

# Netherlands Yearbook of International Law

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Janne E. Nijman · Wouter G. Werner  
Volume Editors

# Netherlands Yearbook of International Law 2012

Legal Equality and  
the International Rule of Law:  
Essays in Honour of P. H. Kooijmans



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## **Aims and Scope**

The Netherlands Yearbook of International Law (NYIL) was first published in 1970. It offers a forum for the publication of scholarly articles in the area of public international law including the law of the European Union. In addition, each Yearbook includes a section *Dutch Practice in International Law*. The NYIL is published under the auspices of the T.M.C. Asser Instituut.

## **T.M.C. Asser Instituut**

Located in the ‘international zone’ of The Hague—the City of Justice, Peace and Security, The T.M.C. Asser Instituut is a leading, inter-university research institute operating in the broad field of international law.

Founded in 1965, the Institute’s international community of scholars is engaged in research, postgraduate training and dissemination of knowledge in furtherance of the purposes and principles of international law. This inter-university institute cooperates closely with and supports the Dutch universities’ activities in the relevant disciplines. The academic fields covered by the Institute are Private International Law, Public International Law, Law of the European Union, International Commercial Arbitration, International Humanitarian Law, International Criminal Law and International Sports Law.

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The Institute has its own publishing house, T.M.C. Asser Press. T.M.C. Asser Press not only serves the publishing needs of the T.M.C. Asser Instituut, but also those of academics and practitioners worldwide in the fields of International and European Law.

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# Preface

We take this opportunity to share with our readership the completion of a transition process, which the *Netherlands Yearbook of International Law* (NYIL) has undergone during the past few years. The results of the transition process first became visible with the introduction of a new cover for volume 41 (2010), when Springer-Verlag got involved in the Yearbook, resulting in a cooperative endeavor between T.M.C. Asser Press, Cambridge University Press, and Springer-Verlag.

During the transition period four important substantive decisions were taken by the Editorial Board: the introduction of a specific theme for every volume of the NYIL, the removal of the ‘Documentation’ section, the introduction of a new section in the book entitled ‘Dutch Practice in International Law’, and the introduction of double-blind peer review. Each decision is briefly explained below.

Starting with volume 41 (2010) specific themes were introduced to encourage debate by addressing a topic from different perspectives. Volume 41 (2010) focused on the theme of ‘Necessity Across International Law’; volume 42 (2011) addressed the topic ‘Agora: The Case of Iraq: International Law and Politics’. The present volume focuses on ‘Legal Equality and the International Rule of Law: Essays in honour of P. H. Kooijmans’ and volume 44 (2013) will consider ‘Crisis and International Law: Decoy or Catalyst?’. Future themes will be announced on the T.M.C. Asser Press website ([www.asser.nl/yearbooks](http://www.asser.nl/yearbooks)). The Editorial Board encourages the submission of unsolicited manuscripts on the annual topic. For further information, please, contact Dr. Monika Ambrus, Managing Editor of the NYIL at [nyil@asser.nl](mailto:nyil@asser.nl) or [m.ambrus@asser.nl](mailto:m.ambrus@asser.nl) where manuscripts may also be submitted.

The Documentation section was removed because of the ample electronic availability of state practice related documentation, such as case law, legislation and other decisions of the government of The Netherlands related to international law. Since 2011 documents regarding the state practice of The Netherlands are available in electronic format at [www.asser.nl/nyil/documentation](http://www.asser.nl/nyil/documentation).

The present volume contains the first ‘Dutch Practice in International Law’, which consists of commentaries on salient developments in the practice of international law in The Netherlands. Hence, it emphasizes the link between the NYIL and The Netherlands.

Finally, we are pleased to announce that the NYIL has now formally instituted double-blind peer review. For more details you may visit [www.asser.nl/nyil/authors](http://www.asser.nl/nyil/authors).

We are confident that over the last few years we have laid a solid foundation for a strong NYIL, which can be flexible to future challenges and opportunities.

The Editors-in-Chief



## Pieter Hendrik Kooijmans (1933–2013)

On February 13, 2013, Pieter Hendrik (Peter) Kooijmans passed away.

The idea for this volume was born at a Restaurant in The Hague. At the end of our lunch, which we would have a few times a year ever since my doctoral defence, Peter gave me a copy of the sales edition of his dissertation. It was still wrapped as if printed yesterday. He and his beloved wife, Jeanne, had cleared out their studies and found another copy of *The Doctrine of the Legal Equality of States: An inquiry into the Foundations of International Law* (1964). It is to this day a standard work on the subject of sovereign equality. It struck me then that ‘something should come of this’.

The current volume thus started out as a project to celebrate Peter Kooijmans’ life, career, and scholarship by way of an active contemporary engagement with his 1964 study. This volume of the *Netherlands Yearbook of International Law* would be launched festively in his presence somewhere in 2013, the year of Peter’s eightieth birthday. However, things turned out differently and with this celebrative volume now comes our sad duty to honour his memory. As Volume Editors, Wouter Werner and I decided not to change the envisaged contents of this volume, but rather to add the words spoken by Dame Rosalyn Higgins during the funeral service together with this In Memoriam. The book has indeed become a tribute to Peter Kooijmans and his work, while at the same time it is highly relevant to current and future international (law) questions. Peter himself was much moved by the project and—in his own words—‘greatly appreciated its intellectual objective’. We are very happy he has been able to see the final prints.

For Peter, profound happiness and gratitude coloured the last days and weeks of his life. First of all, happiness and gratitude for the love and support of his beloved wife, children and grandchildren, and for his many lifelong friends. But he also felt deep gratitude for his extraordinary career. He had enjoyed his work so much, all of it, that he felt truly privileged also on this account.

For our part, we lose an extraordinary member of the international law community both inside The Netherlands and abroad, who has given a lot in the different responsibilities he bore during his six decades-spanning career.<sup>1</sup> Peter Kooijmans has

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<sup>1</sup> For more details about Peter Kooijmans’ career see infra Nijman and Werner 2013, at 4–6.

made a difference in many ways. As an international human rights law expert and Chairman of the Dutch delegation to the UN Commission on Human Rights he contributed to the development of the human rights apparatus within the United Nations; and then became the first to fulfil the post of Special Rapporteur on Torture. In this latter role, Peter reconciled diplomacy and human rights advocacy. He operated well-considered and steadfast and as such managed to impact also in a very concrete and positive way the lives of people. As Dutch Minister of Foreign Affairs, he did not fail to take the human rights framework on board and have it influence and shape Dutch foreign policy to a significant degree. All of this experience with the practice of international law and international relations Peter Kooijmans brought into his lectures on public international law, and to the academic community at large as a professor, a dean, and later as the President of the University of Leiden Supervisory Board. He was not only a highly respected but also a much beloved professor, who impacted generations of law students at the VU and Leiden University with his inspiring way of teaching and with a well-defined perspective on international law and its function within international society. For us as doctoral candidates, he was a wise mentor; he challenged our views but also respected the academic freedom needed to grow into an independent researcher. Finally, Peter Kooijmans also brought his extensive human rights experience and expertise to the International Court of Justice. From his days in international political practice, he was used to deal with sensitive political issues traditionally placed behind the veil of state sovereignty, and during his time on the bench—as later he would proudly point out—the World Court broke through the strict separation between the national and the international with regard to the rights of convicted persons in case of capital punishment. The Court found that even though international law did not prohibit the death penalty, it did require that necessary safeguards for the protection of the individual's rights be provided, among which consular assistance. The fact that the International Court of Justice pierced the sovereign veil and spoke out on the protection of the rights of individuals informed, according to Kooijmans, the attitude of national judges deciding in similar cases. The protection of human dignity defined Peter Kooijmans' view on the function of law in the international society, as well as his own position when implementing the law in action. In brief, in all public functions which Peter Kooijmans held—and of which we have mentioned far from all—he aimed to serve the community at large. This was rooted in a genuine conviction, and Peter much enjoyed the work that came with it; all who have had the privilege of working with him in any of these functions will recollect his characteristically sparkling eyes.

Peter Kooijmans did his work with intelligence, diplomatic talent, a sharp pen and pointed tongue where necessary, human interest and empathy, a great sense of humour, and—not least—intellectual and political courage. In Peter, we lose an outstanding and internationally recognised international law expert, a highly esteemed colleague, a truly pro-Europe statesman, an inspiring mentor and exceptional teacher, and a great and loving friend. Peter remains in our thoughts, and may also be an inspiration to our work.

Janne Nijman

## Speech by Rosalyn Higgins—20 February 2013

Pieter Kooijmans was a Member of the International Court of Justice from 6 February 1997 to 5 February 2006. How profoundly fortunate it was for me that we should have been seated as neighbours for the Court's hearings and deliberations. I learned so much from Pieter these years. Our *sotto voce* exchanges throughout these nine years developed into lasting friendship.

He came with a large reputation in the field of international law and his qualities rapidly made themselves felt. In spite of his high standing in Dutch public life and in academic international law, it was early apparent, and welcome, that he was 'a team player'. He enjoyed the discussions of the Bench and played a full part in them—but also listened with courtesy and interest to the views of all his colleagues. It was not his way to insist upon things, but having deployed his viewpoint, he might later expand on it in a well-reasoned Separate Opinion.

He was often in demand as a Member of the Court's Drafting Committee, he though did not hesitate to write Separate Opinions or Declarations when he believed elaboration of his ideas was called for. These Separate and Joint Opinions, taken together, form an important corpus of law for all who care about international law.

I do not wish to give the impression that he was rigid in the exchanges with his colleagues. I recall to this day that in one case he strongly argued for a particular view, though several of his colleagues had a different view. When it came to voting, he seemed to vote in a manner quite inconsistent with the point of view he had been contending for. When his colleagues noted this, with astonishment, he quietly said, 'But you have convinced me with your arguments'.

Pieter Kooijmans' Opinions are to be understood as reflecting his legal philosophy. He was not a Judge who thought that the Court should decide the very minimum possible in order to dispose of the dispute before it. He was disposed towards judicial activism, though not, he said, in circumstances that would cause harm. But—as he explained in a lecture shortly after he left the Court—'I [am not] in favour of a form of judicial restraint that closes windows which need to be opened'. In the *Congo v Uganda* case, Judge Kooijmans thought that the Court had missed an opportunity to pronounce on certain difficult issues relating to the use of

force—and in his view these issues were of primordial importance but not yet judicially resolved. He thought that the principal judicial organ of the world community *could* usefully have provided guidance in the legal field.

A propensity towards judicial activism did not mean that Kooijmans had pre-set answers in mind. He never confused quiet, moderate judicial activism with what he would have termed substantive wishful thinking. This is well illustrated by what he had to say on the contemporary state of the law on State immunity and universal jurisdiction. He was a complex thinker—liberal, but hard-headed, too—an attractive amalgam.

If Pieter Kooijmans was liberal but head-headed, he was also unopinionated while at the same time being an intellectual leader. And he seemed to me to have a remarkable sense of the ‘right’ and ‘wrong’ of things. He seemed to find such matters simple, certain and straightforward—qualities I admired, and rather envied.

He was greatly valued—and indeed loved—by his colleagues. His modesty was such that he studied closely every word that his colleagues wrote as they prepared their Notes on a case, that is, their preliminary views on all they had read and heard. But the reality was that it was to Pieter Kooijmans’ Note that we so often first turned. We knew how persuasive it was sure to be.

Pieter Kooijmans was the least pompous or self-important of men. Where he was seated at a reception, or what should be his position as the Court lined up, was of no interest to him.

All of these many qualities—deep scholarship, friendliness, humility, quiet confidence—combined to give the Court, for nine precious years, this popular colossus. His work, and our memory of this special, special man, live on.

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