KlimaSeniorinnen and its Progeny

The Beginning of a Stock-Taking

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On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered rulings in three climate-change cases, thus becoming the first international court to establish a right to be protected from the effects of climate change. The leading judgment was *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*; a case brought against France and another one against dozens of States Parties were declared inadmissible.

These Strasbourg rulings were followed in short order by a trio of advisory opinions issued, respectively, by the International Tribunal on the Law of the Sea, the International Court of Justice, and the Inter-American Court of Human Rights, all of which have been extensively dissected in this blog's symposia (see here, here, and here). Taken together, these judgments and opinions have given rise to a new body of international law. More importantly, and despite any expected nuances, they disclose, in my view, a great degree of convergence in their overall approaches to the definition of the relevant State obligations, thus mutually reinforcing the overall authority of this emerging field of law. Among other things, they have lifted any lingering doubts that climate change affects the enjoyment of human rights recognised and protected by international law.

In the meantime, the Strasbourg Court has delivered further rulings on climate-change applications, most notably with the recent judgment in *Greenpeace Nordic*. Now, two years after the *KlimaSeniorinnen* precedent, we can perhaps begin to take stock of its implications and its progeny. In this short contribution I will focus on two key sets of issues: the nature of the State obligations; and the standing requirements.

Needless to say, there is no shortage of legal and factual questions that have yet to reach the ECtHR. Among these, I would highlight questions related to each country's "fair share" of the remaining carbon budget and/or the corresponding mitigation obligations; and the methodologies needed to make these calculations. National courts are already engaging with these questions (see here and here), at a fairly sophisticated level. As to Strasbourg – and despite the absence so far of a second ruling on the merits of a country's climate-change obligations – the *Greenpeace Nordic* judgment, which dealt with questions related to environmental impact assessments in fossil fuel explorations, shows that the potential for enriching the existing jurisprudence is far from tapped.

The Rights at Stake and the Nature of States' Obligations

In *KlimaSeniorinnen*, the Court defined for the first time the rights individuals enjoy in the context of climate change as part of the right to respect for their private and family lives. It did so in the following terms: Article 8 of the Convention encompasses a right for individuals to effective protection from serious adverse effects of climate change on their lives, health, wellbeing and quality of life.

This formulation already suggests a *ratione materiae* threshold that must be met for Article 8 to become applicable in this context ("*serious* adverse effects"). Such thresholds are not uncommon in the delimitation of Article 8 rights: e.g. interferences with private life within the employment context, protection of reputation, or even standard environmental nuisances must meet similar thresholds.

Turning to the States' positive obligations, the core duty is to adopt a proper regulatory framework and implementing measures. Such measures should seek to prevent a rise in global temperatures beyond

levels capable of producing serious and irreversible effects on Article 8 rights – in other words, reaching a point of no return, on human timescale. This definition should, first, be read in the light of the scientific consensus as to the heating red lines we should aim not to cross in order to prevent more catastrophic harm. Secondly, State measures should be driven by the overall goal of each State reaching net neutrality within, "in principle", the next three decades (that is, around 2050). In establishing this second and "harder" benchmark, the Strasbourg Court has arguably gone somewhat further than the advisory opinions adopted by the other international and regional courts, which have tended to define State duties as obligations of due diligence and therefore of *conduct* – whereas the duty of gradually bringing national-level net GHG emissions to zero by mid-century represents something closer to an obligation of *outcome*. At the same time, the "in principle" clause may allow States that are less economically developed to plead for some additional time while still displaying sufficient progress towards net neutrality in the interim.

That last point brings us to the importance of *intermediate* goals, which the Court has equally emphasised in its now well-known paragraph 550 of the *KlimaSeniorinnen* judgment. As some top national courts have similarly noted, this is important for at least two reasons. First, if we keep pushing down the road the bigger sacrifices that need to be made, we risk imposing a growing and unfair burden on (the rights of) the next generation. Secondly, as reaching net neutrality will require profound societal transformations, it is unlikely to be achieved "at the last minute" through some miraculous policy or new technology. In other words, insufficient State action today may irreversibly undermine the enjoyment of certain basic rights by future generations. Think of it as the legal equivalent of crossing a black hole's "event horizon".

Mitigation and Adaptation Measures

It is obvious, however, that even the best laid plans will amount to little in the absence of effective *implementing measures*, as the Grand Chamber hinted in *KlimaSeniorinnen* when assessing the adequacy of the Swiss framework and practices (see § 565 of the judgment). At the same time, it is important to bear in mind that the Court is primarily concerned with *aggregate* progress in the area of mitigation, while granting the States a quite considerable margin as to *how* – and through what precise combination of sacrifices and reduction measures at any given period – they manage to meet those reduction targets (see also § 551 of the *KlimaSeniorinnen* judgment). This explains why the recent Chamber decision in the *Fliegenschnee* case concluded that there is no Convention right to a particular set of mitigation measures, such as banning the sale of fossil fuels.

The Grand Chamber also outlined a general obligation for States to specify "the overall *remaining carbon budget* [until reaching net zero], or another equivalent method of quantification of future GHG emissions." This particular requirement has generated a great deal of commentary on its practical and methodological implications (see, among multiple contributions, here and here). While engaging with such questions in depth would require a separate discussion, it would suffice here to say that the quantification requirement merely reflects the scientific fact that humanity as a whole is living under a "global carbon budget" if we are to have any hope of staying within the temperature-increase red lines agreed by the community of States. If that global budget is not converted, in some way, into national-level (or perhaps regional) budgets, the carbon math would simply break down (again, in the absence of some groundbreaking new technology that would allow for viable alternative solutions such as scalable carbon removal from the atmosphere).

Lastly, it is noteworthy that the Court required the mitigation measures to be "supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection" (see § 552 of the judgment). The need for such measures may have obvious connections to the victim status of individuals, to which I turn now.

Victim Status of Individuals

The standing aspects of the *KlimaSeniorinnen* judgment have generated much academic debate, for understandable reasons.

To recall, the Grand Chamber set an exceptionally high threshold for individual standing: individual applicants must show both (i) a *high intensity of exposure* to climate change risks *and* (ii) a pressing need for individual protection *due to the absence of viable harm reduction measures*.

Applying this standard to the facts of the Swiss case, the Court examined the adverse effects of summer heatwaves on the senior applicants. It found that reasonable means of both general and personal adaptation existed in Switzerland, which could have mitigated any imminent health threats they faced. Thus, the respondent Government had shown that the country had managed to significantly lower its heat-related mortality rates (compared to pre-2015 levels) through extensive information campaigns and other practical measures. Such general measures could have been supplemented by measures of individual precaution and adaptation, given the individual health situation of each applicant.

Such an approach is not meant to deny that many (if not most) people in Europe can be adversely affected, to some degree, by climate change; and even more so if added vulnerabilities, such as old age or poor health, are factored in. Such claims can be successfully put forward by associations representing the diffuse interests of those categories – as was indeed the case in *KlimaSeniorinnen* and, more recently, confirmed by the Court in *Greenpeace Nordic*. Within the framework set up by the Grand Chamber, however, individual standing is reserved for those persons who are facing more than average or "manageable" levels of adversity due to climate change. While such a high threshold for the application of Article 8 is rather unique in our case law, little about the magnitude and complexity of climate change can be said to be ordinary. It is not uncommon or improper for standing requirements to be influenced, to some degree, by questions of judicial policy, as long as alternative avenues of redress remain viable.

Post-*KlimaSeniorinnen*, various Court formations have deployed similar arguments in finding no individual standing in cases brought against Italy (see here and here), Germany, Austria, and Norway. Arguably, future individual applicants will be more likely to be successful by relying not only on a high intensity of (potential) harm from climate change, but also on the absence of viable adaptation measures at this time – either because the national authorities have failed to put such measures in place, or because they are insufficient or impose an intolerable burden in their particular ("frontline") circumstances.

Standing of Associations

The standing of associations is the other side of the "victim status" coin. From what I can surmise, the main challenge posed by a large body of commentary has been the following: how can associations have Convention standing to act on behalf of individuals adversely affected by climate change, while these same individuals do not necessarily reach the threshold of "pain" set by the Court for individual standing?

The question may appear legitimate from a purist or generalised perspective. However, we are faced here with a unique challenge, which calls for out-of-the-box jurisprudential solutions, both at the level of principles and practical implications. Business as usual does not apply neatly when dealing with a planetary crisis.

Nor is the approach without precedent. Thus, it is not uncommon in situations of (widely) diffuse harm, or in situations otherwise calling for some form of collective action, for legal systems to craft remedies similar to what the Grand Chamber developed in *Klimaseniorinnen* – for example, through "class action"-style remedies that allow groups of (somewhat) affected individuals to challenge the serious *aggregate* effects of adverse actions or policies. Such collective remedies have become increasingly common in areas of law as diverse as competition, consumer protection, data protection, and, indeed, environmental harm.

At the same time, the Grand Chamber recognised that, while it has taken inspiration from the practices related to the standing of associations within the general environmental context (the Aarhus Convention's regime), the remedies developed under climate change law need not be identical to the latter and may call for further adjustment. In my view, the same logic would apply at the national level.

The inter-generational implications of climate change, or the fact that new climate conditions may become irreversible if we do not act now, add further support for such solutions, without it being necessary in my view to be seen as the only or primary justification. It is possible, therefore, to see the two different categories of standing established by the *KlimaSeniorinnen* judgment as being mutually complementary or compensatory. Time will tell if further tweaking or better solutions are needed.

An equally important question arises for national legal systems: how do the *KlimaSeniorinnen* standing requirements for associations play out at the national level? Here, once again, some creativity may be called for. For reasons of subsidiarity, both the national systems and the Convention system would benefit immensely from a harmonised approach, whereby national systems, in one way or another, seek to mirror the procedural standing for associations that is available in Strasbourg. Otherwise, we run the risk that no effective remedies (individual or collective) would be available (to be exhausted) at the national level. This would turn the ECtHR into a court of first instance on highly complex matters of fact, science, and national law and policy. Such a predicament would not be ideal in any situation, and even less so in the climate change context.

The novel doctrines established by the ECtHR in *KlimaSeniorinnen* are the product of a regional human rights court being called to address the impact, within its own jurisdiction, of a global human-rights challenge. It remains to be seen whether they will meet the test of time – when our time window for finding adequate solutions may itself be limited. It is comforting to see, however, that in crafting these new and weighty legal obligations for States, the Strasbourg Court has joined a solid judicial consensus at the international level.

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