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**PROCEEDINGS OF THE PUBLIC PART  
OF THE ANNUAL GENERAL MEETING**

***Climate Change:  
Options and Duties under International Law***

**2 November 2018**

**held in room 3.60, Wijnhavengebouw, Campus The Hague, Leiden University,  
Turfmarkt 99, 2511 DP The Hague**

The President, prof. W.J.M. van Genugten, opened the meeting at 2:00 P.M. After noting that a larger than usual number of members (and non-members) was present, almost 120 in all, he told the audience that, unfortunately, Mr. R.H.J. Cox, due to illness, had been unable to come to The Hague. He then invited the authors of the *preadviezen* to present their reports.

**PRESENTATION PREADVIEZEN**

**The Hard Work of Regime Interaction I**

**Prof.dr. E. Hey**

*Professor of Public International Law, Erasmus University, Rotterdam*

In our *preadvies*, dr. Violi and I explored how the international regimes on climate change and on human rights have interacted and how this has affected the content of the Paris Agreement.

In my part of the presentation, I will set out the analytical framework that we utilised in the *preadvies*. We used the insights about regime interaction developed by Jeffrey Dunoff. The analytical framework developed by Dunoff encompasses not only retrospective transactional regime interactions before international courts and tribunals, the focus of many an analysis on regime interaction. Instead, it also encompasses prospective relational interactions between regimes. Dunoff identifies three types of relational interactions: (1) regulatory and administrative interactions, (2) operational interaction and (3) conceptual regime interactions. For the purpose of our *preadvies*, we analysed interaction between the climate change regime and the human rights regime through the lens of conceptual interaction.

Using the lens of conceptual interaction enables one to explore the distinct narratives that come with different regimes and that are grounded in law. These narratives are co-determinative of how regime interaction transpires and are at the source of the contestation that regularly emerges when regimes interact. In brief, the lens of regime interaction enables one to show that regime interaction is not only about what is to be regulated, but also, and importantly, about how it is regulated and who regulates and obtains benefits or bears burdens as a result of regulation. The

'how' and the 'who' aspects of regulation are at the centre of the controversy that regularly arises when regimes interact.

Two recent examples of regime interaction illustrate our point. Firstly, the ongoing negotiations to regulate the conservation of biodiversity in marine areas beyond national jurisdiction, the so-called BBNJ-negotiations. What needs to be regulated is universally understood to be the conservation of biodiversity in areas beyond national jurisdiction. When considering how this needs to be regulated, however, and who should regulate, controversy emerges in the negotiations because two very different regimes, namely the freedom of fishing on the high seas and the common heritage of mankind in the Area, interact. The common heritage of mankind implies benefit and burden sharing, that is developed states have to contribute to developing states obtaining access to the resources and to the benefits derived therefrom. On the other hand, the freedom of fishing implies that there is freedom of access to the resources and that those states who have the means to access the resources reap the benefits therefrom. Secondly, the interaction between the International Maritime Organization (IMO) and the climate change regime. Again, what to regulate, reducing greenhouse gas emissions from ships, had attracted broad consensus. However, the IMO regime and the climate change regime come with different implications when it comes to the 'how' and the 'who'. The IMO regime suggests uniform regulations for the sector, without a preferential position for developing states; the climate change regime, based on the principle of common but differentiated responsibilities, suggests a preferential position for developing states and burden sharing. This resulted in lengthy and difficult negotiations.

## **The Hard Work of Regime Interaction II**

### **Dr. F. Violi**

*Assistant Professor of Public International Law, Erasmus University, Rotterdam*

In my part of the presentation, I will show how we have analysed the interaction between the climate change and human rights regimes employing the analytical framework of conceptual interaction, as explained by Prof. Hey.

The first step is to explore how the two regimes fit into the *trias* of conceptual regime interaction, i.e. the 'what', the 'who' and the 'how'. As to the object of regulation, human rights traditionally are conceived to provide retrospective protection to individual interests from abuse of (public) authority that materialises into a wrongdoing. Contrariwise, the climate change regime was set up to deal with aggregate interests, thus displaying a collective dimension both in terms of the impact and the sources of climate change. In the latter regime regulation is aimed at preventing potential prospective harms through mitigation or adaptation policies.

The difference in the 'what' also affects the nature and characteristics of the legal instruments regulating the two regimes, i.e. the 'how'. At a general level, the significant aspect of human rights agreements is that these create obligations of States towards individuals. Often, these are supervised and/or monitored by judicial or quasi-judicial bodies. In contrast, climate change commitments can be characterised as an inter-dependent, collective endeavour to which States reciprocally commit, leading to very flexible obligations that are the result of great compromise with generally no supervision on the part of judicial or quasi-judicial bodies.

Both regimes also differ in terms of ‘who’ undertakes the burdens and who benefits. In the case of human rights there generally is a harm translating into a violation that can be attributed to a specific wrongdoer. Judicial protection allows for responsibility to materialise and compensation to be awarded. In the case of climate change, on the other hand, it is not easy to connect a harm to a specific act or to one emitter only. Generally, the harm is caused by a combination of different acts, occurring in different areas of the globe. In other words, even though climate change results in victims, it may be impossible to identify a violation and establish a causal link. This leads to a diffuse burden sharing.

Additionally, climate change is based on a very strong economic narrative. Market mechanisms characterise the regulatory measures adopted by parties in the climate change regime. Broadly speaking, the private sector especially enjoys the benefits of the market-oriented nature of the climate change regime. At the same time, market-based mechanisms are worsening the discrepancy between developed and developing countries. These mechanisms tend not to address the distributive consequences of climate change for individuals and communities.

Against this general classification of the two regimes, let us now have a look at the findings of the *preadvies*: How does the interaction of the climate change regime with the human rights regime affect and shape the relevant regulatory framework? In our *preadvies*, we categorise this interaction as (1) normative development (i.e. what happens at the level of substantive rights and obligations), and (2) interaction before international judicial bodies (what is the role of judicial and quasi-judicial bodies).

As to the normative development, let us look at the most recent instrument, namely the *Paris Agreement*.<sup>1</sup> This is the latest example of regime interaction between climate change and human rights. Starting with the ‘what’, we can observe that the object of regulation is already changing. It is not so much individuals’ rights or the prevention of climate change impact that are being regulated. It is rather the implications of climate change for the full enjoyment of human rights that are being addressed. We can see this at various places in the Paris Agreement: the preamble, for example, contains an explicit reference to human rights.

More importantly, however, regime interaction changes how regulation is constructed. Articles 7, 8 and 12 of the Paris Agreement, e.g., couple adaptability and mitigation measures with the human rights’ notions of vulnerability and damage. These provisions allow for the foregrounding of a distributional dimension of the climate change regime beyond the inter-State level. In particular, Article 7 requires States to design adaptability measures for the protection of vulnerable groups from climate change impact. This obligation incorporates a human rights dimension in the climate change regime. Another example is the reference to procedural rights, more specifically to access to information and public participation in decision-making. Such references allow other interests than purely those of States to influence the measures that are to be taken to tackle climate change. Finally, we can also see that the interaction leads to an expanded burden- and benefit-sharing among States and also extends to include individuals and communities.

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<sup>1</sup> In our *preadvies* we also looked at earlier developments, prior to the Paris Agreement.

If we turn to international (quasi-)judicial bodies, we can observe that these bodies could form a site of conceptual interaction too. This could be made possible through the activation of procedural and positive obligations inferred from the substantive rights at stake. Positive obligations in the context of mitigation and adaptation policies have been mainly acknowledged by national courts. One might expect, however, that through the 'process of persuasion' national case law will spur a similar development at an international level. The *Urgenda* case is indeed an early example of this. In this specific case, the notion of due diligence in the climate change context was normatively determined by recourse to human rights.

What will be the future of regime interaction between human rights and climate change? We might expect an expansion of prospective due diligence obligations for States to contain climate change impacts on human rights.

### **Private Law as a Crowbar for Coming to Grips with Climate Change**

#### **Prof.dr. J. Spier**

*Professor of Law and Global Challenges, Universities of Amsterdam and Stellenbosch, former Advocate General at the Netherlands Supreme Court, Professor emeritus, Maastricht University*

Climate change is the most urgent and serious challenge ever for humankind. It is not only a serious threat to the environment, but also it constitutes a legal challenge. States nowadays have recognised that climate change requires multilateral and collective efforts. At the same time, the concrete obligations of individual stakeholders remain unclear. But as long as we do not know our obligations, we will never solve the problem. Without recognition of concrete legal obligations of at least States and enterprises, compliance with them and assessment of such compliance are impossible; this is important for e.g. investors, rating agencies, auditors and CEO's.

Of course, there have been attempts to overcome these ambiguities. For example, let us think of the Oslo Principles and the Principles on Climate Change Obligations of Enterprises. I should like to stress one point in regard to these Principles: There is an emerging view that big oil is the one and only problem. In my opinion, it would be a serious mistake to think that they are the one and only problem. This would make it far too easy for others to escape their own obligations and maintain that they do not have to do anything. Besides, if we assume that they have obligations, could these be enforced against Gazprom, Aramco and many others? In short, there is only a very weak legal basis for the argument that everything must be done by big oil.

However, in my presentation I want to focus on the notion of liability. The debate is shifting towards liability only, presumably because people have come to the conclusion that we are unable or unwilling to keep global warming well below two degrees, so we should focus on the consequences. I think that is a serious mistake. Prevention is of the essence and should be our first priority.

Liability is also extremely difficult. We have to make choices and these are unavoidably unbalanced due to the hugely diverging interests involved, for example between rich and poor countries, between rich and poor people and between present and future generations, combined with the fact that there can never be enough funds to cover all the losses.

There are many reasons for thinking that liability will become a hot topic, even though the business community does not seem to want to believe it. Very many serious people and organisations are focusing on, and promoting, liability. Take for example a number of soft law instruments, guidelines, codes of conduct and statements issued by top judges all around the world. Legal scholars also are currently examining the topic of liability, but until now the discussion remains very abstract. People tend to ignore the potential consequences of liability or appear to be indifferent to them.

We should really think about whether we are willing to translate climate change into liability and, if so, how to do that. The problem is that, if we were to require businesses to pay for all of the losses they might have caused, this would result most probably in a high number of bankruptcies, which, in turn, would have a huge adverse impact on society. On the other hand, if liability were excluded or significantly reduced, this would leave victims empty-handed. This means, we need to try and find a balance and that is extremely difficult.

In my eyes, the best, but by far not the ideal, solution would be to set up an international agreement with as many countries as possible. This agreement should focus on the effective prevention of climate change, i.e. curbing emissions to the highest extent possible to keep global warming well below two degrees Celsius, and should provide that there will be no liability, either for past or for future emissions. That such an agreement will ever come into existence is not very likely, however. Alternatively, it could be left to judges to decide on liability on a case-by-case basis, but this would almost certainly give rise to chaos; hence, it is no solution either. All in all, I tend to think that fully fledged liability would be the worst solution, so we have to find ways to limit it. I am afraid that the time for a complete rejection of liability has elapsed.

In the absence of an international agreement it might be useful to focus first on adaptation, primarily by developing countries and, if still reasonably affordable (an unlikely scenario) to a significantly lesser extent by the lower part of developed countries. In my view, the litigation started by California and New York turns things upside down. They have significantly contributed to the problem themselves, and therefore they should not be able to impose the adaptation costs on enterprises, not even if the latter are co-responsible. If there is enough money left, it would make sense to pay compensation to victims in the least developed countries and the lower part of developing countries. In the extremely unlikely scenario that, even after this, any money would be left, one might think about how to compensate others. But we should not forget, once again, there are limits to the funds available. Money that is spent now will not be available anymore for future generations who certainly did not cause the problem.

### **An ocean under stress: climate change and the law of the sea**

**Prof.dr. A.H.A. Soons**

*Professor emeritus of Public International Law, Utrecht University*

In my report, I have selected only a few examples of where international law is being used to deal with issues of climate change. We all know the manmade causes of climate change and in my report I have dealt with the effects on the oceans. There are three main effects: (1) global warming, including warming of the sea, (2) sea level rise, and (3) acidification and deoxygenation and their adverse effect on marine life. In my report, I have examined how the general and particular law of the sea, i.e. treaties dealing with such matters as fisheries and

pollution and other specific issues, can be used and have been adapted to deal with climate change. This includes mitigation of the causes of climate change and adaptation to its effects.

The sea can be utilised in various ways, not only to mitigate the adverse effects of climate change by reduction of the emission of greenhouse gases (GHG) from sea-based activities, but also as part of the solution, by its use as a source of clean energy (e.g. winds and tides) or to capture CO<sub>2</sub>. This can be done through sub-seabed storage with the help of marine geo-engineering, which involves the capture of GHG on land and transferring them to porous ocean subsoil, in to which they are fed, or through ocean iron fertilisation, whereby iron particles are offloaded into the ocean, where they will sequester CO<sub>2</sub>. While both techniques might help to mitigate climate change, they are not without risks, e.g. the risk of leaks, and that is why it requires regulation. This is dealt with in some detail in my report.

Two earlier examples of quick and effective global law-making on mitigation measures are worth mentioning. Firstly, Annex VI, added to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) in 1997 and dealing with air pollution from ships, that is to say emission of GHG, in combination with the Law of the Sea Convention (LOSC). The LOSC's rules of reference ('generally accepted international rules and standards') require the parties to the LOSC to apply these rules of reference to their ships and through these they may be bound by the provisions of conventions to which they are not parties, such as MARPOL. In this way the MARPOL emission standards may be applied to ships from more than 80 member states of the LOSC who are not party to MARPOL. Secondly, the 2006 amendment to the Annex to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Protocol), regulating the sub-seabed sequestration of CO<sub>2</sub>, which entered into force 100 days after its adoption, is another good example of very quick rule-making. The 2013 amendment to the London Protocol itself, dealing with marine geo-engineering and iron fertilisation, also is an example of very prompt law-making. Similarly, in my view, through the LOSC's rules of reference, these amendments (when in force) apply to all parties to the LOSC, including the more than 100 States not being parties to the London Protocol.

Turning to the regulation of adaptation issues, I will mention only one example, namely the Arctic Ocean. Due to the melting of the permanent ice during the summer periods, parts of the Arctic Ocean beyond national jurisdiction become accessible for activities, in particular fishing. Very recently, in October 2018, the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean was signed, also an example of using the precautionary approach. The Agreement prohibits commercial fishing in the Arctic Ocean for the coming decades until we know that, and under what conditions, fishing may be conducted there in a sustainable manner. Here is another interesting question of how these rules on Arctic fishing made by a small group of Arctic coastal states (and a few others) could be enforced also against non-parties in the future through the provisions of another agreement, namely the 1995 Straddling Fish Stocks Agreement,<sup>2</sup> which is connected to the LOSC.

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<sup>2</sup> Formally, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish.

Finally, I wish to draw attention to perhaps the most important issue facing many coastal States, namely the issue of sea level rise. This could lead not only to the loss of land, but also to coastal States being confronted with the potential loss of maritime entitlements and maritime exclusive economic zones. This is because the baseline, which is the point of reference for any measurement of maritime jurisdictional zones, is the low-water line. When the sea level rises, this baseline will shift landward and in the case of low-lying islands it may even disappear altogether. Huge interests are involved. This may affect hundreds of thousands of square kilometres and lead to the potential loss of fishing rights or rights to oil and gas. In this context we should not think only of the Pacific Ocean or the Indian Ocean. Klein Bonaire and Klein Curaçao, two small islands in the Caribbean, part of the Kingdom of The Netherlands and no more than one metre above sea level at their highest point, may serve as an example. They stand to be lost later this century as a result of sea level rise.

In view of this, I would like to put forward several possibilities for how the law of the sea regulating maritime jurisdictional zones could be adapted. In particular, I should like to present possibilities how new state practice could ensure that current entitlements are maintained. Firstly, States could agree to freeze the baseline regardless of sea level rise. Secondly, States could freeze the outer limits of maritime jurisdictional zones. In my view, the latter would have the least consequences for the current law, because the established rules on baselines would not have to be changed. However, one should not forget that by this the Exclusive Economic Zone would become wider than under the current law of the sea. In general, I am convinced, States could react best to the issue of sea level rise by engaging in new practices, leading to new accepted interpretations of, or modifications to, existing rules and/or the emerging of new customary international law.

More findings can be read in my report, but I would like to make clear that, in my view, international law contains adequate mechanisms for adapting and developing the law of the sea in response to climate change.

#### **QUESTIONS, ANSWERS AND DEBATE**

##### **Mr. J.G. Auz**

*International Climate Protection Fellow at the Potsdam Institute for Climate Impact Research*

In my research I am also looking at the interaction between human rights and climate change and I think that the paper of prof. Hey and dr. Violi is quite insightful. There is one thing in particular that I fully agree with and that is the differentiation between both regimes. The climate change regime takes a more inter-State approach, whereas human rights is more intra-state, more individuals-driven. There are a few (minor) things I missed in your report. Firstly, prof. Alan Boyle states that the Paris Agreement, as it is now, is not very stringent in its wording in general, let alone where human rights are concerned. Secondly, human rights are quite anthropocentric, so biodiversity questions might be left out.

Thirdly, not all countries – and some of these are big emitters, specifically the U.S. and China – have ratified the human rights treaties. Could you please elaborate on how they can be held accountable for human rights violations.

Now I come to my questions. Human rights are built on the Westphalian notion of sovereignty whereby States are the main incumbents regarding human rights violations, which means they are compartmentalised under the territory of the State and the States only are responsible. In light of this, to what extent can this architecture of human rights provide a response to the globalised nature of interactions, given that non-State actors are the main perpetrators of GHG emissions worldwide. In what way can the interaction between regimes provide an answer to this?

**Prof. Hey**

One can hardly disagree with prof. Alan Boyle, where he says that the Paris Agreement is not stringent enough.

With respect to your question regarding big emitters not having signed the human rights treaties: The point we wished to make – and this also relates to the issue of the non-State actors – is that when regimes do interact, that interaction often is contentious, because different discourses interact in the process of finding a new common narrative. Integrating non-parties into these new narratives is an issue that goes way beyond climate change, but I would suggest that one way to stimulate this is to ensure that different narratives emerge, a step presently being engaged in by those initiating climate change litigation at various places around the globe.

**Dr. Violi**

Non-State actors' potential infringements of human rights are definitely an interesting aspect. We still do not have either a shared philosophical or moral account of human rights. In fact, there is an ongoing debate on the nature and theoretical justification thereof. This relates indeed, among other things, to the horizontal effects of human rights. Currently, there is a great deal of discussion about, for example, including investors' obligations in international investment agreements. Thus, the traditional understanding of 'vertical' human rights where only States are responsible for human rights violations might be changing in view of a certain type of power non-State actors are able to exert. I would just like to point out that what we were looking at is this new narrative that is currently evolving, which might allow us to look at the same time at both climate change and human rights in a different framework, but we will have to wait and see how this develops at various levels, including the involvement of non-State actors.

**Prof. Spier**

There is a strongly emerging view that human rights are relevant to enterprises and what many people seem to ignore is that many multinational companies have subsidiaries around the globe. That means that violations of human rights can easily be enforced at least in many other countries, even if the country where a company is based is not a party to a human rights treaty. In addition, many enterprises have applauded the Ruggie Principles. These Principles provide, among other things, that enterprises have to comply with human rights and have to remedy losses caused by violations and enterprises apparently accept that. The same is true for the UN Global Compact and so much more, so I am inclined to believe that in this respect the situation is much more positive than you appear to believe.



**Prof. Hey**

May I add to this that the Ruggie Principles or, for example, the Oslo Principles to which you referred in your report, were the result of interaction between a variety of regimes, a variety of ways of thinking about the issues that concern us, and that this leads to a new language.

**Mr. M.C. Leach**

*Ph.D. Candidate, Tilburg University*

*Addressed to Prof. Hey and dr. Violi*

I know your project was not empirical, but how would you characterise the nature of the work of the actors who were involved when those regimes were interacting? In your chart you put the outcomes, but I was not sure whether the outcomes were the result of an effort to make the regimes compatible with each other or to eliminate contradiction between them or that there actually was a moment where somebody made the decision that certain interests are more important than other interests.

*Addressed to Prof. Spier*

You implied in your presentation that the paradigm of liability would be a private law concern involving litigation between individuals, such as those harmed against companies, but I was imagining as I was listening, that the real sea change would be in the insurance world. If you can find liability for what are now uninsurable acts, like acts of God, then insurance companies would become the main actors in these sorts of things. How would that be the real agent of change?

**Prof. Spier**

When you talk to insurance companies, they are plainly saying that climate change is not an issue for them. That is not a very useful statement, but they are making it time and again. Indeed, they could be an agent of change if they would understand that, sooner or later, climate change will ruin them. Currently, they are covering property losses. In the short term, that may be possible, although it is very difficult to calculate what losses will occur in the future. This means they do not really know what they are covering, but for the time being they have been able to manage. To the best of my understanding they are still covering liability, because their lawyers are advising them that it is a non-issue. It would be extremely useful if they explicitly excluded liability coverage, because this might act as a wake-up call and cause people to change their behaviour. In particular, it would help if insurance companies stopped providing liability coverage for directors and officers. This would make them realise that it is desperately needed to do much more than they actually do.

**Dr. Violi**

When we started exploring regime interaction, we did not do so starting from a specific assumption. We were not necessarily looking for a positive (or harmonising) interaction. We were trying to understand whether there was any regime interaction and how this would play out. We did not conduct an empirical study. When thinking of regime interaction at the level of actors, however, one could characterise it as follows: different regimes have different

epistemic communities. Each of these epistemic communities understands and shapes the law or their normative preferences through their political preferences. Apparently, in the case of the Paris Agreement NGOs and those countries most threatened by climate change were able to play a strong role during the negotiations and somehow their narrative made its way into the Paris Agreement more than had been the case for earlier climate change conventions or instruments. That is what probably happened, but more extensive empirical research would be needed before you could draw more definite conclusions.

**Prof. Hey**

During the negotiations leading up to the Paris Agreement a very strong coalition of NGOs, UN human rights institutions, including John Knox, United Nations Special Rapporteur on Human Rights and the Environment, and the UN High Commissioner for Human Rights cooperated very closely and strategically. For example, they strategically submitted documents to the negotiations and used the media. Several states, including Norway and the Netherlands, were also involved, e.g. by facilitating meetings.

**Mr. T.R. Bleeker, LL.M.**

*Ph.D. Candidate, Utrecht University (Utrecht Centre for Water, Oceans and Sustainability Law)*

*Addressed to Ms. J.H. Albers*

In the *Urgenda* case, the Dutch Government argued that it is entitled to a ‘wide margin of appreciation’ in choosing its climate measures to fulfil its positive obligations under Articles 2 and 8 European Convention on Human Rights (ECHR), and that the judiciary should not interfere with its climate change policy. My question is: How should this margin of appreciation be understood? Is it a matter of ‘*Trias politica*’, in that the judiciary cannot determine which measures the government should take to fulfil its obligations? Or is the margin of appreciation ‘merely’ a matter of subsidiarity, which would mean that the ECHR leaves it to the Member States to determine how to fulfil the obligations of Articles 2 and 8 ECHR? If it is the latter, it would seem that the margin of appreciation as such is not an obstacle for the climate injunction in the *Urgenda* case, because this principle has nothing to do with the separation of powers.

**Ms. J.H. Albers, LL.M.**

*Winner 2018 François Prize*

In my thesis<sup>3</sup> I mentioned the margin of appreciation. I realised that it is important and I discussed it with people, but I did not look into it extensively. I agree with you that indeed it is more a matter of Europe not being able to take decisive steps. The *trias politica* is not so much an issue because, in my opinion, the question is not that the judiciary should not tell States what to do. They do, but they do not say how States should achieve this. The courts have said that States should protect their citizens better and work on their duty of care, but the way in which the States can accomplish this is up to them. In that sense I would say that *trias politica* is not so much an issue and that this is more a question of subsidiarity.

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<sup>3</sup> J.H. Albers, “Human Rights and Climate Change, Protecting the Right to Life of Individuals of Present and Future Generations”, master thesis submitted for the 2018 François Prize of the KNVIR.

**Ms. Albers**

*Addressed to Prof. Hey and dr. Violi*

You say that the Paris Agreement, because of its enhanced attention to adaptation and loss as well as the links to vulnerability, opens the door for human rights considerations, in the sense that distributional effects of climate change can now be extended beyond the inter-State level to the level of groups and communities. However, the collective dimension of climate change is hard to reconcile with the individual approach of human rights courts, especially the European Court of Human Rights. In light of this, how do you see these distributional effects in the advantage of groups and communities being materialised before international human rights courts and not just in the conceptual and normative development?

**Dr. Violi**

Human rights litigation probably will be the toughest test for regime interaction between human rights and climate change. Generally, in human rights litigation you need to be able to prove that a harm is the result of a violation committed by a certain wrongdoer. In the setting of a human rights court, this might be very difficult when it comes to climate change impact. What we looked at is the potential of the duty of care as a positive obligation. One would still need a harm of an individual or a group of individuals caused by climate change, but courts may be able to approach this issue by identifying the violation of a duty of care in tackling climate change (rather than the violation of a negative human rights obligation).

**Mr. K.H. Ameli**

*Former Judge of the Iran-US Claims Tribunal*

*Addressed to Prof. Soons*

With regard to the regulation of CO<sub>2</sub> storage at sea, as well as ocean iron fertilisation, my question is whether it is only the leakage that requires regulation, in other words, has it been decided already where CO<sub>2</sub> may be stored? Do we have procedures in place to assist developing countries that do not have the technical facilities to arrange for this kind of storage?

*Addressed to Prof. Spier*

Would you please comment on how we can learn from the advantages and disadvantages of the experience of the Gulf of Mexico leakage, where BP was required to pay a huge amount of compensation without even being required to go to court. I have the same question with respect to the fraudulent emission programme of Volkswagen. Perhaps there are some lessons we can learn from these cases.

**Prof. Soons**

Interestingly, at a very early stage, when the ideas of sub-seabed sequestration of CO<sub>2</sub> and ocean iron fertilisation were being developed and the first experiments took place, the relevant international regulatory bodies took the initiative to put any activities in this area on hold until adequate regulation was in place. With respect to sub-seabed storage we now have an international regulation, which is in force, but in only three or four places in Europe CO<sub>2</sub> is stored in accordance with these very detailed technical rules. I am not aware of any sub-seabed storage

of CO<sub>2</sub> outside Europe and perhaps North America, but it can happen elsewhere. If it does, the rules must be applied by States and perhaps not all of these have the necessary capacity to monitor these activities and do all the other things that are required. It is an important point and I touched upon it briefly in my report. If countries lack the necessary capacity, the International Maritime Organization (IMO) may be requested to offer assistance.

With respect to ocean iron fertilisation there is a regulation that will apply globally, but its regime is prohibitive. It only allows experiments under stringent conditions, which means that developing countries are not affected for the time being.

### **Prof. Spier**

Your question is pertinent and at the same time extremely difficult. With respect to Volkswagen: As far as I am aware, the liability issue has not yet been settled. The only thing that happened is that huge fines were imposed. The Gulf of Mexico is a very different story. If I am right, in those days there was very strong pressure by the President of the United States to 'settle this'. If there is any lesson to be learned from the Gulf of Mexico oil spill, I am inclined to think it is that such pressure should be less appropriate or even completely inappropriate in relation to climate change. Why? What happened in the Gulf of Mexico can – and must – be distinguished from climate change, at least in one important respect. If my understanding is correct, the oil company in the Gulf of Mexico was aware of what went wrong. Generally, enterprises are well aware of the fact that they should reduce their emissions and that they should do much more to cope with the threats of climate change, but they only know this in the abstract. Of course, you can reduce emissions even if you have no idea how much you have to reduce them. You could argue that, at least, they should be liable for what, beyond any reasonable doubt, should have been done. At the next level, however, it is difficult for enterprises to assess what they have to do in order to comply. What I am saying now is very much contrary to the well-known 'wisdom' of lawyers. We have learned that the system works as follows: You will find out in the future what you had to do, namely when a court tells you what your obligations were. This is not entirely satisfactory, but on the whole difficult to avoid. This may be unfair vis-à-vis certain victims, who are left empty-handed, or alleged tortfeasors who did not realise that they committed a tort, but that is how it is. In relation to climate change the situation is completely different. There, far-reaching liability will have a tremendously adverse impact on society, and in a sense it would be unfair, or at least unattractive, to apply the system as we are used to until now. So, my lesson from the Gulf of Mexico would be: Let us be extremely reluctant to put pressure on enterprises to settle the liability issue with specific States, if not for other reasons, because money can only be spent once. In other words, if compensation is paid to States A, B and C, there will be no money left for other victims, present and future, so we should try and solve this problem in a more subtle way. What would be the best 'subtle way' is something about which could be argued at length. I have some ideas about this, but it is entirely possible that others may have brighter and better ideas.

### **Prof.dr. W.J.M. van Genugten**

Since you mention you have some ideas about how to deal with the liability issue, please share them with us in just a few words.

**Prof. Spier**

Ideally speaking, there should be an international convention, either limiting or excluding liability, but this would come at a price. The price would be an obligation for enterprises to reduce their emissions to the extent necessary to ensure that global warming does not exceed the 1.5- or 2-degree threshold. Perhaps full exclusion of liability would be unfair, but then it should be made very clear what the liability caps are. Alternatively, I could imagine that we would accept liability, but only if the obligations are sufficiently clear. In that case we would have to sort this out first. The Paris Agreement is important and useful, but in this respect it falls short. While I have the greatest respect for those who negotiated the Paris Agreement – I think they did a brilliant job – we know it falls short. If countries act in accordance with their nationally determined contributions, we will face global warming of somewhere between 2.7 and 3.5 degrees. This means that much much more needs to be done and we really need to start thinking about making obligations concrete. Once the obligations of the respective players are concrete, it may make sense to say: You knew what your obligations were, you did not comply. Consequently, you are liable. Unfortunately, however, we have not yet reached that stage. That being the case, we should be reluctant to impose far-reaching liability and for now perhaps we should restrict ourselves to adaptation costs incurred by relatively poor countries and other losses suffered by poor people. If, after that, there is any money left, which seems most unlikely, we would have to think of how to distribute that.

**Prof.dr. S. Trevisanut**

*Professor of International Law and Sustainability, Utrecht University*

*Addressed to Prof. Soons*

Considering the debates surrounding the 1996 London Protocol, as yet ratified by a very limited number of States, how can the rules of reference in the LOSC make the amended version of the London Protocol binding for all LOSC State parties? Can the interaction with the climate change regime play a role to sustain the 'generally accepted' character of these rules?

**Prof. Soons**

The London Convention, which used to be called the London Dumping Convention, deals with the disposal of waste and other matter at sea. It contained rather restrictive definitions, however, and this led to the adoption, in 1996, of the London Protocol. The London Protocol took the precautionary approach, which I think is important, and was a reflection of customary international law. It not only contained broader definitions, for example of dumping. It is in force, but has not completely replaced the London Convention.

The main point prof. Trevisanut was making, I think, is that the London Protocol became involved in starting to regulate new problems, such as sub-seabed storage of CO<sub>2</sub> and ocean iron fertilisation. It is important that these kinds of marine geo-engineering are regulated on a world-wide scale, but treaties are binding only on the parties to them. The sub-seabed storage rules in the London Protocol are definitely binding on the parties, because the Annex was amended very quickly and no party rejected them. It was also amended for (future) marine geo-engineering activities. In that respect it is very forward-looking, which I think is a positive development, but it could take years before this amendment enters into force for the parties to the London Protocol.

What I have noticed, however, – without extensive fact finding, I should add – is that the amendment is already affecting state conduct. In the ocean iron fertilisation experiments, for example, States, very prudently, are acting in accordance with the rules in the (amended) London Protocol, even though the relevant amendment has not yet entered into force.

Your other question was: Can you regard these rules in the London Protocol, when they have entered into force, – through the rules of reference in the LOSC – as binding on all the States who are party to the LOSC? This depends on your interpretation of the words “generally accepted rules and standards”, contained in these rules of reference, if you take into account that they have been accepted only by 40 to 50 States. In addition, there are no relevant decisions by the International Tribunal for the Law of the Sea or a court of arbitration, so it is speculative how a judge would look at this, but I would gladly defend that these rules are generally accepted, because they are the best we have and it also would be in accordance with the more general approach under the LOSC to protect and preserve the marine environment. After all, this must have some significance! At the same time, I will concede that a different point of view may be defended, even if I would rather not do this.

**Prof.dr. E. Lijnzaad**

*Judge, International Tribunal for the Law of the Sea*

*Addressed to Prof. Soons*

I was very happy with prof. Trevisanut's question, because I also had a question along these lines, but perhaps more from a law of treaties perspective. This concerns how Article 211 (*Pollution from Vessels*) LOSC operates with respect to MARPOL and the London Dumping Protocol. Article 211 is longish and not necessarily easy to read or very clear. I may not be fully versed in Article 211, but I have trouble with the line of reasoning proposed by prof. Soons. First of all, there is this chicken and egg element, where Article 211 obliges flag States to adopt and enforce “generally accepted rules”. That in itself is a little odd, because if rules are “generally accepted”, apparently, they exist, so why should one have to adopt them? Presumably, these “generally accepted rules” are rules of customary law, so perhaps this a question of a drafting error or, alternatively, the drafters wanted to make it absolutely clear that these rules are important rules. However, my main concern is that it looks as though it is a “magic wand”. Looking at the Convention you conclude that rules in a protocol adopted by a very small number of States are binding on a much larger number of States, namely the parties to the Convention. Now I do appreciate what you said. It is correct, in terms of practice, that by the time certain rules have ended up in an instrument, practice may precede its formal ratification, even if it may be open to discussion whether this is voluntary practice or legally obliging practice.

If one looks at the sources of international law, how can you conclude that the rules written down for future acceptance that have only been accepted by a limited number of States apply to all? I suspect this goes to the question of how customary law and treaty law interact, but I find it difficult to say that rules of the amended version of the London Protocol are binding on States who are not a party to it. After all, in this day and age, not becoming binding is often a deliberate choice. For me it would be different if you said that these rules are binding as customary law. You suggest, however, that these rules are binding through the LOSC. Could you please clarify this, because perhaps I have not quite understood how that works.

**Prof. Soons**

Much has been written about the effect of the rules of reference in part XII of the LOSC, and the views I expressed are widely shared. The LOSC has a series of innovative notions. It was perhaps a revolutionary development when, in the 1970s, these provisions were included in the LOSC. It is clear from the *travaux préparatoires* that this is the intended effect: When you become a party to the LOSC, through these rules of reference, you are also bound – as a matter of treaty obligation – to apply the generally accepted rules and standards. The next question is, of course, when rules and standards may be deemed to be “generally accepted”. About this too, much has been written. I have been involved in this also. A long time ago, the Ph.D. thesis of Erik Molenaar was entirely devoted to this topic.<sup>4</sup> The International Law Association had a Committee on vessel-source pollution. I think that there is no doubt that the MARPOL Convention with its own specific rules concerning how changes to the detailed Annexes are to be adopted has a relatively high threshold before they enter into force and that the technical rules and standards that have been adopted under the MARPOL Convention and entered into force are in fact the generally accepted international rules and standards. When you look at state practice, I found not a single State that is a party to the MARPOL Convention and that, in its own national legislation, makes a distinction with respect to the obligations of foreign-flag vessels in their own maritime areas, whether or not their national legislation, which is in accordance with MARPOL, can only be applied to parties to the MARPOL Convention. They are applied generally, also to non-parties to the MARPOL Convention. For that reason, I think that, as far as vessel-source pollution is concerned, the matter is completely clear. With respect to dumping I readily agree that you can have a discussion whether or not the rules that have been adopted by the London Protocol with only a limited number of members can be said to satisfy the requirement of generally accepted international rules and standards. In the absence of other criteria, however, I think you can really develop an argument pointing in that direction.

**Prof. Hey**

Your question raises some very pertinent but complicated issues. Relating it to the topic of the reduction of CO<sub>2</sub> emissions from ships: Five states voted against the resolution that amended the MARPOL Convention – the Annex on air pollution with respect to CO<sub>2</sub> emissions – namely Brazil, Chile, China, Kuwait and Saudi Arabia. Is that vote in the International Maritime Organisation totally meaningless, when the amendment of the MARPOL Convention is related to the Law of the Sea Convention by means of the rules of reference contained in the latter?

**Prof. Soons**

The answer is yes. They are parties to the LOSC.

**Prof. Hey**

I think that might be too simple. I do not think that “generally accepted” means that anything that gets through in one of the forums that are referenced to automatically binds all states parties to the LOSC. I think there are thresholds to consider and that one needs to look at the context.

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<sup>4</sup> Prof.dr. E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Ph.D. thesis, Utrecht 1998.

I concede that the MARPOL Convention amendments on CO<sub>2</sub> emissions from ships are normatively very relevant, including for the five states who voted against them, but to totally ignore what happened in the IMO I find rather strange.

**Ms. L.E. Burgers**

*Ph.D. Candidate, University of Amsterdam*

*Addressed to prof. Spier, Prof. Hey and Dr. Violi*

I am researching the democratic legitimacy of climate change litigation. Just a few days ago, the Human Rights Committee launched its General Comment Nr 36, in which it also connected the right to life to climate change. It said that environmental degradation and climate change counted as one of the most pressing and serious threats to the right to life and that, consequently, States should take measures to preserve the environment and protect against climate change. I think that is very much a confirmation of your hypothesis, of the interaction there.

My question, however, relates to criticism directed at this connection, that was also delivered against the *Urgenda* case, namely that this would stretch the right to life too much. I am playing the devil's advocate here, because, actually I do agree with the critics. When reading an issue like climate change into a human right, such as the right to life, this gives more power to the judiciary to adjudicate on these issues against both States and corporations. In the *Urgenda* case as well as in the General Comment is it mentioned that this is relevant for both States and private actors. In the long term, this might undermine legitimacy of those regimes. In constitutional theory, people speak of over-constitutionalisation. So, I am wondering what you think about this, also in relation to your views on the suitability of litigation for tackling this problem. By the way, I very much agree with you that a legislative solution would be the best option and, although the first contribution was more descriptive and analytical, rather than normative, I would like to hear your views on this issue.

**Prof. Spier**

In my presentation today, I could not present everything covered in my report. I am by no means opposed to litigation. I strongly believe that it can be very useful, but first things first. We should focus on what is most urgent and what is most urgent is to avoid that we pass the fatal threshold, irrespective of whether that is 1.5 or 2 degrees or anything else. That kind of litigation is extremely valuable and even necessary.

Yes, it is important to accept the idea that Article 2 plays an important role in this respect. Finally, of course it is useful – I am repeating myself here – to come up with one-liners, such as “You have to take measures”. Indeed, we do, but please let us try to be more concrete.

**Dr. Violi**

I think there are standards that need to be satisfied. Otherwise, one would run the risk of diluting obligations and then delegitimising the advancements that have been made so far, also in the Paris Agreement. I think it would be desirable for adjudication or litigation to go hand in hand with normative and legislative development. That is why we salute, with at least some positive considerations, the Paris Agreement and the inclusion of vulnerability and other human rights related aspects within the climate change regime. I think that this might be a way to go forward.



I would have to think about it a little bit further, but there is indeed a risk that over-litigation, uncoupled from normative development, may dilute legitimacy.

**Prof. Van Genugten**

There was also a brief question on the risk that Article 2 of the European Convention on Human Rights, which concerns the right to life, is overstretched and that this might lead to the risk that in the fight against climate change and its effect on people the application of human rights standards turns into hostility towards human rights.

**Prof. Hey**

I would like to look at this from a slightly different angle. I agree with what has been said. Yes, we need measures. Yet, at the same time, if governments and businesses are protracting, I see litigation as a means of, among other aims, furthering the adoption of legislation. I also note that in our *preadvies* we argue, contrary to Dunoff, that some litigation can be prospective. A pertinent example being environmental cases before human rights courts.

**Prof.dr. R. Lawson**

*Professor of European Law, Leiden University*

*Addressed to prof. Spier*

The *Urgenda* judgment is a long judgment, 47 pages, but it boils down to three or four paragraphs that are decisive. They concern the interpretation and application of Articles 2 and 8 of the European Convention on Human Rights. My question to you is whether you find the reasoning of the Court of Appeal (*Gerechtshof*) convincing and whether you think it will survive, if the case goes to the Supreme Court, which I think is not unlikely. The reason why I am asking this is that the Court of Appeal seeks to base itself on a number of cases decided by the European Court of Human Rights – there are four of them – and to my mind these cases are about somewhat different situations. In these four cases a threat to the right to life occurred at a very specific place and affected specific groups of people, who could be identified in advance. For example, a dam was about to break or a waste tip was about to explode and it was pretty clear – at least in hindsight – what should have been done. Basing itself on these Strasbourg judgments the Court of Appeal of The Hague said there is a general duty to prevent harm and take reasonable measures. It then went on to order the Dutch State to take these measures.

Since you yourself made a distinction between lessons we can learn from the Gulf of Mexico and climate change in general, my question to you is how convincing you think this part of the judgment is, irrespective of whether you sympathise with the outcome of the case and the need to take measures.

**Prof. Spier**

*Urgenda* had asked the Court of first instance (*Rechtbank*) for injunctive relief in that the State had to reduce its emissions by 25 to 40 per cent. The Court in first instance decided that the State had to reduce its emissions by 25 per cent. For mysterious reasons *Urgenda* did not appeal and, rightly or wrongly, it was rather strongly and rather bluntly criticised about this by the Court

of Appeal. Is its judgment convincing? Personally, I think it is, but it could have been even more convincing.

The drafters of the Oslo Principles have taken the view that there is no reason why we should only look at one specific part of the law. That is particularly true for such a very difficult and important topic. My learned friends and I believe that the better option would be to borrow from as many legal sources as possible. That said, I am inclined to think that the Article 2 argument suffices, although additional arguments certainly would have improved the judgment, and, yes, you are right. There is a difference vis-à-vis the earlier cases. In this respect the right to life is a bit, or perhaps more than a bit, less direct than in earlier cases. Still, it is at stake, because if we are unable or unwilling to reduce our emissions to the extent needed, many many people will die and it will have many additional adverse consequences. And if I may add, in one important respect I found the judgment on appeal much more convincing than the judgment in first instance. The latter court did not at all explain why the State had to reduce its emissions by 25%. For the Court of Appeal it was much easier, of course, because a maximum of 25% was a given. It did not have to decide whether it should or could have been more. Even so, it implicitly makes it crystal clear that it takes the view that, had it been asked, it would have given injunctive relief for a higher percentage. In any event, the Court of Appeal makes it very clear why 25% is really necessary.

**Ms. R. Roland Holst, LL.M.**

*Ph.D. Candidate, Utrecht University*

*Addressed to prof. Soons, prof. Hey and dr. Violi*

Do you see any scope within the Law of the Sea Convention, apart from the rules of reference, to bring in climate change-related obligations and interests, for example through the general obligations of Part XII on the prevention of pollution of the marine environment, or the obligations on coastal States to exercise due regard in relation to other States? How could the expanding “due diligence” notion be relevant here?

**Prof. Soons**

What I addressed was that the obligation to reduce emissions follows from the substantive obligations for States in Part XII LOSC to adopt such rules. The LOSC essentially deals with sea-based activities and that is what I focussed on and in that context I mentioned ships’ emissions, but before that I said that, as far as the most important sources, i.e. the land-based sources of emissions, are concerned, the LOSC refers to the climate change regime of the Paris Agreement. I think there is scope to bring climate change obligations into the LOSC, but then the question is what are the specific obligations and you would have to go to the regime producing these specific obligations.

**Dr. Violi**

I think due diligence is a somewhat complex notion. It has a lot of potential, but it needs to be explored further. Your question concerns the interaction between the law of the sea and climate change regimes. Towards the end of the year, a Paris work programme on ‘Matters relating to Article 4 of the Paris Agreement’ is expected to be released. This should define or specify the

due diligence standard that is expected under Article 4 of the Paris Agreement. I do not know whether you could read into the general duty to prevent transboundary harm or marine pollution the (specific) due diligence standard that is required under the Paris Agreement. It is a good question and it definitely requires and deserves further analysis.

**Mr. Idris Dana**

*Lecturer of international law, Padjadjaran University, Bandung, Indonesia*

Climate change is extremely dangerous to all the people. How is the protection of the environment part of the customary international law, especially in light of the United Nations General Assembly Resolutions on this topic?

Can we extend the acts contributing to the climate change as the most serious crime? Would it be possible to include crimes against the environment in the Rome Statute? Climate change is a concern to the whole of humankind. In light of this, why are there no mechanisms to deal with it in the courts? Why were no cases brought to the international courts by, for instance, Tuvalu or the Marshall Islands? There are some cases in national law, for instance *Urgenda* in the Netherlands, as well as some in Australia and the United States. Nonetheless, why has no case ever been brought before the International Tribunal for the Law of the Sea (ITLOS) or the International Court of Justice (ICJ)?

**Prof. Soons**

I think you mentioned several aspects of the question of holding some person, entity or State responsible for the damage caused by climate change and what you referred to covers not only criminal law and inter-state responsibility law, but also civil liability law. In other words, you introduced a very broad theme into our discussion. When you speak of climate genocide and the Rome Statute, you are talking about international crimes, but we do not yet have generally accepted norms of "crimes against the environment". The matter has been discussed for many years, but it is not in the Rome Statute, so that cannot be of any help here. In my opinion, when we are talking of climate change, criminal law is not of any help. With regard to the question why there have been no cases before ITLOS or the ICJ, one needs to realise that it is very problematic to identify specific breaches and to define the damage. It is a question of causation and a question of attribution and these are probably insurmountable at the moment. A number of law firms investigated this approach, but until now they saw no chance of success.

**Prof. Spier**

The small island States have considered seeking an advisory opinion of the ICJ and if I have been correctly informed, they are still considering it. The opinion they obtained from a leading academic in this field, a leading English QC, was to the effect that they might have a fair chance of success, but only provided they asked the right question. And that, probably, is what makes it tricky. Many of you know this much better than I do, but it is my impression that the ICJ often tries to be on the safe side and that is not what we need here. If the ICJ tells us what the obligations are and that is clearly insufficient, we will have been put back a long way and that is the last thing we need. If countries really wish to get useful answers from the ICJ, they should think very hard about the right questions to avoid that kind of risk.

As far as criminal liability is concerned, I have little doubt about the usefulness – or probably even the necessity – of thinking about criminal law solutions, but one has to be cautious here.

**Prof. Hey**

I agree that where the ICJ is concerned it is important to ask the right question, but at the beginning of your intervention I think you asked whether the obligation to mitigate climate change could be seen as customary international law. I think that argument can be made, but that then brings us back to the question: What is the obligation? It would not be enough to say that all States have to “address” or “mitigate” climate change, because then you would have to ask what exactly they would have to *do*.

**Prof. Spier**

I might add, if there are people among you who are keen to support cases to be submitted to the ICJ, please contact my friend Tony Oposa,<sup>5</sup> who is working very hard to prepare such a case. I completely disagree with him, because I think it is far too tricky, but if you think it would be worthwhile, do send him an e-mail message.

**Dr. O. Spijkers**

*Assistant Professor of Public International Law, Utrecht University*

I have two comments. Yesterday, I heard an interview with Dutch philosopher René ten Bos, in which he expressed his concern that the general public might get bored of the discussions about climate change: Another species of fish has become extinct? So what? In other words, these alarming facts and stories will cease having an impact on the public at large. So, my question is: If this is really true, what could be the role of academics? In my opinion we should try to think of more innovative ways of interacting with the general public. For example, instead of holding conferences and publishing papers, perhaps post-apocalyptic movies should be made, which might have the right impact.

*Addressed to prof. Spier*

I really get upset when politicians make this so-called ‘drop-in-the-ocean’ argument. My former colleague Thierry Baudet is notorious for doing this. They tell you that it does not really matter what you as an individual do. It will have no effect on the climate if you try to do the right thing (making your life miserable in the process) and the same is true even if this entire country does so. People are very easily persuaded by this kind of argument, even very intelligent people. How does one make them change their mind?

**Prof. Spier**

I think there already are a number of the kind of movies you suggested, but it might be very helpful to have more of them. Al Gore did a very good job in this respect and some others did as well, but perhaps we need even more intrusive movies.

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<sup>5</sup> Antonio A. Oposa Jr is an environmental lawyer – and litigator – from the Philippines and he also is President of the Law of Nature Foundation.

As far as your 'drop-in-the-ocean' argument is concerned: Even the not overly progressive US Supreme Court has rejected it. It was also rejected by the Court of Appeal of The Hague in the *Urgenda* case, and I strongly agree with you that the argument does not make any sense. Accepting it would mean, for all practical purposes, that the law does not have anything to offer in relation to the most urgent and most important topic ever. That simply cannot be true.

Now why are people harping on the 'drop-in-the-ocean' argument? I do not know for sure, but my guess is they do it because they are trying to find "arguments" to justify their unwillingness to take action.

**Prof. Hey**

I totally agree with Otto Spijkers that we need to be more creative and also need to collaborate with artists, poets, philosophers and others. I am not saying that we should not have meetings like this one, where we discuss among ourselves, but I think there are other ways of conveying our message to a wider circle of people involved in climate change and issues that go far beyond these discussions. If you are interested in doing anything like that, I think we ought to talk, since I might well be interested in collaborating on such a project.

**Mr. A.M.M. Orié**

*Former Judge at the International Criminal Tribunal for the former Yugoslavia*

I noticed that when criminal law came up in the context of climate change, some wild suggestions were made, such as crime against humanity and environmental genocide. I think that indeed in that direction no solution can be found. A crime against humanity requires a "widespread and systematic attack against a civilian population" and that is not at all easy to prove in the case of climate change. For genocide there would have to be "genocidal intent". If you want to kill every person in the world, that is not genocide. You need to focus on a certain group of people and even taking aside genocidal intent, it would be very difficult to prove. In other words, genocide cannot provide a solution either.

When I spoke with prof. Spier during the break, I said that we do not have the normative framework and that we cannot ask the courts to tell people what they should have done if, at the time they were not aware what was their obligation. This means we need to start by developing the normative framework, because many people cannot yet find in the legal system what they should do or should have done, while very often they can find what they should *not* do or should *not* have done.

It is not really necessary to resort to major crimes, such as genocide, in order to be able to take action against behaviour that harms the environment. We have fraud, for example. Think of Volkswagen. Environmental prohibitions could play a role. If people are held liable (under civil law) or made criminally responsible for their behaviour, they will think twice before they continue with that behaviour. It may not solve all our problems, but it should keep things from getting worse than they are already.

**Dr. M.J. Wewerinke-Singh**

*Assistant Professor of Public International Law, Leiden University*

I have an observation in relation to the paper of Prof. Hey and Dr. Violi and in particular the first proposition at the end of the paper: For those who are not intimately familiar with the climate change regime: In Paris, the Conference of the Parties adopted a decision that accompanied the Paris Agreement, in which it called for the establishment of a Task Force on displacement. The Report produced by the Task Force, which was released only two weeks ago, offers a very nice example of your premise that the Articles of the Paris Agreement are particularly interesting when it comes to regime interaction, because the report presents displacement as a human rights issue, saying that human rights are negatively impacted by climate change and articulating obligations of States to protect climate displaced persons at all stages of displacement. This was the result of a very dedicated engagement with this Task Force by a staff member of the UN Office of the High Commissioner for Human Rights; and not only that. It was also the result of the recent adoption by UN Human Rights Council of a resolution on climate change and migration, which led to a panel discussion, followed by a report, which was submitted to the Task Force and that, in turn fed into the work of the Task Force.

It is also interesting that the main argument invoked by the OHCHR,<sup>6</sup> as well as by civil society representatives who were advocating a human rights approach to climate migration at the meeting of this Task Force was that a human rights approach to displacement, which, technically, falls under Article 8 of the Paris Agreement (Loss and Damage), was necessary because of the preambular reference to human rights. That reference requires interpretation of these articles in light of human rights. So perhaps, in view of that the question is not so much what is more significant: the preambular reference to human rights or the substantive articles, no matter how they interact; how the treaty provisions interact in order to promote regime integration.

In relation to Prof. Soons's fantastic paper, which I really enjoyed reading, I would like to respectfully disagree with one minor point, which is the idea that academics should not engage with the question of potential statelessness resulting from climate change. Here my views are coloured by my previous job, which was at the University of the South Pacific in Vanuatu. I have a Fijian Ph.D. student, who is researching the question of potential climate induced statelessness from a customary regional law perspective, and with your permission, I will put you in touch with this Ph.D. student, in order that she may convince you of the importance of academic engagement with this question.

**Prof. Hey**

Thank you very much for drawing our attention to the Task Force Report, which has just come out.

Our first proposition might well be a bit too provocative. I think we agree that both the preambular language and the articles of the Paris Agreement referencing human rights are important. The one thing we found, however, when we were researching the topic of our

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<sup>6</sup> Office of the United Nations High Commissioner for Human Rights

*preadvies* was that, interestingly, very few people were picking up on the substantive articles of the Paris Agreement, instead focusing on the preambular provision.

**Prof. Soons**

So as to avoid any misunderstanding: Were you referring to statelessness as a result of the disappearance of a State?

**Dr. Wewerinke-Singh**

Yes. What my Ph.D. student is working on is the nexus between climate change, loss of territory, potential statelessness and human rights.

**Prof. Soons**

That is a very broad topic. The point I would like to make – and that is briefly addressed in my report – is that at this moment I would be very careful when discussing hypothetical solutions for the four or five States in the Pacific – and the one in the Indian Ocean, the Maldives – that really have a long-term prospect of complete disappearance of part of their territory or, in any event, of becoming uninhabitable, so that there will be no population left, which raises the question whether or not they can continue as a State, as well as a number of other issues related to, for example, the nationality of citizens and the governance of ocean areas. A few monographs have been published on this, but this is all very speculative. In addition, this is an issue that is so sensitive for the local populations that one would have to be extremely careful when speculating that you could have something like an entity that is no longer located on the territory of a disappeared State, but still governs as a particular subject of international law. I think it is up to these governments themselves to think of, not only how they can maintain their entitlements to their maritime areas, but also how they can continue to govern the people that had to evacuate the territory. There are other options as well, which for some reason are not addressed, and which are peculiar to the region. My main concern would be that it could be dangerous to speculate too much without taking into account the wishes and perspectives of the local population, but I gather that your Ph.D. student is doing just that.

**Mr. S. van Hoogstraten**

*Former General Director of the Carnegie Foundation (Peace Palace) and former Treasurer of the Hague Academy of International Law*

My question concerns the interaction between the trade in emission rights and the Paris Agreement. I thought that an element of the climate regime was the introduction of a system of buying and selling emission rights. This system would allow a country to reduce its emissions less than it should by buying the emission rights of another country that had more emission rights than it needed. What happened to this system? Is this option of buying yourself out of your reduction obligation still on the table or has it been annulled by the Paris Agreement?

**Dr. Violi**

During our research we were asking ourselves the very same question. In fact, Article 9 of the Paris Agreement refers to climate finance, and I think the provisions included in it will be further specified and implemented in the future, mostly (at least on its face) in support of developing

and most fragile countries. Article 9 also refers to the financial mechanism of the UN Framework Convention on Climate Change and mandates that it shall serve as the financial mechanism under the Paris Agreement.

**Prof. Spier**

Let us please keep in mind that global emissions are still rising and that was not really what the Kyoto Protocol aimed at, so at the very least we could say – and I think that would be very much an understatement – that that system was hugely inadequate.

**Prof. Hey**

The question is what happened to the flexible mechanisms under the Kyoto Protocol. We do not know yet, because this is still being worked on. Nobody has decided to get rid of the flexible mechanisms, even if they are one of the reasons why the Kyoto Protocol has performed so badly when it comes to reducing CO<sub>2</sub> emissions. The answer is that we will have to wait for the implementation phase of the Paris Agreement to see what comes out of these further negotiations.

**Ms. L. van der Burg, LL.M.**

*Researcher at Friends of the Earth Netherlands (Milieudefensie)*

As a researcher with Friends of the Earth Netherlands I am working on the climate case against Shell. I have a question. If I understood correctly, I believe that several of the panellists have said that we can only enforce legal obligations in relation to climate change and human rights if we know concretely what States or companies should be doing in order to achieve our climate goals. In my opinion, if we look at the decision of the Court of Appeal in the *Urgenda* case, we can conclude, actually, that we do know what States should be doing, at the very least, in order to avoid dangerous climate change. And, now that we have the IPCC Report on 1.5 degrees, that came out only a day before the *Urgenda* ruling, we also know more concretely even what oil and gas companies and other companies should be doing to stay on the trajectory needed to have a chance to remain below 1.5 degrees or well below 2 degrees.

I do not know if I understood this correctly and if you think this is something we do not have yet, but I think that we have enough scientific evidence from which we can derive specific and enforceable obligations for States and enterprises in relation to human rights and climate change.

**Prof. Spier**

*Urgenda* was actually quite easy. One of the many arguments put on the table by the Court of Appeal was that the State had committed itself to reduce its emissions by 30 per cent. and it could not explain why it had changed its mind. Given these facts it was rather self-explanatory that 25 per cent. was the very minimum. There were more arguments, so that was easy.

You are right in so far, that it is crystal clear all States together and all enterprises together must do much much more. It is extremely likely that almost all enterprises in developed countries will have to reduce their emissions at a much higher pace. I am not sure, however, – and you did not mention it either – why it is so clear what is the percentage for each single enterprise. Unless society or the courts are willing to accept the Principles on Climate Obligations of Enterprises, I do not know the answer. With due respect, you did not give the answer either,



although I realise that this would have been close to impossible in the brief time allocated to you. I wish it were different, but for the time being we really do not know. We desperately need a discussion about this and anything that can contribute to getting an answer to the question will be extremely welcome.

### **Concluding remarks**

#### **Prof. Soons**

I noticed that no questions were asked on the consequences of sea level rise, on how you can ensure that States that will be affected by sea level rise do not lose their maritime entitlements and on proposals for enabling them to safeguard these rights. I take it that, since nobody talked about this, everybody thinks that this is a very fair and equitable approach to this problem and that, indeed, it is a good suggestion that States will be allowed to maintain at least the outer limits and also the baselines of their maritime zones. And I hope that the International Law Commission, if it takes up this topic, will contribute to a further development of rules and that this will lead to a highly interesting modification of the Law of the Sea Convention by subsequent practice.

#### **Prof. Spier**

I am very happy to have seen so much expertise and so much willingness to change the scene during the Annual Meeting. Let us use this energy to come up with a concrete solution and refrain from only talking in the abstract. Without substance we won't be able to square the circle.

#### **Dr. Violi**

There is an urgent need to find a solution on how law could adapt to climate change threats normatively and how it could be used in order to litigate climate change implications.

#### **Prof. Hey**

I must say, I am very positively surprised by seeing so many young and such a diverse group of participants at the meeting. This provides me with the trust that in future we will have many bright minds dedicated to combating climate change and to the protection of the environment more in general.

#### **Prof. Van Genugten**

Let me end by thanking the speakers and the members of the audience who participated in the discussion for their respective contributions. With this I am closing the meeting.

Rapporteurs:           Monika Tobjasz  
                                  Kilian Roithmaier  
                                  *T.M.C. Asser Institute, The Hague*