Human rights v. Insufficient climate action: The Urgenda case

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Abstract
Climate change is a human rights issue, but what exactly can courts require States to do in this regard? This contribution discusses the Dutch Urgenda case, in which the Court of Appeals recently found a violation of Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights and ordered the State to reduce greenhouse gas emissions by 25% by 2020. Looking at the case law of the European Court of Human Rights on environmental issues, as well as the nature of positive obligations, it appears that Urgenda involves a more abstract situation and a more precise positive obligation than is usually the case in human rights adjudication. Because ex post facto complaints are no solution, and in light of the growing number of Urgenda-like cases pending before (international) courts, efforts need to be made to ensure that human rights ‘fit’ climate change cases and courts can provide effective protection in this regard.

Keywords
Human Rights, climate action, positive obligations, Urgenda, European Convention on Human Rights

Climate change is a human rights issue. Deterioration of the environment can have an enormous impact on rights to a healthy environment, to private life, to adequate housing, and so on, but also form a serious threat to the right to life. Yet while the link between the environment and human rights is indisputable, the precise human rights obligations of States to mitigate climate change and

1. See, UN Human Rights Committee General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, para 62.
prevent the disastrous effects thereof are less clear. The Dutch Urgenda case provides an interesting example in this regard. The case was brought by citizens’ platform Urgenda, which strives for a fast transition towards a sustainable society and has received ample attention both in the Netherlands and beyond. In 2015, the District Court of The Hague ordered the Dutch State to reduce greenhouse gas emissions by 25% by 2020. This judgment was recently upheld by the Court of Appeals of The Hague.

In contrast to the District Court, the Court of Appeals concluded that the Dutch government’s current actions to combat climate change are insufficient in the light of the State’s human rights obligations under Articles 2 (Right to life) and 8 (Right to respect for private and family life) of the European Convention on Human Rights (‘ECHR’). Urgenda’s victory emphasises the need for more climate action, as well as the role that both courts and human rights can play in this regard. At the same time, the judgment raises some important questions. Linking the ECHR to complaints concerning environmental risks seems like the right thing to do – not least because the European Court of Human Rights (‘ECtHR’) has explicitly recognised the protective role of the Convention in this regard, albeit generally in cases concerning individual complainants in which the harm had already taken place. What happens to this protection, however, in cases where the danger is enormous and looming – but where there are no specific occurrences of rights’ infringements yet against which the action or omissions of the State can be judged? Ex post facto complaints may seem useless in the context of climate change. However, it must be admitted that human rights violations involving abstract, future events present a puzzle that is not easy to solve.

**Climate litigation**

‘Climate litigation’ is by now a well-known phenomenon. Although it may seem as if most climate-related cases have followed from the example of Urgenda and its success, this is not the case. A subcategory of climate-related cases, brought over the past decades, concern alleged violations of human rights. For example, the risk of suffering adverse impacts of climate change in a case of deportation featured in appeals against the denial of refugee status in New Zealand. In the case of a Pakistani farmer, it was concluded that the government’s delay in implementing national climate change policies offended the fundamental rights of the citizens. A petition to the Inter-American Commission on Human Rights concerning the rights of Arctic Athabaskan peoples resulting from rapid Arctic warming caused by Canada’s carbon emissions is pending, and so is a suit before a United Kingdom court alleging that the approval to expand Heathrow International Airport is illegal because the State’s climate change commitments have not sufficiently been taken into account.

This January, a hearing was held before the Irish High Court in a case of Friends of the Irish Environment (FIE), which argued that the government’s approval of a National Mitigation Plan in

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2. See www.urgenda.nl. The name Urgenda is the result of merging the words ‘urgent’ and ‘agenda’.
3. District Court The Hague, 24 June 2015, ECLI: NL: RBDHA:2015:7196 (Urgenda).
4. Court of Appeals The Hague, 9 October 2018, ECLI: NL: GHDHA:2018: 2610 (Urgenda).
5. Some examples of this case law will be referred to below.
6. Ioane Teitiota v. the Chief Executive of the Ministry of Business, Innovation and Employment [2015] NZSC 107.
7. Lahore High Court, 4 September 2015, W.P. No 25501/2015, Leghari v. Federation of Pakistan.
8. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada.
9. Plan B Earth v. Secretary of State for Transport, Claim no CO/3149/2018.
2017 violated, besides national law, its obligations under the ECHR. In 2018, a case was filed in France by four non-governmental organisations concerning the question of whether the State’s failure to take further climate action violates its duty to act (also) in light of the ECHR. Similar initiatives can be found throughout the world in the Philippines, Germany, Canada, Belgium, and pending before the European Court of Justice. Most of these newer cases are, like Urgenda, of a more abstract nature involving great indeterminacy. Besides dealing with future events, they neither concern one particular plant, airport, or activity, nor a specific risk such as the likely flooding of a particular area involving a somewhat clear group of potential victims. The questions they involve hence differ from the ones usually dealt with in human rights litigation and must be answered taking into account the overall aims of human rights as well as the role of courts in this regard.

A variety of human rights norms are invoked in climate litigation, and jurisdictions differ considerably as to their standing requirements and methods of interpretation. Especially when more abstract climate claims are involved, one interesting aspect, however, is the focus on younger or even future generations. This brings in rights of the child, but also the question of whether protection can be claimed on behalf of future generations. In Juliana v. the United States, it was explicitly held that young people could pursue constitutional claims to compel climate action. In Urgenda, the Court of Appeals refrained from delving into the question of the rights of future generations, because also ‘the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced’. It is worth having a closer look at this case, as well as the ECtHR’s case law and the nature of positive obligations, to put the Dutch court’s ‘human rights turn’ in perspective.

The Urgenda reasoning

In brief, the Court of Appeals’ human rights reasoning went as follows: Articles 2 and 8 include protection in environment-related situations affecting or threatening to affect the right to life, as well as against adverse effects on the home or private life reaching a minimum level of severity. Both rights include the positive obligation to take concrete actions to prevent a future violation of these interests (a duty of care). In the event of dangerous activities and when there is

10. Friends of the Irish Environment v. Ireland.
11. Notre Affaires à Tous and Others v. France.
12. In re Greenpeace Southeast Asia and Others (Philippines), Case No CHR-NI-2016-0001.
13. Friends of the Earth Germany, Association of Solar Support and Others v. Germany.
14. ENvironnement JEUnesse v. Canada, No 500-06.
15. VWZ Klimaakzaak v. Kingdom of Belgium and Others.
16. Case T-330/18 Armando Ferrão Carvalho and Others v The European Parliament and the Council [2018].
17. Öneryildiz v. Turkey App no 48939/99 (ECtHR, 30 November 2004), discussed below.
18. See, for example, the Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/35/13.
19. United States District Court for the District of Oregon, 10 November 2016, Case No. 6:15-cv-01517-TC, Juliana et al. v. USA.
20. Urgenda (n 4), para 37.
21. The Court of Appeals refers to Öneryildiz v Turkey (n 17); Budayeva and others v Russia App nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 29 September 2008); Kolyadenko and Others v Russia App nos 17423/05,
a known, real and imminent threat, the State must take precautionary measures to prevent infringements to the greatest extent possible. Assessing whether such a situation is present, the Court of Appeals listed several facts and scientific evidence, to conclude that ‘it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generations of citizens will be confronted with loss of life and/or a disruption of family life’. Therefore, the duty of care applies.

Next, the Court considered the international agreements and the actions of the Dutch government so far and concluded that a reduction obligation of at least 25% by end-2020 is in line with the State’s duty of care under the ECHR. All counter-arguments put forward by the government in this regard, related to ‘waterbed effects’, the adaption measures taken, the lack of a causal link and so on, failed. Concerning the uncertainties related to climate change, the Court of Appeals held that this is exactly why more action can be required as opposed to less. In line with this, it pointed out that the precautionary principle has been recognised by the ECtHR, notably in the 2009 case of Tătar v Romania.23

Regardless of the clear presentation of the relevant (legal) facts, the question remains as to how exactly these (can) inform the precise positive obligations distilled from Articles 2 and 8. A glance at the environmental case law of the ECtHR provides some necessary background.

**Articles 2 and 8 ECHR and environmental protection**

Since the Convention mostly lists ‘civil and political rights’, the link with environmental protection is not obvious per se. Traditionally, civil and political rights, including the right to life and private life, were considered negative rights. Yet with the recognition of positive obligations, together with the fact that there is no watertight division between the socio-economic sphere and the rights outlined in the Convention, the Strasbourg Court has expanded its protective scope. Given the aim of ‘effective protection’ developed in the case law of the ECtHR, this makes sense. In earlier environmental cases involving the right to private life, the ECtHR’s review has been relatively hesitant, resulting in violations mostly in cases concerning irregularities under national law, for example, when a polluting plant could continue to operate without the necessary licence, or information was withheld from the public even though there was a legal obligation to disseminate it. Recently, the ECtHR’s case law has focused more on procedural protection, meaning that the decision-making process leading to activities that have an adverse effect on
the environment, should involve appropriate facts and studies in order to predict this effect and strike a fair balance between the conflicting interests involved. The margin the ECtHR grants is generally wide, especially when substantive choices are involved. In Fadeyeva v. Russia, it noted that even though ‘in today’s society the protection of the environment is an increasingly important consideration’, because of the complexity of the issues involved, the Court’s task remains a primarily subsidiary one. Unsurprisingly, the cases dealt with by the ECtHR all concern individuals or groups of individuals that claim that there has been an interference with their rights. This is in line with the ‘interpretative hurdles’ the ECtHR has identified in the case of Fadeyeva, where it held that ‘complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant’s private sphere, and secondly, that a level of severity was attained’. These requirements direct the efforts of the Strasbourg Court to cases involving severe, specific situations. In such situations, it is possible to determine whether the State has discharged its positive obligations – in light of the available (scientific) knowledge and given what eventually occurred – or failed to provide the necessary protection. Cases in which the protection offered is of a more large-scale and future-oriented nature, such as the 2019 case of Cordello and Others v. Italy, where 180 applicants complained about the risks of toxic emissions of a nearby steelwork for their health and the environment, have still concerned a specific set of individuals, mostly in a specified location and facing a particular risk.

The right to life case most relevant to climate litigation is Önerylidiz v. Turkey, yet one must not overlook what distinguishes it from a climate case like Urgenda. A methane explosion on a rubbish tip killed nine of Önerylidiz’ relatives living next to the tip, while the authorities had been aware of this particular risk and decided to take no action at all. In a case like this, the ECtHR could hold that the State had not met its positive obligations, without having to expand on what these exactly entail and how the State should have complied with them. However, if we leave aside the fact that specific incidents and deaths can still be prevented, and the case’s level of abstraction more generally, the emphasis placed in Önerylidiz on the fact ‘that it was impossible for the administrative and municipal departments [... ] not to have known of the risks [... ] or of the necessary preventive measures’, can be translated to Urgenda and similar climate cases.

Naturally, the comparison, be it in the context of Article 2 or 8, remains a convoluted one, not least because the ECtHR would not deal with a case like Urgenda due to the impossibility of an actio popularis on the basis of Article 34 of the Convention.

The nature of positive obligations

Positive obligations are of crucial importance for the realisation of all kinds of human rights – including civil and political, socio-economic and environmental rights. Yet they are not easy to pinpoint, that is, it is often not clear what positive obligations exactly follow from a human rights norm like the right to respect for private life. This has to do with their ‘disjunctive structure’,

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29. Taşkin and Others v Turkey App no 46117/99 (ECtHR 30 March 2005).
30. Fadeyeva v. Russia (n 21), para 103.
31. ibid, para 70.
32. Cordella and others v Italy App nos 54414/13 and 54264/15 (ECtHR 24 January 2019).
33. Önerylidiz (n 17).
34. Önerylidiz (n 17), para 101.
meaning that whereas in the case of negative obligations it is clear what must be done (refraining from interfering), positive obligations can be fulfilled in various ways. In the field of environmental action as much as elsewhere, positive obligations moreover require action that is costly, in terms of time, efforts and resources. The puzzle of how to define workable positive obligations is therefore explicitly linked to a discussion of the role of courts. Supranational courts are generally unlikely to formulate positive obligations that are overly precise or demanding, as it is not their task to interfere with national policy-making and budgetary issues. National courts will be mindful not to upset the balance of powers. This goes *a fortiori* for climate litigation on the basis of the ECHR: climate action is a politically sensitive issue, while the ECHR norms on the face of it neither provide environmental, nor positive protection.

In line with this, in cases like *Urgenda*, positive obligations can raise several issues. Whereas proportionality review (under for example Article 8) specifically deals with the relation between the impugned omission and the specific infringement, in abstract cases this relation is less clear-cut, resulting in a more general test of whether what the State did was ‘ok’. When at the same time, there is (sufficient) agreement on what must be done to prevent abstract harm – for example, cutting greenhouse gas emissions by at least 25% in 2020 – courts can nevertheless define far-reaching and detailed positive obligations. A comparison made in a case note on the *Urgenda* judgment illustrates why this can be problematic. If there is evidence that wearing a helmet while riding a bike would result in fewer traffic deaths, a court could in line with this reasoning order the State to make helmets obligatory. For non-Dutch readers: this would be a big thing in the Netherlands. In the *Urgenda* case, it is considered that the means for complying with its positive obligations are still for the State to determine. Arguably, however, identifying a positive obligation to take the necessary precautionary measures, while leaving it to the State to decide which means (25% reduction by 2020? making helmets obligatory?) are chosen to achieve this aim, would be more in line with the Strasbourg experience. With positive obligations, courts are able to regulate much, but the level of specificity with which they are determined involves a matter of choice, which cannot be seen in isolation from concerns related to the separation of powers.

**Still confused, but on a higher level**

Human rights must be considered in every climate change issue – be it in court cases or in a procedure for permission for a hazardous activity. The UN Human Rights Committee’s recognition of the relevance of the right to life in climate issues in a General Comment, however, is something fundamentally different from a court identifying binding obligations in specific cases in this regard. It is a leap from the theory and practice of judicial human rights protection as we

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35. Vladislava Stayanova, ‘The Disjunctive Structure of Positive Obligations under the European Convention on Human Rights’ (2018) 87 Nordic Journal of International Law 344.
36. The same holds true for the more absolute protection under Article 2, which is not characterised by a proportionality analysis.
37. Chris Backes and Gerrit van der Veen, *Administratiefrechtelijke Beslissingen* 2018/417.
38. In *Urgenda*, the Court of Appeals argued in a straightforward manner, that there is no separation of powers issue because all it does is apply the international norms that according to the Dutch constitution have direct effect, see for this para 69 of the Appeals judgment. I think it is not this ‘black and white’. Yes, courts can review climate complaints on the basis of human rights, but this is only the first question they have to deal with.
39. UN Human Rights Committee General Comment No. 36 (n 1).
know it, at least in the context of the ECHR,40 to a far-reaching order in a case like Urgenda. Yes, the Dutch court was confronted with a problem that is much more complex than the issues it usually deals with.41 Given what is at stake, its efforts to provide a reasoned and rights-based response must be applauded. Nonetheless, this kind of climate litigation is not merely a matter of applying existing requirements to different factual situations. The general and serious nature of the issue of climate change is argued to be a ground for limiting the State’s margin of appreciation and levelling-up positive obligations. This, however, overlooks the fact that not only what is at risk, but also the nature of the legal claim, is significantly different from when an individual complains about her asthma resulting from nearby polluting activities. There is therefore a need to take efforts to ensure that human rights ‘fit’ climate change cases like Urgenda, for example by adjusting the concept of positive obligations to abstract climate claims.

Looking at climate cases in the light of the ECtHR’s case law and the structure of positive obligations, leaves us still confused, but on a higher level.42 We cannot wait until floods submerge the land. Like the political process, courts are not perfect, but this should not keep them from assessing climate cases from the perspective of rights. Hopefully, in hindsight, we can say that Urgenda was a first, still somewhat wobbly, judicial step toward their effective protection.

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40. The analysis in this contribution centred on the ECHR. For a more thorough analysis of the potential of judicial human rights protection in climate cases, a broader (comparative) approach is needed.

41. Christina Eckes, ‘De Urgenda uitspraak doet juist recht aan het EVRM’ (EU Explainer, 27 October 2018) <http://euexplainer.nl/?p=520> accessed 6 February 2019.

42. Quoting physicist Enrico Fermi.