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# The Quest for Cosmopolitan Justice in Climate Matters

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## Abstract

At a time when climate litigation is soaring worldwide, some recurrent patterns among legal systems allow for a brief reflection on cosmopolitan justice. In a recent strand of cases (*Urgenda, Leghari, Juliana v. Unites States* and *Earthlife*), different courts have reached climate-protective rulings by applying constitutional provisions, along with international principles and treaty norms. Until the first case was rendered in 2015, such interpretive technique was unprecedented in the field of climate change litigation. Yet, it appears to be well-founded in international law, instrumental for its enforcement and replicable across legal systems. None of the cases reviewed are final, yet they all appear to have precipitated a process of public reasoning at the national and international levels, as well as policy change under some circumstances. While access to justice is notably absent from the international climate change regime, individuals and NGOs are currently vindicating it before national courts.

## Part I. Introduction

“Fiat iustitia et pereat mundus”. Let justice be done though the world may perish. There must be something inherently human in the idea of justice, bound to a calling entrenched in the human nature, entwined with a drive to act that would not be worthy in a world utterly deprived of justice. A host of values and ideals might re-

place justice in the old Latin adage. We all acknowledge the importance of saying the truth, but what about: let the truth be done though the world may perish? Justice might still hold more poignancy than the truth. Whilst the truth is a choice of men within the four corners of their soul, a choice to renovate in societal life, justice appears to relentlessly linger in the community of men by foreshadowing the possibility that we—as a body politic—attain some level or higher level of coexistence, that we as a citizenry act for more and for a just world.

Albeit its Latin wording, the adage did not emerge until probably the 16<sup>th</sup> century.<sup>1</sup> According to some, its use originated from Ferdinand I, successor to Charles V. Yet, its revival in the *Perpetual Peace* by Immanuel Kant (1795) projects the motto within the scope of moral and political philosophy, and for the incremental shaping of a pacified legal order.

In the present essay, I tentatively address the quest for justice from an international law perspective. Leaving aside the traditional notion of international law as regulative of inter-state relations (*jus gentium* as termed in the *Perpetual Peace*), I would rather espouse the looking glass of a *ius cosmopolitanicum*, characterizing individuals and states as equal actors and international law as one of the sources applicable to prospective differences. Under examination is the eruptive problem of justice related to climate change. Rather than purporting new avenues of regulation and novel treaties to be drafted, I would rather take international law as a given and

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<sup>1</sup> H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Penguin 1977), 224.

emphasize the prong of the justiciability of the rights therefrom derivable on the part of individuals, either acting on their own or represented by NGOs.

After briefly considering the 'legalization' and 'judicialization' of international climate change law (Part II), I would turn to specific judicial instances opposing individuals and NGOs to their own governments in climate change matters (Part III). None of the decisions under consideration is final, still all cases appear to have triggered unprecedented media resonance and a public reason process, at both the national and international levels. After considering the emergence of similar cases in other legal systems (Part IV), I conclusively appraise the main functions, potential and shortcomings of this trend of climate change litigation (Part V). I conclude by arguing that the mechanism applied by national courts in the cases under examination is beneficial to the enforcement and legitimacy of international law, and ultimately to the protection of the climate. Yet, some limitations are notably outstanding.

The present essay is based on a number of assumptions and limitations. My purpose is to consider the quest for justice from the viewpoint of the strategic use of international law in domestic courts. The selected realm of application is international climate change law, even though a host of principles relevant to international environmental law more generally would come into play. Most of the claims are directed to the *forum* state, namely the state where the action is brought, and entail limits on the state's territorial sovereignty over its resources. One of the claims concerns the no-harm principle as related to the obligations of enterprises. All in all, international law appears to offer a repository of rights where to ground either claims or complaints pertaining to climate change matters.

## Part II. From Legalization to Judicialization

I herein aim to clarify some assumptions of the cosmopolitan outlook adopted in the present essay. At the end of the present paragraph, I conclude by holding that international law has evolved as much as to include the individual as one of its actors, rather than merely a subject. As an actor, both individually and within a collective capacity (e.g. civic associations, NGOs), the individual has increasingly been able to limit the sovereignty that the state has long wielded over its natural resources. In a recent turn, such limitation of sovereignty appears to concern also the possibility for individuals and NGOs to hold enterprises accountable in court for damages caused through legal conduct contributing to climate change, against the idea that all permitted actions shall go unchecked in climate matters.

As classical sociology was bound to study the 'national society' owing to its origination in the aftermath of the Franco-German war of 1870,<sup>2</sup> so was international law predestined to revolve around the international affairs of a world made of nation-states due to its crystallization in the 16<sup>th</sup> and 17<sup>th</sup> centuries. The Western origins of the international community are usually traced back to the Peace of Westphalia in 1648, which introduced the principles of religious equality and the equality of states into the practice of international law.<sup>3</sup> Absent its demise, sovereignty is clearly epitomized in one of the current principles of international environmental law, namely the principle of permanent sovereignty over natural

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<sup>2</sup> U. Beck, 'Cosmopolitan Sociology – Outline of a Paradigm Shift' in M. Rovisco and M. Nowicka (eds), *The Ashgate Research Companion to Cosmopolitanism* (Ashgate 2011) 18.

<sup>3</sup> W. Preiser, 'History of the Law of Nations. Ancient Times to 1648' in R. Bernhardt (ed), *Encyclopedia of Public International Law: History of International Law, Foundations and Principles of International Law, Sources of International Law, Law of Treaties*, vol 7 (Elsevier 1984) 156.



resources. Even though the landmark resolution adopted by the UN General Assembly on 14 December 1962,<sup>4</sup> generally viewed as an expression of customary international law, bestows such a right onto “peoples and nations,” the principle itself is often regarded as a prerogative of the nation-state and a potential hurdle to environmental protection.

At first glance, the principle of permanent sovereignty over natural resources appears to allow each state a wide leeway in the management of its natural resources, even to the expense of its own peoples. One of the few limits imposed by general international law to the principle of territorial sovereignty dwells with the prohibition to cause damages on areas *beyond* the state’s national jurisdiction.<sup>5</sup> Still, the conduct of every state should comport with the “principles and rules of international law,”<sup>6</sup> including its treaty obligations.

Notwithstanding the host of treaties aimed to reign in sovereign powers—a phenomenon known as ‘legalization,’ biodiversity indicators are constantly declining and the international community is often regarded as failing to enforce existing regulation and address the most crucial environmental challenges of our time.<sup>7</sup> The weight of environmental depletion, often

coupled with distributive injustice, has been especially perceived in the changing of the climate ever since last century. Individuals have incrementally started to hold their respective governments, and even enterprises, accountable for either insufficient action or inaction, first by relying on domestic law, and most recently by deploying international law principles and treaty norms. The recent strand of climate cases deploying international law appears to scrape the principle of territorial sovereignty in that individuals and NGOs counteract ineffective legalization and enforcement, both at the national and international levels, with a new type of litigation.

This new type of litigation appears to be framed as a form of private enforcement of international law in domestic courts. Such a means of enforcement is not a novel one, having found articulation in international law literature in the 1930s.<sup>8</sup> Among the interpretive techniques available to the judiciary, indirect application—also called the consistent interpretation of national law with international obligations—has been considered the preferred one by national courts,<sup>9</sup> besides being also the less politically controversial. Indeed, it relies on the presumption that the legislator intends to comply with its international obligations. Its deployment for reasons of environmental protection usually posits that the joint application of international law and national law can attain better protective results than sole national law in the chosen matter of application. With specific reference to the climate field, this mixed fuel of international law and national law started in 2015 with a type of domestic litigation that spearheaded the application of constitutional law, tort law, environmental law and

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<sup>4</sup> Permanent Sovereignty over Natural Resources, GA res. 1803 (XVII), 17 UN GAOR Supp. (No.17) at 15, UN Doc. A/5217 (1962).

<sup>5</sup> A. Nollkaemper, ‘Sovereignty and Environmental Justice in International Law’ in J. Ebbesson and P. Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009) 255. For a detailed discussion on the principle of sovereignty over natural resources and the responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction, see P. Sands and others, *Principles of International Environmental Law* (3rd edn, CUP 2012) 190–200.

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996, 226, para 22 (International Court of Justice).

<sup>7</sup> See, *inter alia*, UNEP, *Global Environment Outlook 5* (first published in 2012) 134.

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<sup>8</sup> G. Scelle, *Précis de Droit des Gens: Principes et Systématique – Pt.2* (Sirey 1934) 10–12.

<sup>9</sup> A. Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 165.

procedural law, along with treaty norms, international customs and principles.<sup>10</sup>

Besides being endorsed within influential soft law documents,<sup>11</sup> such technique conforms with what is considered to be the most effective avenue of enforcement of international law, namely its internalization and domestication.<sup>12</sup> The concocting of this mixed fuel scenario has taken place within the form of transnational law litigation, already known to be wielded for the advancement of human rights in domestic courts.<sup>13</sup> The specific type of litigation is transnational due to the derivation of claims of rights from a body of 'transnational' law,<sup>14</sup> namely do-

mestic and international, private and public law, which is invoked in a single action.

As is often the case in transnational litigation, the new strand of climate cases that I am to review has been staged in domestic courts. Most notably, it has pitted individuals and/or NGOs against the *forum* state. A recent turn in this line of cases, featured in a German case, appears to allow individuals and NGOs to judicialize climate change matters against enterprises with some use of international law principles.

The strand of cases is still in its infancy. Yet, it is safe to say that the involvement of individuals within decision-making at a global level, which constituted the very initial inclusion of non-state actors within global environmental matters, is not considered sufficiently satisfactory. In the glaring absence of any right to access justice within the climate change regime,<sup>15</sup>

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<sup>10</sup> Even though this form of judicialization is novel for its use of international law, it appears to fall within the 'classic' field of public interest litigation, which emerged in the 1950s in the United States and later spread to a number of countries. The main objective of public interest litigation is to precipitate social change through the judicial enunciations of norms and a novel application of remedies. For a list of the distinctive traits of public law litigation, see A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 HarvLR 1281, 1302. On the theory and structure of public interest litigation, see H. Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, <http://www.worldbank.org/publicsector/legal/index.htm>, last visited 7 December 2017, 7–11. Cf. the early use of international law on the part of the US Supreme Court for the protection of individual rights from government infringement in D. Sloss, 'Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation' (2014) 71 Wash Lee Law Rev 1757, 1808, 1821–1822, 1825–1827.

<sup>11</sup> With specific reference to climate change, prominent scholars and practitioners advocated the joint application of human rights law, national environmental law and, to a lesser extent, tort law. See Oslo Principles on Global Climate Change Obligations, <http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf>, last accessed 16 August 2017.

<sup>12</sup> A. M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503, 534.

<sup>13</sup> H.H. Koh, 'Transnational Public Law Litigation' (1991) 100 Yale LJ 2347, *passim*.

<sup>14</sup> *Ibid.* See *ibid.* also the five features characterizing transnational public law litigation. See also H.H. Koh, 'Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation' (1987) 22 TexInt'l LJ 169, 194–195.

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<sup>15</sup> See the 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107, Article 6(a)(ii) and Article 6(a)(iii). The UNFCCC does not provide for access to justice, restraining its purview to the other two pillars of procedural environmental rights embodied by access to information and participation in decision-making. See also the Kyoto Protocol to the United Nations Framework Convention on Climate Change UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998), Article 10(e). The Kyoto Protocol solely recognizes the right to access information. See 2015 Paris Agreement on Climate Change, FCCC/CP/2015/L.9/Rev.1, Article 12. In the mold of the UNFCCC, the Paris Agreement enshrines public participation and public access to information and omits access to justice. As rightly noted, "even when an agreement does not provide for a right to access or participation, it may nevertheless support rather than be neutral or opposing the notion of participatory and procedural rights in environmental matters". Jonas Ebbesson, *Participatory and Procedural Rights in Environmental Matters: State of Play* (High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward Co-organized by UNEP and OHCHR, Nairobi, 30 November–1 December 2009, 2009), 3. Even when an agreement recognizes participatory or procedural rights, the term chosen might not belong to the rights-language. In fact the notion of rights is more tailored to human rights treaties than international environmental law, see *ibid.*, 3–4.

individuals and NGOs have lately judicialized climate matters by vindicating their rights, the rights of future generations and the interests of the climate before national courts.

### Part III. Novel Litigation in Climate Change Matters

Notwithstanding the adoption and rapid entry into force of the Paris Agreement, international climate change policy and law has not stood out for being particularly effective.<sup>16</sup> For this reason, among others, individuals have taken climate change matters to national courts for the latter to precipitate change. By applying international environmental principles and treaties along with national norms, national courts have allowed individuals and NGOs to access courts and attain climate-protective rulings. The new strand of case law started in 2015 in the Netherlands, and was continued through decisions by the Lahore Green Bench in Pakistan, a District Court in the United States and the Pretoria High Court in South Africa. In this paragraph, I overview each case and conclude by maintaining that some interpretive features have emerged in a strikingly similar way in all four cases, setting the stage for a prospective effusion of the same techniques to further national courts.

The *Urgenda* case is an action in tort, which was brought to the District Court of The Hague by the Urgenda Foundation, a Dutch environmental NGO, and 886 individuals on behalf of which Urgenda was acting. In June 2015, the three-judge panel found the State liable of hazardous negligence and enjoined it to increase the State's emissions reduction target from approxi-

mately 17% to 25% by 2020 compared to 1990. The ruling is now on appeal.

It appears that the court in *Urgenda* granted rights, both procedurally and substantively, by indirectly applying international law, the European Convention on Human Rights ('ECHR') and EU law. With respect to standing, the court interpreted Urgenda's bylaws and the Dutch Civil Code in light of the concept of sustainable development as enshrined in the Brundtland Report, especially in its global and intergenerational dimension; Article 2 of the UN Framework Convention on Climate Change ('UNFCCC'), framing the objective of the UNFCCC; and Articles 2 and 8 of the ECHR on the right to life and the right to respect for private and family life, respectively. Such an application resulted in Urgenda's possibility of pleading even on behalf of future generations.

On the substantive plane, Urgenda brought an action in tort under the theory of unlawful hazardous negligence (Book 6, Section 162 of the Dutch Civil Code), which was read along with a provision in the Dutch Constitution imposing a duty of care on "authorities to keep the country habitable and to protect and improve the environment" (Article 21 Dutch Constitution). Now, what do these provisions imply? The Court developed a two-tier test: first, by hammering out the degree of discretion that pertains to the government in the specific field of climate change policy, and secondly, by materializing a minimum degree of care that the Dutch State is to provide.<sup>17</sup> In both tiers, the court construed the duty of care, as enshrined in the Dutch Civil Code and the Constitution, in light of the objectives and principles set forth in international cli-

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<sup>16</sup> The Status of Climate Change Litigation. A Global Review, UNEP-Sabin Center for Climate Change (May 2017), <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envvt-CC-Litigation.pdf>, last accessed 14 June 2017, 6–9.

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<sup>17</sup> On the two-tier test, see *Urgenda v The Netherlands* The Hague District Court (June 24, 2015) ECLI:NL:RBDHA:2015:7196 (original language: ECLI:NL:RBDHA:2015:7145) para 4.52.

mate policy and EU legislation, due to the “nature of the hazard.”<sup>18</sup>

With respect to the first prong, namely the degree of governmental discretion on the matter, the court identified limits to governmental discretion in the no-harm principle, the UNFCCC and related instruments,<sup>19</sup> and especially Articles 2 and 3 UNFCCC. These two provisions were found to uphold: the principle of inter-generational equity; the principle of intra-generational equity; the precautionary principle combined with a cost-benefit nuance;<sup>20</sup> and the principle of sustainable development.<sup>21</sup> With respect to EU climate policy and principles, the court found that governmental discretion was bounded due to Article 191 of the Treaty on the Functioning of the European Union (‘TFEU’), articulating the principle of a level of high protection of the environment, the prevention principle, and the precautionary principle.<sup>22</sup>

With respect to the second prong of the test, namely the minimum degree of care required of the Dutch State, the court referred to positive obligations that the Dutch State ought to fulfil for the protection of the environment toward the individuals under its jurisdiction and control, according to the European Court of Human Rights’

(‘ECtHR’) case-law.<sup>23</sup> The positive obligations contained in the minimum degree of care was found to rest on *immediate* action through *mitigation*, rather than adaptation, measures.<sup>24</sup> A higher mitigation target, the court held, comports with the principles of inter-generational equity, precaution and prevention. The court maintained that the adequate contribution to prevent hazardous climate change was an emissions reduction target of at least 25% compared to 1990 levels.<sup>25</sup> Such emissions reduction level was the minimum required by *Urgenda* and corroborated by the scientific documents prepared by the Intergovernmental Panel on Climate Change (‘IPCC’).<sup>26</sup> Such a target was found to be beyond the requirements of EU regulation on the matter, yet economically feasible,<sup>27</sup> also in comparison to the national policies of the United Kingdom, Denmark and Sweden.<sup>28</sup> In conclusion, this is a case of indirect application of international law or, termed in accordance with the Dutch legal system, a reflex effect of international law in Dutch law.<sup>29</sup>

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<sup>18</sup> Ibid, para 4.55.

<sup>19</sup> The Court especially recalled the Kyoto Protocol and its Doha Amendment, which the Court acknowledges not to be binding yet. The Netherlands is Party to both. See *ibid* paras 4.42 and 4.66.

<sup>20</sup> Ibid, para 4.58. Note that the effectiveness of the measures is evaluated worldwide.

<sup>21</sup> Ibid, para 4.59.

<sup>22</sup> Ibid, paras 4.60 and 4.61 referring to Article 191(1) Treaty on the Functioning of the European Union (2009), Official Journal C 326, 26/10/2012 P. 0001 – 0390 (‘TFEU’). The court also recalls Article 191(3) TFEU, which notably emphasizes the need for EU policy makers to take into account “the available scientific and technical information,” among other criteria. See *ibid*, para 4.62.

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<sup>23</sup> Ibid, para 4.74 referring to 4.45–4.49, where the Court recalls the positive obligations enshrined in Articles 2 and 8 ECHR.

<sup>24</sup> Ibid, para 4.71. The court dismissed the State’s contention on the effectiveness of CO2 storage and capture mechanisms, *ibid*, para 4.72. See also para 4.63 for further considerations.

<sup>25</sup> Ibid, para 4.91. The scientific evaluation of the matter is carried out from *ibid*, para 2.8.

<sup>26</sup> See *ibid*, para 4.85 to retrieve *Urgenda*’s request, and para 2.15 to find consistent data from the IPCC Fourth Report.

<sup>27</sup> Ibid, para 4.76 on the accordance of higher mitigation targets with the relevant international principles, and para 4.86 on the need for the envisaged measure not to be disproportionately burdensome for the Netherlands.

<sup>28</sup> Ibid, para 4.82.

<sup>29</sup> On some criticism toward the decision, see, among others, M. Peeters, ‘*Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States*’ (2016) 25 RECIEL 123.



The second case that I am to overview was decided by a Pakistani court. *Leghari* falls within a constitutional type of litigation that a lawyer from a farming family of Lahore brought against the Pakistani government. With an order issued in September 2015, the Lahore's Green Bench ordered the establishment of a Climate Change Commission tasked with implementing Pakistan's Climate Change Policy and Framework for the effective enforcement of the people of Punjab's fundamental rights.<sup>30</sup> The relevant legislation was already in place for the period 2014–2030, yet it was admittedly lacking implementation. The so-called climate change orders are still ongoing and incrementally issued by Justice Syed Mansoor Ali Shah.

As for *Urgenda*, the court in *Leghari* granted rights, both procedurally and substantively, by indirectly applying international law. Given the character of a public interest litigation case, Judge Shah established the court's jurisdiction without further analysis besides the alleged breach of fundamental rights and the asserted claim to protect the latter on behalf of the people of Punjab. Moreover, the petitioner was not requested to prove how specifically the executive's inertia had/would have affected his farming family and his own source of income. On the substantive plane, the relevant judge found that the Pakistani central government, due to its "lethargy" on the climate change policy and implementing framework, had violated a number of constitutionally protected fundamental rights. An infringement was found of the right to life (Article 9 of Pakistan's Constitution), which implicitly includes the right to a healthy and clean environment, the right to human dignity (Article 14 of Pakistan's Constitution), the right to property (Article 23 of Pakistan's Constitution) and the right to infor-

mation (Article 19A of Pakistan's Constitution). The Green Bench read the provisions in light of sustainable development, the precautionary principle, the principle of environmental impact assessment ('EIA'), inter and intra-generational equity, as well as the public trust doctrine.<sup>31</sup>

The content of this decision is especially pivotal for its being issued in the jurisdiction of a developing country, where the relevant judge recalled the government to its duties. Such duties are enhanced by the developing status of the country itself and the disproportionate effect of climate change on South Asia in particular.<sup>32</sup> Not only did the court intervene on the objectives to be reached, but it also acted as the Rawlsian exemplar of Public Reason.<sup>33</sup> In fact, it put forward a new discourse on the constitutional essentials by coordinating ministries and governmental bodies, as well as by educating them about the effects of climate change on the fundamental rights of the people of Punjab.

The third case I am to broach is *Julianna v. United States*, whereby a group of young people and a guardian for future generations have sued the United States and other governmental officials for the alleged violation of substantive due process rights (5<sup>th</sup> Amendment to the US Constitution), specifically life and liberty, by failing to adopt measures to decrease greenhouse gas emissions. A federal judge in Oregon, where the case is still under adjudication, denied several

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<sup>30</sup> *Leghari v Federation of Pakistan and others*, Lahore High Court, WP No 25501/2015 (Sept 14, 2015).

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<sup>31</sup> *Ibid*, para 7. The public trust doctrine is traced back to Roman law, was adopted by common law legal systems and has further been developed with respect to the planetary physical system, including the climate. On this point, see E. Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equality' (1984) 11 *Ecology LQ* 495, *passim*.

<sup>32</sup> *Leghari* (n 30) para 4.

<sup>33</sup> J. Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *UChiLRev* 765, *passim*.

motions to dismiss and a motion to strike.<sup>34</sup> Even though the decision hinges on procedural matters, it appears to be already notable.

By embracing the opinion rendered by a magistrate judge,<sup>35</sup> the US District Judge, Judge Aiken, acknowledged the effects of climate change on individuals as effects of a constitutional magnitude and explicitly recognized the justiciability of the issue, namely its aptitude to being the object of judicial decisions.<sup>36</sup> The judge acknowledged the existence of the right to a climate system capable of sustaining human life. She also maintained the correlative deprivation of the right to life and liberty (5<sup>th</sup> Amendment to the US Constitution) that results from the absence of effective action on the part of the federal government.<sup>37</sup> The relevant judge expressed her awareness of the inter-generational dimensions of the public trust doctrine, which was already recalled by the Pakistani Court in *Leghari*, but did not expound them.<sup>38</sup>

The defendants in the case later moved for a stay of proceedings, which was denied by Judge Aiken. While the fossil fuel industry had intervened, they later asked and obtained to be released from the case. The defendant in the case, the federal government, filed a petition for 'writ of mandamus' with the Ninth Circuit Court of Appeals, asking the Court of Appeals to issue the writ and direct the district court to dismiss the

case. The Court of Appeals is presently adjudicating the matter.

The fourth and last case is *Earthlife*, which was rendered by the Pretoria High Court in March 2017.<sup>39</sup> Differently from the previous, this case does not concern climate policy, but rather a specific project. Earthlife Africa ('Earthlife'), an environmental NGO founded in South Africa, filed an administrative appeal and later a claim with the Pretoria High Court, claiming that the Director of the Department of Environmental Affairs (the 'Chief Director') had failed to consider the climate change impacts of a proposed coal-fired power station before granting the authorization. In administrative proceedings, the Minister of Environmental Affairs (the 'Minister') had amended the authorization issued by the Chief Director and requested that the building firm carry out a climate change assessment of the envisaged project. At that stage of the administrative process, however, the authorization could not have been withdrawn.<sup>40</sup> In its decision, the Pretoria High Court set partially aside the Minister's ruling, suspended the authorization, and remitted the matter of climate change impacts to the Minister for reconsideration on the basis of the climate change report.<sup>41</sup>

The matter of the case turns on the interpretation of section 24O of South Africa's National Environmental Act ('NEMA'), namely South Africa's EIA law. The latter requires that the authorization of listed activities mandatorily consider all "relevant factors," among which climate change is not mentioned.<sup>42</sup> The Pretoria High Court set itself to interpret section 24O(1)

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<sup>34</sup> *Kelsey Cascade Rose Juliana et al v the United States of America et al*, 6:15-cv-1517-TC (Judge Aiken, Opinion and Order, District of Oregon, 10 November 2016), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MTD.Aiken.pdf>, last accessed 16 August 2017.

<sup>35</sup> *Kelsey Cascade Rose Juliana et al v the United States of America et al*, 6:15-cv-1517-TC (Thomas M Coffin, Magistrate Judge, Findings and Recommendations to the District Court for the District of Oregon, 8 April 2016), <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf>, last accessed 16 August 2017.

<sup>36</sup> *Juliana v. United States* (n 34), 16–17.

<sup>37</sup> *Ibid*, 32.

<sup>38</sup> *Ibid*.

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<sup>39</sup> *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (High Court of South Africa – Gauteng Division, Pretoria, 8 March 2017), Case no 65662/16, <http://climatecasechart.com/non-us-case/4463/>, last accessed 7 December 2017.

<sup>40</sup> *Earthlife* (n 39) 41.

<sup>41</sup> *Ibid*, 47.

<sup>42</sup> *Ibid*, 6.

of NEMA with reference to its wording and purpose, and in light of “its ethos and intra- and extra-statutory context.”<sup>43</sup> It thus applied NEMA consistently with section 24 of South Africa’s Constitution, regarding environmental protection, as well as international law.<sup>44</sup> The Court applied Article 3(3) of the UNFCCC, enshrining the precautionary principle, and Article 4(1)(f) of the UNFCCC, imposing “an obligation on all states parties to take climate change considerations into account in their relevant environmental policies and actions, and to employ appropriate methods to minimise adverse effects on public health and on the environment.”<sup>45</sup> Similarly to the *Leghari* court, the *Earthlife* court highlighted the priority of poverty alleviation within South Africa’s climate change action.<sup>46</sup> The judge also mentioned the Paris Agreement, but did not apparently apply it.<sup>47</sup>

Conclusively, the court held that the decision was not “reasonable, rational and lawful” since the authorization could not have been withdrawn in light of the climate change assessment of the project. Thus had Art. 24O(1) of NEMA been violated.<sup>48</sup>

Notwithstanding some notable differences, all four courts accepted the judicialization of climate change matters by applying international law and the most important law of the land, the Constitution. The interpretive technique unleashed, namely the indirect application of international law, offers a glimpse of the domestication of international law sources that may occur

in the future also in further jurisdictions, be they of a common law or civil law tradition, within a developed or a developing country.

#### **Part IV. Germany, Norway and Pakistan (Again) to Follow?**

The concept of inter- or trans-judicial dialogue is renowned at the level of international and transnational legal scholarship. The application of the same norms, principles and concepts in functionally equivalent ways by functionally equivalent national courts not only can operate as an instrument of dogmatic analysis and reciprocal legitimation, but may even lead to the emergence of international customary law. For example, the Magistrate judge in *Juliana v. United States* extensively quoted the *Urgenda* decision, specifically with regard to the justiciability of climate matters and the carbon leakage argument.<sup>49</sup>

Yet, there may also be a dialogue among plaintiffs. The concept of an inter-plaintiff dialogue belongs to the realm of human rights litigation but has steadily been spreading also to the field of environmental litigation. The following cases concern litigation presently unfolding in Germany, Norway and Pakistan. Just one of these cases has been decided in first instance, the Norwegian case. The German case has been decided on procedural grounds and has proceeded beyond the pleading phase, while the Pakistani case has not been decided yet. Still, all three cases appear to either explicitly deploy the indirect application of international law or implicitly refer to international law principles, in the mold of the cases previously illustrated (see *supra* Part III). There is nothing unprincipled in the further spreading of the techniques invoked by plaintiffs and applied by the relevant judges in the strand of cases prompted by *Urgenda*. Yet, plaintiffs and the judiciaries should be aware of the communal

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<sup>43</sup> Ibid, 36.

<sup>44</sup> Ibid, 32ff. The Court cites the presumption principle enshrined in section 233 of the South African Constitution, see *Earthlife* (n 39) 33.

<sup>45</sup> Ibid, 34. The NGO *Earthlife* also referred to the Kyoto Protocol and the Paris Agreement, see *ibid*, 15.

<sup>46</sup> Ibid, 15.

<sup>47</sup> Ibid, 36.

<sup>48</sup> Ibid, 40.

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<sup>49</sup> *Juliana v. United States* (n 34) 11.

use of the same norms and concepts in order to avoid the fragmentation of international law and persuasively hammer out equivalent levels of protection, as compatible with the relevant legal system, legal culture and culture more generally.

In July 2016, Saul Luciano Lliuya, a Peruvian citizen, brought a claim to the District Court of Essen, Germany, against RWE AG ('RWE'), an electric utility company incorporated in Germany and Europe's biggest single emitter of CO<sub>2</sub>.<sup>50</sup> The company is allegedly contributing to the melting of glacier Palcaraju and, consequently, to the increasing water volume of the Lake Palcacocha, located above the Andes' city of Huaraz, where plaintiff owns property. Grounding his claim on different legal theories—private nuisance, agency and unjust enrichment—plaintiff asked the court to determine that RWE is liable to cover the expenses for preventative measures to protect the plaintiff's property against flooding from the glacier lake insofar as the plaintiff is afflicted with such costs.<sup>51</sup>

With a decision rendered in December 2016, the Essen District Court dismissed the claim without proceeding to the evidence phase of trial, mainly due to the lack of specificities of the claim and the complexity of the causal nexus required for the legal attribution of climate change effects to the conduct of individual emitters.<sup>52</sup>

The decision, however, was reversed in November 2017 by the Civil Court of Appeals of Hamm, which maintained that a request for partial refund of the expenses incurred by plaintiff appears to comport with the principles underlying some of the German Civil Code's provisions on interference with property owner's rights.<sup>53</sup> The Court thus found that evidence shall be taken from expert opinions on several matters, among which RWE's percentage of contribution to the causal nexus. According to the Carbon Majors' Report, the plaintiff asserted such contribution to be 0.47%, for a total liability of RWE in the case of approximately 17,000,00 euros.<sup>54</sup>

Even though it does not appear that plaintiff invoked international law, one of the lawyers that contributed to the plaintiff's legal strategy commented the complaint as being grounded on the no-harm principle.<sup>55</sup> The latter is recognized as a principle of international customary law<sup>56</sup> and was applied in the *Urgenda* decision. Additionally, the polluter pays principle, which is characterized as a principle of international environmental law,<sup>57</sup> appears to have been recalled by the Appeals' Court when it asserted that "[i]t is in accordance with the legal system that even the one who acts lawfully must be liable for property impairments caused by him."<sup>58</sup> It is therefore to be seen whether such references will

<sup>50</sup> Securing the Future (RWE AG, Report 2015) 42, <http://www.rwe.com/web/cms/mediablob/en/2998766/data/1904186/2/rwe/responsibility/climate-protection/RWE-Our-Responsibility-Report-2015.pdf>

<sup>51</sup> *Lliuya v RWE AG* (District Court of Essen, 15 December 2016) 14/0354Z/R/rv, 2–3 of the unofficial English translation available at <http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/>, last accessed 7 December 2017. See also W. Frank, *The Huaraz Case (Lliuya v. RWE) – German Court Opens Recourse To Climate Law Suit Against Big Co2-Emitter* (Sabin Center for Climate Change Law: Climate Law Blog, 7 December 2017), <http://blogs.law.columbia.edu/climatechange/2017/12/07/the-huaraz-case-lliuya-v-rwe-german-court-opens-recourse-to-climate-law-suit-against-big-co2-emitter/>, last accessed 7 December 2017.

<sup>52</sup> *Lliuya v. RWE* (n 51).

<sup>53</sup> Para 1004(1) German Civil Code.

<sup>54</sup> R. Heede, *Carbon Majors: Accounting for Carbon and Methane Emissions 1854–2010. Methods & Results Report* (Climate Mitigation Services, 2014) 27, <http://carbonmajors.org/wp/wp-content/uploads/2014/04/MRR-9.1-Apr14R.pdf>, last accessed 7 December 2017. *Lliuya v RWE AG* (Civil Court of Appeals of Hamm, 30 November 2017) I-5 U 15/17, 2 O 285/15, 1, <http://germanwatch.org/de/download/20732.pdf>, last accessed 7 December 2017.

<sup>55</sup> W. Frank, *The Huaraz Case (Lliuya v. RWE)* (n 51).

<sup>56</sup> See, *inter alia*, P. Sands and others, *Principles of International Environmental Law* (n 5) 196.

<sup>57</sup> See, *ibid*, 228–229.

<sup>58</sup> *Lliuya v RWE AG* (Civil Court of Appeals of Hamm, 30 November 2017) (n 54) para 2.



be more explicit in the further adjudication of the case. If such were the case, this would be the first and only climate change case where the indirect application of international law is pleaded in national courts against an enterprise for claiming damages.

As another development of climate change litigation, the much-acclaimed Paris Agreement has recently entered the litigation scene. The Paris Agreement was invoked within a claim filed in Norway in October 2016.<sup>59</sup> Two environmental NGOs brought a claim against the Norwegian government to challenge the legality of oil and gas licenses for deep-sea extraction in the Barents Sea. Plaintiffs motivated the licenses' illegality by resting on the reformed provisions of Section 112 of the Norwegian Constitution. As a first theory, claimants argued that the licenses breach the absolute prohibition, which is derivable from Section 112, for the state to allow the extraction in issue, given the damage and risk to which the environment can be exposed.<sup>60</sup> If such prohibition were not absolute, a prohibition on such activities would nevertheless result from the application of the principle of proportionality between environmental degradation and socio-economic benefits—maintained plaintiffs in the summons. Alternatively, plaintiffs asserted that the licences were invalid because of procedural errors, specifically related to the neglect of environmental and climate considerations during the EIA process for issuing the licenses.<sup>61</sup>

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<sup>59</sup> *Greenpeace Nordic Ass'n and Nature & Youth v Norway Ministry of Petroleum and Energy* (Oslo District Court, petitioned filed 18 October 2016), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161018\\_3593\\_petition.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161018_3593_petition.pdf), last accessed 16 August 2017.

<sup>60</sup> *Greenpeace Nordic Ass'n and Nature & Youth v Norway Ministry of Petroleum and Energy* (n 59) 6.

<sup>61</sup> See *ibid*, 6.

By explicitly referring to the presumption principle, which equals the interpretive technique of the indirect application of international law, claimants argued that Section 112 of the Norwegian Constitution should be interpreted consistently with Norway's international obligations,<sup>62</sup> among which the precautionary principle,<sup>63</sup> the no-harm principle,<sup>64</sup> the Paris Agreement, in particular Articles 2(1)(a), 4(1), 3 and 4(3),<sup>65</sup> Articles 2 and 8 of the ECHR, and Article 12 of the International Covenant on Economic Social and Cultural Rights ('ICESCR').<sup>66</sup> The precautionary and no-harm principles, as well as Articles 2 and 8 ECHR, have been successfully applied also in some of the cases reviewed under Part III.

With reference to the inter-plaintiff prong of the case, the summons referred to the ruling in *Urgenda*,<sup>67</sup> and one of the NGOs representatives cited both *Urgenda* and *Juliana v. United States* in an earlier article that he contributed to write.<sup>68</sup>

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<sup>62</sup> *Ibid*, 36.

<sup>63</sup> The precautionary principle is held to unfold both a substantive prong and a procedural prong. See *ibid*, 6. See also *ibid*, 37. Both prongs were also applied in the *Urgenda* decision, see comments by S. Roy and E. Woerdman, 'Situating *Urgenda v the Netherlands* within Comparative Climate Change Litigation' (2016) 34 *JERL* 165, 180ff.

<sup>64</sup> Plaintiffs analyzed the no-harm principle by referring to the principle of non-discrimination, see *Greenpeace Nordic Ass'n and Nature & Youth v. Norway Ministry of Petroleum and Energy* (n 59) 37–38. See *ibid*, 38, where plaintiffs cited *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Judgment, ICJ Reports 2010, 14 (International Court of Justice).

<sup>65</sup> *Greenpeace Nordic Ass'n and Nature & Youth v. Norway Ministry of Petroleum and Energy* (n 59) 19. See also *ibid*, 22, for reference to Norway's Nationally Determined Contribution.

<sup>66</sup> *Ibid*, 38–39.

<sup>67</sup> *Greenpeace Nordic Ass'n and Nature & Youth v. Norway Ministry of Petroleum and Energy* (n 59) 4.

<sup>68</sup> A. Melli and others, 'Norway's Dash for Arctic Oil Violates its Own Constitution' *The Ecologist* (16 October 2015) [http://www.theecologist.org/News/news\\_analysis/2985911/norways\\_dash\\_for\\_arctic\\_oil\\_violates\\_its\\_own\\_constitution.html](http://www.theecologist.org/News/news_analysis/2985911/norways_dash_for_arctic_oil_violates_its_own_constitution.html), last accessed 16 August 2017.

The case has been recently decided by the Oslo District Court.<sup>69</sup> The competent judge maintained that Section 112 of the Norwegian Constitution, an environmental provision, confers rights and can be invoked in the courtroom.<sup>70</sup> Such holding is unprecedented as Section 112 had not been tried before. Notwithstanding, the judge found that the threshold for assessing whether Section 112 has been breached is largely left for the Norwegian Parliament to set.<sup>71</sup> The judge bestowed wide discretion also on the Norwegian government with respect to the procedure for and content of the EIA that preceded the issuance of the licenses.<sup>72</sup> International law did not play a large role, and ECHR law did not play any role, in the decision as the judge asserted that plaintiffs had not clarified, nor substantiated whether the licenses breached international law

<sup>69</sup> Greenpeace Nordic Ass'n and Nature & Youth v Norway Ministry of Petroleum and Energy (Oslo District Court, 4 January 2018, 16-166674TVI-OTIR/06).

<sup>70</sup> Ibid, 13–17. The judge, however, did not clarify what type of right Section 112 enshrines, e.g. whether to life, health or democratic participation – which affects the judicial level of scrutiny. B.K. Ese, 'Dommen tvingar fram nye klimasøksmål' *UiB Nyheter* (5 January 2018) <http://www.uib.no/aktuelt/113792/dommen-tvingar-fram-nye-klimas%C3%B8ksm%C3%A5l>, last accessed 10 January 2018.

<sup>71</sup> Ibid, 20. It appears that the judge is preoccupied with the democratic character of the judgment, and thus confers wide discretion to the Norwegian Parliament. The upcoming question thus revolves around the level of discretion recognized to the government when governmental action does not involve a vote in the Parliament. Even though discretion is ultimately conferred to the Parliament, the decision shows that the judge actually pondered whether CO<sub>2</sub> emissions would substantially increase due to the licenses, but concluded that increase would be marginal. Such conclusion is reached on the assumption that the "high scenario" of CO<sub>2</sub> emissions does not materialize, which appears at loggerheads with the precautionary principle. Ibid, 22. One may inquire why the "high scenario" was not taken into account and what the consequences may be if it does.

<sup>72</sup> Ibid, 29–45.

and ECHR law.<sup>73</sup> Plaintiffs have announced that they will appeal the decision.<sup>74</sup>

As for the Norwegian case, the Paris Agreement has been recently invoked within a claim filed in Pakistan in April 2016 by a young girl, Rabab Ali.<sup>75</sup> Rabab's father, an environmental lawyer, filed a public interest litigation case with the Supreme Court of Pakistan alleging violations of constitutionally protected fundamental rights,<sup>76</sup> in light of a number of international principles: the principle of sustainable development, the precautionary principle, the obligation to undertake an EIA, as well as the principle of inter-generational equity. Moreover, a host of conventions and instruments were recalled, among which the UNFCCC, the Kyoto Protocol, the Rio Declaration and the Paris Agreement. The influence of the victorious *Leghari* case is quite apparent from plaintiff's emphasis on the principle of environmental impact assessment and the public trust doctrine, which have been deployed in the *Leghari* judgment.

Yet, the factual posture of the case is quite specific. Among a range of acts and omissions attributed to the government of Pakistan, petitioner contested the approval of a plan to develop coal and requested an injunction against the plan. The

<sup>73</sup> Ibid, 28. On the reference to international law, namely the Kyoto Protocol and the Paris Agreement, in order to state that Norwegian oil and gas burned abroad is not under Norwegian jurisdiction, see *ibid*, 18–19.

<sup>74</sup> S.V.B. Langåker, 'Støttar anke i klimasøksmålet mot staten' *Framtida* (7 January 2018) <https://framtida.no/2018/01/07/landsmotet-stottar-anke-i-klimasoksmalet>, last accessed 10 January 2018.

<sup>75</sup> *Ali v Federation of Pakistan* (1 April 2016), Constitutional Petition (Supreme Court of Pakistan, Islamabad), <http://climatecasechart.com/non-us-case/ali-v-federation-of-pakistan-2/>, last accessed 16 August 2017.

<sup>76</sup> Article 9 – Security of person and Right to life; Article 4(2)(a) – Right of individuals; Article 5(2) – Obedience to the constitution and law; Article 14(1) – Inviolability of the dignity of man; Article 19 – Right to information; Article 23 – Right to property; Article 24(1) – Protection of property rights; Article 25(1) – Equality of citizens.

latter is anticipated to commensurately increase greenhouse gas emissions and displace residents in the region, besides direct and indirect environmental degradation. It was not clear why Rabab Ali did not cite the *Leghari* case in the petition, yet the type of litigation is similarly molded for the public interest and it encompasses the joint application of domestic law and doctrines, especially of a constitutional kind, along with international norms.<sup>77</sup> With regard to inter-plaintiff dialogue, Rabab Ali's father worked jointly with Our Children's Trust, namely the NGO organizing plaintiffs in *Juliana v. United States*, in order to prepare the case.<sup>78</sup>

All in all, the foregoing cases appear to fall within the mold of transnational law litigation previously alluded to. Notwithstanding some differences, this strand of litigation rests on the mixed fuel of international norms, notably environmental principles and treaty norms, along with national law. All cases came under the spotlight of the media and apparently spurred a public reason process among the domestic body politic and within the international community.

## Part V. Conclusive Remarks

In light of successful decisions (Part III) and similarly crafted claims (Part IV), it appears that individuals and NGOs are currently issuing a clarion call for cosmopolitan justice in climate matters.<sup>79</sup>

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<sup>77</sup> South Asian newspapers see correlations between the *Ali* and *Leghari* cases. Z.T. Ebrahim, 'Seven Year Old Sues Pakistan Government over Climate Change' *The Third Pole* (5 July 2016), <https://www.thethirdpole.net/2016/07/05/seven-year-old-sues-pakistan-government-over-climate-change/>, last accessed 16 August 2017.

<sup>78</sup> ELAW Bulletin, 'Children Making the Case for the Climate' (29 July 2016), <http://www.elaw.org/children-making-case-climate>, last accessed 16 August 2017).

<sup>79</sup> For an interesting point on climate change and cosmopolitanism, see Beck, 'Cosmopolitan Sociology – Outline of a Paradigm Shift' (n 2) 24: "[...] climate change – like ancient cosmopolitanism (Stoicism), the *ius cosmopolitica* of the Enlightenment (Kant) or crimes against human-

Whether national courts, especially at the apex level, will uphold such construction of the laws remains yet to be seen. In this conclusive paragraph, I consider the main functions, potential and shortcomings of the process under analysis. Short of any predictive attempt, I conclusively hold that the mechanism applied in the cases under examination is instrumental for the ongoing process of environmental democracy allowing for increased access to justice, especially access to courts, for individuals and NGOs. Moreover, such mechanism appears potentially beneficial to the enforcement of international obligations in environmental and climate matters, as well as replicable across legal systems, notwithstanding some shortcomings. The actual confines of the practice are nevertheless to be drawn within each legal system

Litigation may be understood to wield at least two functions: a substantive one, which is concerned with the victory of the case and the attainment of substantive outcomes, and an expressive one, lying asunder from the prize of victory and rather hinged on shaping the public discourse on specific issues. Each of the analyzed cases cannot be predicted to permanently consolidate in successful final decisions. Notwithstanding, their expressive function can hardly be underestimated. The surge of a new class of rights that are equally related to human life and the climate system is being articulated in national courts. Above the clamor of media animosity on climate matters, individuals have chosen to divest themselves of the role of spectators and become actors, with no certain outcome to ensue. The line of cases has positively affected the public reason process at both the domestic and international levels, fulfilling the third prong of environmental democracy, namely access to

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ity (Hannah Arendt, Karl Jaspers) – releases a 'cosmopolitan moment and momentum'."

justice, which complements the first two prongs of access to information and participation in decision-making. Any judicial decision that rules out the matter in procedural terms—before any understanding of the substantive matters—may become “the external power that deprives man of the freedom to communicate his thoughts publicly,” which turns out to deprive him “at the same time of his freedom to think.”<sup>80</sup>

Anyway, no decision is necessitated toward substantive results favorable to the cause of climate change aversion. Each national judge is indisputably situated within the moorings of the relevant legal culture and simmering social norms, besides a surface legal level that could in principle be accommodated to an interpretation coherent with international law.<sup>81</sup> Yet, contemporary law is “generated and refined by multiple and complex *national, international and supranational motions*” so that “the current legal culture—and thus also the identity of the judiciary—is developing across, and to a certain degree totally independent of, national borders.”<sup>82</sup>

The homogenization of national laws is not cherished, nor invoked. If these cases turn out to be successful, as it happened to be in the human rights’ field, norms will converge from “adjudications in multiple jurisdictions each reflecting the socio-political structures of its constitution,

while seeking to conform local practices to evolving international standards.”<sup>83</sup>

Much potential of the process under discussion depends on the legitimacy of international law. In fact, the international environmental norms considered to be more legitimate are often the ones that courts will more likely apply. Therefore, the legitimacy of the norm is apt to allow for its effective enforcement.<sup>84</sup> In a circular spiral, however, the judicial incorporation of principles and norms of international law is also going to contribute to the increased legitimacy of the norms applied.

One may note at least five shortcomings entrenched within the envisaged mechanism of enforcing international law through courts and increasingly attaining cosmopolitan justice in climate matters.

Firstly, a climate protective outcome may be contingent on the individual willingness of judges to apply international law.

Secondly, even national judges favorable to the application of international law may be at pains in deploying international environmental treaties that are usually grounded on the attainment of objectives, rather than on the implementation of specific tools. Similarly, some international environmental principles may occur to domestic judges as vague.

Thirdly, such a strand of litigation may trigger some not always constructive discussions on the legitimacy of national judiciaries, and the boundaries of the separation of powers’ principle. The executive and the judiciary might characterize such cases as a battleground where to clarify the actual reach of the principle of separa-

<sup>80</sup> Arendt, *Between Past and Future: Eight Exercises in Political Thought* (n 1) 230 citing I. Kant, ‘Beantwortung der Frage: Was ist Aufklärung?’ *Berlinische Monatsschrift* (1784) tr. by D. Colclasure, ‘Toward Perpetual Peace: A Philosophical Sketch’ in P. Kleingled (ed), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2000)

<sup>81</sup> For these categories, see K. Tuori, ‘Fundamental Rights Principles: Disciplining the Instrumentalism of Policies’ in A.J. Menendez and E.O. Eriksen (eds), *Arguing Fundamental Rights* (Springer 2006), 42.

<sup>82</sup> Supreme Court Justice dr. juris A. Bårdsen, ‘Supreme Courts and the Challenges posed by the Transnationalisation of Law’ (Faculty of Law, University of Bergen, 21 September 2015) 7.

<sup>83</sup> M. O. Chibundu, ‘Making Customary International Law through Municipal Adjudication: A Structural Inquiry’ (1999) 39 *VaJInt’l L* 1069, 1148.

<sup>84</sup> T.M. Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 24.



tion of powers with the likelihood that relations between the two powers be strained.

Fourthly, litigation might not be an effective mode of enforcement due to its costs in terms of personal and pecuniary resources.

Lastly, among the possible drawbacks, victorious national decisions may turn to be a backlash for international policy-making and law-making in climate matters to a point where negotiating states would craft international legal norms to prevent the potential liability of States from being assessed in national courts.

*Fiat justitia et pereat mundus.* In Kant's interpretation, the adage cited across this essay may ideally lead to the political maxims based "on the pure concept of the duty of right (...), whatever the physical consequences may be," rather than "the welfare and happiness that an individual state can expect to derive."<sup>85</sup> Only time will (maybe)

tell what the political maxims based on the duty of right is in climate change matters, and whether such maxims are feasible in the long run. Yet, the participation of individuals and NGOs through courts appears to already fulfill an ideal of justice based on a collective duty of care. The world, in its integrity, belongs to none sovereign power, rather to each individual and the whole community. More, "the growing prevalence of a (narrower or wider) community among the people of the earth has now reached a point at which the violation of right at any *one* place on the earth is felt in *all* places."<sup>86</sup> The case of climate change is a potent reminder of such a state of interdependence.

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<sup>85</sup> Kant, 'Beantwortung der Frage: Was ist Aufklärung?' *Berlinische Monatsschrift* (1784) tr. by D. Colclasure, 'Toward Perpetual Peace: A Philosophical Sketch' (n 79) 102.

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<sup>86</sup> *Ibid*, 84.