

Title

# Transitional Justice and the Climate Crisis

An analysis

by

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## Abstract

*Climate change presents mankind with a moral problem that cannot be solved with existing political systems. In this context, the aim of this paper is to study a thought experiment: Can the concept of transitional justice be used as a constructive instrument for a coordinated climate policy? The mechanisms and findings of transitional justice have been used in over thirty countries in a number of conflicts. They consist of the attribution of historical responsibility, amnesties, measures to comply with legal obligations, truth commissions, reparations and structural reforms. This paper analyses the suggestion of applying a transitional justice lens to the climate change scenario. The question is, what can a transitional justice perspective contribute to a climate-friendly future in addition to existing measures of climate legislation and what are the limits of such an implementation?*

## I. Introduction

Humanity is at a crossroads. It can continue its raid on the last resources - with fatal consequences for our planet. Or it may recognize the earth as something finite and worth protecting and strive to preserve the wealth of the ecosystems for future generations.<sup>1</sup> According to the IPCC<sup>2</sup>, the continuing emission of greenhouse gases is leading to a heating of the atmosphere with drastic consequences for humans and nature: ecosystems are collapsing. Fresh water supplies are running out. Millions of people will suffer from hunger, disease or epidemics. Entire regions will become uninhabitable. Forced migration will increase rapidly worldwide. The dangers of climate change are among the greatest challenges of the 21st century. Limiting them requires a significant reduction in greenhouse gas emissions.<sup>3</sup>

The primary objective of containment is to prevent the average global temperature from rising by 1.5° Celsius compared to pre-industrial levels.<sup>4</sup> The global strategy is divided into two categories: Mitigation and Adaptation. However, it is not clear who is responsible for what part of the implementation. The heavily criticized announcement of the US Government about the

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<sup>1</sup> Bentz-Hölzl, Der Weltklimavertrag (2014) 15.

<sup>2</sup> The Intergovernmental Panel on Climate Change (IPCC) is the United Nations' body for the evaluation of the latest scientific findings in connection with climate change and is based in Geneva. It is divided into three working groups and a task force. Working Group I deals with the physical and scientific basis of climate change, Working Group II with the impacts of climate change, adaptation and vulnerability, and Working Group III with the mitigation of climate change.

<sup>3</sup> IPCC, Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)], 8.

<sup>4</sup> Paris Agreement, United Nations Treaty Collection. 8 July 2016. (retrieved 18.05.2020 from <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>).

withdrawal from the Paris Climate Change Convention is a reflection of the weak global cohesion in the question of burden sharing.<sup>5</sup>

Why is it so difficult to find a solution to the problem of climate change? In his 2006 paper "A Perfect Moral Storm", the moral philosopher Steven Gardiner provides insight into why the distribution of moral responsibility and therefore the assignment of political action is so complex.<sup>6</sup> Gardiner explains how specific characteristics of the problem of climate change make it particularly difficult to act accordingly. In particular, he concludes that our vulnerability to moral corruption and an inappropriate global power structure stands in the way of effective global climate legislation. The metaphor of a perfect storm as a particularly catastrophic situation caused by a combination of unfavourable circumstances illustrates this highly unfortunate situation adequately. The divergence of causes and effects, the fragmentation of the responsible actors and the institutional inadequacy lead to a general incapacity to act on the part of current leaders.

In view of the urgency of the problem, scientists are researching alternative concepts that simplify a solution to this ethical problem. Sonja Klinsky and Jasmina Brankovic look back on the success of transitional justice systems and notice several parallels between the initial situations of transitional justice cases and the current status quo in the climate debate. So far, the lessons of transitional justice have not yet been studied in a climate context. I will argue for the view that experiences from past transitional justice cases provide useful concepts and strategies for solving our current problem of climate change.<sup>7</sup>

Analogies are a proven method for creative problem solving. In jurisprudence for instance, this technique is used to close unwanted loopholes in the law.<sup>8</sup> Klinsky/Brankovic describe "analogous thinking" as a method for examining the potential of transitional justice in the context of climate change. It enables us to address the question: how would a transitional justice process look from the perspective of national legislative and system change processes? Creative and innovative solutions are needed for the questions and challenges associated with climate change.<sup>9</sup> There are three reasons to believe that transitional justice is useful for the climate

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<sup>5</sup> Twitter announcement of the 21st May 2017, <https://twitter.com/realDonaldTrump/status/869903459511918592>, retrieved on 20.08.2020

<sup>6</sup> Gardiner, A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption, *Environmental Values* 15, 397.

<sup>7</sup> Klinsky/Brankovic, *The global climate regime and transitional justice* (2018) S. 3.

<sup>8</sup> Bydlinski, B./Bydlinski, F., *Grundzüge der juristischen Methodenlehre: Bearbeitet von Peter Bydlinski* (2018) 80–85.

<sup>9</sup> Bast/Carayannis/Campbell, *Arts, Research, Innovation and Society* (2014) 5–18.

change context. Firstly there is a need for new approaches given the insufficient current strategies outlined in the next chapter. Secondly the similarities between transitional justice scenarios and the current state of the global climate regime provide a sufficient ground for an analogy. Thirdly the tools and mechanisms presented in part three that originate from transitional justice have been useful in solving horrendous situations before and if adjusted correctly might serve again in forging climate change policies and institutions. Before I say to what extent such an approach is promising, I want to recall the current strategies aimed at mitigating a climate disaster and explain why there are not sufficient.

## **II. Insufficient current strategies to mitigate the climate crisis**

### **a. „Green Growth“**

The idea of sustainable economic growth is a fundamental component of international climate policy. The core idea is a combination of economic growth and sustainable production methods.<sup>10</sup> This concept can be found in numerous documents and strategy papers of international organisations and governmental programmes. The United Nations (UN) Rio+20 Conference in June 2012 focused on the "Green Economy" or, more precisely, how economies can achieve "Green Growth". Although many strategies for a green economy were endorsed in Rio, no new international commitments emerged.<sup>11</sup>

The Green New Deal promoted by EU Commission President Ursula Van der Leyen promises climate neutrality by 2050 in the EU while simultaneously promoting economic growth and creating new jobs.<sup>12</sup> Given the many different forms and shapes of "Green Growth" or the "Green Economy", it is difficult to judge how promising this strategy is at a global level. Especially against the background of a planet with limited resources.

"As long as economic growth remains so important to global policymakers, humanity is hopelessly constrained: the environmental policies we need, face the unreasonable political hurdle that they must also be shown to promote economic growth. This must change." states growth-critical economist Viktor Peter, who considers the idea of a growing economy with limited resources to be incompatible.<sup>13</sup> The idea of green growth seems paradoxical to me too.

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<sup>10</sup>For a critical discussion on Green Growth see: *Zszman et al*, Green growth, *Intereconomics* 47, 140 (2012).

<sup>11</sup> *Barbier*, The Green Economy Post Rio+20, *Science* 338, 887.

<sup>12</sup> *EU-Kommission*, Der europäische Grüne Deal, EUR-Lex - 52019DC0640 - EN - EUR-Lex <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2> (aufgerufen am 10.08.2020).

<sup>13</sup> *Victor*, Questioning economic growth, *Nature* 468, 370.

After all, the promising economic growth of the past decades has led to a threatening increase in CO<sub>2</sub> emissions and must therefore be fundamentally reconsidered.

### **b. Fair Burden Sharing**

Strategies for fair burden sharing are another way of dealing with the problem of injustice in the context of climate change. Efforts to formalize and clarify fair burden sharing in international climate protection policy began in the 1990s. The Kyoto Protocol contains provisions for emissions trading and the joint implementation of projects to reduce emissions. The signatories created a joint budget to invest in projects to curb greenhouse gas emissions all over the world. This is known as the Clean Development Mechanism (CDM).<sup>14</sup> In the Paris Climate Agreement signed in 2015, countries are asked (not obliged) to justify why their "intended nationally determined contribution", i.e. their national climate strategy, can be considered fair. In this way, the issue of justice is incorporated into national climate strategies. However, so far these justifications have been rather unsatisfactory according to IPCC Research member Professor Harald Winkler.<sup>15</sup>

Overall, fair burden sharing is a crucial part of the global discussions on climate justice. The self-assessment in the Paris Climate Convention is admittedly in tension with an objective evaluation, however, insisting on a universal fair burden sharing can lead to a political deadlock. For example, Canada has insisted on fair and comprehensible commitments from the other countries in 2011 before the exit from the Kyoto Protocol.<sup>16</sup> US President Donald Trump repeatedly relied on fairness arguments in his statement on the withdrawal from the Paris climate agreement.<sup>17</sup> This shows that "fair" burden sharing alone is not a sufficient instrument, due to the different ideas and perceptions of fairness and fair burden sharing with regard to the mitigation of greenhouse gas emissions.

### **c. Climate Activism**

Not only political decision-makers shape the discourse on climate justice, but also numerous institutions of civil society. Non-governmental organisations and social movements play a key

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<sup>14</sup> *Tonn*, An equity first, risk-based framework for managing global climate change, *Global Environmental Change* 13, 295.

<sup>15</sup> *Winkler et al*, Countries start to explain how their climate contributions are fair: more rigour needed, *International Environmental Agreements: Politics, Law and Economics* 18, 99.

<sup>16</sup> *Staff/agencies*, Canada pulls out of Kyoto protocol, *The Guardian*, 13.12.2011 (retrieved on 10.08.2020).

<sup>17</sup> *Shear*, Trump Will Withdraw U.S. From Paris Climate Agreement, *The New York Times*, 01.06.2017. (retrieved on 10.08.2020).

role in the fight against a global climate catastrophe.<sup>18</sup> The Bali Declaration signed by international NGOs<sup>19</sup> in 2002 contains 27 principles of climate justice. The Declaration includes, among other things, the demand that those affected by climate change in particular take a leading role in global climate policy (point 5.). and underlines the right of young people to participate in decision-making processes to a fair degree. In addition, the right of unborn generations to a stable climate and natural resources is affirmed in point 27.<sup>20</sup> Since then, environmental organisations and young social movements in particular have been generating media interest in climate change and increased political pressure on governments to initiate climate policy changes. Nonetheless civil society organization lack financial and political power. Hence we can not rely on the admirable commitment of climate activists alone for the mitigation of greenhouse gas emissions.

#### **d. Protecting the climate in court: Climate Lawsuits**

The potential of legal instruments to promote climate protection has long been recognised. This can be seen above all in the increasing number of court cases in connection with climate protection claims. The Sabin Center For Climate Change Law Database<sup>21</sup>, based in New York, documents all cases in this context since 1986. Since the signatories of the Paris Agreement are ultimately responsible for protecting the human rights of their citizens, they can be held accountable for acts or omissions that lead to human rights violations for their citizens in connection with inadequate climate protection measures.

On 20<sup>th</sup> of February 2020, the lawyer Michaela Krömer, submitted, together with Greenpeace Austria and 8,063 supporters, an application to the Constitutional Court to revoke tax exemptions that favour air travel over rail. The motion is based on Articles 2 and 8 of the European Convention on Human Rights, Articles 2 and 7 of the Charter of Fundamental Rights and the principle of equality. The submission also includes a request for a preliminary ruling from the European Court of Justice on the legal nature of Article 37 of the EU Charter of

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<sup>18</sup> *Derman*, Climate governance, justice, and transnational civil society, *Climate Policy* 14, 23 (2014).

<sup>19</sup> Signatories of the Bali Principles are CorpWatch, US Friends of the Earth International Global Resistance Greenpeace International groundwork, South Africa Indigenous Environmental Network, North America Indigenous Information Network, Kenya National Alliance of People's Movements, India National Fishworkers Forum, India OilWatch Africa OilWatch International Southwest Network for Environmental and Economic Justice, US Third World Network, Malaysia World Rainforest Movement, Uruguay.

<sup>20</sup> Bali Principles of Climate Justice <http://www.indiaresource.org/issues/energycc/2003/baliprinciples.html> (retrieved on 10.08.2020).

<sup>21</sup> The Sabin Center for Climate Change Law develops legal strategies to combat climate change. It trains law students and lawyers and provides the public with up-to-date resources on climate law and climate regulation.

Fundamental Rights.<sup>22</sup> Despite individual successes<sup>23</sup>, climate litigation is insufficient due to the complex procedures involved. Nevertheless, they have more than just a symbolic effect. They generate attention and increase pressure on decision-makers.<sup>24</sup>

Green Growth, Fair burden sharing, Climate litigation and activism have led to the state that we are in today. They may have contributed to creating a global consciousness about an ongoing climate crisis. Nevertheless I find that the actual results are failing us for the following reasons: Firstly, the broad majority of democratic constitutions do not take nature and the environment into account. That means that the environment is still not seen as important enough so that it would rightfully be integrated into the core values of democratic legal systems. Secondly, there is no global strategy that seems promising enough for preventing a climate disaster. If a country such as the United States can simply exit one of the most critical international contracts on this issue without fearing serious consequences, then I do not see how the existing international institutions would be fit for major consequences of climate change, such as forced migration, natural disasters, food shortages, the destruction of ecosystems etc... Perhaps the most important finding that emerges from the study of these four strategies is that each of them has a contribution to make, but even together they cannot meet the scale of the challenge. One of the advantages of the transitional justice approach is that it recognises that dealing with complex justice issues is multifaceted. It is not a matter of preferring one strategy over another, but rather of reflecting on how they can be shaped to deliver greater overall justice over time.<sup>25</sup>

### **III. Structural similarities as a basis for analogous thinking**

The authors Sonja Klinsky and Jasmina Brankovic note that the framework of transitional justice have several structural similarities with the worldwide climate debates.<sup>26</sup> I find that the following considerations provide a convincing argument for the application of transitional justice to the context of climate change.

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<sup>22</sup> See Article 37 on environmental protection stating that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

<sup>23</sup> On 20.12.2019, the Dutch Constitutional Court ruled that the Dutch government is obliged to reduce CO2 emissions by at least 25% compared to the base year on the basis of the state guarantee obligations under Art 2 and Art 8 ECHR. (*Urgenda Foundation vs The State of the Netherlands*, C/09/456689/HA ZA 13-1396.)

<sup>24</sup> *Fitz*, Klimakrise vor Gericht, *Juridikum zeitschrift für kritik | recht | gesellschaft* 2019, Heft 1, S. 104.

<sup>25</sup> *Klinsky/Brankovic*, *The global climate regime and transitional justice* 62.

<sup>26</sup> *Klinsky/Brankovic*, *The global climate regime and transitional justice* S.25-30.

## 1. Transitional Justice — definition and history

The United Nations Organization defines transitional justice as "the full range of processes and mechanisms associated with a society's attempt to deal with the legacy of widespread abuses in the past in order to ensure accountability, serve justice and achieve reconciliation".<sup>27</sup> It is widely assumed that transitional justice emerged from the developments in international law after the First World War and was further established after the Second World War through international treaties and customary law. The trials in Nuremberg and Tokyo laid the foundation for the legal development of international criminal law.<sup>28</sup> Modern forms of transitional justice emerged in Latin America and Eastern Europe in the 1980s and 1990s with the aim of guiding divided societies on their way to peaceful conflict resolution. These went beyond the mere prosecution of war crimes and were intended to rebuild a more peaceful society.<sup>29</sup> Initial situations of transitional justice processes show a number of parallels to the standstill of global climate policy. The next chapter will address these similarities.

## 2. Structural similarities

### a. The need to review the past

The starting point for Transitional Justice processes lies between a conflict-ridden past and a more peaceful future.<sup>30</sup> Similarly, the global climate conflict is characterized by a lack of attention for justice debates from the past. The inequalities between a highly industrialized North and exploited countries of the global South<sup>31</sup> create insoluble tensions that make it difficult to find solutions between the conflicting parties.

### b. A hurting stalemate and unavoidable interdependences

An unbearable stalemate arises when the fates of the actors involved are intertwined and the costs of the conflict become so high, that everyone wants a better relationship and seeks to

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<sup>27</sup> *United Nations*, „The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General”, (2004) 4, <https://www.un.org/ruleoflaw/files/2004%20report.pdf>, abgerufen am 20.05.2020.

<sup>28</sup> *Fletcher*, A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes, *Fordham International Law Journal* 39, 447.

<sup>29</sup> *Klinsky/Brankovic*, The global climate regime and transitional justice, 23.

<sup>30</sup> See also: William Zartman dealt with the need to review the history of a conflict in order to find sustainable solutions for the future *Zartman, I.W./Kremeniuk*, Peace versus justice: negotiating forward- and backward-looking outcomes (2005).

<sup>31</sup> The distinction between developed industrialized countries and developing countries of the global South is a generalization. The contribution of individual states to climate change can be examined more closely with the Climate Analysis Indicators Tool (CAIT) at *ClimateWatchData.org* which is offering clear data sets.



avoid even worse results. As a rule, the parties only resolve their conflict if they are prepared to do so, i.e. if alternative, usually unilateral means of achieving a satisfactory outcome are blocked and the parties feel that they are in an uncomfortable and costly situation.<sup>32</sup> However, the dependencies in the climate context go beyond this in comparison to classic transitional justice processes. They extend across the entire planet and lead to implications, that are hard to grasp but, without change, can have catastrophic consequences in just a few decades.

### **c. Disputed rights and problematic enforceability**

Purely legal procedures in the form of enforceable claims do not help sufficiently in transitional justice processes. Legal systems often fail because of the complex and diffuse damage cases in which the damaged and the injuring party cannot be clearly proven. The judiciary alone is not able to cope with the extent of the injustices caused by armed conflicts, for example, and to bring the truth to light. In the context of climate change, lawyers are already taking the courageous step of asserting subjective rights before the state courts.<sup>33</sup> However, so-called climate lawsuits are not a sufficient instrument due to the magnitude of the necessary political change alone.

### **d. Wide range of damages**

In Transitional Justice processes, damages are considered through a Human Rights Lens with a view on reparation. The different types of damage range from economic catastrophes and financial losses to the loss of human life and genocides. Damage caused by climate change can be regarded as serious and diverse. They include for example impacts on agriculture, ecosystems, forestry, water supply and human health.<sup>34</sup>

### **e. Structural power imbalances**

Transitional justice measures are necessarily embedded in the political processes of the country. In some cases, a group that has caused structural human rights abuses for many years is in power, while in other cases a change of power may already have taken place. The danger that power elites may influence the process should not be underestimated, for example due to

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<sup>32</sup> Zartman, Z./Zartman, I.W., The timing of peace initiatives: Hurting stalemates and ripe moments 1, *Global Review of Ethnopolitics* 1, 8.

<sup>33</sup> Cf. Kling, Die Klimaklage gegen RWE – Die Geltendmachung von Klimafolgeschäden auf dem Privatrechtsweg, *Kritische Justiz* 51, 213; Fitz, Klimakrise vor Gericht: Klagen als ultima ratio im Klimaschutz?, *zeitschrift für kritik | recht | gesellschaft* 2019, 104.

<sup>34</sup> Cf. Anthoff/Ketterer/Lippelt, Klimaschäden und Klimaverhandlungen, *Ifo Schnelldienst*; München 62, 52; Cullity, Climate Harms, *The Monist* 102, 22.

unequal distribution of decision-making powers and resources.<sup>35</sup> In the climate context, there is a massive technological and economic power gap between the conflicting parties.<sup>36</sup>

We have just seen how core similarities outlined in Klinsky/Brankovics work suggest sufficient grounds for applying transitional justice in the climate context. Nevertheless the strongest objection to the idea of applying a transitional justice lens to the climate change context could say that the similarities are not similar enough for providing a common ground. Furthermore I find that Klinsky/Brankovic do not sufficiently address the interests of non-human life as well as the interests of future generations. I will develop these two arguments that refute the claim that transitional justice provide useful insights for climate change policy-makers in the following chapter.

### **3. Limitations**

#### **a. Key differences**

My first argument is that, even if there are similitudes between classic transitional Justice settings and the current climate debate, I believe that the differences between the two settings are underestimated in Klinskys work.

Usually transitional justice processes take place within a State. For instance in the state of South Africa, or recently within the country of Columbia. However the global climate case is a planetary issue. The number of parties involved as well as the amount of data and proof might surpass the capacity of a transitional justice application. Another difference between the classic transitional justice environment and the climate crisis setting concerns the element of intentionality. Usually if harm occurs over long periods of time in a human rights context, the violations are caused intentionally or at least knowingly. For example the slaughter in Rwanda between Hutus and Tutsis was a civil war between two parties that intentionally would harm one another. Whereas the populations of polluting countries live without the intention of harming anyone in the present or the future. The greenhouse gas emissions are merely a side effect of the modern lifestyle. Not merely an act of war nor an intentional human rights violation.<sup>37</sup>

Thirdly in a usual transitional justice situation there is a “victims vs perpetrators” scenario in which there are two sides opposing one another with a clear distinction between the two.

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<sup>35</sup> Cf *Der Merwe, van/Chelin*, Impartial vs Selective Justice: How Power Shapes Transitional Justice in Africa, *African Conflict and Peacebuilding Review* 10, 99-126.

<sup>36</sup> Cf *Roberts/Parks*, A climate of injustice: global inequality, North-South politics, and climate policy (2007).

<sup>37</sup> *Sinnott-Armstrong*, It's Not My Fault: Global Warming and Individual Moral Obligations, in *Sinnott-Armstrong/Howarth* (Hrsg), *Perspectives on Climate Change* (2005), 221.

However greenhouse gas emitting countries are polluters and victims at the same time. There is no clear line of demarcation between the parties since nearly everyone involved is causing damage and being harmed at the same time. In this case the attribution of responsibility is more complex than in post-war societies. These differences make an analogous application of Transitional Justice seem ill-suited to the climate context at a second glance.

#### **b. Inadequate representation of non-human life and of future generations**

My second argument on why transitional justice might not sufficiently suit the struggle for climate justice concerns the lack of representation of non-human life and of future generations. The climate debate essentially circles around arguments concerned with the harmful effects of human-induced climate change on fellow human beings. Little regard is given to fellow sentient creatures. According to the philosopher Angie Pepper there are good reasons to reject the idea that only humans can be the appropriate recipients of cosmopolitan justice.<sup>38</sup> A report of the World Wildlife Foundation (WWF) from 2014 describes the decline of 52% in overall population of vertebrate animals across 3.038 species between 1970 and 2010.<sup>39</sup> The rapid mass extinction of animal life on our planet is linked to human behaviour and can only be reduced by a shift in energy and food production, a reduction of our ecological footprint as well as an attribution of fundamental importance to natural capital in government policies. The transitional justice approach neglects the significance of animal life. There is no chapter granted to the representation of non-human life that usually faces greater threats than humanity due to its incapacity to adapt. Climate change will impact and destroy the livelihoods of many sentient beings therefore in order to obtain a greater overall justice, adequate representation of animal life on the planet must be guaranteed throughout any climate governance process. Pepper presents a catalogue of responsibilities towards non sentient beings based on an animal rights approach in the adaption process. This overview of duties could be used for the implementation of climate governance and complement the Transitional Justice approach outlined by Klinsky and Brankovic.

Furthermore future generations are not taken into account sufficiently. It is proven that the effect of greenhouse gas emissions are delayed in time. If the current generation fails to strongly mitigate climate change, then stronger and more harmful impacts will occur which will result

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<sup>38</sup> *Pepper*, Adapting to Climate Change: What We Owe to Other Animals, *Journal of Applied Philosophy* 36, 592.

<sup>39</sup> *OV*, Half of Global Wildlife Lost, says new WWF Report | Press Releases | WWF <https://www.worldwildlife.org/press-releases/half-of-global-wildlife-lost-says-new-wwf-report> (aufgerufen am 08.09.2020).

in increased adaptation costs to future generations.<sup>40</sup> It is not clear how these interests will be served in the transitional justice process given the fact, that such processes are often backwards oriented and seek to obtain justice for past harms. Nor is it clear how an adequate representation might be possible in such a context against the background of the unanswered ethical questions that arise from intergenerational justice.

Klinsky/Brankovic might respond to my arguments in the following way. For instance they could say that they are well aware of stretching transitional justice theory and practice. However the climate context is structurally similar *enough* so that lessons learned elsewhere could provide useful insights. With regard to the differences there have never been two identical scenarios for transitional justice. Each conflict is unique and therefore requires a suited model for solving the tensions individually. The challenge in this context will be to think of institutions and mechanisms that might serve the aim of fair global climate governance. Its goal is not to solve the entire climate crisis, but to enable inspirations from past conflict resolution processes and facilitate decision making on a global scale in order to respond in time to an ever-growing global catastrophe.<sup>41</sup> Consequently the success of a transitional justice approach depends on the arrangement of the strategies and mechanisms and their cohesiveness. In my view the strength of transitional justice is its capacity to adapt to many different type of conflicts and provide constructive solutions.

Even if it cannot serve all stakeholders equally such as animals or future generations, it can specifically implement a strategy that will take their interests into account within a bigger scope. The strategies originating from transitional justice have developed with each application. The history shows that this relatively new concept has evolved from rigid international criminal courts to flexible truth seeking bodies and structural reform plans. I will outline some of these strategies for better understanding here.

#### **4. Applicable mechanisms and field of implementations**

##### **a. Mechanisms for managing responsibility (Prosecution, Amnesties, legal accountability, Truth commissions)**

Transitional Justice presents a set of complementary tools. One alone is not sufficient in addressing the injustices rooted in the past, nor can it build the foundations of new institutions.

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<sup>40</sup> *Lawrence*, Justice for future generations: Climate change and international law, 16 .

<sup>41</sup> See for more Information on climate change scenarios: *Wallace-Wells*, The Uninhabitable Earth, Annotated Edition, Daily Intelligencer .

For a transitional justice approach to succeed in the climate context, the combination of strategies must be applied conscientiously with regard to the specific tensions.<sup>42</sup> The attribution of responsibility for past harms should be addressed in order to create a starting point for further negotiations. This section will present three mechanisms for dealing with responsibility for climate harms: Truth commissions, prosecution and amnesty.

Truth commissions have been used in over 30 countries<sup>43</sup> and consist of an institution recording statements from all parties involved in the conflict. During the truth recovery process it is possible to generate opportunities for reconciliation and address harms that cannot be analysed in judicial proceedings. A truth commission could be implemented within the climate context in several ways. There could be an institution within the international climate convention, or alternatively outside of the United Nations body, that could collect data from the past of all emitting countries. Another way of implementing a truth commission is to request a legal body, such as the international Court of Justice to make a non-binding statement on past emissions.<sup>44</sup> The results of the truth commission provide a common ground for further steps in the transitional justice process. The main goal of its report is to serve other instruments such as prosecutions.

Prosecution is a way in which the harm can be linked to specific actors. Also it sends the message, that ongoing emissions will not be tolerated as before. The sheer amount of potential prosecutions for climate impacts would exhaust the capacities of any judicial system. However prosecutions can put pressure on the parties and help in creating a hurting stalemate to initiate further commitments in negotiations. Amnesties can be granted with or without conditions. They are highly propagated in transitional justice processes because they facilitate the negotiation of compromise and can be a guarantee for the collaboration of opposed parties.

### **b. Addressing harms with reparations**

In the transitional justice context, reparations aim at responding to the needs of the affected victims rather than on who is to blame. Non-punitive approaches to reparations avoid unnecessary tensions and provide pathways for repairing relationships. The design of reparation

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<sup>42</sup> *Klinsky*, An initial scoping of transitional justice for global climate governance, *Climate Policy* 18, 752 (758).

<sup>43</sup> ICTJ. (2008). Truth Commission II. Retrieved from <https://www.ictj.org/sites/default/files/ICTJ-Global-Truth-Commissions-2008-English2.pdf> Igreja, V. (2015). Amnesty law, political struggles for legitimacy and violence in Mozambique. *International Journal of Transitional Justice*, 9(2), 239–258

<sup>44</sup> *OV*, World court should rule on climate science to quash sceptics, says Philippe Sands; International Court of Justice ruling would settle the scientific dispute and pave the way for future legal cases on climate change, says high-profile lawyer, *The Guardian* (London, England) .

programs can vary. Although there are some elements that have to be examined in this context. Existing human insecurities should be taken into account and the reparations program has to be transparent.<sup>45</sup>

### **c. Institutional Reform**

In order to avoid a recurrence of injustices, the political and/or economic system that led to human rights abuses need to be revised. The concrete structural changes in a transitional justice process strongly depend on the given context. For instance, in South Africa a completely new constitution provided the framework for a new social contract.<sup>46</sup> A proven method for removing systemic injustices is to change the legal foundations of a country. The attempt to include fundamental legal remedies for the environment has not yet succeeded in most countries. Constitutional changes could be one option to improve the fight against climate change. There could be many more strategies for institutional changes. A more detailed description of current debates would exceed the frame of this paper. I will now present two arguments for why its utility in this context is limited.

## **5. Concluding remarks**

In this paper I presented the idea of a transitional justice process in the climate policy context outlined by the two researchers Klinsky and Brankovic. There are indeed several similarities between common transitional justice scenarios and the current climate change tensions. The parties involved are inevitably interdependent, disbalanced on a power perspective and the harms involved are of tremendous calibre. Nevertheless there are striking differences such as the overwhelming global dimension of the conflict exceeding the usual transitional justice situation, the additional complexity of causal fragmentation and a lack of intentionality that impedes the attribution of responsibility. Also this model is lacking attention towards non-human life and interests of future generations. Yet these arguments do not entirely negate that a new lens could add useful ideas on how to solve this global problem. Strategies for navigating a transitional justice process would have to be adequately designed. They usually involve a truth seeking body, prosecutions, amnesties, strategies for repair and institutional transformation.

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<sup>45</sup> *Balasco*, Reparative development: re-conceptualising reparations in transitional justice processes, *Conflict, Security & Development* 17, 1.

<sup>46</sup> *Gross*, The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel, *Stanford Journal of International Law* 40, 47.

To conclude lessons can be learned from the success of transitional justice for the climate context for the reasons stated above. That means not to implement such an idea at all cost, but to give a systemic view of justice a chance to be applied in an urgent case. We may not be morally, legally or causally responsible for climate change, but we have an “intervention-responsibility”, as the philosopher Dale Jamieson states, because the consequences of climate change described earlier are undesirable and our generation could significantly mitigate them without excessive cost.<sup>47</sup>

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