



Respect and protect human rights: lessons from transitional justice

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This essay focuses on how transitional justice-based approaches could help to ensure that respect and protection of human rights forms a core part of the future climate agreement. The essay argues that international law needs to evolve to respond to the unprecedented threat posed by climate change. It considers a proposal by Maxine Burkett aimed at rectifying injustice suffered by climate vulnerable countries and a transitional justice-related proposal by Larry May, which could help inform new global approaches to climate change. The essay recommends: that the outcome of the Paris climate conference in 2015 should reflect that the less progress there is on mitigation, the more important it is to prioritize negotiations on adaptation and on loss and damage; and that industrialized countries consider a symbolic apology for historical responsibility, to help reframe the negotiations as an effort based on reconciliation, global climate solidarity and respecting and protecting human rights.

INTRODUCTION

Respecting and protecting human rights in the future climate change agreement

At the time of writing the negotiations on the future climate change agreement face many challenges. The prospects for achieving the goal that Parties to the UN Framework Convention on Climate Change (UNFCCC) have agreed, to limit the global average temperature increase to below 2 °C, are not promising. Many vulnerable countries have argued that a goal of 1.5 °C would be necessary to avoid severe negative impacts in their countries.

The challenges in the negotiations include the intertwined questions of: how to overcome the divisions that stand in the way of reaching a new climate change agreement that is fair, that respects and protects human rights, and that will slow climate change to a safer level; and how to address negative climate change impacts, in particular in vulnerable countries and communities.

It is essential that the new climate change agreement reflects the climate justice principle of respecting and protecting human rights: without it, a durable agreement is unlikely to be possible and already vulnerable countries and people will suffer. Recognition

of the impact that climate change has on human rights has grown in recent years (Wewerinke, 2013). Without urgent and deep global emission reductions climate change will compromise human rights such as the rights to food, to water and to health to an increasing degree.

At its session in June 2014 the UN Human Rights Council reiterated its concern that the adverse effects of climate change have a range of direct and indirect implications for all human rights, and that these are felt most acutely by those already in vulnerable situations owing to: geography; poverty; gender; age; indigenous or minority status; or disability. It called on states to continue to enhance international dialogue and cooperation in relation to the adverse impacts of climate change on the enjoyment of human rights, referring in particular to developing countries, especially least developed countries, small island developing states and African countries. The Human Rights Council's concern was reflected further in its decision to hold a full-day discussion on specific themes relating to human rights and climate change at an upcoming session (UN Human Rights Council, 2014).

One way to incorporate respect and protection of human rights within the UNFCCC process, in particular in the new climate change agreement currently under negotiation, would be to borrow and adapt approaches and ideas from transitional justice. There is a great difference between the global climate change negotiations and the desperate situations of societies that have experienced violent conflict and large-scale human rights abuses. However, climate change is causing an unprecedented global injustice, with unprecedented implications for human rights, which demands new global responses. Learning from transitional justice could help the international community to achieve an effective and just response to

climate change, informed by the need to respect and protect human rights.

Transitional justice could also help UNFCCC Parties to find a new way forward in the negotiations. There are strongly held differences in views between countries regarding the future climate change agreement, in particular about how the global effort to combat climate change should be shared among countries and about issues such as financial resources for developing countries. The negotiations need new approaches, including new legal solutions that could help countries to break deadlocks and accelerate negotiations on the deep and urgent emission reductions that are needed to put the world on a path towards limiting climate change to a safer level.

Firstly, the essay provides brief overviews of transitional justice and of reparations in international law. It then considers climate change and transitional justice, including: the status of the international climate change negotiations; a proposal for climate reparations; and a proposal for a worldwide insurance scheme for victims of war and mass atrocities. Both proposals could inform solutions in the global climate change process. The essay concludes that approaches and ideas from transitional justice could make a significant contribution to a new phase in the UNFCCC negotiations, which would be based on reconciliation, global climate solidarity and respecting and protecting human rights. The final part contains specific recommendations.

Transitional justice

The increasing importance and urgency of the human rights implications of climate change, the growing need for adaptation and the escalating risks of unavoidable climate change-related loss and damage in vulnerable countries and communities - caused by insufficient mitigation – reinforce the need for solutions centred on climate justice.

In broad terms, transitional justice refers to mechanisms and approaches applied in societies that are attempting to make a transition from conflict and large-scale human rights abuses to a more stable future. Borrowing and adapting approaches and ideas from transitional justice and applying them in the context of climate change offers a new framework in which to examine challenging questions at the centre of the international climate negotiations and explore new ways forward, with respect and protection of human rights and the needs of the vulnerable as priorities.

The International Centre for Transitional Justice (ICTJ) describes transitional justice as “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms” (ICTJ, 2014).

Larry May, whose proposals relating to reparations are considered later in this essay, describes the aim of transitional justice as unique: to “achieve a just and lasting peace in a society that has been ravaged by war and atrocities such as genocide” (May 2011, 2).

Transitional justice is an evolving field. Pilar Domingo emphasizes that the definition of transitional justice is deeply contested, because its boundaries are continuously changing in response to conceptual developments, country experiences and changing expectations of victims. She identifies four main categories of transitional justice processes and mechanisms: truth-telling exercises; justice mechanisms; reparations and restitution; and mechanisms to vet and purge security forces and other state offices of perpetrators of crimes or complicity in crimes (Domingo, 2012, 2, 4-5).

Transitional justice also has weaknesses. For example, Clara Sandoval Villalba considers issues such as the tension between achieving peace and justice, for example noting that the International Criminal Court (ICC) is considered by some critics to be an obstacle to peace in some countries where it is conducting investigations (Sandoval 2011, 5).

Despite certain weaknesses and unanswered questions transitional justice is a powerful, transformational idea that has made it possible for countries and societies that have experienced conflict and gross human rights violations to find a degree of reconciliation and stability. As described above, reparations form an important part of transitional justice. As considered further below, discussions about reparations for climate change have gained increasing prominence in recent years, including in connection with the UNFCCC negotiations on climate change-related loss and damage in vulnerable countries. The section below provides a brief explanation of reparations in international law.

Reparations

International law on reparations includes open questions, but its main elements are well recognized. State responsibility for a wrongful act gives rise to an obligation to make reparation (International Law Commission, 2001). According to the International Law Commission’s authoritative 2001 *draft articles on Responsibility of States for Internationally Wrongful Acts*, reparation involves restitution, compensation and satisfaction, singly or in combination. A state responsible for a wrongful act has an obligation to make full reparation.

Restitution is a primary element of reparation and involves returning the situation to its original state, as far as possible and provided it does not involve a burden out of all proportion. **Compensation** is to include any

financially assessable damage, to the extent this has not been made good through restitution. Insofar the injury cannot be made good through restitution or compensation, the responsible state is under an obligation to give satisfaction. **Satisfaction** may involve, for example, acknowledgement of the breach or an apology. Importantly, according to the draft articles the responsible state also has an obligation to cease the act if it is continuing and to offer guarantees of non-repetition if the circumstances require (International Law Commission, 2001). **Cessation and non-repetition** are particularly important in the context of climate change.

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in 2005, include the following forms of reparation: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition.

For example, the *Basic Principles* define rehabilitation as including medical and psychological care, as well as legal and social services. Examples of satisfaction include: verification of the facts and full and public disclosure of the truth; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; and commemorations and tributes to the victims (United Nations, 2006).

Climate Change and Transitional Justice

The status of the international climate change negotiations

In 2011 UNFCCC Parties tasked the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) with developing a new “protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”, to be agreed by 2015 and to come into effect and be implemented from 2020 (UNFCCC, 2011a). Parties also recognized that mitigation efforts prior to 2020 need to be strengthened. The aim is to adopt the “2015 climate change agreement” in Paris in December 2015.

Parties need to overcome many challenges to be able to conclude a new climate change agreement in 2015. The new agreement needs to result in an effective global response to the scientific evidence about advancing climate change. It needs to take into account the historical responsibility of developed countries for climate change, growing emissions in developing countries and the deep divisions between developing and developed countries about the sharing of future emission reductions efforts.

The negotiations need to include a way forward on adaptation to climate change and also on the increasingly important issue of loss and damage caused by climate change. The concept of climate change-related loss and damage refers, broadly, to permanent loss and damage in vulnerable developing countries, which can no longer be avoided through mitigation and which cannot be avoided through adaptation. Impacts that result in loss and damage include, for example: extreme events such as cyclones and heat waves; slow-onset changes such as glacier melt and loss of soil moisture; and state shifts where impacts result in permanent changes, such as ecosystem

changes (Stabinsky and Hoffmaister, 2012, 2 - 3). The less progress there is in the negotiations on emission reductions, the more adaptation is needed and the greater the risk of loss and damage.

The negotiations on loss and damage are where issues related to reparations, in particular compensation, have emerged most explicitly in recent years. Developing countries have argued that the UNFCCC negotiations must address loss and damage, including compensation for the loss and damage they suffer. Developed countries have been hesitant, especially in relation to any wording that might risk implying acceptance of liability and possibly a consequent right to compensation.

The negotiations have addressed loss and damage since 2010, when a work programme on approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change was launched. This focused on three main thematic areas: assessing the risks of loss and damage, and current knowledge; a range of approaches to address loss and damage, including impacts of extreme weather events and slow onset events; and the role of the UNFCCC in approaches to address loss and damage (UNFCCC, 2011b).

At the Doha Climate Change Conference in 2012 strong disagreements between developing and developed countries about establishment of an international mechanism to address loss and damage came to a head. In a compromise, the Conference of the Parties (COP) decided to establish, at its next session in 2013, “institutional arrangements, such as an international mechanism” to address loss and damage (UNFCCC, 2012c). Following intense negotiations at the Warsaw Climate Change Conference in 2013 the COP reached a compromise in establishing “the Warsaw international mechanism for loss and

damage associated with climate change impacts” (UNFCCC 2013d). The focus is currently on operationalizing the mechanism.

Although Parties were able to agree on the establishment of the Warsaw International Mechanism, there are strongly differing views about loss and damage between developing and developed countries and future negotiations face considerable challenges. Issues with financial implications, in particular issues that might have legal compensation-related implications, are likely to be most challenging.

The negotiations on loss and damage have given new prominence to the question of climate change-related reparations in recent years. This is likely to be reinforced by the expected worsening of negative climate change impacts, especially if UNFCCC Parties are not able to conclude a new climate change agreement at the Paris Climate Change Conference in December 2015, which results in significant global emission reductions.

Climate change is making global cooperation on an entirely new scale necessary. It is essential that countries find a way forward that makes it possible to overcome differences, strengthen cooperation and accelerate progress on emission reductions. Good legal design choices for the architecture of the future climate change agreement, strong leadership in the negotiations and political initiatives by countries or groups of countries can help resolve some of the challenges related to the negotiations on the new agreement.

However, there is also a need to re-explore some of the fundamental assumptions that underpin the negotiations and consider new approaches and ideas, including ones that might allow Parties to reframe difficult negotiating issues in a more positive way. As considered further below, transitional justice

could have a significant, potentially transformational contribution to make in this regard, and its focus on human rights would be a means of incorporating the climate justice principle of respecting and protecting human rights in the future climate change agreement.

A proposal for climate reparations and a proposal for a worldwide insurance scheme for victims of war and mass atrocities

The sections below consider a proposal by Maxine Burkett for overarching climate reparations claims and a proposal by Larry May for a worldwide no-fault insurance scheme that would cover the reparation costs for victims of war and mass atrocities. Both proposals raise important ideas that could help to inform a fair and effective global response to climate change, which respects and protects human rights.

As noted later in this essay, borrowing approaches and ideas from transitional justice would not necessarily need to mean applying strict legal concepts in the area of climate change. That could help to make new approaches acceptable to countries, especially countries that might have specific legal concerns.

A proposal for overarching climate reparations claims

Maxine Burkett has addressed the situation of the climate vulnerable, which she identifies as communities or states that have a particularly acute vulnerability to climate change, in *Climate Reparations* (Burkett 2009, 5). Burkett argues rightly that “[t]he very nature of climate change defies a comfortable parsing of familiar claims and remedies” (Burkett, 2009, 2).

Climate change has created an unprecedented situation, which demands new responses from the international community. While Burkett’s proposal would meet many challenges in practice, its focus on the

vulnerable aligns with a climate justice framework and with respecting and protecting human rights.

Drawing on work related to transitional justice by among others Pablo de Greiff, who became the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in 2012, she develops a proposal for overarching claims for climate reparations. In Burkett’s view *ad hoc* litigation efforts will remain important, but she believes that an overarching reparations claim is needed to meet the scale of climate damage (Burkett 2009, 2).

She sets out an approach to reparations based on three main elements: an apology; compensation; and a guarantee of non-repetition. Burkett acknowledges that her reparations frame arguably stretches the concept of reparations further than before, but she emphasizes the unprecedented issues raised by climate damage (Burkett, 14, 2).

According to Burkett a reparative scheme could serve as an organizing principle for compensation claims, while addressing the moral challenges and fostering a healing process in the pursuit of just remedies (Burkett, 2009, 13). In her view reparations involve both parties acknowledging that their futures are best served through collaboration (Burkett 2009, 14). She believes that “there is a transformative quality to both the process and product of reparations efforts that stems from their engagement with morality and community” (Burkett 2009, 15).

In *Climate Reparations* Burkett considers a hypothetical case of small island states against the United States to test the feasibility of a reparations claim. She envisages reparations claims as coordinated efforts between a vulnerable country or group of countries in collaboration with a major greenhouse gas emitting country or group of countries (Burkett 2009, 28).

In Burkett's view implied or explicit obligations for Annex I countries contained in the UNFCCC provide support for finding that these countries would be rightly subject to claims for reparations, in addition to other international law rules on which claims could be based (Burkett 2009, 21 -22). She argues that adaptation measures, such as insurance and technology transfer, can be viewed as methods of compensation, and that developed countries could provide, without delay or distraction, funding to help developing countries (Burkett 2009, 24).

A proposal for a worldwide no-fault insurance scheme for victims of war and mass atrocities

Larry May has questioned what model of compensation might be appropriate in a context of transitional justice, when considering reparations for victims of war or mass atrocities. He has argued that in achieving transitional justice the duty of restoration may not lie only with those who have caused the damage (May 2011).

His proposal for a worldwide no-fault insurance scheme for victims of war and mass atrocities is relevant for the climate justice principle of respecting and protecting human rights in that it makes the needs of the vulnerable a primary concern. Insurance-related issues have also been part of the UNFCCC negotiations, raised in particular by the Alliance of Small Island States (AOSIS), which has put forward a proposal for a Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts. It included three components: an Insurance Component; a Rehabilitation/Compensatory Component; and a Risk Management Component (AOSIS, 2012).

In May's view transitional justice demands that victims receive their due even if the winners may have to provide most of the compensation. He premises this on the idea that in situations of scarcity the most vulnerable must get their due first (May,

2011, 6 - 7). He points out that it is not always the major antagonists that are responsible for a war and that even if a government has been the aggressor, innocent civilians who were not responsible often suffer (May 2011, 19 - 20).

While acknowledging that the idea is controversial, he proposes a worldwide no-fault insurance scheme for covering the reparation costs of victims of war and mass atrocities. All states in the world would contribute to a fund that would be used to pay all reparation costs at the end of war or mass atrocity. The proposal would break the legal link between reparations and fault: states that were not even involved in the war or mass atrocity would be expected to contribute. In this way, in May's view, victims would be more likely to be compensated than if restitution and reparation rested only with the wrongdoers (May 2011, 21).

Gabriella Blum and Natalie J. Lockwood explore May's proposal in *Earthquakes and Wars: The Logic of International Reparations*. They offer their investigation as "a framework for comparing various international schemes to aid or compensate victims of calamities and for considering global justice more broadly" (Blum and Lockwood 2012, 2). Specifically, Blum and Lockwood investigate whether the arguments for expanding compensation duties in war are necessarily confined to war situations and in particular whether the arguments would also support an expanded duty to compensate victims of natural disasters.

Blum and Lockwood note that May's proposal to unlink the duty of repair from the prior perpetration of harm "represents a significant departure from existing notions of state responsibility" (Blum and Lockwood 2012, 10). However, they also find that justifications for expanding the duty to repair war damage could also support an expansion of a duty to aid victims of natural disasters or of other causes of human suffering. In their view it is

not a given that damage caused by war should be prioritized (Blum and Lockwood, 2012, 32). If one shares Blum and Lockwood's viewpoint, the duty to repair could also be expanded in the context of climate change. Blum and Lockwood recognize that the political prospects of May's proposal are not strong, but conclude that although the proposal for a worldwide no-fault scheme goes far beyond what has been understood as the duty to repair it deserves serious contemplation (Blum and Lockwood 2012, 32).

May's proposal that all states should contribute to reparations, irrespective of whether they were aggressors or even involved in the conflict or mass atrocity, may stretch ideas about reparations too far for some, but the idea of putting the needs of the victims first is compelling. Transposed to climate change, it would align strongly with the climate justice principle to respect and protect human rights.

In May's model there would still be questions about how the reparations burden should be shared globally. For example, should fault be a factor in dividing the cost of reparations? This would not necessarily have to be an issue if applying similar ideas in the climate change context. For example, voluntary contributions could play a role, as could mobilizing funds through new or existing international mechanisms.

Conclusions

The global response to climate change needs new approaches and ideas, including new legal solutions. It is essential that international law evolves to respond to the unprecedented challenge that climate change poses. In particular, international law can and should help to make reconciliation and global solidarity in the face of climate change possible (Hyvarinen, 2013). Transitional justice-based approaches and ideas could make a significant contribution to this and to achieving a fair and effective new climate

change agreement, which incorporates respect and protection of human rights.

As noted Maxine Burkett emphasizes the transformational potential of reparations. She argues that to repair individual communities and the global community all concerned will need to confront deep moral questions (Burkett 2009, 15). Repair may be necessary for the global community to be able to move forward and to fight climate change in an effective and just way. Transitional justice and proposals such as Maxine Burkett and Larry May's can inform and strengthen the global response to climate change through a framework that makes respect and protection of human rights explicit and essential.

An important point is that drawing on transitional justice for new approaches in the climate negotiations would not necessarily need to involve applying strict legal concepts. This could help to make the introduction of new approaches acceptable to countries that might otherwise be concerned about potential legal implications.

Building on the above, a new phase in the UNFCCC negotiations, informed by transitional justice and with respect and protection of human rights as a central priority, could include the following elements:

Acknowledgement and apology could form a powerful basis for beginning to reframe the UNFCCC negotiations. Taking into account developed countries' concerns related to compensation and legal liability an apology could be formulated in a way that avoided such implications, while still demonstrating genuine recognition of historical responsibility and its effects on the shared global climate and consequently on vulnerable countries and people. Such an apology could have the potential to be a turning point in the negotiations.

The human rights concerns that are central to transitional justice would make the vulnerable, whose human rights are most at risk, a priority in the UNFCCC negotiations. This should include increasing assistance to vulnerable developing countries in the form of: financial resources; technology transfer and development; and capacity-building. In addition, it should include considering a no-fault global insurance scheme for climate-related loss and damage, building on May's proposal and proposals such as those put forward by AOSIS, and/or global or regional solidarity funds (Shine, 2013). The negotiations on loss and damage should be accelerated, as should those on adaptation, with respect and protection of human rights as a central concern.

Cessation and non-repetition in the form of urgent and deep emission reductions, in particular by countries that bear the greatest historical responsibility for climate change, would be essential. Failure to limit climate change to a safer level by keeping the global average temperature increase to below 2°C or less would make it very challenging, if not impossible, to realize the climate justice principle of respecting and protecting human rights.

The new climate change agreement will need to respond to increasingly dangerous climate change. It is essential that it reflects a new, much stronger level of commitment to global emission reductions and a much stronger focus on respect and protection of human rights. Constructing new approaches based on transitional justice, and adapting them for the context of climate change, could help to achieve that.

Recommendations

The UNFCCC negotiations need to find a path forward that enables the international community to recognize and respond to the injustice of climate change and overcome the divisions that stand in the way of a concerted and effective global effort to fight climate change. A successful global response to climate change will require an unprecedented level of international cooperation, including development of new legal solutions.

New approaches based on transitional justice, which has human rights at its centre, could realize the climate justice principle to respect and protect human rights in the future climate change agreement. A re-framing of the UNFCCC negotiations that draws on transitional justice could also have transformational potential: it could allow a shift towards negotiations based on reconciliation and global climate solidarity.

Climate change is a long-term problem, which even the strongest possible outcome at the Paris Climate Change Conference in 2015 cannot resolve, although the Paris conference could lay the basis for a new phase in the negotiations. The continuing UNFCCC negotiations need to take place in a framework of trust and cooperation, with vulnerable countries and communities as a priority concern. To achieve this the negotiations need to move to a new level, beyond past differences and entrenched divisions. That in turn will require positive global leadership and the willingness of at least some countries to take the first steps.

As described above, a new phase in the UNFCCC negotiations could include: acknowledgement, and apology for historical responsibility; increasing assistance to vulnerable developing countries, including considering a global insurance scheme and/or global or regional solidarity funds; and cessation and non-repetition in the form of

successful negotiations leading to urgent and deep emission reductions.

Based on this, initial steps could include the following:

- The less progress there is towards keeping the average global temperature increase to well below 2°C the more important it is to prioritize adaptation to climate change and the response to climate change-related loss and damage. This understanding should form an explicit part of the outcome of the Paris Climate Change Conference in December 2015 and should be reflected in steps agreed in Paris to advance the post-Paris negotiations on adaptation and loss and damage.
- Circumstances and patterns of emissions growth have changed since the UNFCCC was adopted in 1992, but industrialized countries' original historical responsibility for climate change remains. These countries should consider demonstrating global leadership by making a symbolic apology in recognition that their development choices triggered climate change. Such a move could be a significant, powerful step towards reframing the UNFCCC negotiations as a shared effort based on reconciliation, global climate solidarity and respecting and protecting human rights.

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