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Law and the End of Anthropocentrism. Judiciary and Climate Change; Ecocide as an International Crime

A report of a captivating conference

J.A. Boer & I.K. Athanasopoulou, datum 22-05-2023

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Auteur	J.A. Boer & I.K. Athanasopoulou[1]
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1. Introduction

This conference, entitled *Law and the End of Anthropocentrism. Judiciary and Climate Change; Ecocide as an International Crime*, brought together two very different issues. This choice may not be obvious, and at a first sight these topics are quite diverse. However, they are related. They both reflect new and fundamental legal debates arising from the urgent ecological crisis of the Anthropocene. They reflect new and fundamental legal questions which legal scholars, national and international legislators and judges alike face at the moment. What role should international criminal law play in preventing acts that cause major harm to the environment? Climate change is also causing serious harm - harm that even limits the habitability of the planet. To what extent are states liable for this? And what about corporations?

With this thought-provoking statement, *Prof. Chris Backes*, Professor of Environmental and Planning Law at Utrecht University and co-organiser of the conference, opened the afternoon. The conference was organised by UCWOSL, RENFORCE and Pathways to Sustainability (Utrecht University), together with the Dutch Environmental Law Association (VMR), and took place last March at the Paushuize in Utrecht. In this report, we will briefly summarise the keynotes (including subsequent reflections) and highlight the main points that emerged from the discussions. Anyone wishing to delve deeper into the subject can visit the VMR website, where the presentations and further reading can be found.[2]

2. Brian Preston: Judiciary and climate change: ensuring government and corporate accountability

The first keynote speaker is the *Hon. Justice Brian Preston*, Chief Judge of the Land and Environment Court of New South Wales, Sydney. His keynote begins with a clear statement: the judiciary must hold both the legislative and the executive branches of government - which are responsible for setting climate change targets and implementing climate change policies - to account for adequately fulfilling their climate change responsibilities. This also applies to corporations, especially since they are responsible for the majority of greenhouse gas emissions. But how does this work in practice? And on what grounds does a judge conclude that a branch of government or a corporation has breached the law in relation to climate change? In his keynote, Preston seeks to answer these difficult questions. He does so by highlighting an impressive number

of court cases - some of which he has been involved in as a judge - to paint a picture of the role of the judiciary in bringing about climate action. This summary highlights some of the cases discussed.

Preston starts with the accountability of government. In the context of climate change, the legislature can breach the law in two ways: they either do so by failing to enact legislation (such as regulations) in breach of a legal duty to do so (an omission), or by enacting legislation that is unconstitutional or otherwise legally invalid (a commission). A good example of an omission that Preston presents, is *Massachusetts v Environmental Protection Agency* (2007). In this case, Massachusetts petitioned the EPA to issue a rule under the *Clean Air Act 1963* to regulate greenhouse gas (GHG) emissions from new motor vehicles. The EPA refused, saying it did not have the authority to do so, because vehicle emissions are not “air pollutants” under the *Clean Air Act*. Wrong, said the US Supreme Court: GHGs do fall within the ‘sweeping’ and ‘capacious’ definition of ‘air pollutant’, and the EPA therefore had the authority to regulate GHG emissions from new motor vehicles. A famous case where the climate legislation involved an unlawful commission, is the *Neubauer et al v Germany* (2021) case. There, the legislation failed to set GHG reduction targets beyond 2031, which placed an unreasonable burden on future generations, which are constitutionally protected in Germany. The Court ordered the government to remake the legislation setting GHG reduction targets beyond 2031.

Preston also talks at length about the lack of implementation of climate legislation by the executive. An interesting case (in which he has also been involved as a judge) was *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* (2021). In this case, a climate action group sought an order to compel the New South Wales (NSW) Environment Protection Authority (EPA) to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The Court held that the threat of climate change was of sufficient magnitude and impact as to be one against which the environment needs to be protected. The EPA had failed to fulfil its duty to develop instruments of the kind described to ensure the protection of the environment against climate change and was therefore ordered by the Court to do so. In addition to this case, the cases *Future Generations v Ministry of Environment of Colombia* (Supreme Court, 2018) and *Urgenda Foundation v State of the Netherlands* (Court of Appeal, 2018) were also discussed in detail in this part of his speech.

Preston then turns to corporate accountability. Corporations are primarily responsible for global GHG emissions, and have a legal responsibility to reduce them. Climate litigation seeks to achieve this by influencing corporate behaviour ‘directly’ or ‘indirectly’. Examples of direct climate litigation include challenging corporations’ high-emission projects. A bit more indirect litigation is to hold corporations accountable for their carbon-intensive operations (as in *Milieudefensie v Shell* (2021)) or their climate-related risks. Even more indirect forms of climate litigation, according to Preston, can be seen when lawsuits target supply and value chains, or so-called climate-related greenwashing. In this part of his speech, he highlights more than eight cases: we focus (again) on the one case he himself decided, *Gloucester Resources Ltd v Minister for Planning* (2019). This was a ‘direct’ case in which the Land and Environment Court of NSW refused a permit for a new open cut coal mine, in part because of the unacceptable greenhouse gas emissions that would result from the extraction and burning of the mined coal. In his decision, Preston wrote that such a coal mine “ *would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape* […] *will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The project should be refused*.”

Preston concludes his keynote address by reiterating the importance of the judiciary upholding the rule of law by holding governments and the corporate sector to account. Where the law promotes taking action to reduce GHG emissions by sources and to increase removal of GHGs, the action of the judiciary facilitate the achievement of effective climate action. “And that”, says Preston, “is a good thing”.

3. Reflections I: Jaap Spier & Natalie Dobson

The first reflection comes from *Prof. Jaap Spier*, former advocate-general at the Dutch Supreme Court and now a professor at the University of Amsterdam, who starts of by stating that courts around the world *will* hold governments and corporations accountable for causing climate change. However, in most countries, the law is unclear on the obligations of states and companies to reduce their emissions and the emissions of the products they produce. This creates uncertainty, making it difficult for lawyers to argue the current state of the law and advise on the liabilities that states and companies face. Judges are forced to find equitable solutions, which can lead to unpredictable outcomes.

Spier argues that reducing emissions to net-zero by 2050 is an irresponsible goal because it will not limit global warming to 1.5 degrees, even if all countries meet with their pledges - which has never happened - in which case we're looking at a rise of around 2.4 degrees. Another problem is the lack of a clear path for phasing out fossil fuels and the responsibility for doing so. A full transition to renewable energy depends on the availability of rare metals, which can have high environmental costs. In addition, the energy transition could take up to 30 more years, and we will have to decide whether to accept a greater increase in global warming, or to reduce our affluent lifestyles.

Spier questions the value of new concepts in climate law, such as obligations to future generations, Mother Earth, and the environment. With so much to do for the living, what is the point of discussing these concepts? Spier concludes by saying that on the one hand climate litigation is unaffordable, but on the other hand we can no longer afford to leave the poorest countries empty-handed and must compensate them as well. We have created a very serious problem, that will be very difficult to solve.

Dr. Natalie Dobson, Assistant Professor at Utrecht University, is next. She acknowledges the increasing success of climate litigation in drawing attention to the urgent need for action to reduce fossil fuel use and raise ambition. However, implementing this ambition often proves to be difficult. Dobson identifies three key challenges for the judiciary in addressing climate change. The *first* challenge is how to translate abstract ambition into concrete implementation. Dobson wonders whether the courts have a role to play in addressing this issue and ensuring that the bodies responsible for implementing climate policy are not given an impossible task. The *second* challenge is how to deal with an indecisive electorate. While commitments to address climate change may have passed through parliament, electoral support may erode over time, particularly in relation to the complexities of balancing short-term economics with long-term climate protection. What is the appropriate role of the courts in that case, when push comes to shove? The *third* challenge is how to adjudicate solutions to difficult new decisions that involve trade-offs. Dobson points out that the courts will have to address concrete questions about the use of renewable energy sources and the protection of indigenous rights and biodiversity. Is it the role of the courts or the legislature to deal with such dilemmas?

Dobson stresses that as climate litigation develops, there will be more difficult cases to deal with, and while the courts can deal with cases focused on rights and obligations, more complex dilemmas will require careful consideration of the role of the judiciary and the legislature in balancing competing interests.

4. Christina Voigt: Ecocide as a fifth international crime: Reasons and Expectations

After a short break, *Dr. Daan van Uhm*, Associate Professor of (Green) Criminology at Utrecht University and the second co-organiser of the conference, announced the day's second keynote speaker; *Prof. Christina Voigt*, Professor of Law at Oslo University and Chair of the IUCN World Commission on Environmental Law.

Voigt was part of an independent panel of twelve experts charged with developing a legal definition of ecocide. The mandate for the panel came from the Stop Ecocide Foundation, and the group was motivated by the idea that law, in all its forms, should be brought to the table to address environmental destruction. Their ultimate goal was (and is!) to not only develop a coherent legal definition of ecocide, but also to have ecocide included in the Rome Statute of the International Criminal Court, and thus criminalising the causing of the most serious and threatening environmental harm. Voigt then lists seven (difficult) decisions that the panel had to make in developing this definition.

First of all, the panel made a structural decision to propose an additional article to the statute, rather than amending an existing one, out of respect for the existing four crimes and their long and difficult history. The definition includes amendments to the Preamble of the statute, Article 5, and an addition to the existing Article 8, Article 8 ter.[3] The panel sought to include environmental harm in times of peace and to capture purely environmental harm not associated with human suffering. In order to adopt a realistic approach, the panel decided to use existing legal language, terms, and concepts with which states are already familiar. However, they used a scientific definition of "environment" rather than a legal one (Article 8 ter (2)e). In addition, the panel decided not to include a catalogue of potential acts that could fall under the definition of ecocide because the definition needed to be short, concise, and abstract, and is intended to apply to many different actors, individuals and corporations.

The next choice concerned the threshold for determining environmental harm. The final text requires severe harm and either widespread *or* long-term harm to fall under the definition of ecocide, since preconditioning both widespread *and* long-term harm would have set the threshold too high. The fifth choice relates to the legality and illegality of acts that may fall under the definition of ecocide. The definition clearly captures all illegal acts that result in environmental harm, but also legal acts that may cause severe, widespread an/or long-term damage to the environment. For legal acts to be constituting an ecocide, there were additional requirements. A legal act can be an act of ecocide if it is ‘wanton’ - carried out with reckless disregard for the environmental damage in relation to anticipated social and economic benefits. As a sixth choice, the panel decided to create a definition of ecocide that is not ecocentric, i.e. does not protect the environment for its intrinsic value. Its aim was simply to provide legal protection to the pure environment. And finally, regarding *mens rea*, the panel opted for a requirement of substantial likelihood, not just intent.

Voigt concludes her presentation by reflecting on the challenges of the ecocide process, noting that political support is uncertain and that the International Criminal Court already faces serious problems. However, the ecocide movement has made progress in criminalising environmental harm and sending a signal to corporations that environmental crimes cannot simply be bought off. Many states have already taken up this issue in national law, which Voigt sees as the best way forward to prevent environmental harm, with international courts as a backstop. This is already a great success for the panel and the Stop Ecocide Foundation in general.

5. Reflections II: Frank Biermann & Cedric Ryngaert

Following Voigt’s presentation, *Prof. Frank Biermann*, Professor of Global Sustainability Governance at Utrecht University, takes the floor. His reflection takes the form of posing questions to both Voigt and the audience. Biermann emphasises the great importance of having a realistic approach to this ecocide-amendment, because in the end, for this article to be effective, governments would of course need to ratify it. Secondly, if states want to find someone responsible for an ecocide, they would find a natural person who has acted unlawfully or recklessly for an anticipated social and economic benefit. The question is whether this legal framework could also bring the “big guys” to justice, like Joe Biden, who has just agreed to drill for oil in Alaska, or Olaf Scholz, with regard to coal mining in Lutzerath. Do Biden and Scholz have a clear access to the benefit anticipated form these acts? According to Biermann, they do. They were also aware of the substantial likelihood of the severe and widespread harm of these acts. What does this mean for the proposed definition of ecocide? And what is the likelihood of Joe Biden and Olaf Scholz arriving in The Hague to defend themselves for the crime of ecocide?

In addition, how will this proposal ensure that the debate between states, actors, activists and academics on ecocide will not lead once again lead to people from the global North bringing people from the global South to the Court in The Hague? Another point Biermann makes is about the concept of environment in the proposal. He argues that there is no such thing as ‘the environment’ left, because humans have been involved in every aspect of it and have drastically reformed (/deformed) it. Biermann concludes by stating the political importance of a proposal such as this to push the legal boundaries further and to signal that not just everything can be balanced by economic growth.

The final reflection of the day comes from *Prof. Cedric Ryngaert*, Professor of Public International Law at Utrecht University. His reflection consists mainly of “friendly critical, but constructive remarks”. His first comment is that he is struck by the fact that the panel has ultimately proposed a non-ecocentric definition of ecocide, in that it balances ecocentric considerations with anthropocentric considerations, by linking the ‘wanton acts’ to expected social and economic benefits. This is a cost-benefit analysis. How is a judge going to weigh the benefits to humans against the ‘costs’ to the environment, with what kind of proportionality test? Secondly, regarding the material element, Ryngaert questions the decision not to include a catalogue of acts that constitute an ecocide. So what conduct is it that qualifies as ecocide? We are all responsible to some extent for environmental damage by building houses, consuming food and flying, but we are not all criminally liable, nor should we be. Ryngaert suggests that a line needs to be drawn somewhere, for which he proposes a non-exhaustive list of relevant conduct that could constitute ecocide. Moreover, some legal systems are unfamiliar with the concept of recklessness, and it is not included in Article 30 of the statute. Ryngaert believes this could lead to over-criminalization or a chilling effect to legitimate industrial activity, and there is always the possibility that the environmental impact of certain activities is not yet known when the precautionary principle is applied. Finally, Ryngaert wonders whether the ICC has the knowledge and capacity to actually investigate ecocide. He wonders whether it would not be more effective to put pressure on the ICC prosecutor to make use of the existing crimes related to environmental harm.

He concludes his reflection by saying that besides his critical remarks, he’s very impressed with the work of the panel and that without the report, we would have never had the lively discussion we’ve had today.

6. Discussion

After each reflection session, there was also a great discussion between the audience - full of young people! - and the speakers. The first discussion was moderated by *Prof. Edward Brans*, Professor of Sustainability and Environmental Liability at Utrecht University, and the second by Van Uhm. We would like to highlight two questions that particularly struck us as interesting.

The first question was put to Preston, Spier and Dobson: how do they see domestic climate litigation influencing the Paris Agreement in terms of concretising the general commitments (which are often described as vague or toothless)? Preston responded that it remains to be seen whether this will create a feedback loop. However, he notes - and as mentioned earlier today - that even if countries do 100% of what they are required to do under the current targets, it will still be too little. We need to do more, and that could be a new type of litigation coming in the future. When Spier was asked by Brans in a follow-up question about the possible emergence of ‘fair share’-litigation (also looking at historical emissions), he reiterated that there is already so much to be done: so much that for him, it is very much a question of whether we should include historical obligations, although he thinks this obligation exists. But when you see what’s already to be done, what’s the point of adding more?

A second point of discussion was introduced by a member of the audience who welcomed the inclusion of ecocide in the statute, but wondered how effective this would be, especially as some scholars see the future of international criminal law at the domestic level. Ryngaert replied that earlier that day he had already wondered whether, instead of amending the statute, it wouldn’t make more sense to draft a transnational crime convention requiring states to criminalise ecocide in their domestic laws. This could be modelled after existing conventions, and could also include its own specialised environmental court, as the ICC may not have the necessary expertise. He suggests that this option could be considered first. Biermann doesn’t agree: he thinks that an international debate targeting an international court is extremely important to drive the domestic debate. But in a sense, he sees where Ryngaert is coming from: the multilateral approach, including smaller agreements, also means that a smaller number of countries can agree on what ecocide actually means. This could be a great strategy for progressive movements like the ecocide movement to book successes more easily.

With that, the time was up. The conference ended as it had begun, with a brief word from Backes, who, as he

had announced at the start of the day, had kept a tight rein on the time available. Fortunately, there was still some time for a word of thanks to those present, the handing over of a small gift to the speakers and, of course, drinks to reflect together on all the great ideas that had been discussed this wonderful and exciting afternoon.

Voetnoten

[1] Julian Boer is a PhD candidate at the Utrecht Centre for Water, Oceans and Sustainability Law at Utrecht University (UCWOSL), where he is working on a thesis on the protection of the interests of future generations in Dutch law. Ismini Athanasopoulou is a lawyer and is doing a Master's programme in Global Criminology at Utrecht University. She is currently working on her thesis on state crime in natural disasters.

[2] See https://www.milieurecht.nl/uu-vmr-law-and-the-end-of-anthropocentrism.

[3] For these proposed amendments to the statute, see https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314
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