Could the Swedish state be held liable for human rights violations induced by climate change?

A case study of Sweden with reference to the Dutch law suit Urgenda et al.

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Table of contents

1. Introduction

As the latest round of United Nations (UN) negotiations in Lima show, the discrepancy between climate science and politics is nearly insurmountable. Although small successful steps may be taken towards reaching global consensus about the severity of climate change, legally binding commitments are distant. It is becoming acutely evident that states must be ushered to take climate action outside of UN negotiations.

Climate change continues to pose a significant threat to human rights. In the Netherlands, 900 claimants together with the non- governmental organization (NGO) *Urgenda,* have filed a law suit against the Dutch state for neglecting to take measures to prevent dangerous anthropogenic interference with the climate system. The case, Urgenda et al, claims that the negligence on behalf of the Dutch state results in human rights violations.

Could a similar case be brought before a court in Sweden?

Hopefully this study can spark a discussion on how law can be employed to attain climate justice.

This study investigates the possibilities of suing the Swedish state for failing to take adequate measures to prevent dangerous anthropogenic interference with the climate system.[1]

The first part of the study reviews Urgenda et al and human rights instruments of particular interest to climate change. The second part of the study focuses on Swedish circumstances in light of the legal claims in Urgenda et al. A discussion of the legal avenues forward concludes the study.

[1] According to the UNFCCC preamble.

2. Urgenda et al

2.1 Background

The International Panel on climate change (IPCC) has concluded since many years that if current greenhouse gas emissions remain unabated the world is heading towards dangerous anthropogenic interference with the climate system. This fact underpins the main objective of the United Nations Convention on climate change (UNFCCC). [2]

In 2010, parties to the UNFCCC agreed that emissions need to be reduced so that global temperature increases are limited to 2 degrees Celsius. [3]

As UNFCC negotiations came to a standstill, industrialized countries and the EU concluded that limiting greenhouse gas (GHG) emissions to 25% - 40% by 2020 compared to 1990s level was crucial to keep an increase in global temperature at 2 degrees. In order for the target to be met, individual states were required to adopt national legislation to reduce GHG by at least 25 % by 2020. Despite such consensus the Dutch state failed to commit to such a reduction and the EU only committed to a joint reduction of 20% of GHG by 2020.[4]

2.2 Legal claims in Urgenda et al

The main part of the law suit is dedicated to explaining the ways in which research on climate change and international law support the legal claims. The first section of the law suit outlines the science of climate change necessary to understand the legal claims.

Urgenda et al argues that the Dutch state's failure to commit to a 25 % reduction in GHG emissions by 2020 constitutes negligence, for which the state is liable. Thus, the law suit seeks an order to direct the Dutch state to take action to limit the amount of CO2 emissions to 40% below 1990s level by 2020.[5]

The case also argues that the failure of the Dutch state to limit GHG emissions amounts to a violation of the right to life and the right to private and family life, as encoded in the European Convention of Human Rights (herein after the

[2] Article 2 UNFCCC, the objective of the UNFCCC and related instruments is to stabilize green house gas concentrations in the atmosphere that would prevent dangerous anthropogenic interference with the climate system

[3] Read more at http://unfccc.int/essential_background/items/6031.php

[4] See EU climate and energy package 2020, at http://ec.europa.eu/clima/policies/package/faq_en.htm

[5] p. 21, *Translation summons Urgenda et al,* the core of the case, All other claims are similar in scope, but are either derived from, supportive to, or less demanding than this core claim

Convention).[6] The case claims that (future) human rights violations will take place within the Netherlands due to the Dutch state's acts and omissions as to climate change.

2.3 Legal grounds of the claims

The objective of this study is not to analyse Urgenda et al in detail. Nonetheless, given the nature of the adverse effects of climate change, a few notes should be made on the human rights case law and human rights legislation relevant to Urgenda et al.

Urgenda et al calls on domestic case law as well as decisions made by the European Court of human rights (herein after the Court) in substantiating the legal claims.

In support of the claim that the right to life in article 2 of the Convention is violated, Urgenda et al calls upon the case of Öneryildiz versus Turkey. In the case the Court ruled that the positive obligation to fulfil the right to life includes all life- threatening situations, including environmental risks.[7]

Among Dutch cases and legislation, the law suit invokes article 21 of the Dutch constitution which commits the Dutch state to safeguard the habitability of the land and the protection and improvement of the environment. [8]

It is difficult, if not nearly impossible, to fully predict the effects of climate change. Climate scenarios presented by the IPCC are modelled according to expected future emissions which in turn depend on climate policy and rapidly changing political landscapes. Climate scenarios are also based on anticipated natural climate variability, and internal natural climate variability gives rise to an uncertainty within the climate system. As a result, it is difficult to establish causation between the violation of a certain human right and act or omission of a state as to the adverse effects of climate change.

However, the purpose of the Convention is not only to regulate responsibility after a violation of the Convention has taken place, but to prevent such violations in the first place. In other words, it is sufficient that the threat or risk of a violation of a human right is present for the performance obligation of

[6] Article 2 right to life and article 8 right to private and family life European Convention of Human rights (ECHR)
[7] ECtHR 18 June 2002, Öneryildiz v. Turkey, par. 59-94.
[8] p.87, *Translation summons Urgenda et al*

a state to arise.[9] This means that violations of the Convention are to be actively prevented by the state.

In congruence with the above, the Court concluded in Taskin vs Turkey that 'for the protection of Article 8 to apply, it is sufficient that there is a clear link between the dangerous effects of the activity on the one hand and the probability of the complainant being exposed to those effects on the other.' [10] Such a preventive duty is also instrumental to attain intergenerational equity.[11]

As to causation, Urgenda et al also draws on the Dutch Kalimijnen ruling. According to this ruling, cumulative emissions do not rid the emitter of liability simply because causation is difficult to establish due to several emitters. [12]

Urgenda et al also calls upon the case of Fadeyeva versus Russia in which the Court concluded that the state has a far reaching duty of protection where no possibility exists of escaping or avoiding (environmental) damage.

Lastly, the no harm rule, which is part of the corpus of international customary law, should be mentioned in this study. The no harm rule was elaborated upon in the Trail Smelter case before the International Court of Justice (ICJ) in 1941. In the ruling the ICJ concluded that no state has the right to use or permit the use of its territory in such a manner that causes injury onto the territories of other states. A state is also responsible for the activities under its jurisdiction.

It follows from this that a state has a positive obligation to prevent significant damage being done from its territory.[13]

3. Extra Territorial Obligations (ETOs)

Urgenda et al claims that human rights violations will take place within the Netherlands as a result of acts and omissions by the Dutch state as to climate change. In this regard, Urgenda et al concerns primarily the territorial obligations of a state.

However, human rights violations induced by climate change will take place on a global scale. Although human rights are universal many states interpret their human rights obligations as only being applicable within their borders, hence

[9] p. 73, *Translation summons Urgenda et al,* and Klass/Germany, Dudgeon/ United Kingdom,
[10] p. 80, *Translation summons Urgenda et al* .
[11] For further reading, see Rio declaration or other legal instruments on sustainable development.
[12] P. 92- 93 *Translation summons Urgenda et al*
[13] See Corfu Channel Case, International Court of Justice,

precluding the state of liability outside of its jurisdiction. Such interpretations result in gaps in human rights protection. [14]

The scope and application of the Convention illustrates this dilemma. According to article 1 of the Convention, 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'[15]

The Maastricht principles on Extraterritorial Obligations of States in the areas of economic, social and cultural rights (ETOs) were developed as clarifications of international law to fill such gaps in human rights protection. [16]

In the context of climate change, ETOS assume particular relevance. The adverse effects of climate change will take place on a global scale. Human rights violations will take place far from the activities that gave rise to the violation.

ETOs say that the scope of a state's jurisdiction extends to 'situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory.'[17]

ETOs also suggest that reparation and effective remedies include 'rehabilitation and guarantees of non-repetition'. ETOs also stipulate that in cases of risk of irreparable harm (such as adverse effects of climate change) interim measure must be available.[18]

As is discussed in the second part of this study, ETOs may be key in a potential law suit for those most vulnerable to climate change.

4. Swedish legal system and climate policy

4.1 Legal system

The Convention is part of Swedish municipal legislation by incorporation.[19]

National courts are to apply the Convention in the same way that it applies other national legislation as Sweden is legally obliged to adhere to the rulings of the Court. This also means that domestic courts are to consider the

[14] p. 3 Maastricht principles
[15] Article 1 European Convention of Human Rights
[16] p. 3 preamble Maastricht principles.
[17] Section 9b, Maastricht principles
[18] Section 38, Maastricht principles
[19] SFS 1994:112

Convention when applying domestic legislation such as the Environmental code (Miljöbalken).

As a brief overview of Swedish legal procedure will show, it is fully possible for citizens or NGOs in Sweden to file a law suit against the state.

Environmental matters are regulated primarily in the Environmental code (Miljöbalken 1998:808)

The Environmental code stipulates that any activity which is environmentally hazardous requires a permit or concession. [20] Environmental courts consider all such applications. [21] The discharge of wastewater, solid matter or gas from land, buildings or structures are explicitly mentioned as hazardous. [22]

When considering such applications the environmental courts must safe guard public health. If there is reason to suspect that an activity may negatively impact human health or the environment even though such precautionary measures are taken as stipulated by environmental legislation, such an activity may only be permitted if there are exceptional reasons. [23]

Also, an activity may not be undertaken if it significantly impairs the living conditions of a significant number of people or negatively impacts the environment. Notwithstanding the above, the government may permit such an activity.[24]

As in the Netherlands, NGOs have standing in the legal proceedings in case of certain environmental matters. [25]

When a decision has been made by an authority or a ruling has been delivered by a court, and such a decision or ruling has not gained legal force, anyone who is negatively affected by that decision, and has locus standi, may appeal it.[26] NGOs may also appeal such a decision.[27]

[20] See chapter 9 section 6 and chapter 9 section 1, Environmental code
[21] Chapter 9 section 8, Environmental code
[22] Chapter 9 section 1, Environmental code
[23] Chapter 2 section 9, Miljöbalken
[24] See 17th chapter Environmental code.
[25] Chapter 16 section 13 Miljöbalken
[26] Locus standi is latin and translates to the right or capacity to bring an action or to appear in a court.
[27] As in the Netherlands the NGO must have been active for at least 3 years, and have at the minimum 200 registered member. The NGO must, according to its objectives/constitution also work to safeguard nature and protect the environment.

The appeal is submitted to the environmental court in whose district the activity is, was or will be mainly pursued.[28]

Proceedings in cases that are not application cases are be instituted by summons applications, unless other provision is specifically made. [29] As is customary in civil law the losing party is liable to pay the legal fees of the winning party. [30]

In short, legal formal procedure is not as much of an issue as the material aspect of a potential climate law suit. There are two principal ways of bringing a matter before a court. Either a decision or ruling is contested by way of appeal, or summons application is submitted. Depending on the matter, the case may be tried either by a court of public administration (en förvaltningsdomstol) or an environmental court.

4.2 Swedish and European climate policy

Compared to other EU member states Swedish climate policy is ambitious. The prevailing idea among Swedish politicians and policymakers is that Sweden can pave the way forward in climate change negotiations by setting an example.

In 2009 the Swedish parliament adopted legislation which committed Sweden to a 40 % reduction in GHG by 2020, compared to 1990s level. Projections also estimate that Sweden will cut its GHG emissions by 20 % in 2020.

In October 2014 EU member states agreed to cut total emissions by 40% compared to 1990s levels by 2030. Despite high ambitions, Swedish delegates supported, in an attempt to avoid standstill at negotiations, a clause which allowed for lower targets than 40%. As a result of this clause the EU agreement remained weak and voluntary in several key aspects. [31]

The EU agreement on a 40% target by 2030 was criticised immediately. NGOs as well as scientists held that the agreement was not enough to keep global warming below 2 degrees. [32] Research show that so as to meet the 2 degree

[28] Chapter 20 section 8, Environmental code
[29] Chapter 21 section 2 Environmental Code.

[30]Chapter 18 Swedish code of judicial procedure.

[31]Nelsen, Arthur, EU leaders agree to cut greenhouse gas emissions by 40% by 2030, The Guardian, accessed at http://www.theguardian.com/world/2014/oct/24/eu-leaders-agree-to-cut-greenhouse-gas-emissions-by-40-by-2030

[32] See critique in Green Peace report accessed at ,http://www.greenpeace.org/eu-unit/Global/eu-unit/reports-briefings/2014/Greenpeace%20media%20briefing%20on%20EU%20Commission%202030%20proposals.pdf

target, the EU must, a minimum level, cut emissions by 60 % in 2030. [33] Moreover, higher ambitions were necessary from the EU to bring a about a 'rapid and just' transition from fossil fuels and into a low carbon economy.[34]

4.2.1 The politics of Vattenfall

At the same time as Sweden professes to take the lead in climate change, it invests in coal combustion plants abroad through state owned electricity company Vattenfall. Over the past couple of years Vattenfall has moved from renewable energy and invested significantly in fossil fuels, mainly coal combustion.

As a result of the shift to coal Vattenfall has become one of the major emitters of GHG in Europe. Vattenfall operates five coal plants in Germany, three in Denmark, and an additional two in the Netherlands. At present Vattenfall has committed to limit its GHG emissions to 65 million ton carbon dioxide annually by 2020. Such a reduction would still surpass annual total Swedish emissions by 15 million tons of carbon dioxide. [35]

Vattenfall is undoubtedly under Swedish jurisdiction, as it is state owned. The combustion of coal and consequently the emissions of CO2 constitutes an environmentally hazardous activity. Given scientific consensus and Swedish recognition of the severity of climate change, it is evident that Vattenfall is actively engaging in activities that cause trans-boundary harm. Vattenfall and the Swedish state do this in spite of knowing the science and risks of climate change.

5. Legal avenues forward

Urgenda et al could be ground breaking. Climate change vulnerability is exacerbated by developmental factors and risks are greater for disadvantaged people and communities in countries at all levels of development.[36] Urgenda et al empowers those most vulnerable to climate change to address the adverse effects of climate change directly through international human rights law.

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[33] Hellberg, Anders, Johan Rockström besviken över klimatuppgörelsen, Supermiljöbloggen available at http://supermiljobloggen.se/nyheter/2014/10/johan-rockstrom-besviken-over-klimatuppgorelsen

[34] See statement from World Wildlife Fund, accessed at http://www.wwf.eu/?231590/EU-fails-credibility-test-on-2030-climate-and-energy-ambition

[35] See the Greenpeace report Vattenfall risky business, September 9th 2014, available at http://www.greenpeace.de/sites/www.greenpeace.de/files/publications/vattenfall_risky_business_23092014.pdf

[36] p. 10, IPCC Fifth Assessment Report Synthesis report, issued 2nd November 2014.

However, Urgenda et al may not be replicated in its entirety in Sweden as Sweden has committed to a 40% reduction of GHG by 2020. Nonetheless, it may be modified and used as a blueprint.

This study has shown that a successful law suit may be centred on several aspects.

5.1 The Swedish 40% target by 2020 is insufficient to keep global warming below 2 degrees.

Research show that EU emissions should be cut by a least 60% by 2030. A 40 % cut is far from enough to keep global warming at 2 degrees.

In light of such findings, Sweden is still not doing enough to prevent dangerous anthropogenic interference with the climate system or to prevent human rights violations. This could be a starting point for a potential law suit. Such a law suit could draw upon major parts of Urgenda et al.

5.2 The activities of Vattenfall exacerbate climate change

Another possibility is to centre a law suit on the activities of Vattenfall. Urgenda et al would serve as blueprint for such a law suit too; GHG emissions from Vattenfall can arguably constitute a violation of article 2 and article 8 of the Convention.

Vattenfall is well-known for its activities and there is a popular resistance among local communities in Germany. Many NGOs, including Green Peace, have criticised Vattenfall for years. Given that there is already widespread opposition to Vattenfall it may be relatively easy to organize the funds necessary to file a law suit against Vattenfall.

5.3 Indigenous peoples rights.

Climate vulnerability is differentiated within states. Communities vulnerable to climate change, such as indigenous peoples, have specific interests in a successful transition to a low carbon and climate proof society. In Sweden the right to traditional reindeer herding by the Sami people is threatened by climate change. A violation of the right to reindeer herding can arguably also constitute a violation of the human right to food. [37] Addressing climate change through the rights of indigenous peoples can be yet another successful way in which a law suit is framed. In doing so, a law suit could also work as to compel

[37] See also UN declaration on the rights of indigenous peoples

Sweden to ratify the principal legal instrument on indigenous peoples right to land, the International Labour Organisation (ILO) convention number 169.

5.4 Adaptation cost and climate finance

Climate vulnerability is also differentiated across the globe. As of today it is difficult to file a law suit against a country without having suffered the human rights violation while under that states jurisdiction. ETOS, which aim to avoid such pit falls in human rights law, stipulate that just reparation for a human rights violation entails rehabilitation and interim measures, as restitution and compensation alone do not suffice in cases of irreparable harm.

In the context of climate change rehabilitation translates to adaptation. Climate change adaptation will be the principal way in which human rights violations induced by climate change are avoided.

The Green Climate Fund, which is not yet operational, will be the primary mechanism of climate finance. It will do so by mainly channelling funds from developed countries to developing countries so as to promote a paradigm shift towards low emissions and climate resilient pathways by providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change.[38]

However, in the aftermath of negotiations in Lima in December 2014 developing countries argued that the principle of common but differentiated responsibility was watered down, resulting in weaker obligations for developed countries to provide climate funds.

How adaptation may be funded, and how it is to be channelled remain some of the major sources of contention at UNFCCC negotiations.

If developed countries fail to pledge the money necessary to achieve the objective of the Green Climate Fund, adaptation measures may be jeopardized or rendered impossible in developing countries. Failure to implement adequate adaptations strategies may exacerbate the adverse effects of climate change and cause further violations of human rights.

In light of this it is relevant to consider if a future law suit could be centred on adaptation. There is incentive for developing countries to pursue the issue of climate finance through human rights law.

[38] See also mission and objective of the Green Climate Fund, available at http://www.gcfund.org/about/the-fund.html.

5.5 Conclusion

There are several ways in which a law suit could successfully claim that the Swedish state is liable for human rights violations induced by climate change.

Hopefully, building alliances and recognising common interests among stakeholders is tantamount to successfully holding states responsible for human rights violations induced by climate change.

6. List of references

Legislation

The Dutch constitution article 21

The Swedish Environmental Code

The European Convention of Human Rights (ECHR)

The Swedish code of judicial procedure

The United Nations convention on climate change (UNFCCC)

Case law from the European Court of Human rights

Fadeyeva versus Russia

Taskin vs Turkey

Öneryildiz versus Turkey

Dutch case law

Kalimijnen ruling

Urgenda et al (Translation of summons final draft).

Case law from the International Court of Justice (ICJ)

Corfu Channel case

Trail smelter case

Declarations and principles

The Maastricht principles on Extraterritorial Obligations of States in the areas of economic, social and cultural rights (ETOs) available at http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

The UN declaration on the rights of Indigenous peoples

Reports

IPCC Fifth Assessment Report Synthesis report

Green Peace statement on EU climate policy, available at http://www.greenpeace.org/eu-unit/Global/eu-unit/reports-

briefings/2014/Greenpeace%20media%20briefing%20on%20EU%20Commission%202030%20proposals.pdf
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