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INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

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BOFAXE

International Problems Require International Answers (Part 1)

The Paris Agreement as a Means of Concretization of the ECHR's Positive Obligations?

This year, the European Court of Human Rights (ECtHR) is expected to deal with several climate change cases, through which the complainants seek to hold their countries of origin responsible for their failure to undertake strong actions for the protection of the climate. Nine children and young adults from Germany have joined forces and filed such an application before ECtHR. Furthermore, a group of senior citizens from Switzerland (App. no. 53600/20), a mayor from France (App. no. 7189/21) and a group of juveniles from Portugal (App. no. 39371/20) are seeking legal protection from the ECtHR claiming that their states of origin violate their rights from Articles 2 and 8 of the European Convention on Human Rights (ECHR).

The first public hearing on the complaint of the climate senior citizens from Switzerland already took place on 29 March 2023. Since the case is being heard by the Grand Chamber, it can be assumed that this will be a landmark decision, which will significantly shape the outcome of subsequent proceedings. During this first hearing, the focus was heavily placed on the victim status under Article 34 ECHR. As the possible admissibility obstacles of these cases have already been analyzed elsewhere (see here and here), this blogpost focuses on another question that is important for the responsibility of States. It seeks to explore how a judgement of the ECtHR could look like if the Court finds Switzerland in breach of the ECHR. In particular, whether the Paris Agreement (PA) could be seen as a means of concretization of the ECHR's positive obligations under Articles 2 and 8, as well as whether the latter has a delimiting effect on the States' margin of appreciation.

The Legal Bases for Climate Protection Under the ECHR

In response to climate change, many European states have passed laws to protect the climate, which share the core element of plans to reduce GHG emissions (*WWF*, p.5). The main complaint of the applicants is the alleged insufficiency of these climate change acts to limit the average global temperature increase to well below 2°C. Since the ECHR does not contain a right to a healthy environment, but the ECtHR has found positive obligations for environmental protection in Article 2 and Article 8 ECHR (see *Budayeva and Others v. Russia*, para. 133; *Giacomelli v. Italy*, para. 76 ff.). They argue that the respective governments breach their positive obligations to protect their citizens under both articles.

Concretization of the Positive Obligations

Firstly, we need to look at the interpretation of the ECHR. According to the customary rules on treaty interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), for the interpretation of the ECHR, the ECtHR can and must take into account not only the wording of the ECHR but also any relevant rules and principles of international law applicable in relations between the Contracting Parties (*Demir and Baykara v. Turkey*, para. 67; *International Commission of Jurists*, p. 8).

For instance, regarding various agreements on the abolition of slavery, the ECtHR has ruled that Article 4 of the ECHR obligates France to criminalize domestic slavery and to ensure effective prosecution (*Siliadin v. France*, para. 112). While Article 4 ECHR merely postulates a prohibition of slavery and forced labor, France had ratified several conventions that obliged the respective contracting parties to establish a legal framework to end slavery as soon as possible (e.g. Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery). Therefore, the ECtHR interpreted Article 4 ECHR in interaction with these international treaties, as defining not only the objective (prohibition of slavery) but also the precise form of action (criminalization) for achieving this objective, thus severely limiting France's margin of appreciation (*Siliadin v. France*, para. 89).

Since the Paris Agreement is a treaty within the meaning of Article 2(1) VCLT and all member states of the European Council and therefore of the ECHR are parties to the Paris Agreement (*Voigt*, p. 3), it is in fact international law, which is relevant to the case and therefore needs to be taken into account, whilst interpreting the ECHR. Looking at the ECtHR's case law this would even be the case if Switzerland had not signed or ratified the Paris Agreement, due to it being accepted by a vast majority of the states and the European Union (*Demir and Baykara v. Turkey*, para. 76, 78). Thus, the opportunity to use the Paris Agreement as a concretization of the ECHR's positive obligations is given.

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The Paris Agreement as a Means of Concretization of the ECHR's Positive Obligations?

The Effect on the State's Margin of Appreciation

The states, on the other hand, refer to the margin of appreciation that they enjoy regarding the fulfilment of their positive obligations under the ECHR (*Swiss Government*, para. 108 ff.). The ECtHR has held consistently that the choice of particular practical measures to fulfill positive obligations falls within the margin of appreciation (*Brincat and Others v. Malta*, para. 101). However, the width of the margin of appreciation beyond the precise measures is questionable. Could the ECtHR possibly rule that Switzerland's climate change act must reach compliance with the goal of "well below 2°C [...] and pursuing efforts to limit the temperature increase to 1.5°C" of Art. 2(1)(a) PA? Or is the ECtHR competent to only assess whether Switzerland is or is not violating provisions of the ECHR? In the second case, it would mean that the ECtHR could only oblige Switzerland to put an end to the violation, and Switzerland could in turn choose how it wants to do that. Thus, Switzerland would be granted a wide margin of appreciation, since it can also decide on the level of ambition it wants to undertake. As a result, this would not set a guideline or precedence for similar cases, it would rather give states the possibility to only undertake small changes within their climate protection laws, thus forcing the affected citizens to go through the whole legal process again.

Yet, if the consideration of the Paris Agreement should lead to an obligation for Switzerland to reach the "well below 2°C" goal, this would limit Switzerland's margin of appreciation to the choice of particular measures leaving none regarding the level of ambition. However, such a limitation requires special circumstances since the ECtHR usually grants a wide margin of appreciation regarding environmental matters. This is based on the proximity of national authorities, from which the margin of appreciation derived in the first place (*Council of Europe*, p. 20). The state's authorities can usually better assess the circumstances on site and thus make a more appropriate decision (*Handyside v. UK*, para. 46; *Powell and Rayner v. UK*, para. 44). However, the cases of positive obligations regarding environmental impacts that have been decided so far have related exclusively to hazards caused or controllable by the state (e.g. *Giacomelli v. Italy*, para. 11; *Gorraiz Lizarraga and Others v. Spain*, para. 9).

Contrary to hazards, climate change is a global problem, which was neither caused by a single state nor can be solved by any single state. This is recognized by Article 2(1)(a) PA as well, which does not oblige every party to keep the temperature increase well below 2°C in their own state, but to keep the global temperature increase well below 2°C. Due to that, the states need to work together, meaning states with higher GHG-emissions must take bigger steps towards achieving this goal. The argument of the proximity of national authorities on which the margin of appreciation is based, therefore does not fit regarding the context of climate change. Since it is a problem not only occurring within a particular territory, it requires an authority not solely examining the situation in a single state but putting it in relation to the global context. The ECtHR being a regional court and therefore having more oversight, thus seems to be more suitable for determining the sufficiency of the measures the states have taken. Thus, the topic of climate change and the Paris Agreement in particular provide special circumstances that could justify a great limitation of the margin of appreciation.

Conclusion

How the ECtHR will ultimately rule remains an open question. It is not possible to make a precise prediction as to the width of the margin the ECtHR will grant states in combating climate change. Nonetheless, there are weighty reasons for concretizing the positive duties of the ECHR more strongly for issues of international importance than for regional environmental threats. Climate change as *the* international threat is a prime example. Each state deciding for itself what contribution it will make proves to be ineffective regarding the protection of humanity in the case of a global problem, which is why such an approach would be incompatible with the intention of the ECHR (see: *Demir and Baykara v. Turkey*, para. 66). Rather, the ECHR must ensure the effective fight against climate change and the protection of the population by limiting the states' margin of appreciation to compliance with the Paris Agreement. Ultimately, this poses the question of who or what if not international courts and agreements should find sufficient answers to the greatest threat to humanity.

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