Climate change negotiations and transitional justice: the advent of a Carbon Truth and Reconciliation Commission?

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Abstract

Developing states, such as India and China, are reluctant to depart from their hard-lined stance on the common but differentiated responsibilities and respective capabilities principle. They want to ensure that the historical responsibility of the developed world is addressed. The developed world is, however, reluctant to acknowledge its historical responsibility. At the core of this deadlock seems to be a lack of trust between parties. The current atmosphere of distrust amongst parties in the climate change negotiations may provide fertile ground for the application of transitional justice (TJ) mechanisms. TJ is well suited for a divisive environment, which is burdened with historical events that hamper further progress. This article investigates whether TJ models may be conducive to further progress in the climate change negotiations. Hence, the discussion focuses on a brief introduction of the notion of TJ; whereafter Truth Commissions are discussed in greater detail. The feasibility of an International Truth Commission concerning historical greenhouse gas emissions then receives attention. The authors conclude that the transposition of the Truth Commission model to the current *casus* will be problematic and that it is probable that the establishment of an 'International Carbon Truth Commission' will merely undermine climate change negotiations. However, the authors suggest that TJ offers lessons for climate change negotiators and that it is necessary to pursue elements of TJ through current climate change negotiations.

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INTRODUCTION

The Durban Platform launched a new round of negotiations aimed at the establishment of 'a protocol, another legal instrument or an agreed outcome with legal force' applicable to all parties for the period from 2020 onwards.[1] The negotiations should be concluded by 2015. Although the recent Conference of the Parties (COP) in Doha secured a second commitment period for the Kyoto Protocol, substantial progress was not made concerning the architecture of a post-2020 agreement and mitigation and financing commitments.[2] These issues persistently impede progress towards the realisation of the goals of the Durban Platform.

The on-going disagreement over the interpretation and application of the (CBDRRC)[3] is at the heart of the disagreement concerning the question of whether and how a future agreement should be applicable to both developing and developed states. This issue relates to the historic responsibility of developed states for greenhouse gas emissions.

In order to progress it is vital for advanced developing states to adopt a more pragmatic stance and accept mitigation commitments.[4] This will ensure that all major emitters address global climate change on the basis of differential obligations. Certain developing states, such as India and China, are reluctant to depart from their hard-line stance on the CBDRRC.[5] They want to ensure that the historic responsibility of the developed world is addressed and require firm commitments from the developed world, in particular the

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1 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC Decision 1/ CP.17 (UN Doc FCCC/CP/2011/9/Add.1, 11 December 2011). For a discussion of the Durban Platform, see: L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' [2012] *ICLQ* 509.

2 Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment), UNFCCC Decision 1/CMP.8 (UN Doc FCCC/KP/CMP/2012/13/Add.1, 28 February 2013).

3 See the discussion of Winkler & Rajamani 'CBDR&RC in a regime applicable to all' [2013] Climate Policy 1.

4 Recent developments at COPs have indicated that the 'firewall' between Annex I and non-Annex I states is, however, eroding. Negotiations in the climate change regime indicate the end of the stark dichotomisation between Annex I and non-Annex I countries in favour of further differentiation amongst developing states. However, the key question remains how to negotiate mitigation commitments that cover major emitters from both the developed and developing states pursuant to equity. Pauwelyn 'The end of differential treatment for developing countries? Lessons from the trade and climate change regimes' (2013) 22 *RECIEL* 29.

5 See Boyle 'A mirage in the desert of Doha assessing the outcomes of Doha 18' available at: www.iisd.org/pdf/2012/com_mirage_desert_doha_cop18.pdf (last accessed 23 February 2014).

provision of financing. The developed world is reluctant to acknowledge its historical responsibility as it fears the advent of litigation.[6] It further argues that it is vital that particularly advanced developing states accept mitigation commitments and contribute to the global combat against climate change. At the core of this deadlock seems to be a lack of trust amongst parties, which is clearly needed for the conclusion of an inclusive post-2020 agreement. Hence, the question arises as to which creative approaches may be used to acknowledge historical responsibility and injustice in order to proceed with constructive climate change negotiations towards a 2015 agreement which will realise an ambitious and equitable outcome.

The quest for international legal innovation on climate change negotiations recently resulted in the question whether Transitional Justice (TJ) approaches, in particular the truth commissions, may be useful in the context of the challenges of climate change negotiations.[7] Could TJ models contribute to the conclusion of an ambitious and equitable legal instrument for the period from 2020 onwards? In response to the this question, the authors briefly introduce the notion of TJ and conduct a 'thought experiment' whereby they determine the relevance of a truth commission for climate change negotiations. Subsequently the authors critically consider the suitability of this approach in relation to climate change negotiations. The authors identify various shortcomings in the application of a truth commission to climate change negotiations and conclude that an International Truth and Reconciliation Commission for climate change negotiations may actually undermine the objectives of the Durban platform.

TJ[8] AND CURRENT CLIMATE CHANGE NEGOTIATIONS

Application of TJ in the context of climate change negotiations

The current atmosphere of distrust amongst parties in the climate change negotiations may provide fertile ground for the investigation of the potential role of TJ mechanisms in its context. TJ is well suited to a divisive environment, which is burdened by historical events that hamper further

6 See for instance Faure & Peeters *Climate change liability* (2011).

7 Werner Scholtz was recently approached by a non-governmental organisation in order to address this issue. The issue was also raised by the Foundation for International Environmental Law and Development (FIELD) (Hyvarinen 'Climate change and global justice: lessons from transitional justice?' available at: www.field.org.uk/papers/climate-change-global-justice-lessons-transitional-justice (last accessed 23 February 2014).

8 It is not the aim of this brief article to dissect transitional justice (TJ) in detail. A comprehensive corpus of scholarship exists. Examples are: Mcadams (ed) *Transitional justice and the rule of law in new democracies* (1997); Williams, Nagy & Elster (eds) *Transitional justice* (2012).

progress. TJ is defined as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[9] Thus, TJ is an approach to pursue justice in times of transition from conflict and/or repression to societal stability. TJ aims to promote civic trust and strengthen democracy and ultimately the rule of law. It is important to note that TJ is applied where a society at large and not merely individuals are affected by human rights abuses. This means that the post-conflict problems that TJ applies to are complex since large numbers of people need to be dealt with in a fair manner for justice to be achieved.

Various complementary mechanisms, both judicial and non-judicial, exist in order to promote TJ.[10] TJ mechanisms must be designed to meet the needs of a specific case. These mechanisms include truth commissions,[11] reparations,[12] criminal prosecutions,[13] vetting and dismissals[14] and institutional reform[15] (or a combination of these approaches).

The relation between TJ and human rights constitutes an important link for the purposes of this discussion. Current discourse on human rights and climate change indicates that climate change has severe effects on a range of human rights, such as the right to life, adequate food, water, health, adequate housing and self-determination.[16] It would, however, be difficult

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9 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the UN Secretary General to the Security Council (S/2004/616, 23 August 2004) (hereafter UNSG Report) par 8.

10 UNSG Report par 8.

11 This is a fact-finding entity that may facilitate the extraction of the truth.

12 The provision of, for instance, financial remedies for victims of human rights abuses is of importance for the achievement of justice.

13 Serious international crimes, such as genocide, crimes against humanity and war crimes may be investigated and prosecuted.

14 In terms of this mechanism individuals associated with past human rights abuses may be identified and removed from the public service.

15 Public institutions are reformed in order to ensure accountability and prevent an occurrence of human rights abuses. Vetting may contribute to institutional reform.

16 See Resolution 10/4 of the United Nations Human Rights Council (UNHRC) ('Human Rights and Climate Change'). Decision 1/CP. 16 (Cancun Agreements) takes note of Resolution 10/4 and emphasises that 'parties should in all climate change related actions, fully respect human rights'. Various authoritative texts have dealt with the legal interface between human rights law and the impacts of climate change. It is not the intent of this publication to revisit this discourse. See, for instance, Knox 'Climate change and human rights law' (2009) 50 *Va J Int' L* 164; McInerney-Lankford, Darrow & Rajamani *Human rights and climate change: a review of the international legal dimension* (2011); Bodansky 'Climate change and human rights. unpacking the issues' (2010) 38 *Ga J Int'l & Comp L* 51; Cameron & Limon 'Restoring the climate by realizing rights: the role of

to prove large-scale human rights violations in the instance of climate change. This is an important distinction between climate change and instances where TJ applies. The fact that, generally speaking, states do not have extraterritorial human rights obligations, may bar vulnerable people in developing states to claim on the basis of human rights violations from developed states for having contributed to climate change through the emission of greenhouse gas emissions.[17] It is, however, important to recognise that the extraterritorial dimension of human rights in relation to climate change is fertile ground for further investigation[18] and is currently under progressive development.[19]

The link between climate change and human rights invites a reflection of the potential role of TJ in relation to climate change negotiations. TJ approaches may be beneficial in relation to the issue of climate change. TJ mechanisms may ensure a promotion of a culture of a range of human rights, which include environmental rights, without being hampered by the issue of extraterritoriality. The design of TJ approaches in this instance could be implemented in the context of the pivotal position of sustainable development in the climate change regime and negotiations.[20] An important legal element of sustainable development is the need to ensure that environmental concerns are integrated into the broader framework of economic and social development.[21] This is akin to the suggestion that in

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the international human rights system' (2012) 21 *RECIEL* 204. See also Boyle 'Human rights and the environment: where next?' (2013) 23 *EJIL* 613.

17 Beyerlin 'Environmental migration and international law' in Hestermeyer *et al* (eds) *Coexistence, cooperation and solidarity Liber Amicorum Rüdiger Wolfrum – volume I* (2011) 328.

18 Paras 64 and 66 of the Analytical Study on the Relationship between Human Rights and the Environment of the UNHCHR (UN Doc A/HRC/19/34, 16 December 2011).

19 See in relation to the general discourse on extraterritorial human rights obligations, for instance: Skogly *Beyond national borders: states' human rights obligations in international cooperation* (2006); Coomans & Kamminga (eds) *Extraterritorial application of human rights treaties* (2004).

20 Article 3(4) of the United Nations Convention on Climate Change (1992): 'Sustainable development is the single most important concept in international environmental law in the 'sense that the whole of international environmental law has to be developed further under an overall "sustainable development umbrella".' Beyerlin'The concept of sustainable development' in Wolfrum (ed) *Enforcing environmental standards: economic mechanisms as viable means* (1996) 112.

21 *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep (25 September 1997) 7, separate opinion of Vice-President Weeramantry, par 140. This is affirmed in the UNFCCC, preambular par 21. Principle 4 of the Rio Declaration provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. This principle of integration is the most 'fundamental and operationally significant' element of sustainable development. Voigt

order to allow justice to make a contribution to societies in transition, the need exists to integrate economic, social and cultural rights in the transitional justice framework.[22] Development assistance in relation to transitional justice is also of importance for weak states.[23] It is in this regard that the question arises as to what role the international community should play in assisting weak states to establish governmental structures in a post-conflict situation.

Hence, it is important to consider which TJ mechanisms may be appropriate in the climate change setting. The choice for a relevant TJ mechanism could be guided by the specific nature and context of the deadlock in relation to climate change negotiations. Cognisance should be taken of the complexity of the issue. The distrust and division exists between states at the international level. However, vulnerable people in states bear the burden of greenhouse gasses. It is not only people in developing states who are affected by the consequences of climate change. For example, the gap between the 'haves' and the 'have-nots' reflected in the domestic setting means that vulnerable people also exist in developed countries.[24] TJ mechanisms are suitable for complex settings, which affect not only individuals but societies at large. The focus of TJ mechanisms in relation to climate change could therefore focus on societies as represented by states. This means that states as the main subjects of international law might represent societies, which are encumbered by the consequences of climate change as well as those industrialised societies which are historically responsible for emissions. The issue in relation to climate change is even more complex as the 'perpetrators' are not states, but companies.[25] The

Sustainable development as a principle of international law resolving conflicts between climate measures and WTO law (2009) 36.

22 Duthie 'Introduction' in De Greiff & Duthie (eds) *Transitional justice and development: making connections* (2009) 19. See, however, the cautionary remarks of Hellsten, which states that 'the wider socio-economic cultural changes are not the task of TJ mechanisms' since TJ 'have a special but short term role in dealing with the most serious human rights violations and in ending impunity'. Hellsten 'Transitional justice and aid – Working Paper 2012/06' (WIDER 2012) 24.

23 See Pietersen *et al* 'Foreign aid to transitional justice: the cases of Rwanda and Guatemala 1995–2005' in Ambos *et al* (eds) *Building a future on peace and justice* (2009) 439.

24 See Farber 'Beyond the north-south dichotomy in international climate law: the distinctive adaptation responsibilities of the emerging economies' (2013) 22 *RECIEL* 42.

25 States, of course, have an obligation to regulate the activities of companies under their jurisdiction.

determination of historic responsibility is therefore a difficult and controversial issue.[26]

The truth commission model[27] could potentially be an appropriate TJ response to the nature and complexity of the historic responsibility in the context of climate change negotiations. Other TJ mechanisms, such as criminal prosecutions,[28] institutional reform[29] as well as vetting and dismissals[30] are not of relevance. It is important to recall that it is the main task of a truth commission to conduct investigations about human rights violations in order to generate a report about its findings (which may include recommendations). Truth commissions are mostly of a temporary nature and are established at the domestic level *via* legislation or agreement. One of the most prominent commissions was the Truth and Reconciliation Commission of South Africa (TRC).[31] The TRC embodied three distinct committees, which were the Human Rights Violations Committee, Reparations Committee and the Committee on Amnesty. It is one of the primary aims of the commissions to achieve reconciliation through truth seeking.[32] The TRC has done this through public hearings attended by victims and perpetrators. The work of the commission was transparent and made public *via* television broadcasts.

It is important to take note of the fact that a commission is not a court of law. It is an alternative, albeit a complementary mechanism to courts. This means that the findings of the commission do not have a direct legal effect on the perpetrator. Truth commissions are generally authorised to investigate only gross human rights violations.[33] It is only in rare instances that they have the

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26 See also Caney 'Cosmopolitan justice, responsibility and climate change' (2005) 14 *LIJL* 747.

27 A truth commission may also recommend reparations, which may be of relevance *in casu.*

28 Serious international crimes are absent *in casu.*

29 The issue *in casu* does not relate to the reform of public institutions that contribute to human rights violations.

30 Vetting and dismissals may be conducted as a part of institutional reform.

31 See Dugard 'Reconciliation and justice: the South African experience' 1998 *Transnat'l L & Contemp Probs* 277. See also Dugard 'Retrospective justice: international law and the South African model' in Mcadams (ed) *Transitional justice and the rule of law in new democracies* (1997) 269.

32 De Greiff distinguishes two mediate goals (recognition and civil trust) and two final goals (reconciliation and democracy) of transitional justice. See De Greiff 'Theorizing transitional justice' in Williams, Nagy & Elster (eds) *Transitional justice* (2012) 34.

33 Van der Merwe 'Delivering justice during transition: research challenges' in Van der Merwe, Baxter & Chapman (eds) *Assessing the impact of transitional justice: challenges for empirical research* (2009) 117 observes as follows: 'Official transitional justice

authority to grant amnesty to the perpetrators under certain specified conditions,[34] such as the requirement that the said violations must have been aimed at attaining a political purpose.[35] Scholars disagree on the issue whether amnesty for crimes under criminal law contravenes international law.[36]

Non-state actors may also have an active role in the establishment and functioning of a truth commission.[37] Civil society in Rwanda, for instance, established a truth commission when they created the International Commission of Investigation on Human Rights Violations in Rwanda.[38]

The international nature of climate change negotiations therefore invokes the question whether it would be possible to establish a truth commission[39] at the international level. The establishment of a permanent international truth commission for criminal cases through a treaty has been suggested.[40] It is, therefore, not theoretically impossible to establish an international

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mechanisms generally are narrow in scope, focusing on particular forms of abuse, designated time frames, and specific categories of perpetrators. The field is also usually quite conservatively circumscribed by a focus on human rights abuses that are defined as criminal, either in terms of international law or according to the law of the affected state. Moreover, there is generally a focus on the most severe forms of abuse, such as the South African TRC's focus on "gross human rights violations".'

34 Recently only the South African Truth and Reconciliation Commission and the Truth Commission in East Timor have been accorded the power to grant amnesty. The South African TRC pertained to civil liability and criminal responsibility. See Dugard n 13 above; Stahn 'Accommodating individual criminal responsibility and national reconciliation: the UN Truth Commission for East Timor' (2001) 95 *AJIL* 952 *et seq*.

35 See the Promotion of National Unity and Reconciliation Act 34 of 1995, s 20(1) for a number of factors to be taken into account in determining whether a gross violation of human rights was aimed at attaining a political purpose.

36 LaPlante 'Outlawing amnesty: the return of criminal justice in transitional justice schemes' (2009) 49 *Va J Int'l L* 915; Sterio 'Rethinking amnesty' (2006) 34 *Denv J Int'l L & Pol'y* 373; and O'Brien 'Amnesty and international law' (2005) 74 *Nord J Int'l L* 261.

37 See for a discussion of the role of civil society in the process of social reconstruction: Roht-Arriaza 'Civil society in processes of accountability' in Bassiouni (ed) *Post-conflict justice* (2002) 97. See for an account of the role of NGOs in the pursuit of TJ in Guatemala: Ballengee 'The critical role of Non-Governmental Organizations in transitional justice: a case study of Guatemala' (1999–2000) 4 *UCLA J Int'l L & Foreign Aff* 477.

38 Gahima *Transitional justice in Rwanda: accountability for atrocity* (2013) 37.

39 See for a comprehensive overview: Hayner 'Fifteen Truth Commissions – 1974 to 1994: a comparative study' in Kritz (ed) *Transitional justice: how emerging democracies reckon with former regimes – volume I* (1995) 225.

40 Scharf 'The case for a permanent International Truth Commission' (1997) 7 *Duke J Comp & Int'l L* 375. This commission would function in addition to the International Criminal Court and domestic courts.

commission *via* a treaty or resolution to facilitate a process of reconciliation in order to address the issue of historical responsibility. The establishing treaty or resolution will need to include lucid and detailed terms of reference for the commission. Issues, such as the period relevant for historic responsibility, need to be decided. It may be necessary for the commission to undertake investigations concerning the historic emissions of greenhouse gases.[41] The division in the UNFCCC between Annex I and non-Annex I countries may be used as a point of departure.[42]

The commission might facilitate a discourse towards reconciliation. It is an extra-judicial mechanism which does not have direct legal consequences and it is of great importance to stress this aspect. The commission should not constitute a witch hunt against the developed states. This very controversial aspect may actually be a major obstacle to the creation of a truth commission. It is, therefore, important to make it clear that developed states do not necessarily accept legal responsibility through their participation. The issue of state responsibility and liability is a different issue, which may be resolved (but preferably not) *via* legal adjudication.[43] The activities of the commission may result in several consequences, which may form part of a pursuit of justice. Developed states may also apologise as a form of symbolic reparation.[44] However, the urgency of the climate change crisis and need for financial assistance towards adaptation for vulnerable states argue against a mere apology without other forms of reparation. Reparation can be compensatory, restitutionary, satisfactory and rehabilitative.[45] The issue of reparations may be linked to the current discourse on loss and damage. The Doha Conference marked the first time that the importance of addressing loss and damage associated with the adverse effects of climate change,

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41 Data concerning historic emissions of certain industrialised states dates back to 1850. However, the quality of the data is not very good. Parker & Blodgett 'Greenhouse gas emissions: perspectives on the top 20 emitters and developed versus developing nations' available at: www.fas.org/sgp/crs/misc/RL32721.pdf (last accessed 23 February 2014).

42 Although the majority of developed states did not intend this differentiation to serve as a measure of accountability.

43 International and domestic climate change litigation is currently a matter of major importance. See Lord, Goldberg, Rajamani & Brunnée *Climate change liability* (2011); and Kosolapova *Interstate liability for climate change-related damage* (2013).

44 Jenkins 'Taking apology seriously' in Du Plessis & Peté (eds) *Repairing the past? International perspectives on reparations for gross human rights abuses* (2007) 53.

45 UNSG report par 54 *et seq.* See 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 (General Assembly Resolution 60/147, 16 December 2005).

especially in developing states, was affirmed in a decision of a COP.[46] Hence, it was decided to establish an international mechanism at COP 19, which would address loss and damage in developing countries that are particularly vulnerable to the consequences of climate change. The Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts was accordingly established at COP 19. This mechanism merely lays the groundwork for further action which needs to be undertaken in order to address loss and damage. The notion of loss and damage is a contentious issue. Many developed countries fear that the recognition of loss and damage may serve as an affirmation of the admission of liability and/or responsibility, which could result in demands for compensation. Substantial difficulties may arise in the establishment of the envisaged mechanism. It is, for instance, difficult to quantify the loss and damages associated with the adverse impacts of climate change. Uncertainty exists as to the establishment of causation between greenhouse gas emissions and loss and damage and apportionment of liability.[47] TJ approaches may be conducive to finding a solution for this complex and controversial issue.

The TJ approach could make provision for some form of 'amnesty' for historical responsibility. This may, however, prove to be as controversial and difficult as in the case of usual truth commissions and the legal validity of this 'amnesty' may also be questioned. 'Amnesty' may be beneficial for developed states but may be opposed with reluctance by vulnerable states.[48] It is therefore not wise to allow for 'amnesty'.

The UN may facilitate the establishment and functioning of the commission. It may be possible for the UNFCCC Secretariat to serve as the relevant institution in this regard. However, it is possible to separate the deliberations

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[46] Decision 3/CP.18 in Report of the Outcome of the Conference of the Parties on its Eighteenth Session, held in Doha from 26 November to 8 December 2012.

[47] See Faure & Nollkaemper 'International liability as an instrument to prevent and compensate for climate change' (2007) 43 *A Stan J Int'l L* 123–79.

[48] Upon signature of the UNFCCC, the small island states of Fiji, Kiribati, Nauru and Tuvalu entered the following declaration: 'The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.' UNFCCC, 'Declarations by Parties' available at: unfccc.int/essential_background/convention/items/5410.php (last accessed 23 February 2014).

of the commission from the cumbersome climate change negotiations in order to escape the existing obstacles blocking consensus.

NGOs are active in relation to climate change negotiations and may also fulfil an important role in the establishment and functioning of an international truth commission.[49] They may identify issues of relevance and serve as agenda setters, act as conscience keepers, and mobilise pressure in order to respond where necessary. They can also provide advice concerning matters of relevance.[50] Several international NGOs, such as the International Centre for Transitional Justice and the African Transitional Justice Research Network, may cooperate with international (environmental) NGOs in transnational networks in this regard.[51]

A (flawed) transposition of TJ?

Any discussion on TJ must be aware that it faces several critical challenges[52] and its impact is difficult to assess. Hence, it is important to acknowledge the potential shortcomings of TJ in its application.

Alison Bisset[53] quite correctly observes that the term 'transitional justice is in many ways misleading'. Its normal meaning implies 'justice during transition' and does not give a real indication of any particular form of justice that has to be implemented 'after transition has taken place'. In addition the term 'justice' in this sense is extremely vague and uncertain. It is suggested that it must at least be understood extensively as

> an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions, and while its administration usually implies formal judicial

49 Tolbert 'Global climate change and the role of international Non-Governmental Organisations' in Churchill & Freestone (eds) *International law and global climate change* (1991) 97.

50 Paragraph 3 of Chapter 27 of Agenda 21 acknowledges this as it states that: 'Non-governmental organisations, … possess well-established and diverse experience, expertise and capacity'. See Yamin 'NGOs and international environmental law: a critical evaluation of their roles and responsibilities' (2001) 10 *RECIEL* 156.

51 Katz & Anheier 'Global connectedness: the structure of transnational NGO networks' in Anheier, Kaldor & M Glasius (eds) *Global civil society 2005/6* (SAGE 2006) 240.

52 See Clark & Palmer 'Challenging transitional justice' in Palmer, Clark & Granville *Critical perspectives in transitional justice* (2012) 1.

53 Bisset *Truth commissions and criminal courts* (2012) 10.

mechanisms, traditional dispute resolution mechanisms are equally relevant.[54]

The point that must be emphasised is that the form of justice to be implemented in future can only be decided upon after the transitional process (whatever this process may entail) has been completed. It may involve certain restorative measures in the sense that the principal contributors (historically developed states) to the problem (*in casu* climate change) may be expected to make some form of reparation to those (mostly developing states) who suffer the negative consequences of the former's actions. The question that then arises is whether any financial development aid that has previously been granted by developed states to developing states should be taken into account. In any event, these are the kind of issues that should be decided upon during negotiations between the developed and developing states.

But even before this point is reached, the international community (and by this is meant both developed and developing states) has to agree on the mechanisms to be employed in order to ensure transitional justice. If the process of transitional justice is not handled with the necessary sensitivity, it may aggravate the problem rather than present a way out of a dilemma.[55]

The transposition of the TRC model to the current *casus* is also fraught with difficulty. One of the most important requirements for the successful functioning of a TRC is the willingness of the perpetrators to acknowledge the past.[56] Exactly this requirement may prove to be a serious stumbling block in employing a TRC-like structure to deal with the issue of climate change. Developed states would not readily admit their contribution to global warming, especially in view of the fact that it has only in recent years been presented as a scientific reality, and they would consequently refuse to be held 'liable' for something they previously did not know to exist. Hence, the TRC model may not be conducive to address the issue of historical responsibility for climate change. Furthermore, TRCs are employed within a single state to establish the truth about and make recommendations concerning the granting of amnesty to or the prosecution of the perpetrators gross human rights violations under a previous regime. As such a TRC

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54 UNSG report par 7.

55 Kritz 'The dilemmas of transitional justice' in Kritz (ed) *Transitional justice – volume I: general considerations* (2004) xxi.

56 Kritz 'The dilemmas of transitional justice' in Art & Jervis (eds) *International politics: enduring concepts and contemporary issues* (9ed 2009) 534.

operates within a criminal law context. In South Africa, for example, the outcome of the TRC process was designed to be either the granting of amnesty to those who fulfilled the requirements, or the institution of prosecution against those who did not qualify for amnesty, although the latter never really materialised.[57] In this instance the TRC model functions on the basis of the authority of the particular state. People and organisations could be forced judicially to testify before the TRC. The relationship between the TRC and those testifying before it might sometimes be an unequal one insofar as the TRC might be endowed with procedural powers similar to those of a court of law. It could thus not in any way be described as a voluntary relationship. Transplanting the concept of a TRC into the international environmental law field may therefore pose serious problems. Firstly, in the context of environmental climate change negotiations a large number of states are involved and all the participant states, whether developed or developing, do so from the position of the sovereign equality of states. They can in no way be forced to participate. In fact, even if they do decide to participate, they may at any time withdraw from the proceedings for whatever reason. This is fully in line with the binding nature of international law which is based on the consent of states. Secondly, the developed states' contribution to climate change over the past decades, cannot with any certainty be described as the commitment to an international (environmental) crime.[58] This does not imply that a progressive development in this regard is unthinkable. Caldwell refers in this regard to 'environmental crimes against humanity',[59] and Marchisio explains the development of environmental crimes as follows:[60]

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57 See Lubbe *Successive and additional measures to the TRC Amnesty Scheme in South Africa: prosecutions and presidential pardons* (2012) 57–101.

58 Climate change does not constitute a war crime in terms of art 8(2)(b)(iv) of the Rome Statute of the International Criminal Court. This provision makes it a war crime to: 'Intentionally launch an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.' Rome Statute of the International Criminal Court UN Doc A/CONF 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 Article 8(2) (b) (iv) (hereafter Rome Statute). For a discussion: Peterson 'The natural Environment in times of armed conflict: a concern for international war crimes Law?' (2009) 22 *Leiden Journal of International Law* 325–343.

59 Caldwell 'Is world law an emerging reality? Environmental law in a transnational world' (1999) 10 *Colo J Int'l Envtl L & Pol'y* 238.

60 Marchisio 'Environmental crimes and violations of human rights' 9 available at: www.unicri.it/topics/environmental/conference/ (last accessed 23 February 2014).

> The environment is increasingly viewed as tied to the protection of human life and basic human values while, more importantly, human rights are one of the great drivers of environmental criminal law's growth.

At this stage of the development of international environmental crimes it must be accepted that the international legal position has not yet fully manifested itself, especially with regard to climate change. In any event, it must also be kept in mind that crimes cannot be established with retrospective effect.

For purposes of this contribution the point of departure is thus that there can be no question of criminal responsibility/liability of developed states for past conduct that contributed to climate change. The TRC structure in this context cannot be employed to extract the 'truth' from a 'perpetrator' state, and to grant 'amnesty' to or institute 'prosecution' against such a state. The best that one can hope to attain with a structure akin to a TRC is to facilitate discussions between developed and developing states with the aim of eventually getting the former to accept their contribution to the problem of climate change, and to get them to agree to some or other form of reparation to developing states in order to create a solid base from which the problem of climate change can be dealt with on an equal footing in future. It should, therefore, be clear that should it be decided to use some kind of structure like a TRC, the underpinning idea needs to be to finally deal with environmental matters of the past and to create circumstances that would be conducive to effective future participation of all role-players in curbing carbon emissions. This approach should also be reflected in the naming of the commission. The impression of a commission that would 'extract the truth' from states, that would grant 'amnesty to perpetrators' or that would propose the 'prosecution of guilty states', would, without a doubt, be counter-productive. Current climate change negotiations are already concerned with some of the aforementioned issues and the question arises accordingly whether the establishment of a TRC-like body may not merely add another ineffective institutional layer to climate change negotiations. In this regard it must also be reiterated that such a commission would deal with states, but that individuals would have to represent the state before the commission because states as institutions can only act through individuals. As the establishment of the International Criminal Court has shown, criminal blame can only be imputed to an individual and not to a state as institution. However, the issue of climate change is so complex that it would be an impossible task to apportion blame to specific individuals. Thirdly, it would be difficult for a

TRC-like body to apportion blame on a micro level, namely to individual states. The most that can be expected from such an institution is to operate on a macro level, namely to make a finding on the collective blame of the developed states with regard to the problem at hand.[61] Fourthly, TRCs are normally employed to resolve conflicts ascribed to serious human rights violations within a specific state. Developed states would probably point out that this description is not readily applicable to climate change issues between states. This, however, does not imply that environmental issues have nothing whatsoever to do with conflict (domestic and international) and human rights. Exponents of security studies have developed a comprehensive body of scholarship on the discourse concerning the environment and peace and security.[62] Legal scholars have also recently investigated the legal implications of the link between environmental degradation and peace and security.[63] Hence, various examples exist of how environmental degradation may potentially lead to acute conflict.[64] For example, environmental change may shift the balance of power between states either regionally or globally, producing instabilities that could lead to war. Bulging populations and land stress may produce waves of environmental refugees that spill across borders with destabilising effects on the recipient's domestic order and on international stability. Countries may fight over dwindling supplies of water and the effects of upstream pollution. In developing countries, a sharp drop in food crop production could lead to internal strife across urban-rural and nomadic-sedentary cleavages.[65] Against this background it could be argued that a TRC-like institution would only become relevant once environmental issues have led to conflict between states.

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61 In this regard Bisset n 53 above at 35 refers to a distinction between macro and micro truth. She subscribes to the view that the former is the task of a truth commission and the latter a function of prosecutorial institutions. See also Chapman 'Truth finding in the transitional justice process' in Van der Merwe, Baxter & Chapman (eds) *Assessing the impact of transitional justice: challenges for empirical research* (2009) 104.

62 For instance: Homer-Dixon 'On the threshold: environmental changes as causes of acute conflict' (1991) 16 *Int'l Security* 76; Myers 'The environmental dimension to security issues' (1986) 6 *Environmentalist* 251.

63 Scholtz '(Collective) environmental security: the yeast for the refinement of international Law' 2008 *YIEL* 135-62.

64 Homer-Dixon 'On the threshold: environmental changes as causes of acute conflict' in Pevehouse & Joshua Goldstein (eds) *Readings in international relations* (2008) 269.

65 See also Gilman, Randall & Schwartz, 'Climate change and 'security'; Barnett, 'Human security'; Doyle & Chaturvedi 'Climate refugees and security: conceptualizations, categories, and contestations' in Dryzek, Norgaard & Schlosberg (eds) *Oxford handbook of climate change and society* (2013) 251–91.

CONCLUDING REMARKS

The urgent need to make progress with international climate change negotiations necessitates the need to pursue innovative solutions. The existing distrust between states, the issue of historic responsibility and the link between climate change and human rights induced us to briefly reflect on the potential role of TJ mechanisms, in particular the Truth and Reconciliation Commission. Hence, we analysed TJ, in particular the truth commission model, in order to determine whether the establishment of an 'International Carbon Truth Commission' may resolve the issue of historical responsibility and orient negotiations towards an equitable outcome. It is not impossible to establish such a commission on the international plane, although it normally operates on the national (domestic) level. However, the transposition of the truth commission to the current *casus* will be problematic. One of the biggest stumbling blocks facing the establishment of such a commission would probably be to get states to voluntarily participate in its proceedings and to convince them that the aim would not be to apportion (criminal) blame and as a consequence impose a form of punishment upon 'guilty' states. Although the objectives of a truth commission can broadly be described as, firstly 'to prevent the recurrence of human rights abuses', and secondly to 'repair the damage that was caused',[66] and although at first glance it would seem that the issue of climate change could therefore easily be dealt with by such a commission, practical considerations have indicated the contrary.

It is most probable that the establishment of a truth commission will merely undermine climate change negotiations. Past negotiations indicate that states will be reluctant to agree to an international truth commission. The establishment of such a structure will be time consuming and this will shift the focus from the conclusion of a much needed ambitious agreement. The question accordingly arises whether any lessons may be learned from TJ, which could be conducive to an ambitious and equitable climate change agreement. It is of course not necessary to institutionalise TJ mechanisms. Elements of TJ may be further pursued through current climate change negotiations. It is, for instance, important to ensure reparations. The reparations may be compensatory and rehabilitative (conducive to adaptation) and satisfactory. The Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts must therefore be

[66] Du Plessis 'The South African Truth and Reconciliation Commission: the truth shall set you free' in Foblets & Von Trota (eds) *Healing the wounds: essays on the reconstruction of societies after war* (2004) 192.

expanded and made operational. This mechanism already exists and it is therefore not necessary to create an additional institution, such as a TRC, in order to address this issue. Political will and commitment of states is required in order to move forward and without such commitment no amount of creative legal thinking will facilitate and promote the objectives of the Durban Platform in order to address the dire consequences of climate change.