Climate litigation between international law and domestic remedies: the virtuous example of collective claims*

Giorgia Pane
University of Palermo
ORCID: https://orcid.org/0000-0003-4136-5025
DOI: 10.54103/milanoup.151.c191

Claims concerning the environment and its relationship with human rights are growing in number and impact. This relationship is mainly explored in different *fora* through the lens of international human rights law. In this very heterogeneous framework, an interesting perspective is offered by domestic case-law in Europe, in which human rights' obligations stemming from the jurisprudence of the ECtHR are used as a means of interpretation of States' obligations towards their citizens. The focus on domestic jurisdiction offers various levels of facilitation to the access to environmental justice. On the other hand, it clashes with obstacles deriving from the risk of the lack of impact that a single decision can have, especially in legal systems of civil law typical of continental Europe. A possible way of contrasting these inherent obstacles is that of the "collective claim", through which issues of a communal interest can be brought forward. The prospected solution, which shows appreciable margins of success, is that of the application of international human rights' law standards of interpretation of international commitments on a national level and from a collective point of view.

Keywords: international human rights law; European Convention of Human Rights; climate litigation; international environmental law; collective remedies; intergenerational equity

* This contribution is a reworking of the following paper: G. Pane, *Pro e contro dei rimedi domestici: prospettive di sinergia europea nel contenzioso climatico collettivo*, in *Ordine internazionale e diritti umani* 2023, p. 375 ss.

1. Introduction

The term "climate litigation" encompasses a multitude of cases,[1] directed both against public authorities and against private actors, held responsible for not taking adequate measures to combat climate change.[2] Such measures are identified, for most States, in the objectives set by the Paris Agreement.[3] Article 2, specifically, states the need to respond to the threat posed by climate change, inter alia, "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".[4]

The Paris Agreement contributed to the recognition of the link between environmental issues and human rights that gave rise to the "rights-based

1 Some of the cases are designed to achieve results that go beyond the individual dispute. These cases seek to advance climate policies and encourage public debate. In these cases, stakeholders make strategic decisions about who will raise the case, where and when the case will be presented, and what legal remedy will be required. These cases are sometimes referred to as "strategic litigation" cases. The term "climate litigation" also includes civil and administrative proceedings raised in the name of individual interests. See J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2022 snapshot policy report*, London, June 2022.

2 On *climate litigation* see W. Kahl, M.P. Weller, *Climate change litigation. A handbook*, London, 2021; F. Sindico, M. Moise Mbengue, *Comparative climate change litigation: beyond the usual suspects*, Berlin, 2021; L. Burgers, *Should Judges Make Climate Change Law?,* in *Transnational Environmental Law* 2020, p. 55 ss. On "*human rights-based approach*" applied in case-law, S. Jodoin, A. Savaresi, M. Wewerinke-Singh, *Rights-based approaches to climate decision-making*, in *Current Opinion in Environmental Sustainability* 2021, p. 45 ss., which shows the evolution of the relationship between human rights and climate change legislation and policy.

3 The Paris Agreement was signed by 195 Member States of the United Nations Framework Convention on Climate Change (UNFCCC).

4 Paris Agreement, Article 2, letter a).
As highlighted by M. Burger, J. Wentz, R. Horton, *The Law and Science of Climate Change Attribution*, in *Columbia Journal of Environmental Law* vol. 45, 2020, p. 147: "Evidence linking human influence on climate to the harmful impacts of climate change plays an important role in lawsuits seeking to compel action on climate change as well as the legal defense of programs and regulations aimed at reducing greenhouse gas emissions or advancing adaptation objectives". There is now scientific consensus about the need to limit the emission of greenhouse gases – in particular CO2 – that cause the temperature of the planet to rise. According to the Paris Agreement, global warming must be kept "well below" 2ºC compared to pre-industrial average levels, trying to limit the increase in temperature to 1.5ºC. If the global temperature rise exceeds 2ºC this would result in flooding due to rising sea levels, heat stress due to more intense and prolonged heat waves, increased respiratory diseases associated with deterioration of air quality due to periods of drought (severe forest fires), increased spread of infectious diseases, severe flooding due to torrential rains, and interruptions of food production and drinking water supply. Ecosystems, flora and fauna would be seriously damaged, and biodiversity would be lost. An inadequate climate policy would, in the second half of the century, result in hundreds of thousands of victims in Western Europe alone. The risk of reaching such a point of no return worsens exponentially with an increase in temperature between 1ºC and 2ºC.

approach",[5] through which climate issues are anchored to fundamental rights. This connection has the dual function of giving climate issues a transversal legitimacy – based on a plurality of rights – and relying on the interpretation given by the regional courts on human rights in order to clarify the scope of State obligations.[6]

It is interesting to note that human rights-based climate cases have been predominantly raised in Europe, followed by North America, Latin America, Asia-Pacific and Africa, and that only about 13% of disputes were submitted to international and regional human rights bodies.[7] Even though a substantial part of the climate dispute relies on the rights enshrined in international human rights conventions, these courts are not always best suited to address climate change issues.

Climate cases mainly involve environmental associations,[8] which tend to be more suitable for promoting widespread interests such as the environment, and are directed to the States,[9] the main recipients of human rights obligations.

In this very heterogeneous framework, an interesting perspective is offered by domestic case-law in Europe, in which human rights' obligations stemming from the jurisprudence of the ECtHR are used as a means of interpretation of

5 Paris Agreement, Preamble: "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity […]". On the recognition of the relationship between climate change and human rights' violations, see the two Reports by J. Knox, Special Rapporteur on the Environment and Human Rights at the United Nations Human Rights Council (UNHRC): *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report*, UN Doc A/HRC/31/52 (2016); *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles*, UN Doc A/HRC/37/59 (2018).

6 On this dual funcion, see P. Pustorino, *Cambiamento climatico e diritti umani: sviluppi nella giurisprudenza nazionale*, in *Ordine internazionale e diritti umani*, 2021, p. 600: «[…] il richiamo della disciplina normativa sui diritti umani – sia essa specificamente dedicata alla protezione ambientale o ricavata per via ermeneutica dal diritto alla vita, alla salute, *etc.* – sembra in grado di svolgere una funzione correttiva di specificazione del contenuto degli obblighi statali a livello internazionale e interno in materia ambientale […]».

7 A. Savaresi, J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, in *Journal of Human Rights and the Environment*, cit.

8 J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2022 snapshot policy report*, cit., p. 11 ss.: more than half of all cases (307 out of 576) and about 90% (56 out of 63) of cases in the reference study period were raised by non-governmental organisations, individuals, or both.

9 J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2022 snapshot policy report*, cit., p. 11 ss.: just over 70% (421 out of 576) of all global cases and 73% (46 out of 63) of cases in the reference study period were filed against governments.

States' obligations towards their citizens (i.e., the so-called *Urgenda Case*, and its "followers").

The present paper aims at analysing the pros and cons of this pattern.

The focus on domestic jurisdiction offers various levels of facilitation to the access to environmental justice [para. 2]. First, it provides "softer" criteria of admissibility than international ones. Secondly, it produces binding judgments already installed in the domestic legal system, which are fully and immediately enforceable. And lastly, it often recognizes locus standi for third parties or it offers the possibility of class actions.

On the other hand, domestic remedies clash with obstacles deriving from the separation of powers argument and the risk of the lack of impact that a single decision can have, especially in legal systems of civil law typical of continental Europe [para. 3].

A possible way of contrasting these inherent obstacles is precisely that of the "collective claim". The impact that environmental and climate deterioration have on human rights cannot and should no longer be tackled as a case-by-case issue.

By analysing national case law on climate change, we can observe a trend of application of international human rights' law standards of interpretation of international commitments on a national level and from a collective point of view. This demonstrates that, although the protection afforded by the European Convention on Human Rights to the Environment is limited, the use of its interpretative standards can serve as an effective instrument of environmental protection at national level, contributing to raising the threshold set by the Convention itself.

2. The ECHR as a means of interpretation of international environmental commitments: *Urgenda and Climate case Ireland*

Within the European regulatory framework, human rights are enshrined in the European Convention on Human Rights (ECHR), whose monitoring body is the European Court of Human Rights ("the European Court").

Although the Convention does not protect the environment as such,[10] the European Court has been called upon several times to interpret its Articles with

10 The European Convention on Human Rights is the only regional human rights treaty that does not provide for a right to a healthy environment, or its equivalent. On 29 September 2021, the Parliamentary Assembly of the Council of Europe passed a resolution urging member States to adopt an Additional Protocol that would adequately protect the environment, encouraging "[…] the Council of Europe to recognise, in time, the intrinsic value of nature and ecosystems in the light of the interrelationship between human societies and

the purpose of developing its case-law on the environment, in view of the fact that the exercise of certain rights of the Convention may be undermined by the existence of environmental damage and exposure to environmental risks.[11]

This is done mainly through the application of Articles 2 (right to life) and 8 (right to respect for private and family life). It is worth noting that, although the substantive scope of these two provisions is different, the Court held that in the context of hazardous activities the scope of positive obligations under Article 2 of the Convention overlaps to a large extent with those under Article 8.[12] Therefore, the State is required to take the appropriate measures not only in the case of material damage but also if there is a "real and immediate risk" that such damage occurs.[13] In this context, the term "immediate" does not mean that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the people involved, even if it were to materialise only in the longer term.[14]

---

nature" (Parliamentary Assembly, Res. 2396, 29 September 2021, para. 6). More recently, the Committee of Ministers has recommended that all 46 Member States actively consider the recognition of the human right to a clean, healthy and sustainable environment (CM/Rec(2022)20, 27 September 2022).

11 The first case in which the European Court of Justice ruled on the matter was European Court of Human Rights, *Lopez Ostra v. Spain*, application no. 16798/90, judgment of 9 December 1994. At para. 51, the Court stated: "Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".

12 ECtHR, *Budayeva and others v. Russia*, applications nos. 15339/02, 21166/02, 20058/02, 11673/02 e 15343/02, judgment of 20 March 2008, para. 133: "It has been recognised that in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8 (see Öneryıldız, cited above, §§ 90 and 160). Consequently, the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life".

13 O.W. Pedersen, *The European Court of Human Rights and International Environmental Law*, in *The Human Right to a Healthy Environment*, J.H. Knox e R. Pejan (eds), Cambridge, 2018, p. 86 ss.

14 ECtHR: *Öneryildiz v. Turkey*, application no. 48939/99, judgment of 30 November 2004 (in the case of a gas explosion in a landfill, the risk of this happening had existed for years and had been known to the authorities for years); *Budayeva and others v. Russia*, applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 March 2008 (the authorities were aware of the danger of mudslides and the possibility of them occurring); *Kolyadenko and others v. Russia*, applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgment of 28 February 2012 (the authorities knew that in case of exceptionally heavy rains, evacuation would be necessary); *Taskin and others v. Turkey*, application no. 46117/99, judgment of 10 November 2004 (threat of environmental pollution that could materialise in twenty or fifty years); *Tătar v. Romania*, application no. 67021/01, judgment of 27 January 2009 (possible long-term health risks from heavy metal emissions from gold mining).

The Court has repeatedly pointed out that the crucial element to trigger the violation of the rights referred to in Article 8 is the existence of a harmful effect on a person's private or family life.[15]

More generally, under Article 34 of the Convention, a person lodging an application must be able to declare that he or she is a victim of an infringement of the Convention. This means in general that the applicant must be directly affected by the infringement. Art. 34, therefore, does not provide for the possibility of an *actio popularis*, as confirmed by the case law of the Court.[16] This limit has repercussions on the possibility for non-governmental organisations to base their dispute at national level on Articles 2 and 8 of the ECHR.

Indeed, one of the main issues in climate cases is determined by national legislation on legal standing. This is often invoked as a parameter of respect for the principle of the separation of powers,[17] in fact standing up as a defence of democracy, as such difficult to overcome. This is further complicated when national legislation is intertwined with the relevant legislation within the European Convention on Human Rights. The cases dealt with in this paragraph represent two ways of dealing with the relationship between international law and domestic remedies on the matter of legal standing.

The first case, also from a chronological point of view, is the famous *Urgenda* case, issued in 2015 by a Dutch environmental group, the Urgenda Foundation (from the English words "urgent" and "agenda"), and about nine hundred Dutch citizens, which sued the Dutch government, demanding that it implement more effective measures to prevent global climate change.

The Hague Tribunal ordered the Dutch State to limit greenhouse gas emissions to 25% above 1990 levels by 2020, finding the government's current commitment to reduce emissions by 17% insufficient to meet the State's fair contribution to the UN target of keeping global temperature increases within 2°C above pre-industrial conditions. The judges concluded that the State has a duty to take climate change mitigation measures because of the "severity of the consequences of climate change and the great risk of climate change occurring".[18]

15 *Ex multis* ECtHR, *Kyrtatos v. Greece*, application no. 41666/98, judgment of 22 May 2003, para. 52: "The crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded […] is the existence of a harmful effect on a person's private or family life and not simply the general deterioration of the environment".

16 ECtHR: *Aksu v. Turkey*, applications nos. 4149/04 e 41029/04, judgment of 15 March 2012; *Burden v. UK*, application no. 13378/05, judgment of 29 April 2008; *Dimitras and others v. Greece*, applications nos. 59573/09 e 65211/09, decision of 4 July 2017; *Cordella and others v. Italy*, applications nos. 54414/13 e 54264/15, judgment of 24 January 2019; *Kalfagiannis and Pospert v. Greece*, application no. 74435/14, decision of 9 June 2020.

17 See below, para. 3.1.

18 To combat climate change, art. 4 para. 2 of the Paris Agreement states that each State "[…] shall prepare, communicate and maintain successive nationally determined contributions that

In order to arrive at this conclusion, the court cited, without directly applying them, the principles of the European Convention on Human Rights.

Both the government and Urgenda appealed. The latter, incidentally, challenging the court's decision that the Foundation could not rely directly on Articles 2 and 8 of the European Convention on Human Rights in the proceedings.

On 9 October 2018, the Hague Court of Appeal upheld the District Court's judgment, concluding that, failing to reduce greenhouse gas emissions by at least 25% by the end of 2020, the Dutch Government was acting illegally in breach of its "duty of care" under Articles 2 and 8 of the ECHR.[19]

The Dutch government appealed to the Supreme Court, which, on 20 December 2019, confirmed the decision pursuant to Articles 2 and 8 of the ECHR, with a ruling that was defined as "a landmark for future climate change litigation".[20]

In par. 5 – entitled «Do articles 2 and 8 ECHR oblige the State to take measures?» – the Court answered a number of questions concerning the scope and application of Articles 2 and 8 of the ECHR.

Recognising that Articles 2 and 8 impose positive obligations on States, the Supreme Court focuses on a dual impact of the European Court's interpretation standards. First, it states that, in accordance with established case-law of the European Court of Human Rights, the provisions of the ECHR must be interpreted and applied in such a way as to make its guarantees practical and effective.[21] This shows that, in its assessment, the Supreme Court recognises

---

it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".

19 The Court upheld Urgenda's appeal, stating that the Dutch Government has an obligation under the European Convention to protect these rights from the real threat of climate change. In so doing, it rejected the government's argument that the lower court's decision constituted "an order to create legislation" or a violation of the principle of separation of powers (see below, para. 3.1). In response to those arguments, the Court affirmed the obligation to apply the provisions with direct effect of the treaties to which the Netherlands is a party, including Articles 2 and 8 of the ECHR. It also made clear that nothing in Article 193 of the Treaty on the Functioning of the European Union prohibited a Member State from taking more ambitious action than the EU as a whole, or that the adaptation measures adopted could offset the government's obligation to reduce greenhouse gas emissions. Finally, it stated that the global nature of the climate emergency did not justify the failure of the Dutch Government to act.

20 A. Nollkaemper, L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, 6 January 2020. Per un'analisi dettagliata del caso e dei suoi punti di forza, si veda M. Montini, *Verso una giustizia climatica basata sulla tutela dei diritti umani*, in *Ordine internazionale e diritti umani*, 2020, p. 506 ss.

21 Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, judgment of 20 December 2019, para. 5.4.1: "According to established ECtHR case law, the provisions of the ECHR must be interpreted and applied so as to make its safeguards practical and effective. According to the ECtHR, this 'effectiveness principle' ensues from 'the object and purpose of the Convention as an instrument for the protection of individual human beings'". See also ECtHR, *Kiliç v. Turkey*, application no. 22492/93, judgment of 28 March

that the interpretation of international human rights standards should depend on the relevant international case law. In this way, it explicitly states that before applying those rules in an internal case, the national court must ask itself how those rules are interpreted in the referring international Court.

As confirmed by par. 5.6.1, in which the Court examines the value of the ECHR's interpretation rules for the Dutch courts,[22] since the ECHR subjects the Netherlands to the jurisdiction of the European Court of Human Rights (Art. 32 ECHR), the Dutch courts must interpret these provisions as the European Court of Human Rights has done or interpret them according to the same standards of interpretation as the European Court of Human Rights.

Secondly, in par. 5.8, the Supreme Court states that, despite the global nature of climate change, Articles 2 and 8 of the ECHR should be interpreted in such a way as to oblige States Parties to "play their part" in combating this danger. This obligation is derived, according to the Supreme Court, from the no harm principle of international law,[23] as evidenced by the Preamble to the United Nations Framework Convention on Climate Change (UNFCCC). Applied to greenhouse gas emissions, the principle implies that States can be called upon to contribute to the reduction of greenhouse gas emissions. This approach justifies a partial responsibility: each State is responsible for its own part and can therefore be called upon to respond.[24]

2000; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, application no. 47848/08, judgment of 17 July 2014.

22 *Urgenda Foundation v. State of the Netherlands*, cit., para. 5.6.1: "Pursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons. Because the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (Article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR".

23 According to the no harm principle a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States. More generally, on the international responsibility of States on the matter of climate change see M. Gervasi, *Le regole della responsabilità internazionale degli Stati dinanzi alla sfida del cambiamento climatico*, in A. Spagnolo, S. Saluzzo (a cura di), *La responsabilità degli Stati e delle organizzazioni internazionali: nuove fattispecie e problemi di attribuzione e di accertamento*, Milano, 2017, p. 61 ss.

24 The Netherlands had argued that the 25% target applied to 'developed nations' as a group, not to individual Netherlands. The Court rejected this argument as the State had not demonstrated why a lower percentage should be applicable to the Netherlands. See A. Nollkaemper, L. Burgers, *A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case*, in *EJIL:Talk!*, cit.: It is relevant that the Netherlands belongs to the countries with the highest emissions per capita in the world. Moreover, the State failed to demonstrate that the 25% reduction by the end of 2020 would have been an unreasonable or unbearable burden under the case law of the European Court. Moreover, this is perfectly consistent with the provisions of the Paris Agreement, in that they provide that each State must submit its NDCs every five years, and with the principle of common but differentiated responsibilities adopted by the UNFCCC. See S. Jolly, A. Trivedi, *Principle of CBDR-RC: Its Interpretation and*

Finally, and this is one of the most interesting aspects of the judgment, the Supreme Court states that the lack of victim status of Urgenda before the European Court does not affect Urgenda's right to initiate national proceedings. This does not deprive Urgenda of the power to appeal under Dutch law under Article 3:305a of the Dutch Civil Code on behalf of residents who are direct victims (para. 5.9.3).[25] Therefore, the fact that Urgenda would not be in a position to initiate proceedings before the European Court in order to prove a violation of the rights laid down in Articles 2 and 8 of the ECHR does not affect the possibility of invoking those same rights – on the basis of those same articles – before the national court. This passage, more than any other, shows the impact of the European Court's interpretation standards in the Supreme Court's ruling.[26]

The issue in *Climate Case Ireland* is mostly identical to *Urgenda*,[27] but the national legislative framework provides a very different conclusion.

Implementation Through NDCS in the Context of Sustainable Development, in *Washington Journal of Environmental Law and Policy* Vol. 11, 2021, p. 309 ss.

25 Art. 3:305a of the Dutch Civil Code guarantees the possibility of a 'class action', stating that any entity that results from its statute as a bearer of specific interests – e.g. the environmental one – can sustain "a legal claim that intents to protect similar interests of other persons", to obtain the following remedies: "[…] in order to force the defendant to disclose the judicial decision to the public, in a way as set by court and at the costs of the persons as pointed out by the court. It cannot be filed in order to obtain compensatory damages (3); A legal action as meant in paragraph 1 cannot be based on specific behaviour as far as the person who is harmed by this behaviour opposes to this (4); A judicial decision has no effect with respect to a person whose interests are protected by the legal action, but who has made clear that he does not want to be affected by this decision, unless the nature of the judicial decision brings along that it is not possible to exclude this specific person from its effect (5)".

26 However, a comment needs to be made on this, as it relates to the issue of the direct applicability of the European Convention. The Netherlands adopts a 'monist' approach to international law and gives the ECHR the same legal status as national law. Courts of 'dualist' States prefer to rely on national laws rather than external sources. H. Keller, A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, 2008; L.R. Helfer, A.M. Slaughter, *Towards a Theory of Effective Supranational Adjudication*, in *Yale Law Journal* 1997, p. 332 ss. On the direct applicability of the European Convention in Italy, still under discussion, see the contributions presented at the SIDI webinar of 3 December 2020, entitled *Diretta applicabilità della CEDU. Quo vadis dopo la sentenza Padula delle Sezioni Unite?* whose proceedings are published in *Diritti umani e diritto internazionale* vol. 1, 2022.
It should be noted, however, that the impact of sources of international law, and in particular of the ECHR, is not necessarily limited by the choice of a 'dualist' approach, which does not preclude the possibility that the jurisprudence of international courts, as the European Court of Human Rights, played a role and was considered in the deliberative and heuristic phase. See J. Bell, *The Argumentative Status of Foreign Legal Arguments*, in *Utrecht Law Review* 2012, p. 8 ss.

27 Friends of the Irish Environment ("FIE") appealed in 2017 to the High Court alleging that the Irish Government's approval of the National Mitigation Plan violated the Ireland's Climate Action and Low Carbon Development Act 2015 ("the 2015 Act"), the Irish Constitution and the European Convention on Human Rights, in particular the right to life and the right to

After the High Court ruled for the government in 2019,[28] the association appealed directly to the Supreme Court, which quashed the National Mitigation Plan ("the Plan") in 2020 because it was *ultra vires* in respect to the 2015 Act that approved it. However, in its judgment, the Supreme Court affirmed that Friends of the Irish Environment lacked standing to bring its claims under the ECHR.[29]

Indeed, the Supreme Court reinstates that in Irish law there's no such thing as an *actio popularis*, and, in addition, the Irish Constitution does not provide a *jus tertii*, which means that Friends of the Environment could not even represent the interests of others.[30]

While in line with the conclusions reached by the Supreme Court in *Urgenda*, namely that the lack of victim status before the European Court did not affect the possibility of an appeal under national law, the Supreme Court based its analysis on the general rule of Irish case law that, in order to be legitimised, the applicant must be able to demonstrate that the rights he enjoys have suffered effective – or potential – harmful interference because of the measure whose constitutionality is in question.[31] The judges admitted, however, that since it is a "rule of practice", it is subject to expansion, exception or qualification when the justice of the case so requires. In this sense, since the fundamental consideration in the exercise of court jurisdiction is to ensure that persons are not adversely affected by the unjust deprivation of a constitutional right,

private and family life. FIE argued that the Plan, which aimed to move to a low-carbon economy by 2050, was inconsistent with Ireland's human rights law and commitments because it was not designed to achieve substantial reductions in short-term emissions. The case was brought before the High Court on 22 January 2019. FIE asked the High Court to annul the government's decision to approve the Plan and, if appropriate, to order the drafting of a new plan.

28 The judges rejected the argument that the Plan was not valid for failing to achieve substantial short-term emission reductions, concluding that the Act did not require special interim targets. The Court stated that the government had properly exercised the political discretion offered by the law, explaining that the Plan was only a first step in achieving the targets for the transition to a low-emission and environmentally sustainable economy by 2050, which would be reviewed and updated. The Court concluded that FIE was entitled to make rights-based claims but rejected the argument that the government had violated the Irish Constitution and the commitments under the European Convention on Human Rights because the Plan was only "one, albeit extremely important, piece of the jigsaw".

29 For a critical analysis of the judgment and its actual impact, see V. Adelmant, P. Alston, M. Blainey, *Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court*, in *Journal of Human Rights Practice* 2021, p. 1 ss.

30 Supreme Court of Ireland, *Friends of the Irish environment v. the Government of Ireland*, judgment of 31 July 2020, para. 5.37. The Supreme Court has reported, departing from it, the position of the judge of first instance, according to which the *locus standi* of FIE was to be recognized on the basis of "important issues of a constitutional nature which affected both its own members and the public at large, as well as significant issues in relation to environmental concerns".

31 Supreme Court of Ireland, *Cahill v. Sutton*, judgment of 9 July 1980, para. 284.

there will be cases where the lack of locus standi may be overlooked if, in the circumstances of the case, there is a "transcendent need".[32]

On the other hand, the Supreme Court, par. 7.18, stated that no "real attempt" had been made to explain why FIE had initiated this procedure and why individual plaintiffs had not initiated the procedure, or tried to intervene. After all, "[i]t is not suggested that the potential class of individual plaintiffs (which is very extensive indeed) suffers from any vulnerability or would face any difficulty in asserting the claim or that the claim would in any way be limited if brought by individuals".[33]

This last passage, that *prima facie* ratifies the definitive lack of locus standi of FIE, emphasises that the issue is not insuperable at all. While the decision of the Supreme Court suggests an evident refusal to take a step forward, it can be argued instead that on the basis of the exception mentioned above – "where there would be a real risk that important rights would not be vindicated unless a more relaxed approach to standing were adopted" – the question of representation, intrinsically linked to intergenerational equity, could be raised again in the future, to be addressed and – possibly – overcome. Indeed, at par. 9.5 of the judgment under examination, having stated that FIE had not sufficiently argued for the existence of an autonomous right to a healthy environment, the Supreme Court concludes that the possibility of invoking rights and obligations of constitutional status is not excluded, stating that they should be addressed in an "appropriate case", but leaving open the question of what the characteristics of the latter might have. Therefore, it would seem that the real question pertains to the rank conferred on the value of the environment, and not to the procedural problem of the lack of legitimacy, wrongly used as an indicator of the violation of the principle of separation of powers.

32 In particular, the judges mention, as acceptable exceptions, those given by the rights of the "unborn" and prisoners with psychiatric disorders. See O. Kelleher, *A critical appraisal of Friends of the Irish Environment v. Government of Ireland*, in *Review of European, Comparative & International Environmental Law* 2020, p. 145: "It is difficult to see how a case, taken by an NGO with a bona fide interest in environmental protection and climate action and strong track record in environmental litigation, challenging a systemic environmental issue that affects the wider community is all that different from these earlier cases. Like those earlier cases that recognized an exception to the general standing rules, those whose interests are prejudiced by the government's inadequate response to climate change are 'the most vulnerable and disadvantaged members of our society'. […] Given the urgent, far-reaching and unprecedented threat runaway climate change poses to a panoply of rights, it is questionable whether the nominal addition of an individual plaintiff would have made the constitutional rights arguments canvassed any more concrete".

33 *Friends of the Irish environment v. the Government of Ireland*, cit., para. 7.18.

3. The other side of domestic remedies: issues and possible ways to overcome them

As stated above, while offering a privileged forum for climate litigation, domestic jurisdiction faces difficulties inherent to its nature. National disputes are often dismissed on the basis of an "anti-democratic" interference of judges in the political process. Environmental concerns are still considered to be a political question, in which the determinations should be left to the democratically elected representatives in Parliaments.

Moreover, issues arise even when the case is considered admissible and there is a favourable ruling. Indeed, national judgments, while being immediately enforceable, are still confined to national borders. This poses the question of the effective impact that these decisions can have for the development of an environmentally conscious case-law in Europe.

These two questions show the apparent limits of domestic remedies. To try and answer them, it is necessary to analyse the theoretical bases of the argument of the separation of powers, and to explore the possibility of a dialogue among courts in Europe.

3.1 The argument of the separation of powers in national jurisprudence: *Neubauer v. Germany*

The principle of separation of powers is one of the arguments most used by judges to justify the inadmissibility of climate cases.[34] However, the thesis does not seem sufficient to stem – or delegitimise – the phenomenon of climate litigation.

The constitutional structure of the governments of most nations in Europe is based on the principle of the separation of powers, pillar of the rule of law, which arose from the need to protect citizens against the arbitrariness of the sovereign.[35] With regard to the role of the judiciary in some climate cases, the

34 To mention some: *Plan B Earth v. The Secretary of State for Business, Energy and Industrial Strategy*, 2019 (alleged violation by the government of the Climate Change Act 2008 for failure to revise its emission reduction target, denied on the basis of government discretion); *Family Farmers and Greenpeace Germany v. Germany*, 2019 (alleged violation of the constitutional rights of plaintiffs with insufficient action to achieve its greenhouse gas reduction targets by 2020, denied on the basis of government discretion); *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment, Transport, Energy and Communications*, 2016 (adequacy of the climate change mitigation objectives and implementing measures of the Swiss Government and possible human rights violations, rejected as a "matter for the democratic process, non-judicial". The Association applied to the European Court of Human Rights in 2020, making it the first climate change case to be brought before the European Court after the exhaustion of domestic remedies. In 2022 it was referred to the Grand Chamber).

35 See *Two treaties of government* by John Locke (1690) and, for the *trias politica*, *L'esprit des lois* by Montesquieu (1748). See also, E.G. Assanti, *Il ruolo innovativo del contenzioso climatico tra*

doubt arises that the decisions of judges result in a judicial activism that goes beyond the boundaries reserved for the judiciary.[36]

On the other hand, it is argued that these judicial decisions confirm a working system of separation of powers based on the "right to justification".[37] According to this theory, which sees the "right to justification" as the true foundation of liberal democracies, judges in climate cases push those who exercise public power to better justify their choices in the light of established scientific knowledge, in order to protect the individual autonomy of future generations.[38] In this sense, the "interference" of judges does not put under pressure the principle of separation of powers, but actually contributes to its full realisation.

Moreover, it is worth considering the collective approach that is considered the basis of the climate cases faced so far. Although neither *Urgenda* nor *Climate Case Ireland* makes explicit mention of intergenerational equity, in both cases the collective and precautionary approach underlies the understanding of the need to protect the environment not only at present but also, and above all, towards the future. The basis of the collectiveness of climate cases relies heavily on the concept of intergenerational equity, enshrined in Principle 1 of the Stockholm

legittimazione ad agire e separazione dei poteri dello Stato. Riflessioni a partire dal caso Urgenda, in *federalismi.it*, 14 July 2021. The Author affirms that in the structure of the *trias politica*, it is already possible to identify the evolution of the founding principle of modern constitutionalism. Montesquieu affirms that it is necessary that the system of State powers be designed in such a way that each can control and, if necessary, restrain the other: it is, therefore, a strictly negative vision of the principle (one power as the limit of the other).

36 For example, in *Urgenda*, the Supreme Court established climate policy in place of the government without a specific legal basis (only on the basis of civil law institutes). While in one case in 2003 the Supreme Court adopted a more sober tone and decided that the judiciary was not allowed to order the legislature to enact legislation. Therefore, a more conservative way was actually possible. See L.F.M. Besselink, *Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 21 March 2003, Civil Chamber, No. C01/327HR. Stichting Waterpakt, Stichting Natuur en Milieu, Vereniging Consumentenbond and three othe*, in *Common Market Law Review* 5, 2004, p. 1429 ss.

37 R. Forst, *Justification and Critique: Towards a Critical Theory of Politics*, Ciaran Cronin (tr.), Polity, 2014.

38 C. Eckes, *Separation of Powers in Climate Cases*, in *Verfassungsblog*, 10 May 2021. The Author critically addresses the concept of "democratic legitimacy", stating that: "[c]onstitutional democracies are committed to an understanding that democratic legitimacy is not necessarily improved by greater majoritarianism. By allocating different functions to the three branches, executive, legislature, and judiciary, separation of powers aims to ensure that the tension between law and majoritarian politics is perpetuated and that neither law nor politics dominates the other. The judiciary has the important function of protecting individual autonomy as a crucially necessary element". See also L. Burgers, *Should Judges Make Climate Change Law?*, in *Transnational Environmental Law* 2020, p. 55 ss, for an emphasis on the role of the environment as a "prerequisite for democracy", and the "updating" function of judicial decisions, which represent "the voice of democracy: they confirm a societally changed interpretation of the law not (yet) made explicit by legislators".

Declaration,[39] which states that men have "a solemn responsibility to protect and improve the environment for present and future generations" and in all the following international instruments that have taken up this formulation.[40] The idea of an intergenerational responsibility evokes the concept of rights and obligations that affect all of humanity. It means that present generations are to some extent responsible for the conditions under which they leave the planet to future generations.[41]

---

39 The Stockholm Declaration is the first official action on the environment in international law issued at the 1972 United Nations Conference in Stockholm. On this occasion it was affirmed that men have a fundamental right to freedom, equality and adequate living conditions, in an "environment that [...] allows them to live in dignity and well-being" and that they have the "solemn responsibility" to protect and improve the environment for present and future generations. The conference participants adopted a non-binding instrument: an action plan containing recommendations for States. Although this is a non-binding legislative act, as is often the case, it has over time led to the conclusion of several treaties and other regulatory instruments dealing with environmental issues, both non-binding – as the Rio Declaration on Environment and Development (1992) – and binding – the Kyoto Protocol (1997) and the Paris Agreement on Climate Change (2015). In addition to these general recognitions, some instruments adopted after 1972 contain, instead, an explicit reference to the protection of the environment. These include Art. 24 of the United Nations Convention on the Rights of the Child (1989) and Art. 29 of the United Nations Declaration on the Rights of Indigenous Peoples (2007). Particularly significant is the General Comment n. 14 of the International Committee on Economic, Social and Cultural Rights which, in interpreting the content of the right to the best standard of health guaranteed by art. 12 of the Pact, specified that it includes the right to a healthy environment.

40 The only legal instruments that have accepted the wording of the Stockholm Declaration are art. 24 of the African Charter of Human and Peoples' Rights (1981) and Principle 28 f of the ASEAN Declaration on Human Rights. A more explicit formulation of a right to a healthy environment is contained in art. 11 of the Additional Protocol to the American Convention on Human Rights (San Salvador Protocol).

41 For further analysis of the concept of intergenerational equity see E.B. Weiss, *Intergenerational Equity*, in *Max Planck Encyclopedia of Public International Law*. On its theoretical bases, E.B. Weiss, *In Fairness To Future Generations and Sustainable Development*, in *American University International Law Review* 8, no. 1, 1992, p. 19 ss. Of particular importance is the question of rights and obligations. It is discussed whether the principle of intergenerational equity also conveys rights, with related obligations on the present generation. In this context, the obligations of the present generation towards future generations would be obligations or duties for which there are no related rights, because there are not yet certain persons to whom the right is attributed. According to Weiss' reconstruction, the rights of future generations could be more like "group rights" that protect common interests. In this sense they would represent "valued interests that attach to future generations" and that the representatives of future generations could protect.
On this point, the *Advisory Opinion OC-23/17 on the Environment and Human Rights* of the Inter-American Court of Human Rights, in which the judges stated that "[t]he human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations […]".

In this respect, Article 13 of the ECHR (right to an effective remedy)[42] is relevant in relation to the infringements of Articles 2 and 8 mentioned above. If we recognise, as provided for in some of the mentioned cases, that future generations will be directly affected by today's decisions, it is possible, through the lens offered by Article 13, to foresee the violation caused by depriving future generations of their representation. The case of *Neubauer v. Germany* provides a positive analysis of the topic.

In February 2020, a group of young Germans filed an appeal against the Federal Act on Climate Protection ("Bundesklimaschutzgesetz" or "KSG") in the Federal Constitutional Court, claiming that it was unlawful, contrary to constitutionally recognised human rights, in that it set the insufficient target of reducing emissions by 55% from 1990 levels by 2030.[43] Indeed, the KSG's 2030 target did not take into account the obligation imposed by the Paris Agreement on the German State to limit the global temperature increase well below 2°C. To achieve the objectives of the Paris Agreement, Germany should have reduced its emissions by 70% from 1990 levels by 2030. Their claims stemmed mainly from alleged violations of the fundamental right to a future consistent with the human dignity enshrined in Article 1 and the fundamental right to life and physical integrity enshrined in Article 2 of the Constitution, in conjunction with Article 20a of the Constitution, which binds the political process to the protection of future generations.

The applicants asked the Federal Constitutional Court to declare that the German legislature had violated the Constitution and that it was obliged to issue new reduction quotas to ensure that Germany's emissions were kept as low as possible, taking into account the principle of proportionality.

On 29 April 2021, the Federal Constitutional Court ruled that parts of the KSG were incompatible with fundamental rights. The Federal Constitutional Court ordered the legislature to establish clear provisions for reduction targets from 2031 onwards by the end of 2022. In response to the decision, federal legislators passed a bill approving an adapted KSG that requires, as a minimum, a 65% reduction in emissions from 1990 levels by 2030, which has been in force since 31 August 2021. It is worth noting that the government's response in the

42 Art. 1 ECHR provides for the obligation for States to ensure "to every person under their jurisdiction the rights and freedoms set out in Title I of the (...) Convention". Therefore, it is mainly the national authorities that must implement and enforce the rights and freedoms enshrined in the Convention, leaving the Court a merely subsidiary role. Moreover, the requirement of the "effectiveness" of the action has been interpreted in a progressively more restrictive manner by the Strasbourg courts, having to be existing, available and appropriate on the basis of the circumstances of the specific case (*ex multis*, ECtHR, *McFarlane v. Ireland*, application no. 31333/06, judgment of 10 September 2010; *Parrillo v. Italy*, application no. 46470/11, judgment of 27 August 2015; *De Souza Ribeiro v. France*, application no. 22689/07, judgment of 13 December 2012).

43 Federal Constitutional Court, *Neubauer and others v. Germany*, judgement of 24 March 2021.

person of Environment Minister Svenja Schulze has resulted in the proposal for a real "intergenerational climate contract".

In its judgment, the Court found that Article 20a of the Constitution not only obliges the legislator to protect the climate and aim to achieve climate neutrality, but also covers "how environmental burdens are spread out between different generations". The federal judges stated that the legislature had not proportionately distributed the budget between current and future generations,[44] arguing that a generation cannot be allowed to consume large portions of the CO2 balance by bearing a relatively smaller share of the reduction effort, if this means leaving subsequent generations with a drastic reduction burden and so "expose their lives to serious losses of freedom".

Moreover, the Court, accepting the reconstruction proposed by the applicants, stressed the constraint placed by Art. 20a to the democratic process, affirming that in Art. 20a environmental protection is elevated to "question of constitutional importance" because the democratic political process – underlying the enactment of ordinary laws – is organised according to a shorter-term perspective based on electoral cycles. This entails a structural risk that the Parliament will be less reactive in addressing the environmental issues that need to be pursued in the long term. Finally, the Court argues, "[i]t is also because future generations – those who will be most affected – naturally have no voice of their own in shaping the current political agenda". In the present judgment, the Court does not seem to be escaping the confrontation with democratic institutions, but, on the contrary, proposes reasons justifying this apparent erosion of the principle of separation of powers.

Moreover, we have reached a point in human history where most of the damage caused by climate change will not be reversible. This means that future generations will not be able to obtain an effective remedy before a national – or international – authority unless we invoke their rights today.

Therefore, as regards the possibility of raising the case, the separation of powers does not seem to be a convincing doctrine. This is partially different if we discuss the possibility of obtaining injunction orders.[45] As the Appeal Court in *Urgenda* stated "the District Court correctly held that Urgenda's claim is not intended to create legislation, either by parliament or by lower government

44 *Neubauer and others v. Germany*, judgment of 24 March 2021, para. 183 (official English translation): "[…] As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future […]".

45 Court of First Instance of Brussels, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, judgment of 17 June 2021. The Court recognised "un effet néfaste direct sur la vie quotidienne des générations actuelle et future" (para. 61), on the basis of articles 2 and 8 ECHR, as interpreted by the ECtHR. Although the judges considered that the government had breached its duty of care, they refused to set specific reduction targets on the basis of the argument of the separation of powers, which led VZW to appeal.

bodies, and that the State retains complete freedom to determine how it will comply with the order. The order also will in no way prescribe the substance which this legislation must have. For this reason alone, the order is not an 'order to enact legislation"'. Therefore, since no specific measure had been ordered, there would be no breach of the principle of the separation of powers. The judges, limiting themselves to setting an objective – to which the State is, moreover, already bound by its international commitments – left to the State the choice of the appropriate means to achieve it, in no way interfering with the sphere of competence reserved to the executive power.

The topic of injunction orders is a recurring argument when it comes to the separation of powers, which may indeed constitute a limit to what the national jurisdiction can obtain. However, it need not necessarily be understood in that sense. The absence of an injunction of specific objectives can also be considered a more flexible and perhaps more effective alternative, involving faster and more immediate "step by step" monitoring, and maintaining a channel of dialogue with the institutions.

3.2 One lonely soldier: the lack of international impact of domestic case law

The questions of "follow-up" and the actual impact of domestic case law are complicated by many factors. Among these, account must be taken of the differences between legislation and judicial systems, as well as political ones.[46] Once again, as already noted regarding *locus standi*, also responses to the argument of the separation of powers depend on national legislation. The same can be said virtually about any issue related to domestic jurisdiction. For the same reason, one of its weaknesses lies in its lack of international impact.

However, the parameter of the rules of the European Convention on Human Rights – as interpreted by the European Court – can offer, at least in part, common ground for national case law across Europe.

In its appeal in *Climate Case Ireland*,[47] Friends of the Irish Environment relied heavily on *Urgenda* and suggested that the Irish Supreme Court consider the Supreme Court of the Netherlands' reasoning convincing as to the correct application of the ECHR to climate change.[48] Friends of the Irish Environment

46 In this sense, P. Pustorino, *Cambiamento climatico e diritti umani*, cit., p. 600. According to the Author, this raises the question of the lack of uniformity between the legal systems applied by the individual States, given that only the most sensitive national courts, forward-looking and independent of national governments have already adopted or are likely to adopt such an approach in the short term, thereby imposing on their governments strengthened obligations compared to other countries, which will benefit from the economic advantage resulting from the provision of additional obligations imposed on other States.

47 Cfr. *supra* para. 2.

48 The Irish Government's arguments against this appear to be at least partially acceptable. First, national courts are warned about the weight to be given to decisions of other national courts under the Convention in cases where the European Court itself has not addressed the issue.

argued that, if the relevant interpretation of the Convention established by the Dutch Supreme Court is correct, it follows, on the basis of the facts, that Ireland also infringes its obligations under the Convention. The Irish Supreme Court, in (not) addressing the issue, relied largely on the considerations of the Court of First Instance, which concluded that *Urgenda* distinguished itself from *Climate Case Ireland* on the basis that in the latter case "no particular Statutory framework had been impugned".[49] In coming to this conclusion, it actually considered the decision of the Dutch Supreme Court.

In turn, the Federal Constitutional Court in *Neubauer*,[50] in affirming the need to specify further reduction targets in good time, mentions, as a source of prime relevance, the reasoning of the Irish Supreme Court in *Climate Case Ireland*.[51] A further mention of the case is made in par. 161 of the same judgment, which also refers to the decision of the Dutch Supreme Court in *Urgenda*.[52] *Urgenda* is undoubtedly the most frequently mentioned case.[53] In *Neubauer* it is mentioned four times,[54] in *Klimatická žaloba ČR v. Czech Republic* ten times.[55] In *VZW Klimaatzaak v. Belgium*, the court shares the interpretation offered by the Dutch Supreme Court, stating that the global dimension of the climate emergency does not remove the Belgian public authorities from their obligations under Articles 2 and 8 of the ECHR.[56]

The Prague Municipal Court in *Klimatická žaloba ČR* defines the ruling in *Urgenda* "inspiring" and relies largely on the reasoning of the Dutch Supreme

---

It is stressed that a State signatory to the Convention does not have the right to bring an action before the European Court to suggest that the interpretation given to the Convention by its own national legal system, which was unfavourable to the State, was incorrect. In addition, the Government suggested that FIE did not establish the requirements deemed necessary to give significant weight to the judgment of a national court on matters relating to the Convention. It has been said that the precise status of the ECHR in Dutch law has not been established and it has also been suggested that the Netherlands applies a monist system under which, unlike Ireland, international treaties can affect domestic law without the need for legislation.

49 *Friends of the Irish environment v. the Government of Ireland*, cit., para. 5.17.

50 Cfr. *supra* para. 3.1.

51 *Neubauer and others v. Germany*, cit., para. 253.

52 *Neubauer and others v. Germany*, cit., para. 161: here in the context of the interpretation of the Special Report of the Intergovernmental Panel on Climate Change (IPCC), which indicates that the reduction target of 1.5°C clearly reduces the likelihood of reaching so-called "tipping points" (IPCC, Special Report, *Global Warming of 1.5°C*, 2018; also IPCC, Special Report, *Global Warming of 1.5°C, Summary for Policymakers*, 2018).

53 All national complaints mention it, and most decisions take it into account (again, see the Sabin Centre database, available at www.climatecasechart.com).

54 *Neubauer and others v. Germany*, cit.

55 Prague Municipal Court, *Klimatická žaloba ČR v. Czech Republic*, judgment of 15 June 2022.

56 *VZW Klimaatzaak v. Kingdom of Belgium & Others*, cit., p. 61: "la dimension mondiale de la problématique du réchauffement climatique dangereux ne soustrait pas les pouvoirs publics belges à leur obligation pré-décrite découlant des articles 2 et 8 de la CEDH".

Court to address the question of the application of the standards offered by Articles 2 and 8 of the ECHR.[57] It proceeds to use them as a basis for interpreting the obligations arising from the Paris Agreement, sharing the consideration of the Dutch Supreme Court, and stating that if the government had properly fulfilled its obligations, climate change would have been milder and avoiding it, as enshrined in Article 2(1)(a) of the Paris Agreement, would have been more likely.[58]

It is relevant to note that the effect of such interconnections can also be appreciated in the preparation of the claim, where the reference to "twin" cases settled in a manner favourable to the applicants is used for the purpose of invoking the same legal arguments.[59]

Cases built on compliance with Articles 2 and 8 of the European Convention on Human Rights can rely on standards of interpretation developed by the prolific case law of the European Court. In fact, although the *Urgenda* judgment had a different impact depending on the State in which the proceedings took place, it is nevertheless constantly mentioned in almost all judgments, whether rights have been recognised or not.[60] The fact that attention has been given to the principles set out in *Urgenda* demonstrates the beginning of a dialogue between the Courts in Europe which, in the future, could provide national interpreters with more than sufficient tools to address climate and environmental issues at national level.

4. Conclusions

The analysis provided in this paper has offered the possibility to draw some conclusions on the matter of national climate litigation.

57 *Klimatická žaloba ČR v. Czech Republic*, cit., para. 234 ss. In *Urgenda*, the Dutch Supreme Court had interpreted the obligations arising from Articles 2 and 8 ECHR, and stated in paragraphs 5.6.2, 5.7.9 and 5.8 that these provisions oblige Member States of the ECHR to take climatic measures deriving from international law and generally accepted scientific standards. The Prague Municipal Court shares this conclusion, stating that the ECHR cannot be interpreted independently from other sources of international law. It states that the level of protection of subjective public rights within the meaning of Article 36(2) of the Charter of Fundamental Rights and Freedoms of the Czech Republic must not be lower than that required by Article 13 of the ECHR. Therefore, the right to effective judicial protection also entails the obligation of the court to verify whether there is a sufficient objective legal basis for determining the specific obligations of the State.

58 *Klimatická žaloba ČR v. Czech Republic*, cit., para. 325 ss.

59 It is necessary to mention the *Giudizio universale* case ("last judgment"), the first case of its kind in Italy, promoted by the association "A Sud" and currently in progress. For a thorough analysis of the elements of the appeal, see R. Luporini, *The "Last Judgment": Early reflections on Upcoming Climate Litigation in Italy*, in *Questions of International Law*, 2021, p. 27 ss.

60 And, as we have seen, the same happened with other "bold" judgments.

While indeed showing several problematic issues, in the light of what has been stated above, we can nevertheless affirm that domestic jurisdiction is a useful venue and collective claims are a virtuous example.

National judges have a unique view of the socio-political environment in which their decisions will be installed. They come from that same environment, they understand it and know how to navigate it. They tend to represent in some way the cultural and juridical background of the State. Therefore, their judgments, however "bold" they may be, are still generally more easily enforceable than international ones.

The experience of *Urgenda* and the other cases analysed shows that international human rights' law standards can have a profound environmental impact, even when they do not explicitly refer to the environment. They also demonstrate how the issues of *locus standi* can be overcome, and push towards a full recognition of the right to a healthy environment.

Indeed, other issues with domestic jurisdiction – namely, separation of powers doctrine and lack of international impact – can be overcome with the consideration of the relevance of the value of environmental protection. If a healthy environment has a constitutional weight on the juridical system, as can be said for most of the Constitutions in Europe,[61] than justiciability of the same should not be considered as a threat to the democratic foundation of the State, but as its very realisation.

Moreover, the practice of cross-referencing put in place by national courts can answer to the concern about the true impact of these judgments. The fact that national judges quote each other shows the birth of a trend in continental Europe. The pattern that emerges confirms a tendency to recognise climate claims based on human rights and contributes to creating a European consensus around these issues.[62] The latter refers to the level of uniformity in the

61 United Nations Environment Programme, *Global Judicial Handbook on Environmental Constitutionalism (3rd Edition)*, 2019, p.19: "Approximately 150 of the world's 193 UN members have constitutions from about 90 nations that expressly or implicitly recognize some kind of fundamental right to a quality environment, while a similar number imposes corresponding duties on individuals or the state to protect the environment, and about three dozen establish procedural rights in environmental matters. Constitutions also identify environmental protection as a matter of national policy, and some recognize specific rights concerning water, sustainability, nature, public trust and climate change. And that about two-thirds (126) of the constitutions in force address natural resources in some fashion, including water (63), land (62), fauna (59), minerals and mining (45), flora (42), biodiversity or ecosystem services (35), soil/sub-soil (34), air (28), nature (27), energy (22), and other (17). Some countries have constitutions that do many if not most of these things, while others do none of them. Most fall somewhere in between."

62 The European consensus is a concept used by the Court arising from the evolutionary nature of the interpretation of the European Convention on Human Rights. As the Court has repeatedly stated, the Convention is a living instrument anchored in the reality of the Member States in which it applies. On the subject, see P. Łącki, *Consensus as a Basis for Dynamic*

regulatory frameworks of Council of Europe member States on a particular subject. In this perspective, the national cases mentioned so far show an additional possible impact direction, not only downwards, within their territory, or horizontally, aimed at other national courts, but also upwards, with a view to transposition at supranational level.

Although a reversal of the trend is desirable,[63] allowing the European Court to clarify its position on environmental protection and climate change, the Court's essentially subsidiary role remains to be taken into account, mechanism which by its very nature implies a privilege of the domestic courts. Whether it acts as a spur to the advancement of domestic law, or as a receiver of it, it is clear that the future of the fight against climate change must pass through a "multi-voice" dialogue, within the European national courts, and between them and the European Court of Human Rights, through an exchange that is not limited to being one-way.

Interpretation of the ECHR – A Critical Assessment, in *Human Rights Law Review* 21, 2021, p. 186 ss. In the article the Author analyses the problems that the theory of consensus encounters in its practical application.

63 See C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *European Journal of International Law* 2022. The article argues that an examination of climate change as a human rights issue by the Strasbourg Court, though requiring changes to current case law, is not only possible but also legally desirable.