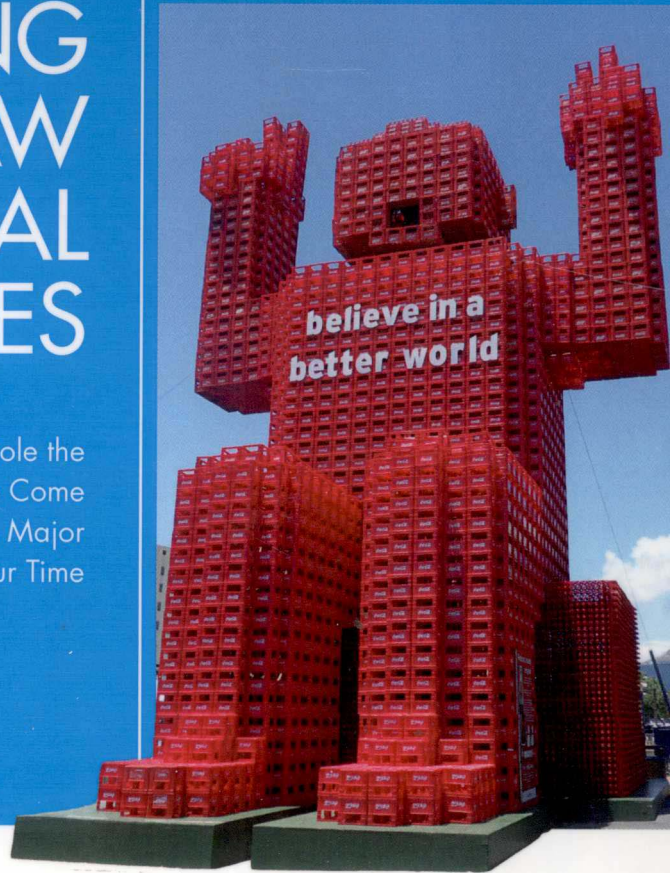


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Legal Perspectives  
for Global Challenges

# SHAPING THE LAW FOR GLOBAL CRISES

Thoughts about the Role the  
Law Could Play to Come  
to Grips with the Major  
Challenges of Our Time



Jaap Spier  
Elbert de Jong

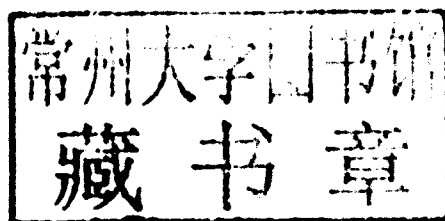
eleven  
international publishing

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## PREFACE

Humanity faces unprecedented threats and challenges. The lifestyle of many countries and people is rather unsustainable. Climate change is the most striking example. Business as usual will end up in major and often global catastrophes. It will adversely impair people around the world. The most vulnerable countries will feel the most grievous harm.

This state of affairs begs a series of new questions. Many of them belong to the *political* arena. Others are about *technical* means to come to grips with the threats. It also affects the law and gives rise to a myriad of new legal questions, given the *global* nature of the threats and – to some extent – the uncertainties what exactly is going to happen where and when.

This newly established and very timely law series *Legal Perspectives on Global Challenges* aims to focus on the way the law can meaningfully contribute to the debate about the global challenges, particularly sustainable development, and in the upshot thereof the eradication of poverty and climate change. In various instances legal gaps, rights and responsibilities need to be distributed with greater fairness in future. This in turn means to ensure that especially poor and marginalized communities in the world do not suffer a disproportionate burden associated with climate change and other global challenges in the realm of sustainability. In this context the question that still needs to be answered centres on how the law can work for everyone more equitably (developing and developed countries), reduce poverty, retain wealth and at the same time protect the environment?

The editors realise that there is a growing amount of impressive doctrine on these issues. The complexity of those issues involves a new way of thinking so that law makers, enterprises, society at large – and law – will manage to adapt to major shifts. So far, the law arguably already provides a sufficiently sound basis for more global stability in many areas, but the least to say is that the boundaries of the protection of the law are rather unsettled. It would be in the best interest of all stakeholders to map the law as it probably stands. Gaps must be filled to cope with the urgent demands of our time. Thus, the law would respond in a responsible and predictable way to these global challenges. This means the development of the laws capacity for change and flexibility in the face of new forces.

The debate, so far, primarily is about very fundamental questions. In the impression of the editors the greater part of existing publications is still rather abstract. Thus *Legal Perspectives on Global Challenges* intends to shed light on a number of important topics, with

## PREFACE

an aim to determine the rights and obligations of the respective 'parties' affected. As long as those rights and obligations largely remain in the clouds, the law is deemed to fall short to overcome deadlocked positions – especially between the global North and South. After all: not only States and enterprises, but also judges, attorneys and other jurists do not know with sufficient precision what they need to do, let alone why.

Many lawyers – and eminent experts – almost inevitably focus on parts of the law belonging to their fields of expertise. This is understandable but not sufficient in the context of the challenges ahead of us. These challenges require that we borrow from the law, legal concepts and other disciplines in as many parts of the law (and 'legal families') as possible. Such an approach will add something to what is already available. At the same time such an undertaking will challenge traditional ways of legal thinking, as shaping the law of the future will require solutions for sustainable development, the eradication of poverty and climate change, which in turn will demand to get the legislator and the judiciary acquainted with the (legal) demands of the 21<sup>st</sup> century. While politicians continue to be called for their inputs, judges will also have to play a major role, if other means fail.

All this begs the question how the law can play a role to contribute to a better and more balanced world. *Legal Perspectives on Global Challenges* aims to invite leading academics and very promising younger scholars to write about these issues briefly mentioned above.

On behalf of the editorial board,

Oliver C. Ruppel

## FOREWORD

Our globe is confronted with unprecedented threats and by the same token challenges. Climate change, sustainable development and the eradication of poverty spring to mind. An ever growing number of people are active in attempts to stem the tide. Many, if not most of them, are rather frustrated because it often seems a hopeless case. Those active in these fields realize that the stakes are so high that they cannot afford to give up.

Over the last ten years, I have devoted the greater part of my spare time to several initiatives, mainly in the legal field. My goal was and is to think about solutions and about the role the law could play to overcome the deadlocked position in relation to the major challenges in the realm of sustainable development and the eradication of poverty. This was a fascinating, inspiring and at the same time rather frustrating experience.

I had the privilege to meet many great people; very senior (ex) politicians, business leaders, leading and other people in non governmental organizations, academics, attorneys, judges and students. Many of them have brought me to understand that our biased beliefs are mistaken in many respects. Contrary to what many seem to expect, many leading academics in the US belong to the forefront of activism; many of them and many others have come up with inspiring and potentially promising ideas to arrive at solutions.

Contrary to the prevailing view, there are many very positive developments in countries such as China and Indonesia, largely thanks to the efforts of top politicians with a clear view. Our 'western' bias (and arrogance) that 'our' law and legal system are the best 'developed', *i.e.* superior and that 'our' courts are, all in all, the best promise for (arriving at) legal solutions, is mistaken. Courts in quite a few so called 'developing' countries do a much better job in the non run of the mill cases. The Indian Supreme Court is a shining example for the world.

My numerous travels for the good cause have put me in contact with many whose ideas greatly influenced my thinking and who encouraged me not to give up. I am most indebted to them.

Out of the many people who would deserve to be mentioned specifically, just a very few names (otherwise, the list would be too long). My friend and colleague Michael Faure, the director of the research institute Metro of the faculty of law of the University of Maastricht, has been extremely supportive and generous over the years. I am most thankful for all that

he has done. I have had many highly inspiring and very useful discussions about this book and related topics with a young researcher from the law faculty of the University of Utrecht (Elbert de Jong); particularly, but by no means only, about the – in my submission – vital chapter 12; as a token of gratitude his name is mentioned on the cover of this book.

The dean of the faculty of law of the University of Stellenbosch, Gerhard Lubbe, was so kind to suggest the research institute linked to his university (Stias), to embark on a project: law making for crisis situations and to invite me as project leader. That project will be realized in 2012, by a small group of eminent experts. This book is a kind of a preparatory study, based on the research conducted and ideas developed over the last ten years. It was largely written during two stays at Stias, a real paradise for research. I owe a lot to its energetic and always supportive director Hendrik Geyer and the inspiring and always extremely helpful staff of Stias.

Last but not least: over the years I have tried to bring together groups of people to explore avenues to come to grips with the issues mentioned above. My friend and colleague at the Supreme Court of the Netherlands, Toon Huydecoper, greatly contributed to all these attempts. He was and is a source of inspiration with his lucid and well considered views about almost everything. Most projects did not get off the ground, but that is entirely due to my shortcomings. I dedicate this book to Toon.

Jaap Spier  
31 December 2011

# TABLE OF CONTENTS

## Part I General Topics

<b>1</b>	<b>Introduction</b>	<b>3</b>
1.1	Paradise Lost?	3
1.2	A World of Misery: Doom or Reality?	5
1.3	Comparing Apples and Oranges?	6
1.4	Compelling Reasons to Adopt a Broader View	7
1.5	The Aim of the Book	9
1.6	Mission Impossible from Scratch Onwards?	10
<b>2</b>	<b>Climate Change</b>	<b>11</b>
2.1	Introduction	11
2.2	The Phenomenon Climate Change	11
2.3	The Impact of Climate Change	13
2.4	A Not Undisputed View	14
2.5	Climate Change Allegedly Already Causes Major Harm World-wide	17
2.6	Climate Change Broadly Perceived as a Serious Threat with Potentially Far-Reaching Consequences	19
2.7	An Economic Perspective	21
2.8	A Political Deadlock	22
2.9	Potential Solutions	24
<b>3</b>	<b>The Doom of Unsustainability in Other Fields</b>	<b>27</b>
<b>4</b>	<b>The Financial Crisis and Its Aftermath</b>	<b>31</b>
<b>5</b>	<b>A Remarkable Meeting of Minds</b>	<b>37</b>
5.1	Introduction	37
5.2	The Goal of the Principles	38
5.3	The Core of the Principles	39
5.3.1	Introduction	39
5.3.2	Liability of States for Human Rights Abuses by Enterprises	40
5.3.3	The Obligations Vested on and Liability of Enterprises for Human Rights Violations	41



## TABLE OF CONTENTS

5.3.4	Extension of Enterprises' Obligations	42
5.3.5	Due Diligence	42
5.4	A Bold and Useful Step Forward, but Fraught with Risk	43
5.5	The 'Reception' of the Principles	44
5.6	Conclusion	45
 <b>Part II Climate Change as <i>Pars Pro Toto</i></b>		
<b>6</b>	<b>Introduction: Could the Law Serve as Crowbar to Come to Grips with Climate Change?</b>	<b>49</b>
 7	 <b>The Vital Role of the Judiciary</b>	 <b>51</b>
 8	 <b>Enforceable Obligations towards Future Generations?</b>	 <b>55</b>
8.1	Introduction	55
8.2	Legal Aspects	56
8.3	Which Obligations Do We Have towards Future Generations?	59
 9	 <b>Precautionary Principle</b>	 <b>61</b>
9.1	Introduction	61
9.2	What Is the Precautionary Principle about?	61
9.3	Precautionary Principle Embedded in the Law	62
9.4	But the Assumptions May Turn Out to Be Mistaken	64
9.5	Conclusion	65
 10	 <b>Legal Bases for Litigation (in Case Need Would Be)</b>	 <b>67</b>
10.1	Introduction	67
10.2	International Law	68
10.3	Human Rights	71
10.3.1	Introduction	71
10.3.2	Climate Change as a Human Rights Issue	72
10.3.3	Unorthodox Exercises	75
10.3.4	The Widest Possible Spectre	80
10.3.5	Making Things More Concrete	82
10.3.6	The Role of Enterprises	82
10.3.7	Conclusion	85
10.4	National Tort Law	86
10.4.1	Introduction	87
10.4.2	The Hard Core of Tort Law	88

10.4.3	<i>Prima Facie</i> Arguably not so Obvious Analogies	90
10.4.4	Conclusion	92
10.5	Historical Contributions (the Temporal Dimension)	92
10.5.1	Introduction	92
10.5.2	How to Deal with the Wrongfulness of Emissions in the (Distant) Past?	93
10.6	Last ‘Drop’	97
<b>11</b>	<b>The Law in Ever Growing Imbalance</b>	<b>99</b>
11.1	Introduction	99
11.2	Potential Arguments to Butter the Defendant’s Case	99
11.3	Unrelated, but Still Important Analogies	101
11.4	Conclusion	103
<b>12</b>	<b>How Far Should GHG-Emissions Be Reduced?</b>	<b>107</b>
12.1	Introduction	107
12.2	The Meaning of ‘Developed’ Country	109
12.3	Obligations of States	110
12.3.1	The Common but Differentiated Responsibilities as a Starting Point?	110
12.3.2	Preliminary Questions	111
12.3.2.1	Introduction	111
12.3.2.2	What Can Be Done?	112
12.3.3	Making Obligations of Developed Countries More Concrete: A First Try	114
12.3.4	The Concept of Common but Differentiated Responsibilities	117
12.3.5	Various Submissions by Others to Attach a Concrete Meaning to CDR	121
12.3.6	Obligations per Capita or per Country?	127
12.3.7	Relevant Criteria	129
12.3.8	A New Try to Develop Criteria	133
12.3.8.1	Starting Points	133
12.3.8.2	A Need for Reconsideration	134
12.3.8.3	New Submissions	135
12.3.9	Who Should Assume the Obligations of the ‘Unwilling’?	138
12.3.9.1	Introduction	138
12.3.9.2	Legal Obligations to Step in Where Others Fail?	139
12.3.9.3	Conclusion	141
12.3.10	Obligations of Enterprises	142

## TABLE OF CONTENTS

12.3.10.1	Introduction	142
12.3.10.2	International Law and Enterprises	142
12.3.10.3	The Obligations of Enterprises	143
12.3.10.4	Obligations of Private Persons	150
<b>13</b>	<b>Liability of Others</b>	<b>151</b>
13.1	D&O-Liability	151
13.2	Various Targets	153
13.2.1	Introduction	153
13.2.2	Insurance Industry	156
13.2.3	Banking Industry	159
13.2.4	Pension Funds	160
13.2.5	Supervisory Institutions	160
13.2.6	Conclusion	160
<b>14</b>	<b>Defenses</b>	<b>163</b>
14.1	Introduction	163
14.2	The Political Argument	163
14.3	Difficulties to Sort Out the Necessary Facts	165
14.4	Compliance with Permits, National Law or the Targets Set in International Agreements	166
14.4.1	No Agreement Can Be Reached, so It Is a Lawless Realm	166
14.4.2	Not Beyond the Targets of International Agreements?	167
14.4.3	Compliance with National Law	170
14.4.4	Compliance with Permits	170
14.4.5	The Alleged Lack of Clarity about the Law as It Stands	171
14.4.6	Waiting for Advances in Technology?	172
<b>15</b>	<b>Causation</b>	<b>175</b>
15.1	Introduction	175
15.2	The Adverse Effects Would Have Occurred Anyway	175
15.3	Minimal Causation	176
15.4	No Causal Link between the Damage in Point and the Defendant's GHG-Emissions	178
15.5	Opening the Floodgates? Ways to Keep Liability within Reasonable Limits	178
<b>16</b>	<b>Remedies</b>	<b>181</b>
16.1	Introduction	181

16.2	Damages	181
16.2.1	Introduction	181
16.2.2	Arguments for Compensation	182
16.2.3	The Dilemma of Crushing Liability?	184
16.2.4	A Choice between the Devil and the Deep Blue Sea	187
16.2.5	How to Keep Liability within Bearable Limits	189
16.2.6	Conclusion	190
16.3	Adaptation Cost	191
16.4	Mitigation Cost	193
16.5	Injunctive Relief	194
16.5.1	Introduction	194
16.5.2	Requirements for Injunctive Relief	195
16.5.2.1	Introduction	195
16.5.2.2	The Requirements for Injunctions	195
16.5.2.3	Clean Hands	196
16.5.2.4	Mission Impossible?	196
16.6	Declaratory Relief	198
<b>17</b>	<b>Criminal Responses</b>	<b>201</b>
<b>18</b>	<b>Other Strategies</b>	<b>207</b>
<b>19</b>	<b>The Importance of Collecting the ‘Right’ Information</b>	<b>213</b>
<b>20</b>	<b>A Search for the Right Allies</b>	<b>217</b>
<b>Part III Lessons for Other Looming Crises</b>		
<b>21</b>	<b>How to Deal with Financial Crises, (Un)sustainable Development and the Eradication of Poverty?</b>	<b>225</b>
21.1	Introduction	225
21.2	Financial Crises	225
21.2.1	The Causes of the Financial Crises	225
21.2.2	An Information Gap	226
21.2.3	Legal Obligations	227
21.2.4	The Way Ahead: <i>Ex Ante</i> Measures	228
21.2.5	The New Way Ahead: <i>Ex Post</i> Steps	231
21.2.6	A Search for Allies	232
21.2.7	Conclusion	232

## *TABLE OF CONTENTS*

21.3	Sustainable Development	233
21.3.1	Introduction	233
21.3.2	Attaching Legal Significance to Pledges	234
21.3.3	Emphasis Should Be Put on Prevention	234
21.3.4	Making Obligations more Concrete	235
21.3.5	Other Issues	237
21.4	Eradication of Poverty	237
 <b>Part IV Law Reform and Epilogue</b>		
22	Law Reform Desirable	241
23	Epilogue	243
<b>Bibliography</b>		247
<b>Table of Cases</b>		271

**PART I**  
**GENERAL TOPICS**



# 1 INTRODUCTION

In the course of the last one hundred years, quite a lot has been achieved particularly in the 'Western' world. Life standards have risen considerably. All kinds of serious diseases belong to the past. People are living longer than ever before; the progress of technology has proven beneficial to mankind. It is primarily the 'developed' countries that have gained a lot from all this, although these developments also had spin-off effects for the 'developing' countries. For example, extreme poverty has been eradicated to quite some extent. The BRICS-countries have become new economic powers in the world. Despite all these advances, the world still faces many threats and challenges. This book is not about the achievements, but about the threats and challenges ahead of us.

## 1.1 PARADISE LOST?

Over the centuries, mankind has done a great deal of evil. By way of examples: a seemingly unlimited series of often useless and irresponsible wars, genocide, slavery, the inquisition in the name of the Lord and more recently the holocaust (not only a 'German' aberration)<sup>1</sup> spring to mind. In our time the war against terror, which has ruined countries and has caused the loss of many lives than otherwise would have been under threat in the worse case-scenarios (not to mention the huge adverse economic impact around the globe), depletion of all kinds of natural resources, trade barriers that hamper the development of many African and Asian countries and, by the same token, keep a major part of their population poor, irresponsible speculations against (the currency of) countries deserve our attention.

The latter set of events arguably is of a very different nature, in that those who are engaged in this type of activities possibly do not realize, let alone aim, that their acts result in the major suffering of many innocent people. The reason why we close our eyes to the impact of these occurrences may well be that the adverse consequences are often less 'visible' because a causal link is much more remote than in case of, for instance, slavery, torture, genocide and the like.

I make this point, that will be elaborated below, reluctantly. After all, most people care about evil done to others. They, in a sense understandably, shy away from admitting that

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1 See Mike Davis, *Late Victorian Holocausts*.



our lifestyle has become unsustainable and that we do not have a choice, but to change course.

It is beyond cavil that genocide, war crimes, torture and, more generally, gross violations of human rights are universally considered as appalling, except perhaps by the very few who commit those crimes. Many believe that they are the most serious threats for humankind. By the same token, they are said to deserve our utmost attention and redress. To a large extent, the same goes for (the eradication of) poverty, be it that this topic, seemingly and unfortunately, is given a lower ranking on the global 'urgency-scale', probably because it is too abstract for people in the western world.<sup>2</sup>

It is common ground that all kinds of gross violations of human rights, such as war crimes, genocide and torture, are fundamentally unacceptable. They *must* be fought. Violators should not escape serious punishment. Yet, it is open to debate whether they truly are the *only* urgent threats or even the most serious injustices that deserve utmost attention. Climate change, unsustainable development, depletion of all kinds of raw materials, shortage of food and the like may *not always* bring about awkward suffering in *concrete* situations. But, seen from a global angle, they are also going to cause evil to an unheard-of extent. Besides, in many instances they will jeopardize the well-being of people to an extent comparable with, if not far more serious than, other extremely serious events. Starvation due to lack of water or food – two of the inevitable consequences of climate change if we do not take the appropriate measures right now – may serve as examples. So, given the *global* impact, these evils deserve at least as much attention as the totally unacceptable acts of the first category mentioned above.

Over the years, I have learnt that such a stance gives rise to fairly strong and not overly positive reactions. Criticasters label it as indifference to or underestimation of the fate of a great many people who are victims of violation of the alleged hard core of human rights. With due respect, it is submitted that this is not the case. I *do not challenge at all* the view that the latter kind of violations deserve our attention. They obviously do. As long as these abuses have not been eradicated, every effort to that extent can only be applauded.

But this leaves untouched that, at least on the somewhat longer term, *many more* people will likely be *greatly* and *adversely* impaired by the emerging threats of climate change, depletion of natural resources and, more generally, unsustainable development. Many

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2 That is not entirely true, of course. It belongs – to mention just one example – to the Millennium Development Goals. More generally, lip-service is paid to the need to overcome poverty at many occasions. So far, effective and sufficiently concrete actions lag behind.