Evaluating Systemic Mitigation Cases under International Human Rights Law Using the Dworkinian Concept of Layers of Intention

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ABSTRACT

This Article looks at the emergence of systemic mitigation cases, a subset of climate litigation in which plaintiffs use international human rights law to argue that states are in breach of their positive obligations to protect human rights by failing to take more aggressive emission reductions. These systemic mitigation cases are premised on an evolutionary interpretation of human rights treaties, which takes into account the realities of climate change. The soundness of such evolutionary interpretation is assessed using the Dworkinian concept of multiple intentions, whereby human rights treaties are explained to embody not one monolithic intention by treaty parties, but rather, layers of intention at differing levels of generality which may come in conflict. The evolutionary interpretation being advocated in systemic mitigation cases, while consistent with some intentions, is also in conflict with others. This Article focuses on the conflicts, particularly in relation to the evolutionary interpretation of a state's extraterritorial jurisdiction and a state's due diligence obligations, to explain the shortcomings of the current approach, especially in relation to the developing world context. This Article further suggests how these conflicts may be managed to enhance the potency of systemic mitigation cases.

I. THE EMERGENCE OF SYSTEMIC MITIGATION CASES

Systemic mitigation cases[1] represent a new and ambitious trend in the application of human rights law within the rapidly developing field of climate change litigation.[2] As defined by Maxwell et al., systemic mitigation cases

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1. Lucy Maxwell et al., *Standards for Adjudicating the Next Generation of* Urgenda*-style Climate Cases*, 13 J. HUM. RTS. & ENV'T 35, 36 (2022); JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2021 SNAPSHOT 23 (2021) (providing a definition of "systemic mitigation cases" adopted by this Article).

2. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation*, 7 TRANSNAT'L ENV'T L. 37, 40 (2018); Annalisa Savaresi & Joana Setzer, *Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers*, 13 J. HUM. RTS. & ENV'T 7, 8 (2022); Maxwell et al.,

involve the use of human rights law to "challenge the overall effort of a State . . . to mitigate dangerous climate change, as measured by the pace and extent of its greenhouse gas . . . emissions reduction."[3] Prominent examples of successful systemic mitigation cases include *Urgenda v. Netherlands* ("*Urgenda*")[4] and *Neubauer v. Germany* ("*Neubauer*"),[5] where the Dutch Supreme Court and German Federal Constitutional Court found that the respective Dutch and German governments' emissions policies were insufficiently aggressive, ordering them to take more robust emissions reduction goals.

This Article focuses on systemic mitigation cases based on *international* human rights law, as derived primarily from international and regional human rights treaties.[6] A contrast can be drawn with systemic mitigation cases based on *domestic* human rights law, as derived primarily from national constitutions.[7] Systemic mitigation cases based on international human rights would naturally be pursued before international tribunals, though it is not uncommon for international human rights law to have domestic effect, whether directly or indirectly, and thus be judicially enforceable by domestic courts.[8] For example, in *Urgenda*, the Dutch Supreme Court held that the state's obligation to protect the right to life and the right to private and family life under the European Convention on Human Rights ("ECHR") implied an obligation to reduce its greenhouse gas ("GHG") emissions by at least twenty-five per cent by the end of 2020, compared to 1990 levels.[9]

Besides *Urgenda*, another prominent example of a systemic mitigation case based on international human rights law is *Sacchi v. Argentina*,[10] where the

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supra note 1, at 36, 38 (arguing that systemic mitigation cases are ambitious because they could "lead to a significant increase in a country's overall mitigation ambition," and focus on "a State's overall mitigation efforts, rather than on a specific project or initiative with GHG emissions implications").

3. Maxwell et al., *supra* note 1, at 36.

4. HR 20 december 2019, NJ 2020, 41 m.nt. J. Spier (De Staat Der Nederlanden (Ministerie Van Economische Zaken en Klimaat)/Stichting Urgenda) (Neth.) [hereinafter Urgenda].

5. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, 157, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 30 (2021) (Ger.) [hereinafter Neubauer], https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html [https://perma.cc/28Y3-S6S7].

6. Margaretha Wewerinke-Singh, State Responsibility, Climate Change and Human Rights Under International Law 23–28 (2019) (explaining that "[t]he corpus of international human rights law has emerged primarily from a large number of treaties, and is continuously expanding, both normatively and institutionally").

7. *See, e.g.*, Eyal Benvenisti & Alon Harel, *Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity*, 15 Int'l J. Const. L. 36, 37 (2017).

8. Marlies Hesselman, *Domestic Climate Litigation's Turn to Human Rights and International Climate Law*, *in* Research Handbook on International Environmental Law 366, 372 (Malgosia Fitzmaurice et al. eds., 2021).

9. Maiko Meguro, *State of the Netherlands v. Urgenda Foundation*, 114 Am. J. Int'l L. 729, 729–31 (2020).

10. *See generally* Committee on the Rights of the Child [hereinafter CRC Committee], Sacchi et al. v. Argentina, U.N. Doc. CRC/C/88/D/104/2019 (Sept. 22, 2021); CRC Committee, Sacchi et al. v. Brazil, U.N. Doc. CRC/C/88/D/105/2019 (Sept. 22, 2021); CRC Committee, Sacchi et al. v. France, U.N. Doc. CRC/C/88/D/106/2019 (Sept. 22, 2021); CRC Committee, Sacchi et al. v. Germany, U.N. Doc. CRC/C/88/D/107/2019 (Sept. 22, 2021); CRC Committee, Sacchi et al. v. Turkey, U.N. Doc. CRC/C/88/D/107/2019 (Sept. 22, 2021).

claimants commenced proceedings against the respondent states for violations of the Convention on the Rights of the Child ("CRC") for taking inadequate steps in, among others, mitigation policies. That the Committee on the Rights of the Child ("CRC Committee") declared *Sacchi* inadmissible for failure to exhaust domestic remedies[11] did not deter similar efforts.

Shortly before the publication of this Article, the Grand Chamber of the European Court of Human Rights ("ECtHR") also released its decisions in *Duarte Agostinho v. Portugal*[12] and *Verein KlimaSeniorinnen Schweiz v. Switzerland*,[13] a duo of systemic mitigation cases that involved allegations of ECHR violations on reasons similar to those mounted in *Urgenda* and *Sacchi*. In late March 2023, the U.N. General Assembly also voted to request the ICJ's advisory opinion on states' obligations to address climate change, particularly with regard to duties under the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant for Economic, Social and Cultural Rights ("ICESCR"), among other international instruments.[14] Colombia and Chile filed a similar request to the Inter-American Court of Human Rights ("IACtHR") on the scope of states' obligations to address the climate emergency under the American Convention on Human Rights.[15]

There is understandable enthusiasm for systemic mitigation cases, which call for domestic courts and international tribunals to be the main driving forces for more aggressive mitigation reductions, especially where national governments have been slow to act. The other significant strategic advantage of systemic mitigation cases is the availability for *individuals* to directly mount claims against states.[16] Absent this mechanism, an aggrieved individual would generally be limited to petitioning his or her own state of nationality to directly bring claims against the respondent state under the law of diplomatic protection.[17]

That said, systemic mitigation cases are not immune from criticism. Academic critiques of systemic mitigation cases have been advanced by, amongst

11. Sacchi et al. v. Argentina, *supra* note 10, ¶ 10.12.

12. Duarte Agostinho and Others v. Portugal and Others, App. No. 39371/20, Decision, Eur. Ct. H.R. (Apr. 9, 2024) [hereinafter Agostinho].

13. Verein KlimaSeniorinnen Schweiz v. Switzerland, App. No. 53600/20, Judgment, Eur. Ct. H.R. (Apr. 9, 2024) [hereinafter KlimaSeniorinnen].

14. *See* G.A. Res. A/77/L.58, at 3–4 (Mar. 1, 2023).

15. Daniel Bodansky, *Advisory Opinions on Climate Change: Some Preliminary Questions*, 32 Rev. Eur. Compar. & Int'l L. 185, 185, 187 (2023).

16. *See* Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 Am. J. Int'l L. 409, 421 (2021).

17. Int'l L. Comm'n [hereinafter ILC], *Draft Articles on Diplomatic Protection*, U.N. GAOR, 61st Sess., Supp No. 10, U.N. Doc. A/61/10 (2006). It is no easy matter to get a state to sue on your behalf—not least because it is impractical to expect the state of nationality to pursue *all* the claims of its citizens.

others, Raible,[18] Mayer,[19] Zahar,[20] Thornton,[21] and Tzevelekos and Dzehtsiarou.[22] Similar doubts have also surfaced from the bench, where Judge Eicke of the ECtHR, writing extra-judicially, questioned the utility of systemic mitigation cases before international tribunals.[23] The same criticism can also be found among climate negotiators, who "were skeptical of the utility of a human rights approach, given the complex and laden agenda of the climate process, and the limited space for new methodological or conceptual approaches."[24] Nevertheless, these cases remain a popular mode of activism in the face of governmental sclerosis.[25]

In this Article, I seek a middle ground, one that shares the optimists' belief in the potential of systemic mitigation cases, but also recognizes the skeptics' concerns about their potential to drive climate policy reform. I do not doubt that the judiciary can play a meaningful role in safeguarding human rights worldwide in the face of the impending climate catastrophe. However, the focus of systemic mitigation cases on an evolutionary interpretation of human rights treaties, which focuses on their object and purpose, often insufficiently engages with competing intentions of states parties. Greater engagement with these competing intentions could enhance the potency of the systemic mitigation project.

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18. Lea Raible, *Expanding Human Rights Obligations to Facilitate Climate Justice? A Note on Shortcomings and Risks*, EJIL Talk! (Nov. 15, 2021), https://www.ejiltalk.org/expanding-human-rights-obligations-to-facilitate-climate-justice-a-note-on-shortcomings-and-risks/ [https://perma.cc/4SG8-8SGJ] (arguing that a focus on human rights and human rights adjudication risks undermining the distributive dimensions of climate justice).

19. *See* Benoit Mayer, *Prompting Climate Change Mitigation Through Litigation*, 72 Int'l & Compar. L. Q. 233, 235 (2023) (arguing that "the lack of useful benchmarks for determining an entity's 'fair share' in relation to global efforts on climate change mitigation would mean relying on the exercise of a relatively unfettered discretion—something that fits poorly with prevailing conceptions of the judicial function").

20. *See, e.g.*, Alexander Zahar, *Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions*, 23 Hum. Rts. Rev. 385, 391–94 (2022) (arguing that human rights law cannot be meaningfully applied in the climate change context unless the requirement of causation is essentially dispensed with); Alexander Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, 33 Eur. J. Int'l L. 953, 954 (2022) (arguing that systemic mitigation cases are mistaken in their conflation of adaptation and mitigation issues, and "the presumption that, because a human rights court can sensibly decide the former, it can also decide the latter").

21. Fanny Thornton, *The Absurdity of Relying on Human Rights Law to Go After Emitters*, *in* Debating Climate Law 159, 169 (Benoit Mayer & Alexander Zahar eds., 2021) (arguing that there are significant difficulties around "uncertain causality chains, the scope of human rights provisions and their application, human rights law's subjects and objectives, and significant issues with implementation and enforcement").

22. Vassilis P. Tzevelekos & Kanstantin Dzehtsiarou, Editorial, *Climate Change: The World and the ECtHR in Unchartered*, 3 Eur. Conv. Hum. Rts. L. Rev. 1, 3–6 (2022) (arguing that "even if the ECtHR stretches its case law to effectively extend it to climate change, this very global threat cannot fit in its entirety into the ECHR system").

23. Tim Eicke, Editorial, *Climate Change and the Convention: Beyond Admissibility*, 3 Eur. Conv. Hum. Rts. L. Rev. 8, 12–16 (2022).

24. Lavanya Rajamani, *Human Rights in the Climate Change Regime*: *From Rio to Paris and Beyond*, *in* The Human Rights to a Healthy Environment 236, 250 (John H. Knox & Ramin Pejan eds., 2018).

25. *See, e.g.*, John H. Knox, *Climate Change and Human Rights Law*, 50 Va. J. Int'l L. 163, 200–06 (2009–2010); Shalini Iyengar, *Human Rights and Climate Wrongs: Mapping the Landscape of Rights-based Climate Litigation*, 32 Rev. Eur. Comp. & Int'l Env't L. 299, 301–03 (2023).

II. The Scope of this Article

I begin by making three clarifications on the scope of this Article. First, systemic mitigation cases focus on *mitigation* measures, which relate to the steps taken by a state to reduce its emissions. These are contrasted to *adaptation* measures, which relate to the steps taken to adapt to worsening climate outcomes.[26]

Second, systemic mitigation cases assert violations of positive state obligations to take more robust measures to mitigate climate change, and not only negative obligations to refrain from directly contributing to climate change.[27] This is explicable on the basis that in many instances, emissions-generating activities are not done by states, but rather private companies, the latter of which are not duty-bearers under human rights treaties.[28] Of course, although private companies are the direct actors, states may subsidize or facilitate their activities. Nevertheless, it remains difficult in many instances to directly *attribute* such activities to states, given the high bar for attributing private conduct to states under the international law of state responsibility.[29]

Third, a distinction should be drawn between cases that allege the insufficiency of emissions reduction goals and cases where states have taken *no steps* to implement them.[30] In the latter case, judicial intervention is, I think, appropriate and justified—the state is simply being asked to do what it expressly set out to do. This Article will not focus on such cases, since requiring governments to carry out legislative enactments can be done by avenues of law other than human rights, and also because these cases do not involve human rights law as a vehicle for *policy change*. As a corollary, this Article casts the spotlight on the former category, where judicial intervention is more creative—and also more controversial.

III. The Role of Evolutionary Interpretation in Systemic Mitigation Cases

A. *The Human Rights Impacts of Climate Change*

It is a trite proposition that climate change is a key driver behind worsening environmental outcomes, which in turn interfere with the enjoyment of human

26. Urgenda, *supra* note 4, ¶ 5.3.2; Sara L. Seck, *Climate Justice and the ETOs*, *in* The Routledge Handbook on Extraterritorial Human Rights Obligations 421, 422 (Mark Gibney et al eds., 2022).

27. *See* Maxwell et al., *supra* note 1, at 38–41.

28. *See* Annalisa Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, 9 Climate L. 244, 248–50 (2019).

29. Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 Melb. J. Int'l L. 1, 5–7 (2004).

30. *See, e.g.*, Asghar Leghari v Federation of Pakistan, (2015) W.P. 25501/2015, ¶ 13 (Pak.) (finding that "no substantial work has been done to implement the Framework" for Implementation of Climate Change Policy (2014-2030) announced by the Ministry of Climate Change of the Government of Pakistan).

rights, including but not limited to the rights to life and health.[31] Worse still, the impacts of climate change on human rights are not evenly distributed, disproportionately affecting poorer and more marginalized states, as well as poorer and more marginalized populations within states.[32] Climate change, being a phenomenon the full extent of which would only be felt some decades later, would also disproportionately affect future generations.[33]

Against this backdrop, it is obvious that the protection of the environment is indispensable for the protection of human rights. Human life, and human rights, are impossible absent a reasonably healthy environment.[34] To that end, the obligation to protect the environment can certainly be derived from the obligation to protect human rights. Put differently, the protection of the environment is justifiable on anthropocentric grounds.[35]

If human rights depend on a reasonably healthy environment, and if the object and purpose of human rights treaties are to promote the protection of human rights, then it should follow that the object and purpose of human rights treaties would require an interpretation of human rights treaty provisions that favor environmental protection. This line of reasoning, as explained in the following subsection, is the primary basis for an evolutionary interpretation of human rights treaties in the environmental context.

B. Evolutionary Interpretation as the Driver of Systemic Mitigation Cases

The success of systemic mitigation cases generally rests on the possibility of *interpreting* human rights treaty provisions, often drafted in open-ended language, to establish human rights violations in the case of insufficient mitigation by states.[36] This possibility is complicated by the fact that the core international human rights treaties do not recognize a stand-alone right to a clean environment,[37] and that claims of violations of non-environmental rights (such as the rights to life, health, or culture) based on the adverse environmental effects of climate change are not easily established due to existing doctrines pertaining to jurisdiction, standing, and causation.[38]

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31. John H. Knox, *Human Rights Principles and Climate Change*, *in* The Oxford Handbook of International Climate Change Law 214, 215–20 (Cinnamon P. Carlarne et al. eds., 2016).

32. Barry S. Levy & Jonathan A. Patz, *Climate Change, Human Rights, and Social Justice*, 81 Ann. Glob. Health 310, 311–14 (2015).

33. Peter Lawrence, Justice for Future Generations: Climate Change and International Law 1 (2014).

34. Wen-Chen Shih, *Human Rights and Climate Finance—How Does the Normative Framework Affect Taiwan?*, *in* Taiwan and International Human Rights: A Story of Transformation 495, 497 (Jerome A. Cohen et al. eds., 2019).

35. Natalia Kobylarz, *Balancing its Way Out of Strong Anthropocentrism: Integration of 'Ecological Minimum Standards' in the European Court of Human Rights' 'Fair Balance' Review*, 13 J. Hum. Rts. & Env't 16, 33 (2022).

36. *See Obligations Implied From Human Rights Treaties*, *in* International Law Obligations on Climate Change Mitigation 133 (Benoit Mayer ed., 2022); Christina Voigt, *The Climate Change Dimension of Human Rights: Due Diligence and States' Positive Obligations*, 13 J. Hum. Rts. & Env't (Special Issue) 152, 162 (2022).

37. U.N. Env't Programme, *Climate Change and Human Rights*, at 12 (Dec. 2015).

38. Tim Eicke, *Human Rights and Climate Change: What Role for the European Court of Human Rights*, 3 Eur. Hum. Rts. L. Rev. 262, 269–72 (2021); Christine Bakker, *Climate Change and Children's Rights*, *in*

The response to these deficiencies, by both academics[39] and international tribunals,[40] is the principle of *evolutionary interpretation*. Under this principle, human rights treaties are "living instrument[s which] must be interpreted in the light of present-day conditions."[41] On that basis, human rights treaty provisions should receive more flexible interpretations to accommodate the factual realities and emerging international law of climate change.[42]

This principle of evolutionary interpretation, in the human rights context, has often been justified based on the *object and purpose* of human rights treaties. The argument proceeds as follows: if the object and purpose of human rights treaties is the protection of human rights,[43] then human rights treaty provisions require an evolutive interpretation to ensure that human rights protection remains effective.[44] In the climate change context, if the enjoyment of human rights depends on a reasonably healthy environment, the object and purpose of human rights treaties would likewise demand an interpretation of human rights treaties which favors the protection of the environment.[45]

The Oxford Handbook of Children's Rights Law 448, 460–64 (Jonathan Todres & Shani M. King eds., 2020); Przemyslaw Siwior, *The Potential Application of the ECHR in Climate Change Related Cases*, 23 Int'l Cmty. L. Rev. 197, 207 (2021); Philippe Cullet, *Human Rights and Climate Change: Broadening the Right to Environment*, *in* The Oxford Handbook of International Climate Change Law, *supra* note 31, at 495, 502; *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, ¶ 70, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

39. *See, e.g.*, Malgosia Fitzmaurice, *The European Court of Human Rights and the Right to a Clean Environment: Evolutionary or Illusory Interpretation?*, *in* Evolutionary Interpretation and International Law 141, 141–43 (Georges Abi-Saab et al. eds., 2019); Nina Mileva & Marina Fortuna, *Environmental Protection as an Object of and Tool for Evolutionary Interpretation*, *in* Evolutionary Interpretation and International Law 123, 136–37 (Georges Abi-Saab et al. eds., 2019).

40. The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 43 (Nov. 15, 2017) [hereinafter Advisory Opinion 23] (describing the same concept of interpretation which "evolve[s] with the times and contemporary conditions" as an "evolutive interpretation"); *see also* CRC Committee, *General Comment No. 26 (2023) on Children's Rights and the Environment with a Special Focus on Climate Change*, ¶¶ 9–10, U.N. Doc. CRC/C/GC/26 [hereinafter CRC General Comment 26] (advocating for a "dynamic interpretation" to children's rights and taking into account "evolving norms, principles, standards and obligations under international environmental law").

41. Tyrer v. United Kingdom, App. No. 5856/72, 2 Eur. H.R. Rep. 1, ¶ 31 (1978).

42. *See* Monica Feria-Tinta, *The Future of Environmental Cases in the European Court of Human Rights: Extraterritoriality, Victim Status, Treaty Interpretation, Attribution, Imminence and 'Due Diligence' in Climate Change Cases*, 13 J. Hum. Rts. & Env't 172, 182–84 (2022); Interview, *P Sands (PS) in Conversation with R Spano (RS) – 8 July 2021*, 13 J. Hum. Rts. & Env't 6, 6–8 (2022).

43. *See* The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 29 (Sept. 24, 1982); Austria v. Italy, App. No. 788/60, Eur. Comm'n H.R., at 18–19 (1963).

44. Soering v. United Kingdom, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) ¶ 87 (1989); Iron Rhine Arbitration (Belg. v. Neth.), 27 R.I.A.A. 35, 73 (2005); James Crawford & Amelia Keene, *Interpretation of the Human Rights Treaties by the International Court of Justice*, 24 Int'l J. Hum. Rts. 935, 944 (2020); Voigt, *supra* note 36, at 159–60; Yuval Shany, The Extraterritorial Application of International Human Rights Law 34 (2019); Hannah Cecille Brænden, *The European Convention on Human Rights and Climate Change: The Right to Life in a Changing Climate*, at 3–4 (June 1, 2021) (Master thesis, University of Oslo).

45. Mileva & Fortuna, *supra* note 39, at 136–37.

While the principle of evolutionary interpretation is doubtless established law,[46] it must nevertheless have its limits. As Judge Bedjaoui took pains to emphasize in the *Gabčíkovo-Nagymaros* case, "the 'interpretation' of a treaty must not be confused with its 'revision.'"[47] To that end, I find that the contours of evolutionary interpretation may be properly drawn only upon a proper justification of the principle.[48]

C. The Relevance of the Vienna Convention Rules in Interpreting Human Rights Treaties

Theorizing the principle of evolutionary interpretation begins with the relevance of the Vienna Convention on the Law of Treaties ("VCLT")[49] in interpreting human rights treaties. Because human rights treaties do not just govern the horizontal relations between states, but also the vertical relations between states and individuals,[50] interpreting them could be said to demand a departure from VCLT principles.[51] On the other hand, the VCLT principles are flexible—the unique interpretive demands of human rights treaties may simply represent their context-specific application.[52]

I find that the latter position is preferable. As a matter of doctrine, human rights tribunals have endorsed the VCLT principles in their analysis.[53] Using the ECHR as an example, in *Loizidou v. Turkey*, the ECtHR observed that

> the [ECHR] must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and that Article 31 para. 3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties' . . .

46. Mamatkulov and Askarov v. Turkey, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., ¶ 121 (Feb. 4, 2005); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146–48 (Aug. 31, 2001). *See* Hum. Rts. Comm. [hereinafter HRC], Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea, ¶ 8.2, U.N. Doc. CCPR/C/88/D/1321-1322/2004 (Nov. 3, 2006).

47. Gabčíkovo–Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 5 (Sept. 25) (Sep. Op. Bedjaoui, J.).

48. *Contra* VAUGHAN LOWE, *How International Law is Made*, *in* INTERNATIONAL LAW 74 (2007) (cautioning that that "treaty interpretation is an area in which the returns on abstract theorizing are low, and diminishing").

49. Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 119 [hereinafter VCLT].

50. Mark Chinen, *Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility*, 25 EUR. J. INT'L L. 703, 704 (2014).

51. Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489, 491 (2000).

52. *See* Başak Çali, *Specialised Rules of Interpretation: Human Rights*, *in* THE OXFORD GUIDE TO TREATIES 504, 511 (Duncan B. Hollis ed., 2020).

53. Banković v. Belgium, App. No. 52207/99, Admissibility, Eur. Ct. H.R., ¶ 55 (Dec. 12, 2001); Nat'l Ass'n Discharged and Ret. Employees of the Nat'l Tax Admin. Superintendence (ANCEJUB-SUNAT) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 394, ¶ 160 (Nov. 21, 2019); HRC, Roger Judge v. Canada, ¶ 10.4, U.N. Doc. CCPR/C/78/D/829/1998 (Aug. 5, 2002).

> In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention (art. 49).[54]

The Human Rights Committee ("HRC") has taken the same view in *Roger Judge v. Canada*, having observed, in the context of a challenge against Canada for violations of the right to life under the ICCPR, that:

> [A]s required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose . . . .[55]

Thus, human rights tribunals have arguably adopted the position that the VCLT's principles of treaty interpretation are broad enough to accommodate the vertical nature of human rights treaties.

Further, human rights courts and other bodies have applied the VCLT for issues *other* than treaty interpretation, such as in relation to reservations[56] and to the nature of state parties' obligations.[57] There would be an incongruency if there were somehow an interpretive "carve-out" where VCLT provisions apply to human rights treaties *save for* matters of treaty interpretation. If such an interpretive carve-out were really intended to apply to human rights treaties, one could expect for such a provision in the treaties themselves, especially given that many such treaties do provide interpretive provisions.[58]

Moreover, human rights treaties are not the only category of *vertical* treaties governing the relationship between private citizens and sovereign states. Investment treaties protect individual investors by conferring upon them judicially enforceable rights, but it is difficult to argue that VCLT principles do not apply to the interpretation of investment treaties.[59]

Last but not least, a historical analysis supports this doctrinal position. Indeed, the "idea that certain categories of treaty were to be interpreted in

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54. Loizidou v. Turkey, App. No. 15318/89, Judgment, Eur. Ct. H.R., ¶ 43 (Dec. 18, 1996).

55. Roger Judge v. Canada, *supra* note 53, ¶ 10.4.

56. HRC, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

57. HRC, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶¶ 3–4, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

58. *See, e.g.*, International Covenant on Civil and Political Rights Arts. 46–7, Dec. 16, 1966 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights Arts. 4, 24–25, Dec. 16, 1966, 993 U.N.T.S 3 [hereinafter ICESCR]; American Convention on Human Rights Art. 29, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; Convention for the Protection of Human Rights and Fundamental Freedoms Art. 17, Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR].

59. *See* Romesh Weeramantry, Treaty Interpretation in Investment Arbitration, ¶¶ 2.28–2.31 (2012).

distinctive ways was well known at the time of the drafting of the VCLT, but the drafters clearly rejected this concept in favor of a generally applicable set of rules."[60] To that end, it is reasonable to conclude that the drafters of the VCLT very much intended its principles to apply to human rights treaties.

In all fairness, some human rights treaties *predate* the VCLT.[61] Even then, the VCLT, or at least the provisions on interpretation, has been observed to codify prevailing customary international law at the time.[62] If the VCLT principles, especially the rules on interpretation, are customary, it is reasonable to infer that these customary rules are similarly generalized and do not create any special regimes for human rights treaties.

D. The Intentions of State Parties as the Justification for Evolutionary Interpretation

I have argued that the principle of evolutionary interpretation is consistent with the framework set out in the VCLT. If so, we should reconsider the very popular argument, earlier canvassed, that the object and purpose of human rights treaties is *the* dominant justification for an evolutionary interpretation of human rights treaties, especially in systemic mitigation cases.

To be clear, the object and purpose of human rights treaties are not irrelevant. But there is, in my view, a subtle yet important difference between using object and purpose as *a* justification for evolutionary interpretation, and as *the* dominant justification for evolutionary interpretation. This is because object and purpose is only one consideration in the interpretive exercise, and the VCLT does not provide for any hierarchy between the text, context, and object and purpose.[63] Put differently, there may be difficulties with justifying evolutive interpretation *purely on teleology*.[64]

Thus, I offer an alternative justification for evolutionary interpretation, one that includes, but is not limited to, the object and purpose of human right treaties. I agree with Bjorge that this justification is grounded in the *intentions of treaty parties*,[65] the underlying thread connecting all the interpretive elements listed in VCLT Art. 31(1). The clearest doctrinal exposition is in the ICJ's *Navigational Rights* judgment:

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60. Crawford & Keene, *supra* note 44, at 939.

61. The most pertinent example being the ECHR, which entered into force about fifteen years before the VCLT was signed. However, the ECtHR has accepted the applicability of the VCLT rules in the interpretation of the ECHR.

62. Arbitral Award of 31 July 1989 (Guinea-Bissau v Sen.), Judgment, 1991 I.C.J. 53, ¶ 48 (Nov. 12).

63. Aguas del Tunari S.A. v. Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 91 (Oct. 21, 2005).

64. *See* Çali, *supra* note 52, at 510–11 (arguing that "[t]o characterize human rights treaty interpretation solely as telos-driven does not survive close scrutiny"); South West Africa (Liber. v S. Afr.), Judgment, 1966 I.C.J. Rep. 6, ¶ 91 (July 18).

65. Eirik Bjorge, The Evolutionary Interpretation of Treaties 58–63, 140 (2014); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21) [hereinafter Namibia Advisory Opinion].

> [W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be *presumed*, as a general rule, to have *intended* those terms to have an evolving meaning . . . .[66]

The ICJ's reasoning is applicable to interpreting human rights treaties, which were drafted using general and open-ended wording.[67] Judge Sicilianos, the former President of the ECtHR, made a similar observation, referring to the above passage to explain in a lecture that:

> [F]ar from marking a departure from the parties' intention, the evolutive interpretation of a convention or treaty containing generic terms – which is the case for the European Convention on Human Rights – must be seen as reflecting, in principle, the *presumed intention* of the contracting states.[68]

E. Uncovering the Intentions of State Parties

The notion of the "intention of state parties" is not without its critics. Scholars have argued that this concept is indeterminate, and references to the intention of states parties may simply enable the injection of subjective normative preferences.[69] I readily accept this critique, but it is not fatal to my reliance on the concept. Rather, this indeterminacy can abate with greater clarity in defining "intention."

The first clarification is that this intention is not monolithic. In his work on constitutional theory, Ronald Dworkin has argued that layers of intention can inhere in constitutional texts.[70] Given the constitutional nature of human

66. Dispute Regarding Navigational and Related Rights (Costa Rica v Nicar.), Judgment, 2009 I.C.J. 213, ¶ 66 (July 13) [hereinafter Navigational Rights Case] (emphases added).

67. *Contra* Oliver Dorr, *The Strasbourg Approach to Evolutionary Interpretation*, *in* Evolutionary Interpretation, *supra* note 39, at 115, 116 (arguing that there is a presumption of evolutionary interpretation in interpreting human right treaties that represents a departure from, and not a consistency with, the general tenets of treaty interpretation).

68. Linos-Alexander Sicilianos (Judge and former President of the ECtHR), Remarks at the Seminar on "The Contribution of the European Court of Human Rights to the Development of Public International Law," on the margins of the 59th CAHDI meeting in Prague, *Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach*, https://rm.coe.int/interpretation-of-the-european-convention-on-human-rights-remarks-on-t/1680a05732 [https://perma.cc/8WTC-WL4F] (emphasis added).

69. *See, e.g.*, Yuji Iwasawa, Domestic Application of International Law: Focusing on Direct Applicability 169–70 (2022); Andrea K. Bjorklund, *The Enduring but Unwelcome Role of Party Intent in Treaty Interpretation*, 112 Am. J. Int'l L. Unbound 44, 44 (2018); Guan Wenwei, *How General Should the GATT General Exceptions Be?: A Critique of the 'Common Intention' Approach of Treaty Interpretation*, 48 J. World Trade 219, 247 (2014).

70. Ronald Dworkin, A Matter of Principle 48 (1985). The phrase "layers of intention" comes from Keith Whittington's article on Dworkin. Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 Rev. Pol. 197, 197, 224 (2000).

rights treaties,[71] it is appropriate to apply this Dworkinian concept in human rights treaty interpretation.[72] Following Dworkin, states parties do not have one monolithic intention, but rather multiple intentions capable of definition at differing levels of generality. Significantly, relatively more abstract intentions on the human rights goals to be achieved (which I shall call "intentions of principle") can be distinguished from relatively more concrete intentions about the means for pursuing such goals (which I shall call "intentions of implementation"). Dworkin raised the example of a congressman voting for the right to equal protection. Here, the "intention of principle" is to treat people as equals, and the "intention of implementation" is to ensure parity in punishment between white and black defendants.[73]

Additionally, these intentions may be framed either as *positive* or *negative*. Positive intentions refer simply to intentions to bring about a certain state of affairs, whereas negative intentions are intentions to *avoid* a certain state of affairs. For example, Dworkin referred to a congressman voting for a restraint of trade bill with the negative intention of *not* allowing a particular merger, which would restrain trade, to proceed.[74]

The second clarification is the *time* at which an intention is identified. The intentions of treaty parties should be determined in a contemporary manner, i.e., at the time of interpretation,[75] because VCLT Art. 31 "makes clear that [t]reaties are not solidified as historic records of their drafter's intentions," but can change upon evidence that states have "modified approaches to the issues, and share a common interpretation of the requisite treaty standards."[76] This is also consistent with the nature of human rights treaties as "living instruments."[77]

That said, there may also be what I call *stable* intentions, intentions that remain stable from the conclusion of the treaty to the contemporary age. For example, the continued existence of a provision in a human rights treaty providing for the right to privacy would imply a stable intention of principle to protect the right to privacy.

The third clarification is that these intentions may *broadly* be classified as either normative or positivistic (although a categorical distinction is not

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71. *See, e.g.*, Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 Eur. J. Int'l L. 749, 750–53 (2008) (noting that there are various ways of understanding international human rights law as constitutional system, and to that extent international human rights law may be "inherently constitutional").

72. George Letsas, A Theory of Interpretation of the European Convention on Human Rights 70 (2007).

73. *See* Dworkin, *supra* note 70, at 48–49.

74. *Id.*

75. Namibia Advisory Opinion, 1971 I.C.J. ¶ 53 ("[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."). Notably, there is jurisprudence supporting a contrary view, i.e., that a treaty ought to be interpreted as it was understood at the time of conclusion. *See generally* Peter Tzeng, *The Principles of Contemporaneous and Evolutionary Treaty Interpretation*, *in* Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law § 16 (Joseph Klinger et al. eds., 2019).

76. Andrew Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality 109 (2012).

77. Tyrer, 2 Eur. H.R. Rep. ¶ 31.

necessary). In relation to intentions of principle, such intentions would be found from the text of the treaty, which represents the intention of the parties reduced into written form.[78] These intentions of principle are arguably normative, because the text of the treaty sets out obligations expressed as statements of value, the plain meaning of which is normative. In contrast, in relation to intentions of implementation, such intentions would be gleaned from contemporary state practice, and to that end, would be more positivistic in nature.

F. Resolving the Conflicting Intentions

Various intentions held by the states parties may, and do, come in conflict. Dworkin gave the example of a congressman voting for "equal protection" with the intention of principle that people are treated equally with respect to their fundamental interests. Assume that the congressman later reveals his negative intention of implementation that segregated schools are *not* outlawed, on the basis that schooling is not a fundamental interest. Outlawing segregated schooling would be consistent with the congressman's *positive* and *normative* intention of principle, but not with his *negative* and *positivistic* intention of implementation.

The natural question then arises as to which of these overlapping and competing intentions should trump. Resolving this question is, in Dworkin's words, of "devastating importance."[79] I find persuasive Neuman's view that

> [M]aking a human right more 'effective' does not necessarily mean giving the right a broader meaning. It means making the enjoyment of the right more of a reality, and that may require defining the positive content of the right in a manner that facilitates its implementation at a particular historical moment within the particular region. At times this may suggest the need for a broader or more categorical interpretation, at times for a more tailored interpretation.[80]

Determining which intention should take precedence, among the various overlapping and competing intentions, thus depends very much on context.

To reiterate, the object and purpose of human rights treaties are not irrelevant. They themselves express a positive intention of principle at the highest level of generality, an important factor justifying evolutionary interpretation. However, other intentions may point in the opposite direction, and thus raise concerns in systemic mitigation cases. These competing intentions merit deeper engagement by courts, lest their decisions engender backlash from states and, consequently, risk undermining the courts' legitimacy.[81]

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78. *See* Gilbert Guillaume, *Methods and Practice of Treaty Interpretation by the International Court of Justice*, *in* The WTO at Ten: The Contribution of the Dispute Settlement System 465, 472–73 (Giorgio Sacerdoti et al. eds., 2006).

79. Dworkin, *supra* note 70, at 49.

80. Gerald L. Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 Eur. J. Int'l L. 101, 111 (2008).

81. *See* Wayne Sandholtz, *Expanding Rights: Norm Innovation in the European and Inter-American Courts*, *in* Expanding Human Rights: 21st Century Norms and Governance 156, 170 (Alison Brysk & Michael Stohl eds., 2017).

It is important to identify how to manage competing intentions to make systemic mitigation cases more potent. Two separate areas benefit from deeper engagement: (a) first, the scope of a state's human rights obligations, as reflected through the evolutionary interpretation of a state's "jurisdiction" under human rights treaties; and (b) second, the contents of a state's human rights obligations, as reflected through the evolutionary interpretation of a state's positive obligations to protect human rights.

IV. The Evolutionary Interpretation of a State's "Jurisdiction"

A. The Extraterritoriality of a State's Human Rights Obligations

One area that benefits from deeper engagement with the competing intentions of treaty parties is the scope of a state's extraterritorial human rights obligations. This Section concerns a specific *subset* of systemic mitigation cases known as *diagonal* cases,[82] where the claimants are neither citizens of respondent states nor residing in the territories of the respondent states.[83] Put differently, diagonal claims are those made by aliens abroad, the most prominent examples of which include *Sacchi* and *Agostinho*.[84]

The success of these diagonal claims depends on the *scope* of a state's human rights obligations, in turn prescribed by the *undertakings clauses* of the relevant human rights treaties.[85] In most core international and regional human rights treaties, the undertakings clauses expressly limit the scope of a state's human rights obligations to people within the state's "territory,"[86] or, more commonly, subject to the state's "jurisdiction."[87] The reference to territory is self-explanatory, referring to people physically present within the borders of a state.

More interesting is the reference to jurisdiction. A state's jurisdiction under human rights treaties has traditionally been understood as "primarily territorial."[88] The notion of jurisdiction must necessarily be broader than the notion of territoriality, lest the former be redundant. But any extraterritorial

82. Feria-Tinta, *supra* note 42, at 175; Monica Feria-Tinta, *Inter-American Court of Human Rights*, *in* The Environment Through the Lens of International Courts and Tribunals 249, 277–78 (Edgardo Sobenes et al. eds., 2022); John H. Knox, *Diagonal Environmental Rights*, *in* Universal Human Rights and Extraterritorial Obligations 82, 82 (Mark Gibney & Sigrun Skogly eds., 2012).

83. Feria-Tinta defines diagonal claims as "claims brought by individuals or groups against States other than their own." Feria-Tinta, *supra* note 42, at 175. This definition is, in my view, overbroad, since it includes claims brought by claimants who are not citizens of the respondent state, but nevertheless *reside in the territory* of the respondent state. There is no controversy with claimants bringing claims in this case.

84. For the avoidance of doubt, *non-diagonal* systemic mitigation claims also exist. *See, e.g.*, KlimaSeniorinnen v. Switzerland, 2024 Eur. Ct. H.R.

85. Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy 11–13 (2011).

86. *See* ICCPR, *supra* note 58, Art. 2(1).

87. Milanovic, *supra* note 85, at 8.

88. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 109 (July 9) [hereinafter Wall Advisory Opinion]; Banković v. Belgium, *supra* note 53, ¶¶ 59–61.

human rights jurisdiction, under international law, remains the exception and not the norm. The most established exception is found when a state exercises effective control over persons or areas outside its territory.[89]

As alluded to earlier, most, but not all, human rights treaties contain express textual limits on the scope of a state's human rights obligations. Two prominent exceptions include the African Charter on Human and Peoples' Rights ("ACHPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the undertaking clauses of which do not contain any express textual limits on the scope of state parties' human rights obligations. Courts have increasingly relied upon this textual difference in recent years to depart from the orthodox position:

> (a) In relation to the ACHPR, the African Commission on Human and People's Rights opined in its 2015 General Comment 3 that states parties are responsible for activities occurring "in their territory or jurisdiction."[90] Similarly, in its 2014 decision in *Al-Asad v. Djibouti*, the Commission stated that the ACHPR applies "primarily within the territorial jurisdiction" of states parties, though they may assume extraterritorial obligations if the claimant was "under the effective control or authority" of the respondent state.[91] In other words, the jurisprudence on the ACHPR was arguably consistent with that under the ICCPR, where a state's human rights obligations would not generally arise unless the claimants belonged to the respondent state's territory or is subject to the respondent state's jurisdiction.
>
> However, in the 2022 decision of *Mornah v. Benin*,[92] the African Court of Human and People's Rights articulated a much broader understanding of extraterritorial obligations. The claimant, a Ghanian national, sued Ghana and seven other African Union states for the respondents' failure to challenge Morocco's occupation of Western Sahara when Morocco was readmitted to the African Union. The Court ruled that the respondent states owed extraterritorial human rights obligations to the people living in Western Sahara, even though the respondents did not exercise effective control over neither Western Sahara nor the Sahrawis living there.[93] The Court

89. Al-Skeini v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R., ¶¶ 131–40 (July 7, 2011); General Comment 31, *supra* note 57, ¶ 10.

90. Afr. Comm'n. Hum. People's Rts. [hereinafter Afr. Comm'n H.P.R.], *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, ¶ 18 (Nov. 18, 2015) (observing that while a state "must" hold to account non-state actors responsible for arbitrary deprivations of life *in* the state's territory or jurisdiction, that state merely "should" ensure accountability for extraterritorial violations of the right to life).

91. Al-Asad v. Djibouti, Comm. No. 383/10, Decision, Admissibility, Afr. Comm'n H.P.R., ¶¶ 134–36 (Oct. 14, 2014).

92. Mornah v. Benin, App. No. 028/2018, Judgment, Merits and Reparations, Afr. Ct. H.P.R. (Sept. 22, 2022) [hereinafter Mornah].

93. *Id.* ¶¶ 149–51.

reasoned that the respondents' *omissions* "had an extraterritorial effect, that is, the continued violation of the rights and freedoms of the people of [Western Sahara]."[94]

The Court's reasoning expressly relies on the object and purpose of the ACHPR to justify broadening its territorial scope. In particular, the Court observed that the state's extraterritorial human rights obligations are "compatible with the purposes and objects of human rights treaties, that is, the protection of human and peoples' rights in view of which 'there is no a priori reason to limit a state's obligation to respect human rights to its national territory.'"[95] Put differently, the *telos* of human rights protection may require a state to do, or refrain from doing, acts within their national territories that generate extraterritorial effect. The Court's reasoning thus implies that the *ability* of a state to affect the human rights of aliens beyond its national borders may sufficiently impose human rights obligations towards such aliens.[96]

That said, *Mornah* deals with the right to *self-determination*, which occupies a unique position under international law.[97] Specifically, the Court relied on observations from the HRC in General Comment 12 on the right to self-determination (expressly referring to states' obligation to refrain from interfering with the internal affairs of *other* states), as well as the text of the ACHPR (obliging member states to offer help to oppressed or colonized "peoples"), to locate extraterritorial obligations with respect to the right to self-determination.[98] To that end, the reasoning in *Mornah* may not apply with equal force in other situations.

Nevertheless, the Court's reliance on the *telos* of human rights protection as a basis for extending the territorial scope of human rights obligations clearly marks a shift from its previous stance.

(b) In relation to the ICESCR, the ICJ in the 2004 *Wall* Advisory Opinion observed that the ICESCR "contains no provision on its scope of application. This may be explicable by the fact that [the ICESCR] guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a state party has sovereignty and to those over which that State exercises territorial jurisdiction."[99] In other words, the position under the ICESCR is similar to that under the ICCPR.

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94. *Id.* ¶ 156.
95. *Id.* ¶ 149.
96. *See infra* Part III.d.1.
97. Mornah v. Benin, 2022 Afr. Ct. H.P.R. ¶¶ 150; Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 613–15 (2011).
98. Mornah v. Benin, 2022 Afr. Ct. H.P.R. ¶¶ 150–51.
99. Wall Advisory Opinion, *supra* note 88, ¶ 112.

> However, it has been nearly two decades since the *Wall* decision, and it is unclear if the ICJ will maintain this position in its forthcoming advisory opinion on climate change, given that this position arguably no longer represents the prevailing consensus about the scope of the ICESCR. In 2017, the Committee on Economic, Social and Cultural Rights issued General Comment 24 on state obligations in the context of business activities, where the Committee observed that extraterritorial obligations arise where a state may "influence . . . the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of [economic, social, and cultural] rights outside its national territory."[100] This conception of extraterritoriality is much broader than the orthodox effective control test, the former no longer requiring any direct control over foreign individuals and territories. Also significant is the Committee's reasoning that the Covenant's extraterritorial obligations arise from the lack of textual restriction linked to territory or jurisdiction.[101]

Hence, there is some divergence in the scope of extraterritorial obligations under different human rights treaties.[102] Effective control over foreign territories and foreign citizens, while not the *exclusive* standard under human rights treaties with textual limits on the scope of a state's obligations, nevertheless represents the prevailing standard. For treaties without such textual limits, it appears that effective control over domestic activities that contributes to the enjoyment of human rights overseas may by itself suffice.

B. The Evolution of "Jurisdiction" in Systemic Mitigation Cases

In the context of diagonal cases, the question of territory generally does not arise since the claimants by definition do not live in the territories of respondent states. As to jurisdiction, the traditional effective control test is not easily satisfied since respondent states neither exercise control over the claimants themselves nor the areas where the claimants reside.[103]

It appears that diagonal cases would be more easily pursued under the ACHPR and ICESCR, treaties without any express textual limits on the scope of a state's human rights obligations. But interestingly, diagonal cases have been pursued, and successfully so, even under treaties *with* express textual limits. That courts have held that claimants in such cases are subject to the

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100. U.N. Comm. Econ. Soc. & Cultural Rts. [hereinafter CESCR], *General Comment 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, ¶ 27, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017).

101. *Id*. ¶ 28.

102. Knox, *supra* note 82, at 86.

103. Feria-Tinta, *supra* note 42, at 177; Kazim Berkay Arslan, *The Extraterritorial Application of Human Rights Treaties in the Context of Environmental Transboundary Harm*, 41 PUB. & PRIVATE INT'L L. BULL. 455, 470 (2022); Birgit Peters, *The European Court of Human Rights and the Environment*, *in* THE ENVIRONMENT THROUGH THE LENS OF INTERNATIONAL COURTS AND TRIBUNALS 189, 195–96 (Edgardo Sobenes et al. eds., 2022).

"jurisdiction" of foreign respondent states, reflects an *evolutionary interpretation* of the concept.

A significant moment in this evolution is the IACtHR's Advisory Opinion on the Environment and Human Rights ("Advisory Opinion 23"), which dealt with extraterritorial obligations under the American Convention on Human Rights ("ACHR"). Significantly, although the ACHR did contain express textual limits on the scope of a state's obligations,[104] the Court opined that:

> When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation.[105]

The IACtHR's approach represents an evolution of the notion of "jurisdiction," where "what matters is whether the source State has effective control over the 'activities that caused the transboundary harm.'"[106] The IACtHR's approach in Advisory Opinion 23 seems to draw inspiration from the CESCR's approach in General Comment 24.

In all fairness, the IACtHR's approach in Advisory Opinion 23 primarily concerns *transboundary environmental harm*, which contemplates the construction of an infrastructure project in an upstream state that affects a downstream state.[107] Climate change, while no doubt relevant and referred to in Advisory Opinion 23, was arguably not the main focus of analysis. Nevertheless, the IACtHR's reasoning proved very amenable to application in a climate change context, and such reasoning was subsequently endorsed by the CRC Committee in *Sacchi*, which found that Germany, France, Brazil, Argentina, and Brazil owed human rights obligations to the claimants, who were children from Argentina, Brazil, France, Germany, India, Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and the United States.[108] According to the CRC Committee, Germany (much like the other respondents) had effective control over the sources of emissions on German territory that contributed to climate change and affected the lives of the claimants.[109] Significantly, the CRC (much like the ACHR) contains an undertakings clause which expressly limits the scope of a state's human rights obligations to those within its "jurisdiction."[110]

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104. ACHR, *supra* note 58, Art. 1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their *jurisdiction*[,]") (emphasis added).

105. Advisory Opinion 23, 2017 Inter-Am. Ct. H.R. ¶ 104(h).

106. Feria-Tinta, *supra* note 42, at 178.

107. Advisory Opinion 23, 2017 Inter-Am. Ct. H.R. ¶ 1.

108. Sacchi et al. v. Germany, *supra* note 10, ¶ 1.1.

109. *Id.* ¶¶ 9.9–9.14.

110. Convention on the Rights of the Child Art. 2(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

This evolutionary interpretation of "jurisdiction" is arguably consistent with the object and purpose of human rights treaties, since the transboundary nature of climate change means that emissions activities in one country will inevitably affect environments elsewhere and, consequently, the enjoyment of human rights elsewhere.[111] The question remains as to whether any intentions of state parties conflict with this evolutionary interpretation.

C. "Jurisdiction" as a Term Capable of Evolutionary Interpretation

I must clarify at the outset that the term "jurisdiction" in undertakings clauses of human rights treaties is capable of evolutionary interpretation. I share Bjorge's view that "jurisdiction" is arguably the kind of "generic term"[112] capable of evolution contemplated by the ICJ in the *Navigational Rights* case.[113] Further, the ICJ in *Agean Sea Continental Shelf* also held that the phrase "domestic jurisdiction" found in a treaty's jurisdiction clause should be amenable to an evolutionary interpretation.[114] Broadening the scope of a state's "jurisdiction" is also consistent with the broad intention of principle of maximizing human rights protections for individuals.[115]

The ECtHR in its 2001 decision of *Banković v. Belgium* took the opposite view—that the undertakings clause of the ECHR may not be susceptible to evolutionary interpretation, since the clause does not provide for the *substance* of human rights protection, but rather the threshold question of the *very scope and reach* of such protection.[116] The ECtHR's reasoning in *Banković* is inconsistent with the ICJ's reasoning in *Navigational Rights* and is not entirely persuasive, because the Court did not advance a principled reason to justify the distinction between the undertakings clause and the substantive provisions. Further, the *travaux* reveals that the undertakings clause of the ECHR originally guaranteed protection to persons within the contracting states' "territories," but the reference to "territories" was later replaced with a reference to "jurisdiction" with the aim "to widen as far as possible the categories of persons who are to benefit by the guarantee contained in the [ECHR]."[117] To that end, the intention of the state parties to the ECHR was clearly not to exclude the term "jurisdiction" from an evolutionary interpretation should the need arise.

And indeed, the ECtHR in its 2011 decision in *Al-Skeini v. The United Kingdom* departed from *Banković*, where the Grand Chamber found that the United

111. Jacques Hartmann & Marc Willers, *Protecting Rights Through Climate Change Litigation Before European Courts*, 13 J. Hum. Rts. & Env't 90, 104–06 (2022).

112. Bjorge, *supra* note 65, at 136.

113. *See* Navigational Rights Case, 2009 I.C.J. ¶ 66.

114. Agean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 3, ¶ 77 (Dec. 12).

115. I depart from Bjorge on the utility of the parties' intention as an organizing concept. Bjorge argued that party intention is the underlying concept justifying evolutionary interpretation. I take a slightly different view, explained above, that party intention is not monolithic, and that it is preferable to speak of parties' intentions in the plural.

116. Banković v. Belgium, 2001 Eur. Ct. H.R. ¶¶ 64–65.

117. William Schabas, The European Convention on Human Rights: A Commentary 85 (2015).

Kingdom does owe extraterritorial human rights obligations to the Iraqi claimants by virtue of their effective control of the relevant parts of Iraq.[118] The Grand Chamber departed from *Banković*, which held that the ECHR is a multilateral treaty applying only in the *espace juridique* of Council of Europe states.[119] As held in *Al-Skeini*, it is not the case that jurisdiction "can never exist outside the territory covered by the Council of Europe member States."[120]

D. The Intention to Avoid Universal Human Rights Obligations in the Systemic Mitigation Context

However, to say that the term "jurisdiction" is capable of evolutionary interpretation is not the same as saying that the term is capable of an interpretation as evolutionary as that advanced by the IACtHR in Advisory Opinion 23, *at least within the limited context of systemic mitigation cases*.

1. *The Functional Model of Jurisdiction*

In my view, the IACtHR's evolutionary interpretation of the term "jurisdiction" entails a very expansive scope of a state's human rights obligations when one considers the peculiarities of climate change.[121] In Advisory Opinion 23, the IACtHR expanded the scope of the doctrine of effective control to include not just overseas territories or overseas individuals, but also domestic activities that cause transboundary harm.[122] Put differently, this evolutionary model of jurisdiction is a *functional* one.[123] If activities within a state's territory have interfered with the foreign claimants' enjoyment of human rights, it follows that the state could have done something about it and thus had jurisdiction over the foreign claimants.[124]

Again, the functional model is consistent with the broad intention of protecting human rights. That said, under this functional model, it is difficult to conceive of a situation where a state *does not* possess extraterritorial jurisdiction to foreign claimants. As Milanovic astutely noted, the proposition that "a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate" cannot be easily "limited on the basis of any non-arbitrary criterion."[125] Milanovic's critique is relevant to systemic mitigation cases, since it is difficult to see how states could ever argue against the causal link between its own emission activities and climate change and, in

118. MILANOVIC, *supra* note 85, at 187.

119. Banković v. Belgium, 2001 Eur. Ct. H.R. ¶ 80.

120. Al-Skeini v. United Kingdom, 2011 Eur. Ct. H.R. ¶ 142.

121. Isa Rama, *Human Rights Litigation: An Avenue to Address Climate Change?* 21 (May, 2022) (LL.M. thesis, Harvard Law School) (on file with author).

122. *See* Advisory Opinion 23, 2017 Inter-Am. Ct. H.R. ¶ 101.

123. Philipp Janig, *Extraterritorial Application of Human Rights*, *in* ELGAR ENCYCLOPAEDIA OF HUMAN RIGHTS 180, 186 (Christina Binder et al. eds., 2022).

124. Arslan, *supra* note 103 at 469, 471; SHANY, *supra* note 44, at 93; Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 LAW & ETHICS HUM. RTS 47, 65–67 (2013); Hartmann & Willers, *supra* note 111, at 105–06.

125. MILANOVIC, *supra* note 85, at 207–08.

turn, climate adverse environmental outcomes in foreign countries. This much is evident from *Sacchi*, where the CRC Committee held that the respondents owe human rights obligations to children from *twelve* states spread across *four* continents.[126] One could replace the least emitting state, Argentina, with any other country, or at minimum, any country with higher total emissions[127] or emissions per capita,[128] and that country would arguably owe human rights obligations to the claimants in *Sacchi* as well. The expansion of jurisdiction via the functional model does not easily accord with exhortations that extraterritorial jurisdiction must be applied to limited circumstances.[129]

Some scholars suggest that the functional model of jurisdiction is more sophisticated. Shany has argued that the functional model does not simply rest on a state's ability to prevent human rights violations abroad: there is also the added element of "directedness and reasonable foreseeability that correlate to notions of capacity and legitimate expectations."[130] The CRC Committee in *Sacchi* did likewise consider arguments of foreseeability and directness before holding that Germany owes human rights obligations to the claimants.[131]

Unfortunately, these additional requirements in my view do not satisfactorily limit the scope of liability in systemic mitigation cases. Given the cumulative nature of emissions on climate change,[132] it is difficult for states to ever argue that they did not foresee that their emissions will contribute to climate change. On directness, climate change is a transboundary phenomenon with worldwide effect. If contributions toward climate change are indivisible,[133] the direct link between a state's emissions activities and any subsequent impairment of human rights overseas would arise almost as a matter of definition. One cannot meaningfully say that Germany contributed to adverse climate change-driven events in Argentina or Palau more directly than any other country in the world.

Put differently, the functional model of jurisdiction, as applied to systemic mitigation cases, would render claimants subject to the "jurisdiction" of each and every state that emits greenhouse gases and contributes to climate change, i.e., every state in the world. I admit that, if every state is contributing to a

126. *See* text accompanying *supra* note 10.

127. *See* Eur. Comm'n Joint Rsch. Ctr., *CO2 Emissions of All World Countries:* JRC/IEA/PBL *2022 Report*, 43 *et seq*. (2022) (a country with higher emission being Iran).

128. *Id.* (countries with higher emissions per capita being Libya, Estonia, Luxemburg, Brunei, Bahrain, Qatar, Kuwait, and Palau).

129. Advisory Opinion 23, 2017 Inter-Am. Ct. H.R. ¶ 81.

130. Shany, *supra* note 44, at 86.

131. Sacchi et al. v. Germany, *supra* note 10, ¶¶ 9.9–9.14.

132. Intergovernmental Panel on Climate Change [hereinafter IPCC], *Summary for Policymakers*, *in* Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 3, 28 (Valerie Masson-Delmotte et al. eds., 2021).

133. Orla Kelleher, *Incorporating Climate Justice into Legal Reasoning: Shifting Towards A Risk-Based Approach to Causation in Climate Litigation*, 13 J. Hum. Rts. & Env't 290, 309 (2022); Ottavio Quirico et al., *States, Climate Change and Tripartite Human Rights: The Missing Link*, *in* Climate Change and Human Rights: An International and Comparative Law Perspective 7, 30 (Ottavio Quirico & Mouloud Boumghar eds., 2016).

global problem that affects the enjoyment of human rights worldwide, logic dictates that every state must play a part in mitigating the problem. But there are significant practical difficulties if the functional model is brought to its logical limits.[134] In particular, potential claimants across the globe can choose to sue any state party that has agreed to an individual complaints procedure.

2. *Establishing the Intention*

This system may conflict with states parties' negative intention of implementation, that human rights obligations ought *not* to be owed by any particular state to *everyone* on the planet (I shall refer to this negative intention as a "negative intention to avoid universal human rights obligations").

For human rights treaties with express limits on the scope of a state's human rights obligations, the very inclusion of such limits arguably indicates a stable intention to avoid universal human rights obligations, for the simple reason that if universal human rights obligations were deemed acceptable, there would not be any textual limit to begin with.[135]

This *stable* intention is further corroborated by the *history* behind the inclusion of these textual limits:

> (a) In the context of the ICCPR, references to both "territory" and "jurisdiction" in the undertakings clause was explained to "avoid obligating States parties to protect persons under their jurisdictional authority but outside their sovereign territory."[136] Granted, this explanation sought to highlight states' unwillingness to take on a treaty obligation requiring them to protect their own nationals abroad—protecting aliens abroad did not appear to receive any detailed treatment.[137] But if states are unwilling to protect their own nationals abroad, the protection of aliens abroad would likely have been even less appetizing. This does appear to be the position, since "for drafters the alleged impossibility of guaranteeing rights abroad to nationals who were within the territorial jurisdiction of another state would necessarily lead to the territorial application of [the ICCPR]."[138]
>
> (b) Likewise, in the context of the ECHR, owing human rights obligations to foreign citizens in foreign countries was "not foreseen—indeed, might well have been met with astonishment—when the

134. Or, to quote Oliver Wendell Holmes, "the life of the law has not been logic; it has been experience." Oliver Wendell Holmes Jr., The Common Law 1 (1881).

135. Mayer, *supra* note 16, at 427–28.

136. William Schabas, U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary ¶ 32 (2019).

137. Karen Da Costa, The Extraterritorial Applications of Selected Human Rights Treaties 29–31 (2013).

138. *Id.* at 34.

> Convention was drafted."[139] This is further emphasized by Article 56, or the colonial clause of the ECHR, inserted for the express purpose of allowing European contracting states to avoid owing human rights obligations to their dependent territories.[140]

The contemporary conduct of states similarly evinces an intention to avoid universal human rights obligations. A clear example of this would be the United States, which has consistently taken the position that it owes no extraterritorial human rights obligations, even though its conduct abroad has raised genuine human rights concerns.[141] Another example would be Sweden, one of the most generous donor countries in the world, but one that nevertheless resists the existence of any obligations to provide foreign aid to this date.[142] Further, concerns with the functional model of jurisdiction could be gleaned from comments in response to the CESCR Committee's draft General Comment 24 from Denmark,[143] Norway,[144] the UK,[145] France,[146] and Switzerland.[147] These are states that could fairly be considered as strong

139. Ed Bates, The Evolution of the European Convention on Human Rights 111 (2010).

140. Milanovic, *supra* note 85, at 14; Louise Moor & AW Brian Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*, 76 Brit. Y.B. Int'l L. 121, 136–58 (2006).

141. Beth Van Schaak, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 Int'l L. Stud. 20, 53–61 (2014).

142. Mark Gibney, *The Historical Development of Extraterritorial Obligations*, *in* The Routledge Handbook, *supra* note 26, at 13, 16.

143. Submission of Denmark, *General Discussion on the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, at 1 [hereinafter Discussion on Draft General Comment, ICESCR Article 6] (Jan. 19, 2017), https://www.ohchr.org/sites/default/files/Documents/HRBodies/CESCR/Discussions/2017/30-Government_of_Denmark.docx [https://perma.cc/DUQ9-P4TR] (stating that "[a]t this stage the Danish Government has no further observations or contributions to the draft General Comment. This should, however, not be interpreted as either agreement or disagreement with the substance of the draft General Comment which is not specifically addressed in the observations submitted by the Norwegian Government").

144. Submission of Norway, Discussion on Draft General Comment, ICESCR Article 6, at 3 https://www.ohchr.org/sites/default/files/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf [https://perma.cc/69J6-FM5Q] (last visited Mar. 2, 2024) (asserting that "the Committee goes too far in defining extraterritorial legal obligations for State Parties to protect against human rights abuse by business entities abroad").

145. Submission of the United Kingdom, Discussion on Draft General Comment, ICESCR Article 6, at 2 (Jan. 31, 2017), https://www.ohchr.org/sites/default/files/Documents/HRBodies/CESCR/Discussions/2017/58-Government_of_the_United_Kingdom.pdf [https://perma.cc/79EW-HBYJ] (stating that "[t]he absence of limits to territorial scope in other clauses, or an overarching limiting clause, should not be taken as an assumption or an acceptance of extra-territorial dimensions to the Covenant" and that "the obligations under the Covenant are primarily territorial and do not have extra-territorial effect").

146. Submission of France, Discussion on Draft General Comment, ICESCR Article 6, at 3 (Jan. 25, 2017), https://www.ohchr.org/sites/default/files/Documents/HRBodies/CESCR/Discussions/2017/47-France.pdf [https://perma.cc/P9X5-SNP5] ("[Q]u'au stade actuel, les États ne sont généralement pas tenus en vertu du droit international des droits de l'homme de réglementer les activités extraterritoriales des entreprises domiciliées sur leur territoire et/ou sous leur iuridiction.") ("[A]t this stage, states are generally not required under international human rights law to regulate the extraterritorial activities of companies domiciled on their territory and/or under their jurisdiction.") (translation provided by author).

147. Submission of Switzerland, Discussion on Draft General Comment, ICESCR Article 6, at 3, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CESCR/Discussions/2017/

defenders of the international human rights regime, and that do provide substantial aid to foreign countries in need of assistance.[148] Similar concerns were likewise noted in state comments to the HRC's draft General Comment 36 on the right to life, from Austria,[149] Netherlands,[150] France,[151] Germany,[152] Norway,[153] and the United States.[154]

In the context of systemic mitigation cases specifically, there are also concerns with the functional model of jurisdiction as applied in *Sacchi*, and as

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Switzerland_fr.pdf [https://perma.cc/X562-5WAZ] (last visited Mar. 2, 2024) ("Nous préférons à ce stade de supprimer cette partie de la phrase, car l'admission de l'applicabilité extraterritoriale dépendra des développements du droit international.") (We prefer at this stage to delete this part of the sentence [on extraterritorial obligations] as the admission of extraterritorial applicability will depend on developments in international law.) (translation provided by the author).

148. Sana Ijaz, *25 Countries that Give the Most Foreign Aid Per Capita*, YAHOO! FINANCE (Aug. 16, 2023), https://finance.yahoo.com/news/25-countries-most-foreign-aid-160100621.html?guccounter=1 [https://perma.cc/NXS9-2FEN]; Michele Wheat, *Which Countries Provide and Receive the Most Foreign Aid?*, WRISTBAND RESOURCES, https://www.wristband.com/content/which-countries-provide-receive-most-foreign-aid/ [https://perma.cc/2N8Q-TEDG] (last visited Mar. 2, 2024).

149. Submission of Austria, on the Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the right to life, [hereinafter Discussion on Draft General Comment, ICCPR Article 6], at 2, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/Austria.doc [https://perma.cc/5B44-ZB7V] (last visited Mar. 2, 2024) (stating that "[p]ara. 66 . . . in its current wording [which states that a state owe human rights obligations to 'persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner'] would extend the obligation to respect and to ensure the rights under Article 6 . . . far beyond the established interpretation of the extraterritorial application of the Covenant").

150. Submission of the Netherlands, Discussion on Draft General Comment, ICCPR Article 6, ¶ 13, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/KingdomofNetherlands.docx [https://perma.cc/UQB6-8BGR] (last visited Mar. 2, 2024) (stating that "[t]he fact that conduct that affected an individual can be attributed because that conduct was under the effective control of a State party, does not necessarily mean that the individual affected by that conduct was within the jurisdiction of that State party").

151. Submission of France, Discussion on Draft General Comment, ICCPR Article 6, ¶ 37 https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/France.docx [https://perma.cc/8QCH-44LN] (last visited Mar. 2, 2024) ("Le seul impact d'une activité étatique de l'État partie sur un individu ou un territoire ne saurait justifier l'application extraterritoriale du Pacte.") ("The mere impact of a State party's activity on an individual or territory cannot justify the extraterritorial application of the Covenant.") (translation provided by the author).

152. Submission of Germany, Discussion on Draft General Comment, ICCPR Article 6, ¶ 21 (Oct. 6, 2017), https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/Germany.docx [https://perma.cc/462N-BXL8] ("The mere fact that a military or other activity abroad has an impact on persons abroad, however, is in the view of Germany not a link that would automatically suffice to establish jurisdiction of Germany over the persons concerned.").

153. Submission of Norway, Discussion on Draft General Comment, ICCPR Article 6, at 4, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/Norway.docx [https://perma.cc/F42H-T2VZ] (last visited Mar. 2, 2024) ("Norway is concerned that the criteria 'persons located outside any territory effectively controlled by the State *who are nonetheless impacted by its . . . activities in a [direct], significant and foreseeable manner,*' would extend the scope of the Covenant beyond existing practices and the wording of the Covenant Article 2. In Norway's opinion, this statement should be reconsidered and preferably deleted.") (emphasis in the original).

154. Submission of the United States, Discussion on Draft General Comment, ICCPR Article 6, ¶ 13, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx [https://perma.cc/TD5K-FKCY] (last visited May 8, 2024) ("Particularly problematic is the assertion in paragraph 66 that Covenant obligations extend to 'persons located outside any territory effectively controlled by the State who are nonetheless impacted by its military or other activities in a [direct], significant and foreseeable manner.'").

endorsed in the CRC Committee's draft General Comment 26 on Climate Change and the Rights of the Child. These concerns can be found in comments from Austria,[155] Canada,[156] Denmark,[157] Germany,[158] and Poland.[159] Again, these concerns are raised mostly by states with strong commitments to the international human rights regime. And it is indeed revealing that the finalized version of General Comment 26 made scant references to *Sacchi* and the functional model of jurisdiction.[160] Last but not least, it is also telling that in *Urgenda* and *Neubauer*, the beneficiaries of the states' human rights obligations were narrowly defined to include Dutch residents[161] and German residents.[162]

3. *The Concern in the Context of Systemic Mitigation Cases*

Of course, whether this negative intention warrants serious concern depends on context and the human rights obligations in question. For example, imagine a system where every state owed a *negative* obligation to everyone on the planet not to kill them arbitrarily with drones. In this case, the tension with the negative intention to avoid universal human rights obligations is not compelling

155. Submission of Austria, Discussion on Draft CRC General Comment 26, at 1, https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-austria-corr-2023-03-02.docx [https://perma.cc/92AS-BMX3] (last visited Mar. 2, 2024) (stating that "the scope of the positive obligations imputable to the States in the particular circumstances also depends on the origin of the threat and the extent to which it is susceptible to mitigation. Examples include the statements on States' extraterritorial obligations; the 'cause and effect' notion of jurisdiction and the right to a safe climate").

156. Submission of Canada, Discussion on Draft CRC General Comment 26, at 3 (Feb. 24, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-canada-2023-03-07.docx [https://perma.cc/MVZ2-9EZ2] ("Canada therefore strongly disagrees that the adverse effects of climate change on the enjoyment of children's rights necessarily give rise to extraterritorial obligations to protect against those effects and to mitigate harms.").

157. Submission of Denmark, Discussion on Draft CRC General Comment 26, at 1 (Mar. 1, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-denmark-2023-03-01.doc [https://perma.cc/G2T9-BSZP] (stating that "jurisdiction does not arise by the mere fact that decisions taken at a national level have an impact on the situation of persons, including children, resident abroad. The Danish Government finds that such a finding would create a situation of unacceptable uncertainty as to the scope of the Member State's obligations" and that "Denmark would suggest to refrain from introducing concepts such as 'fair share' which is not conceptualized in the climate regime").

158. Submission of Germany, Discussion on Draft CRC General Comment 26, at 2 (Feb. 10, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-germany-2023-02-13.docx [https://perma.cc/HDY3-T4LQ] (stating that "Germany's point of view is that a mere 'cause-and-effect' doctrine is unable to give rise to jurisdiction").

159. Submission of Poland, Discussion on Draft CRC General Comment 26, at 2, https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-poland-2023-02-06.docx [https://perma.cc/K5JB-3S2E] (last visited May 8, 2024) (suggesting that the words "including extraterritorial obligations" be deleted from the phrase "Under the Convention, States have obligations, including extraterritorial obligations").

160. *See generally* CRC Committee, *General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change*, U.N. Doc. CRC/C/CG/26 (Aug. 22, 2023) (making only two references to businesses enterprises' extraterritorial activities, and never attempting to connect these references to the scope of a state's human rights jurisdiction).

161. Urgenda, *supra* note 4, ¶ 5.6.2.

162. Neubauer, *supra* note 5, ¶¶ 173–79.

because it usually does not cost the government much to refrain from doing something[163]—not least arbitrary murder.

But in diagonal cases, the concerns with this negative intention are more compelling. To begin with, state obligations in the systemic mitigation context include *positive* obligations requiring states to take steps to reduce their emissions. These positive obligations entail considerable burdens on states.[164] This is significant because developing states are routinely involved as respondents. For instance, the respondents in *Sacchi* included Argentina, Brazil, and Turkey; while the respondents in *Agostinho* included Bulgaria, Russia, and Turkey. It may not be an appealing proposition to require developing countries, who may not have sufficient resources to meet the human rights needs of their own citizens, to also fulfil the human rights needs of the world at large. This lack of appetite is perhaps best expressed through the comments of Canada to the CRC Committee's draft General Comment 26: "the right to life cannot extend so far as to impose a positive obligation on States to protect children from the harm resulting from any reasonably foreseeable but distant threat."[165]

Another difficulty arises when one considers the implications of universal human rights obligations on a state's policymaking imperative. If a state owes human rights obligations to people all over the world, a state may have to design its mitigation policy with *the whole world* in mind. Given the diffused and globalized nature of climate change, it may very well be normatively desirable for states to account for the interests of people beyond its borders. But the practical and administrative complexity involved in devising policies with the global population in mind should not be discounted, especially for governments of developing countries, which may possess neither the competence nor the wherewithal for such an endeavour. Further, the idea that elected representatives must account for aliens in domestic decision-making may not garner much political currency among the electorate.

A further concern relates to the implications of the functional model of jurisdiction *beyond* the mitigation context. The duty to protect human rights from the adverse effects of climate change *includes*, but certainly is *not limited to*, mitigation—they may apply to adaptation as well.[166] After all, if states owe human rights obligations to people all over the world to protect them from climate change, and if such protection may entail either mitigation or adaptation, it may mean that states also owe a duty to take adaptation measures for people all over the world as well. As the German Federal Constitutional Court recognized in *Neubauer*, this may not be very realistic:

> However, with regard to people living abroad, the German state would not have the same options at its disposal for taking any

163. Sarah Joseph & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary ¶ 1.100 (2014).

164. *See* Mayer, *supra* note 36, at 141–42.

165. Government of Canada, *supra* note 156, at 4.

166. *See supra* Part II.

> additional protective action. Given the limits of German sovereignty under international law, it is practically impossible for the German state to afford protection to people living abroad by implementing adaptation measures there.[167]

Of course, one distinction is that, while mitigation activities in one country would be felt across the globe, a country's adaptation efforts would likely only affect itself. There arguably should only be extraterritorial obligations to mitigate but not to adapt. Nevertheless, adaptation may also involve the *payment of money*: state A may have to *provide financial aid* to state B for the latter to take adaptation measures if the people in state B are subject to state A's jurisdiction. This raises difficulties because the question of climate-related financial aid from developed to developing countries is subject to intense negotiations.[168] Using international human rights law to compel such aid, effectively bypassing negotiations, raises questions of propriety.

The concerns that I have raised, with the negative intention that states do not face universal human rights obligations, do not mean that the functional model should be discarded altogether. After all, "the functional model was [developed] in an attempt to overcome issues that became increasingly apparent [with the orthodox approach]."[169] I propose that these concerns may be addressed, and the functional model made more attractive, with devices that meaningfully limit liability.

There is, of course, no easy solution to what this liability-limiting device may be. Given the conceptual difficulties with delineating the scope of liability, extraterritorial jurisdiction in systemic mitigation cases should, perhaps, be left to negotiations between states. A negotiated solution would arguably not be premised on any rigorous application of doctrine, but its sensitivity to the *realpolitik* of climate change, and to states' varying capabilities and circumstances.

Another potential solution is the transplantation of principles from international environmental law. The functional model of jurisdiction, as explained by Judge Bonello in *Al-Skeini*, focuses on whether the observance (or the breach) of human rights is within the state's authority and control.[170] Put differently, the focus is on state *accountability* for protecting human rights. That question of *accountability* is a constant theme in international environmental law, and there exist well-established principles for allocating responsibility for environmental damage. Since environmental damage from climate change directly affects the enjoyment of human rights, and since VCLT Article 31(3) permits, if not compels, the interpretation of human rights treaties in light of all "relevant rules

167. Neubauer, *supra* note 5, ¶ 178.

168. *See, e.g.*, *Delivering for People and the Planet*, United Nations, https://www.un.org/en/climatechange/cop27 [https://perma.cc/QP9C-7T25] (last visited May 8, 2024) (discussing the establishment of a loss and damage fund financed by developed countries to compensate for loss and damage suffered by developing countries).

169. Janig, *supra* note 123, ¶ 34.

170. Al-Skeini, 2011 Eur. Ct. H.R. ¶¶ 11–13 (Bonello, J., Concurring).

of international law,"[171] some borrowing from international environmental law may be helpful—in particular, through the principle of "common but differentiated responsibilities."[172] That principle focuses on special needs and circumstances, future economic development for developing states, and historic contributions to an environmental problem.[173] These three factors may act as useful guides in drawing the line and preventing the collapse of the functional model of jurisdiction.

Last but not least, the difficulties mentioned here should not be interpreted as arguments against an application of the functional model of jurisdiction in other situations. These difficulties arise in the specific context of climate change because the diffuse and globalized nature of this phenomenon means that reliance on the functional model may engage the negative intention of not exposing states to universal human rights obligations.

V. The Evolutionary Interpretation of a State's Positive Obligation to Protect Human Rights

Another area that may benefit from deeper engagement with the competing intentions of treaty parties is the content of a state's human rights obligations. This Part focuses on systemic mitigation cases in which the petitioners allege that the state breached its *positive obligation* to protect human rights by failing to enact more aggressive emissions reduction policies.

A. The Science on Climate Change

It may be beneficial to quickly overview the current science on climate change. I will rely on the scientific findings as presented in the Intergovernmental Panel on Climate Change ("IPCC")'s Summaries for Policymakers of the Synthesis Report for the Sixth Assessment Report ("AR6 SPM"), released in March 2023.[174]

The AR6 SPM predicted that reaching carbon neutrality by 2050, followed by net negative emissions afterward ("2050 Scenario"), is needed to limit warming to 1.5 degrees by 2100 (>50% chance) with no or limited overshoot; while achieving carbon neutrality by 2070, followed by net negative emissions afterward ("2070 Scenario"), is needed to limit warming to 2 degrees by 2100 (>67% chance).[175]

171. VCLT, *supra* note 49, Art. 31(3).

172. United Nations Framework Convention on Climate Change Art. 3(1), May 9, 1992, 1771 U.N.T.S. 107.

173. Philippe Sands et al., Principles of International Environmental Law 234–36 (2012).

174. Hoesung Lee et al., IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)* (2023) https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf [https://perma.cc/MXP9-DTGQ] [hereinafter AR6 SPM].

175. *Id.* at 10, Table 1.

Worryingly, global emissions in 2030 associated with the most recent Nationally Determined Contributions ("NDCs") would lead to a median warming of 2.8 degrees by 2100.[176] NDCs are commitments from states on their emissions targets under the Paris Agreement,[177] though their potency is in practice limited given that states have absolute discretion in determining them. If emissions policies prevailing as of 2020 remain unchanged, there would likely be a median warming of 3.2 degrees by 2100.[178]

It was further observed that "[a]pproximately 3.3–3.6 billion people live in contexts that are highly vulnerable to climate change," and that the largest adverse impacts from climate change were observed in "Africa, Asia, Central and South America, LDCs, Small Islands [Developing States] and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households."[179] For context, one of the IPCC Working Groups observed in 2022 that "global hotspots of high human vulnerability" are found in "West, Central- and East Africa, South Asia, Central and South America, Small Island Developing States and the Arctic."[180]

Last but not least, the changes necessary to the modern economy to meet the 2050 and 2070 Scenarios "involve rapid and deep and in most cases immediate GHG emission reductions in all sectors."[181] For instance, reaching the 2050 Scenario is predicted to require a median reduction of 60% in global emissions by 2035, while reaching the 2070 Scenario is predicted to require a median reduction of 35% in global emissions by 2035.[182] This is an important fact given that the largest share of global emissions came from CO_2 generated by fossil fuels and industry.[183]

B. The Argument in Systemic Mitigation Cases

Against the background of these undeniably worrying findings by scientists, the arguments mounted in systemic mitigation cases have generally,[184] but not universally,[185] proceeded along the following lines. First, human rights treaties impose on states obligations to take positive steps to protect human rights. This is well established. Second, in determining whether states have

176. *Id.* ¶ A.4.3.

177. NDCs are voluntary obligations under the Paris Agreement, the leading multilateral treaty on climate change, the key objective of which is to limit global warming to less than 1.5 degrees, or at worst 2 degrees, above pre-industrial levels. Paris Agreement Arts. 2(1)(a), 3, 4(2), Dec. 12, 2015, 3156 U.N.T.S. 79.

178. AR6 SPM, *supra* note 174, ¶ A.4.4.

179. *Id.* ¶ A.2.2.

180. IPCC, *Summary for Policymakers*, *in* Climate Change 2022: Impacts, Adaptation and Vulnerability Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 3, ¶ B.2.4 (Hans-Otto Pörtner et al. eds., 2022).

181. IPCC, *Summary for Policymakers*, *in* Climate Change 2022: Mitigation of Climate Change Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 1, ¶ C.3 (Priyadarshi R. Shukla et al. eds., 2022).

182. AR6 SPM, *supra* note 174, at 22, Table XX.

183. *Id.* ¶ A.1.4.

184. Mayer, *supra* note 36, at 230–31; Maxwell et al., *supra* note 1, at 53–57.

185. Voigt, *supra* note 36, at 169–71.

discharged their positive obligation to protect human rights, the relevant rules of international environmental law provide a reference. This is also not controversial—in interpreting a treaty provision, VCLT Article 31(3)(c) provides for reference to "relevant rules of international law." Justifiably, international environmental law may give content to the otherwise rather open-ended positive obligation to protect human rights.

The real innovation is in claimants applying these rules of international environmental law, particularly the Paris Agreement, as a yardstick to define the extent of the state's positive obligation to protect human rights. In particular, Article 2(1)(a) of the Paris Agreement described its objective, in non-binding terms, as "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."[186] Claimants argue that a collective objective on climate mitigation may be extrapolated from these temperature targets (for instance, keeping global warming below 2 degrees requires the 2070 Scenario, which in turn requires a median emissions reduction of 35% by 2030). From this collective objective, one can further extrapolate a mitigation objective specific to the respondent state using the appropriate burden-sharing criteria.[187] If this state-specific mitigation objective is not satisfied, it will follow that the state is in breach of its positive obligation to protect human rights.

Further, this mitigation objective may be derived at different time frames. For example, in *Urgenda*, the Dutch Supreme Court did not find objectionable the government's target of carbon neutrality (or near-neutrality) by 2050. However, the Court took issue with the government's target of a 20% reduction, relative to 1990, by 2020. The Court held that this reduction goal fell short of the fair share standard, which the Court found to be a 25% reduction, relative to 1990.

C. The Evolution of the Due Diligence Standard

1. *The Traditional Qualitative Methodology*

Traditionally, the applicable legal standard in determining whether a state has breached its positive obligation to protect human rights[188] can be summarized in two words: due diligence.[189] The concept of due diligence is well known in international law.[190] International tribunals have consistently held

186. Paris Agreement, *supra* note 177, Arts. 2(1)(a).

187. Maxwell et al., *supra* note 1, Part 4.3; Lavanya Rajamani et al., *National 'Fair Shares' in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law*, 21 Climate Pol'y 983, 999 (2021).

188. For an explanation of the juridical nature of this positive obligation to protect human rights, *see, e.g.*, General Comment 31, *supra* note 57, at ¶¶ 6–8; CESCR, *General Comment 12: The Right to Adequate Food (Art. 11)*, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

189. Voigt, *supra* note 36, at 161.

190. *See generally* Joanna Kulesza, Due Diligence in International Law (2016).

that the standard of due diligence does not require that no human rights violation occurs, but only that the state takes all reasonable measures to prevent violations of human rights from occurring.[191]

The due diligence standard and the duty to take reasonable steps have received wide support among international human rights bodies.[192] Essentially, the fulfillment of a state's positive obligation to protect human rights is a matter where the state enjoys some discretion. The state must put in reasonable efforts, but no more, and such efforts suffice if the state struck a *fair balance*[193] between the interests of the claimants and other countervailing interests. A state generally achieves this fair balance if it has properly, fairly, and reasonably considered all relevant considerations in its decision-making process.[194]

2. *An Evolution toward a Quantitative Methodology*

This traditional qualitative approach appears to be shifting toward a more quantitative approach in systemic mitigation cases. Claimants are now arguing that a state must reduce its domestic emissions by a quantified "fair share" of global greenhouse gas emissions. Indeed, the leading systemic mitigation cases, inspired by the success of *Urgenda*, have adapted this "fair share" language.[195]

This doctrinal development is not *sui generis*, and there is nothing inherently objectionable with having a floor below which a state is breaching its due diligence obligation. For instance, the state obligation to treat prisoners humanely, to comply with ECHR Article 3, entails specific minimum standards for the size of prison cells, which the ECtHR derives from international recommended standards.[196] The same idea underlies the notion of "minimum core obligation[s]" in interpreting socio-economic rights obligations under the ICESCR.[197]

However, this doctrinal development, in the context of *environmental regulation*, is a novel one. The quantitative method espoused in *Urgenda* led to the Dutch Supreme Court ordering the government to limit GHG emissions to 25% below 1990 levels by the end of 2020, having found the government's existing pledge to reduce emissions by 17% insufficient. Put differently, the Court arrived at a policy position which it thought most appropriate while

191. General Comment 31, *supra* note 57, at ¶ 7; HRC, *General Comment 36 on Article 6: Right to Life*, ¶ 21, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019); Budayeva v. Russia, App. Nos. 15339/02 et al., Judgment, Eur. Ct. H.R., ¶ 137 (Mar. 20, 2008); Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

192. Gonzales et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 258 (Nov. 16, 2009); Optional Protocol to the ICESCR Art. 8(4), Dec. 10, 2008, 2022 U.N.T.S. 29.

193. Kobylarz, *supra* note 35, at 20–23.

194. *See* Buckley v. United Kingdom, Judgment, 1996-IV Eur. Ct. H.R., ¶¶ 74–77 (Sept. 25).

195. Urgenda, *supra* note 4, at ¶ 6.3.

196. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Living Space per Prisoner in Prison Establishments: CPT Standards*, Council of Europe (Dec. 15, 2015), https://rm.coe.int/16806cc449 [https://perma.cc/8AKB-YKMU].

197. CESCR, *General Comment 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990).

overriding the government's position in that aspect. In the context of the ECHR, this marks a departure from a long line of ECtHR case law in the environmental sphere, consistent with the Court's hesitance to devise its own policy in this "difficult and technical social sphere."[198] The IACtHR adopts this position in Advisory Opinion 23, observing that, given the difficulties in adopting public policies, and choices regarding priorities and resources, the state's positive obligations must be interpreted in a way that does not impose a disproportionate burden on the authorities.[199]

The claimants in *Agostinho* employed a more sophisticated version of this quantitative methodology, recognizing an absence of a globally-agreed approach to burden-sharing that would enable the precise identification of a state's fair share of emissions reduction.[200] Instead of identifying a *dominant* burden-sharing criterion,[201] the claimants argued that it suffices to determine a *range* of burden-sharing criteria: the first step of which is assigning a "fair share range" to each country based on the available literature.[202] If a country's emissions level is within this range, it may be considered fair. Assuming that every other country's target will fall on the same place on its range as the first-mentioned country, the resulting level of temperature change is calculated.[203] This is the methodology used by the Climate Action Tracker ("CAT"), "an independent scientific analysis that tracks government climate action and measures it against the globally agreed {goal of the} Paris Agreement."[204]

Having urged the ECtHR to adopt CAT's methodology, the claimants in *Agostinho* explained that, based on this methodology, the emissions goals of the respondent states are either "insufficient," "2 degree compatible," or "1.5 degree compatible."[205] If a state's emissions level is "2 degree compatible," it means that if all other countries were to adopt mitigation efforts of equivalent ambition relative to their respective fair share ranges, then global warming can be kept below 2 degrees. On the basis of CAT's determination that all of the respondent states' emissions goals were "insufficient," the claimants argued that the respondents breached their obligation to protect human rights.[206]

198. Powell and Rayner v. United Kingdom, App. No. 9310/81, Judgment, Eur. Ct. H.R., ¶ 44 (Jan. 24, 1990); Hatton v. United Kingdom, App. No. 36022/07, Judgment, Eur. Ct. H.R., ¶ 122 (July 8, 2003); Brincat v. Malta, App. Nos. 60908/11 et al., Judgment, Eur. Ct. H.R., ¶¶ 101–03 (July 24, 2014).

199. Advisory Opinion 23, 2017 Inter-Am. Ct. H.R. ¶ 120.

200. Agostinho v. Portugal, Complaint, Eur. Ct. H.R., Annex, ¶ 29 (Feb. 9, 2020) [hereinafter Agostinho Complaint].

201. *Id.* ¶ 32.

202. *Id.* ¶ 31.

203. Will Donaldson, *Guest Commentary: The Meaning of "Fair Share" in Climate Ambition Litigation under the Paris Agreement*, Climate Law: A Sabin Center Blog (Sept. 29, 2022), https://blogs.law.columbia.edu/climatechange/2022/09/29/guest-commentary-the-meaning-of-fair-share-in-climate-ambition-litigation-under-the-paris-agreement/ [https://perma.cc/Z9LM-9T3W].

204. Agostinho Complaint, 2020 Eur. Ct. H.R. ¶ 31, citing *About*, Climate Action Tracker, https://climateactiontracker.org/about/ [https://perma.cc/4TQL-VXH3] (last visited May 13, 2023).

205. *Id.*

206. *Id.* ¶¶ 27–31.

This more sophisticated methodology represents an evolution from what came before. There remains a quantified mitigation objective below which the state will be found in breach of its obligation of due diligence, which is the level of emissions that CAT found to be "2 degree compatible."

D. The Intention that Courts Refrain from Unilaterally Prescribing National Policies in the Systemic Mitigation Context

A shift toward the quantitative methodology undeniably resonates with the object and purpose of protecting human rights. In an era of slow intergovernmental negotiations, where states have been unwilling to commit to more meaningful NDCs, the imposition of more exacting emissions standards by courts is surely welcome.

At the same time, the quantitative methodology also entails a much more assertive role for human rights tribunals in environmental regulation. Setting down a minimum standard for emissions policy places human rights tribunals in the role of policymakers. The Dutch Supreme Court has implicitly accepted this point, having decided that it is permissible to legislate on the acceptable emissions goal. According to the Court, it is only impermissible to also legislate *how* the government should achieve this goal.[207]

This more assertive policymaking role played by human rights tribunals is in my view worthy of deeper engagement because there may be a possible tension with a negative intention of implementation, that human rights tribunals *refrain* from unilaterally prescribing national policies.

1. *Establishing this Intention*

This negative intention is most easily gleaned from the European context, due to features specific to the ECHR. Cogent evidence of this negative intention can be gleaned from the 2013 amendments to the preamble of the ECHR,[208] which reiterate the principle of subsidiarity, allocating primary responsibility for protecting human rights to states and giving the ECtHR only a subsidiary role in supervision.[209] Even more significant is the express recognition of the "margin of appreciation" doctrine by Council of Europe states. The key tenet of this doctrine is that human rights tribunals should refrain from venturing into the policy arena, owing to institutional and epistemic limitations. As explained by the ECtHR in its 2012 *Kolyadenko v. Russia* decision:

> There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means.

207. Urgenda, *supra* note 4, at ¶ 8.2.4.

208. Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms Art. 1, June 24, 2013, C.E.T.S 213.

209. Janneke Gerards, General Principles of the European Convention on Human Rights 160 (2019).

> In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres[.][210]

It is this doctrine that undergirded the ECtHR's observation, as recently as 2019 in *Cordella v. Italy*, that it is not the Court's role "to determine precisely what measures should have been taken in the present case in order to reduce the level of pollution more effectively."[211]

This intention of states parties is not limited to the European context. That states should retain *deference* on how to discharge their obligations is common across all human rights regimes, notwithstanding the HRC's apparent rejection of the Eurocentric doctrine of "margin of appreciation."[212] For instance, all the human rights regimes recognize that the primary responsibility for ensuring human rights protection belongs to states, and that supervising bodies play only a *supervisory* role.[213] Indeed, the Vienna Declaration, promulgated at the 1993 World Conference, clarified that "the primary responsibility for standard-setting lies with States."[214] This position is also reflected by the consciousness, among human rights supervising bodies, that a policymaking role is not appropriate. For example, the CRC Committee observed in its 2003 General Comment 5 that it "cannot prescribe in detail the measures which each or every State party will find appropriate to ensure effective implementation of the Convention."[215]

Additionally, many domestic courts in systemic mitigation cases have consistently refrained from taking up a more assertive policymaking role in setting emissions policies.[216] Of course, *Urgenda* is an obvious counterexample, but it

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210. Kolyadenko v. Russia, App. Nos. 17423/05 et al., Judgment, Eur. Ct. H.R., ¶ 160 (Feb. 28, 2012).

211. Voigt, *supra* note 36, at 171.

212. Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee*, 65 Int'l Comp. L.Q. 21, 22 (2015).

213. Manfred Nowak, U.N Covenant on Civil and Political Rights: CCPR Commentary XXV (2005).

214. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 38, U.N. Doc. A/CONF.157/23 (June 25, 1993).

215. CRC, *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child*, ¶ 26, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

216. *See, e.g.*, Bundesgericht [BGer] [Federal Supreme Court] May 5, 2020, Entscheidungen des schweizerischen Bundesgerichts [BGE] I 146 (Switz.) (rejecting petitioners' claim that the Swiss Government had failed to uphold obligations under the Swiss Constitution and ECHR because of a failure to enact more aggressive emissions policies, the court holding that the plaintiffs' asserted rights had not been affected with sufficient intensity, and that the remedy they seek must be achieved through political rather than legal means); Plan B Earth v. Prime Minister [2021] EWHC 3469 (Eng.) (dismissing an application for judicial review alleging violations of the English Human Rights Act 1998 on the ground that the U.K. government failed to take measures to align U.K. emissions with Paris Agreement targets, and reasoning that the court lacked the necessary expertise to evaluate the complex administrative framework to address climate change); Civ. [Tribunal of First Instance] Bruxelles (4th ch.), June 17, 2021, case 2015/4585/A, http://climatecasechart.com/climate-change-litigation/non-us-case/

has nevertheless failed to gain broad acceptance in foreign jurisdictions—the claimants in the cases mentioned in the beginning of this paragraph all drew inspiration from *Urgenda*.[217] Therefore, the prevailing view appears to be that domestic courts should not intervene in the policy sphere. I again note that these are domestic courts of countries with strong human rights traditions and strong commitments to combating climate change. Of course, there are differences between domestic courts and international human rights tribunals, and limitations on the former need not mirror those on the latter. Nevertheless, from a positivist perspective, the consistent refusal of domestic courts to wade into the policy arena does evidence a general reluctance of states toward judicial intervention in the climate policy sphere.

At the international level, it is perhaps telling that the CRC Committee, in its 2022 General Comment 26, recognized that states "retain discretion in arriving at a reasonable balance between determining the appropriate levels of environmental protection and achieving other social goals in the light of available resources."[218] This notwithstanding a somewhat contradictory exhortation for states to comply with their "fair share" of emissions reduction.[219] States share this sentiment in their comments to the draft General Comment 26, insisting on their imperative to pursue emissions policies in a manner most suitable to their own circumstances. Such sentiments can be gleaned from

vzw-klimaatzaak-v-kingdom-of-belgium-et-al/ (finding inadequate Belgium's current climate change mitigation policies in violation of the ECHR, but refusing to impose any specific GHG emissions reduction targets, based on separation of powers considerations; and considering that in the absence of specific international or domestic obligations in this regard, the development of an emissions reduction plan lay within legislative and executive discretion); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (Ninth Circuit holding that ordering the federal government to adopt "a comprehensive scheme to decrease fossil fuel emissions and combat climate change" would exceed a federal court's remedial authority); Friends of the Irish Environment CLG v. Government of Ireland, Ireland and the Attorney General [2020] IESC 49 (Ir.) (refusing to quash Ireland's National Mitigation Plan on the ground that the plan violates the Irish Constitution, finding that the asserted enumerated right to a healthy environment is superfluous and excessively vague); TRF-3, Acao Popular No. 5008035-37.2021.4.03.6100, 27.5.2021, http://climatecasechart.com/non-us-case/six-youths-v-minister-of-environment-and-others/ (Braz.) (Federal Civil Court of São Paulo refusing to enjoin the government to adopt more aggressive NDCs, finding that it was not possible to state that the new NDC did not reflect the greatest possible ambition); Environnement Jeunesse v. Attorney General of Canada, 2021 QCCA 1871 (Can. Que.) (dismissing a claim that Canada has failed in its obligations to protect the fundamental rights of young people under the Canadian Charter of Rights and Freedoms and the Québec Charter of Rights and Freedoms by setting insufficient emissions reduction goals; and reasoning that the claim asks the courts to tell the legislature what to do, which is not the court's role, and that the legislature is better placed to weigh the countless challenges of global warming); Sarah Thomson v. Minister for Climate Change Issues [2017] NZHC 733 (N.Z.) (dismissing a challenge to the government's target for emissions reduction, finding that while the court can review government policy-making around climate change, the court may have to defer to elected officials on constitutional and epistemic grounds); Nature and Youth Norway v. Ministry of Petroleum and Energy, Case No. 20-051052SIV-HRET (Nor.) (dismissing a challenge against the Ministry of Petroleum's decision to grant licenses for deep-sea extraction in the Barent Sea on the ground of violations of the right to a healthy environment in Art. 112 of the Norwegian Constitution and also the ECHR; and finding no violation of either the Constitution or the ECHR, reasoning that the future emissions from exported oil are too uncertain to bar the granting of these petroleum exploration licenses).

217. Mayer, *supra* note 19, at 236–38.

218. CRC General Comment 26, *supra* note 40, at ¶ 73.

219. *Id*. at ¶ 98(b).

the comments of China,[220] Canada,[221] Colombia,[222] Denmark,[223] Finland,[224] Israel,[225] and Poland.[226] Indeed, Canada and Denmark expressly reject the concept of "fair share."[227]

A tension with this negative intention is not a new phenomenon in international human rights law.[228] Whether this tension is compelling, again, very much depends on context. In my view, it is important to consider whether the "fair share" standard is convincingly justified by the actual standard of emissions reduction adopted by the state. If the state has adopted such a standard, the court would not be imposing its own policy preferences by ordering that the state contribute its fair share. Instead, the court is simply holding the state to the latter's own policy position.

2. *The Concern in Relation to Developed States*

Viewed in this light, this negative intention, at least among developed states, may be insufficient to outweigh the positive intention of principle

220. Submission of China, Discussion on Draft CRC General Comment 26, at 3, https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-china.docx [https://perma.cc/M9Z2-CVQD] (last visited May 8, 2024) (stating that the draft general comment "paid less attention to the practical needs of developing countries to secure people's livelihood and promote development.")

221. Submission of Canada, *supra* note 156, at 6 (stating that "the term 'fair share' is not an agreed upon term within the global climate change regime and cannot be found in the climate change treaties that States have agreed to be bound by.").

222. Submission of Colombia, Discussion on Draft CRC General Comment 26, at 16, https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-colombia-2023-02-17.docx [https://perma.cc/FWF8-3CZL] (last visited May 8, 2024) ("Se considera muy valiosa la propuesta de asignar recursos específicamente para niños y niñas, pero incluir "substantive part" puede llevar a ambigüedades, ya que no es claro su alcance ni en qué medida responde a las necesidades identificadas por los países en desarrollo más vulnerables en un contexto más global.") ("The proposal to allocate resources specifically for children is considered very valuable, but including 'substantive part' may lead to ambiguities, as it is not clear its scope or to what extent it responds to the needs identified by the most vulnerable developing countries in a more global context.") (translation provided by the author).

223. Submission of Denmark, *supra* note 157, at 3 (stating that "Denmark would suggest to refrain from introducing concepts such as 'fair share' which is not conceptualized in the climate regime . . . Denmark would encourage [the Committee] to refrain from conceptualizing the concrete actions that stems from this concept [of common but differentiated responsibilities]").

224. Submission of Finland, Discussion on Draft CRC General Comment 26, at 3 (Feb. 15, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-finland-2023-02-15.docx [https://perma.cc/2DJ9-J6Z8] (stating that "[i]n case the wording of the paragraph [about the duty to provide remedies for violations of human rights] is interpreted to include complaints on passivity of the State, such as failure to implement plans, this could cause challenges regarding national legislation").

225. Submission of Israel, Discussion on Draft CRC General Comment 26, ¶ 18 (Mar. 5, 2023) https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc26/2023/states/GC26-states-israel-2023-03-07.docx [https://perma.cc/M3NQ-LQWB] (stating that "[t]he draft General Comment obliges the States to phase out the use of coal, oil and natural gas immediately. As the immediate phase out of all fossil fuels may present challenges for certain states, we suggest that the General Comment recommend to phase down the use of coal, oil and natural gas, with the aim of their phase out and a move to renewable energies").

226. Submission of Poland, *supra* note 159, at 2 (stating that "[s]ince there is no international agreement on phasing out the use of coal, oil and natural gas, Poland proposes the following wording [that allows for a] 'Phasedown and adapted gradual changes to capabilities of national economies from the use of unabated coal power'")

227. *See* text accompanying *supra* notes 221 and 223.

228. *See* LEGG, *supra* note 76, at 109.

of protecting human rights. The Dutch Supreme Court in *Urgenda* emphasized various resolutions joined by the Netherlands in the Conferences of the Parties ("COP") meetings to the Kyoto Protocol between 2011 and 2015, which stated in their preambles that developed countries as defined in Annex I of the UNFCCC (including the Netherlands) ought to commit to a minimum of 25% reduction by 2020;[229] and also an offer from the EU to commit to a 30% reduction (even though the conditions for that offer did not materialize).[230]

That said, this argument is not watertight. These resolutions were not intended to carry binding legal effect, especially not regarding their preambular paragraphs. In any event, as the Court itself recognized, climate change conferences after 2015 no longer explicitly addressed or referred to the minimal reduction target of 25% by 2020.[231] To that end, the Court was arguably justified in relying on a standard that developed states have declared for themselves in non-binding terms, and then *consciously* disregarded. Nevertheless, international human rights law may, at times, require more of states than what states have committed to through binding legal obligations.[232] Further, the 25% standard remains one that developed states articulated for themselves by choosing to add the preambular statement in the resolutions. Therefore, the Court was arguably not straining its capacity because it did not simply pick a number of its own determination.

3. *The Concern in Relation to Developing States*

i. A Lack of Standards from Developing States

While the negative intention that courts do not unilaterally prescribe national policies does not raise serious concerns in the context of developed states, this intention raises a bigger hurdle in relation to developing countries for two reasons.

The first is a lack of standards among developing, especially least developed, states, on how the Paris Agreement goal of limiting global warming to 2 degrees could be translated into concrete policy positions. The 2021 Glasgow Climate Pact[233] and 2022 Sharm el-Sheikh Declaration[234] did declare global emission reduction goals—the former stating a reduction of 45% by 2030 relative to 2010 levels, and the latter stating a reduction of 43% by 2030 relative to 2019 levels. But there remains the question of whether this is a meaningful

229. Urgenda, *supra* note 4, ¶ 7.2.3.

230. *Id.* ¶ 7.2.6.

231. *Id.* ¶ 7.2.3.

232. *See, e.g.*, Demir and Baykara v. Turkey, App. No. 34503/97, Judgment, Eur. Ct. H.R. (Nov. 12, 2008) (interpreting freedom of association under Art. 11 of the ECHR to include a right to collective bargaining, departing from earlier case law; and relying on a series of non-binding instruments, and binding instruments to which Turkey was not a party).

233. UNFCCC Conference of the Parties, *Glasgow Climate Pact*, ¶ 30, Decision 1/CMA.3, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1 (Nov. 13, 2021).

234. UNFCCC Conference of the Parties, *Sharm el-Sheikh Implementation Plan*, ¶ 14, Draft decision -/CP.27, U.N. Doc. FCCC/CP/2022/L.19 (Nov. 20, 2022).

basis from which states—especially developing states—can derive individual emissions goals.

Mayer, for instance, is extremely skeptical that a collective emission reduction target can meaningfully translate into individual targets for states.[235] In contrast, Rajamani is confident that states can devise individual targets using scientific criteria and the principles of international environmental law.[236] In my view, Mayer's position is more convincing. As Mayer has explained, the principles of international environmental law that Rajamani relies on are rather open-textured and capable of very flexible application. It is not difficult to replace Rajamani's results with other figures yet still insist that these new figures comport with principles of international environmental law. Further, climate change is, as described by Richard Lazarus, a "super-wicked" policy area demanding the kind of polycentric expertise that adjudicatory bodies may not necessarily possess.[237] Accordingly, while principles of international environmental law may be sufficient in the threshold stage of jurisdiction,[238] these same principles are not equally elucidatory when establishing liability.

Notably, many developing states do make non-binding declarations of aspiring to achieve carbon neutrality by 2050 or sometime later.[239] However, I find it difficult to extrapolate from this future standard any appropriate fair share at any *earlier date*. It does not follow, from State A's commitment in 2010 to achieve carbon neutrality by 2050, that a 50% reduction by 2030 is necessary. Even Rajamani does not go as far to suggest that this temporal extrapolation is feasible or preferable.

Therefore, absent any standards adopted by developing states about their willingness to reduce emissions, other than their (admittedly unsatisfactory) NDCs or their distant commitments to carbon neutrality, the negative intention that human rights supervising bodies refrain from setting national policies is more compelling. The fair share standards imposed on developing states, no matter how well-reasoned or well-intentioned, have no basis in the standards that these states actually committed to.

The tension heightens when considering the human rights costs of a more aggressive emission reduction policy.[240] I do not mean to say that the costs of mitigation outweigh the benefits—in fact, it is difficult to deny that the converse is true, given the scale and severity of the climate crisis. But it remains the inconvenient truth that "the adoption of low-emission technologies lags in most developing countries, particularly least developed ones, due in part to limited finance, technology development and transfer, and capacity."[241] To that

235. Mayer, *supra* note 36, at 243–50.

236. Rajamani et al., *supra* note 187, at 995–97.

237. Richard Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 Cornell L. Rev. 1153, 1161 (2009).

238. *See supra* Section III.d.3.

239. *See Data Explorer*, Net Zero Tracker, https://zerotracker.net/ [https://perma.cc/39PF-5NQA] (last visited May 8, 2024).

240. Mayer, *supra* note 36, at 141–42.

241. AR6 SPM, *supra* note 174, ¶ A.4.5.

end, more aggressive mitigation policies also impose greater burdens on developing countries, considering financial and institutional constraints. As a corollary, while developing states must take more aggressive mitigation measures, it may be less than desirable to force developing states to take such measures using international human rights law if they are not yet ready. International environmental lawyers would no doubt refer to the principle of common but differentiated responsibility to suggest that developing states need not take as aggressive mitigation measures as developed states. But to say that developing states need not take *as* aggressive mitigation reduction as developed states is different than saying that developing states need not reduce their emissions whatsoever. Emissions reductions are still needed, and the costs of such reductions would doubtless be less politically acceptable to developing states.

ii. Concerns with Inequality within States

The second reason that this negative intention is more compelling in systemic mitigation litigation against developing states is that the unilateral imposition of policies by human rights tribunals may exacerbate inequality within these developing countries. Due to a lack of financial and institutional capacity, a forced transition to low-emission technologies may disproportionately burden poorer populations.

An example can be drawn from the Delhi Vehicular Pollution case,[242] an early progeny of contemporary systemic mitigation cases. In that case, the petitioner commenced public interest litigation concerning the poor air quality in Delhi and argued that environmental laws in India required that the government address air pollution in the interest of public health. The claim succeeded and the Supreme Court of India ordered the government to phase out vehicles using diesel or petroleum in favor of vehicles using greener fuels.[243] The order, initially applying to government buses, eventually expanded to apply to all public transport.[244] There were insufficient public vehicles that were compliant with the Court's order, to the detriment of the poor and working class who rely more on public transport. As explained by the legal scholar, Anuj Bhuwania:

> The Supreme Court acted supposedly on purely environmental grounds, marshalling the spectre of vehicular pollution without adequately considering the impact its interventions would have on vulnerable sections of the population who live a hand-to-mouth existence, and without making any effort to cushion them from the harsh economic effects of such a transition.[245]

242. MC Mehta v. Union of India, (2002) AIR 2002 SC 1696 (India).

243. *Id.* ¶ 47.

244. Michael Jackson & Armin Rosencranz, *The Delhi Pollution Case: Can the Supreme Court Manage the Environment?*, 33 Env. Pol'y L. 88, 88 (2003).

245. Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India 57 (2016).

There is thus a real concern that a human rights tribunal, in their efforts to protect the environment and human rights, may inadvertently hurt the very marginalized populations they wish to protect.

In all fairness, the concerns with inequality could have arisen from the Supreme Court of India's failure to consider how the impact of more stringent emissions reduction would be redistributed. To that end, human rights tribunals could consider mitigation objectives *together* with distributive goals. My discomfort with this suggestion is the fact that the solution to judicial policymaking appears to be more judicial policymaking. If human rights tribunals are also directly concerned with the redistributive effects of mitigation, the line drawn by the Dutch Supreme Court in *Urgenda* between legislating an emissions goal (which may be acceptable if such a goal comes from a standard adopted by the state) and legislating *how* to achieve that emissions goal (which is much harder to justify) would all but disappear.

iii. Fair Share Standards for Developed, but not Developing, States?

A very plausible solution to the two concerns raised above could involve the imposition of fair share standards by human rights tribunals on the developed world, for which some standards have been adopted, but not the developing world, for which no standards have been adopted. Rajamani makes a similar argument, that of the G20 states, the developing states of India and Indonesia should be allowed to increase their emissions, while developed states need to reduce their emissions, and drastically so, by 2030.[246] I foresee two difficulties with this argument.

First, some of the biggest emitters are developing countries—India the third biggest emitter, and Indonesia the tenth, in 2019.[247] And one cannot ignore Brazil, Iran, and China, who are also major developing emitters. In fact, China and India's emissions together account for almost a third of global emissions.[248] The fight against climate change will not prove effective if developing emitters, or at least major ones, are not required to take more aggressive mitigation action.

Second, the idea that developing states may continue emitting (or increase their emissions) because their emissions per capita remains low, while developed states need to drastically reduce their emissions may amount, in effect, to a program of global redistribution where the costs of global mitigation action shifts from the developing world to the developed world, using the framework of international human rights law. Although there may be a compelling moral

246. Rajamani et al., *supra* note 187, at 999.

247. *Which Countries are the World's Biggest Carbon Polluters?*, Climate Trade (May 17, 2021), https://climatetrade.com/which-countries-are-the-worlds-biggest-carbon-polluters/ [https://perma.cc/2Z3W-UL3X].

248. Johannes Friedrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, World Res. Inst. (Mar. 2, 2023), https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters [https://perma.cc/WDS5-CJDS].

case for this redistribution, there remains a real question as to whether *international human rights law* is the appropriate vehicle, given that assistance to the developing world for climate change mitigation is a question currently subject to intense negotiations.[249] Again, the concern that human rights tribunals do not unilaterally impose national policies on states takes on greater significance, when such imposition bypasses ongoing negotiations.[250]

E. A Return to a More Proceduralized Form of Review

I have laid down some possible difficulties with quantitative methodology in assessing a state's due diligence obligations in the context of climate mitigation. That said, an evolution from the qualitative to a quantitative method is entirely defensible: the former, with its supposed deference to governmental decision-making in a policycentric area such as climate change, can allow states to maintain lackluster emissions policies.[251] To that end, it is no surprise that a move towards a more substantive mode of review, one that lays down concrete and stringent goals for national governments, could induce greater efforts at combating climate change.

But the above assumption need not necessarily hold true. In my view, a return to the orthodox qualitative and more proceduralized mode of review can do an equally good job at keeping states up to task on the fight against climate change. This move will also alleviate the tension with the negative intention that human rights bodies refrain from unilaterally imposing national policies.

A good example of a successful proceduralized form of review is *Neubauer*. In *Neubauer*, the youth claimants successfully argued that the government's target of reducing emissions by 55%, relative to 1990 levels by 2030 was insufficient.[252] There is no complaint about the government's goal to achieve carbon neutrality by 2045. At first glance, it appears that *Neubauer* is factually very similar to *Urgenda*. But there are two key differences in the reasoning adopted by the courts, both in the applicable law and the reasoning adopted.

In relation to the applicable law, the German Constitutional Court relied primarily on the German Federal Constitution, relying much less on international human rights law. This contrasts with the Dutch Supreme Court's heavy reliance on the ECHR in *Urgenda*. While the German court did refer to the ECHR, such reference merely supported the obvious proposition that a state's

249. *See, e.g.*, *Delivering for People and the Planet*, *supra* note 168.

250. China and Canada's comments to the CRC Committee's Draft General Comment 26 reflected this concern. *See* Submission of China, *supra* note 220, at 2 (stating that "part V 'General obligation of States' of the draft general comment obviously exceeds the mandate of the CRC by commenting on specific climate issues such as mitigation, adaptation and climate finance. This may overlap with the discussion under the United Nations Framework Convention on Climate Change (UNFCCC) and its Paris Agreement, as the main channel"); Submission of Canada, *supra* note 156, at 6 (stating that "[w]hile Canada agrees that the [CRC] should inform how States implement their climate change obligations . . . Canada would note that the *UN Framework Convention on Climate Change* and the *Paris Agreement* are the agreed upon international framework for States to implement their mitigation and adaptation strategies, cooperation and financial support when it comes to climate change").

251. Maxwell et al., *supra* note 1, at 36–37.

252. Neubauer, *supra* note 5, at 6 (Holdings).

positive human rights obligations include the obligation to protect against the risks of climate change.[253] Further, the German court also noted that it is not obvious that the ECHR grants a greater scope of protection than the German Basic Law.[254]

Neubauer undertook a methodology much more consistent with qualitative methodology, although it did not apply international human rights law. There, the deficiency of the 55% reduction goal by 2050 was not justified by any quantified objective. In fact, the Court expressly found that this reduction goal could not be challenged on the basis that it was *objectively inadequate*. The Court noted that "the legislator has considerable leeway in deciding how to strike an appropriate balance between the interests of property owners exposed to risks from climate change and the interests opposing more stringent climate action. It is not evident at present that the challenged provisions overstep this leeway."[255] Put differently, the Court expressly declined to determine any quantified mitigation objective.

The innovation lies with the Court's finding that the 55% reduction goal was nevertheless unconstitutional because it created *disproportionate risks of infringement of human rights in the future*:

> . . . fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded onto the future…
>
> one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom – something the complainants describe as an "emergency stop" . . .
>
> [The German constitution] concerns how environmental burdens are spread out between different generations[.][256]

In essence, the government breached its duty of due diligence because it *failed to strike the right balance* between current and future generations. Assuming that the German government intended to keep its word of achieving carbon neutrality by 2050, to commit to only a 55% reduction by 2035 is to require future generations to disproportionately bear the human rights costs of mitigation action. This is because the reduction in emissions between 1990 and 2035 would be proportionately the same as the reduction in emissions between 2035 and 2050.

In terms of the remedies granted, the Federal Constitutional Court refrained from setting any emission reduction target, explicitly leaving that question

253. *Id.* ¶¶ 99, 147.
254. *Id.* ¶ 147.
255. *Id.* ¶ 172.
256. *Id.* ¶¶ 183, 192–93.

open for the government (which eventually decided on a 65% reduction by 2035). I find the reasoning of the court in *Neubauer* highly persuasive in a way that accords much better with the negative intention that human rights tribunals do not impose policy preferences.

In all fairness, the Dutch Supreme Court adopted a similar line of reasoning in *Urgenda*, finding that "any postponement of the reduction of emissions therefore means that emissions in the future will have to be reduced on an increasingly large scale in order to make up for the postponement in terms of both of time and size."[257] However, the Court only mounted this line of reasoning to dismiss the government's argument that "achieving a 25% to 40% reduction by 2020 is not necessary, because the same result can be achieved by accelerating the reduction of greenhouse gas emissions in the Netherlands after 2020."[258] The Court's concern was thus one of *feasibility*, whether "with the 20% reduction . . . by 2020, the overall reduction over the next few decades, which the State itself believes to be necessary in any case, is still feasible."[259] As the German Court correctly recognized in *Neubauer*, feasibility is not the main concern. What matters is whether the *allocation of burdens* of mitigation action to future generations is disproportionate.

I am of the view that the approach in *Neubauer* may lend itself useful to future courts applying international human rights law. Here, human rights tribunals are not entrusted with the invidious task of forcing states to comply with any given emission standard. Rather, they simply query whether national governments have struck a *fair balance* between the rights of current and future generations.

This approach may prove especially potent in cases against countries with *formal laws* requiring carbon neutrality by 2050 (or earlier), such as Canada and most of Western Europe.[260] This approach may also prove useful for states that have either a goal of carbon neutrality by 2050 in their *policy documents*, or, at minimum, *pledged* to achieve carbon neutrality by 2050. In all these situations, assuming that national governments intend to keep their word, an approach that offloads most of the burdens of emissions reduction to future generations could fail to strike a fair generational balance. To that end, human rights tribunals are not telling states what to do—they are simply saying that states *can do better*. The intention that human rights tribunals do not unilaterally prescribe national polices would not raise any concerns.

Of course, the success of this approach assumes that national governments maintain their position, binding or otherwise, of carbon neutrality by 2050 (or earlier). It is always open for states to delay their goals. In such a situation the risk of offloading the burdens of emissions reduction would likewise decrease, since the rate of emissions reduction in the future will not need to be so drastic. For instance, the German Federal Constitutional Court in 2022 refused to

257. Urgenda, *supra* note 4, ¶ 7.4.3.
258. *Id.*
259. *Id.* ¶ 7.4.6.
260. *See Data Explorer*, *supra* note 239.

admit a systemic mitigation case heavily inspired by *Neubauer*.[261] In this case, youths backed by the German environmental NGO Environmental Action Germany submitted eleven separate complaints against ten German states in 2021, claiming that current climate change policies in these states were insufficiently aggressive in reducing emissions. The Court distinguished this case from *Neubauer* on the basis that while the federal government is obliged to set emission reduction goals, the states are neither obliged, nor is it even clear that they have the competence at all, to set any such goals independent from the federal target.

That said, we should not assume that states can easily kick the can down the road to avoid violating its human rights obligations. After all, there are serious optics implications with states refusing to commit to carbon neutrality, or delaying their commitment to neutrality, especially where many other states are doing the contrary. Politically speaking, it is arguably very unpopular for a government to backtrack on its emission reduction promises lest they be seen as not caring about the environment or about future generations.

In summary, the return to a more proceduralized form of review avoids the tension with the intention of implementation that human rights tribunals do not unilaterally prescribe national polices. However, this proceduralism need not neglect the intention of principle that prioritizes the protection of human rights. This proceduralist approach may be a viable alternative to the current evolution of the due diligence standard, since the shift to the quantitative methodology entails a degree of judicial interference that does not comport with the intention of implementation earlier mentioned.

VI. Applying my Analysis to the ECtHR's Decisions in *Agostinho* and *KlimaSeniorinnen*

Shortly before this Article's publication, the ECtHR's Grand Chamber released a duo of landmark systemic mitigation judgments, *Agostinho* and *KlimaSeniorinnen*. A detailed analysis of the judgments could take up an entire article by itself. At this juncture, I wish to simply offer some preliminary thoughts, especially insofar as the ECtHR's reasoning in the judgments touches on issues relating to evolutionary interpretation.

A. The Rejection of Jurisdictional Expansionism in Agostinho

Of the duo, *Agostinho* is the more ambitious, and also undoubtedly the less successful. In *Agostinho*, the applicants—a group of six Portuguese nationals living in Portugal—complained against Portugal and *thirty-two other ECHR member*

261. Markus Burianski et al., *German Federal Constitutional Court Refuses to Hear Climate Activists' Complaints*, White & Case (Feb. 4, 2022), https://www.whitecase.com/insight-alert/german-federal-constitutional-court-refuses-hear-climate-activists-complaints [https://perma.cc/HVL3-AAJP].

states.[262] The essence of the complaint is that the respondent states' greenhouse gas emissions have contributed to global warming, and resulted in heatwaves affecting the applicants' health; and that the respondents must take measures to regulate, in an adequate manner, their contributions to climate change.[263]

The applicants' complaint, far-reaching as it may be, was not resolved on the merits. The Grand Chamber dismissed the complaint due to a failure to exhaust domestic remedies[264] and a lack of jurisdiction,[265] the latter of which is germane to our analysis. In particular, the Grand Chamber found that jurisdiction can only be established in relation to Portugal, where the applicants reside.[266] As a corollary, no extraterritorial jurisdiction was established for the remaining respondent states.[267]

In analyzing the bases for extraterritorial jurisdiction, the Grand Chamber's analysis is avowedly traditional, reiterating that extraterritorial jurisdiction attains only in cases where the respondent state exercises effective control over the alleged victim[268] or the area in question[269]—and none of these criteria were satisfied in the present case.

More significantly, the Grand Chamber also emphasized that "it has consistently rejected the idea that the fact of a decision being taken at national level which has an impact on the situation of a person abroad could in itself establish jurisdiction of the State concerned over the person."[270] The *sui generis* nature of climate change was, in the Grand Chamber's views, insufficient to justify a departure from this position.[271]

The language used by the Court is revealing. Notwithstanding the multifaceted nature of climate change, the complex causal link between national emissions and global warming, and the existential crisis occasioned by climate change, the Grand Chamber did not find them sufficient to "in themselves serve as a basis for *creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction or as justification for expanding on the existing ones*."[272] The explicit reference to "judicial interpretation" is a clear signal of the Grand Chamber's refusal to adopt an *evolutionary interpretation* of "jurisdiction" under the ECHR.

The reasons offered by the Grand Chamber for its avowedly conservative position also merit discussion. First, the Grand Chamber took pains to note that "the proposed positive obligations of States in the field of climate change

262. Duarte Agostinho and others v. Portugal and others, App. No. 39371/20, Legal Summary, Eur. Ct. H.R. (Apr. 9, 2024).

263. Duarte Agostinho and others v. Portugal and others, App. No. 39371/20, Information Note on the Court's case-law 246, Eur. Ct. H.R. (Dec. 2020).

264. Agostinho, *supra* note 12, at ¶¶ 226–28.

265. *Id.* ¶ 214.

266. *Id.* ¶ 178.

267. *Id.* ¶ 214.

268. *Id.* ¶ 182.

269. *Id.* ¶ 181.

270. *Id.* ¶ 184.

271. *Id.* ¶ 195.

272. *Id.* (emphasis added).

could be a sufficient ground for holding that the State has jurisdiction over individuals outside its territory or otherwise outside its authority and control,"[273] and that "jurisdiction cannot be established merely on the basis of the argument that the State is capable of taking a decision or action impacting the applicant's situation abroad."[274] These statements reject the *functional* model of jurisdiction adopted in *Sacchi*, where the respondent state's *ability* to improve the human rights of aliens abroad through its domestic actions is found as a sufficient basis for human rights jurisdiction.[275]

Second, the reason behind the Grand Chamber's discomfort with the functional model of jurisdiction, at least in the climate change context, is avoiding a situation "requiring the State to satisfy substantive obligations under the [ECHR] despite the fact that it has neither 'control', within the meaning of the Court's case-law, over the territory where the applicants are suffering the alleged impacts of climate change, *which could, in principle, be anywhere*, or control over the applicants themselves."[276] I read this line as a reference to the Grand Chamber's awareness of the negative intention to avoid universal human rights obligations.

This negative intention is even more clearly expressed in a subsequent part of the judgment:

> Given, as the applicants themselves accepted, the multilateral dimension of climate change, almost anyone adversely affected by climate change wherever in the world he or she might feel its effects could be brought within the jurisdiction of any Contracting Party for the purposes of Article 1 of the Convention in relation to that Party's actions or omissions to tackle climate change. Such a position could not be accommodated under the Convention[.]
>
> . . . as regards the harmful consequences produced by GHG emissions, these are the result of a chain of effects that is both complex and more unpredictable in terms of time and place and are therefore particularly diffuse, making it difficult to establish the respective contributions to the adverse impact of the emissions abroad. *The scope of the extraterritorial jurisdiction sought by the applicants would in effect be without any identifiable limits* . . .
>
> . . . accepting the applicants' arguments would entail *an unlimited expansion of States' extraterritorial jurisdiction* under the Convention and responsibilities under the Convention towards people practically anywhere in the world. This would turn the Convention into a global climate-change treaty.[277]

273. *Id.* ¶ 198.
274. *Id.* ¶ 199.
275. *See infra* Part IV.d.1.
276. *Id.* ¶ 200. Emphasis added.
277. *Id.* ¶¶ 206–08. Emphases added.

The Grand Chamber's concerns with the functional model of jurisdiction support the points that I have previously mentioned on the negative intention to avoid universal human rights obligations. While the functional model may prove a positive step forward in international human rights law, the peculiarities of climate change render it difficult to apply without making states responsible for people across the world.[278]

In sum, the Grand Chamber has refused to undertake an evolutionary (and expansive) interpretation of "jurisdiction" under the ECHR, precisely due to the concerns with potentially undermining the negative intention of avoiding universal human rights obligations. While proponents of a more assertive ECtHR may be disappointed, I find that there is much to commend with the Grand Chamber's ruling in *Agostinho*.

B. The Emergence of a New Due Diligence Standard in KlimaSeniorinnen

KlimaSeniorinnen is by far the more successful case of the duo. There, the applicants include a Swiss association for the prevention of climate change (comprising hundreds of elderly members), and four elderly women residing in Switzerland who complain of health problems that worsen during heatwaves. The complaint was lodged not against a number of states, but only Switzerland where the applicants are based. The applicants complained that Switzerland failed to comply with its positive obligations to effectively protect, among other rights, respect for private and family life and the home (ECHR Article 8), in particular by failing to adopt appropriate regulations and to implement them with adequate and sufficient measures in order to achieve the objectives for combatting climate change.[279]

The applicants' claim on Article 8 succeeded before the Grand Chamber, which found that Switzerland breached its positive obligations under Article 8 of the ECHR.[280] Notably, the Grand Chamber's reasoning was not unanimous—Judge Eicke wrote a powerful dissent pertaining to the supposed excesses with the majority's *evolutionary interpretation* of a state's positive obligations in the context of climate change. I will set out the crux of the majority and the dissent's reasoning before offering my views.

1. *The Majority's Reasoning*

The Grand Chamber began its analysis of a state's positive obligations in the context of climate change by invoking the doctrine of margin of appreciation. However, the Grand Chamber quickly distinguished, on the one hand, "the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this

278. *See infra* Part IV.d.3.

279. Verein KlimaSeniorinnen Schweiz v. Switzerland, App. No. 53600/20, Legal Summary, Eur. Ct. H.R. (Mar. 17, 2021).

280. KlimaSeniorinnen, 2024 Eur. Ct. H.R. ¶¶ 573–74.

respect,"[281] which entails a narrower margin; and on the other hand, "the choice of means designed to achieve those objectives," which entails a broader margin.[282] The Grand Chamber justified this distinction based on the gravity of the threat and the consensus of the stakes involved for the former, and wider freedom in "choice of means, including operational choices and policies adopted . . . in the light of priorities and resources," for the latter.[283]

Keeping in mind this distinction, the Grand Chamber went on to say that states must "adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change."[284] In particular, this requires "measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades."[285] Such substantial and progressive reduction requires "immediate action [to] be taken [with] adequate intermediate reduction goals," so as to "avoid a disproportionate burden on future generations."[286] However, "the choice of means to pursue those aims and objectives . . . remains wide."[287]

Applying these principles, the Grand Chamber found that Switzerland failed to discharge its positive obligations, arguably on three different grounds.

First, the Swiss government has failed to meet its self-imposed mitigation milestones which, on its own admission, are insufficient to combat climate change. The currently-in-force CO_2 Act requires that 2020 GHG emissions be reduced by 20% compared to 1990 levels. However, studies from the Swiss Federal Council itself found that this level of reduction is insufficient, either to meet the goal of limiting global warming to 2 to 2.4 degrees (which required emissions reduction of 50% to 85%), or to meet UNFCCC commitments under.[288] In any event, this reduction of 20% was not met.[289] Further, while Switzerland has attempted to effect amendments to the CO_2 Act in 2017, according to which the reduction target for the years 2021 to 2024 was set at 1.5% per year compared with 1990 levels, there were nevertheless no attempts to regulate the time period after 2024.[290]

Second, Switzerland remains unable to provide a comprehensive regulatory framework for emission reduction over time. In 2022, Switzerland enacted the Climate Act (not in force), contemplating net-zero by 2050. The Climate Act also provides for an intermediate target for 2040 (75% reduction compared with 1990 levels) and for the years 2031 to 2040 (average of at least 64%) and

281. *Id.* ¶ 357.
282. *Id.* ¶ 543.
283. *Id*, ¶ 543.
284. *Id.* ¶ 545.
285. *Id.* ¶ 548.
286. *Id.* ¶ 549.
287. *Id.*
288. *Id.* ¶ 558.
289. *Id.* ¶ 559.
290. *Id.* ¶ 561.

2041 to 2050 (average of at least 89% compared with 1990 levels).[291] However, while the Climate Act sets out the general objectives, the concrete measures to achieve them are not provided. Instead, these concrete measures would be fully fleshed out in the CO_2 Act, which the Grand Chamber already found insufficient.[292] Further, as the CO_2 Act addresses emissions up to 2024, and the Climate Act deals with emissions after 2030, the period between 2025 and 2030 remains unaccounted for.[293]

Third, Switzerland failed to take any measures to quantify its remaining carbon budget. The Grand Chamber took notice of the applicants' argument that Switzerland "would have a remaining carbon budget of 0.44 $GtCO_2$ for a 67% chance of meeting the 1.5ºC limit (or 0.33 $GtCO_2$ for an 83% chance) . . . Thus, under its current climate strategy, Switzerland allowed for more GHG emissions than even an 'equal per capita emissions' quantification approach would entitle it to use."[294]

Further, the Grand Chamber rejected Switzerland's argument that its climate policy could be considered as "similar in approach" to having a carbon budget. The Grand Chamber was not convinced that "an effective regulatory framework concerning climate change could be put in place without quantifying, through a carbon budget or otherwise, national GHG emissions limitations."[295] Last but not least, the Grand Chamber also endorsed the German Constitutional Court's position in *Neubauer*, that it was not impossible to determine the national carbon budget.[296]

2. *Judge Eicke's Dissent*

Judge Eicke began his dissent with a powerful charge, that the majority had "gone well beyond . . . the permissible limits of evolutive interpretation."[297] In relation to the majority's finding that Switzerland has breached its positive obligations under Article 8, Judge Eicke took the view that the majority acted contrary to the ECtHR's previous case law to (a) create a new right to effective protection from adverse effects of climate change to their health and well-being, and (b) impose a new "primary duty" to adopt regulations to mitigate the effects of climate change, in the form of substantial GHG emissions toward net neutrality.[298]

Judge Eicke further noted that the majority's position, that member states shall only have a reduced margin of appreciation in assessing their "commitment to the necessity of combating climate change and its adverse effects, and

291. *Id.* ¶ 564.
292. *Id.* ¶ 565.
293. *Id.* ¶ 566.
294. *Id.* ¶ 569.
295. *Id.* ¶ 570.
296. *Id.* ¶ 571.
297. *Id.* Partly Concurring Partly Dissenting Opinion of Judge Eicke, ¶ 3.
298. *Id.* Partly Concurring Partly Dissenting Opinion of Judge Eicke, ¶ 65.

the setting of the requisite aims and objectives in this respect,"[299] is contrary to the ECtHR's previous deference to national authorities on matters of "difficult social and technical spheres" developed in the context of, arguably, (much) less complex spheres than the fight against anthropogenic climate change.[300]

Last but not least, Judge Eicke noted his concern that the majority's position may end up being counterproductive, writing:

> [T]here is a significant risk that the new right/obligation created by the majority . . . will prove an unwelcome and unnecessary distraction for the national and international authorities, both executive and legislative, in that it detracts attention from the on-going legislative and negotiating efforts being undertaken as we speak to address the – generally accepted – need for urgent action. Not only will those authorities now have to assess and, if considered necessary, design and adopt (or have adopted) new "regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" but there is also a significant risk that they will now be tied up in litigation about whatever regulations and measures they have adopted (whether as a result or independently) or how those regulations and measures have been applied in practice and, where an applicant was successful, lengthy and uncertain execution processes in relation to any judgments.[301]

3. *My Assessment*

Judge Eicke's dissent focused not on the majority's analysis of the specific facts of the case, but rather with the majority's statements of general principles. I take a similar position—while the majority's handling of the facts are commendable, I share Judge Eicke's concerns that the majority's broad statements of general principle may be problematic, especially in relation to the negative intention that international courts refrain from unilaterally prescribing national policies.

I have argued above that there exists a negative intention that courts refrain from unilaterally prescribing national policies in the systemic mitigation context. This means international courts should focus on a more qualitative and proceduralized form of review in assessing a state's due diligence obligations. As a corollary, this also means that international courts should avoid a quantitative methodology involving the imposition of judicial standards on what a country's fair-share of emission reductions should be.

With these considerations in mind, there is little fault to find with in relation to the majority's scrutiny of the Swiss government's efforts. Much like the German Constitutional Court in *Neubauer*, the majority in *KlimaSeniorninen* has

299. *Id.* Partly Concurring Partly Dissenting Opinion of Judge Eicke, ¶ 66.
300. *Id.*
301. *Id.* Partly Concurring Partly Dissenting Opinion of Judge Eicke, ¶ 69.

refrained from determining any quantified mitigation objective. This much is evident from an examination of the three grounds relied on by the majority.

On the first ground, that the Swiss government failed to meet its own emissions reduction milestones is admitted by the government. Similarly, the finding of insufficiency regarding Switzerland's emission reduction goals came from the Swiss Federal Council itself, not a finding prescribed by Court majority.

On the second ground, the Swiss government's failure to provide a comprehensive regulatory framework to reduce emissions over time did not depend on a judicial finding regarding any "fair share" of emission reduction. Instead, the problem was the Swiss government's failure to articulate the means for achieving the aims it had set out in the CO_2 Act and the Climate Act, and the failure to provide for any mitigation strategy for the years between 2025 and 2030. Like in *Neubauer*, the Court is not telling Switzerland what to do—but simply that Switzerland can *do better*.[302]

On the third ground, the majority did refer to the applicants' proposed carbon budget for Switzerland "assuming the same per capita burden-sharing for emissions from 2020 onwards,"[303] and it further observed that "under its current climate strategy, Switzerland allowed for more GHG emissions than even an 'equal per capita emissions' quantification approach would entitle it to use."[304] At first blush, it does appear that the majority *is* relying on the applicants' proposed quantification of a "fair-share" of emissions that Switzerland is entitled to—which would undermine the negative intention that courts refrain from imposing national policies. But the subsequent paragraphs clarify that the real issue was Switzerland's failure to craft *any* specific carbon budget at all. This would not undermine the negative intention that courts refrain from unilaterally prescribing national policies, as that would only happen if the ECtHR decides to substitute the carbon budget with its own.

To that end, the majority's approach in assessing the Swiss government's due diligence obligation remains a proceduralized form of review that does not trigger any concern with undermining the negative intention that courts refrain from imposing national policies in the climate change sphere. However, the same approach may not necessarily remain the status quo. The majority, in setting out general principles, provided detailed criteria to assess whether the state has exceeded the margin of appreciation, including adopting a target timeline for carbon neutrality; setting and updating intermediate GHG emissions reduction targets; providing evidence of compliance with such targets; and devising appropriate legislation and measures.[305]

I sympathize with Judge Eicke's concern that assessing these criteria is something "the Court is ill-equipped and ill-suited to perform."[306] It is possible to

302. *See infra* Part V.e.
303. KlimaSeniorinnen, 2024 Eur. Ct. H.R. ¶ 569.
304. *Id.*
305. *Id.* ¶ 550.
306. *Id.* Partly Concurring Partly Dissenting Opinion of Judge Eicke, ¶ 67.

interpret some of these criteria, such as the setting of GHG targets, as justifying a quantitative methodology whereby the ECtHR could substitute the state's national policy with its own assessments. For instance, the Court could say that intermediate emissions goals are incapable of meeting the overall reduction goal. Alternatively, the court could say that the relevant emissions reduction targets have not been properly updated.

Granted, just because the ECtHR's general statements of principle *may* permit a quantitative methodology, does not mean that it necessarily *will*, though one can imagine a creative litigant trying to bring that very same argument before the Court. And in an era where political will is an exhaustible resource, this open-textured test may lead to the kind of counter-productiveness that Judge Eicke is concerned with, proving an "unwelcome and unnecessary distraction" from ongoing and negotiations and legislative efforts.[307]

Conclusion

In conclusion, many of the difficulties facing systemic mitigation cases can be traced back to an undue focus on the object and purpose of human rights treaties, i.e., an undue focus on the intention of principle of promoting the protection of human rights, at the expense of downplaying other intentions which may point in a different direction.[308]

Given that the evolutionary interpretation of human rights treaties concerns novel and unforeseen circumstances, the risk of conceptual overreach is all too real, especially in the context of a complex and multifaced issue like climate change. Of course, I do not mean to say that human rights doctrines cannot be meaningfully applied in the context of climate change. But any evolutionary interpretation of human rights treaties must nevertheless be grounded upon the common intention, or intentions, of treaty parties, if such evolution is to be well-received, and well-complied, by treaty parties. To that end, I have suggested two areas in which the current evolutionary interpretation of human rights treaties may be in tension with the intentions of states parties, and some tentative solutions for managing such tensions.

First, for the evolutionary interpretation of a state's "jurisdiction," guidance may be gleaned from principles of international environmental law, including but not limited to the principle of common but differentiated responsibilities. Second, for the evolutionary interpretation of a state's positive obligation to protect human rights, it may be beneficial to return to a more proceduralized form of review which does not impinge on the intention of implementation that there be limited judicial interference with domestic policy-making.

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307. *Id*. Partly Concurring Partly Dissenting Opinion of Judge Eicke, ¶ 69.

308. A helpful comparison can be made with John Tasioulas's notion of "conceptual overreach," where an idea, in this case human rights, loses conceptual coherence by being overstretched in accommodating an ever increasing range of policy demands. John Tasioulas, *The Inflation of Concepts*, Aeon (Jan. 29, 2021), https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason [https://perma.cc/R2P7-NGN5].

In the end, the noble aspirations of international human rights law should be tempered with a sober understanding of *realpolitik*, and of the recognition that the intention of principle of protecting human rights is neither the only, nor the determinative, intention of parties to human rights treaties. While I have great confidence in the potential of international human rights law to provide a meaningful avenue for humankind to navigate the impending climate crisis, I also think that international human rights law should not be thought of as the *panacea* to our climate woes. A more moderate and doctrinally rigorous approach to systemic mitigation cases may very well prove to be more fruitful.