, reconciliation, social cohesion and healing". Expanding on the mechanisms outlined in this briefing paper, the policy defines TJ as:

"[T]he various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation. Transitional justice is meant to assist societies with legacies of violent conflicts and systemic or gross violations of human and peoples' rights in their effort to achieve transition to the future of justice, equality and dignity. Going beyond retribution and drawing on traditional justice approaches emphasizing conciliation, community participation and restitution, the conception of TJ advanced in this policy seeks to address African concerns on violent conflicts and impunity through a holistic policy that considers the particular context and cultural nuances of affected societies, as well as the gender, generational, ethnocultural, socio-economic and development dimensions of both peace and justice."

or community center) or symbolic (e.g. public apologies, memorials). Broadly defined, reparations may comprise restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence. Although predominantly provided in the form of intrastate administrative programs, there are examples of interstate and other forms of reparations.

Institutional reform, through changes to existing institutions and/or the establishment of new institutions. These reforms are intended to promote accountability for past harms and create an environment where new harms are prevented or made difficult to commit. They also signal the human rights values of the new regime through public sector retraining and changes to government programs (e.g. education). This may include vetting of officials complicit in past abuses.

Transitional justice in the climate context

Broadly speaking, transitional justice emerges from the recognition that historically rooted events, systems, and norms responsible for imposing harm must be included in any viable pathway toward a future in which all people are able to lead full, flourishing lives. In this tradition, the voices and experiences of those who have been harmed are essential, even though, politically speaking, they may also be peripheral to the centers of power. Peripheral voices are necessary, not only due to the obligations of morality, but also because it is precisely the experiences of those who have been harmed and previously excluded that must guide efforts to build a more just, peaceful, and ultimately legitimate new regime, based on trust and solidarity.

Justice disputes have always been at the heart of the international negotiations on climate change. The Global North owes the South a significant ecological debt but there has never been a formal recognition of responsibility or even apology from those who have caused significant harm to people and planet. Instead, the international climate law and policy processes were largely shaped by developed country parties' material interests and normative perspectives – one of the reasons for the lack of trust and confidence that has characterized the UNFCCC negotiations to date.

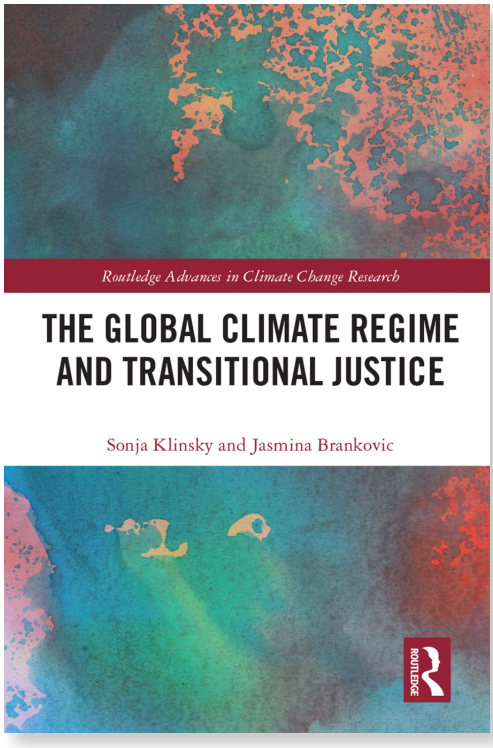
The Paris Agreement did not solve these justice tensions and the underlying disagreement about parties' responsibilities associated with past and future emissions is reflected in many of their discussions. These tensions have the potential to intensify as the full scope of the mitigation and climate impact challenges becomes apparent. But can the depth of collective action and solidarity needed to achieve the objective of limiting global warming to between 1.5 and well below 2 degrees Celsius be realized if these fundamental questions are left unaddressed? History suggests that such a "settlement" may unravel over time and require additional work.

While "climate injustice" is obviously different from war, civil unrest, abuse, or oppression, transitional justice processes have dealt with issues such as systemic economic disadvantage, human rights abuses, and loss of life, health, property, culture, or heritage. There is no standard transitional justice approach, and practitioners must tailor the strategy to each particular context. This has resulted in a wealth of different experiences to draw on. Multiple mechanisms from the transitional justice "tool-box" can be used, combined, or modified to fit the purpose.

To engage with a transitional justice process in the climate context, actors with historical responsibility are unlikely to cooperate without some protection from retribution. But addressing their responsibility is also about creating legitimacy and buy-in for a future-oriented approach. Finding a balance between backward- and forward-oriented measures is therefore key. Another challenge in designing and implementing a transitional justice process is finding ways of overcoming power imbalances by systematically decentering privileged voices and actively building space for voices and concerns on the periphery.

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. Focusing on either only the past or the future is unlikely to be a winning strategy. To move forward we must look at the past, not to condemn, but to help build the trust needed to forge the way forward. Transitional justice provides ideas and tools to do just this. Maybe the COVID-19 pandemic is the jolt we need to chart a new path based on trust, solidarity and empathy.

The authors of this briefing paper are Jasmina Brankovic, Augustine Njamnshi and Christoph Schwarte. The paper draws heavily on Sonja Klinsky and Jasmina Brankovic, The Global Climate Regime and Transitional Justice, Routledge, London, New York, 2018.



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Established in South Africa in 1989, the Centre for the Study of Violence and Reconciliation (CSVR) is a multidisciplinary institute that seeks to understand and prevent violence, heal its effects, and build sustainable peace at the community, national, and regional levels. Through its research, advocacy, and psychosocial support work, and in collaboration with communities affected by violence and inequality, CSVR seeks to enhance the accountability of state, continental, and global institutions and build social cohesion and active citizenship.

The Pan African Climate Justice Alliance (PACJA) is a consortium of more than 1000 organisations from 48 African countries that brings together a diverse membership drawn from grassroots, community and faith-based organizations, non-governmental organizations, trusts, foundations, indigenous communities, farmers and pastoralist groups. They share the vision to advance a people-centered, right-based, just and inclusive approach to address climate change and other environmental challenges facing humanity and the planet.

LRI is a UK based charity that provides legal assistance free of charge to delegates from poor and climate vulnerable developing countries as well as civil society observer organizations. LRI does this with the support of a global network of lawyers from law firms, barrister chambers and universities who produce legal opinions in response to specific queries raised in connection with the climate negotiations.
The opinions and legal briefing papers are publicly available through LRI's database at https://legalresponse.org/legal-assistance/

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