

Stefan Kirchner*, *Climate Change and Environmental Rights Litigation at the European Court of Human Rights: A View from the Arctic*

Abstract: Climate change is real. It is felt particularly severely in the Arctic and in mountainous areas. While efforts to limit the effects of climate change are underway on a global level, most notably with the 2015 Paris Accord, damages are already suffered on the local level. Climate change affects in particular communities which are closely connected to nature and which therefore are sensitive to change, such as indigenous communities. Climate change shatters the capacity for resilience and can threaten the very survival of communities. In recent years, litigation has emerged as a potential tool for attempts to recover some of the losses suffered due to climate change. In this text it will be shown that the European Court of Human Rights, although it has been slow in recognizing environmental rights, has the potential to serve as an adequate forum for human rights-based climate change litigation.

Keywords: climate change, human rights, Litigation, indigenous peoples, Arctic.

Introduction

Climate Change is Real

Climate change is a reality.¹ It is something that is happening today and it has real and tangible effects on the lives of people already today. Seeing pictures of receding glaciers or of ice shelves in Antarctica breaking off, reading about polar bears that literally starving to death and drowning due to the lack of sea ice, which they need for the hunt, or about the economic promises of the shortcut for international shipping through the Arctic,² all can give the impression that climate change happens in places which are far away. But climate change is already a reality today.³ Nowhere is the impact of climate change felt as dramatically as in the Arctic where we see dramatic changes happening not over decades but from one winter to the

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¹ Bassam Z. Shakhashiri / Jerry A. Bell, Climate change and our responsibilities as chemists, in: 7 *Arabian Journal of Chemistry* (2014), pp. 5-9, <https://doi.org/10.1016/j.arabjc.2013.10.004>.

² Santiago Suárez de la Fuente / Ulrik Larsen / Rachel Pawling / Iván García Kerdan / Alistair Greig, Using the forward movement of a container ship navigating in the Arctic to air-cool a marine organic Rankine cycle unit, in: 129 *Energy Procedia* (2017), pp. 1010-1017, <https://doi.org/10.1016/j.egypro.2017.09.230>, at p. 1011, but see also Jong-HoNam / InhaPark / Ho JinLee / Mi Ok Kwon / Kyungsik Choi / Young-Kyo Seo, Simulation of optimal arctic routes using a numerical sea ice model based on an ice-coupled ocean circulation method, in: 5 *International Journal of Naval Architecture and Ocean Engineering* (2013), pp. 210-226, <https://doi.org/10.2478/IJNAOE-2013-0128>, at pp. 210 et seq., and Yevgeny Aksenov / Ekaterina E. Popova / Andrew Yool / A.J. George Nurser / Timothy D. Williams / Laurent Bertino / Jon Bergh, On the future navigability of Arctic sea routes: High-resolution projections of the Arctic Ocean and sea ice, in: 75 *Marine Policy* (2017), pp. 300-317, <https://doi.org/10.1016/j.marpol.2015.12.027>, at pp. 300 et seq.

³ On global warming, arguably the best known indicator of climate change, in the last century see Didier Swingedouw / Juliette Mignot / Eric Guilyardi / Sébastien Nguyen / Lola Ormières, Tentative reconstruction of the 1998–2012 hiatus in global temperature warming using the IPSL–CM5A–LR climate model, in: *Comptes Rendus Geoscience*, 15 November 2017, <https://doi.org/10.1016/j.crte.2017.09.014>, p. 1.

next.⁴ What is happening is not just global warming but a fundamental transformation towards less predictability.

In this text the effects of climate change on indigenous communities in the European Arctic will be described, followed by a look at potential climate change litigation at the European Court of Human Rights (ECtHR) in Strasbourg under the European Convention on Human Rights⁵ (ECHR).

The Problem

Climate change does not only mean a reduction of sea ice cover, locally the reduction of sea ice cover in one area can occur at the same time as ice cover anomalies elsewhere.⁶ Climate change is not only about rising temperatures but also includes the disruption of climate patterns. This also means that climate-related knowledge, which has been relied on for many generations, can lose its informational value within a short period of time. As knowledge gained by decades of experience is devaluated, the very structure of societies are affected as well.

Climate change affects many aspects of human life. This is especially the case for communities which are dependent on their natural environment, which is particularly affected by climate change.

Among those who are most affected by climate change are the communities which rely on their natural environment for their survival. This includes in particular indigenous peoples in the Arctic. For example, the Sámi are an indigenous people living in the northernmost part of Europe; their homeland, Sápmi, is governed by Norway, Sweden, Finland and Russia. Long suffering from discrimination by the dominant societies and the loss of their native lands, climate change is putting Sámi livelihoods, such as reindeer herding, at risk.⁷ What has been one of the key elements of Sámi culture for many generations might very soon turn from a livelihood and a guarantee for the food security of the Sámi people to not much more an expensive cultural activity. A way of life which has been around for many generations, which has evolved, become part of the culture and which has shaped a culture, is at risk of disappearing within a few years. In the case of the Sámi people, it will be noticed by the world, but around the world, and especially in the global North, many other cultural activities will be lost almost without anybody on the outside noticing it.

In addition, coastal communities are threatened by increasing Arctic shipping. Not only is there a risk of water pollution, for example from oil spills,⁸ but shipping also leads to increasing air

⁴ See for example Gennady G. Matishov / Sergei L. Dzhenyuk / Denis V. Moiseev / Aleksandr P. Zhichkin, Pronounced anomalies of air, water, ice conditions in the Barents and Kara Seas, and the Sea of Azov, in: 56 *Oceanologia* (2014), pp. 445-460, doi:10.5697/oc.56-3.445, at p. 446, on a warm temperature anomaly in the Barents Sea which has been around for more than a decade already.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, European Treaty Series No. 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁶ Gennady G. Matishov / Sergei L. Dzhenyuk / Denis V. Moiseev / Aleksandr P. Zhichkin, Pronounced anomalies of air, water, ice conditions in the Barents and Kara Seas, and the Sea of Azov, in: 56 *Oceanologia* (2014), pp. 445-460, doi:10.5697/oc.56-3.445, at p. 446.

⁷ Stefan Kirchner / Vanessa M. Frese, Mass-Starvation of Rangifer tarandus herded by Indigenous Peoples as a Result of reduced Access to Lichen caused by Climate Change, in: *Laws* 2016, 5, 24; doi:10.3390/laws50200; Stefan Kirchner, Climate Change Effects on Snow Conditions and the Human Rights of Reindeer Herders, in: 33 *Pace Environmental Law Review* (2015), pp. 1-22, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1783&context=pelr>.

⁸ See e.g. Stefan Kirchner, Multiple Risks and Limited Law: Compensation for Oil Spills in the Context of Long-Term Damages to Arctic Coastal Communities, in: 30 *Ocean Yearbook* (2016), pp. 267-281.

pollution.⁹ In Northern Europe, indigenous communities therefore experience multiple direct and indirect effects of climate change which put human health at risk.

Indigenous peoples often have a very close connection to nature. Even though many indigenous persons live in cities far away from their ancestral homelands and despite the relative economic importance of non-traditional jobs, nature remains important for indigenous peoples. For a lot of indigenous communities, nature is essential for the very survival as well as for the identity of a community. Some of these traditional livelihoods are shared also by non-indigenous communities the same area and also communities which are not indigenous in the legal sense of the term often rely on traditional forms of livelihood which are nature-dependent. All of these communities and their cultures are threatened by climate change. Climate change is not merely about missing emissions targets, this is about the very existence of peoples, communities and cultures.

Sustainable nature-based livelihoods are vulnerable to change. In this case, the change is brought upon indigenous communities from the outside. Although of course local communities also rely on fossil fuels, the cause of the damage can be found primarily outside of the Arctic, in countries with limited environmental and pollution legislations, such as China, Russia or the United States. In particular the continued use of fossil fuels, such as oil or coal, is a major factor in global warming. For many in the Arctic, warming means more business opportunities. But it also means the loss of knowledge. What used to be normal, is no longer so. Knowledge which has been gathered over the course of centuries becomes useless within a few years. Indeed, the impact of climate change is even visible on a short scale, i.e., within a few years. Weather is not the same as climate and one or two weather extremes might not yet be indicators for climate change, but what we can see in the North are entire series of extremes.

In the case of indigenous communities, climate change means that the very basis of life, culture and economy is changing. What one has learned from his or her ancestors might no longer be relevant today, even though it was still the norm just a few years ago. In particular in the Arctic, the reality of climate change is visible very clearly. Like in the case of long-distance air pollution or plastic waste in the Arctic Ocean, the source of the problem is usually not located in the Arctic but in factories elsewhere. Countries which actively allow or even support the burning of fossil fuels share the blame for the dramatic effects climate change has on communities in the Arctic.

Responses

In recent years, significant steps have been taken to combat climate change. Law, in particular international law, has become a valuable tool in the fight against climate change. The 2015 Paris agreement¹⁰ was an important step in the right direction. Rather than step back from this standard, as the current US government wants to do, it is important to move forward and to establish legally binding global standards which aim at limiting the effects of climate change, preventing future damage and helping those most affected. On a national level, emission goals are set by some states but in the long run, effectively fighting climate change and global warming - thereby limiting its effects - will require not only technical developments and policy

⁹ See e.g. Jianqiong Zhan / Yuan Gao / Wei Li / Liqi Chen / Hongmei Lin / Qi Lin, Effects of ship emissions on summertime aerosols at Ny-Alesund in the Arctic, in: 5 Atmospheric Pollution Research (2014), pp. 500-510, <https://doi.org/10.5094/APR.2014.059>, at pp. 504 et seq.

¹⁰ Paris Agreement, 2015, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

changes but also understanding on a personal level¹¹ as well as the commitment to make changes in one's own life.

An other, individual, approach is litigation. By targeting emitters of greenhouse gases, individuals in multiple jurisdictions have been trying to limit the damage caused by climate change or by demanding compensation for damages which have already been suffered. These claims might be brought in domestic courts¹² or on the international level. International human rights law can actually be utilized to protect the rights of indigenous peoples in the context of climate change,¹³ albeit with some limitations in the context of litigation.¹⁴

On the European level, however, there is still room for improvement.

So far there have been no specific climate change-related cases at the European Court of Human Rights in Strasbourg.¹⁵ But there is reason to believe that the ECtHR can be a useful venue for climate change litigants as environmental human rights have gained more recognition by the European Court of Human Rights in recent years. A closer look at these cases in which the reveals that the nature of the environmental damage is usually not relevant. What matters is that the environmental damage amounts to a violation of rights under the European Convention on Human Rights, such as the right to life¹⁶ (Article 2 ECHR), the right not to be treated inhumanely¹⁷ (Article 3 ECHR) or the right to private life¹⁸ (Article 8 ECHR). The latter right was also found to have been applicable in the case of *G and E v. Norway*,¹⁹ which dealt with the impact of a dam construction project on indigenous Sámi livelihoods, in this case fishing, hunting and reindeer herding.²⁰ Although no violation of Article 8 ECHR was found in that 1983 decision, the aforementioned development of environmental human rights jurisprudence in the decades since then indicates that the case could well be decided differently today, were it not for paragraph 2 of Article 8 ECHR, which allows for interferences by the state if they are, *inter alia*, “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

¹¹ See Tomáš Milěj / Petr Sládek, The climate literacy challenge, in: 12 *Procedia - Social and Behavioral Sciences* (2011), pp. 150-156, <https://doi.org/10.1016/j.sbspro.2011.02.021>, at p. 152.

¹² Agence France-Presse, Peruvian farmer sues German energy giant for contributing to climate change, in: *The Guardian*, 14 November 2017, <https://www.theguardian.com/world/2017/nov/14/peruvian-farmer-sues-german-energy-giant-rwe-climate-change>.

¹³ Stefan Kirchner, Climate Change Effects on Snow Conditions and the Human Rights of Reindeer Herders, in: 33 *Pace Environmental Law Review* (2015), pp. 1-22, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1783&context=pehr>, at p. 21.

¹⁴ See *ibid.* and cf. Human Rights Committee, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, 26 March 1990, U.N. Doc. Supp. No. 40 (A/45/40), at 1 (1990), para. 13.3.

¹⁵ A search of the Court's HUDOC database on 21 November 2017 revealed that the term “climate change” only appears in two decisions, European Court of Human Rights, *Hatton and others v. United Kingdom*, Application No. 36022/97, Judgment of 8 July 2003, in a reference to the UN Framework Convention on Climate Change in footnote 5, and in European Court of Human Rights, *Animal Defenders International v. United Kingdom*, Application No. 48876/08, Judgment of 22 April 2013, in para. 7 of the Concurring Opinion by Judge Bratza, as one of several examples for issues which could be considered controversial. The continued denial of climate change even by influential political decision-makers, contrary to the existing scientific evidence, means that this assessment, unfortunately, remains correct.

¹⁶ E.g. European Court of Human Rights, *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment of 30 November 2004.

¹⁷ E.g. European Court of Human Rights, *Florea v. Romania*, Application No. 37186/03, Judgment of 14 September 2010.

¹⁸ E.g. European Court of Human Rights, *Guerra and others v. Italy*, Application No. 14967/89, Judgment of 19 February 1998.

¹⁹ European Commission on Human Rights, *G and E v. Norway*, Applications Nos. 9278/81 and 9415/81, Decision of 3 October 1983, p. 35.

²⁰ *Ibid.*

protection of health or morals, or for the protection of the rights and freedoms of others.”²¹ Many permits for activities which cause harm to the climate might be permissible in this context — but activities which do not pass this test may potentially be prohibited under reference to the rights of individuals. State action can also consist of failing to adequately regulate and limit climate change activities. The continued reliance on coal for the generation of energy makes a number of European countries, such as Germany, valuable targets for climate change litigation in Strasbourg. Once there will be no more practical need for coal to produce energy in Europe, it could well be argued that there is no such necessity anymore. As renewable energy technology develops, it will be easier to make the case for a violation of Article 8 ECHR by allowing coal to be burned for the generation of electricity. In the context of other rights, such as the right to life, it has to be noted that the restrictions are less far-reaching than is the case with Article 8 ECHR, which in turn will make it harder for states to argue that engaging in or at least permitting activities which are harmful to both the climate and human health should be legal under the ECHR.

Conclusions and Outlook

Even though the path to Strasbourg appears to be a road not yet taken in climate change litigation, it remains a distinct possibility — and indeed is bound to become more relevant in the future. As the effects of climate change become more and more visible, climate change litigation will become more relevant. This will especially be the case if the causality problem can be overcome. Causality will be a problem in many jurisdictions but the approach used by the plaintiff in the RWE case currently underway in Germany, to claim partial damages parallel to the respondent’s share of greenhouse gas emissions, might work in some national legal systems. As awareness of climate change and damages due to climate change increase, so will the likelihood of climate change litigation. With more cases reaching domestic courts in states which have ratified the European Convention on Human Rights, it is only a matter of time until cases will come before the European Court of Human Rights. When this happens, there is a chance that the Court will award compensation for climate change related damages assuming there has been a violation of rights protected under the European Convention on Human Rights. If the experience with environmental human rights is any guide in this respect, this might still be a long way, but it is likely to happen sooner or later.

²¹ Article 8 (2) ECHR.