Breaking New Ground: Climate Change before the Strasbourg Court

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An ocean of ink has been already spilt for the long-awaited judgments of the European Court of Human Rights (ECtHR) on the *KlimaSeniorinnen v. Switzerland*, the *Duarte Agostinho and Others v. Portugal and 32 Others* and the *Carême v. France* case (see inter alia here, here and here). On the 9th of April, the Grand Chamber delivered its pronouncements on those cases, all of them related to the – legal but also political – "hot potato" of climate change. The increasing climate change litigation before the Strasbourg Court does not come as a surprise. The deleterious effects of climate change are all the more profound in every part of human action, exacerbating the peaceful enjoyment of human rights. Prior to this, the proliferation of environmental cases that had reached the ECtHR bench offered the latter the opportunity to shed light on the interplay between these two legal worlds (see here and here).

However, the Strasbourg Court is now confronted with new, unprecedented challenges. Although the *KlimaSeniorinnen* case had a favourable outcome, the other two cases were found inadmissible. This post reflects on the admissibility hurdles and *in merito* hurdles of those cases with a special focus on the *KlimaSeniorinnen* and the *Duarte Agostinho* judgments that shared several common threads.

Admissibility Hurdles

When it comes to the admissibility stage, the major hardship for climate change litigants is definitely the invocation of victim status under Article 34 ECHR.

Environmental cases are no exception. For instance, in its rather recent *Cordella* judgment (para. 108), the Court declared the case, brought by 180 applicants, inadmissible for the 19 applicants who failed to prove that they were directly (personally) affected by the toxic emissions from the Ilva steelworks. Nevertheless, the ruling was deemed as a welcome development in the ECtHR's environmental *corpus juris.*

This also brings us to the almost absolute preclusion of *actio popularis* that the ECtHR has routinely reaffirmed. The Court has explained in *Câmpeanu* (para. 101) that "(i)n order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect". Yet, the Court has relaxed its stringent victim requirements over the years.

Keeping in mind, however, the framing of "potential victimhood" by the Court, perhaps it was expected that the ECtHR would face great difficulty in relaxing its approach in the foreseeable future. But, in the context of climate change, the question "who is affected by the State's action/inaction?" cannot receive a straightforward answer. None of us is directly/personally affected by the effects of climate change and all of us are indirectly/potentially affected at the same time. As Tzevelekos and Dzehtsiarou had correctly observed a few years ago with regard to environmental cases "(t)he Court's judgments in this area typically deal with well-identifiable threats, such as industrial pollution or human-made hazards. Claims in relation to climate change are much more complex in terms of causes and effects, indeterminate in terms of individualised harm, and unclear as to the possible measures to be adopted."

Both the *KlimaSeniorinnen* and the *Duarte Agostinho cases* presented such admissibility challenges, unavoidably raised by the respondent States.

The *KlimaSeniorinnen* case was lodged with the Court by an association representing a group of elderly women and four (4) of its members who complained that they are victims of a breach of the ECHR rights as they are – and will be – affected by climate change-induced heatwaves and thus, face the risk of "heat-related mortality and morbidity". Interestingly, the environmental organization bringing the claim before the Strasbourg Court alleged to be also a direct victim of a breach invoking its statutory mandate to prevent health hazards caused by dangerous climate change and to defend the rights of the represented vulnerable group (elderly women). And that was a game changer, as explained below.

The *Duarte Agostinho* case, brought by 6 adolescents/young adults complaining about the intertemporal effects (i.e. natural disasters, heatwaves) of climate change to be a result of the failure of 33 States to comply with their obligations pertaining to the reduction of GHG emissions, posed equally difficult questions in terms of admissibility. Although there was no organization involved whatsoever, the *in abstracto* framed claims of the applicants could trigger once more the *actio popularis* prohibition. In addition, the causal link between the harm that the alleged victims suffer (or will suffer) and the climate inaction not only of the State in which the applicants reside but also of 32 other States was difficult to establish. It goes without saying that solid scientific evidence was very much required to establish a certain degree of causation in this respect. Given that climate change is revealed as an

extraordinary example of transboundary harm, the extra-State effects of climate inaction *in casu* also trigger, for the applicants, the extraterritorial jurisdiction of the 32 other respondent States.

Arguably, given the particular significance and the sheer complexity of the cases at hand, the Court was anticipated to respond to these admissibility questions in a flexible manner, and, partially, it did.

In *KlimaSeniorinen*, although the Court found the claims of the four individual applicants inadmissible as they did not fulfil the victim-status criteria under Article 34 ECHR, the most interesting point of this part of the judgment revolves around the NGO's *locus standi*. For the ECtHR, as long as a relevant association meets the criteria laid down in paragraph 502 it can successfully bring a case of such urgency and significance before its bench, irrespective of whether the individuals represented by the said association meet conditions for victim status. Given the ever-increasing litigation pertaining to climate change, this finding of the Court is expected to encourage the enhanced participation of NGOs in climate change adjudication. Avoiding future *actiones populares*, the bar is, nonetheless, set too high for the individuals who want to bring their case to Strasbourg, alleging potential victimhood resulting from climate harm.

The *Duarte Agostinho,* on the other hand, failed to pass the admissibility hurdles of the case. First, the Court found, in respect of the 32 other respondent States, that they lacked jurisdiction in the case of Portuguese children. Notwithstanding the polycentric nature of climate change and the transboundary character of its effects, the Court found that the "control over the person's interests" instead of the "control over a person" model of jurisdiction, proposed by the applicants, "would entail an unlimited expansion of States' extraterritorial jurisdiction under the Convention and responsibilities under the Convention towards people practically anywhere in the world" (para. 208). The Court, therefore, rejected the functional approach of extraterritorial jurisdiction and distanced itself from the more expansive concept of extraterritoriality in climate change cases, suggested by the Committee of the Rights of the Child (CRC) in *Sacchi* (see here and here) and the Inter-American Court of Human Right in its *Advisory Opinion on Human Rights and the Environment* (para. 212). In addition, the fact that the applicants did not bring their case to the Portuguese courts was decisive for the Court in finding that they did not pursue any available legal pathway in Portugal. Reminding the subsidiarity principle, the Court concluded that the applicants failed to exhaust the domestic remedies under Portuguese law and that it could not have decided otherwise (paras 225-228).

Last but not least, the *Carême* case, brought by a former resident and mayor of the Grande-Synthe municipality in France, was also rejected on admissibility grounds since the applicant, who complained of being severely affected by climate inaction originating from the French authorities, lost victim status as, in the meantime, he was elected to the European Parliament and moved to Brussels.

Substantive Issues

Stepping cautiously into the field of climate change is not "a walk in the park" for any human rights court. In the absence of environmental provisions in the text of the ECHR, the Court, *via* its evolutive interpretation of the ECHR (see here) has been proved a welcome avenue of relief for individuals suffering from environmental harm. That is exactly where the positive obligations doctrine of the Court comes into play (see e.g. here). In *López Ostra v. Spain*, the ECtHR famously held that the protection from environmental harm falls within the protective scope of Article 8 ECHR which contains a positive duty to assess, to a satisfactory degree, the risks that the hazardous activity for the environment creates for individuals, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, and more generally their right to enjoy a healthy and protected environment. This was reaffirmed in quite a number of cases ever since (see *inter alia* here, here and here). The ECtHR has also recognized the States' positive obligation to take preventive measures against environmental disasters emanating from Art. 2 ECHR (see *Öneryildiz v. Turkey* para. 101 and *Özel and Others v. Turkey* para. 173) and of course, the positive duty of the State concerned to guarantee a thorough and effective investigation under the procedural limb of Article 2 is also extended to cases of life-threatening environmental disasters (see here). The Court has also acknowledged a procedural positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him/her to assess any potential environmental risk (see here).

The core question in *KlimaSeniorinen* was whether the Court would find that there is also a positive obligation imposed on the State(s) to prevent climate harm. In other words, whether States can be found responsible under the ECHR for anthropogenic climate change.

The Strasbourg Court replied in the affirmative. The *KlimaSeniorinnen* judgment has broken new ground as, for the first time, it saw climate-related harm endangering the enjoyment of individuals' rights as violations of the ECHR. Given the overlap between the positive obligations under Article 2 and 8 ECHR, the Court, taking into account the useful guidance provided by the environmental case-law on Article 2, examined only the claims falling within the ambit of Article 8 ECHR (para. 537).

Before diving into what has been decided, two specific points of the ruling merit our attention. First, the Court felt that it should first set the scene. It, therefore, highlighted the mixed character that these types of situations (i.e. climate change) might take, combining both political and legal aspects that are often hard to separate. Yet, totally aware of its subsidiary role as a human rights Court, the Court clearly takes a "hands-on" approach clarifying that, insofar as the ECHR rights are profoundly affected, the Court can -and must- decide on matters touching upon collective interests of global concern (paras. 420-436, 449-451).

Second, the Court clearly goes for a certain “relativization” of causation in the context of positive obligations doctrine when climate change cases are on the table.

According to the Grand Chamber,

“439. In the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution. Furthermore, from the perspective of human rights, the essence of the relevant State duties in the context of climate change relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved, although the individual exposures to such risks will vary in terms of type, severity and imminence, depending on a range of circumstances.”

Hence, in light of the “special features” that climate change presents, the Court opts for an adjusted approach of positive obligations apt to prevent climate harm both in terms of victimhood and content.

Having said all the above and mindful of the margin of appreciation that States enjoy in these cases (para. 543), the Court, drawing from the UNFCCC and the Paris Agreement, set the standards that should be met for the substantive positive obligations of Switzerland to be fulfilled, albeit examined in an overall manner (paras 550-551). In light of the above, the Court concluded that the implementation by the Swiss authorities of the relevant regulatory framework was flawed as they failed to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Swiss authorities also failed “to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework” in a way that proved that the respondent State “exceeded its margin of appreciation and failed to comply with its positive obligations in the present context” (para. 573).

As for the Court’s findings with regard to Article 6 par.1 (access to court), it held that the applicant NGO’s legal action had been rejected – first by an administrative authority and then by the national courts at two levels of jurisdiction – on the basis of inadequate and insufficient grounds. Thus, the ECtHR concluded that had been no other avenue available in Switzerland to bring their climate-related claims to a court.

The Court as a Rule-Maker: Strategic Role and Legitimacy

The *Klimaseniorinnen* case definitely marks a milestone in the environmental jurisprudence of the Strasbourg Court offering a blueprint for further developments. When it comes to the admissibility stage, the judgment's main added value is the generous understanding of NGOs' standing that fits squarely with the adjudication of disputes decided in the public interest. With regard to the merits of the case, the mere fact that anthropogenic climate change is officially endorsed within the protective scope of the Convention can be a game-changer for climate change litigation and, perhaps more generally, public interest litigation before the Court in the years to come (see Corina Heri's chapter, pp.317-343). Without putting aside the useful inspiration from the well-established *compendium* of positive duties under Article 2, it also informed the contours of positive obligations under Article 8. In light of the States' international obligations under the UNFCCC and the Paris Agreement, the ECtHR now admits that the States' failure to effectively mitigate the adverse effects of the GHG emissions can also affect persons' lives, health, well-being and quality of life can and hence, violate individual rights (at least, *via* applicant NGOs).

From a neatly legal perspective, the Grand Chamber thus took a rather balanced position: it remained loyal to a principle-based (in *Duarte Agostinho*), yet creative (in *Klimaseniorinnen*), reading of its admissibility criteria and at the same time, it extended the substantive protection offered by the Convention.

The question also readily emerges: can the explicit incorporation of the *right to a healthy environment* in the ECHR advance the protection standards in climate change cases? The Court has already started to shape an emerging right to a healthy environment, timidly incorporated within the scope of the application of the ECHR rights. The Parliamentary Assembly has also proposed a draft of a new protocol to the Convention and this possibility is currently discussed within the Council of Europe. At the UN level, important resolutions have now paved the route for the autonomous reach of the right to a healthy environment and the international community is now more ready than ever for the realisation of this right, as it readily flows from its recent recognition first by the Human Rights Council Res 48/13 (2021) and later on, by the General Assembly Res 76/300 (2022).

Awaiting new developments on this matter, all lights are, for now, on the judicial production of the Strasbourg Court. Mindful of the dynamics and the limitations of its mandate, the Court has definitely seized the opportunity to reaffirm its strategic role as a rule-maker and to foster its legitimacy within the region. Far from overstating the importance of the said judgments, the Court's first take on climate change not only brings to the fore, once again, its constitutional role in setting general standards of protection that offer valuable guidance to the ECHR State Parties. It also encourages the more active involvement of States in addressing climate change and adds to the global discussion regarding climate litigation.

Requests for advisory opinions on climate change are currently pending before the International Court of Justice, the Inter-American Court of Human Rights and the International Court for the Law of the Sea. Only time will tell how these core findings of the

Strasbourg Court will be *exported* to other legal orders, regional or global.