



*Ufficio dell' Agente del Governo
davanti alla Corte europea dei diritti dell' uomo*

AVVOCATURA GENERALE DELLO STATO

EUROPEAN COURT OF HUMAN RIGHTS

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland

Application no. 53600/20

Intervention of the Italian Government

under Rule 44 § 3 of the Rules of Court



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1. Further to the letter of the Deputy Grand Chamber Registrar of 24 October 2022, the Italian Government are pleased to submit their third-party intervention pursuant to Article 36 § 2 of the ECHR and Rule 44 § 3 of the Rules of Court.
2. The case concerns the alleged omissions of the Swiss federal government to adopt an adequate climate protection policy. According to the Applicants, who are an association of elderly women and some of their individual members, Switzerland climate policies would be failing to protect the enjoyment of the rights under Articles 2 and 8 ECHR, and the Applicants would be left without a remedy Articles 6 and 13 ECHR (right to a fair trial and right to an effective remedy, respectively).
3. The Italian Government wish to address three relevant aspects for this dispute, namely: I) the scope of Article 1 of the ECHR, in of light of climate change; II) the victim Status under Article 34 of the ECHR in environment and climate-related change cases; III) The general scope of Articles 2 and 8 in environment and climate- related matters.

I. The Jurisdiction under Article 1 ECHR

4. As well known, the notion of jurisdiction under Article 1 ECHR is primarily territorial.¹ The Court must interpret the word “jurisdiction” in Article 1 in accordance according to its ordinary meaning, read in context and in view of its purpose, as prescribed by the rules of treaty interpretation under the Vienna Convention on the Law of Treaties.² Ultimately, the Court’s jurisdiction is based on consent and must be exercised within the limits set by Member States, guaranteeing adequate legal certainty.
5. According to the Court, acts performed or producing effects outside the Member States’ territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in “exceptional cases”, based on certain “defining principles”.³ This could happen when the

¹ *Catan and Others v. the Republic of Moldova and Russia*, § 104, *Güzelyurtlu and Others v. Cyprus and Turkey*, § 178, *Al-Skeini and Others v. the UK*, §131, *Abdul Wahab Khan v. UK*, § 25, *M.N. and Others v. Belgium*, §§ 98-100.

² *Catan and Others v. the Republic of Moldova and Russia*, § 104, *Güzelyurtlu and Others v. Cyprus and Turkey*, § 178, *Al-Skeini and Others v. UK*, §131; *Abdul Wahab Khan v. UK*, § 25.

³ *Al-Skeini v. UK*, §§ 131, 133.



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Contracting State by its own positive action exercises control and authority over persons or effective control over an area outside its territory.⁴

6. In *Güzelyurtlu and Others v. Turkey*, for example, the Court found that Turkey's jurisdiction was established mainly because Turkey had "effective control" of the relevant part of Northern Cyprus.⁵ In *Hanan v. Germany* the Court found that Germany's jurisdiction under Article 1 was established mainly due to the fact that Germany "retained exclusive jurisdiction over its troops with respect to serious crimes".⁶

7. IN *M.N. and Others v. Belgium*, the Grand Chamber listed the categories of extra-territorial jurisdiction recognized by the Court's case law, namely: where a Contracting State exercises effective control over an area outside its national territory;⁷ where, in certain circumstances, an agent of a Contracting State uses force outside its territory;⁸ where the diplomatic or consular officials of a Contracting State, in their official capacity, exercise abroad their authority in respect of that State's nationals or property;⁹ and where specific circumstances of a procedural nature have been used to justify extra-territorial jurisdiction.¹⁰ For example, such circumstances have arisen in the context of civil proceedings for damages brought by the applicants before the Italian courts in respect of the deaths of their relatives as a result of air strikes carried out by NATO in the Federal Republic of Yugoslavia.¹¹

8. In this respect, the Court has rejected the "cause and effect" notion of jurisdiction.¹² That implies that "the mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is [...] not such as to establish the jurisdiction of the State concerned over those persons outside its territory".¹³

⁴ *Banković v. Belgium*, §§57, 59, 61 and 63; *Al-Skeini v. UK*, §§130-138.

⁵ *Güzelyurtlu and Others v. Turkey*, §114.

⁶ *Hanan v. Germany*, § 124.

⁷ *M.N. and Others v. Belgium*, §103.

⁸ *Ibid.*, § 105.

⁹ *Ibid.*, § 106.

¹⁰ *Ibid.*, § 107.

¹¹ *Marković and Others v. Italy*, § 54.

¹² *Banković v. Belgium*, § 75.

¹³ *M.N. and others v. Belgium*, §104.



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9. The Court has warned against interpretations of Article 1 that would favor unlimited jurisdiction. An overly extensive approach would imply that any State could be held liable for any alleged violation of the Convention's protected rights in the world. This would heavily threaten the legal certainty concerning who owes obligations to whom under the Convention.

10. The "special" circumstances of a given case do not, as such, imply extraterritorial jurisdiction, nor does the "living instrument" principle of interpretation can be applied to Article 1. The latter, in fact, sets the very scope of the Parties' positive obligations and, consequently, the scope and reach of the entire Convention.¹⁴ Considering every individual as being *ipso facto* within the jurisdiction of the Court, would deprive Article 1 jurisdictional scope of any *effet utile*.

II. The Victim Status under the Article 34 ECHR

11. Under Article 34 ECHR, individuals have standing before the Court, provided that they make out a case that they are "victims" of an alleged violation.¹⁵

12. To be a victim, the individual applicant must be affected by the challenged measure,¹⁶ as the ECHR system does not allow claims *in abstracto* or *actio popularis*.¹⁷ It follows that individuals cannot challenge a measure simply because they consider that it may contravene the Convention¹⁸ or with the sole purpose of collective defending public interests.

13. The prerequisite for victim status is fulfilled if a sufficiently direct connection exists between the applicant and the disadvantage which has occurred or is impending and which brought about the alleged violation. Regarding the concept of victim status, in *Cordella v. Italy*,¹⁹ the Court recognised that "l'élément crucial qui permet de déterminer si, dans les circonstances d'une affaire, des atteintes à l'environnement ont emporté violation de l'un des droits garantis par le paragraphe

¹⁴ *Banković v. Belgium*, §§64-65.

¹⁵ *Vallianatos and Others v. Greece*, § 47.

¹⁶ *Micallef v. Malta* [GC] (§ 44; *Burden v. UK* [GC] § 33; *Gorraiz Lizarraga and Others v. Spain*, § 35; *SARL du Parc d'Activités de Blotzheim v. France* § 20.

¹⁷ *Klass and Others v. Germany*, § 33; *Perez v France* § 70; *Cordella and Others v. Italy*, § 100.

¹⁸ *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, § 101.

¹⁹ *Cordella v. Italy*, 101.



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1 de l'article 8 est l'existence d'un effet néfaste sur la sphère privée ou familiale d'une personne, et non simplement la dégradation générale de l'environnement.²⁰

14. The fact that a certain event might have consequences on a number of people, or even on a collectivity, does not automatically grant the applicant the "victim status".

15. Indeed, in *Roman Zakharov v. Russia*, the Court recalled that the Convention does not allow *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but rather determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention.²¹ Even when scientific evidence suggests that a certain risk exists and might at some point impact the enjoyment of rights under the Convention, Applicants still have to prove to be directly affected by the measures complained of, establishing a "causal link" between the measure and the alleged effect on them personally.²²

16. In *Ždanoka and Others v. Latvia*, individuals had complained under Article 8 that the State had permitted the construction of wind farms in the area where their properties or residences had been located, claiming that the turbines had generated high noise levels. The Court noted that the applicants had been unable to produce evidence to the effect that the operation of wind turbines would directly and seriously affect them, with the necessary degree of probability; the mere mention of certain adverse effects arising from the operation of wind turbines in general was considered to be too vague that regard.²³

17. An applicant cannot be considered a "victim" under Article 34 based on mere risk of future violations.²⁴ Only in rare situations a person who is indirectly affected by the violation may be an applicant under Article 34²⁵. In *extremely* exceptional circumstances, the Court has recognized a "potential victim" status to a person who is likely to be affected by an alleged infringement of his/her fundamental rights. Exceptional circumstances should not be allowed to undermine the

²⁰ *Fadeïeva c. Russie*, § 88,

²¹ *Roman Zakharov v Russia*, §164.

²² *Bernard and Others and Greenpeace Luxembourg v. Luxembourg*.

²³ *Vecbaštika and Others v. Latvia*, §

²⁴ *Berger-Krall and Others v Slovenia*, §§258-260.

²⁵ *Vatan v. Russia*, § 48.



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principle that only those whose rights have effectively and concretely been breached, or will surely incur such breach, may claim the applicant's status.

18. The Applicant will have to produce "reasonable and convincing evidence that a violation affecting him personally will occur".²⁶ In other words, mere conjecture is insufficient.²⁷ That applies also particular to allegations of violations of Convention stemming from environmental damage.²⁸

III. On Articles 2 and 8 ECHR

19. Article 2 ECHR lays down a positive obligation on States to take appropriate steps to safeguard the right to life of those within their jurisdiction.²⁹

20. A complaint will fall under Article 2 where there was a causal link between the incident or event in question and the injuries sustained.³⁰

21. According to the case of *Nicolae Virgiliu Tănase v. Romania*, complaints can be examined under Article 2 where the level of the injuries was such that the victim's life was put in serious danger.³¹

22. While the State might be required to take positive measures to safeguard Article 2, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation.³²

23. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources.³³

²⁶ *Senator Lines GMBH v Austria; Aly Bernard and others v Luxembourg*.

²⁷ *Senator Lines GmbH v. fifteen member States of the European Union*, [GC], §50; *Shortall and Others v. Ireland* (dec.)).

²⁸ *Caron and Others v. France*, §

²⁹ *Öneryıldız v. Turkey* [GC], No. 48939/99, § 89.

³⁰ *Tănase v. Romania*, § 143.

³¹ *Krivova*, § 45; *Shevchenko*, § 42; *Cavit Tınarlıoğlu*, § 68; and *Kotelnikov*, § 97.

³² *Budayeva v. Russia*, § 134-135; *Brincat and Others v. Malta*, 2014, § 101.

³³ *Osman v. UK*, § 116.



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24. Indeed, States enjoy, as the Court has previously held, in difficult and technical spheres,³⁴ a wide margin of appreciation in assessing the adequate measures to guarantee the right to life.

25. In cases concerning potentially lethal accidents or environmental disasters, the Court affirmed that Article 2 applies either if the activity at issue was dangerous by its very nature and put the life of the people concerned at real and imminent risk, or if the injuries suffered by them were seriously life-threatening.³⁵ The assessment of the relevant risk or injury depends on various factors.³⁶

26. The assessment of the relevant risk or injury varies. Where the real and imminent risk of death stemming from the nature of an activity is not evident, the level of the injuries sustained by the applicant takes on greater prominence.

27. As to Article 8 ECHR, the Court affirmed that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8.³⁷ Furthermore, in order to raise an issue under Article 8, the interference must directly affect the applicant's home, family or private life.³⁸

28. In *Vecbaštika and Others v. Latvia*, where individuals had complained under Article 8 that the State had permitted the construction of wind farms in the area where their properties or residences had been located, claiming that the turbines had generated high noise levels and caused other nuisance (vibrations, low-frequency sound, shade and shadow flicker) affecting their health and well-being. The Court noted that the applicants had been unable to produce evidence to the effect that the operation of wind turbines near their properties would directly and seriously affect them, with mere mention of certain adverse effects arising from the operation of wind turbines in general was insufficient in that regard. The Court concluded that it did not have reasonable and convincing evidence that there would be a risk in the present case of endangering the applicants' private and family life.

³⁴ *Hatton and Others v. UK*, §§ 100-01.

³⁵ *Kolyadenko v. Russia*, § 155.

³⁶ *Tănas v. Romania* [GC], §§ 139–145.

³⁷ *López Ostra v. Spain*, § 51.

³⁸ *Kyrtatos v. Greece*, § 52; *Fadeyeva v. Russia*, § 68; *Aydın and Others v. Turkey*, § 24.



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Rome, December 5, 2022

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