

CLIMATE CHANGE REMEDIES



INJUNCTIVE RELIEF AND
CRIMINAL LAW RESPONSES

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SUN PRESS

Climate Change Remedies: Injunctive Relief and Criminal Law Responses

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THE STIAS SERIES

The Stellenbosch Institute for Advanced Study (STIAS) was born from a simple but powerful conviction: in this part of the world special initiatives are required to create and maintain an environment where we can generate and engage with conceptual frameworks and knowledge that may guide us in tracking and co-shaping global academic developments and that will allow us to address the 'big' questions and issues South Africa and the African continent face, also in a global context.

STIAS has been moulded in the tradition of Institutes for Advanced Study across the globe. It distinguished itself by encompassing all disciplines from the natural to the social sciences and humanities (with a particular emphasis on research grounded in multi-disciplinarity), by maintaining a focus on the African and South African context, and by striving towards contemporary relevance, also by actively creating avenues for communicating the results of its research projects to a wider public.

The STIAS series publications are thus aimed at a broad public which will naturally vary with specific research themes. Straddling the academic world and the forum of an engaging public is a challenge that STIAS accepts; we trust that each STIAS publication will reflect the 'creative space for the mind' in which it is rooted, stimulate public interest and debate, and contribute to informed decision making at various levels of our society.

Further information about STIAS and its research programme may be found at www.stias.ac.za.

Hendrik Geyer
STIAS Director
Stellenbosch
June 2011

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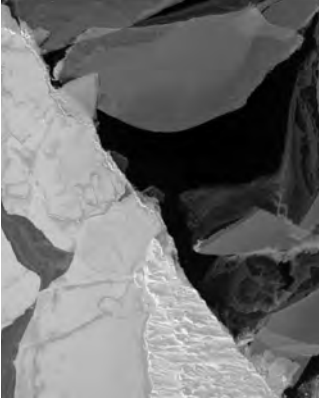
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PREFACE

Jaap Spier

Climate change poses significant threats to humanity, other living species and the environment. The challenge to come to grips with these threats accelerates at a great pace. Alarming warnings catch the attention of ever more politicians and senior business people. Thanks to the impressive work done by major international organisations, such as various UN bodies, the UN High Commissioner for Human Rights, the EU, the African Union, the World Bank, IPCC, a large number of NGOs and leading newspapers and magazines, public awareness is growing. But so far, the willingness to translate the awareness into concrete, let alone adequate, action has fallen short. Short-term interests and views, the level playing field, greed and the realities of international politics seem to be an insurmountable obstacle to achieving the bitterly needed global action.

It is unrealistic to assume that legal strategies alone could stem the tide to the full extent needed. But they could contribute to a global solution. They could serve as a welcome vehicle for politicians and business leaders of good will to explain to their voters and shareholders that they must change course. If effective, legal strategies could bring the unwilling to their senses.

The traditional legal paradigm is to find solutions for evil, once materialised. For a number of reasons, that is the wrong track in relation to climate change. We cannot wait until the planet has become unlivable. We must avoid the looming catastrophes to the extent possible.

STIAS, an independent research institute attached to Stellenbosch University (South Africa), has launched an international project to deal with a kaleidoscope of legal issues to the effect mentioned above.

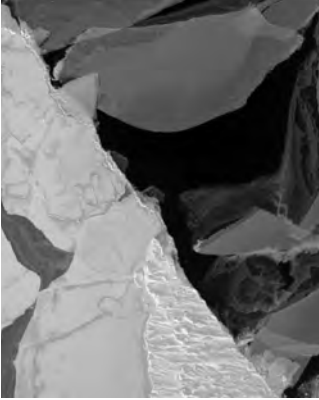
Insofar as civil law can contribute to the avoidance of climate change, the means to arrive there need attention. Prof. Ulrich Magnus (before his retirement from University of Hamburg), one of the éminences grises of private and private international law in the German-speaking world, addresses a series of important procedural aspects of injunctive relief. Besides, he proposes and discusses the ins and outs of an International Environmental Court.

Criminal law could play an important role in arriving at a change of mindset. If irresponsible environmental behaviour would fall under the umbrella of criminal law, the deterrent impact would probably be significant. Prof. Gerhard Kemp, an eminent South African expert of criminal law, provides an overview of and develops useful thoughts about the potential of international criminal law as a key piece of global governance.

Africa is one of the continents that will suffer most from climate change. The legal scene of this ever more important continent is still largely unexplored. Prof. Oliver Ruppel, one of the key players in the arena of climate change, paints a vivid picture of major legal developments in Africa.

At the end of the day, legal action requires a better understanding of the do's and don'ts. To the extent possible, we must figure out what national states and enterprises have to do to meet their legal obligations. That issue, and substantive key topics in relation to injunctive relief, are discussed in my contribution.

A major part of this research project has been executed at the premises of STIAS in Stellenbosch, a paradise for research. We are most thankful to STIAS director Hendrik Geyer and the extremely helpful STIAS staff for their support and the welcoming and stimulating environment for groundbreaking research.



I

INJUNCTIVE RELIEF: OPPORTUNITIES AND CHALLENGES

Thoughts about a potentially promising
legal vehicle to stem the tide

Jaap Spier

Without addressing the interplay between climate change and justice, no response to climate change will succeed.¹

1.1 Introduction

1.1.1 *High Noon*

This book is the second fruit of a project conducted at Stias about the role the law could play to come to grips with the major challenges of our time, with emphasis on climate change.² If society at large does not change course drastically, we are

1 S. Johnson, 'Climate Change and Global Justice: Crafting Fair Solutions for Nations and Peoples', *Harvard Environmental Law Review*, Vol. 33, 2009, p. 301.

2 The first book, *Shaping the Law for Global Crises*, was written by Jaap Spier (hereinafter *Shaping the Law for Global Crises* or *Spier 2012*). It dealt with the major challenges of our time with a common denominator (climate change, unsustainable development, financial crises): irresponsible human behaviour with a huge adverse global impact; the book put emphasis on climate change.