Climate change and the European Court of Human Rights
Future potentials

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Introduction

The European Court of Human Rights (ECtHR) has established case law on environmental matters and extraterritorial human rights obligations that provides guiding principles for climate change litigation. This chapter analyses the suitability of the ECtHR for climate change and human rights litigation from three perspectives. The first perspective seeks inspiration from the Urgenda case to assess what theoretical opportunities are available to establish climate change liability before the ECtHR for a single state towards its citizens (territorial liability). The second perspective analyses how a single state could be held liable to individuals residing outside the territoriality of the responsible state (extraterritorial liability). The third perspective concerns the possibilities of establishing the shared responsibility of several states.

The basis for the responsibility of a single state in a climate change case: territorial liability or extraterritorial liability

Territorial liability

The interpretation of the European Convention on Human Rights is not done in isolation of international development. According to the ECtHR’s own case law, it is well established that it “can and must” take into account the development of international law, and it does so especially in new areas of protection.

In addition, due to the subsidiary role of the ECtHR, it draws inspiration and guidance from domestic rulings. One possible guiding model for climate change rulings is provided in the Dutch landmark case, Urgenda. Despite of the significance of the Urgenda ruling, it should be noted that it has been appealed by the Dutch government, so the reconsideration may change the conclusions.

The Urgenda ruling provides guiding principles for climate change litigation on how to assess whether a state has been aware of climate change and the human rights obligations related to it. In addition, it acts as a guide on how to establish the responsibility of the state towards its own citizens, even though there has not yet been physical damage resulting from the failure
of precautionary measures. Besides, the *Urgenda* case established the ruling that the individual responsibility of the Netherlands is not diminished even though climate change results from the actions of multiple actors.\(^{10}\) The assessment of the awareness of the state and the formula of establishing the duty to undertake preventive measures in the *Urgenda* case is in line with the current green jurisprudence of the ECtHR. The assessment of the awareness of the state is closely connected to the doctrine of consensus,\(^ {11}\) whereas the precautionary measures have a strong connection to the doctrine of positive obligations.

**Assessment of the state’s awareness of climate change**

The jurisprudence of the ECtHR has established a requirement that the state should take preventive measures to protect rights if the authorities are aware or should have been aware of real and immediate threats to life. The burden of proof on establishing this can be on the side of the applicant or the state.\(^ {12}\)

The *Urgenda* case provides guidance on how to build consensus argumentation\(^ {13}\) on the awareness of the state about climate change. The first set of evidence in the *Urgenda* case was to prove that there is a scientific basis for the urgent demand to take actions to diminish the level of greenhouse gas emissions. These materials included scientific reports from both international and domestic institutions. The second set of evidence included materials on the relevant obligations related to the international climate change legal and policy framework as well as European climate change policy. The Hague District Court found that the involvement of the Netherlands in the UN and EU climate change agreements and policy measures proved that the state should have been aware of the risks of climate change since 1997, and without any doubt since 2007. All of these documents showed that the Netherlands was involved in international policy-making that undoubtedly required the state’s knowledge of the risks of climate change.

The assessment conducted in the *Urgenda* case is similar to the *Brincat and Others v. Malta* case, which was a case presented to the ECtHR on asbestos. The ECtHR used a consensus assessment in order to determine whether Malta knew about the health risks related to asbestos. The ECtHR assessed both domestic and international scientific knowledge of asbestos, as well as Malta’s membership of the International Labour Organization (ILO).\(^ {14}\) The similarities in the assessment of the *Urgenda* and *Brincat* cases could lower the threshold for the ECtHR to conduct a similar assessment in the context of climate change and to conclude that there is a scientific and international consensus on the existence of climate change and its impacts on human rights.

**Positive obligations as criteria for the assessment of the adequacy of the adopted measures**

The approach in the *Urgenda* case focused on the question of whether the state had fulfilled its duties on prevention of climate change. The ruling of the *Urgenda* case concluded that there is no necessity to have a substantive violation if procedural rights are not respected. In the ECtHR, a similar approach is connected to the positive obligations of the state.

The current doctrine of positive obligations requires states “to take all appropriate steps to safeguard life for the purpose of Article 2”, including “a legislative and administrative framework”, and they must “govern licensing, setting up, operation, security and supervision of the activity” and “make it compulsory for all those concerned to take practical measures to ensure the effective protection”.\(^ {15}\) Measures under the positive obligation doctrine have included the right of access to environmental information;\(^ {16}\) the establishment of safety zones;\(^ {17}\) the implementation of effective risk assessment; the establishment of a coherent supervisory system, including
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an emergency warning system; the establishment of specific mutual agreements for cooperation between authorities crossing the borders of Member States; the control of private parties’ practical steps to ensure that river channels are clean\(^1\) and the safety or transfer of buildings.\(^2\)

In the context of climate change, positive obligations can include a variety of duties. For example, current global and regional climate change agreements can be interpreted to constitute such mutual agreements to cooperate and control the private parties to which the positive obligations refer.\(^3\) In addition, implementing effective risk assessment and access to environmental information could require the state to prepare adequate studies on the relationship of its policies and its impacts on climate change and human rights. In specific circumstances, where there is a risk of climate change causing a rise in sea levels, the state should inform its citizens and establish a monitoring and warning system.

**Extraterritorial liability of a single state in the context of climate change**

Boyle has stated that if one state can be identified as causing extraterritorial environmental harm, according to international environmental law, “costs can be redirected back to the Polluting State in full, emphasizing the responsibility of states to control sources of environmental harm”.\(^4\)

However, the ECtHR has been cautious in extending its jurisprudence of extraterritoriality outside of the limited context of military operations, extraditions and expulsions, so there is no current jurisprudence concerning environmental matters.\(^5\) Nevertheless, the current doctrine provides general guiding principles for climate change litigants.

It should be noted that the extraterritorial approach of the ECtHR differs from its own logic established in non-extraterritorial cases. Thus, a successful climate change claim would have to comply with the current extraterritoriality doctrine. The extraterritoriality doctrine requires the following elements: there are “exceptional circumstances” resulting from “acts of (—) authorities”, the acts may take place inside or outside national boundaries,\(^6\) the acts have negative effects outside the territory of the responsible state\(^7\) and the state should have effective control over the person or an area.\(^8\)

In formulating the environmental extraterritoriality claim, it is important to be aware that the ECtHR has accepted the application of the doctrine only in respect to acts that are conducted by state actors.\(^9\) Thus, the criteria might not be fulfilled in cases where there is only a failure of the state to control private parties.

**Establishing shared liability?**

*The basis in differentiated fault doctrine*

The jurisprudence of the ECtHR has established shared responsibility in specific circumstances. For example, in the human trafficking case of *Rantsev v. Cyprus and Russia*, the ECtHR considered the differentiated faults of the states.\(^10\) Oxana Rantseva was trafficked for the purpose of sexual exploitation from Russia to Cyprus, where she died. The ECtHR found that Cyprus as the state of destination failed to protect Rantseva from trafficking and to sufficiently investigate her death. In addition, the ECtHR found that Russia had an obligation as the state of origin to sufficiently investigate how the trafficking of Rantseva took place from its borders.

It should be noted that the Court made references to other international treaties and also allowed third-party interventions (INTERIGHTS). Both of these facts had an impact on the
judgment. For example, Hodson states that through third-party interventions, NGOs “fulfil a role of assisting the Court in new areas of law where the impact is particularly broad. They provide comparative analysis and practical information that the parties may be unable to marshal and the Court would otherwise be unable to acquire.” Hodson has argued that while NGOs are not the “life blood” of the Court, they still have a “meaningful and largely overlooked impact”.28

In addition, in El-Masri v. The Former Yugoslav Republic of Macedonia, Macedonia was responsible under Article 3 of the ECHR for failure to take adequate preventive measures, even though the CIA had a dominant role in committing the acts of torture.29 The ECtHR emphasized the responsibility of Macedonia to “carry out an effective investigation” and extended its responsibility to even cover the ill-treatment of the applicant after his transfer to the United States.

In theory, similar logic could be applicable in the context of climate change, where the fault could be divided between two or more states. State authorities X could have an obligation to ensure that activities are not transferred to such country Y where the legislation and administrative measures do not provide adequate safeguards of absolute rights. In parallel, country Y, where the heavy pollution would be transferred, should take action to ensure that the rights are not violated.

The basis in joint enterprise

Another doctrine of shared responsibility concerns joint ventures. In Hess v. the United Kingdom,30 the Four Allied Powers were committed inherently to joint conduct, illustrated by the decision-making body and actual control over the person. However, while the Commission acknowledged the de facto existence of shared activity in Hess, it was not at the time ready to establish a division of “joint authority” between the states involved.

In Hussein v Albania and twenty other States, the ECtHR continued its cautious approach by emphasizing the dominant role of the US in the arresting process, giving the presence of the European coalition a secondary role.31 The threshold used in the case requires active and direct involvement and a common act of joint enterprise instead of sole participation in a joint enterprise.32 A strict reading of the case would imply that joint action and intent are not present in the context of climate change because the phenomenon has developed over the years without proper joint control.

Concluding remarks

The ECtHR does not yet have jurisprudence on climate change and human rights. However, current jurisprudence on positive obligations, extraterritoriality and shared responsibility provides guiding principles for climate change litigation. These guiding principles provide a model for litigants on how to establish whether the state is aware of climate change, what precautionary measures under human rights law states are obliged to take in order to prevent violations, how to argue that the state has a responsibility towards citizens of another state and under which conditions the responsibility could be shared.

So long as there are no climate change judgments from the ECtHR, these principles are only guiding. The actual development of climate change–related human rights case law under the European Convention on Human Rights requires strategic litigation, such as that done in the Urgenda case in the Netherlands. Currently, there are several other pending cases in Europe, such as the Swiss senior case, the Swedish Magnolia case, the Klimaatzaak case in Belgium and the People v. Arctic Oil in Norway.33 Similar to the Urgenda case, these cases seek to secure the recognition of the link between human rights obligations and climate action. In relation to the new areas of
protection, the ECtHR often waits for domestic and international developments in order to be consistent before it stretches its interpretation to new fields. Thus, the importance of the rulings resulting from current strategic litigation cannot be overemphasized.

Notes


3 The Hague District Court ruled that the Netherlands has a duty to take more action to reduce greenhouse gas emissions in its territory. The Court ruled that the Netherlands should ensure that domestic emissions are at least 25% lower than 1990 levels by 2020. The Dutch Government has appealed the decision. Urgenda C/09/456689, 13–1396, 24 May 2015, Rechtbank Den Haag, The District Court of the Hague, see in particular paras 3.2.m 4.45, 4.46, 4.49, 4.52, 4.74.


5 ECtHR, Al-Adnsi v. United Kingdom, Appl. no 35763/97, Judgment of 21 November 2001, para 55; ECtHR, Demir and Baykara v. Turkey, Appl. no 34503/97, Judgment of 12 November 2008, paras 147–151. All ECtHR decisions are available online at http://hudoc.echr.coe.int/.


8 Urgenda, available online at http://us1.campaign-archive2.com/?u=91ffff7bfd16e26db7bee63af&id=c5967d141c&e=46588a629e.

9 Pedersen, supra note 1.

10 Urgenda C/09/456689, supra note 3, at 4.97.


12 See ECtHR, Aksy v. Turkey, Appl. no 21987/93, Judgment of 18 December 1996, para 61; ECtHR, Abdullaziz, Cabales and Balkandali v. the United Kingdom, Appl. no 9214/80, 9473/81 and 9474/81, Judgment of 28 May 1985, para 78; ECtHR, Creaga v. Romania, Appl. no. 29226/03, 23 February 2012, para 88.

13 Urgenda C/09/456689, supra note 3.


15 Ibid., para 101.


17 ECtHR, Kolyadenko and Others v. Russia, Appl. nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgment of 28 February 2012, para 173.

19 ECtHR, Kolyadenko and Others v. Russia, Appl. nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgment of 28 January 2012, paras 168–172, 185.


21 Boyle, supra note 4, at 379.


23 The question of whether the act is committed inside or outside the state border is not necessary as the responsibility may be established currently under both circumstances. See ECtHR, Soering v. the United Kingdom, Appl. no 14038/88, Judgment of 7 June 1989; ECtHR, Vilmanahaj and Others v. the United Kingdom, Appl. no. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991; ECtHR, Bankovic v. Belgium, Appl. no 5220/99, Judgment of 12 December 2001; ECtHR, Illich Sanchez Ramirez v. France, App. no. 28780/95, Judgment of 24 June 1996; ECtHR, Hirsi Jamaa Others v. Italy, Appl. no. 27765/09, Judgment of 23 February 2012.


25 ECtHR, Loizidou v. Turkey, Appl. no 15318/89, Judgment of 23 March 1995, para 62.


27 ECtHR, Rantsev v. Cyprus and Russia, Appl. no 25965/05, Judgment of 7 January 2010.


29 ECtHR, El-Masri v The Former Yugoslav Republic of Macedonia, Appl. no 39630/09, Judgment of 13 December 2012, paras 206, 211.

30 ECtHR, Hess v. United Kingdom, Appl. no 6231/73, Judgment of 28 May 1975.

31 ECtHR, Hussein v. Albania and twenty other States, Appl. no 23276/04, Judgment of 14 March 2006.

32 Ibid.