

Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?

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“The voice of the inanimate object, therefore, should not be stilled.” Sierra Club v. Morton, 92 S.Ct. 1361 (1972), 1374 (Douglas, W.O., dissenting)

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I.
 INTRODUCTION

As the world was sonorously applauding the unexpected consensus over the Paris Agreement, the warmest year on record was about to come to an end and, possibly, be succeeded by an even warmer year.¹ Such a convergence of events might be more telling than it appears and is arguably apt to raise decisive questions on the effectiveness of the tools so far deployed to tackle climate change.

Quite interestingly, concerted efforts to abate greenhouse gas (GHG) emissions materialized relatively early if one considers the average low timeliness of international law.² It may be safe to identify such efforts firstly in the initial implication of a concept, namely sustainability as newly coined in the Brundtland Report,³ and then in the molded appearance of a fully-fledged convention, which is the United Nations Framework Convention on Climate

1. *NASA, NOAA Analyses Reveal Record-Shattering Global Warm Temperatures in 2015*, NASA (Jan. 20, 2016, <http://www.nasa.gov/press-release/nasa-noaa-analyses-reveal-record-shattering-global-warm-temperatures-in-2015> [<https://perma.cc/BA7D-NL93>] (last visited Oct. 27, 2016); Global Analysis, NOAA: NATIONAL CENTERS FOR ENVIRONMENTAL INFORMATION (Feb. 2016), <http://www.ncdc.noaa.gov/sotc/global/201602> (last visited Apr. 7, 2016).

2. On the lack of timeliness in dealing with the Rwanda genocide, see Samantha Power, *Inhabiting the Horror, Foreword* to ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* ix-x (2003); Matthew C. R. Craven, *Introduction: International Law and Its Histories*, in *TIME, HISTORY AND INTERNATIONAL LAW* 16 (Matthew C. R. Craven et al. eds., 2007) (noting the inability of the UN Security Council to take action).

3. REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 43 (1987). The terms “global warming” and “climatic change” were authored by geochemist Wallace Broecker of Columbia University in 1975. See Wallace S. Broecker, *Climatic Change: Are We on the Brink of a Pronounced Global Warming?*, 189 *SCIENCE* 460 (1975).

Change.⁴ In some thirty years from then and after a number of further agreements, however, we still do not possess the wherewithal to effectively implement international law norms and prevent the further deterioration of the climate, as year 2015 temperatures stand to demonstrate.

Lacking a centralized enforcement system, international law norms are constantly susceptible to being breached.⁵ Although international law scholars have historically deemed compliance rates with international agreements—let alone customs⁶—very high,⁷ enforcement is still a major challenge.⁸ All the more so when international law aspires to address apparently intractable global challenges, such as climate change, which are inherently spurred by the current system of production and consumption.

More effective strategies for addressing climate issues might arise from refined law-making and wider enforcement tools. On law-making, one of the most contended issues of the pre-Paris regulatory framework has been identified in the lack of emission-reduction obligations on developing countries,⁹ which might have

4. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

5. *See, e.g.*, LORI F. DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 7, n. 4 (6th ed. 2014).

6. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U.CHI. L. REV. 1113, 1113 (1999).

7. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2nd ed. 1979).

8. DAMROSCH & MURPHY, *supra* note 5, at 17–19.

9. More precisely, non-Annex I Parties to the 1992 United Nations Framework Convention on Climate Change. United Nations Framework Convention on Climate Change, May 29, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107. It appears the United States disapproved of the exclusion of developing countries from emissions reduction targets from the very molding of the Kyoto Protocol. *See* Gerhard Peters & John T. Woolley, *William J. Clinton: Remarks on the Kyoto Protocol on Climate Change and an Exchange With Reporters in New York City*, THE AMERICAN PRESIDENCY PROJECT (December 10, 1997), <http://www.presidency.ucsb.edu/ws/?pid=53688> [https://perma.cc/ZAZ6-K3DD]; Quirin Schiermeier, *The Kyoto Protocol: Hot Air*, NATURE (November 28, 2012), <http://www.nature.com/news/the-kyoto-protocol-hot-air-1.11882> [https://perma.cc/G8C8-66KG]; Yulia Yamineva & Kati Kulovesi, *The New Framework for Climate Finance Under the United Nations Framework Convention on Climate Change: A Breakthrough or an Empty Promise?*, in CLIMATE CHANGE AND THE LAW 209 (Erkki J. Hollo et al. eds., 2013) (discussing

doomed it to failure. On enforcement, the Kyoto Protocol to the UNFCCC has even been hailed as the first Multilateral Environmental Agreement (MEA) taking enforcement seriously,¹⁰ yet issues of implementation were not consistently brought before its compliance committee.¹¹

Squaring the circle of environmental protection, equity and economic advancement is not an easy task, but it may fall short of becoming a quixotic project if specific underused features of the current climate change legal framework are to be analyzed and further deployed.

One of the possible enforcement tools to apply is the domestic implementation of international climate change law in domestic courts. If 2015 is remembered for being the warmest year on record, as well as the propitious time for the international community to consent to the Paris Agreement, it is also to be cherished for harboring the first instances worldwide where international law has been implemented in domestic courts for the adjudication of climate claims, in the Netherlands and Pakistan, respectively. Here lies a decisive question: should such instances be cursorily overviewed as sporadic examples of judicial activism, or can they rather be assessed as patterns for boosting alike decisions and possibly impacting international climate policy?

The second option appears preferable in light of the Rio Declaration, and precisely Principle 10, by which effective access to judicial and administrative proceedings, including redress and

the mistrust between developed and developing countries).

10. Meinhard Doelle, *Compliance and Enforcement in the Climate Change Regime*, in CLIMATE CHANGE AND THE LAW 172 (Erkki J. Hollo et al. eds., 2013). It was, however, contended that an evolution toward soft law has taken place within the UNFCCC since the 2007 Bali meeting. See Antto Vihma, *Analyzing Soft Law and Hard Law in Climate Change*, in CLIMATE CHANGE AND THE LAW 160 (Erkki J. Hollo et al. eds., 2013). The role of soft law in climate change law might be explained by the uncertainties of both climate change as a phenomenon and economic reasons. Indeed, it was noted that “formal enforcement does not work as well where the future is uncertain (the optimal actions for each party are highly dependent on the future State that materializes) and the costs of contracting are high.” See Robert E. Scott & Paul B. Stephan, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 86 (2006)

11. Doelle, *supra* note 10, at 186.

remedy, in environmental issues shall be provided at the State level.

In the present paper, I will take international climate change law norms as a given, and will instead turn to their implementation in domestic courts as one of the possible enforcement strategies for advancing the protection of the climate. After this Introduction (Part I), the enforcement of climate change law will be overviewed at the international law level (Part II, subpart A) and portrayed in the context of domestic courts (Part II, subpart B). In order to flesh out such a proposal as the latter, the viability of procedural rights, as embodied in Principle 10 of the Rio Declaration, will be assessed and compared with substantive rights as a possible leverage of enforcement in the sphere of climate change law (Part II, subpart C). Such leverage will be pictured out in Part III within the first two judicial decisions applying international law for the protection of the climate in domestic courts, namely the *Urgenda* decision from the Netherlands (Part III, subpart A),¹² and the *Leghari* decision from Pakistan (Part III, subpart B).¹³ The legacy of each of those will be evaluated under the prong of judicial globalization¹⁴ and international climate policy (Part III, subpart C). By taking stock of the preceding parts (Part IV), I will argue that the interpretive techniques deployed in this strand of cases are poised to further advance international climate change law, not only on a substantive plane, but also on a procedural plane, especially with regard to the standing of individuals and NGOs. Indeed, I hold such a judicial turn to be a viable enforcement mechanism in the field of climate change law and policy, especially in the aftermath of the 2015 Paris Agreement.

12. *Urgenda v. The Netherlands*, The Hague District Court (June 24, 2015) ECLI:NL:RBDHA:2015:7196 (original language: ECLI:NL:RBDHA:2015:7145) [hereinafter *Urgenda Foundation v. The Netherlands*, RvdW 2015].

13. *Leghari v Federation of Pakistan and others*, Lahore High Court, WP No 25501/2015 (Sept 4, 2015) (Pak.).

14. Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (2000); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am. J. Int'l L. 241 (2008); Eyal Benvenisti and George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 Eur. J. Int'l L. 59 (2009).

The foregoing analysis is based on a number of assumptions and limitations. The implementation of international law in domestic courts is only one of the available tools for meeting the goals set forth in international climate legislation and implied in international environmental principles.¹⁵ Moreover, the type of climate change litigation that I will address in this paper covers claims brought by non-State parties on both mitigation and adaptation measures,¹⁶ and is limited to the adjudication of disputes by a domestic court with specific reference to the direct or indirect application of international law, rather than solely national law.¹⁷

II.

AN ENFORCEMENT APPROACH TO CLIMATE CHANGE LAW

The enforcement imperative in climate change law appears especially urgent while considering that, even if concerted efforts were to be effectively taken now, the warming is already locked in for the next 25 years due to historical emissions.¹⁸

In this section, I briefly consider the classically construed notion of enforcement of international law as it has played out in climate issues. In light of emerging difficulties inherent in the international legal order and climate regulatory framework, I will propose a complementary strategy of enforcement as embodied in the judicial domestication of climate claims by either direct or indirect application of international law. I will

15. For discussions on international environmental principles and concepts, see DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 433–501 (5th ed. 2015) and SUMUDU ATAPATTU, *EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 97–98 (2007).

16. JACQUELINE PEEL & HARI M. OSOFSKY, *CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY* 2, n. 2 (2015); HUNTER ET AL., *supra* note 15, at 634.

17. For a comprehensive understanding of climate change litigation, also encompassing national law, see e.g., PEEL & OSOFSKY, *supra* note 16, at 9. *Cf.* Sabin Center for Climate Change Law, *Litigation Charts*, COLUM. L. SCHOOL, <http://web.law.columbia.edu/climate-change/resources/litigation-charts> [<https://perma.cc/X9QL-U79K>] (last visited Oct. 28, 2016) (compiling climate change caselaw).

18. *GLOBAL CLIMATE CHANGE AND U.S. LAW* 19 (Michael B. Gerrard & Jordy Freeman eds., 2d ed. 2014).

argue that the implementation of international law in domestic courts not only advances the protection of the climate, but can also signal the legitimacy of international law norms and contribute to the ultimate adherence to them.

A. *Enforcement at International Law, From Kyoto to Paris*

In order to highlight the reasons why enforcement in domestic courts can supplement enforcement applied at the international law level, the latter will be discussed selectively, with no intent to provide an exhaustive explanation of the hurdles it has thus far encountered in climate matters.

The need for implementing the climate regulatory framework was first met by fleshing out a compliance system in the 1997 Kyoto Protocol, whose entry into force was delayed until 2005. The Kyoto Protocol will be in effect until 2020, when the Second Commitment Period ends and the Paris Agreement is expected to enter into force.

The Kyoto compliance system is built around binding emission-reduction commitments,¹⁹ and is composed of a facilitative branch, enforcement branches, a plenary, and a bureau.²⁰ The compliance system was operational as late as in 2006, only two years before the start of the First Commitment Period.²¹ While the facilitative branch was meant to facilitate compliance,²² it had been summoned in only one circumstance up to 2012.²³ On the other hand, the enforcing branch firstly appeared to be thoroughly consistent with the top-down approach adopted in the Protocol,

19. Doelle, *supra* note 10, at 169; IMPLEMENTING THE CLIMATE REGIME: INTERNATIONAL COMPLIANCE (Olav Schram Stokke et al. eds., 2005); Edith Brown Weiss, *Strengthening Compliance with Climate Change Commitments*, in COEXISTENCE, COOPERATION AND SOLIDARITY, LIBER AMICORUM FOR RÜDIGER WOLFRUM 693, 693–720 (Holger P. Hestermeyer et al. eds., 2011).

20. Doelle, *supra* note 10, at 169. Compliance issues can be referred to the compliance system by either a party or an Expert Review Team (ERT). The compliance committee was established by the Marrakesh Accords, Decision - /CP.7. UNFCCC, THE MARRAKESH ACCORDS & THE MARRAKESH DECLARATION (2001), http://unfccc.int/cop7/documents/accords_draft.pdf [<https://perma.cc/GBE8-9TS6>].

21. Doelle, *supra* note 10, at 169.

22. *Id.* at 170.

23. *Id.* at 171.

yet implementation issues have not been promptly brought before it.²⁴ As a third authority within the structure, the COP/MOP is the ultimate overseer of the process but has not had much direct involvement.²⁵ The broad powers preventing information from becoming public have widely undermined the credibility of the system,²⁶ and its triggering in case of violations has not proved effective.²⁷

All in all, experience suggests the Kyoto compliance system has been underutilized since a number of issues, spanning delays in reporting to Canada's withdrawal, have not been presented before the branches either on time or at all.²⁸

Broadly speaking, the bottom-line on the Kyoto Protocol's top-down approach is not particularly impressive:²⁹ many countries have not met the 2012 targets they agreed to, Canada withdrew, some States—such as Japan and Russia—declared that they would not sign for a Second Commitment Period, and the Protocol now covers only around 15 percent of global emissions worldwide.³⁰ Furthermore, States in Copenhagen did not fulfill

24. *Id.* at 186.

25. *Id.* at 187.

26. *Id.* at 168.

27. The compliance system allows self-triggering by parties, party to party triggering, and triggering by ERT. *Id.* at 184.

28. *Id.* at 184, 188 (recalling the inability of either branch of the compliance system to react in response to Canada's intention, as early as 2007, not to meet its emission-reduction target); Jane Matthews Glen & José Otero, *Canada and the Kyoto Protocol: An Aesop Fable*, in ERKKI J. HOLLO ET AL., *CLIMATE CHANGE AND THE LAW* 489–507 (2013) (noting Canada's dwindling commitments specifically).

29. See W. BRADNEE CHAMBERS, *INTERLINKAGES AND THE EFFECTIVENESS OF MULTILATERAL ENVIRONMENTAL AGREEMENTS* 124 (2008), where the UNFCCC is deemed not effective in meeting its objectives, but effective in evolving and meeting the changing norms of society.

30. Martijn Wilder et al., *The Paris Agreement: Putting the First Universal Climate Change Treaty in Context*, BAKER & MCKENZIE (JAN. 11, 2015) at 24, http://www.bakermckenzie.com/-/media/files/insight/publications/2016/01/the-paris-agreement/ar_global_climatechangetreaty_apr16.pdf?la=en. Hitomi Kimura, *Climate Change and Policy in Japan*, in *CLIMATE CHANGE AND THE LAW* 585–95 (Erkki J. Hollo, Kati Kulovesi, and Michael Mehling eds., 2013). Yulia Yamineva, *Climate Law and Policy in Russia: A Peasant Needs Thunder to Cross Himself and Wonder*, in *CLIMATE CHANGE AND THE LAW* 551–66 (Erkki J. Hollo, Kati Kulovesi and Michael Mehling eds., 2013).

the expectation to effectively replace the Kyoto Protocol with binding obligations.³¹

The classical top-down approach entrenched in the Kyoto Protocol was further implemented in the 2012 Doha Amendment, which has bound Annex I countries, namely developed country Parties having ratified the Amendment, for the Second Commitment Period (2012–2020). The Doha Amendment has not come into effect yet.³²

After the momentous consensus on the 2015 Paris Agreement, international climate change law is apparently living through a rejuvenation of intents and means also in enforcement matters. With regard to intents, both developed and developing countries assented to curb emissions and submit their Nationally Determined Contributions (NDC),³³ which are to be communicated every five years, potentially for decades. In relation to means, the Paris Agreement specifically emphasizes, *inter alia*,

31. A large number of developed and—for the first time—developing countries made mitigation non-binding pledges that were first formulated in the 2009 Copenhagen Accord (COP 15) and later included in the 2010 Cancun Agreements (COP 16). Those pledges consist of voluntary actions that countries, now totaling 141, bound themselves to undertake during the period 2012–2020 and also entail reductions in deforestation rates and other measures besides absolute targets. *See Copenhagen Accord*, THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php [<https://perma.cc/5MF5-35CQ>] (last visited Aug. 2, 2016).

32. A total of 144 instruments of acceptance are required for the entry into force of the amendment. As of December 29, 2016, 75 countries have ratified the Doha Amendment. *See Status of the Doha Amendment*, THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php [<https://perma.cc/654J-GV4E>] (last visited January 22, 2017).

33. Paris Agreement to the United Nations Framework Convention on Climate Change art. 3, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/10/Add.1, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf [hereinafter Paris Agreement]. The Paris Agreement is the first climate treaty to engage the whole world, namely 195 countries and the European Union. However, some commentators hold that current emission reduction plans worldwide are not sufficient to stabilize sea levels. *See Irene Quaille, 'Abandon City!'—Climate Experts Warn of Displacement and Migration as Sea Levels Rise*, DEUTSCHE WELLE (Feb. 12, 2016), <http://www.dw.com/en/abandon-city-climate-experts-warn-of-displacement-and-migration-as-sea-levels-rise/a-19044363> [<https://perma.cc/ZTS8-ELAP>].

forestry measures,³⁴ adaptation,³⁵ capacity building³⁶ and cooperative approaches to achieve nationally determined contributions.³⁷

Nevertheless, the enforcement conundrum, which is inherent in international law but at times mitigated by a sophisticated design of internal bodies and mechanisms,³⁸ is still present. Although “parties shall account for their nationally determined contributions,”³⁹ no specific enforcing branch is in place for ensuring accountability on NDCs. Rather, a transparency framework is to be arranged “to promote effective implementation”⁴⁰ in a “non-intrusive” and “non-punitive manner,”⁴¹ by way of national communications, biennial reports, international assessment, and international consultation,⁴² and under the supervision of an expert-based and non-punitive

34. Paris Agreement, *supra* note 33, at art. 4.1 and 5.

35. *Id.* at art. 7.

36. *Id.* at art. 11.

37. *Id.* at art. 4.16, 6.

38. Mario Molina et al., *Reducing Abrupt Climate Change Risk Using the Montreal Protocol and Other Regulatory Actions to Complement Cuts in CO₂ Emissions*, 106 PROC. OF THE NAT'L ACADEMY OF SCI. 20616, 20617 (2009) (available at <http://www.pnas.org/content/106/49/20616.full.pdf> [<https://perma.cc/U76J-UHWM>]).

The Montreal Protocol is widely considered the most successful environmental treaty, phasing out almost 100 ozone-depleting chemicals by 97% and placing the ozone layer on the path to recovery by mid-century. It also is the most successful climate treaty to date, because chlorofluorocarbons (CFCs) and most other ozone-depleting substances (ODSs) that it has phased out are powerful GHGs with high GWPs that contribute 12 percent of the radiative forcing from long-lived GHGs and 20 percent of net anthropogenic forcing in 2005.

See the enforcement apparatus devised within the Montreal Protocol and further Adjustments in HUNTER ET AL., *supra* note 15, at 556. However, some implementation challenges have been identified. *See id.* at 588. On the Montreal Protocol as an alternative, albeit controversial, strategy to address GHG emissions, *see* Camilla Bausch and Michael Mehling, *Alternative Venues of Climate Cooperation: An Institutional Perspective*, in CLIMATE CHANGE AND THE LAW 117–19 (Erkki J. Hollo, Kati Kulovesi & Michael Mehling eds., 2013). The author, however, highlights that “the UN climate regime is currently the only realistic option.” *See id.* at 141.

39. Paris Agreement, *supra* note 33, at art. 4.13.

40. *Id.* at art. 13.1.

41. *Id.* at art. 13.3.

42. *Id.* at art. 13.3-4, 13.13.

committee.⁴³ Even the global stocktake the Conference of the Parties (COP) is to undertake in 2023 and every five years⁴⁴ thereafter might prove toothless to effectively induce State Parties to limit the temperature increase to 1.5°C above pre-industrial levels.⁴⁵ Some leeway in effective implementation, however, might dwell on the actions the COP itself is to undertake in order to establish such subsidiary bodies and exercise other functions as deemed necessary for the implementation of the Agreement.⁴⁶

Be that as it may, the Paris Agreement's bottom-up approach, as opposed to the Kyoto Protocol's top-down streamline, might turn out to be much more effective. At the time of writing, the Paris Agreement is open for signature⁴⁷ and has entered into force,⁴⁸ however implementing decisions by the Agreement's governing body still need to be laid down to effectively hammer out a revamped system of climate adaptation and mitigation.

B. *Enforcement in Domestic Courts, From The Hague to Lahore*

Even when the Paris Agreement enters into force, the prime drivers of emission-reduction efforts will be national policies, which will probably be tested and accounted for in domestic courts, as the decisions handed down by the courts in The Hague and Lahore demonstrate.⁴⁹

43. *Id.* at art. 15.2.

44. *Id.* at art. 14.

45. *Id.* at art. 2.1.a.

46. *Id.* at art. 16.4.a, b.

47. The Paris Agreement was open to signature April 22, 2016 at the UN headquarters in New York.

48. The Paris Agreement entered into force November 4, 2016. Pursuant to Article 21.1, the Agreement entered into force when at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global Greenhouse Gas (GHG) Emissions had deposited their instruments of ratification, acceptance, approval or accession. Paris Agreement, *supra* note 33, at art. 21.1.

49. Wilder et al., *supra* note 30, referring specifically to the decisions handed down in the Netherlands and Pakistan. It stills holds true that the current climate change regime requires that the national measure of each State be compatible with the international regime. *See* JONAS EBBESSON, COMPATIBILITY OF INTERNATIONAL AND NATIONAL ENVIRONMENTAL LAW xix (Kluwer 1996).

There may be a host of reasons why enforcement by international law has so far not been effective.⁵⁰ According to international law scholarship, among many reasons, a State's defection from a treaty comes about when compliance costs have surpassed the State's benefits,⁵¹ which may have very well been the case for Canada's withdrawal from the Kyoto Protocol.

More generally, the overall UNFCCC regulatory framework might have been perceived as not sufficiently legitimate, where legitimacy is measured by a number of factors,⁵² namely the norm's historical pedigree, its determinacy, its coherence, and its adherence.⁵³ For this reason, alternative regimes have been advanced for tackling climate change.⁵⁴

NICOLA DURRANT, *LEGAL RESPONSES TO CLIMATE CHANGE* 79 (Federation Press 2010).

50. On the distinction between compliance and effectiveness, where effectiveness is improved compliance, *see* Lisa L. Martin, *Against Compliance*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS THE STATE OF THE ART* 591, 602 (Jeffrey L. Dunoff and Mark A. Pollack eds., 2013).

51. Rachel Brewster, *Reputation in International Relations and International Law Theory*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS THE STATE OF THE ART* 524, 533 (Jeffrey L. Dunoff and Mark Pollack eds., 2013).

52. According to the New Haven School's approach, as epitomized in Franck's work, compliance is achieved through the compliance-pull of a norm, resulting from its legitimacy. Such tools of compliance are a norm's historical pedigree, the norm's determinacy, its coherence and its adherence. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS passim* (Oxford University Press 1990). Steven R. Ratner, *Persuading to Comply On the Deployment and Avoidance of Legal Argumentation*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 568, 569–70 (Jeffrey L. Dunoff and Mark A. Pollack eds., 2013). On the "cycles" of legitimacy the UNFCCC has recurrently gained, *see* Bausch and Mehling, *supra* note 38, at 138.

53. The UNFCCC framework might be considered overly advanced regarding its historical pedigree, especially with respect to the emission abatement obligations it imposes. Its determinacy, which is the ability for norms to communicate content, was quite clear but deemed not necessarily fair due to the lack of obligations on Non-Annex I Parties. Its coherence, namely its consonance with related norms and coordination with different treaty regimes (such as the WTO order or human rights treaties), was not specifically sought-after in the drafting of the UNFCCC and protocols. Its adherence, namely the consistency with higher, constitutive norms, can be easily grasped in the UNFCCC, yet the principles it adhered to are recent and innovative, emerging from the Stockholm Declaration and practice.

54. On the use of climate-related trade measures by a WTO member, *see*

If the overall climate regulatory framework might have not been perceived as thoroughly legitimate, the legitimacy of specific climate-related principles, such as the equity principle,⁵⁵ and bodies, such as the Intergovernmental Panel on Climate Change (IPCC),⁵⁶ has appeared visible to some domestic courts, which have increasingly internalized climate-related norms and promoted compliance therewith.⁵⁷

While the implementation of such principles and recognition of such bodies' results is no silver bullet for the effectiveness of the climate regulatory framework, it certainly strengthens its legitimacy and may bring about an increased acceptance of such principles and results among the societal values of each State. The latter may be characterized as the circular mechanism of the

Francesco Sindico, *Why Comply When Other Are Not Bound? Emissions Trading, Carbon Leakage and Trade Measures*, in LA MISE EN ŒUVRE DU DROIT INTERNATIONAL DE L'ENVIRONNEMENT IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW 209, 237 (Sandrine Maljean-Dubois and Lavanya Rajamani eds., 2011). On alternative international law regimes for addressing climate change, see Bausch and Mehling, *supra* note 38. On a case for interlinkages between treaties as a tool for boosting the effectiveness of MEAs, see Chambers, *supra* note 29, at 130. On the mutual supportiveness between the international biodiversity regime and the international climate change regime, see Elisa Morgera, *No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law*, in CLIMATE CHANGE AND THE LAW 359 (Erkki J. Hollo, Kati Kulovesi and Michael Mehling eds., 2013). On the intertwining between the climate change regime and the REDD+ program, see, e.g., Christina Voigt & Felipe Ferreira, *The Warsaw Framework for REDD+: Implications for National Implementation and Access to Results-based Finance*, 2015 CARBON & CLIMATE L. REV. 113 (2015); Anna Savaresi, *The Role of REDD in the Harmonisation of Overlapping International Obligations*, in CLIMATE CHANGE AND THE LAW 391 (Erkki J. Hollo, Kati Kulovesi and Michael Mehling eds., 2013). On the possible relevance of the World Heritage Convention, see CINNAMON PIÑON CARLARNE, CLIMATE CHANGE LAW AND POLICY. EU AND US APPROACHES 129–33 (Oxford U. Press 2010).

55. See *Urgenda Foundation v. The Netherlands*, RvdW 2015, § 4.8–4.10; *Leghari*, W.P. No. 25501/2015 (Pak.) (Sept 14, 2015) § 7.

56. See *Urgenda Foundation v. The Netherlands*, RvdW 2015, § 2.17.

57. As a variant to Franck's approach to legitimacy, Koh and Simmons have independently emphasized the role of domestic institutions in internalizing international law norms and promoting compliance with them. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997). Koh Harold Hongju, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998). BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (Cambridge U. Press 2009).

implementation of international law in domestic courts, by which the domestic recognition of international law principles and practice as customary or simply legitimate contributes to their prospective emergence as customs and standards at both international and domestic law.⁵⁸

The recognition of climate principles and processes might emerge by way of either direct or indirect application of international law in domestic courts. Under the prong of direct application, domestic courts apply international law even when the latter has not been fully implemented internally, at either the legislative or executive level (*direct application*).⁵⁹ Under the prong of indirect application, national courts are often able, and sometimes specifically required, to construe and apply national law in such a manner that any conflict with international rules is prevented (*consistent interpretation* or the *Charming Betsy* canon).⁶⁰ Under both prongs, courts deploy specific interpretive techniques and act as agents of both the domestic and international legal system, in a sort of double role.⁶¹ Such techniques appear legitimate in that courts are applying the whole of the relevant law, be it domestic or international.⁶²

58. Martin, *supra* note 50, at 601, *citing* Koh. Cf. Benvenisti, *supra* note 14, at 248. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v Belg.), Judgment, 2002 I.C.J. Rep. 3, 56–58 (Feb. 2002). Atapattu, *supra* note 15, at 485, clearly acknowledges that national judiciaries have been more capable than their international counterparts to refer specifically to sustainable development. Moreover, the author maintains “the success of sustainable development and other principles depends on the extent to which they are internalized and applied at the national level.” *Id.*

59. Simon Marsden, *Invoking Direct Application and Effect of International Treaties by the European Court of Justice: Implications for International Environmental Law in the European Union*, 60 INT'L & COMP. L.Q. 737 (2011). Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2349 (1991).

60. Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L. J. 1784 (2011).

61. David Sloss, *Self-Executing Treaties and Domestic Judicial Remedies*, 98 AM. SOC'Y OF INT'L L. 346 (2004). Cf. GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE—PT.2 10-12 (Sirey 1934).

62. For some instances of such application in the environmental sphere, see Heather McLeod-Kilmurray, *Lowering Barriers to Judicial Enforcement: Civil Procedure and Environmental Ethics*, in COMPLIANCE AND ENFORCEMENT IN ENVIRONMENTAL LAW 289 (LeRoy Paddock et al. eds., 2011).

These techniques play out differently in accordance with the either monist or dualist character of the domestic legal order, encompassing international law as its part and parcel or rather characterizing it as a separate legal system, respectively.⁶³ Nevertheless, differences are mostly notable in the application of treaties, whereby a monist legal order is bound by treaties upon ratification, and a dualist order requires implementing measures to be in place for international law to be binding upon courts.⁶⁴ Conversely, the application of customs and principles of international law is generally dependent on the sole hierarchy of sources within the relevant legal system, rather than on implementing measures, and might allow for an increased use of international customs in domestic courts.⁶⁵ Both the Dutch and Pakistani cases have carried out such prediction in their extensive application of international environmental principles.⁶⁶

Be that as it may, States rarely take a purely monist or dualist stance,⁶⁷ and such a distinction is nugatory from an international law perspective in that a State cannot invoke its own law as a reason for non-compliance with international law.⁶⁸

63. ANTONIO CASSESE, *INTERNATIONAL LAW* 213 (Oxford University Press, 2nd ed. 2005). John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. OF INT'L L. 310, 311 (1992). JOSEPH F. C. DIMENTO, *THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW* 34 (Austin: U. Texas Press 2010).

64. In a purely monist legal order, a rule of international law supersedes any inconsistent national law, even national laws of constitutional character. See Damrosch and Murphy, *supra* note 5, at 621. A slightly different definition of a monist legal order is provided by David Sloss. See David Sloss, *Domestic Application of Treaties*, SANTA CLARA L. DIGITAL COMMONS 3 (2011) [available at <https://perma.cc/G5T9-FJZT>]. For instance, the United States is characterized as a monist legal order, where courts have drawn a distinction between “self-executing” and “non-self-executing” treaties. See *id.* at 3 and 9.

65. For instance, a dualist legal system such as Italy requires that customs trump domestic legislation even when they (legislation or custom) arise subsequently (Art. 10.1 Cost. It.). Many national systems have accepted customary law as the “law of the land” even where the Constitution is silent on the subject, see JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57 (Oxford U. Press, 8th ed., 2012).

66. See *infra* note 113 and 147.

67. Damrosch & Murphy, *supra* note 5, at 622.

68. Vienna Convention on the Law of Treaties art. 46, May 23, 1969, 1155 U.N.T.S. 331.

While customary law and international law principles are somewhat easily applied,⁶⁹ the practice of implementing treaty norms in domestic courts is more varied. In order to understand the peculiarities of treaty application, some distinctions have been articulated on the type of obligations courts may be called upon to enforce. Indeed, international law obligations can be characterized as generating from horizontal relations among States, vertical relations between States and private actors (including natural persons and corporations), and transnational relations between private actors who interact across national boundaries.⁷⁰

Even if domestic courts rarely apply treaties that regulate horizontal relationships among States,⁷¹ I will later showcase how the court of The Hague was able to apply such a horizontal type of agreement as the UNFCCC.⁷²

With regard to transnational treaty provisions, municipal courts are more willing to be the enforcer in that they generally regulate cross-border relationships among private actors.⁷³

Vertical provisions are similar to transnational provisions, however they entail the public functions of government in a way that transnational relations do not. For this reason, those courts that are less prone to scrutinize the government, applying the so-called “nationalist” approach, often shy away from adjudicating vertical provisions.⁷⁴ Conversely, transnationalist judges strike the balance between the protection of the individual and

69. Especially for the indirect application of international environmental law (IEL) principles, see Maria Francheteau-Laronze, *L'application du droit international de l'environnement par le juge national: éléments d'analyse comparative*, in LA MISE EN ŒUVRE DU DROIT INTERNATIONAL DE L'ENVIRONNEMENT / IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW 635–642 (Sandrine Maljean-Dubois and Lavanya Rajamani eds., 2011). Conversely, the direct application of international environmental law (IEL) principles is somewhat more difficult. See *id.*, at 627–634.

70. See Sloss, *supra* note 64, at 10 (discussing the relationships between states and private actors generated by international law obligations).

71. *Id.* at 11.

72. See *infra* Section III.A.

73. Such considerations apply equally to monist and dualist systems. See Sloss, *supra* note 64, at 10–11.

74. *Id.* at 12. For more on the distinction between the transnationalist and nationalist approach, see Sloss, *supra* note 61, at 504.

deference to the public functions by assigning greater weight to the responsibility of protecting private parties. As will be shown in the Dutch and Pakistani decisions, such a transnationalist approach may even allow domestic courts to adjudicate governmental policies, namely climate change policies, stemming from horizontal relations among States, namely the UNFCCC. Such a phenomenon occurs in the environmental sphere even when international environmental law (IEL) conventions are not always easy to apply in that their binding character is not fully apparent.

Be that as it may, the implementation of international law in domestic courts is contingent on a number of conditions, among which are the monist or dualist character of a legal system; the specific type of international law norms, whether custom- or treaty-based; the specific type of provisions, whether horizontal, vertical or transnational; and the particularized attitude of the relevant court, whether nationalist or transnationalist.

The major shortcoming in the enforcement at the domestic level generally rests on two factors: firstly, in the special solicitude from the bench not to enmesh in policy decisions, which is the constant attitude of nationalist courts; secondly, in the host of difficulties that even transnationalist courts might encounter in the application of environmental treaties, which sometimes do not appear to set rules but rather encourage the attainment of ambitious goals.⁷⁵

According to commentators, the inherent structure of the Paris Agreement, mainly the requiring of its implementation by way of governmental policies, has further increased the likelihood that enforcement through domestic courts will occur.⁷⁶ The Paris Agreement is not going to suddenly unstitch the difficulties in implementing international law concerning climate issues in domestic courts. However, prospective litigation might be successful in the framework of the Paris Agreement, as a broader understanding of procedural and substantive

75. Francheteau-Laronze, *supra* note 69, at 620.

76. Sara Stefanini, *Next Stop for Paris Climate Deal: the Courts*, POLITICO (Jan. 11, 2016, 8:49 PM CET), <http://www.politico.eu/article/paris-climate-urgenda-courts-lawsuits-cop21/>.

environmental rights is fast shaping, as I will consider in the next section.

*C. The International Linchpin for Domestic Adjudication:
Principle 10 of the Rio Declaration*

Procedure in environmental cases is paramount to achieving substantial ends. In the present section, I argue that environmental procedural rights might be characterized as the Trojan horse for the fulfillment of substantive rights in climate litigation.⁷⁷

Environmental procedural rights, as first enshrined in Principle 10 of the Rio Declaration, may provide a linchpin for boosting domestic adjudication of climate claims. Such procedural rights are in fact more liberally granted by domestic courts by wielding a number of instruments, among which the implementation of international law in domestic courts, as the *Urgenda* court demonstrates. Such a phenomenon is apt not only to strengthen the democratic participation of individuals and NGOs in climate matters, but also to incrementally allow for the enhanced protection of substantive rights, namely the interest for climate adaptation and mitigation, as well as the wellbeing of present and future generations.⁷⁸

77. Procedural rights are not new to international law. Generalized access to justice was already enshrined in G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948) [Declaration on Human Rights] (Articles 8 and 10).

78. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (vol. I) (Aug. 12, 1992). See Felix Ekardt, *Climate Change and Justice: Perspectives of Legal Theory*, in *CLIMATE CHANGE AND THE LAW* 63, 70 (Hollo et al. eds., 2013), for a discussion on the construction of substantive rights in the climate sphere, encompassing energy access and a stable climate. See also Stephen Humphreys, *HUMAN RIGHTS AND CLIMATE CHANGE* (2009) (discussing the human rights implications of climate change); see also Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank Study available at <http://documents.worldbank.org/curated/en/2011/01/14101989/human-rights-climate-change-review-international-legal-dimensions> [https://permacc/A4KA-NQN5] 2011); see also Timo Koivurova, Sébastien Duyck & Leena Heinämäki, *Climate Change and Human Rights*, in *CLIMATE CHANGE AND THE LAW*, 287 (Hollo et al. eds., 2013) (discussing the human rights implications of climate

An increasingly liberal construction of procedural rights may also spring from the dreadful consequences following from inaction on climate change on the part of national governments and the responsibility to protect the individuals that some courts perceive is their role to fulfill.

Procedural environmental rights have classically been distinguished under three pillars: the right to information, participation in decision-making, and effective access to judicial and administrative proceedings. Such efficacious distinction was first formulated in Principle 10 of the 1992 Rio Declaration⁷⁹ and later incorporated within the most important Convention relating to procedural environmental matters, namely the 1997 Aarhus Convention under the auspices of the United Nations Economic Commission for Europe,⁸⁰ to which over 40 UNFCCC

change); see also John H. Knox, *Climate Change and Human Rights Law*, 50 Va. J. Int'l L. 163 (2009) (discussing the human rights implications of climate change); see also *The Effects of Climate Change on the Full Enjoyment of Human Rights* (Office of the United Nations High Commissioner for Human Rights, available at <http://www.thecvfor.org/wp-content/uploads/2015/05/human-rightsSRHREpdf> [<https://permacc/5975-MZZ8>] (last visit: April 14, 2016), 30 April 2015); see also Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 Stan. J. Int'l L. 103 (discussing human rights in the context of environmental rights); see also Dinah Shelton, *Human Rights and the Environment: Substantive Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 265 (Fitzmaurice et al. eds., 2010) (discussing human rights in the context of environmental rights).

79. See Jonas Ebbesson, *Principle 10. Public Participation*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 287 (Jorge E. Vinuales ed., 2015), for an account on the origins and rationale of Principle 10, its content, and its connections with other principles and assessments. Among the three pillars, public access to information is the most widely granted in environmental agreements. *Id.* at 293. The origin of some of these access rights was traced in the Declaration on Human Rights. *Id.* at 297. See Koivurova et al., *supra* note 78, at 315–18, for a discussion on procedural rights in flexibility mechanisms. See Atapattu, *supra* note 15, for a discussion on the implications of such access rights in the concept of sustainable development. Participatory rights are usually recalled in the context of environmental assessments. *Id.* at 353–78.

80. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 2161 UNTS 447; 38 ILM 517 (1999). See JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 242 (2014), for a discussion on the limitations of the Aarhus Convention. The Commission on Human Rights, at its first session following the World Summit on Sustainable Development noted

party States are also party.”⁸¹

It appears that Principle 10 initiated a movement towards the proceduralization of environmental rights, probably as a substitute for the steadfast recognition of the substantive human right to a healthy environment.⁸²

Notwithstanding, climate change law, especially the UNFCCC and subsequent agreements, appears to have neglected the third pillar, namely access to justice, along its treacherous path of negotiations. In fact, the UNFCCC is silent on access to justice, circumscribing its mandate on parties to promote and facilitate at the national and, as appropriate, subregional and regional levels, public access to information on climate change and its

“the entry into force of the Aarhus Convention and “encourag[ing] all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings.” Resolution 2003/71, 25 April 2003, UN Doc. E/CN.4/2003/135 p.260, 8th preambular para. & para. 6. See James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 J. Env'tl. L. and Litig. 27, for a discussion on the importance of the Aarhus Convention. See Jona Razzaque, *Human Rights to a Clean Environment: Procedural Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 284, 292 (Fitzmaurice et al. eds., 2010), for a discussion on the influence of the Aarhus Convention and Principle 10 on regional and national instruments.

81. Koivurova et al., *supra* note 78, at 312. “In his background paper for Ministerial consultations at the 26th session of the Global Ministerial Environmental Forum, Executive Director of UNEP Achim Steiner” championed a global version of the Aarhus Convention. David Banisar et al., *Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice*, 12 SUSTAINABLE DEV. L. & POL'Y. 8, 9, 12 (2012).

82. Marc Pallemmaerts, *Proceduralizing Environmental Rights: the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context*, in HUMAN RIGHTS AND THE ENVIRONMENT. PROCEEDINGS OF GENEVA ENVIRONMENT NETWORK ROUNDTABLE 14 (2004). Pallemmaerts highlights that the right to a healthy environment has been expressly recognized in the Aarhus Convention. *Id.* at 18. See David R. Boyd, *The Implicit Constitutional Right to Live in a Healthy Environment*, 20 REV. EUR. COMMUNITY & INT'L ENVTL. L. 171 (2011), for a discussion on the recognition of the right to a healthy environment. See also DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION. A GLOBAL STUDIES OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2011) (discussing environmental rights in the context of constitutions and human rights); see also Marie Soveroski, *Environment Rights versus Environmental Wrongs: Forum over Substance?* 16 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 261 (2007) (discussing environmental rights).

effects, as well as public participation in addressing climate change and its effects and developing adequate responses (UNFCCC Art. 6(a)(ii)(iii)).⁸³ Moreover, Agenda 21, as adopted at the United Nations Conference on Environment and Development (UNCED), limited its recognition of access rights to public participation in decision-making concerning the environment.⁸⁴ A country-driven work program was adopted in 2002 in order to facilitate the cooperation and implementation of Article 6 of the Convention, but nothing more appears to have ensued.⁸⁵ Under the Kyoto Protocol, Article 10 (e) was limited to requiring that State parties “cooperate in and promote at the international level” public access to information, with no mention of either participation in decision-making or access to justice.⁸⁶

Although the UNEP Governing Council finally adopted guidelines (the ‘Bali Guidelines’) on how governments should develop national laws in relation to Principle 10 and the 2012 Rio Conference on Sustainable Development (‘Rio+20’) further endorsed the principle,⁸⁷ the Paris Agreement confines itself to public participation and public access to information, omitting any reference to access to justice.⁸⁸

This has occurred in contrast to regional experiences, such as the Aarhus Convention and the Latin-Caribbean initiative to advance the implementation of procedural rights, which are spurring the recognition of environmental procedural rights at

83. United Nations Framework Convention on Climate Change, art. 6(a)(ii)(iii), May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107. *See also* MAY & DALY, *supra* note 80, at 238–39 (discussing the UNFCCC).

84. Ebbesson, *supra* note 79, at 289.

85. U.N. Conference of the Parties, *Part Two: Action Taken by the Conference of the Parties at its Eighth Session*, U.N. Doc. FCCC/CP/2002/7/Add.1 (28 March 2003). Principle 10 was also confirmed by the First Global Ministerial Environment Forum in Malmö in 2000. United Nations Environmental Program (UNEP) Malmo Ministerial Declaration, unep.org/malmo/malmo_ministerial.htm (May 31 2000).

86. 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). Procedural rights were also included under the Clean Development Mechanism (CDM); Koivurova et al., *supra* note 78, at 315.

87. *The Future We Want*, UN doc A/RES/66/288 (Sept 11, 2012), point 99.

88. Paris Agreement, *supra* note 33, at art. 12.

both the international and domestic levels.⁸⁹ Further environmental agreements have also recognized such access rights,⁹⁰ and international tribunals have also often construed existing human rights as encompassing access to information, participation in decision-making, and effective access to justice.⁹¹ The term procedural justice was eventually coined in order to signify “the fairness of the process by which goods are allocated and decisions made” in the environmental sphere.⁹²

All in all, the Rio Declaration has been deemed a “mixed success” and, unlike other areas in the Declaration, no instrument on access rights in environmental matters has been hammered out.⁹³ Three specific models of implementation of

89. The Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development was signed at the United Nations Conference on Sustainable Development (Rio+20) in June 2012, by ten governments from Latin America and the Caribbean (LAC), with the goal of advancing the implementation of procedural rights—the rights to information, participation in decision making, and justice with respect to environmental matters—in the region. Soledad Aguilar & Eugenia Recio, *Climate Law in Latin American Countries*, in *CLIMATE CHANGE AND THE LAW* 653 (Hollo et al. eds., 2013). See Ebbesson, *supra* note 79, at 298, for an account of instruments and regimes of regional scope in the matter.

90. The 1992 Convention on Biological Diversity (‘CBD’) has introduced public participation rights, where deemed appropriate, within Environmental Impact Assessment procedures for projects likely to have a significant adverse effects on biodiversity, Article 14 (a). The CBD Conference of the Parties has further promoted public participation in its decisions. The 1994 Convention to Combat Desertification (UNCCD) protects access rights even further, requiring that States Party promote and facilitate access to information and participation, even for NGOs, *see* Articles 5 (d), 10, 16 and 19. Reference to access to information and public participation in decision-making is also present in i) treaties on trade and use of harmful matters, most notably the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; the Cartagena Protocol on Biosafety to the Convention on Biological Diversity; the Stockholm Convention on Persistent Organic Pollutants; and the Minamata Convention on Mercury; ii) treaties on benefit-sharing and resources, most notably the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity; and iii) treaties on nuclear energy. Ebbesson, *supra* note 79, at 294–97.

91. Ebbesson, *supra* note 79, at 308.

92. Susan Clayton, *Models of Justice in the Environmental Debate*, 56 *J. SOC. ISSUES* 459, 461 (2000).

93. Banisar et al., *supra* note 81, at 10.

access rights have been proposed,⁹⁴ yet domestic implementation was not included and is arguably among the most concrete options to evaluate.

Firstly, the tangible character of such a mode of implementation is materialized by the rise of what was dubbed environmental constitutionalism, and also with reference to procedural rights. Indeed, the constitutions of more than sixty countries recognize or promote procedural rights,⁹⁵ and the constitutions of about three dozen countries specifically grant procedural rights in environmental matters.⁹⁶

Secondly, domestic implementation of environmental procedural rights might also come along through the recognition of access rights as customary rules at international law, which are to be enforced in domestic courts according to the hierarchy among sources provided by the legal order. The customary character of the provisions enshrined in Principle 10 of the Rio Declaration has been upheld by some scholars,⁹⁷ yet court practice has not been retrieved in this regard.

Thirdly, provisions on access rights might be more generally present in domestic statutes and regulations. Procedural rights demand that national courts identify specific procedures by which certain decisions are to be made.⁹⁸ Yet, in the case of access to justice, courts—by allowing parties to enter the sacred courtrooms of justice—also allow for the possibility to achieve specific outcomes. If it is undeniable that access to justice can be hindered by obstacles concerning standing, justiciability, remedies, and enforcement;⁹⁹ however, courts are also in the position to wield some discretion on the way environmental procedural rights are granted, which might be more feasible with respect to procedural rather than substantive matters,¹⁰⁰ where

94. *Id.* at 12.

95. MAY & DALY, *supra* note 80, at 241.

96. *Id.* at 243.

97. *Id.* at 317. DIMENTO, *supra* note 63, at 31.

98. MAY & DALY, *supra* note 80, at 249.

99. *Id.* at 243.

100. *See, e.g.,* McLeod-Kilmurray *supra* note 62, at 297–304 (contending that courts need a framework of environmental ethics and principles to inform the way they interpret and apply procedural rules).

discretion often appears a byword for interference with the political branch.

Indeed, procedural rights might be even more effective than the substantive right to a clean/healthy environment and alike. For example, environmental procedural rights raise few of the vast and policy-based considerations that are required in recognizing substantive environmental rights, allowing judges to escape controversies from the public on the political nuance of their decisions. Moreover, they are easier to enforce than substantive rights.¹⁰¹

Yet, procedural rights are still instrumental for achieving the recognition of some substantive rights related to the environmental sphere. There are many shortcomings in fashioning a claim on the basis of substantive rights in environmental matters. For example the lack of a circumscribed injury to a particular claimant and the difficulty in retrieving clear evidence, as opposed to classic litigation.¹⁰² Furthermore, in certain cases, remedies are difficult to devise,¹⁰³ all the more so when environmental protection competes with other human rights.¹⁰⁴

My contention is that either a human rights-based claim or reference to international law in domestic adjudication might advance both substantive and procedural climate change law, especially when it concerns the main hurdle posed by litigation, namely standing, which is also dispositive of the substantive character of a claim. This can be achieved in at least two different modes. Under the first mode, courts might deploy the high level of discretion that is bestowed upon them in procedural matters¹⁰⁵ by considering the substantive character of the litigation, oftentimes related to human rights, which might justify a looser application of procedural rules in order for the

101. MAY & DALY, *supra* note 80, at 249. *See also id.* at 126 (“[T]he majority of constitutional provisions purporting to advance substantive environmental constitutionalism have yet to be engaged meaningfully by domestic courts.”).

102. *Id.* at 276 (referring to constitutional litigation).

103. *See id.* at 277 (referring to constitutional claims).

104. *See id.* at 277–78.

105. McLeod-Kilmurray, *supra* note 62, at 297–300.

litigation matter to be ascertained.¹⁰⁶ Under the second mode, domestic thresholds for standing might be interpreted more liberally in light of international law, especially international environmental principles.¹⁰⁷

Indeed, such a conceptual framework can be inferred from the two cases that are to be discussed. As I will explain, under the first mode, the Pakistani court in *Leghari* did not apply any real threshold for standing since the relevant claims were classified under constitutional/human rights litigation, for which there is no real threshold for standing pursuant to Pakistani law.¹⁰⁸ Similarly, the court in *Urgenda* was very liberal in allowing standing, although litigation was not constitutional but still grounded on the protection of constitutional/human rights. Under the second mode identified in the foregoing, the Dutch court indirectly applied international law when ascertaining standing of the NGO Urgenda. Indeed, it interpreted Urgenda's bylaws in light of the concept of sustainable development, as enshrined in the Brundtland Report, and intergenerational equity, as part and parcel of IEL. The ultimate result rested on permitting Urgenda's standing even for future generations.¹⁰⁹

Both modes can be arguably characterized as implementing international law, by reference to human rights and specific principles or norms of international law, respectively. This might

106. Standing threshold requirements do not always need be loosened in climate cases. The mere showing of an injury in fact, which is generally characterized by some particularized element, requires an understanding of substantive matters.

107. MAY & DALY, *supra* note 80, at 107.

When courts implement environmental rights in particular, they tend to import many of the principles and values of environmental law that have become widely accepted throughout the world in similar cases, such as the precautionary principle, the principle that the polluter should pay for the damage, principles of sustainable development and intergenerational equity, and sometimes procedural principles that are unique to environmental litigation including the reversal of the burden of proof and probabilistic evidence. The incremental growth of a body of law through case-by-case application can ensure that the law develops progressively and relatively smoothly over time. This can help to increase its acceptance in the local society.

108. *Leghari v. Federation of Pakistan*, (2015) LHC, W.P. No. 25501/2015 (Pak.).

109. *Urgenda Foundation v. The Netherlands*, RvdW 2015, § 4.8–4.10.

prove that enforcement of international law in domestic courts (*supra*, Part I.B) is not only possible in the realm of environmental procedural rights but also beneficial for the attainment of environmental substantive rights, specifically in climate change litigation.

As a recent explication of such theory, the constitutional character of a climate claim was recalled by a magistrate judge and upheld by a federal judge in Oregon as one of the main arguments for granting the justiciability of the claim.¹¹⁰

The hidden potential of domestic courts for the protection of the climate can be further expanded if one considers the inter-judicial dialogue recently engaged by courts,¹¹¹ especially when it comes to the implementation of international law in domestic courts, to which I will now turn in considering the *Urgenda* and *Leghari* case.

110. Juliana, 2016 WL 1442435 at *8–13. The Magistrate Judge identifies the particularized character of plaintiff's injury by recalling the international law principle of inter-generational equity. *Id.* at *4–5. The complaint is part of a series of lawsuits initiated by Our Children's Trust across the United States. On these specific facts, a group of young people and a guardian for future generations have filed a claim against the United States and other government officials for failure to take measures to abate GHG emissions on account of the violation of substantive due process rights (Fifth Amendment), namely life and liberty. *Id.* at *1. The Magistrate Judge remarkably introduces public health as a ground for constitutional litigation by affirming that failure to regulate the emissions would result in a danger to the public health of constitutional proportions. *Id.* at *5. In the words of the Magistrate Judge, "plaintiffs assert a novel theory somewhere between a civil rights action and NEPA/Clean Air Act/Clean Water Act suit to force the government to take action to reduce harmful pollution." *Id.* at *3. To further explore the standing requirement in the Magistrate Judge's words: "[T]he court should be loath to decline standing to persons suffering an alleged concrete injury of a constitutional magnitude." *Id.* at *4. The Magistrate Judge also dismisses all arguments based on the political question doctrine. *Id.* at *7. Moreover, the Magistrate Judge asserts a substantive right is affirmed as granted by the Due Process Clause under the Public Trust Doctrine. *Id.* at *9–13. If the district court adopts the Magistrate Judge's recommendations and the Ninth Circuit upholds them on appeal, climate litigation in the U.S. would likely take a brand new turn.

111. Slaughter, *supra* note 14; Benvenisti, *supra* note 14. See also Juliana, 2016 WL 1442435 at *6–7 (referring to the *Urgenda* decision in his review of the redressability prong of standing).

III.

A PROPOSAL

In this paragraph, I illustrate the foregoing conceptual framework on the implementation of international law in domestic courts as a tool available for the protection of the environment. I will attempt to do so by resorting to the first two decisions worldwide where domestic courts have held their governments responsible for not taking action on climate change on the grounds of international law, rather than national law only. I will eventually argue that, notwithstanding striking differences, both courts indirectly applied international law on the procedural and substantive prongs of the claims, allowing for the ultimate protection of the climate and individuals.

A. *The Urgenda Case*

1. The case

The *Urgenda* case was lodged with the District Court of The Hague by the Urgenda Foundation, a Dutch NGO striving for a ‘more sustainable society’, with a primary—albeit not exclusive—focus on the Netherlands.¹¹² Urgenda contended that the Dutch government was acting unlawfully by failing to reduce or have reduced the annual GHGs emissions in the Netherlands by 40 percent, in any case at least 25 percent, compared to 1990, by the end of 2020. With an unprecedented ruling rendered in June 2015, the three-judge panel found the State liable for such hazardous negligence and enjoined the State to limit the joint volume of Dutch annual GHGs emissions, or have them limited, to achieve a target reduction of 25 percent below 1990 levels by 2020.

With respect to standing, the Court interpreted the Foundation’s bylaws in light of the concept of sustainable development, as enshrined in the Brundtland Report, and

112. *Urgenda Foundation v. The Netherlands*, RvdW 2015 at § 2.2 (“The purpose of the Foundation is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands.”).

intergenerational equity, as a principle of IEL,¹¹³ permitting Urgenda's standing for three categories of individuals: Dutch nationals, people living in other countries, and future generations. Moreover, as required by Dutch law for reasons of standing, Urgenda was bound to contact the government prior to starting proceedings, which it had done.

With respect to the substantive issue of State liability, the Court did not directly apply either international law or European Union ('EU') law. It did not even recognize Urgenda's status as a potential victim pursuant to the European Convention on Human Rights.¹¹⁴ Rather, the non-domestic sources of law were deemed to have a "reflex effect" in national law by substantially supplementing it, which might be characterized as the indirect application of international law.¹¹⁵

The judges relied on Book 6, Section 162 of the Dutch Civil Code, providing for redress to an open-catalogue type of tort—a tort not rising from defined circumstances but rather when damages materialize.¹¹⁶ The provisions of the Dutch Civil Code, however, only provided the legal theory of unlawful hazardous negligence, so the Court had to turn toward constitutional law, international law and EU law in order to flesh out the standard

113. See *supra* Part II.C for a discussion on the impactful character of international law principles for advancing environmental procedural rights. See generally Atapattu, *supra* note 15, at 77–201 (discussing sustainable development as a principle of international environmental law); MALGOSIA FITZMAURICE, *CONTEMPORARY ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW* 110-69 (2009) (discussing the intergenerational equity principle of international environmental law).

114. According to the Court, Urgenda had no standing under Article 34 of the ECHR for the alleged violation of positive obligations enshrined in Articles 2 (right to life) and 8 ECHR (right to privacy and family life).

115. *Urgenda Foundation v. The Netherlands*, RvdW § 4.43.

(This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national law open standards and concepts, including social propriety, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international law obligations. This way, these obligations have a 'reflex effect' in national law.)

On the indirect application of international law, see *supra*, Part II.B.

116. On the use of tort law in climate litigation arising in Australia, see Piñon Carlarne, *supra* note 54, at 133. On the use of tort law for advancing climate claims in general, see Durrant, *supra* note 49, at 268–306. Specifically on professional liability, see *id.* at 307–326.

of care required and allegedly not met. By neatly developing a two-tier test, the Court first questioned the degree of discretionary power the State is entitled to in climate change policy. Secondly, it deployed a bundle of EU and international law tools to hammer out the minimum degree of care the State is expected to observe in the matter.

Firstly, the Executive's traditional discretion was found to be curbed by the Dutch Constitution, Article 21, in that "it imposes a duty of care on the State relating to the livability of the country and the protection and improvement of the living environment."¹¹⁷ Given the novelty of the claim, the Court interpreted the constitutional provisions in light of three sets of sources: the "no harm" principle, international law, and EU law. The "no harm" principle posits that no State has the right to use its territory, or have it used, to cause significant damage to other States,¹¹⁸ which the Netherlands would do unless it reduces emissions and notwithstanding its small contribution to the worldwide amount of GHGs. The State did not contest the applicability of this principle.

Secondly, in order to determine one more limit to the Executive's discretion, the Court also reviewed the objectives and principles of the international climate policy,¹¹⁹ and specifically,

117. *Urgenda Foundation v. The Netherlands*, RvdW §§ 2.69, 4.35, 4.74. Article 17 of the Dutch Constitution recites the following: "No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law," retrievable at <https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>. [<https://perma.cc/AK8G-YC4V>] (last visited Aug. 2, 2016). On the importance of constitutional provisions for advancing both substantive and procedural environmental rights, see *supra* Part II.C.

118. Rosa Fernández-Egea, *State Responsibility for Environmental Harm, "Revisited" Within the Climate Change Regime*, in *Implementation of International Environmental Law XXX*, 389–90 (Sandrine Maljean-Dubois & Lavanya Rajamani eds., 2011). See also HUNTER ET AL., *supra* note 15, at 433 (introducing principles and concepts in international environmental law (IEL)); Fernández-Egea, *supra* note 118 at 389–95 (discussing the question of whether there is a general obligation to prevent environmental harm caused by climate change, which would imply State Responsibility for breaches of climate change rules that are not contained in treaties).

119. *Urgenda Foundation v. The Netherlands*, RvdW 2015 (explaining that the Court retrieves such principles from Articles 2 and 3 of the UNFCCC).

the protection of the climate system, for the benefit of current and future generations, on the grounds of what the Court called “fairness,”¹²⁰ the precautionary principle, and the principle of sustainable development.¹²¹ Besides such principles, the Court set into motion Articles 2 and 3 of the UNFCCC by interspersing the whole decision with the imperative for industrialized countries—such as the Netherlands—to take the lead in climate action (Article 3 (1) UNFCCC), and the prohibition on the Signatories to the Convention to use any lack of full scientific certainty as a reason for postponing the most appropriate measures (Article 3 (3) UNFCCC).¹²²

Thirdly, a further boundary the Executive is bound not to cross dwells on the set of climate change policy principles the Court derives from Article 191 (1) of the Treaty on the Functioning of the European Union (TFEU), namely the principle of a high level of protection for the environment, the precautionary principle, and the prevention principle.¹²³

In light of these limits on governmental discretion, the Court turned to assessing the minimum degree of care the State is expected to undertake toward Urgenda and its constituency. By relying on the “high risk of hazardous climate change,” the Court found such a duty of care bound the Dutch government to

120. *Id.* at § 4.56. *See also id.* at § 4.57 (explaining that in the Court’s view, fairness is characterized as mandating both a leading role for industrialized countries, and a specific obligation of protection toward future generations).

On the broad concept of fairness encompassing the principle of inter-generational equity and the principle of intra-generational equity, which normally correlates with the principle of Common But Differentiated Responsibility and Capabilities (CBDRs), see Patrícia Galvão Ferreira, *Common But Differentiated Responsibilities’ in the National Courts: Lessons from Urgenda v. The Netherlands*, 5 *TRANSNAT’L ENVTL. L.* 337.

121. *Urgenda Foundation v. The Netherlands*, RvdW 2015 at § 4.56. *See also id.* at § 4.59 (explaining that the sustainability principle signals that the Signatories to the UNFCCC “will promote sustainability and that economic development is vital for taking measures to combat climate change.”).

122. *See generally* André Nollkaemper, *The Netherlands, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 326–69 (Cambridge Univ. Press 2009) (On the application of treaties in the domestic legal order of the Kingdom of the Netherlands).

123. 2012 O.J. (C 326) 1977-091X.

prevent such a high risk from coming about.¹²⁴ The omissions to take action on such risk were evaluated against the international obligations the Netherlands undertook in becoming a signatory to the UN Climate Change Convention and the Kyoto Protocol.¹²⁵

The Court also advanced an economic analysis of the costs of compliance by maintaining that the costs for the State to meet its obligations were not deemed exceedingly onerous for two reasons. Firstly, until 2010, the Netherlands had a national reduction target of 30 percent below 1990 levels by 2020, which the then-government considered cost-effective. The target dropped, however, under the ETS Directive to an EU reduction target of 20 percent by 2020, and a Netherlands' target of approximately 17 percent, compared to 1990. The contention from the government that the 30 percent reduction target by 2020 was not cost-effective anymore was deemed unsubstantiated by the Court, which referred with craft and ease to policy recommendations contained in both IPCC and UNEP reports, specifically highlighting the effectiveness of mitigation over adaptation measures.¹²⁶ The effectiveness of abatement measures is indeed the most decisive limit to governmental discretion, especially on the assumption that Annex-I countries (including the Netherlands) to the UNFCCC¹²⁷ must reduce

124. *See Urgenda Foundation v. The State of the Netherlands*, RvdW 2015, at § 4.65. In § 4.63, the court took into account (i) the nature and extent of the damage ensuing from climate change; (ii) the knowledge and foreseeability of this damage; and (iii) the chance that hazardous climate change will occur. The court relies heavily on the IPCC's latest documents, *cfr. ibid.*, § 2.8–2.21. It also refers to the Netherlands Environmental Assessment Agency (PBL), the Royal Netherlands Meteorological Institute (KNMI), which is the Netherlands' representative at the IPCC, and the Emissions Database for Global Atmospheric Research (EDGAR), which is a database collecting each country's global emissions within a joint project of the European Commission and PBL.

125. *See id. at* § 4.66. What makes this specific prong interesting is the further assumption that the State is bound to take action since "citizens and businesses are dependent on the availability of nonfossil energy sources to make the transition to a sustainable society."

126. *See id.* § 2.17 on the IPCC evaluation, and *id.* § 2.30 on the UNEP report.

127. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. The court cites stricter

greenhouse gas emissions by 25–40 percent by 2020 to maintain the increase in temperature at no more than 2°C, according to latest scientific and policy documents the Court finely perused.¹²⁸

2. Assessing the Impact of Urgenda

The breakthrough of this decision springs from the decisive role of science in court, and specifically from the reports of the IPCC, which were uncontested by the government and gained a unique legal status in the decision.¹²⁹ From the viewpoint of prospective litigation, scientific reports, especially when authored by the IPCC, are likely to become dispositive of climate claims.¹³⁰

Also of specific interest for the purpose of this essay is the use of principles in court, which is remarkable for its overwhelmingly international character and specifically in the framework of a civil law country.¹³¹ By relying on soft law documents and conventions, the Court was able to reformulate the principles of sustainable development, fairness, and the no-harm principle, from which it carved out specific obligations,

climate policies of competitive countries such as the United Kingdom, Denmark, and Sweden in order to substantiate the cost-effectiveness of further reduction of Dutch emissions. *Urgenda Foundation v. The Netherlands*, RvdW 2015 at § 4.82.

128. *Urgenda Foundation v. The Netherlands*, RvdW 2015 at § 4.70.

129. The IPCC's neutrality has been contested, inter alia, in Larry S. Luton, *Climate Scientists and the Intergovernmental Panel on Climate Change: Evolving Dynamics of a Belief in Political Neutrality*, 37 ADMIN. THEORY & PRACTICE, Aug. 2015 at 144.

130. This might not be true for all domestic courts. For instance, the U.S. Supreme Court has consistently engaged with science since its first environmental decision on public nuisance actions. *Missouri v. Illinois*, 200 U.S. 496 (1906). It is, however, highly unlikely for the Supreme Court and lower courts to issue a similar ruling under the present construction of the separation of powers theory under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).¹

131. On the somewhat ambiguous attitude held by courts in the Netherlands, cf. MAY & DALY, *supra* note 80, at 24 (where it appears that apex courts in the Netherlands have maintained that it is the authorities' responsibility to keep the country habitable and to protect and improve the environment. Nevertheless, until 2014, they declined to infer environmental rights from constitutional provisions on a sound environmental policy).

such as the one encapsulated in the final order for the government to achieve a 25 percent target reduction below 1990 levels by 2020.

The use of such principles by a domestic court could lead to a mutually reinforcing process by which more domestic courts will use such principles and more international courts will refer to domestic decisions to provide evidence of the existence of IEL customary rules. Expectations are that such a “reflex effect” of international law, as the Court expressly affirmed, will be mainly deployed to replenish national law open standards and concepts, the notion of general interest, and certain legal principles,¹³² such as the sometimes loose domestic notion of tortious negligence.

Albeit persuasive in applying IEL principles and conventions, the Court was somewhat less persuasive with respect to soft law, which was probably invoked in exceedance of what appeared needed and impactful. Moreover, the Court failed to explain why the EU-agreed framework of climate action, which would result in a 14–17 percent emissions reduction on the part of the Netherlands to be achieved in 2020 compared to 1990, was challengeable in court.¹³³

132. *Id.* at 115.

133. *See Urgenda Foundation v. The Netherlands*, RvdW 2015, at § 4.31, 4.70. The emission reduction of 14 to 17 percent was estimated by the government, which evaluated expected emissions cutbacks resulting from the obligations the Netherlands undertook under the EU Emissions Trading Scheme (EU ETS). *Id.* § 2.76. The EU ETS is now in its third phase (2013–2020), which shifted the regulatory scheme from a system of national caps to a single, EU-wide, system by which 2020 emissions from fixed installations will be 21 percent lower than in 2005. Council Directive 2003/87, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, 2003 O.J. (L 275) (EC). Conversely, non-ETS sectors such as transport (except aviation and international maritime shipping), buildings, agriculture, and waste are covered by the Effort Sharing Decision, by which the Netherlands agreed to a 16 percent emissions reduction compared to 2005 (not 1990). Council Decision 406/2009/EC, of the European Parliament and of the Council of 23 April 2009 on the effort of member states to reduce their greenhouse gas emissions to meet the community’s greenhouse gas emission reduction commitments up to 2020, O.J. 2009 (L 140/136). *See also Urgenda Foundation v. The Netherlands*, RvdW 2015 at § 4.28 (where the court lamented that the Netherlands had failed to explain which reduction target applies to the Netherlands in view of the 2014 EU’s announcement of a

All in all, more NGOs in countries of similar legal tradition are expected to file climate claims for inadequate action of the relevant governments.¹³⁴ Nevertheless, the case offers a limited number of idiosyncrasies that might make it difficult to represent in other domestic courts, most notably the specificity of the Dutch constitution.¹³⁵ Peculiarly Dutch is also the theory of a limited separation of power between the judiciary and the government, the so-called *trias politica*, when “citizens, individually or collectively, have turned against government authorities.”¹³⁶ In such cases, the court posits that the judicial outcome will possibly affect political decision-making, nonetheless the judge has the authority to settle disputes involving the government and should not restrain the redressability of claims for such reason. Somehow echoing defenses to the counter-majoritarian objection,¹³⁷ the Dutch court maintains the democratic legitimacy of the judiciary to rule on this matter, on the basis of “democratically established legislation” vesting power in the judiciary, rather than elections.¹³⁸

It is safe to say that never before was an order to limit GHGs issued by a Court vis-à-vis the governmental branch.¹³⁹ The Government decided to appeal the decision¹⁴⁰ and is bound to report any unfolding issues to the Parliament. This case is not, however, a stand-alone anymore, having later been rejoined by a judgment rendered in Pakistan in September 2015.¹⁴¹

reduction target of 40 percent by 2030 and 80 percent for 2050, as compared to 1990).

134. K. J. de Graaf & J. H. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change* 27 J. OF ENVTL L., Nov. 2015, at 517, 527.

135. See *supra* note 117.

136. *Urgenda Foundation v. The Netherlands*, RvdW 2015, at § 4.97.

137. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

138. See *Urgenda Foundation v. The Netherlands*, RvdW 2015, at § 4.97.

139. Ferreira, *supra* note 120, 331. ROGER H. J. COX, *REVOLUTION JUSTIFIED* (Planet Prosperity Foundation, 2012). Roger H. J. Cox was one of the legal counsels to the Urgenda Foundation.

140. Grounds for appeal were received on April 11, 2016 but are currently only available in Dutch.

141. Urgenda is currently providing support for a number of groups looking to file similar lawsuits in different countries; however, those activities are not at

B. *The Leghari Case*

1. The case

Less than three months elapsed before a similar decision was issued by the Lahore High Court (LHC), Pakistan. The dispute concerned the position of Asghar Leghari, a law student and lawyer in Lahore, who comes from a farming family and claimed that the Federation of Pakistan was curtailing his fundamental rights by failing to address the adverse impacts of climate change, his primary concern being water and food security.¹⁴² Indeed, the lawsuit was based on the violation of human rights, characterizing the lawsuit as human rights litigation worthy of constitutional jurisdiction.¹⁴³

The government had actually set in place a National Climate Change Policy (NCCP) and the relative Framework for Implementation of Climate Change Policy for the period 2014–2030; still it had admittedly fallen short of implementing both. With an order issued September 14, 2015,¹⁴⁴ the LHC Green Bench ordered the establishment of a Climate Change Commission (CCC), tasked with implementing the Climate Change Policy and Framework for the effective enforcement of the people of Punjab's fundamental rights. The case is now unfolding as a series of recurrent orders the court keeps issuing for expediting the works of the Commission, directing its works and reviewing its interim reports. The so-called climate change orders are issued by Justice Syed Mansoor Ali Shah, who is well-known for his bold judgments.¹⁴⁵ In one of the latest orders, the

a stage that warrants publication at this point.

142. *Leghari*, W.P. No. 25501/2015 (Sept 4, 2015) § 6 (Pak.).

143. Aman Ullah, *Public Interest Litigation in India and Pakistan: Innovate Approaches to Refuse Standing*, 9 J. QUALITY & TECH. MGMT, Dec. 2013, at 91,99. "The jurisdiction of the Supreme Court and the High Courts can only be invoked in the case of violation of a fundamental right." *Id.* And see JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* 103 (Cambridge University Press, 2014) (stating that social, economic and cultural claims are most likely justiciable in Pakistan, India, Bangladesh, and Nepal).

144. *Leghari*, W.P. No. 25501/2015 (Sept 14, 2015) § 8(iii) (Pak.).

145. K Shriniwas Rao, *Justice AP Shah Can Walk the Talk*, CRICBUZZ (Nov. 10, 2015), <http://buff.ly/1Z4DCly> [<https://perma.cc/DKN7>]. Justice Shah holds a

Court ascertained the failure by the government to achieve the so-called “priority actions” under the Framework by December 31, 2015 and ordered that such priority items, as far as the Province of Punjab is concerned, be achieved by June 2016 at the latest.¹⁴⁶

The Court first considered the ongoing impact of climate change on Pakistan, especially in the form of extreme events. By failing to implement its climate change policy, the government was abridging the rights of its people as enshrined in the Pakistani Constitution.¹⁴⁷ Furthermore, the Green Bench also recalled the need to read such constitutional provisions in conjunction with a number of international law principles, namely sustainable development, the precautionary principle, the principle of environmental impact assessment (EIA), inter and intra-generational equity, and the public trust doctrine.¹⁴⁸

In comparison to the Dutch case, the Pakistani Court forwent any referral to the no-harm principle, gave specific emphasis to the equity principle, touched on the EIA principle, and arguably introduced a novel principle to the international plane, which is the common law public trust doctrine.¹⁴⁹ The no-harm principle was not relevant to the case, as Pakistan is not a major

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146. *Leghari v Federation of Pakistan and others*, Lahore High Court, WP No 25501/2015 (Jan 18, 2016), §§ 3–4.

147. These rights include the right to life, PAKISTAN CONST. art. 9, which implicitly encompasses the right to a healthy and clean environment, the right to human dignity, *id.* art. 14, the right to property, *id.* art. 23, and the right to information, *id.* art. 19A.

148. *Leghari*, W.P. No. 25501/2015 (Sept 14, 2015) § 7 (Pak.). In the court’s view, international environmental principles act in conjunction with the constitutional principles of democracy, equality, and social, economic and political justice. *Id.*

149. With reference to the EIA principle, see *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 (April 20). With reference to the public trust doctrine, which stemmed from common law and was later enshrined in statutes and constitutions of various legal traditions, see Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 808 (2012) and JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* 267 (Cambridge University Press, 2014).

contributor to global warming and is actually a “victim of climate change and requires immediate remedial adaptation measures to cope with the disruptive climatic patterns.”¹⁵⁰

The court’s reasoning entails that the government’s responsibility is even more stringent in light of the equity principle, signifying an enhanced responsibility toward the weak and vulnerable segments of society. The EIA principle was not explored further than being mentioned, neither was the public trust doctrine, yet the Court proved bold in advancing them to interpret constitutional provisions and impose obligations onto the executive.

Albeit with a different move, the Pakistani decision aligns with the Dutch one in ordering the executive branch to take action to address climate change. In both rulings, the relevant judges referred to specific constitutional provisions and heavily grounded their reasoning on human rights and international environmental principles.

2. Assessing the Impact of Leghari

The decision rendered in Pakistan was unexpectedly bold for three main reasons. Firstly, the Court characterized the government’s conduct with the colorful wording of “lethargy,” as if the decision were the obliged judicial response to the grave omissions of the executive.¹⁵¹

150. *Leghari*, W.P. No. 25501/2015 (Sept 14, 2015) § 4 (Pak.).

151. *Leghari*, WP No 25501/2015 (Sept 4, 2015) § 8 (Pak.). In a subsequent order, *Leghari v. Federation of Pakistan, etc.*, WP No 25501/2015 (Lahore High Court) (Dec. 7 2015) § 6 (Pak.), the court emphasizes the “huge disconnect inter Ministries regarding the issue of Climate Change. It is sad to note that understanding and seriousness of climate change is still a far cry. There is paucity of understanding coupled with extreme apathy.” Moreover, according to the order issued Jan 18, 2016, the Climate Change Commission reported a “not particularly visible” or “uniformly high” degree of familiarity with the Executive’s Climate Change Policy in the concerned Ministries. *Leghari v. Federation of Pakistan, etc.*, WP No 25501/2015 (Lahore High Court) (Jan. 18 2016) § 1 (Pak.). Indeed, the Policy appears not to have fully considered the 18th Constitutional Amendment, and fell short of considering several of the Provinces’ roles and responsibilities. *Id.*

What is required is a paradigm shift in the mind-set of the Federal and Provincial Governments, its Ministries, Departments and Agencies that climate change is a real threat which needs to be countered effectively to ensure a better future for

Secondly, the Court exhorted other judges, presumptively Pakistani judges, to shift from environmental justice to climate change justice, by continuing to ground decisions on the fundamental rights doctrine with a novel and specific bent to climate rather than general environmental issues.¹⁵² Thirdly, the Court's language sometimes conjures up the imminence and urgency of national security threats, which comes prominently in the definition of climate change as a "major national security threat."¹⁵³

These three features clearly set this decision apart from the *Urgenda* case. The difference can be explained with reference to the specific setting of this case, which was decided by the *Green Bench* of the Lahore Supreme Court. Green Benches began spreading across the country after Pakistan's Supreme Court endorsement of the 2012 Bhurban Declaration titled "A Common Vision on Environment for the South Asian Judiciaries."¹⁵⁴ Given the common understanding of the judiciary's role in addressing environmental issues, the *Leghari* decision appears to be deeply influenced by India's Supreme Court's jurisprudence, especially through the notion of public interest litigation,¹⁵⁵ and may become a legitimate precedent also for other courts in South Asia.

Nonetheless, the Court did not specifically address the issue of standing,¹⁵⁶ nor the legal force of scientific evidence of climate

the country.

Id. § 6.

152. On constitutional litigation spurred in Pakistani courts and favorable to the plaintiffs in environmental matters, see MAY & DALY, *supra* note 80, at 97 and 120.

153. *Leghari*, WP No 25501/2015) (Oct 5, 2015) § 6. (Pak.). The Pakistani court considers the impact of climate change on individuals much more broadly than the Dutch court. For instance, on the food and health security challenges raised by climate change, see *Leghari*, WP No 25501/2015 (Lahore High Court) (Jan. 18 2016) § 5.

154. Bhurban Declaration: A Common Vision on Environment for the South Asian Judiciaries, March 25, 2012, <http://www.unep.org/delc/worldcongress/Portals/24151/BhurbanDeclaration.pdf> [<https://perma.cc/3KRX-TSQB>].

155. Gitanjali N. Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, 14 ENVTL. L. REV. 200 (2012).

156. "Courts in India, Pakistan, Bangladesh, and Nepal have recognized a form of open standing to vindicate environmental harms on behalf of the public

change, which was taken for granted. The scientific grasp of the events is undoubtedly feeble in the Pakistani decision, and it sometimes appears that mitigation and adaptation measures were somewhat used as interchangeable terms.¹⁵⁷

Still, this decision was balanced enough to persuade the Pakistani government, both at the federal and provincial levels, to take steps toward implementing its plans under the strict supervision of the Court in a quite expeditious fashion.¹⁵⁸ Not only did the court compel executive authorities to take certain actions required by the Framework for Implementation of Climate Change Policy but it also provided the Pakistani government with material knowledge on climate change threats and effects. Furthermore, it directed the executive to gather data and analyses on specific issues in a progressive mode, thus structuring the judicial process as an ongoing check on governmental action. What is more, the relevant judge, Justice Shah, instructed the government on administrative decision-

interest.” MAY & DALY, *supra* note 80, at 278. Constitutional litigation in Pakistan, as this case shows, does not require thresholds to be met for standing, but rather automatically grants standing if substantive issues, namely violations of human rights, are found. *See* Ullah, *supra* note 143, at 99. On the limits the Pakistani courts have recently imposed on the ensuing flood of cases, see *id.* at 99–103.

157. *Leghari*, WP No 25501/2015 (Sept 4, 2015) §§ 3, 5.

158. Climate change orders are progressively being issued by the judge. The Court order under *Leghari v Federation of Pakistan and others* (Jan 18, 2016) (§ 5, p. 15 referring to § 1.4, p. 2) incorporates the CCC recommendation for the Executive to draw separate budget lines for climate change mitigation/adaptation, which has so far been absent “despite the fact that Pakistan is regarded as one of the most vulnerable countries and has begun to lose a high it a percentage of its Gross Domestic Product (GDP) to climate induced disasters.” *Ibid.* (§ 1.12, p. 5), where the CCC calls for data taking into account gender in order to determine adaptation strategies/interventions for men and women. *Ibid.* (§ 1.6, p. 7), where the CCC mentions the need for Ministries and departments to be fully supported by civil society organizations, universities and think tanks. *Ibid.* (§ 7, p. 16) where the Court prompted the CCC to ensure that LEAD and WWF initiate smart courses/workshops for the Focal Persons in various Departments and Ministries. In *ibid.* (§ 1.11, p. 11), the CCC specifically encouraged the undertaking of REDD+ projects, and in *ibid.* 12, even portrays a sustainable energy mix to adopt in the post-Paris era. *Ibid.* (§ 3, p. 14), the Court found that, according to the CCC report, priority actions under the Climate Change Framework at hand, which were to be achieved by December 31, 2015, had not yet been fully achieved.

making by either approving or disapproving the executive's decision of conferring competencies to lower bodies and geographically relocating lower bodies in charge of implementing the climate change framework.¹⁵⁹

On the ground of the 2012 Bhurban Declaration,¹⁶⁰ governments of different States in South Asia may similarly comply with climate change orders issued by courts, without feeling dwarfed by the assertiveness of the courts.

The legacy of this decision for climate change law is notable. Similarly to the Dutch case, the judiciary required the executive branch to enforce climate change policies. Notwithstanding the lack of reference to either the IPCC or the UNFCCC, the Pakistani judge wielded a wide array of principles of IEL as interpretive standards in the reading of the Pakistani Constitution, thus indirectly applying international law as the Dutch court did. The specific reference to fundamental rights is remarkable in Asia, where such theory has sometimes been met with resistance as Western imperialism.¹⁶¹ By turning a lame document into a "catalyst" for steering "Pakistan towards climate resilient development," the Green Bench of the Lahore Supreme Court prompted the government to be an enforcer of sustainable development.

C. Urgenda, Leghari, and the International Climate Policy

Quite strikingly, both *Urgenda* and *Leghari* hinge on international law and constitutional law, which have been

159. On the huge disconnect among Ministries, as reported by Judge Shah, see *Leghari v Federation of Pakistan and others*, Lahore High Court, WP No 25501/2015 (Dec 7, 2015) § 6. On the transfer of the Joint Secretary Climate Change to Baluchistan, notwithstanding its expertise on climate change matters, see Justice Shah's ruling at *Leghari v Federation of Pakistan and others*, Lahore High Court, WP No 25501/2015 (Sept 4, 2015) § 8. On the need for upper governmental entities to direct lower bodies, see *Leghari v Federation of Pakistan and others*, Lahore High Court, WP No 25501/2015 (Sept 14, 2015) § 14.

160. See Bhurban Declaration, *supra* note 154.

161. Thomas W.H. Ng, *Are Human Rights a Western Construct? From the Confucius Peace Prize to the Practice of Suttee in India* 5 J. INT'L SOC. RES. 465 (2012).

dubbed the “common communication tools” of a globalized judicial front.¹⁶²

The interpretive technique applied by both courts rested on the indirect, rather than direct, application of international law—both treaty and customary, which is a powerful tool for achieving specific judicial policy goals without raising too much of a controversy.¹⁶³ Certainly, such interpretive technique is more likely than others, for example the direct application of international law, to lead to widely different results notwithstanding the sameness of the international law norm that is indirectly applied.

What is more, both decisions made use of international law norms on the procedural and substantive prongs of the claims, allowing for a mutual reinforcement of both. Possibly, such mutual reinforcement of access to justice—procedural prong—with the results gained through it of protecting the climate and individuals’ quality of life—substantive prong—appears to truly fulfill the promise of Principle 10 of the Rio Declaration. By allowing individuals to access justice on the basis of international law norms,¹⁶⁴ States would indirectly comport with the underpinnings of Agenda 21, whose basic point was action at the national level.¹⁶⁵ They would also fulfill voluntary compliance with international law, which is more effective than coercion.¹⁶⁶

162. Benvenisti, *supra* note 14, at 242. Benvenisti, however, interprets this new phenomenon as a way to “reclaim the domestic political space that is increasingly restricted by the economic forces of globalization and the delegation of authority to international institutions.” *Id.* at 244.

163. The direct application of international law in domestic courts is on average much more controversial. See MAY & DALY, *supra* note 80, at 104, according to whom judicial discretion in the context of environmental constitutionalism often raises several of the concerns that actually define what is known as the political question doctrine in American law. On the latter, see Baker v. Carr, 369 U.S. 186 (1962).

164. On the implication of environmental procedural rights for democracy, see TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS Ch. 4 (2005); ATAPATTU, *supra* note 15, at 485.

165. John C. Dernbach, *Sustainable Development as a Framework for National Governance* 49 CASE WES. RES. L. REV. 1, 5.

166. International law, even more than individual State’s legal system, needs this element of promotion of voluntary compliance because of the relative paucity of

Decisions of the kind of *Urgenda* and *Leghari* are apt to boost not only Principle 10 of the Rio Declaration, and the results it may help achieve, but also the role of the holders of such rights, namely the individuals, who are the very ones bearing the brunt of climate change.¹⁶⁷

The truly globalizing character of these techniques in the climate sphere has not been proved yet, however some predictions can be advanced that courts in more powerful countries with relatively strong domestic democratic processes are likely to show greater deference to their governments and render such decisions less often.¹⁶⁸

There is no possible way to foretell whether more courts will be influenced by the legitimate—albeit foreign law—precedents of *Urgenda* and *Leghari*.¹⁶⁹ Nonetheless, it appears that similar decisions are more likely to morph out of the Paris agreement in comparison with previous agreements.¹⁷⁰

modes of compulsion. In any community, however, whether national, local, or international, the sense of community is buttressed by a high level of voluntary rule compliance. Legitimation thus serves to reinforce the perception of *communitas* on the part of the community members.

THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 26 (Clarendon Press 1995).

167. The generality of the threat is considered from an anthropocentric point of view, since it is indisputable that both flora and fauna suffer from the fallout of climate change. The role of the individual in climate change law is even enhanced by the greatly influential role played by future generations. According to Felix Ekardt, fundamental rights of future generations are not current rights, but rather “pre-effects” of future rights, which does not diminish their importance. *See* Ekardt, *supra* note 78, at n. 14.

168. Citing the American case, Benvenisti, *supra* note 14, at 248. Nevertheless, empirical studies suggest that the recognition of sustainability within the constitution or as interspersed in legislation might trigger consistent engagement on the part of the judiciary. MAY & DALY, *supra* note 80, at 265. *Id.* at 267, has even maintained that “the experience in the United States is typical: lacking constitutional recognition, sustainability has not yet triggered juridical engagement.”

169. In general, on the strong peer effects in judicial decisions due to local and/or regional patterns see Ángel Martín-Román et al., *Peer Effects in Judicial Decisions: Evidence from Spanish Labour Courts* 42 *INT'L REV. L. & ECON.* 20, 31.

170. Wilder et al., *supra* note 30. Specific provisions of the Paris Agreement might allow for this outcome. Indeed, pursuant to Article 2 (1) (a), the increase in the global average temperature is to be maintained “well below 2°C above

All in all, judicial orders are no panacea for resolving environmental degradation or climate change, but they can at least stimulate the political process and galvanize civil society engagement.¹⁷¹

From its very inception, IEL has witnessed and further enhanced the role of the individual in its sphere.¹⁷² Such a turn might be a further and determinative contribution to the characterization of the individual as a pivotal actor in the law-making and enforcing of international law.¹⁷³

pre-industrial levels” and efforts should be pursued “to limit the temperature increase to 1.5 °C above pre-industrial levels.” Therefore, domestic courts might be buttressed in their effort to prompt executive/legislative action on climate change by reviewing the consistency of national plans with the ambitious goal set forth by the international community in Paris. Furthermore, Article 4 (1) provides that,

in order to achieve the long-term temperature goal . . . [p]arties aim to reach global peaking of greenhouse gas emissions as soon as possible . . . and to achieve rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.

The need for a balance between emissions and GHG sink might persuade courts that “amending” is necessary, for example, for energy plans not encompassing a sufficient percentage of renewable energy. Another potential standard against which judges may assess the executive’s fulfillment of individuals’ rights might be Article 5 of the Paris Agreement, prompting parties “to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for” a number of policies, spanning from forestry plans to non-carbon benefits. Though Article 5 provides parties with mere ‘encouragement,’ it clearly encourages actions to implement and support

policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches.

Such provisions are poised to enhance the crisscross between the UNFCCC and REDD+. See Voigt & Ferreira, *supra* note 54, *passim*.

171. MAY & DALY, *supra* note 80, at 279. Cf. HAYWARD, *supra* note 164, Ch. 3.

172. Rio Declaration on Environment and Development, *supra* note 78.

173. CASSESE, *supra* 63, 142–150. RENÉ CASSIN, L’HOMME, SUJET DE DROIT INTERNATIONAL ET LA PROTECTION DES DROITS DE L’HOMME DANS LA SOCIÉTÉ UNIVERSELLE (1950) *in* LA TECHNIQUE ET LES PRINCIPES DU DROIT PUBLIC

IV.

TAKING STOCK

In the present essay, I tentatively portrayed the implementation of international law in domestic courts as one of the possible tools for a more effective enforcement of international law in the climate sphere. Nevertheless, such development is extremely conditional on the constitutional framework and judicial policy present in each country, and might not be persuasive enough in that UNFCCC has only recently been interpreted as imposing obligations onto States toward their own citizens, rather than toward other States.¹⁷⁴

The built-in mechanisms of enforcement enshrined in climate change law were briefly analyzed, but further contributions might illuminate the effectiveness of such specific tools as Emissions Trading, the Clean Development Mechanisms, and the Joint Implementation.¹⁷⁵

Procedural rights were foreshadowed as the Trojan horse for more successful litigation, however, it is not necessarily so: trees have no standing yet.¹⁷⁶ Some further discussion is also in order in relation to the recognition of substantive rights in the field of climate change litigation.

ÉTUDES EN L'HONNEUR DE GEORGES SCELLE 67–91 (LGDJ 1950). On the role of the individual specifically in the effective enforcement of International Environmental Law (IEL), see LAVANYA RAJAMANI and SANDRINE MALJEAN-DUBOIS, THE PRESENT STATE OF RESEARCH CARRIED OUT BY THE ENGLISH-SPEAKING AND THE FRENCH-SPEAKING SECTIONS—REPORT OF THE DIRECTORS OF STUDIES *in* LA MISE EN ŒUVRE DU DROIT INTERNATIONAL DE L'ENVIRONNEMENT IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW 168–171 (Martinus Nijhoff 2011).

174. Fernández-Egea, *supra* note 118, at 405–408 on the assessment of climate obligations as *erga omnes*.

175. On the methods of the mitigation regime, see Rowena Maguire, *Foundations of International Climate Law: Objectives, Principles and Methods*, *in* CLIMATE CHANGE AND THE LAW (Erkki J. Hollo et al. eds., 2013). On the proposal to expand the notion of “threat to international peace and security,” see Martti Koskenniemi, *Breach of Treaty or Non-compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. (1992) 123, 123.

176. Christopher D. Stone, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT (3d ed. 2010), recalling *Sierra Club v. Morton*, 405 U.S. 727 (1972) and considering whether the climate has standing.

What is more, I exemplified the conceptual framework I was arguing by solely referring to decisions rendered by domestic courts by applying international law, therefore more interest might thrive on domestic courts/administrative bodies applying domestic law,¹⁷⁷ and international courts applying international law to climate issues.¹⁷⁸

Moreover, the analyzed decisions are only relevant for national governments since no decision worldwide has so far put a burden on companies responsible for GHG emissions.¹⁷⁹

177. For instance, a remarkable petition has been lodged with the Commission on Human Rights of the Philippines, requesting an investigation on i) “the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines” and ii) “whether the investor-owned Carbon Majors,” namely 50 entities, “have breached their responsibilities to respect the rights of the Filipino people.” Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change by Greenpeace Southeast Asia et al. <http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf>. See Noriko Okubo, *Climate Change Litigation: A Global Tendency*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE VOLUME I: LEGAL RESPONSES AND GLOBAL RESPONSIBILITY 741–758 (Oliver C. Ruppel et al. eds., 2013).

178. On international climate change cases, see Ilias Plakokefalos, *International Courts and Tribunals and the Implementation of International Environmental Law*, in IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW 471–514 (Sandrine Maljean-Dubois & Lavanya Rajamani eds., 2011). Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects* 22 J. ENVTL. L. & LITIG. 267 (2007). Piñon Carlarne, *supra* note 54, at 125. Michael Mehling, *Enforcing Compliance in an Evolving Climate Regime*, in PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME 194–215, 210–211 (Jutta Brunnée et al. eds., 2013). Roda Verheyen & Cathrin Zengerling, *International Climate Change Cases*, in Ruppel et al., *supra* note 177, at 759–804. On the quest relating to the venue where small island nations can institute injunction proceedings against activities of other States leading to sea level rise, see Ulrich Magnus, *Injunctions Against Climate Change?*, in Ruppel et al., *supra* note 177, at 831–866.

179. Ekardt, *supra* note 78, at 71. Private actors’ actions, such as the operation of an industrial plant, are “only” tolerated by the State. They realize the autonomy of the operator, but are not relevant to the surrounding community’s freedom. The argument goes that, even if emissions are tolerated, the State still has the duty to protect the surrounding community’s freedom, which unfolds in a host of fundamental rights. On the conflict between the human rights of the emitters and climate change victims, see Christian

All in all, the challenge of enforcement is here to stay, even if polycentric systems of enforcement, such as the stepping in of domestic courts, might be available.¹⁸⁰

At a time when IEL has probably matured into a more developed stage, international environmental principles appear strong enough to be recognized and applied in courts of both developed and developing countries, as the cases at hand show.¹⁸¹

The role that courts are now assuming, however, might sap their own legitimacy domestically and undermine international efforts, internationally. Domestically, concerns about the separation of power will legitimately be raised and possibly result in statutory limitations to the adjudication of climate claims. Internationally, states might be at pains to articulate and delimit their own obligations in order to restrain the judicial activism of their national courts. International bodies and

Roschmann, *Climate Change and Human Rights*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE VOLUME I: LEGAL RESPONSES AND GLOBAL RESPONSIBILITY 236–240 (Oliver C. Ruppel et al. eds., 2013). and especially 238, portraying participatory—rather than substantive—rights as a way to deal with the balancing of interests. On the trigger of State Responsibility also for companies' activities causing GHG emissions, see Fernández-Egea, *supra* 118, at 401–402.

180. Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change* 20 GLOBAL ENVTL. CHANGE 550, 551 (2010). Climate change policy has conventionally been framed within the theory of collective action, which predicts that voluntary efforts will never provide the necessary incentives for drastic emissions abatement on the account that independent actors seek only short-term material benefits. Rather, an enforceable global treaty will provide the necessary incentives. Ostrom, however, maintains that collective-action problems involving public goods can also be understood through a polycentric approach, which is characterized by multiple governing authorities creating various benefits by way of local knowledge and cooperation. When ordering the government to implement domestic and international law, domestic courts provide this polycentric element. Therefore, further discussion is in order concerning whether domestic courts' decisions provide an efficient and fair mechanism to bring about the collective action necessary to address climate change.

181. More generally, more similarly-fashioned decisions may, in turn, allow for less fragmentation among international environmental law (IEL) regimes. MAY & DALY, *supra* 80, at 271–72. It was correctly stated that “the legitimacy of global governance will continue to be one of the greatest challenges for globalization and the continued development of international law.” See DAVID J. BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW 180 (2008).

corporate voluntary actions might also be bridled by the uncertain normative environment.¹⁸²

Conclusively, if the State Parties to the Paris Agreement do not live up to the treaty objectives and civil society's expectations, more decisions in the same vein as *Urgenda* and *Leghari* are expected to be rendered in the future.

182. On the effectiveness of enforced self-regulation, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1994).