CLIMATE LITIGATION BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: SOME OBSERVATIONS ON THE CASE *KLIMASENIORINNEN AND OTHERS V SWITZERLAND*[*].

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1. Introduction.

«The world has never seen a threat to human rights of the scope presented by climate change. This is not a situation where any country, any institution, any policy-maker can stand on the side-lines. The economies of all nations; the institutional, political, social and cultural fabric of every State; and the rights of all […] people – and future generations – will be impacted». With these words, taken from a speech delivered by the High Commissioner for Human Rights in 2019[1], the counsel of the applicants in the case of *Klimaseniorinnen v Switzerland*[2] made his opening remarks before the Grand Chamber of the European Court of Human Rights at the public hearing held on 29 March 2023. The hearing on *Klimaseniorinnen v Switzerland* has been the first one concerning climate change-related violations of human rights before the Strasbourg Court[3] (two additional

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[1] Opening statement by UN High Commissioner for Human Rights Michelle Bachelet at the 42nd session of the Human Rights Council, 9 September 2019.

[2] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, no. 53600/20, Grand Chamber hearing of 29 March 2023 available at the following link: https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=5360020_29032023&language=lang&c=&py=2023.

[3] The application was brought against Switzerland on 26 November 2020; *Duarte Agostinho et al v Portugal and 32 Others Member States* on 7 September 2020.

cases have been so far referred to the Grand Chamber: *Carême v France*[4], whose hearing already took place on 29 March 2023 afternoon, and *Duarte Agostinho v Portugal and 32 Other Member States*[5] – the hearing is scheduled for 27 September 2023).

Numerous other applications have been so far introduced before the Strasbourg Court[6], putting it squarely at the core in the "Rights Turn in Climate Change Litigation"[7].

In the past, the European Court of Human rights has examined many cases concerning human rights violations as a result of environmental degradation and natural disasters, even in the absence of the explicit provision of the right to a healthy environment in the Convention[8]. After an initial phase in which the applications concerning environmental issues were declared inadmissible[9], the Strasbourg bodies[10] have developed a rich and interesting case-law applying mainly[11] positive obligations[12] inherent in Articles 2 and 8

[4] *Carême v France*, no. 7189/21: on this case see M. Torre-Schaub, *The Future of European Climate Change Litigation: The Carême case before the European Court of Human Rights,* in *Verfassungsblog*, 10 August 2022.

[5] *Duarte Agostinho et al v Portugal and 32 Others Member States* (no 39371/20): on this case see P. Clark, G. Liston and I. Kalpouzos, *Climate change and the European Court of Human Rights: The Portuguese Youth Case*, in *EJIL:Talk!*, 6 October 2020.

[6] However, the Court has decided to adjourn its examination of six cases until such time as the Grand Chamber has ruled in the climate change cases before it: www.echr.coe.int/Documents/FS_Climate_change_ENG.pdf.

[7] See J. Peel and H.M. Osofsky, *A Rights Turn in Climate Change Litigation?*, in *Transnational Environmental Law*, 2018, p. 37 ff; A. Savaresi, *Human Rights and the Impacts of Climate Change: Revisiting the Assumptions*, in *Oñati Socio-Legal Series*, 2021, p. 231 ff.

[8] On proposals within the Council of Europe see N. Kobylarz, *Derniers développements sur la question environnementale et climatique au sein des différents Organes du Conseil de l'Europe*, in *Revue internationale de droit comparé*, 2022, p. 66 ff. Within the United Nations on 8 October 2021 the Human Rights Council adopted Resolution 48/13 on *The human rights to a clean, healthy and sustainable environment*, UN Doc. A/HRC/RES/48/13, and on 28 July 2022 the General Assembly adopted Resolution 76/300 on *The human rights to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300, 1 August 2022: on this last resolution see V. Grado, *Il diritto umano universale a un ambiente sano: recenti (e futuri) sviluppi*, in *La Comunità internazionale*, 2023, p. 225 ff.

[9] ECHR Court, judgment *Airey v Ireland*, 9 October 1979, p. 14; Com. EDH, *Dr S. c. RFA*, App. No 715/60 decision on admissibility, 5 August 1969; Com. EDH, *X et Y c. RFA*, App. no 740176 decision on admissibility, 13 May 1976.

[10] The Commission and the Court till the entry into force of the Protocol no 11 (1 November 1998), which set a single, full-time Court.

[11] Also Article 1 Protocol No. 1, Article 6 and Article 13 ECHR; less frequently also art. 14 ECHR (prohibition of discrimination), as in the case *Greenpeace Nordic and Others v Norway* (App. no 34068/21) and art. 3 ECHR, raised *proprio motu* by the Court in the *Duarte* case: see on this point C. Heri, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?*, in *EJIL:Talk!*, 22 December 2020.

[12] In general terms, positive obligations require States to take reasonable steps to avoid a risk of harm about which they knew or ought to have known. Therefore, a foreseeable and significant risk concerning the enjoyment of a right, and a possibility for the State to prevent or limit a risk or remedy its consequences are necessary conditions. For an in-depth analysis on positive obligations in relation to the Klimaseniorinnen case see E. Schmid and V. Boillet, Tierce intervention au sens de l'article 44 (3) du Règlement de la Cour, Centre de droit comparé, Université de Lausanne, 2022 and literature quoted therein (available at https://www.klimaseniorinnen.ch/wp-content/uploads/2023/01/53600_20_GC_OBS_P3_Universite_de_Lausanne__Mmes_Schmidt_et_Boillet__25_11_22.pdf).

ECHR, both in relation to environmental damage[13] and natural disasters[14], recurring to the *evolutionary interpretation* of the Convention (according to which the Convention is «a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law»[15]).

However, using the *human rights toolbox* for the consequences of climate change poses additional challenges, because climate change is due to transboundary gas emissions caused by multiple actors[16] and the consequences concern the whole of humanity but in an unequal way[17] (and indeed the greatest consequences mainly concern States in regions of the world that for the past have contributed only minimally to CO2 emissions) and complex questions arise regarding causal link, attribution and responsibility.

2. The case *Klimaseniorinnen and Others v Switzerland*.

The applicants are the association Klimaseniorinnen and four elderly ladies who, after exhausting domestic remedies, turned to the European Court on 26 November 2020 alleging a violation of Articles 2 (right to life) and 8 (protection of private and family life) ECHR due to Switzerland's failure to take appropriate measures to reduce the (already present and future) risks for their health and lives connected to climate change. They also raised questions about Articles 6 and 13 ECHR: since 2016 they had urged a number of authorities to make up for their failure to take the necessary measures to meet the 2030 goal set by the 2015 Paris Agreement on climate change (COP21), in particular to limit global warming to well below 2 degrees Celsius compared to pre-industrial levels. The Federal Court, however, rejected their request, affirming inter alia that, «even invoking the concept

[13] See *ex multis* ECtHR, *Guerra and Others v Italy*, App. no 116/1996/735/932, judgment of 19 February 1998; *Öneryldiz v Turkey*, no 48939/99, judgment of 30 November 2004; *Tătar v Romania*, no 67021/01, judgment of 27 January 2009.

[14] See *ex multis* ECtHR, *Budayeva and Others v Russia*, App. Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008; *Kolyadenko and Others v Russia*, Appeals Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012.

[15] See M. Torre-Schaub, *La protection de l'air et de l'atmosphère en Europe. Focus sur la Cour européenne des Droits de l'Homme. Quelles potentialités pour la lutte contre le changement climatique?*, in *Blog de ClimaLex*, 30 May 2022, p. 4, who mentions also another mechanism, i.e. "protection par ricochet", adding that "les deux techniques se recoupent parfois".

[16] As pointed out by V. Grado, *Il diritto umano universale a un ambiente sano*, cit., p. 226, the threefold planetary crisis of climate change, biodiversity loss and pollution is mainly fuelled by activities carried out by private companies domestically and transnationally.

[17] H. Keller and C. Heri, *The future is now*, cit., p. 154.

of 'potential victim', the applicants were still required to demonstrate that they were sufficiently affected by the alleged failings. As it had not been established that they had sufficient standing, the court was of the view that their claims were tantamount to an *actio popularis*»[18] .

The European Court of Human Rights, aware of the urgency and importance of the issues at stake in the present case, gave priority to the case and communicated it to the Swiss Government on 25 March 2021; subsequently, on 26 April 2022, the Chamber of the European Court of Human Rights relinquished jurisdiction in favour of the Grand Chamber and on 29 March 2023 a public hearing took place before the Grand Chamber, with a large participation of scholars, associations and press. Although predicting what the Court will say is difficult, the fact that both admissibility and substantive issues were dealt with at the hearing, suggests that the Court will rule on both admissibility and merits[19].

Several challenging issues have been raised in the application and in the written observations submitted by both parties and by the numerous subjects authorized to intervene (eight Member States and numerous associations, Legal Clinics and individual Professors[20]). In this contribution, however, after a brief presentation of the case, my analysis will focus on two aspects[21] which were at the centre of the hearing before the Grand Chamber on 29 March 2023, namely the notion of victim and the applicability of Articles 2 and 8 ECHR – more specifically, of the positive obligations inherent in these articles – in the light of the commitments undertaken by States under international climate law[22]. These issues, indeed, recur in several other cases pending before the Strasbourg Court and have already been the subject of domestic decisions, as in the well-known *Urgenda* case[23], in which the Supreme Dutch court have for the first time, by resorting to

[18] Information Note on the Court's case-law, April 2021, available at file:///C:/Users/Anna/Downloads/Verein%20KlimaSeniorinnen%20Schweiz%20and%20others%20v.%20Switzerland%20(communicated%20case)%20(1).pdf250.

[19] See on this point H. Arling and H. Taghavi, *KlimaSeniorinnen v Switzerland – A New Era for Climate Change Protection or Proceeding with the Status Quo?,* in *EJIL:Talk!,* 6 April 2023.

[20] https://en.klimaseniorinnen.ch/

[21] For a complete analysis on the substantive and procedural aspects of the case in question and the other cases pending before the Strasbourg Court see M. Torre-Schaub, *La protection de l'air et de l'atmosphère*, cit., and H. Keller and C. Heri, *The Future is Now: Climate Cases before the ECHR,* in *Nordic Journal of Human Rights*, 2022, pp. 1-23 and literature indicated therein.

[22]On the same day of the hearing, on 29 March 2023, the General Assembly of the United Nations adopted by consensus a resolution requesting an advisory opinion from the International Court of Justice on the obligations of States in respect of climate change (following the request, with the support of more than 100 countries, from Vanuatu, a Pacific island State which, due to sea-level rise caused by climate change, risks disappearing), https://press.un.org/en/2023/ga12497.doc.htm.

[23] Supreme Court of the Netherlands, The *State of the Netherlands v Urgenda Foundation*, no. 19/00135, judgement of 20 December 2019 (www.urgenda.nl), which was followed by a large number of national

Articles 2 and 8 ECHR, ordered Netherlands to reduce its greenhouse gas (GHG) emissions with at least 25% by the end of 2020.

3. Some observations on the status of victim and violation of positive obligations under Articles 2 and 8 ECHR in light of the hearing before the Grand Chamber.

3.1. The victim *status*.

One of the key issues for the Court is a procedural one, i.e. the victim status of the applicants, with respect both to the four elderly women (applicants 2-5) and to applicant n. 1, Verein Klimaseniorneen, an association under Swiss law for the prevention of climate change (counting more than two thousand elderly women as members).

Applicants 2–5 claim to be *direct victims* of Respondent's omissions, because, «with every heatwave, *they were and continue to be* at a *real and serious risk* of *mortality and morbidity* greater than the general population»[24], alleging in some cases also specific health problems[25]; they additionally claim that they are *potential victims* «because omissions in reducing GHG emissions in line with the Paris limit will significantly *increase* their risk of heat-related mortality and morbidity». They allege to this end scientific data that attest, on one hand, that the raise of temperature is affecting more and more life, health and family and private life in Switzerland, and, on the other hand, that the risk of mortality or morbidity is higher for elder women[26].

In respect of Applicant n. 1, the victim status is alleged because the Respondent's omissions prevent Applicant 1 from furthering one of its main objectives (since the association's aim is to prevent health hazards caused by climate change) and because the association «offers many of its members the only viable way to defend their rights effectively»[27]. To this end

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decisions similarly referring to the ECHR. For an overview, see P. Pustorino, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2021, p. 596 ff.; J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot.* London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

[24] See Application, Additional Submission, par. 33, available at https://www.klimaseniorinnen.ch.

[25] *Ibidem*, par. 7.

[26] *Ibidem*, par 34. On the debate concerning science before courts see: L. Lima and C. Ragni, *Science before international tribunals*: *Deference or distrust?*, in *QIL*, 31 March 2023.

[27] *Ibidem*, par. 35.

the applicants recall a very interesting case, *Gorraiz Lizarraga and Others v Spain*[28], where the Court stated that «indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively»[29].

For both categories of applicants, the Application affirms that there is a *sufficient close connection* between Respondent's omissions in climate protection and the risk of heat-related mortality as well as the current and future impairments of the Applicants' health[30], recalling to this end scientific data[31]. Moreover, it adds that the Applicants should not be denied victim status simply because a general public interest co-exists with their particular interest (recalling to this end *Tâtar v Romania*[32] and *Di Sarno v Italy*[33]), pledging for an evolutive interpretation of the concept of victim, in order to ensure that protection of the rights guaranteed by the Convention isn't *ineffective and illusory*.

As the Court has previously stated, under Article 34 ECHR, a victim is the person directly affected by the act or omission which is in issue. At this stage, the violation alleged need only be «conceivable»; in addition, «there must be *a sufficiently direct link* between the applicant and the harm which they consider they have sustained on account of the alleged violation»[34]. As a consequence, the Court declares inadmissible actions alleging that a domestic law is contrary to the ECHR if it is not established that it has a direct effect on the applicants, unless the applicants prove that they belong to a category of persons who are particularly likely to be affected by the legislation in question[35].

However, as pointed out[36], "the Court has previously allowed environmental applications that combine public and individual interests, using reasoning that could be replicated in climate cases". The 2019 *Cordella v Italy*[37] case is emblematic: the Court, relying on scientific evidence, took into consideration the link between pollution caused by the still works and the impact on health conditions of local populations, and affirmed that the persistence of such a situation of environmental pollution endangered the health of the

[28] *Gorraiz Lizarraga and Others v Spain*, no. 62543/00, judgement of 27 April 2004.
[29] Ibidem, par. 38.
[30] Application, Additional Submission, par. 38.
[31] Alleged in sections 1.1, 1.2 and 1.5.
[32] *Tătar v Romania*, no. 67021/01 judgement of 27 January 2009.
[33] *Di Sarno et al v Italy*, no. 30765/08, judgement of 10 January 2012.
[34] *Gorraiz Lizarraga and Others v Spain*, cit., par. 35.
[35] ECHR Court, Practical guide on admissibility criteria, updated on 31 August 2019, par. 33-34.
[36] H. Keller and C. Heri, *The Future is Now*, cit., p. 156.
[37] *Cordella and Others v Italy*, judgment of 24 January 2019 (nos. 54414/13 & 54624/15).

applicants and at the same time of the entire population living in the areas at risk.[38] In other words, «the mere fact that the challenged act or omission impacted a large swath of the population — or even virtually all of the population — did not stop the Court from recognizing victim status and assessing the merits of the case»[39]. In addition, it is important to stress the role played in the *Cordella* case by science: *mutatis mutandis*, in the light of the scientific evidence offered in particular by the IPCC[40] on the risks of climate change for human life and health, also the applicants in the *Klimaseniorinnen* case should be considered victims. More specifically, as convincingly argued in the Third Party Written Submission on behalf of the Global Justice Clinic, the Climate Litigation Accelerator & Professor C. Voigt[41], the applicants, as elderly women, have already experienced the impact on their health (and in some case on their lives) of heatwaves, which are a consequence of climate change (caused mainly by the emission of greenhouse gases). States have indeed the power to reduce emissions «but often fail to do so in a manner that would prevent deleterious warming. The elderly thus can be considered *direct* victims, as there is – at minimum – a conceivable violation of the Convention attributable to states' failure to sufficiently regulate greenhouse gas emissions»[42]. In addition, they are also *potential* victims «owing to the risk of a future violation»[43]. As previously stated by the Court, to this end «an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient»[44]. However, as pointed out, «the international scientific consensus[45] establishes that climate change will worsen as more greenhouse gases are emitted and the elderly will continue to face disproportionate harms if business continues as usual», thus providing «far more than 'reasonable and convincing evidence' of the likelihood of a future

[38] Press release issued by the Registrar of the Court, ECHR 029 (2019).
[39] See Third Party Written Submission on behalf of the Global Justice Clinic, the Climate Litigation Accelerator & Professor C. Voigt, available at: https://www.klimaseniorinnen.ch/wp-content/uploads/2021/11/Global-Justice-Clinic-Climate-Litigation-Accelerator-C.-Voigt.pdf.
[40] The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change: see https://www.ipcc.ch/.
[41] Third Party Written Submission on behalf of the Global Justice Clinic, the Climate Litigation Accelerator & Professor C. Voigt, cit.
[42] *Ibidem.*
[43] *Tauira and Others v France*, no. 28204/95, decision on admissibility of 4 December 1995, par. 130.
[44] *Skender v the Former Yugoslav Republic of Macedonia*, no. 62059/00, decision on admissibility of 10 March 2005, par. 8.
[45] As recently attested by authoritative bodies like the Intergovernmental Panel on Climate Change ("IPCC") in its last Report (see note n. 40).

violation of the elderly's rights»[46].

Such a conclusion, which is very likely with respect to individual Applicants no. 2-5, could be accepted in my opinion also with respect to Applicant n. 1, in the light of the abovementioned case *Gorraiz Lizarraga and Others v Spain*[47], although the following case-law on NGO legitimation active is still "restrictive and occasionally contradictory"[48]. An openness on the part of the Strasbourg Court would be very important, also in light of the restrictive position of the Court of Justice of the European Union, which in a recent case declared the application inadmissible – recalling the Plaumann jurisprudence –, because the plaintiffs were not *individually concerned* by a legislative package of mitigation measures because they were not the addressees of those acts[49]. As noted, such a position would have the «perverse effect that the more serious the damage, and hence the more persons are affected, the less access to courts is provided»[50]. A similar argument was also raised during the hearing of 29 March 2023: «individuals who are directly or lightly affected by climate harm can be victims for the purposes of Article 34 even though countless others are similarly affected» and that «to deny standing simply because too many others are also affected would mean that the most injurious and widespread Government action could be questioned by nobody»[51].

3.2. Violation of positive obligations under articles 2 and 8 ECHR.

One might wonder when the Court will address the question concerning the victim status

[46] Third Party Written Submission on behalf of the Global Justice Clinic, the Climate Litigation Accelerator & Professor C. Voigt, cit., par. 20.
[47] See H. Keller and A. Pershing, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, in *European Convention on Human Rights Law Review*, 2021, p. 38.
[48] See H. Keller and C. Heri, *The future is now*, cit., p. 157, and N. Kobylarz, *The European Court of Human Rights: An Underrated Forum for Environmental Litigation*, in H. Tegner Anker and B. Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal instruments and Approaches*, Intersentia, 2018, p. 109.
[49] General Court order, 8 May 2019, case T-330/18, *Carvalho and Others v Parliament and Council*: see M. Montini, *Verso una giustizia climatica basata sui diritti umani*, in *Ordine Internazionale e Diritti Umani*, 2020, p. 530; G. Winter, *Armando Carvalho and Others v EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, in *Transnational Environmental Law*, 2020, p. 137 ff.; M. E. Harris, *Carvalho and Others v Parliament and Council: Climate Justice and 'Individual Concern'*, in *Diritti umani e diritto internazionale*, 2020, p. 175 ss. The Court of Justice declared the appeal inadmissible, confirming the General Court's position by a judgment delivered on 25 March 2021 (case C-565/19 P).
[50] See on this point G. Winter, *Armando Carvalho and Others v EU*, cit, p. 158.
[51] Statement by Ms. Sandvig for the European Network of National Human Rights Institutions: see Transcript of the hearing, available at https://en.klimaseniorinnen.ch/wp-content/uploads/2023/05/Transcript-Hearing-29-March-2023-final.pdf, p. 20-21.

(assuming that it does not instead take a restrictive approach by declaring the appeal inadmissible as an *actio popularis*): that is, whether it will decide to examine it at the stage of admissibility, or join it with the merits, as it has done in other cases[52], also because, as noted, "if the allegation is an omission to take sufficient measures required by a positive obligation, the legal assessment inevitably requires at least a preliminary engagement with the scope of the positive obligation when deciding whether the applicants have victim status […] To know if an omission exists and if the applicant(s) are affected by it, one must first ask what measures would have, approximately, been required"[53] and compare what the State actually did with what is required by the international obligations at stake, i.e. in the present case article 2 and 8 ECHR, read in light of the long-term temperature goal provided for in article 2 par 1(a) and the due diligence obligation contained in Article 4 par. 3 of the Paris Agreement[54].

Indeed, in the application, in the Applicants written observations on the Facts and the Law, in most of the *Amicus Curiae* Interventions as well as during the hearing, a huge attention has been devoted to the debate on scientific data to demonstrate that «Switzerland's climate strategy falls far short of what is necessary. Notably, its commitment to reduce domestic emissions to 34% below its 1990 emission levels by 2030 is clearly inadequate to keep the 1.5°C-Limit. Moreover, it is significantly lower than the EU's commitment to 55%»[55]. For these reasons, the applicants ask the Court to order Switzerland urgently to adopt legislative and administrative measure to do its share to prevent a global temperature increase of more than 1.5°C, including concrete emission reduction targets: as specified in the Application, «In view of the magnitude of the risks climate change imposes, the clear science, the urgency of the situation and the *clear ultimate objective* of the UNFCCC[56], […] the Respondent has to take *all measures that are not impossible* or disproportionately

[52] See H. Keller and C. Heri, *The future is now*, cit., p. 158, in particular case-law quoted at note 31.
[53] See E. Schmid, *Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case*, in *EJIL: Talk!*, 30 April 2022; for an in-depth analysis on this point see E. Schmid and V. Boillet Third Party intervention, cit.
[54] See Third Party Written Submission on Behalf of the Global Justice Clinic, the Climate Litigation Accelerator & Professor C. Voigt, cit., par 34-52; M. Wewerinke-Singh, *State responsibility, climate change and Human Rights under International Law*, Oxford Hart, 2020, p. 88 ff.
[55] https://en.klimaseniorinnen.ch/wp-content/uploads/2022/12/20221205-PR-EN-Submission.pdf
[56] It is the ultimate objective of the UNFCCC, ratified by Switzerland in 1993, to «prevent dangerous anthropogenic interference with the climate system». To reach that goal, in the 2010 Cancun Agreements, Switzerland committed to «reducing global greenhouse gas emissions […] below 2°C above pre-industrial levels», recognizing the need to «strengthen the long-term global goal *on the basis of the best available scientific knowledge*»: see par. 15, Application, Submission Addendum, cit.

economically burdensome with the objective of reducing GHG *to a safe level*»[57], quoting a talk Professor Christine Voigt gave at the High Level Conference on "Human rights for the planet" organized by the Council of Europe on 5 October 2020[58], where the author anticipates some of the argument thoroughly developed in the abovementioned Third Party Written Submission[59]. For the purpose of the present paper, we will limit ourselves to mentioning some of the final passages of this intervention: after a rich argumentation, in fact the authors conclude that «[t]o comply with their human rights obligations, ECHR member states must pursue drastically accelerated climate action, at the level of each state's highest possible ambition. By not adopting targets and reducing emissions at that level of ambition, states fail to prevent foreseeable human rights harms caused by climate change — and thereby violate their obligations»[60]. The role of the Court should therefore be to verify whether the measures were adopted with due diligence[61], what it indeed already did in the *Cordella* case, noting that «while it is not for it to determine precisely what measures should have been taken in the present case in order to reduce the level of pollution more effectively, it is undoubtedly for it to determine whether the national authorities approached the question with *due diligence*»[62].

3.3. Considerations on the collective causation problem.

The last point we want to address concerns an important question which is relevant both in respect to the status of victim and the merits of the case, i.e. the collective causation

[57] Application, Submission addendum, cit., par 51.
[58] See C. Voigt, *The climate dimension of human rights obligations*, Conference: Human rights for the planet (ECHR and COE), 5 Oct. 2020, p. 4, available at https://www.jus.uio.no/ior/english/people/aca/chrisvo/voigt_final-talk_the-climate-dimension-of-human-rights-obligations.pdf.
[59] Third Party Written Submission on behalf of the Global Justice Clinic, the Climate Litigation Accelerator & Professor C. Voigt, op. ult. cit.
[60] *Ibidem*, par 49.
[61] On the notion of due diligence, see *ex multis* S. Cassella (ed), *Le standard de due diligence et la responsabilité internationale - Journée d'études franco-italienne du Mans*, Paris, Pedone, 2018, in particular S. Forlati, *L'objet des différentes obligations primaires de diligence: prévention, cessation, répression. . .?*, p. 39 ff.; A. Peters, H. Krieger and L. Kreuzer (eds), *Due Diligence in International Law: Dissecting the Leitmotif of Current Accountability Debates* , Oxford, Oxford University Press, 2020. See also, with respect to positive obligations and due diligence, V. Stoyanova, *Due Diligence versus Positive Obligations* in J Niemi, L Peroni and V. Stoyanova (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention*, Routledge, 2020 and literature quoted therein.
[62] *Cordella and Others v Italy*, cit., par. 161.

problem[63].

Indeed, the fact that climate change is due to greenhouse gas emissions caused by multiple subjects and the consequences affect humanity as a whole (and in an unequal way), has enlightened a problem of collective causation[64] which has been raised "to shield individual defendants from responsibility"[65] in many cases and is a central argument also in the Respondent defence in the present case[66].

The causation problem is indeed relevant both on the stage of proceedings, because claims might be declared inadmissible whether the state action or omission is considered not directly affecting the applicants, and on the substantive level, whereas "a defendant state did not breach an obligation since nothing that that state could do would suffice to prevent climate change-related harms"[67].

On the international level it is very interesting the case *Sacchi v Argentina and Others*[68], where the UN Committee on the Rights of the Child gave a decision which "while a loss for the specific claimants [the case was declared inadmissible for non-exhaustion of domestic remedies], was a major win for future climate change complaints under the OPIC

[63] See N. Nedeski and A. Nollkaemper, *A guide to tackling the collective causation problem in international climate change litigation*, in *EJIL:Talk!*, 15 December 2022.

[64] The problem of causality is a complex issue that goes beyond the scope of this article, which limits itself to highlighting the contribution of scientific evidence in the attribution of State responsibility: on the subject in general see V. Lanovoy, *Causation in the Law of State Responsibility*, in *British Yearbook of International Law*, 2022) and A. Ollino and G. Puma, *La causalità e il suo ruolo nella determinazione dell'illecito internazionale*, in *Rivista di diritto internazionale*, 2022, p. 313 ff.; with specific reference to climate litigation see M. Wewerinke-Singh, *State responsibility, climate change and Human Rights under International Law*, cit. p. 88 ff; M. Feria-Tinta, *Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and other Key underlying notions*, in *Europe of Rights & Liberties*, 2021, p. 51 ff; M. Torre-Schaub, *La protection de l'air et de l'atmosphère*, cit., in particular pp. 5-9; H. Keller and C. Heri, *The future is now*, cit., p. 167.

[65] *Ibidem.*

[66] In the transcript of the hearing of 29 March 2023, the causation problem is mentioned more than ten times.

[67] N. Nedeski and A. Nollkaemper, *A guide to tackling the collective causation problem*, cit. The authors make reference also to the relevance of the causation problem with respect to reparation, which however is beyond the scope of this paper.

[68] *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 107/2019*, CRC/C/88/D/107/2019, 8 October 2021. On this decision see A. Nolan, *Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina*, in *EJIL:Talk!*, 20 October 2021; M. Wewerinke-Singh, *Communication 104/2019 Chiara Sacchi et al v Argentina and Others Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Rights of the Child's decision on Sacchi v Argentina*, in *Leiden Children's Rights Observatory*; M. La Manna, *Cronaca di una decisione di inammissibilità annunciata: la petizione contro il cambiamento climatico Sacchi et al. c. Argentina non supera il vaglio del Comitato dei diritti del fanciullo*, in *Sidiblog*, 15 novembre 2021; A. Liguori, *Cambiamento climatico e diritti umani dinanzi al Comitato dei diritti del fanciullo*, in *La Comunità internazionale*, 2022, p. 117 ff.; L. Magi, *Cambiamento climatico e minori: cambiamento climatico e minori: prospettive innovative e limiti delle decisioni del Comitato per i diritti del fanciullo nel caso Sacchi et al.*, in *Diritti umani e diritto internazionale*, 2022, p. 157 ff.

due to the Committee's expansive approach to the jurisdictional issue and *causality*"[69]. The communication at the base of the decision, which differs in several aspects from the present case (it was indeed introduced in 2019 by 16 young people from 12 countries, including the well-known Swedish activist Greta Thunberg, accusing Argentina, Brazil, France, Germany and Turkey of having violated the Convention on the Rights of the Child causing and perpetuating the climate crisis), has been "the first attempt to hold multiple States Parties to an international human rights treaty responsible for human rights violations related to climate change"[70]. The decision, although the final outcome of inadmissibility, is very important for the case under exam for some very important general statements regarding also the notion of causality and victim status[71].

To this end, it is appropriate to recall some fundamental passages of the Committee's decision in relation to the concept of jurisdiction and victim. With regard to jurisdiction[72], the Committee adopted a very broad notion, inspired by the *Advisory Opinion* of the Inter-American Court on *The Environment and Human Rights* of 15 November 2017[73], where the Inter-American Court had used "a new test to determine the Convention's extraterritorial application in cases involving environmental harm"[74], based on a functional notion of jurisdiction. In this opinion, in fact, the Court stated that «When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when

[69] A. Nolan, *Children's Rights and Climate Change,* cit. Italics added.
[70] M. Wewerinke-Singh, op. cit.; the Duarte case, introduced by six children against Portugal and other 32 COE Member States, was instead introduced before the European Court in September 2020.
[71] In this decision, the question of causality is relevant to the assertion of state jurisdiction. However, in my view, the Committee's interpretation of causation could be useful also for the different (but in a certain way) connected question of determination of victim status: see *ultra*.
[72] The Strasbourg Court will have to face a similar problem concerning the scope of jurisdiction in the Duarte case: One may wonder if it will affirm a broad notion of jurisdiction such as the one envisaged by the Committee of the Child in the Sacchi case; indeed, in the recent case *H.F. and others v France* (judgment of 14 September 2022), concerning the issue of the repatriation of French foreign fighters' family members (especially minors), who were detained in Syrian camps, the Strasbourg Court didn't follow the approach on jurisdiction adopted, few months before, by the CRC on the similar case *L.H. and others v France*: see on this point A. Fazzini, *L'applicabilità extraterritoriale degli obblighi positivi in materia di diritti umani: il rimpatrio dei familiari dei foreign fighters francesi,* in *La Comunità internazionale,* 2023, p. 323 ff.
[73] Inter-American Court of Human Rights' Advisory Opinion on *The Environment and Human Rights*, 15 November 2017, OC-23/17. See M. Feria-Tinta and S. Milnes, *The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights*, in *EJIL:Talk!*, 26 February 2018**,** A. Berkes, *A New Extraterritorial Jurisdiction Recognized by the IACtHR*, in *EJIL:Talk!*, 28 March 2018; M. L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, in *ASIL Insights*, 10 May 2018.
[74] See M. L. Banda, *Inter-American Court of Human Rights' Advisory Opinion*, cit.

the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation»[75]. With respect to the case under exam, the Committee of the Child first of all recalls this Opinion, stressing that: «In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin *for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage*»[76], i.e. for a violation of a positive obligation of prevention. The Committee also considers that, although the elements necessary to establish State liability are rather a matter of substance, «the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction»[77]. As noted, in applying the test developed by the Inter-American Court, the Committee interprets the causality requirement as consisting of three elements: "first, the State on whose territory the greenhouse gas emissions originated must exercise *effective control* over the sources of those emissions; second, there must be a *causal link* among the acts or omissions of the State of origin and the negative effects on the rights of the child even outside its territory; third, the alleged harm suffered by victims must have been '*reasonably foreseeable*' to the State at the time of its actions or omissions"[78].

What we would like to stress here is that in order to demonstrate that the above-mentioned requirements are fully met in the *Sacchi* case, the Committee refers to scientific evidence for affirming, on one hand, that carbon emissions originating in each State Party contribute to the worsening of climate change and, on the other hand, that climate change has a negative impact on the enjoyment of rights both internally and externally the territory of the State Party, stressing that «through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions»[79]. The Committee also adds, through the reference to the principle of

[75] Par. 104 Advisory Opinion. Italics added.
[76] Par 10.5 of the Decision referring to paragraphs 101-102 of the *Advisory Opinion*.
[77] *Ibidem.*
[78] See on this point M. Wewerinke-Singh, *Communication 104/2019 Chiara Sacchi,* cit.*;* M. La Manna, *Cronaca di una decisione di inadmissibilità annunciata,* cit.
[79] *Decision adopted by the Committee on the Rights of the Child*, cit., par. 10.8.

common but differentiated responsibility, explicitly enshrined in the Paris Agreement, that «the *collective nature of the causation of climate change*[80] does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location». The argument invoked in the defence by the Respondents – based on the fact that all States contribute through emissions to aggravate climate change, and therefore it would not be possible to establish the causal link – is therefore rejected since each State is responsible for its share of emissions[81], which is indeed the argument of the applicants in the *Klimaseniorinnen* case[82].

The scientific evidence is also invoked to justify the existence of foreseeability of the damage: the Committee notes, in fact, that «In light of existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including rights under the Convention, the Committee considers that the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party»[83]. In addition, the Committee notes – in line with the position of the Inter-American Court that not all adverse effects in cases of cross-border damage give rise to the liability of the State in whose territory the activities causing cross-border damage took place – that the existence of jurisdiction must be examined in the light of the particular circumstances of the case and that the damage must be significant; the remaining part of the causal chain is dealt jointly with the victim status requirement[84]: the Committee concludes that the effects of climate change have affected the applicants *personally* not only in the light of the circumstantial personal consequences (asthma due to smoke from fires; life-threatening diseases such as malaria, *dengue* fever and *chikungunya* ; the lack of water due to drought, the risk that one's own lands could disappear under water within a few decades, etc.), but also for the foreseeable effects that climate change will produce in the future.

This decision is important for the pending case before the ECHR because there are several similarities: in both cases the applicants are part of a vulnerable group (young people in the Sacchi case, elderly women in the *Klimaseniorinnen* one) and allege a violation of positive

[80] Italics added.
[81] M. La Manna, *Cronaca di una decisione di inammissibilità annunciata*, cit. See also A. Nolan, *Children's Rights and Climate Change*, cit., noting that "the Committee did not differentiate between state responsibility for emissions directly caused by state actors and those caused by non-state actors".
[82] See Application, par. 56.
[83] *Decision adopted by the Committee on the Rights of the Child*, cit., par. 10.10.
[84] See A. Nolan, *Children's Rights and Climate Change*, cit.

obligations for failure to adopt all reasonable measures to prevent and mitigate climate change; and in both cases the respondent States invoke the collective causation problem to evade responsibility. What we want, in particular, to underline from Sacchi is the importance of recurring to science to rebut the collective causation argument, in conformity with a growing research trend[85] which might help to "corroborate factual links between global greenhouse gas emissions and climate change-related harms"[86], and even, according to some scholars[87], "enable quantifying individual emitters' marginal contributions to extreme weather events[88] and slow-onset changes[89]".

Actually, referring to scientific evidence might be important also with respect to the causation problem in respect of the merits of the case, at the stage of determining the breach of a positive obligation under articles 2 and/or 8 ECHR.

Switzerland indeed has made recourse to the so called «drop in an ocean argument»: its actions alone could not prevent the risks that climate change involves and «its failures cannot therefore be considered causative of the relevant harm»[90]. The applicants' lawyer, however, during the hearing convincingly claimed that «this argument has been roundly rejected by Contracting State Courts, including the Dutch Supreme Court in the *Urgenda* case […] If a State as rich and technically advanced as Switzerland does not do its fair share – taking the lead as well as pursuing its highest possible ambition – then other States will also fail to do so. It follows that when a State such as Switzerland fails to do its share to meet the objectives of that agreement, it directly increases emissions, and it also discourages other States from doing their share»[91].

Indeed, the *Urgenda* case is a very important case where for the first time a domestic court side-stepped the collective causation problem by interpreting articles 2 and 8 ECHR, in

[85] See the Sixth Assessment Report — IPCC, available at https://www.ipcc.ch/assessment-report/ar6/ and F.E. Otto, P. Minnerop, P. Raju, E. Harrington, L.J. Stuart-Smith, E. Boyd, R. James, R. Jones and K.C. Lauta, *Causality and the fate of climate litigation: The role of the social superstructure narrative*, in *Global Policy*, 2022, p. 736 ff.

[86] N. Nedeski and A. Nollkaemper, *A guide to tackling the collective causation problem*, cit.

[87] R.F. Stuart-Smith, F.E. Otto, A.I. Saad, G. Lisi, P. Minnerop, K. Cedervall Lauta, K. van Zwieten and T. Wetzer, *Filling the evidentiary gap in climate litigation*, in *Nature Climate Change*, 2021 p. 651 ff.

[88] Such as heatwaves, storms or floods.

[89] Such as sea level rise, salinification of water.

[90] In addition, the Government claimed that the Applicants have not suffered effects on their rights under Articles 2 and 8 «with the necessary degree of intensity» (par. 55 of Government Replay of 16 July 2021). On this question see K. Braig and S. Panov, *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?*, in *Journal of Environmental Law and Litigation*, 2020, p. 261 ff.

[91] Adding that every fraction of a degree of temperature increase is relevant: see Transcript of the hearing, available at https://en.klimaseniorinnen.ch/wp-content/uploads/2023/05/Transcript-Hearing-29-March-2023-final.pdf, at p. 16.

light of treaties and principles of environmental and climate law, as implying positive obligations to do its share to meet the objectives of the Paris Agreement[92]. As pointed out, the collective causation problem was overcome in that context because "there is no need to demonstrate that the link between the conduct of an individual state and the harm that is to be prevented satisfies the "*but for"* test of causation"[93]. It is rather required that the State had taken reasonable steps to avoid the risk of harm about which it knew or ought to have known[94]: to this end "attribution science can strengthen a plaintiff's claims[95]". Turning to the *Klimaseniorinnen* case, what we might infer is that, if scientific evidence demonstrates that more emissions in the future will increase heatwaves and that heatwaves increase the risks of mortality and morbidity on elderly women, then a failure from Switzerland in reducing emissions at its utmost may help corroborate the argument that it is contributing to a real risk of harm for the Applicants.

4. Conclusions.

The European Court will presumably pronounce itself on the *Klimaseniorinnen* case at some time in 2024[96].What it will say remains to be seen, especially with respect to the causal link issue, which is a very complex problem. Indeed, the fact that climate change is due to greenhouse gas emissions caused by multiple subjects and the consequences affect humanity as a whole (and in an unequal way), is enlightening a problem of collective causation. As pointed out, "Climate change may be a 'death of a thousand cuts' that is difficult to attribute to any one state's emissions"[97], and applying direct and exclusive

[92] See on this point, also for some critical remarks, F. Passarini, *CEDU e cambiamento climatico, nella decisione della Corte Suprema dei Paesi Bassi nel caso Urgenda, in Diritti umani e diritto internazionale*, 2020, p. 782 ff. On shared responsibility with respect to climate change see in particular J. Peel, *Climate Change* in A. Nollkaemper, I. Plakokefalos and J. Schechinger (eds), *The Practice of Shared Responsibility in International Law*, Cambridge, Cambridge University Press, 2017.
[93] N. Nedeski and A. Nollkaemper, *A guide to tackling the collective causation problem,* cit.
[94] See, *mutatitis mutandis*, ECtHR, judgment of 28 March 2000, *Mahmut Kaya v Turkey*, no. 22535/93, par. 115.
[95] *Ibidem.* The authors add that "Findings that future emissions will make sea level rise X times more likely or intense, or that such emissions will make heatwaves more likely, may help substantiate the argument that a state contributes, in causal terms, to a real risk of harm and that that state should take measures to prevent that risk. Moreover, plaintiffs can rely on methods that scientifically link an individual emitter's contribution to climate change to the likelihood or intensity of climate change-related harms, to argue that an emitter can, by taking preventative measures, *decrease* the likelihood or intensity of harm".
[96] Podcast on *The biggest climate case that ever was*, episode of The Europeans, available at https://open.spotify.com/episode/33IuPfE9JlOnTinVcHqvbn.
[97] H. Keller and C. Heri, *The future is now*, cit., p. 167.

causality might be at the same time problematic and inappropriate in this kind of situation[98]. Such a question would however deserve an in-depth analysis, which is beyond the scope of this paper[99]. My aim was rather to focus on the contribution of scientific evidence in the attribution of State responsibility, according to a growing trend which ended up in successful outcomes in previous cases and might hopefully also bring the Strasbourg Court to find a violation of positive obligations under Articles 2 or 8 ECHR in the *Klimaseniorinnen* case.

Why would this be important? Indeed, a lively debate is investing the utility and the suitability of the *Rights Turn* before domestic courts and international organs to fight climate change[100]. And it is true that climate litigation has indisputable limits. As pointed out[101], "[h]human rights remedies provide declaratory relief to name and shame abusers, but this makes little difference, if is not followed by action to prevent further harm and remedy the harm caused".

However, the most important contribution that litigation might give is putting pressure on State and non-State actors, and more in general to help all actors ("the institutional, political, social and cultural fabric of every State"[102]) to heighten awareness that climate change is one of the most important challenges of our time and a very complex one "for any single regulatory tool to adequately address"[103]. Still, litigation based on human rights is one of these tools and now time has come for the European Court of Human Rights to do its part.

Abstract: Il 29 marzo 2023 si è tenuta la prima udienza pubblica davanti alla Grande Camera della Corte europea dei diritti dell'uomo sul caso *Klimaseniorinnen and Others* al

[98] *Ibidem*.
[99] See literature quoted at note 65.
[100] C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *European Journal of International Law*, 2022, p. 925 ff.; A. Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, in *European Journal of International Law*, 2022, p. 953 ff.; C. Heri, *Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar*, in *EJIL:Talk!*, 6 October 2022; B. Mayer, *Climate Litigation and the Limits of Legal Imagination: A Reply to Corina Heri*, available at https://cil.nus.edu.sg/blogs/climate-litigation-and-the-limits-of-legal-imagination-a-reply-to-corina-heri/, 4 November 2022.
[101] A. Savaresi, *Human Rights and the Impacts of Climate Change*, cit., p. 246.
[102] See *supra*, text in correspondence at note 1.
[103] C. Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, in C. Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, Cambridge, Cambridge University Press, 2022, p. 12 ff.

c. Svizzera, che riguarda violazioni dei diritti umani connesse al cambiamento climatico. Le ricorrenti sono l'associazione *Klimaseniorinnen* e quattro anziane signore che, dopo aver esaurito le vie di ricorso interne, il 26 novembre 2020 si sono rivolte alla Corte europea lamentando, tra l'altro, la violazione degli articoli 2 (diritto alla vita) e 8 (protezione della vita privata e familiare) della Convenzione europea dei diritti dell'uomo (CEDU) a causa della mancata adozione da parte della Svizzera di adeguate misure per ridurre i rischi, per la loro salute e la loro vita, connessi ai cambiamenti climatici.

In questo articolo l'autrice si concentra su due aspetti ai quali è stata dedicata grande attenzione in occasione dell'udienza davanti alla Grande Camera, ovvero la nozione di vittima e l'applicabilità degli articoli 2 e 8 CEDU - più specificamente, degli obblighi positivi inerenti a tali articoli - alla luce degli impegni assunti dagli Stati nell'ambito del diritto climatico internazionale. Alcune considerazioni finali riguardano un'importante questione che è rilevante sia per accertare lo status di vittima, sia per l'esame del merito, ovvero il problema del nesso causale.

Abstract: On 29 March 2023 the first public hearing concerning climate change-related violations of human rights was held before the Grand Chamber of the European Court of Human Rights on the case *Klimaseniorinnen and Others v Switzerland*. The applicants are the association Klimaseniorinnen and four elderly ladies who, after exhausting domestic remedies, turned to the European Court on 26 November 2020 alleging *inter alia* a violation of Articles 2 (right to life) and 8 (protection of private and family life) ECHR due to Switzerland's failure to take appropriate measures to reduce the risks for their health and lives connected to climate change.

In this paper the author focuses on two aspects which were at the centre of the hearing before the Grand Chamber, namely the notion of victim and the applicability of Articles 2 and 8 ECHR - more specifically, of the positive obligations inherent in these articles - in the light of the commitments undertaken by States under international climate law. Some final considerations address an important question which is relevant both in respect to the status of victim and the merits of the case, i.e. the collective causation problem.

Parole chiave: cambiamento climatico – CEDU – status di vittima – obblighi positivi– nesso causale.

Key words: climate change – ECHR - victim *status* – positive obligations – causal link.