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Op-Ed: "The Klimaseniorinnen Case: In Search of Substantive Standards"

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This contribution is part of the EU Law Live Symposium on Climate Protection as a European Fundamental Right under the ECHR and beyond. Previous Op-Eds were authored by *Carolina Ramalho dos Santos and Erriketi Tla da Silva*, *Bas van Bockel*, *Anaïs Brucher and Antoine De Spiegeleir, Sumeyra Arslan*, *Christa Tobler*, *Niels Hoek and Justine Muller*, *Marta Torre-Schaub*and *Mario Pagano*. More Op-Eds on this topic will be published soon on EU Law Live.

And, so this is Christmas (war is over)
And what have you done? (If you want to) [1]

And, so this is Christmas: **cheers and boos**

The first incursions of the European Court of Human Rights in the field of climate change met with a mixed response. Even though each of the 11 individual applications was rejected, it was the success of the Swiss NGO *Verein KlimaSeniorinnen* that determined the outlook of this set of three cases (*Duarte Agostinho a.o. v. Portugal and 32 others*, *Verein KlimaSeniorinnen Schweiz o.a. v. Switzerland* and *Carême v. France*).

Predictably, there were cheers from the side of climate litigation activists and scholars. Although some believed that the Court should have gone further, they welcomed the landmark ruling as a much-needed contribution to the growing body of case-law on the subject. The boos came from quarters that deny that there is a climate crisis, and/or argue that the Court engaged in judicial activism: this, they maintain, is a policy area that is best left to the legislator and the executive.

All this could have been foreseen, and was undoubtedly foreseen by anyone involved in the three cases. What must be difficult to anticipate, though, is how *unfair* part of the criticism sometimes is. A graphic example was offered by a commentator of *The Spectator*:

> 'We have debated for years whether Britain's continued membership of the European Court of Human Rights threatens our national security. This ruling means that it will

> threaten our prosperity and democracy as well. … Claimants alleged that thanks to heatwaves, they need to organise their lives around a weather forecast, and this was a violation of their human rights. The Court agreed'.

Either the author did not bother to read the judgment, or he deliberately misrepresented what the Court actually said:

> '553. However, while it may be accepted that heatwaves affected the applicants' quality of life, it is not apparent from the available materials that they were exposed to the adverse effects of climate change, or were at risk of being exposed at any relevant point in the future, with a degree of intensity giving rise to a pressing need to ensure their individual protection (…). It cannot be said that the applicants suffered from any critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation given the extent of heatwaves affecting that country (…)'.

These considerations were lost on the Spectator's author, who may have sensed a great opportunity to ridicule the Court, no matter what it actually said. Sadly, this is becoming a widespread phenomenon. When the Dutch Supreme Court delivered its carefully drafted judgment in the *Urgenda* case, critics were quick to point their fingers at these activist judges without engaging with the court's elaborate reasoning. Perhaps this should come as no surprise since the first comments came in within hours after the judgment was delivered.

In an earlier contribution, Christa Tobler already pointed to the 'heated public debate' that took place in Switzerland following the Court's rulings. Meanwhile, on 13 June, Swiss parliament's lower house voted to disregard the Strasbourg Court's *KlimaSeniorinnen* judgment. This is climate change in a very different sense: across the continent post-War Europe's multilateral institutions are being undermined. The erosion takes place at breath-taking speed. Its consequences for the protection of human rights are no less serious than those flowing from the 'real' climate crisis.

And what have you done?

So, was the *KlimaSeniorinnen* judgment a Pyrrhic victory, as Joshua Rozenberg asked in his first comments on the case?

Clearly the Court invested heavily in the three cases. The cases were assigned to the Grand Chamber, an increasingly rare move as the Court generally seeks to deal with its case-load in the most efficient way. The rulings were elaborate and crafted in a precise way. They bring together a wealth of information relating to climate change and engage extensively with the submissions of the parties and the interveners. The considerations concerning the victim requirement (in the Swiss case) and extra-territoriality (in the Portuguese case) are meticulous. The Court was even prepared to change its approach to the standing of associations in climate-change litigation under the Convention, so as to do justice to 'the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context' (§ 499 of *KlimaSeniorinnen*). In doing so, the Court must have been aware of the question whether this new approach can be limited to climate-change litigation: inevitably, there will be border-line cases. And what about other areas where systemic yet intangible trends have a profound impact on the enjoyment of human rights? Think of situations where the rule of law is under pressure and where the authority of the judiciary is systematically undermined. There will a clear common interest to address these trends, preferably at an early stage when it may be difficult to identify individual victims? Will the Court then deny standing to an NGO representing, say, judges who feel that they are under pressure?

These questions are for another day. Now, one may raise another question: what did all these efforts yield? What, in substantive terms, did the *KlimaSeniorinnen* judgment tell us? Put briefly, the Court identified, in Article 8 of the Convention, a 'right for individuals to effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change' (§§ 519 and 544 of the judgment). From this it derived a 'primary duty' for the High Contracting Parties, in line with the international commitments that they entered into, 'to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change' (§ 545). This obligation is in turn specified as the requirement 'that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades' (§ 548). To this end, immediate action must be taken; measures must be defined in a binding regulatory framework, with targets and timelines, followed by adequate implementation (§ 549). The States' efforts will be assessed by looking at a set of five requirements (§ 550-551). That is not all: these measures must be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change (§ 552), while specific procedural safeguards need to be available, too (§ 553-554).

All in all, the Court goes a long way to specify the State's positive obligation to counter climate change (or rather, mitigate its effects). But, unavoidably, the Court cannot be too specific. The actual measures are for the domestic authorities to decide. In accordance with the principle of subsidiarity, the Court states, the States should be accorded a wide margin of appreciation when it comes to their 'choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources' (§ 543).

War is over, if you want to

The question then is: what next? How to determine whether Switzerland, or any individual Contracting Party to the Convention for that matter, did enough? That will not be an easy question, as the Court acknowledges that 'each individual State is called upon to define its own adequate pathway for reaching carbon neutrality' (§ 547). The Court's standards will need to be operationalised, which will require close reading of the judgment. Undoubtedly different interpretations will be advanced by the various actors that are involved, including, of course, climate change litigators and State authorities.

In future cases – and there will be future cases! – domestic courts will be confronted with these questions. In answering them, they face the dilemma that the Court acknowledges in a slightly different context (§ 484). On the one hand there is the risk of 'disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change'. On the other hand, the Court continues, there is a risk that 'even obvious deficiencies or dysfunctions in government action or democratic processes could lead to the Convention rights of individuals and groups of individuals being affected without them having any judicial recourse'. Not an enviable position for the domestic courts to be, in at a time that the judicial branch is all too often the subject of criticism. Similar dilemmas will face the Court once it is called upon to rule on follow-up cases: it will need to balance the margin of appreciation, which it usually leaves in areas which are characterised by complex and sensitive policy-making, and its desire to ensure accountability.

But at first instance, it is the Committee of Ministers of the Council of Europe that is called upon to determine whether Switzerland did enough. After all, under Article 46, paragraph 2, of

the Convention, the Committee of Ministers shall supervise the execution of the Court's judgments. It is an interesting exercise to imagine a meeting, in the not-so-distant-future, where the representatives of Switzerland will have to explain to their colleagues whether their country has done enough to fight climate change. Ironically, the resolution of the Swiss parliament, calling upon the government to disregard the *KlimaSeniorinnen* judgment, may prompt the Committee of Ministers to use the 'enhanced procedure'. But then: how will this discussion go? No doubt the other Member States have not forgotten the Portuguese case, which was addressed against 33 of them: a reminder that they may be next. Will the Council of Europe Member States be keen to introduce – in this particular context – a mechanism to supervise whether they comply with their obligations under, *inter alia*, the Paris Agreement?

Much will depend on the role of the Department for the Execution of Judgments, which supports the Committee of Ministers in this area. No doubt civil society will make ample use of the opportunity to submit their so-called Rule 9 observations.

John Lennon rightly noted that war is over, if no-one wants it. Unfortunately the opposite is also true. At a time that climate change policies are the subject of increasing tensions in society across the continent, the *KlimaSeniorinnen* case is far from over.

[1] J. Lennon & Y. Ono, *Happy Xmas (War is over)* (1972).

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