Looking Sideways

The Comparative Law Process and Climate Change Case-Law Before the European Court of Human Rights

Rachael Kondak

29.06.2026 doi: 10.59704/82c25e98437ab662

What are the major interpretative principles which assist the European Court of Human Rights in its decision-making? What role do they play in climate change judgments? Subsidiarity, the living instrument doctrine and a harmonious interpretation of international law all enable the Court to incorporate relevant comparative law into its reasoning, informing the decision-making process. Each interpretative principle allows and encourages a two-way dialogue between the Strasbourg Court and its partners: national courts, regional human rights courts and global mechanisms. Each encourages a different form of dialogue but with the same goal: legitimisation. Climate change case-law is particularly well-suited to the comparative law approach, for reasons which I set out below, and I argue that the role of comparative law can potentially have more impact in this emerging area of the law than in others.

Climate Change Cases as a Comparative Exercise

Climate change case-law lends itself well to the comparative law exercise for the following reasons: firstly, the special feature of climate change is that it is a global phenomenon to be addressed at a global level. It is only reasonable for the European Court to look beyond its borders. Secondly, the complexity of the scientific evidence means that the decisions and opinions of other courts are particularly helpful in drawing legal conclusions from the data. Thirdly, comparative law provides a blueprint for the Court, assisting the Court in its development of its case-law to an emerging area. Finally, intergenerational burden sharing means that the Court is looking both backwards and forwards over time, why not also look sideways over its shoulder at other courts?

Interpretative Principles Encouraging Judicial Dialogue

What are the interpretative principles as set out in *Magyar Helsinki Bizottság v Hungary* [GC] [2016] (paras. 118-122) which enable the Court to engage in comparative reasoning and judicial dialogue?

Subsidiarity encourages a dialogue with national courts by recognising that the primary responsibility for protecting Convention rights lies with the domestic authorities. By virtue of Article 1, State Parties undertake to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention.

The Court therefore looks closely at national legal developments, emerging domestic consensus, and the reasoning of constitutional and Supreme Courts across Europe. In the *Verein Klimaseniorinnen Schweiz* [GC] [2024] case, the Court set out an overview of national climate case-law from France, Germany, Ireland, Norway, Spain, the UK and Belgium. While not commenting on these domestic cases in particular detail, the Grand Chamber does refer to them in its reasoning. For example, in concluding that environmental degradation creates serious and potentially irreversible adverse effects on the enjoyment of human rights, the Court referred to domestic case-law acknowledging these effects (para. 431). Moreover, in finding a violation of Article 6 § 1 of the Convention, the Court referred to

> *"the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared*

> *responsibility and subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed" (para. 639).*

The principle of harmonious interpretation prompts dialogue with the regional human rights courts and global mechanisms. The Court has consistently affirmed that the Convention's provisions "cannot be interpreted and applied in a vacuum," but must be read "in light of relevant rules of international law and the evolving normative commitments of the States Parties." This interpretative approach finds its basis in Article 31 of the Vienna Convention on the Law of Treaties (1969), which requires that treaty terms be interpreted in their context and in light of the treaty's object and purpose — including consideration of "any relevant rules of international law applicable in the relations between the parties."

Accordingly, the Court has interpreted the general provisions of the European Convention in light of a large number of international treaties. Examples include rules relating to the grant of State immunity in *Al-Adsani v the United Kingdom* [2001], The Hague Convention on the Civil Aspects of International Child Abduction in *Neulinger and Shuruk v Switzerland* [2010], and international humanitarian law in *Ukraine and the Netherlands v Russia* [2025]. This practice has continued, and I would argue, intensified, for climate change cases. We find the international law sections of climate change judgments to be extremely long and detailed compared to average Grand Chamber cases – see, for example, the references to the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement in *Verein Klimaseniorinnen Schweiz* (paras. 133-231) and *Greenpeace Nordic and Others v Norway* [2025] (paras. 129-176).

The living instrument doctrine means that the European Convention should be interpreted taking into account present day conditions. On the basis of evolutive interpretation the Court has expanded its interpretation beyond the letter of the Convention to deal with a number of new issues concerning, for instance, same-sex partnerships, gender recognition and data protection. In other words, the lack of an explicit reference to an emerging theme in the Convention has not been a complete bar to the Court expanding the scope of its interpretation under a particular Article.

Unlike the African Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the European Convention does not contain a specific right to a clean and healthy environment. Nevertheless, the living instrument doctrine has enabled the Court to take an interpretative leap forward and recognise a right to climate protection derived from Article 8. The Court did not create a new right but pushed the boundaries of existing rights – without going against the letter of the Convention.

Judicial Dialogue Assisting the Court to Put Into Practice These Interpretative Principles

While it is impossible to ascertain what specific role comparative law references play in the final adjudication of a case, climate change cases issued by regional human rights courts and international human rights bodies appear to have paved the way to assist the European Court's evolving climate jurisprudence. This is reflected in the Court's engagement with a growing body of international climate change litigation. In *Verein Klimaseniorinnen Schweiz*, the Court referred to the Inter-American Court 2017 Advisory Opinion on "The Environment and Human Rights", the March 2022 Resolution by the Inter-American Commission on Human Rights, the African Commission Resolution from 2019 on the human rights impacts of extreme weather and the 2002 case *Social and Economic Action Rights Centre v Nigeria*. Similarly, in *Greenpeace Nordic* the Court drew upon the International Tribunal for the Law of the Sea's 2024 Advisory Opinion, the Advisory Opinion of the EFTA Court from 21 May 2025, the Advisory Opinion of the Inter-American Court of Human Rights on "Climate emergency and Human Rights" from 29 May 2025 and the Advisory Opinion of the International Court of Justice from July 2025.

Behind the citation of judgments from other courts – be they domestic, regional human rights, or

international courts – lies a rich history of judicial dialogue established over decades, often built up through personal encounters. This dialogue has become more and more important in recent years and takes multiple forms: dialogue through judgments, through the Superior Court Network, by way of bilateral visits, and through advisory opinions as set up by Protocol No. 16. I will now address each in turn.

Formal judicial dialogue is often characterised as a conversation through judgments between national superior courts and the Strasbourg Court, which usually results in the issue in question being resolved over time. One example is the case of *Al-Khawaja and Tahery v the United Kingdom* [2011], where the Grand Chamber adjusted its position on a specific aspect of the right to a fair trial (rules on the evidence of witnesses who are absent from trial) in direct response to the UK Supreme Court's judgment in *R v Horncastle and others (Appellants)* [2009].

Another form of dialogue is through the Superior Courts Network (SCN). It was created by the European Court of Human Rights in 2015 and now spans all 46 Council of Europe member States, comprising 112 member courts and eight observer courts. This network is dedicated to sharing knowledge and know-how about the Convention at an operational level.

Regular meetings between judges of the European Court of Human Rights and national superior courts take place throughout the year, either in Strasbourg or in host countries. Similar meetings are organised with the Court of Justice of the European Union and other international law bodies.

Dialogue between the three human rights courts – the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights – began in its institutionalised form in 2018 (see the European Court's dedicated webpage). The San José Declaration established a Permanent Forum of Institutional dialogue between the three courts. Four volumes of Annual Joint Law reports have been published on the courts' websites. Dialogue is not just between Judges of these three courts but also involves Registry staff and takes the form of webinars, such as a recent one on climate change litigation.

Finally, Protocol No. 16 introduces a system under which national courts can apply to the Court for advisory opinions on legal questions pending before those courts in order to foster dialogue and enhance the Court's "constitutional" role.

Concluding Thoughts

I argue that in recent climate change judgments, the interpretative doctrines of subsidiarity, harmonious interpretation and the living instrument doctrine were put to work by the European Court judges in interpreting the European Convention on Human Rights in light of national, regional and global human rights standards regarding the climate. Institutionalised judicial dialogue, built up over decades, enabled the Court to look at how systems both within and beyond Europe are approaching climate change challenges with innovation and forward-thinking. This global approach adds legitimacy to the Strasbourg Court's rulings. But it does not mean that comparative law will always be decisive for the outcome of the case. The comparative law exercise is only one of the adjudicative tools capable of justifying interpretative leaps forward and since we cannot know what goes on behind the closed doors in judicial deliberations, its precise weight in any given outcome is unclear. Yet, in the context of climate change, the dialogue and cross-fertilization of regional human rights standards seem particularly well-developed and likely to intensify in the future.

ABOUT THE AUTHOR

Rachael Kondak

Rachael Kondak works as the Head of the Private Office of the President of the European Court of Human Rights. Having begun her career as a barrister in London practising in family law, Rachael joined the Council of Europe in 2005 working for the Commissioner for Human Rights and then joining the Court in 2009.

SUGGESTED CITATION

Kondak, Rachael: Looking Sideways: The Comparative Law Process and Climate Change Case-Law Before the European Court of Human Rights , Verfassungsblog, 29.06.2026, doi: 10.59704/82c25e98437ab662.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260629-190724-0.