

# The Networks of Human Rights and Climate Change

*The State of the Netherlands v Stichting Urgenda*

Supreme Court of the Netherlands, 20 December 2019 (19/00135)

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The link between human rights law and climate change is now all but obvious, following intense scrutiny in recent years. Reports from the World Bank,<sup>1</sup> the UN Special Rapporteur on Human Rights and the Environment,<sup>2</sup> and vast amounts of scholarly work drive home the point that climate change impacts are likely to have profound effect on the enjoyment of a series of fundamental human rights.<sup>3</sup> In the international climate change regime, the connection between human rights and climate change was formally recognised at the Conference of the Parties to the UNFCCC in 2010 in Cancun<sup>4</sup> and more recently the Paris Agreement calls on parties to ‘respect, promote and consider their respective obligations on human rights’ when taking steps to address climate change.<sup>5</sup>

Against this rapidly growing body of work, express judicial endorsement of the link between human rights and climate change has been less forthcoming even if several attempts have been made. The 2005 claim by a group of Inuit petitioners to seek relief before the Inter-American Commission on Human Rights against the USA on account of its historical greenhouse gas emissions was ultimately unsuccessful.<sup>6</sup> The 2017 advisory opinion from the Inter-American Court of Human Rights on the extraterritorial application of human rights responsibilities in relation to environmental harms is potentially highly significant in the context

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<sup>1</sup> S McInerney-Lankford, M Darrow and L Rajamani, *Human Rights and Climate Change* (World Bank, 2011).

<sup>2</sup> See also Statement of the UN Special Procedures Mandate Holders on the Occasion of Human rights Day in Geneva, 10 December 2014, *Human Rights and the Environment*

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&>

<sup>3</sup> See most recently the collection of contributions in *9 Climate Law* (2019).

<sup>4</sup> UNFCCC Decision 1/CP.16, para. 8, fccc/CP/2010/7/Add.1 (2007)

<sup>5</sup> Paris Agreement UN Doc. fccc/CP/2015/L.9/Rev.1 (2015).

<sup>6</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States of 7 December 2005 available on [https://earthjustice.org/our\\_work/cases/2005/inuit-human-rights-and-climate-change](https://earthjustice.org/our_work/cases/2005/inuit-human-rights-and-climate-change)

of climate change, yet it is worded in rather general terms.<sup>7</sup> Similarly in 2019, the EU's General Court rejected a claim filed by a group of citizens arguing that the lack of ambition in the EU's climate change package violated 'their fundamental rights' by reference to the claimants' lack of standing (the claim is on appeal to the CJEU).<sup>8</sup> A potentially curious omission in this tentative and emerging body of climate change and human rights litigation is the lack of cases from the European Court of Human Rights (ECtHR). Whilst claimants before the ECtHR would face challenges in bringing a climate change case, the lack of case law stands out because the Court has over decades developed a rich body of case law on environmental rights.<sup>9</sup> It could even be argued that the environmental case law from the ECtHR stands out as one of the central doctrinal sources underpinning the link between human rights and environmental protection simply by reference to the sheer number of environmental cases from the Court, which stands at nearly 200.<sup>10</sup> Alas, the ECtHR is yet to deliberate on the direct and express relevance of the Convention to climate change.

This, however, does not mean that the court's case law is irrelevant to claimants seeking to utilise the human right vocabulary in their fights to persuade authorities to enact enforceable greenhouse gas reductions. In the domestic legal context of the state parties to the ECHR, the court's environmental rights case law is highly relevant. Just how relevant, was highlighted in the recent decision by the Dutch Supreme Court in the *Urgenda* decision. Not only does the *Urgenda* decision offer an enlightening example of the link between international human rights provisions and climate change in the European context. It also offers a potential prism for future developments in human rights and climate change litigation. To probe these developments, this note considers the decision by the Dutch Supreme Court from the vantage point of human rights and climate change, specifically focusing on the ECHR. As such, the note does not engage with what implications the decision might have for climate change litigation or mitigation in the Netherlands or the merits of the case from the perspective of Dutch law administrative law.

## **The Urgenda Decision**

Before the Dutch Supreme Court the claimants based their case on the carefully constructed line of reasoning that 1) greenhouse gas emissions from the Netherlands are excessive (in

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<sup>7</sup> Inter-American Court of Human Rights, Advisory Opinion, OC-23/17 of November 15, 2017.

<sup>8</sup> *Carvalho and Others v Parliament and Council* Case T-330/18 on appeal Case C-565/19 P.

<sup>9</sup> Council of Europe, Manual on Human Rights and the Environment (2012).

<sup>10</sup> Ole W Pedersen, 'Of Successes and Failures: Greening the European Convention of Human Rights', ('Human Rights in the Anthropocene' conference presentation, Raoul Wallenberg Institute of Human Rights, Lund University, 16-17 October 2019).

relative and absolute terms); 2) that the Dutch government has an obligation under the ECHR to take due care to minimise risks to the enjoyment of right to life and respect for private and family life (articles 2 and 8 of the ECHR respectively); and 3) that in order to execute that obligation the government must implement more stringent emission reduction obligations than the ones already in place under Dutch law (aiming at a 20% reduction in emissions by 2020 compared to the 1990 baseline).

In response to the decision on appeal from the Court of Appeal, which had found that the government had failed in discharging its articles 2 and 8 obligations by not committing to emission reduction obligations aiming at least at a 25% reduction, the Dutch government sought to rebut the relevance of the ECHR. Firstly, the government argued that the lower court had failed to take into account the margin of appreciation developed by the ECtHR (a doctrine often deployed in environmental cases). Second, the government argued that the joint application of the lower court of Articles 2 and 8 alongside each other was an insufficient base on which to furnish individual obligations as the Convention does not as such confer standing on organisations seeking vindication of individual rights on the behalf of a wider public interests. Finally, the government contended that even where articles 2 and 8 obligations are triggered, a 25% reduction in emissions does not follow as a matter of law but is in fact a political consideration.

In its decision, the Supreme Court not surprisingly held that climate change poses serious risks for current and future generations, threatening loss of life and disruption of family life. Obvious as this might seem, this finding is central for the application of the ECHR and the obligations derived from articles 2 and 8. The reason for this, as the Court lays out in its assessment of the ECtHR's case law,<sup>11</sup> is that the ECtHR has held that where serious environmental risks arise, the ECHR mandates that governments take specific regulatory steps to minimise those risks.<sup>12</sup> It is now well-established that particular environmental harms and environmental risks that might trigger the application of the Convention include risks from industrial emissions,<sup>13</sup> noise pollution,<sup>14</sup> waste pollution,<sup>15</sup> as well as risks and harms arising from natural disasters such as flash-flooding and mudslides.<sup>16</sup> In this light, the Dutch Supreme

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<sup>11</sup> *The State of the Netherlands v Stichting Urgenda*, Supreme Court of the Netherlands, 20 December 2019 (19/00135) paras 5.2.1-5.4.3. available on <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>.

<sup>12</sup> *Tătar v. Romania*, application no. 67021/01. (European Court of Human Rights, 2009).

<sup>13</sup> *Fadeyeva v. Russia* (2007) 45 EHRR 10.

<sup>14</sup> *Moreno Gómez v. Spain*, (2005) 41 EHRR 40.

<sup>15</sup> *Di Sarno v. Italy*, application no. 30765/08 (European Court of Human Rights, 2012).

<sup>16</sup> *Kolyadenko and others v Russia*, application nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (European Court of Human Rights, 2012).

Court had little hesitation in finding that the obligations arising from this case law apply in the context of climate change risks.

With the Supreme Court taking the seemingly straightforward - even if slightly groundbreaking - step to apply the ECHR environmental obligations to climate change, the Court was still left with a lot of heavy lifting in terms of translating this into an obligation of specific emission reduction obligations. The main challenge in trying to make this interpretive leap stems primarily from the fact that the case law developed by the ECtHR gives rise to few concrete standards beyond a general due diligence obligation centring around the need to put in place regulatory and administrative regimes, providing for meaningful public participation and the access to independent mechanisms of oversight.<sup>17</sup> The Supreme Court responded to this challenge by taking inspiration (in part) from the ECtHR's willingness to look beyond the ECHR itself, towards other international sources of norms and rules, when developing its environmental rights case law.<sup>18</sup> The Dutch Supreme Court thus found support for a more ambitious emission reduction programme in the many meetings and resolutions adopted by succeeding conferences of the parties (COPs) to the UNFCCC and assessment reports adopted amongst others by the IPCC.<sup>19</sup> This body of work was, by the Supreme Court, seen as constituting a 'common ground' and international consensus of norms and aspirations, even if not legally binding in law, which provide an interpretive and persuasive background for the barebone legal obligations of articles 2 and 8.<sup>20</sup> This 'common ground' is likewise a basis recognised and referred to by the ECtHR in its own case law and has from time to time been used to develop specific obligations in respect to environmental impact assessments and public participation requirements.<sup>21</sup> On the back of this, the Supreme Court found that the increased 25% emission reduction sought by Urgenda constituted an 'absolute minimum' target necessary to implement the obligations of articles 2 and 8.

## Analysis

A couple of initial points ought to be made before scrutinising the potentially important decision by the Dutch Supreme Court. The comments below are based on the unofficial translation

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<sup>17</sup> *Kolyadenko and others v Russia* above n 16.

<sup>18</sup> For a discussion of the ECtHR's reliance on international environmental law see OW Pedersen, 'The European Court of Human Rights and International Environmental Law' in JH Knox and R Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 86-96.

<sup>19</sup> *Urgenda* above n 11 section 6 of judgment.

<sup>20</sup> *Urgenda* above n 11 para 7.2.11.

<sup>21</sup> *Urgenda* above n 11 para 5.4.2. See also *Giacomelli v. Italy* (2006) 5 EHRR 871.

provided by the Dutch judiciary, which is publicly available but not an authentic text.<sup>22</sup> In these circumstances, it cannot be ruled out that certain important nuances are lost. For example, in its discussion around the ECtHR's environmental case law, the text of the judgment unhelpfully refers varyingly to 'real and imminent' threats and risks as well as 'genuine' and 'serious' risks without necessarily considering in detail if these different typologies necessitate different legal responses.<sup>23</sup> It is for those reasons that this note limits itself to focusing on the relationship between human rights and climate change in the context of the ECHR rather than the on no doubt equally important matters of Dutch law.

The first point to make specifically in respect to the ECtHR's environmental jurisprudence is that the *Urgenda* decision adds very little to the doctrinal point of law developed over three decades by the ECtHR itself. The interpretation of the ECtHR's environmental case law by the Supreme Court comes across as entirely reasonable in respect to identifying the main legal obligations and doctrines emerging from the case law. The standout feature of the Supreme Court's decision is the application of the ECtHR doctrine in the context of Dutch law and the results flowing from this. For example, the Dutch government was right to point out in its submission to the Court that an organisation like *Urgenda* would not have standing before the ECtHR to question government inaction allegedly putting large groups of citizens under serious risk of harm. Under the Convention, standing is only afforded to victims of Convention violations, which does not ordinarily entail *actio popularis* claims like the present one. The response to this is perhaps not surprisingly that for the purposes of domestic law in the present case, it does not really matter whether the claimant has standing before the ECtHR or not. What matters is whether the claimant has standing in domestic law.

Related to this is the engagement of the Dutch Supreme Court with the claim advanced by the Dutch government that the margin of appreciation precludes the Court from scrutinising too closely the specific plans for emission reduction. Had the Dutch government found itself before the ECtHR, its claim to a higher degree of deference would very likely have been more successful than it turned out to be before the Dutch Supreme Court. This simply follows from the fact that the ECtHR regularly emphasises that whilst its function is to oversee compliance with the Convention by the contracting parties, it acts as an international tribunal whose jurisdiction remains supervisory and consequently somewhat removed from the detailed decision-making of the domestic jurisdiction. In short, an international court like the ECtHR is likely to afford governments a larger degree of discretion (or margin of appreciation) than a domestic court. Although this need not be the case in every jurisdiction, the Dutch Supreme

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<sup>22</sup> *Urgenda* above n 11.

<sup>23</sup> For a critique of the ECtHR's lack of specific engagement with the nature of environmental risks see OW Pedersen, 'Environmental Risks, Rights and Black Swans' (2013) 15 ELR 55.

Court evidently did not see itself as being tied down by the doctrine of the margin of appreciation as developed by the ECtHR. In one sense, why should it? There is not necessarily any reason to assume that a doctrine developed by an international court, in the context of adjudicating on an international human rights treaty, in an attempt to restrain itself from veering into areas that it might not be well-placed to adjudicate on, ought to confine the adjudicatory scope available to a domestic court. Each court, in its role and perception of itself as a tribunal and adjudicator, be it the ECtHR or a domestic Supreme Court, necessarily operates within the confines of the legal context, power balances, institutional responsibilities and functions of whatever legal culture it finds itself in.<sup>24</sup>

This theme of adjudicatory contingency exerts a strong influence throughout the Supreme Court's decision. For example, in its discussion on the uncertainty around what types of climate change risks might ultimately materialise, the Supreme Court draws support from the sparse case law from the ECtHR on the precautionary principle when finding that articles 2 and 8 apply to risks even where there is no certainty (assuming that is epistemologically possible).<sup>25</sup> One potential limitation of this line of argument in the context of the ECHR case law is that the relevance of the precautionary principle in ascertaining the scope of the specific Convention obligations is far from clear. As noted, the ECtHR case law on the principle is sparse - so far the ECtHR has relied on the principle in only the one case of *Tatar v Romania*.<sup>26</sup> In this case, the principle was referred to as being among a range of material considerations that the ECtHR might come to rely on by nature of the principle's widespread use in international and European environmental law. Since the *Tatar* decision, however, the Court has not explicated the relevance of the principle nor has it developed further its case law on the principle when invited to do so by claimants.<sup>27</sup> On this reading, the reliance on the principle by the Dutch Supreme Court might come across as a bit of stretch; the Supreme Court is arguably overplaying the significance of the principle in the context of the ECHR. Conversely, the reliance on the principle by the Supreme Court might simply rest on the not unreasonable interpretation that for the purposes of the present claim, adding a precautionary emphasis to the obligations of articles 2 and 8 as they play out in the domestic context, is simply a result of the interpretive dynamic that develops when a domestic court applies international doctrines. On this reading, the ECtHR's case law, *de minimis* as it is, mainly serves as a

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<sup>24</sup> See e.g. E Lees and OW Pedersen, *Environmental Adjudication* (Hart Bloomsbury 2020) forthcoming.

<sup>25</sup> *Urgenda* above n 11 para 5.3.2. So far the ECtHR has relied on the precautionary principle only in *Tătar v. Romania*.

<sup>26</sup> *Tătar v. Romania* above n. 12.

<sup>27</sup> *Hardy and Maile v. United Kingdom*, application no. 31965/07 (European Court of Human Rights, 2012).

baseline or floor on which domestic courts (and legislatures) can add interpretive finesse and more clear-cut obligations.

Ultimately, these points highlight the emerging and potentially fruitful interplay between international environmental rights doctrines and domestic adjudication. One central feature of the ECtHR case law on environmental rights is that it has served the significant purpose of providing certain claimants with an important and sympathetic forum of adjudication (and remedies) where these might not have been readily forthcoming in the domestic context. A significant number of environmental cases before the ECtHR thus relate to the situation where claimants plead with the court to enforce domestic environmental standards, rules and judgments where these have been ignored by the responding state party. Whether this feature is seen as bringing out an element of the rule of law or whether it is seen as a form of additional judicial supervision and enforcement, providing much needed environmental justice for individuals bearing a disproportionate burden of environmental risks, a clear dynamic in the ECtHR's environmental case law has been the Court's ability to provide a minimum safeguard of environmental protection.<sup>28</sup> This line of reasoning ultimately goes to the conceptual point that, at core, the enjoyment of basic environmental conditions constitute a basis for the enjoyment of fundamental human rights.

In contrast to this, the dynamic in *Urgenda* is different. In *Urgenda*, the dynamic is arguably more traditional if not equally important. As noted above, the Dutch Supreme Court relies on the ECtHR's case law as a base on which to furnish domestic legal obligations that the ECtHR itself would very likely not have been able to distil from its own case law. On this reading, the significance of the ECtHR's environmental rights case law takes on a new but equally important role. The significance stems from the relevance of the ECtHR environmental rights case law in the context of a contracting party like the Netherlands where a detailed regulatory regime for dealing with climate change is already in place. Up to this point, the main relevance of the ECtHR's environmental case law has arguably been, as noted, to provide an additional layer of enforcement where domestic legal regimes are evidently inadequate if not lacking entirely. In response to this, the ECtHR provides for what is in all but name an environmental rights regime based on traditional international due diligence obligations. This function has partly expressed itself in the fact that the contracting parties most likely to be found to have violated this obligation are, generally speaking, states with the unenviable challenge of having to strike a domestic balance between rapid economic development and dealing with historical legacies of severe industrial pollution and lack of robust legal regimes

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<sup>28</sup> OW Pedersen, 'The ties that bind: the Environment, the European Convention on Human Rights and the Rule of Law' (2009) *European Public Law* 16(4) 571.

of environmental regulation and governance.<sup>29</sup> A not insignificant number of successful environmental claims before the ECtHR have been brought against former Soviet Union states that, for various and obvious reasons, have struggled to rapidly upgrade domestic systems of environmental governance and law.<sup>30</sup>

Against this, the application of the ECtHR's environmental rights case law in *Urgenda* serves a different purpose. Instead of providing a doctrine, which can fill gaps in domestic legal systems, the environmental rights case law from the ECtHR is in *Urgenda* used as a basis upon which to strengthen already elaborate regimes of environmental law. One important significance of this is that such strengthening is, as noted, highly unlikely to take place before the ECtHR itself simply by virtue of the self-imposed restrictions the ECtHR has put on its own doctrine and jurisdiction, however reasonable and justifiable these restrictions may be. A consequence of this is that the baseline environmental rights doctrine provided by the ECtHR serves in certain contexts to provide not only a much needed international outlet for the claimant who has little recourse in the domestic contexts, but also as a basis upon which claimants are able to persuade courts in domestic legal settings of the need to closely scrutinise aspects of domestic law even where these are unlikely to have been successful before the ECtHR itself.

Overall, the dynamic which emerges here in respect to the ECtHR's environmental rights jurisprudence arguably takes on the form of a network. A network in which the different units of domestic courts, contracting state parties and the ECtHR itself operate through a set of interconnections between particular localities; an 'apparatus, where commands can come from multiple sources, and where units are potentially autonomous and semi-autonomous' in developing the detailed legal rules subject to the supervisory oversight of the ECtHR.<sup>31</sup> A feature of the network model as it plays out in the present human rights and climate change context is that it is not as such defined by traditional notions of hierarchy, precedent and authority otherwise prevalent in adjudicatory systems. In the present network model, there is strictly speaking no obligation in precedence on the Dutch Supreme Court to develop and add to the minimum obligations emanating from the ECtHR case law (at least as far as the ECHR goes). The network feature is also at play in the case law from the ECtHR itself where the Court over the years has relied extensively on legal developments in international environmental law and EU environmental law in the attempt to define its own case law.<sup>32</sup>

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<sup>29</sup> Pedersen above n 10.

<sup>30</sup> Ibid.

<sup>31</sup> EL Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press 2007) 50. Even if Rubin's metaphor of a network is applied to 'government' more generally, it nevertheless offers a useful framework in the present case.

<sup>32</sup> Pedersen above n 18.

Similarly, the network is present in some of the decisions referred to above, including the advisory opinion of the Inter-American Court of Human Rights, where in the absence of any significant environmental rights case law in its own case law, the Inter-American Court ended up referring extensively to the many decisions of the ECtHR.<sup>33</sup> Whilst reliance on judicial decisions extrinsic to a particular court's jurisdiction is nothing new, the recent examples of it playing out so richly in the context of environmental rights suggests that this particular area of law is likely to remain a highly fertile ground for future litigation across domestic jurisdictions and international tribunals. In here lays the potential significance of the *Urgenda* decision: whilst it creates no legal precedents outside the confines of Dutch law (and even there its actual impact may well prove to be minimal), it has highlighted the potential of the environmental rights case law from the ECtHR to function as a base on which domestic legal obligations can be furthered. Of course, the willingness of courts in other jurisdictions to follow the Dutch example and use the ECtHR's case law as a springboard for scrutinising domestic obligations will no doubt vary significantly.

In the context of the UK, it cannot necessarily be assumed that a UK court would make the same findings even if particular areas of law might seem ripe for claims based in the environmental rights doctrine of the ECtHR (e.g. the repeated failure of the UK government to comply with the Air Quality Standards Regulations 2010).<sup>34</sup> There are two reasons for this. First, in the UK, courts have been less inclined to engage with the environmental human rights argument as providing a discrete basis for scrutinising government decisions. A recent example akin the *Urgenda* claim is found in the challenge by the Plan B group to the failure of the Secretary of State to amend the emission reduction target of the Climate Change Act 2008 (which has subsequently been amended), relying amongst other points on the argument that the failure to do so would violate the claimant's human rights under articles 2 and 8.<sup>35</sup> Giving short shrift of the argument, Justice Supperstone asserted that 'this is an area where the executive has a wide discretion', echoing the spirit of the margin of appreciation as applied by the ECtHR itself.<sup>36</sup> Second, were a UK court to divert from this conservative approach, it cannot be assumed that it would necessarily go as far as the Dutch Supreme Court in finding that the application of articles 2 and 8 necessarily entails the concrete emission reduction obligations that it did in *Urgenda*. This stems from the fact that UK courts traditionally defer to

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<sup>33</sup> *Urgenda* above n 11.

<sup>34</sup> SI 2010 1001 and *R (Clientearth) v Secretary of State for Environment Food and Rural Affairs* [2018] EWHC 315 (Admin).

<sup>35</sup> *R (Plan B and others) v Secretary of State for Business Energy and Industrial Strategy* [2018] EWHC 1892 (admin).

<sup>36</sup> *R (Plan B and others) v Secretary of State for Business Energy and Industrial Strategy* at [49]. See also the refusal to allow appeal by the Court of Appeal referring to the margin of appreciation in a manner significantly different from the one applied by the Dutch Supreme Court.

government agencies and administrative decision makers at a high degree when it comes to environmental claims.<sup>37</sup> In this regard, UK courts strike a line closer to that of the ECtHR itself when the ECtHR in its environmental case law repeatedly stresses the margin of appreciation and the point that its jurisdiction remains largely supervisory. The potential of the ECtHR's environmental case law to spur further climate change litigation (and develop the adjudicatory network identified here) has obvious limitations. Ultimately these limitations reflect the dynamics of the adjudicatory systems in which climate change and environmental rights adjudication plays out.

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<sup>37</sup> OW Pedersen, 'A Study of Administrative Decision-Making before the Courts' (2019) 31 JEL 59.