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Climate Change Mitigation as an Obligation Under Human Rights Treaties?

By Benoit Mayer *

Abstract

Judges and scholars have interpreted human rights treaties as obligating states to mitigate climate change by limiting their greenhouse gas emissions, an argument instrumental to the development of climate litigation. This Article questions the validity of this interpretation. A state's treaty obligation to protect human rights implies an obligation to cooperate on the mitigation of climate change, the Article argues, only if and inasmuch as climate change mitigation effectively protects the enjoyment of treaty rights by individuals within the state's territory or under its jurisdiction. As such, human rights treaties open only a narrow window on the applicability of general mitigation obligations arising under climate treaties and customary international law.

I. Introduction

States have recognized that climate change and its adverse effects, a common concern of humankind, call for international cooperation.[1] Mitigating climate change requires substantial efforts to limit and reduce greenhouse gas (GHG) emissions at a global scale.[2] But while it is collectively rational for states to invest in substantial efforts to mitigate climate change, it is individually rational for each state not to cut its own emissions, instead seeking to free ride on the mitigation outcomes achieved by others.[3] This collective action problem is compounded by the absence of objective formulae to determine the requisite level of global mitigation action and to allocate the efforts necessary to achieve it.[4] States have long acknowledged

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[1] United Nations Framework Convention on Climate Change, pmbl., paras. 2, 7, May 9, 1992, 1771 UNTS 107; Paris Agreement, pmbl., paras. 6, 8, Dec. 12. 2015, 55 ILM 740 (2016).

[2] Myles R. Allen, et al., *Technical Summary*, *in* Global Warming of 1.5°C: An IPCC Special Report 25, 31 (Valérie Masson-Delmotte, et al. eds., 2019).

[3] Stephen M. Gardiner, A Perfect Moral Storm: The Ethical Tragedy of Climate Change 26 (2011); Eric A. Posner & David Weisbach, Climate Change Justice 170 (2010).

[4] *See* Myles R. Allen, Opha Pauline Dube & William Solecki, *Framing and Context*, *in* Global Warming of 1.5°C, *supra* note 2, at 56–67; Gardiner, *supra* note 3, at 5; Reto Knutti, Joeri Rogelj, Jan Sedláček & Erich M. Fischer, *A Scientific Critique of the Two-Degree Climate Change Target*, 9 Nature Geoscience 13 (2016); Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 Int'l & Comp. L. Q. 493 (2016).

that, as a whole, they are failing to spur sufficient mitigation action, but they are yet to increase their individual commitments accordingly.[5] Domestic litigation is increasingly viewed as a way to overcome the failure of international negotiations.[6]

States have broad obligations to mitigate climate change under international environmental treaties,[7] and possibly even broader obligations under customary international law,[8] but plaintiffs typically lack standing to invoke any of these obligations.[9] Rather, when climate litigation is based on international law,[10] it generally relies on human rights treaties.[11] As human rights treaties require states to take measures to protect human rights, and as climate change hinders the enjoyment of various human rights, there is at least a plausible argument that human rights treaties may imply an obligation for states to mitigate climate change.

This argument has received considerable support in recent years, particularly from UN human rights treaty bodies. The Committee on Economic, Social and Cultural Rights (CESCR) has suggested that, "[i]n order to act consistently with their human rights obligations," states parties should revise the nationally determined contributions (NDCs) to global mitigation action that they have communicated under the Paris Agreement.[12] The Committee on the Elimination of Discrimination against Women has asserted the existence of an obligation for states "to effectively mitigate . . . climate change in order to reduce the increased disaster risk."[13] These two treaty bodies were joined by three others in issuing a statement according to which, to comply with human rights treaties, states "must adopt and implement policies aimed at reducing emissions . . . which reflect the highest possible ambition."[14] Consistently, treaty bodies have included recommendations for policies and measures on climate change mitigation in their concluding observations on national periodic reports.[15]

[5] *See* Dec. 1/CP.21, Adoption of the Paris Agreement, para. 17, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016); Dec. 1/CP.25, para. 8, UN Doc. FCCC/CP/2019/13/Add.1 (Mar. 16, 2020).

[6] *See generally* Joana Setzer & Rebecca Byrnes, Global Trends in Climate Change Litigation: 2020 Snapshot (2020); Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AJIL 679 (2019).

[7] *See* text at notes 76–79 *infra*.

[8] *See* text at notes 81–85 *infra*.

[9] *See* note 92 *infra*.

[10] Regarding litigation based on purely domestic legal provisions, see, e.g., Rb Den Haag (District Court, The Hague), June 24, 2015, ECLI:NL:RBDHA:2015:7145 (Urgenda/Staat der Nederlanden), unofficial English translation ECLI:NL:RBDHA:2015:7196 (Neth.) [hereinafter *Urgenda* (Rb)] (tort law); Corte Supreme de Justicia [CSJ] [Supreme Court], abril 5, 2018, MP Luis Armando Tolosa Villabona, STC4360-2018, Radicación No. 11001-22-03-000-2018-00319-01, Barragán/Presidencia, *available at* https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf (Colom.) [hereinafter *Barragán*] (constitutional rights); Juliana v. United States, 947 F.3d 1159 (9th Cir 2019) [hereinafter *Juliana*] (public trust doctrine).

[11] *See* Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 Transnat'l Envtl. L. 37 (2018); Setzer & Byrnes, *supra* note 6, at 1; Peel & Lin, *supra* note 6, at 684–85. *See also* note 19 *infra*.

[12] CESCR, Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights, para. 6, UN Doc. E/C.12/2018/1 (Oct. 31, 2018). *See* Paris Agreement, *supra* note 1, Art. 4(2).

[13] Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, para. 14, UN Doc. CEDAW/C/GC/37 (Mar. 13, 2018).

[14] CEDAW, et al., Joint Statement on "Human Rights and Climate Change" (Sept. 16, 2019), *at* https://perma.cc/6VXT-LAD4.

[15] *E.g.*, CESCR, Concluding Observations, Sixth Periodic Report of Norway, paras. 10–11, UN Doc. E/C.12/NOR/CO/6 (Apr. 2, 2020); CESCR, Concluding Observations, Fourth Periodic Report of Ecuador, paras. 11–12, UN Doc. E/C.12/ECU/CO/4 (Nov. 14, 2019); Committee on the Rights of the Child (CRC),

Developments have also been taking place at the national level, generally in relation to civil and political rights. In *Urgenda*, the Supreme Court of the Netherlands has 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 GHG emissions by at least 25 percent by the end of 2020 compared with 1990 levels.[16] By contrast, in *Natur og Ungdom*, the Supreme Court of Norway found that the issuance of ten petroleum production licenses did not involve a "real and immediate" threat on the rights to life or to private and family life under the ECHR,[17] although the Court may not necessarily have arrived at the same conclusion if the challenge had been directed more broadly at national mitigation policies.[18] Claims based on mitigation obligations implied from human rights treaties are currently pending before other national courts,[19] the European Court of Human Rights,[20] and two treaty bodies.[21] Comparable cases have also been made on the basis of constitutional rights,[22] leading often to similar

Concluding Observations, Combined Fifth and Sixth Periodic Reports of Australia, paras. 40–41, UN Doc. CRC/C/AUS/CO/5-6 (Nov. 1, 2019); CRC, Concluding Observations, Combined Fourth and Fifth Periodic Reports of Japan, para. 37, UN Doc. CRC/C/JPN/CO/4-5 (Mar. 5, 2019); CESCR, Concluding Observations, Sixth Periodic Report of Germany, paras. 18–19, UN Doc. E/C.12/DEU/CO/6 (Nov. 27, 2018); CESCR, Concluding Observations, Fourth Periodic Report of Argentina, paras. 13–15, UN Doc. E/C.12/ARG/CO/4 (Nov. 1, 2018); CEDAW, Concluding Observations, Ninth Periodic Report of Norway, paras. 14–15, UN Doc. CEDAW/C/NOR/CO/9 (Nov. 17, 2017); CESCR, Concluding Observations, Sixth Periodic Report of the Russian Federation, paras. 42–43, UN Doc. E/C.12/RUS/CO/6 (Oct. 16, 2017).

[16] HR Nederlanden (Supreme Court of the Netherlands) Dec. 20, 2019, ECLI:NL:2019:2006 (Urgenda/Staat der Nederlanden), unofficial English translation 59 ILM 814 (2020) (Neth.) [hereinafter *Urgenda* (HR)].

[17] HR-2020-2472-P, paras. 168, 171, Dec. 22, 2020, Case No. 20-051052SIV-HRET, unofficial English translation, *available at* https://www.xn–klimasksml-95a8t.no/wp-content/uploads/2021/01/judgement_translated.pdf (Natur og Ungdom/Norway) (Nor.) [hereinafter *Natur og Ungdom*].

[18] *See id.*, para. 173. A key aspect of the case is the Court's emphasis on the "principle" or "division of responsibilities" according to which a state is not responsible for emissions from the combustion of exported oil. *See id.*, para. 159.

[19] *E.g.*, CE Sect., Nov. 19, 2020, ECLI:FR:CECHR:2020:427301.20201119 (Grande-Synthe/France), Decision on Admissibility (Fr.) [hereinafter *Grande-Synthe*]; Appeal Notice in Case C-565/19 P, 2019 OJ (C 372) 16 (July 23) (EU); Tribunal de Première Instance francophone de Bruxelles [TFI] [French-Speaking Tribunal of First Instance of Brussels], Case 15/4585/A, Klimaatzaak/Belgium (filed Dec. 4, 2014), *available at* http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al.

[20] Application by KlimaSeniorinnen v. Switzerland (Nov. 26, 2020), *available at* http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament; Communicated Case No. 39371/20, Duarte Agostinho v. Portugal (Nov. 13, 2020), http://hudoc.echr.coe.int/eng?i=001-206535.

[21] Petition to the Committee on the Rights of the Child, Sacchi/Argentina (filed Sept. 23, 2019), *available at* http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al; Petition of Torres Strait Islanders to the United Nations Human Rights Committee (petition filed May 13, 2019), *available at* http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change.

[22] *E.g.*, BVerfG, 1 BvR 2656/18, Mar. 24, 2021, *at* http://www.bverfg.de/e/rs20210324_1bvr265618.html (Ger.) [hereinafter *Neubauer*]; Misdzi Yikh v. Canada, 2020 FC 1059 (Can.) [hereinafter *Misdzi Yikh*]; Mathur v. Ontario, 2020 ONSC 6918, *at* https://canlii.ca/t/jbph7 (Ont.); La Rose v. The Queen, 2020 FC 1008 (Can.) [hereinafter *La Rose*]; Hunbeobjaepanso [Const. Ct.], 2020 Heonma 389 (Do-Hyun Kim/South Korea); Environnement Jeunesse c. Procureur Général du Canada, [2019] QCCS 2885, *at* https://canlii.ca/t/j1ghh (Que.). Some other cases involve the application of both constitutional and treaty rights: see, e.g., *Grande-Synthe*, *supra* note 19; *Natur og Ungdom*, *supra* note 17; Friends of the Irish Environment v. Ireland [2020] IESC 49, [2020] 2 ILRM 233 (Ir.); Verwaltungsgericht Berlin [VG] [Administrative Court Berlin] Oct. 31, 2019, VG10K412.18, Backsen/Germany, unofficial English translation *available at* http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government (Ger.) [hereinafter *Backsen*].

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analyses.[23] While some cases have been dismissed on procedural grounds—for instance with regard to particular conceptions of the separation of powers[24] or for lack of standing[25]—others will likely be decided on the merits in the years to come.

The relevant literature is largely supportive of the interpretation of human rights treaties as the source of mitigation obligations.[26] Michael Burger and Jessica Wentz, for instance, note the existence of a "growing consensus that a mitigation obligation does exist under international human rights law."[27] Doubts, however, have occasionally been raised. More than a decade ago, a report by the UN high commissioner for human rights conceded that, "[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense."[28] Lavanya Rajamani observed that many negotiators "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."[29] Alan Boyle suggested that the causes, effects, and responsibilities associated with climate change "are too numerous and too widely spread to respond usefully to individual human rights claims or to analysis by reference to particular human rights."[30] Fanny Thornton asked whether the causal links between a state's mitigation action and the enjoyment of human rights may be "too intricate and diffuse" to ground a convincing legal case.[31] These views recognize that climate change differs in many respects from the issues to which human rights law has generally been applied: responsibilities are diffuse, there is no distinct class of victims, and overall a state's action on climate change mitigation, by itself, is never a quick or effective fix.

This Article builds on these prior doubts to assess the possibility of interpreting human rights treaties as the source of a state's obligation to mitigate climate change. The analysis

[23] On territorial application, see note 118 *infra*. Constitutional law may however include different definitions of rights and related obligations. For instance, the Canadian Charter of Rights and Freedoms does not create positive obligations, which hinders its application as the source of an obligation to mitigate climate change. *See La Rose*, *supra* note 22, paras. 66, 79; *Misdzi Yikh*, *supra* note 22, para. 91. Some constitutions protect rights (e.g., to a healthy environment) that are not systematically recognized in human rights treaties.

[24] *E.g.*, *La Rose*, *supra* note 22; *Misdzi Yikh*, *supra* note 22. *See Juliana*, *supra* note 10 (by analogy in a public trust case).

[25] *See* references contained in notes 103–110 *infra*.

[26] *See, e.g.*, Margaretha Wewerinke-Singh, State Responsibility, Climate Change and Human Rights Under International Law (2019); Sumudu Atapattu, Human Rights Approaches to Climate Change (2016); John H. Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), Report, UN Doc. A/HRC/31/52 (Feb. 1, 2016) [hereinafter Knox, 2016 Report] (on the human rights obligations relating to climate change); John H. Knox, *Climate Change and Human Rights Law*, 50 Va. J. Int'l L. 163 (2009); Human Rights and Climate Change (Stephen Humphreys ed., 2009). *See generally* UN OHCHR, *Frequently Asked Questions on Human Rights and Climate Change* 31, Fact Sheet No. 38 (2021).

[27] Michael Burger & Jessica Wentz, *Climate Change and Human Rights*, *in* 7 Elgar Encyclopedia of Environmental Law 198, 205 (Michael Faure ed., 2015).

[28] Office of the UN High Commissioner for Human Rights, Report on the Relationship Between Climate Change and Human Rights para. 70, UN Doc. A/HRC/10/61 (Jan. 15, 2009).

[29] Lavanya Rajamani, *Human Rights in the Climate Change Regime*, *in* The Human Rights to a Healthy Environment 236, 250 (John Knox & Ramin Pejan eds., 2018).

[30] Alan Boyle, *Climate Change, the Paris Agreement and Human Rights*, 67 Int'l & Comp. L. Q. 759, 777 (2018).

[31] Fanny Thornton, *The Absurdity of Relying on Human Rights Law to Go After Emitters*, *in* Debating Climate Law (Benoit Mayer & Alexander Zahar eds., 2021).

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presented here is critical but constructive. The Article suggests a new, plausible way—consistent with the tenets of treaty interpretation—to construe human rights treaties as the source of an obligation to mitigate climate change, albeit only in very limited circumstances. The Article submits that, to comply with its treaty obligation to protect a human right, a state must cooperate on the mitigation of climate change only *if* and only *inasmuch as* climate change cooperation may effectively protect the enjoyment of the right at issue by individuals within its territory or under its jurisdiction. While international human rights law may thus have a role to play in the mitigation of climate change under certain circumstances, this role is far more limited than what judges and scholars have suggested so far.

Part II outlines the relevant conceptual background on the relation between climate change mitigation and human rights treaties. By contrast with the general obligations on climate change mitigation that arise from international environmental agreements or customary law, human rights treaties provide a bizarre, frequently ill-fitting legal ground to envision states' obligations to mitigate climate change—one that tends to emphasize the direct, local, short-term costs of mitigation action within the state's territory rather than its more diffuse, global, long-term benefits. One can debate whether human rights treaties were ever intended to regulate such diffuse impacts. Nevertheless, and despite the absence of identifiable victims of climate change, human rights treaties may enable the use of some implementation mechanisms not otherwise available in relation to general mitigation obligations.

Part III demonstrates the possibility of identifying mitigation obligations on the basis of human rights treaties. The key problem it addresses is that human rights treaties require states to protect human rights mainly within their own territory, thus remaining insensitive to most of mitigation action's global benefits. Contrary to prevailing theories, this problem cannot be overcome by extending the extraterritorial application of human rights treaties, by interpreting international law as imposing "collective obligations," or by reference to states' general international law obligation to cooperate on matters of international concern (an other-regarding obligation of cooperation). The problem, however, can partly be addressed by understanding that a state's obligation to protect human rights implies an inward-looking obligation of cooperation: a state must cooperate on climate change mitigation in good faith if—assuming other states follow the same precept—this can be anticipated to help protect the rights of individuals within its territory and under its jurisdiction.

Finally, Part IV discusses how the mitigation obligations derived from human rights treaties are to be interpreted. Under the principle of systemic integration, the interpretation of implied mitigation obligations should take into account other relevant norms, including general mitigation obligations arising under climate treaties and customary international law. Scholarship and judicial practice have misconstrued this principle when assuming that, for a state to comply with its mitigation obligation implied from a human rights treaty, it must fully comply with all its general mitigation obligations. Rather, the Article suggests that human rights treaties open only a certain window onto the applicability of general mitigation obligations. The size of this window of applicability varies according to the treaty, the right, and the national circumstances at issue—in particular, the potential benefits of mitigation action for the enjoyment of the right within the state's territory and under its jurisdiction. As no human rights treaty fully comprehends the benefits of climate change mitigation for human welfare, future generations, and ecological resources, implied mitigation obligations can only open a narrow window on the applicability of general mitigation obligations.

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II. The Relevance of Human Rights

This Part includes introductory observations about the relevance of human rights to climate change mitigation. First, it explores the ambivalent relation between climate change and the enjoyment of human rights: while climate change hinders the enjoyment of human rights, this is also true of action taken to mitigate climate change, the "cost" of which for the enjoyment of human rights tends to be more local and immediate than its "benefit." Second, this Part discusses the strategic procedural advantages of human rights law from the viewpoint of potential plaintiffs, noting that the difficulty of attributing any "victims" to a state's failure to mitigate climate change may hinder access to some (but not all) of the judicial and quasi-judicial procedures generally available under human rights treaties.

A. The Ambivalent Relation Between Climate Change Mitigation and Human Rights

1. The Human Rights Impact of Climate Change

Human rights treaties create two types of obligations: negative obligations to "respect" (i.e., to refrain from violating) human rights and positive obligations to "protect" and "fulfill" human rights.[32] Some human rights treaties specifically point to the obligation of states "to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to" human rights,[33] or simply to "take all appropriate measures to ensure" that individuals can enjoy their rights.[34] More generally, a state must take appropriate measures to address any threat to the enjoyment of human rights, whether this threat is of human origin (e.g., crime) or triggered by a natural event (e.g., a natural disaster).[35] Positive human rights obligations are obligations of conduct: a state can be held responsible for a wrongful act only if it fails to exercise due diligence, notwithstanding the consequences.[36]

The fifth assessment report of the Intergovernmental Panel on Climate Change (IPCC) reflects the global scientific consensus that climate change has "caused impacts on natural and human systems"[37] by increasing the frequency or severity of some extreme weather

[32] *E.g.*, Walter Kälin & Jörg Künzli, The Law of International Human Rights Protection 87 (2d ed. 2019).

[33] International Covenant on Civil and Political Rights, Art. 2(2), Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR]. *See* International Covenant on Economic, Cultural and Social Rights, Art. 2(1), Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR].

[34] Convention on the Rights of the Child, Art. 2(2), Nov. 20, 1989, 1577 UNTS 3.

[35] *See* H.R. Comm., Views, para. 7.3, Commc'n No. 2751/2016, Portillo Cáceres/Paraguay, UN Doc. CCPR/C/126/D/2751/2016 (Sept. 20, 2019); H.R. Comm., General Comment No. 36, Article 6: Right to Life, para. 26, UN Doc. CCPR/C/GC/36 (Sept. 3, 2019); John H. Knox (Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), Mapping Report, paras. 47–61, UN Doc. A/HRC/25/53 (Dec. 30, 2013); Budayeva v. Russia, 2008-II Eur. Ct. H.R. 269, paras. 128–129.

[36] *See* Stoicescu v. Romania, App. No. 9718/03, para. 59 (Eur. Ct. H.R. July 26, 2011); H.R. Comm., General Comment No. 31: The Nature of the General Obligation Imposed on States Parties to the Covenant, 8, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172 (July 29, 1988). On the concept of obligation of conduct, see Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 Eur. J. Int'l L. 371 (1999).

[37] Christopher B. Field, et al., *Technical Summary*, *in* Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects. The Working Group II Contribution to the Fifth

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events, reducing the availability of freshwater resources, and affecting ecosystems, food production, human health, livelihood, and poverty, among other things.[38] Many of the effects of climate change hinder the enjoyment of human rights, including civil and political rights (e.g., rights to life and to property),[39] economic, social, and cultural rights (e.g., rights to an adequate standard of living and to the highest attainable standard of health),[40] and third generation rights (e.g., when applicable, the right to a healthy environment).[41] Climate change could well be, as Mary Robinson famously suggested, "the greatest threat to human rights in the twenty-first century."[42]

States' obligation to protect human rights must be informed by scientific knowledge about the current and predictable impacts of climate change. The first and most obvious implication is that states must implement measures to promote *adaptation* to climate change.[43] Some of the impacts of climate change can be avoided or reduced, for instance, by preventing urban development in coastal regions that will be affected by sea-level rise or through early-warning systems aimed at reducing the vulnerability of populations to extreme weather events.[44] A state can generally implement such measures on its own, although some states may need international financial or technical assistance. As many of the impacts of climate change affect the enjoyment of human rights, states' obligation to protect human rights can be interpreted as an obligation to take adaptation measures to avoid or reduce these impacts. Accordingly, the High Court of Lahore pointed out that a state's "delay and lethargy" in implementing adaptation action could constitute a breach of its human rights obligations.[45] However, adaptation is insufficient to prevent the increasingly harmful consequences of ongoing GHG emissions. As the IPCC noted, the existence of "biophysical limits to adaptation" and constraints of costs and resources mean that "adaptation cannot generally overcome all climate change effects."[46] Adaptation action needs to be complemented by mitigation action.

ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 33, 40 (Christopher B. Field, et al. eds., 2014).

[38] *Id.* at 40–51.

[39] *E.g.*, ICCPR, *supra* note 33, Art. 6; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, Mar. 20, 1952, ETS No. 009.

[40] *E.g.*, ICESCR, *supra* note 33, Arts. 11–12.

[41] *E.g.*, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art. 11, Nov. 17, 1988, OASTS No. 69; African Charter on Human and Peoples' Rights, Art. 24, June 27, 1981, 1520 UNTS 217.

[42] Mary Robinson, *Social and Legal Aspects of Climate Change*, 5 J. HUM. RTS. & ENV'T. 15, 15 (2014).

[43] *See* H.R. Council Res. 41/21, para. 2, UN Doc. A/HRC/RES/41/2 (July 23, 2019); CESCR, Statement on Climate Change, *supra* note 12, para. 7; Boyle, *Climate Change, the Paris Agreement and Human Rights*, *supra* note 30, at 771; Knox, 2016 Report, *supra* note 26, para. 68; *Neubauer*, *supra* note 22, para. 157.

[44] *See generally* Field, et al., *supra* note 37, at 85–92.

[45] Leghari v. Pakistan, para. 20 (WP No 25501/2015), Lahore High Court Green Bench, Order (Sept. 4, 2015), *available at* https://elaw.org/pk_Leghari (Pak.). The Court referred to a policy framework which also contains some measures on climate change mitigation, but it is with regard to adaptation that the Court found that the state was at fault. *See id.*, paras. 5, 8(ii). *See also* Leghari v. Pakistan, PLD 2018 Lahore 364, para. 21 (Jan. 25, 2018) (Pak.). For similar reasonings, see CESCR, Concluding Observations, Sixth Periodic Report of Canada, paras. 53–54, UN Doc. E/C.12/CAN/CO/6 (Mar. 4, 2016); CESCR, Concluding Observations, Sixth Periodic Report of Finland, para. 9, UN Doc. E/C.12/FIN/CO/6 (Nov. 28, 2014).

[46] Field et al., *supra* note 37, at 62. *See* Ottmar Edenhofer, et al., *Technical Summary*, *in* CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE: WORKING GROUP III CONTRIBUTION TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 33, 50 (Ottmar Edenhofer, et al. eds., 2014).

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A second implication of our knowledge of climate change could be that, in order to protect the enjoyment of human rights, states should promote the *mitigation* of climate change by taking measures to reduce GHG emissions.[47] The Human Rights Council's special procedure mandate-holders have suggested that human rights treaties require states "to adopt the mitigation measures necessary to reduce global emissions so as to hold the increase in global temperature below levels that would cause widespread harm to the enjoyment of human rights."[48] A similar reasoning led the Supreme Court of the Netherlands, in *Urgenda*, to interpret the obligation of states to protect the right to life and to private and family life under the ECHR as implying an obligation to mitigate climate change.[49]

However, the benefits of a state's mitigation action for the enjoyment of human rights are not as direct, immediate, and predictable as those of adaptation action. With adaptation action, a state may achieve some effective human rights benefits for its population, for instance by establishing early-warning systems that help reduce casualties in the event of a natural disaster[50] or by implementing various policies to support food production when it is threatened as a consequence of climate change.[51] By contrast, a national mitigation policy aimed at reducing the state's GHG emissions can only have a minor influence on the global rate of GHG emissions ("flow"), and this will only gradually reflect on the atmospheric concentrations in GHGs ("stock") that cause climate change, so that such policy will achieve very little, if any, tangible human rights benefits for the state's population.[52] Thus, while a state may adapt to climate change by implementing national policies on its own, effective mitigation action requires international cooperation in order to achieve significant cuts in GHG emissions at the global scale. And while adaptation action may achieve tangible outcomes in the short- to medium-term, the full benefits of mitigation action can only unfold in the long term, when years-long emission reductions efforts start reflecting in lower-than-expected GHG concentrations in the atmosphere.

2. *The Human Rights Impact of Mitigation Action*

Climate change mitigation could possibly have three types of impacts on the enjoyment of human rights. Firstly, the implementation of mitigation action can involve human rights

[47] This Article uses GHG emission to refer to *net* emission, thus considering the enhancement of sinks and reservoirs of GHGs as a form of emission reduction.

[48] An Open Letter from UN Special Procedures Mandate-Holders, A New Climate Change Agreement Must Include Human Rights Protection for All, at 3 (Oct. 17, 2014), *available at* https://unfccc.int/resource/docs/2014/smsn/un/176.pdf.

[49] *Urgenda* (HR), *supra* note 16.

[50] Renan Braga Ribeiro, Alexandra Franciscatto Penteado Sampaio, Matheus Souza Ruiz, José Chambel Leit ão & Paulo Chambel Leit ão, *First Approach of a Storm Surge Early Warning System for Santos Region*, *in* Climate Change in Santos Brazil: Projections, Impacts and Adaptation Options 135 (Lucí Hidalgo Nunes, Roberto Greco & José A. Marengo eds., 2019); Marilyn Aparicio-Effen, Ivar Arana, James Aparicio & Mauricio Ocampo, *A Successful Early Warning System for Hydroclimatic Extreme Events: The Case of La Paz City Mega Landslide*, *in* Climate Change Adaptation in Latin America 241 (Walter Leal Filho & Leonardo Esteves de Freitas eds., 2018.)

[51] Gina Ziervogel and Polly Ericksen, *Adapting to Climate Change to Sustain Food Security*, 1 WIREs Climate Change 525 (2010). *See generally* Subsidiary Body for Implementation, Progress in the Process to Formulate and Implement National Adaptation Plans, at 12–14, UN Doc. FCCC/SBI/2020/INF.13 (Nov. 20, 2020); Bonizella Biagini, Rosina Bierbaum, Missy Stults, Saliha Dobardzic & Shannon M. McNeeley, *A Typology of Adaptation Actions: A Global Look at Climate Adaptation Actions Financed Through the Global Environment Facility*, 25 Glob. Envtl. Change 97 (2014).

[52] *See* text at note 119 *infra*.

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violations, for instance the forcible relocation of populations to give room to a hydroelectric project[53] or to the production of biofuel.[54] However, states have an obligation to comply with their human rights obligations when implementing mitigation action, and there is no inevitable conflict between the protection of human rights and the mitigation of climate change.[55] Human rights violations in the process of implementing mitigation action can, and must, be prevented.

Secondly, climate change mitigation may sometimes be presented as one of the objectives of general interest which human rights treaties recognize as justifying limitations to the protection of rights—along with national security, public order, and economic development. For instance, climate change mitigation could arguably be taken to justify (under conditions of necessity, proportionality, and legality) hydroelectric projects involving land expropriation or even population displacements, which would otherwise be incompatible with the state's human rights obligation.[56] Besides, the recognition of a "climate emergency" by various national institutions in recent years[57] suggests the need for exceptional measures that could conceivably include derogations from human rights.[58] In fact, climate change mitigation is perhaps more naturally framed as an objective justifying limitations of and possibly derogations from human rights, rather than as a way to protect the enjoyment of individual rights—but one does not necessarily exclude the other.[59]

Thirdly, and overall, climate change mitigation involves a massive redeployment of resources, which will inevitably compete with other priorities relevant to the protection of human rights, even when this does not translate directly into any human rights limitations.[60] At times, mitigation action may compete with other policies for the use of natural resources: for instance, mitigation strategies relying heavily on biofuel or on negative emission technologies would increase demand for land and water, with potential impacts for the rights to food and water.[61] Other mitigation strategies may increase the price of energy,[62] with potential

[53] *See* Philip Martin Fearnside, *Belo Monte: Actors and Arguments in the Struggle Over Brazil's Most Controversial Amazonian Dam*, 148 DIE ERDE 14 (2017); ATAPATTU, *supra* note 26, at 135.

[54] *See* UNEP, CLIMATE CHANGE AND HUMAN RIGHTS, at viii (2015); ELIZABETH CUSHION, ADRIAN WHITEMAN & GERHARD DIETERLE, BIOENERGY DEVELOPMENT: ISSUES AND IMPACTS FOR POVERTY AND NATURAL RESOURCE MANAGEMENT (2010).

[55] *See* Paris Agreement, *supra* note 1, pmbl., para. 12; Dec. 1/CP.16, para. 8, UN Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) (Cancun Agreements); H.R. Council Res. 41/21, *supra* note 43, pmbl., paras. 7–8.

[56] Guiding Principles on Internal Displacement, Princ. 6(2)(c), UN Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998); KÄLIN & KÜNZLI, *supra* note 32, at 540.

[57] *E.g.*, Parliament Resolution on the Climate and Environment Emergency, 2019/2930(RSP) (Nov. 28, 2019) (EU); House of Commons, Journals, 42-1, No. 435, Vote No. 1366 (June 17, 2019) (Can.); (Dec. 2, 2020) 749 NZPD 233-250 (N.Z.); 659 Parl. Deb. HC (6th ser.), col. 225-318 (2019) (UK).

[58] *See* ICCPR, *supra* note 33, Art. 4; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15, Nov. 4, 1950, 213 UNTS 221, as amended by Protocols 1, 4, 6, 7, 12, 13, and 16 [hereinafter ECHR]. *See also* Knox, *Climate Change and Human Rights Law*, *supra* note 26, at 200; Stephen Humphreys, *Introduction: Human Rights and Climate Change*, *in* HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 26, at 6.

[59] Thus, a common justification for human rights limitation is the protection of the rights of others. *See, e.g.*, ICCPR, *supra* note 33, Arts. 12(3), 18(3), 19(3)(a), 21, 22(2).

[60] *See, e.g.*, Humphreys, *supra* note 58, at 2, 22.

[61] Pete Smith, et al., *Agriculture, Forestry and Other Land Use (AFOLU)*, *in* CLIMATE CHANGE 2014: MITIGATION, *supra* note 46, 811, at 835 (Box 11.5). *See generally* Benoit Mayer, *Bioenergy with Carbon Capture and Storage: Existing and Emerging Legal Principles*, 13 CARBON & CLIMATE L. REV. 113 (2019).

[62] Edenhofer, et al., *supra* note 46, at 63.

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adverse effects on poverty.[63] In more general terms, mitigation action is expensive[64] and it will require financial investments at a pace and scale that imply substantial costs of opportunities for the pursuance of other policies.[65] Developed states, for instance, have pledged to mobilize jointly U.S.$100 billion per year by 2020 to support climate action,[66] and they have decided to set a higher goal post-2020.[67] The IPCC estimated that, under the most cost-effective scenarios, mitigation action could entail global consumption loss of 1.7 percent by 2030 and 4.8 percent by 2100.[68]

The ability of a state to effectively protect human rights is resource-dependent,[69] and some of the resources that states invest in reducing GHG emissions are inevitably taken away from other priorities, including priorities that advance the protection of human rights. As an immediate budgetary constraint, mitigation action perhaps more obviously hinders efforts to protect social and economic rights, such as the rights to an adequate standard of living, to the highest attainable standard of health, or to education;[70] but it also affects the effective protection of civil and political rights as states may not, for instance, be able to invest as much in road safety, crime prevention, or the justice system, when they are massively investing in mitigation action.[71]

There is indisputable evidence that, from a global utilitarian perspective, the costs of mitigation action are justified by its benefits: humankind is certainly better off investing in stringent measures to reduce GHG emissions than enduring the increasingly severe impacts of climate change on individuals, societies, and ecosystems for centuries to come.[72] States have

[63] *See* Abidah B. Setyowati, *Mitigating Energy Poverty: Mobilizing Climate Finance to Manage the Energy Trilemma in Indonesia*, 12 SUSTAINABILITY 1603 (2020); Shoibal Chakravarty & Massimo Tavoni, *Energy Poverty Alleviation and Climate Change Mitigation*, 40 ENERGY ECON. S67 (2013).

[64] Emission-reduction measures may at times (but not always) be justified by their direct economic benefits (e.g., producing renewable energy may be cheaper than producing energy from fossil fuels) and co-benefits (e.g., shutting down coal plants may be justified by public health considerations; investing in clean energy can create jobs). *See* Gabriel Blanco, et al., *Drivers, Trends and Mitigation*, *in* CLIMATE CHANGE 2014: MITIGATION, *supra* note 46, at 392; Diana Ürge-Vorsatz, et al., *Measuring the Co-benefits of Climate Change Mitigation*, 39 ANN. REV. ENV'T & RESOURCES 549 (2014). Urgenda estimates that compliance measures implemented by the Dutch government cost "about €3bn euros." *See* Jonathan Watts, *Dutch Officials Reveal Measures to Cut Emissions After Court Ruling*, GUARDIAN (Apr. 24, 2020), *at* https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling.

[65] States have long recognized the conundrum of reconciling climate change mitigation with economic development and poverty eradication, in particular in the context of developing countries. *See* UNFCCC, *supra* note 1, pmbl., para. 1, Art. 3(1); Paris Agreement, *supra* note 1, pmbl., para. 9, Arts. 2(1), 4(1).

[66] Dec. 1/CP.16, *supra* note 55, para. 98.

[67] Dec. 1/CP.21, *supra* note 5, para. 53; Dec. 14/CMA.1, para. 1, UN Doc. FCCC/PA/CMA/2018/3/Add.2 (Mar. 19, 2019).

[68] Edenhofer, et al., *supra* note 46, at 57.

[69] *See* ICESCR, *supra* note 33, Art. 2(1); Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R., para. 116; KÄLIN & KÜNZLI, *supra* note 32, at 102–03.

[70] *See* note 40 *supra*.

[71] There can be no fair trial without a budget to hire and train judges and lawyers. *See* Sigrun Skogly, *The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity?*, 12 HUM. RTS. L. REV. 393, 394, 397 (2012). On positive human rights obligations as obligations of conduct, see note 36 *supra*.

[72] *See* Marshall Burke, Solomon M. Hsiang & Edward Miguel, *Global Non-linear Effect of Temperature on Economic Production*, 527 NATURE 235 (2015) (suggesting that climate inaction would cost humankind about 23% of global income by 2100). How stringent these measures ought to be, however, is debated. *See* WILLIAM D. NORDHAUS, THE CLIMATE CASINO: RISK, UNCERTAINTY AND ECONOMICS FOR A WARMING WORLD 205–19 (2013). For a skeptical view on the need for onerous mitigation policies and measures, see BJORN LOMBORG, FALSE ALARM: HOW CLIMATE CHANGE PANIC COSTS US TRILLIONS, HURTS THE POOR, AND FAILS TO FIX THE PLANET (2020).

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acknowledged that it is in their common interest to implement "an effective and progressive response to the urgent threat of climate change."[73] Justifications for climate change mitigation, however, are expressed in terms of global utility, for instance by reference to economic development, food production, or human security.[74] By contrast, human rights treaties require each state to protect the rights of individuals within its territory and under its jurisdiction, not to maximize global utility. The lenses that human rights treaties offer tend to magnify the immediate, proximate costs of a state's mitigation action—that are borne primarily by the individuals within the state's territory—while being unable to fully appreciate the utility of such action—the global, diffuse, long-term benefits for individuals, societies, and ecosystems that justify mitigation action from a broader policy perspective. In other words, human rights treaties miss a large part of the picture when it comes to justifying mitigation action.[75]

B. The Strategic Advantages of Human Rights Law

Human rights treaties provide neither the only nor the most compelling legal basis to claim that states ought to mitigate climate change. Virtually every state is party to the UN Framework Convention on Climate Change (UNFCCC) and to the Paris Agreement. Under the latter, states have committed to communicate successive NDCs and to take appropriate measures to achieve their objectives.[76] While it is largely understood that the NDCs that have been communicated to date lack ambition,[77] it remains that every party to the Paris Agreement has also a general (albeit ill-defined) obligation under the UNFCCC to formulate and implement measures on the mitigation of climate change.[78] This general mitigation obligation is arguably to be read in the context of the growing expectation, expressly reflected in the Paris Agreement, that each state will communicate NDCs that "reflect its highest possible ambition."[79] Climate treaties thus provide at least a plausible legal basis to challenge a state's lack of ambition on climate change mitigation.

In addition, states have a customary international law obligation to exercise due diligence to protect the rights of other states,[80] including by taking appropriate measures to prevent

[73] Paris Agreement, *supra* note 1, pmbl., para. 5.

[74] UNFCCC, *supra* note 1, Arts. 1(1), 2; Paris Agreement, *supra* note 1, Arts. 2(1), 4(1), 7(1); Field, et al., *supra* note 37, at 61; Edenhofer, et al., *supra* note 46, at 40. On the other hand, states have rejected a proposal of framing the objective of the Paris Agreement as the protection of human rights. *See* Benoit Mayer, *Human Rights in the Paris Agreement*, 6 CLIMATE L. 109, 114–15 (2016). The Preamble to the Paris Agreement mentions human rights, but merely as a constraint on climate action. *See* Paris Agreement, *supra* note 1, pmbl., para. 12.

[75] *See* Section III.A *infra*.

[76] Paris Agreement, *supra* note 1, Art. 4(2). *See generally* Benoit Mayer, *Article 4: Mitigation*, *in* THE PARIS AGREEMENT ON CLIMATE CHANGE 109, 124–28 (Geert van Calster & Leonie Reins eds., 2021); R v. Heathrow Airport [2020] UKSC 52, para. 122 (UK).

[77] *See* note 5 *supra*.

[78] UNFCCC, *supra* note 1, Art. 4(1)(b). *See id.* Art. 4(2)(a) (applicable to Annex I Parties). On the interpretation of these provisions as the source of a general obligation on climate change mitigation, see *Grande-Synthe*, *supra* note 19, para. 12; *Urgenda* (HR), *supra* note 16, para. 5.7.3; BENOIT MAYER, THE INTERNATIONAL LAW ON CLIMATE CHANGE 114 (2018); DANIEL BODANSKY, JUTTA BRUNNÉE & LAVANYA RAJAMANI, INTERNATIONAL CLIMATE CHANGE LAW 131 (2017); Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1, 6 (2008).

[79] Paris Agreement, *supra* note 1, Art. 4(3).

[80] *See, e.g.*, Corfu Channel (UK v. Alb.), Judgment, 1949 ICJ Rep. 4, 22 (Apr. 9). *See generally* Study Group on Due Diligence in International Law, Second Report, 77 ILA REP. CONF. 1062 (2016).

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significant transboundary environmental harm.[81] If interpreted from an inductive or "traditional" approach, in light of the general practice of states, this obligation would presumably not require any particular state to implement mitigation actions with levels of ambition exceeding those followed by most other states. A deductive or "modern" approach could however suggest a more demanding obligation,[82] in light, perhaps, of the objective of holding global warming within 2 or even 1.5 °C above pre-industrial temperatures—an objective states agreed upon in the Paris Agreement[83]—if this objective can be construed as a necessary implication of states' general mitigation of due diligence.[84] The Draft Conclusions on the identification of customary international law adopted by the International Law Commission in 2018 emphasize the inductive approach without denying the complementary role that the deductive approach has played in judicial practice.[85]

The interest for human rights treaties in relation to climate change mitigation stems in no small part from the access they provide to litigation and other complaint mechanisms.[86] Neither the UNFCCC nor the Paris Agreement has an effective mechanism to review compliance,[87] while the prospects for international litigation on general mitigation obligations are limited by the voluntary nature of international dispute settlement and (to a lesser extent) by the limited incentive for a state to initiate contentious proceedings against another with respect to an *erga omnes* obligation.[88] By contrast, human rights treaties provide potential

[81] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para. 29 (July 8); Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 ICJ Rep. 14, para. 101 (Apr. 20) [hereinafter *Pulp Mills*]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 ICJ Rep. 665, para. 104 (Dec. 16) [hereinafter *Certain Activities*]. *See also*, *e.g.*, Int'l L. Comm'n (ILC), Draft Guidelines on Protection the Atmosphere (first reading), Guideline 3, *in* ILC Report, 70th Sess., at 158, UN Doc. A/73/10 (2018); Benoît Mayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, 19 ASIA PACIFIC J. ENVTL. L. 79 (2016); Dinah Shelton, *Equitable Utilization of the Atmosphere*, *in* HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 26, at 91; Voigt, *supra* note 78.

[82] On the distinction between the modern and the traditional approaches to identifying rules of customary international law, see, e.g., William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, GEO. J. INT'L L. 445 (2013). On the interpretation of customary international law in relation to climate change mitigation, see generally Benoit Mayer, *A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere*, 20 MELB. J. INT'L 453, 468 (2019).

[83] Paris Agreement, *supra* note 1, Art. 2(1)(a).

[84] As most states are not acting consistently with these temperature targets, this deductive reasoning would lead to the self-contradictory conclusion that states are not generally acting consistently with their customary obligation. *See* note 155 *infra*.

[85] *See* ILC, Draft Conclusions on the Identification of Customary International Law, Conclusion 2, cmt. para. 5, *in* ILC Report, *supra* note 81, at 119. *See also, e.g.*, *Pulp Mills*, *supra* note 81, para. 204; *Certain Activities*, *supra* note 81, para. 104.

[86] *See* Lavanya Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change*, 22 J. ENVTL. L. 391, 417 (2010).

[87] On the limits of the facilitation and compliance mechanism established under the Paris Agreement, see Paris Agreement, *supra* note 1, Art. 15(2); Sylvia I. Karlsson-Vinkhuyzen, Maja Groff, Peter A. Tamás, Arthur L. Dahl, Marie Harder & Graham Hassall, *Entry into Force and Then? The Paris Agreement and State Accountability*, 18 CLIMATE POL'Y 593, 594 (2018).

[88] Admissibility, on the other hand, should not be an obstacle, given the *erga omnes* nature of mitigation obligations. *See* ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 48, *in* ILC Report 53rd Sess., at 31, UN Doc. A/56/10 (2001) [hereinafter DARSIWA]; Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 10, para. 180; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order on the Request for the Indication of Provisional Measures, para. 41 (Jan. 23, 2020),

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plaintiffs with various institutional and procedural advantages. In addition to establishing state-to-state dispute settlement and complaint mechanisms,[89] human rights treaties often allow individuals, and sometimes groups, to file complaints before international bodies or cases before regional human rights courts,[90] while treaty bodies periodically review and make concluding observations on national reports.[91] Overall, human rights treaties or their instrument of incorporation allow individuals or groups to claim standing regarding the performance of a state's obligation before domestic courts, whereas they would typically have no standing to directly invoke climate treaties or customary law.[92]

A major procedural caveat, however, is that applicants claiming the implementation of a state's obligation under a human rights treaty are often required to prove that they are, or would imminently become, the "victims" of a human rights violation.[93] This condition has already been a hurdle in simpler cases concerning local environmental harm,[94] where admissibility was limited to applicants who were "directly and seriously affected"[95] or otherwise could prove "a reasonably foreseeable threat to" their rights.[96] The relevant cases admitted by the European Court of Human Rights, for instance, typically concern individuals affected by a disaster[97] or directly exposed to a major local source of pollution,[98] rather than those exposed to more diffuse environmental harms. The condition of victimhood is particularly problematic in climate litigation. Climate change hinders the enjoyment of human rights in a diffuse fashion; it may rarely, if ever, be possible to consider someone a "victim" (whether actual or potential) of climate change—and, *a fortiori*, of a state's failure to implement the requisite mitigation action.[99]

available at https://www.icj-cij.org/files/caserelated/178/178-20200123-ORD-01-00-EN.pdf. *See also* Mayer, *Review*, *supra* note 82, 490–92.

[89] *E.g.*, ICCPR, *supra* note 33, Arts. 41–42; ECHR, *supra* note 58, Art. 33.

[90] *E.g.*, ECHR, *supra* note 58, Art. 34; Optional Protocol to the International Covenant on Civil and Political Rights, Arts. 1–2, Dec. 16, 1966, 999 UNTS 171; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Arts. 1–2, Dec. 10, 2008, 48 ILM 256 (2009).

[91] *E.g.*, ICCPR, *supra* note 33, Art. 40(4).

[92] *See* Eric A. Posner, *Climate Change and International Human Rights Litigation*, 155 U. PENN. L. REV. 1925, 1927 (2006). *See generally* INTERNATIONAL LAW IN DOMESTIC COURTS 7 (André Nollkaemper, August Reinisch, Ralph Janik & Florentina Simlinger eds., 2019).

[93] *E.g.*, Optional Protocol to the ICCPR, *supra* note 90, Art. 2; Optional Protocol to the ICESCR, *supra* note 90, Art. 2; ECHR, *supra* note 58, Art. 34. *See also* López Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A), para. 51 (1994).

[94] *See* H.R. Comm., Views, paras. 5.5–5.7, Commc'n No. 645/1995, Vaihere Bordes v. France, UN Doc. CCPR/C/57/D/645/1995 (July 22, 1996). *See generally* Loukis Loucaides, *Environmental Protection Through the Jurisprudence of the European Convention on Human Rights*, 75 BRIT. Y.B. INT'L L. 249, 250–52 (2004); Richard Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AJIL 263, 284–85 (1995).

[95] Hatton v. UK, 2003-VIII Eur. Ct. H.R. 189 para. 96. *See* Dmitriyev v. Russia, App. No. 17840/06, para. 32 (Dec. 1, 2020), *at* http://hudoc.echr.coe.int/eng?i=001-206265; Cordella v. Italy, App. No. 54414/13, paras. 100–09 (Jan. 24, 2019), *at* http://hudoc.echr.coe.int/eng?i=001-189421.

[96] *Cáceres*, *supra* note 35, para. 7. *See* Caron v. France, App. No. 48629/08 (June 29, 2010).

[97] *E.g.*, Budayeva v. Russia, *supra* note 35; Öneryildiz v. Turkey, 2004-XII Eur. Ct. H.R. 1.

[98] *E.g.*, Cordella v. Italy, App. No. 54414/13 (2019); Fadeyeva v. Russia, 2005-IV Eur. Ct. H.R. 255; Taşkın v. Turkey, 2004-X Eur. Ct. H.R. 179; *López Ostra*, *supra* note 93

[99] *See Natur og Ungdom*, *supra* note 17, paras. 167–68, 171 (dismissing claims based on the European Human Rights Convention because of the absence of actual and imminent risk); Bundesgericht [BGer] [Federal Supreme Court], May 5, 2020, 1C_37/2019, paras. 5.4–5.5 (Verein KlimaSeniorinnen Schweizet/Eidgenössisches Departement für Umwelt) (Switz.).

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Arguments aimed at overcoming this challenge have sometimes relied on scientific studies regarding probabilistic event attribution to suggest the possibility of identifying "victims" of climate change.[100] However, scientists are divided about the soundness of such studies and, even more, about their relevance to litigation.[101] At any rate, attributing a weather event to climate change is only one of the links in the causal chain that must be established to prove that individuals are victims of a state's failure to take appropriate measures to protect their human rights. A weather event only affects an individual when, as the result of successive individual and collective decisions, this individual is exposed and vulnerable to the event. Thus, migration studies deny the possibility of identifying a discrete population of "climate migrants" on the ground that the influence of climate change on migration, albeit real, is diffuse and indirect.[102] At the other extremity of the causal chain, attributing any "climate victim" to a state's conduct would require evidence that events affecting the individual were caused by the failure of *that* state to mitigate climate change, rather than by historical GHG emissions that took place before the scientific discovery of climate change, emissions of other states, or emissions that even the state's most stringent mitigation action would not have been able to prevent.

The absence of identifiable "victims" could strike a fatal blow to individual or group applications before regional human rights courts and complaints to treaty bodies. On the other hand, this caveat does not necessarily affect the other strategic advantages of human rights treaties, in particular the periodic adoption of concluding observations by treaty bodies or even the possibility of interstate complaint and dispute settlement procedures based on human rights treaties. Overall, domestic legal systems define their own conditions for standing, which are sometimes more favorable to the implementation of human rights treaties in the absence of identifiable victims, for instance when they permit public interest litigation. Thus, the Supreme Court of the Netherlands allowed Urgenda to invoke the ECHR in defense of a public interest even while noting that the association would lack standing before the European Court of Human Rights as "it is not itself a potential victim."[103] Similarly, standing remained unchallenged in *Natur og Ungdom*,[104] as Norwegian law expressly allows public interest litigation by interested NGOs.[105] By contrast, the European Union's General

[100] *See, e.g.*, Petra Minnerop & Friederike Otto, *Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic*, 27 BUFF. ENVTL. L. REV 49 (2020); Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?*, 36 J. ENERGY & NAT. RESOURCES L. 265 (2018); Knox, 2016 Report, *supra* note 26, para. 36.

[101] Field, et al., *supra* note 37, at 40. *See* Greg Lusk, *The Social Utility of Event Attribution: Liability, Adaptation, and Justice-Based Loss and Damage*, 143 CLIMATIC CHANGE 201 (2017); Mike Hulme, *Attributing Weather Extremes to "Climate Change": A Review*, 38 PROGRESS IN PHYSICAL GEOGRAPHY 499 (2014); Kevin E. Trenberth, *Attribution of Climate Variations and Trends to Human Influences and Natural Variability*, 2 WIREs CLIMATE CHANGE 925 (2011).

[102] *E.g.*, W. Neil Adger, et al., *Human Security*, *in* CLIMATE CHANGE 2014: IMPACTS, *supra* note 37, at 770; Foresight, *Migration and Global Environmental Change: Final Project Report* (2011), *at* https://www.gov.uk/government/publications/migration-and-global-environmental-change-future-challenges-and-opportunities. *See also* BENOIT MAYER, THE CONCEPT OF CLIMATE MIGRATION 10–12 (2016); Calum T.M. Nicholson, *Climate Change and the Politics of Causal Reasoning: The Case of Climate Change and Migration*, 180 GEOGRAPHICAL J. 151 (2014). *But see* Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement*, 114 AJIL 708 (2020).

[103] *Urgenda* (HR), *supra* note 16, para. 5.9.3.

[104] *Natur og Ungdom*, *supra* note 17.

[105] Lov om mekling og rettergang i sivile tvister [Act Relating to Mediation and Procedure in Civil Disputes], LOV-2017-06-16-63, Sec. 15-8.

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Court dismissed as inadmissible a case challenging the compatibility of the European Union's 2030 mitigation target in light of the Charter of Fundamental Rights, in line with the limited conditions for standing under EU law,[106] on the ground that the applicants had not established that the legislation they sought to challenge could infringe their fundamental rights.[107] The Administrative Court of Berlin also denied standing, on comparable grounds, to individual farmers and an NGO that claimed that additional mitigation action was essential to protect fundamental rights.[108] The Supreme Court of Ireland denied standing to an NGO making similar claims on constitutional and conventional bases.[109] Meanwhile, the French State Council allowed standing to townships and associations representing public interests to challenge the legality of the state's mitigation action, but not to individuals pursuing their own interests.[110]

This procedural difficulty reveals a more fundamental questions about the limitations of human rights law and adjudication with regard to climate change mitigation. When no victim can be identified, human rights no longer act as a "trump" over objectives of general interest;[111] rather, what is framed as "human rights protection"—the mitigation of climate change—itself becomes, in fact, an objective of general interest, which competes with other such objectives and with the protection of individual rights. One may question whether human rights law permits a judicial cost-benefit analysis of these various objectives of general interest,[112] and more specifically whether human rights law can be interpreted as *requiring* states to pursue one such objective (with indirect human rights benefits) *even if it comes at the expense of direct impacts on human rights*. If so, how to ensure that the judicial process of interpreting and applying human rights law does not take over the political process of defining and balancing objectives of general interest? This question goes far beyond the scope of this Article, but it necessarily informs what, ultimately, one considers as the potential for human rights treaties to be interpreted *at all* as the source of an obligation to mitigate climate change.

III. The Identification of Implied Mitigation Obligations

This Part assesses whether human rights treaties imply an obligation to mitigate climate change. First, it identifies the difficulty of approaching the need for international cooperation in terms of human rights obligations: a state, acting on its own, is unable to achieve sufficient mitigation outcomes to effectively protect the human rights of individuals within its territory or under its jurisdiction. Second, it refutes three common arguments for the identification of implied mitigation obligations which rely, respectively, on (1) the extraterritorial application

[106] Consolidated Version of the Treaty on the Functioning of the European Union, Art. 263(4), July 6, 2016, 2016 OJ (C 202) 47.

[107] Case T-330/18, Carvalho v. Parliament, ECLI:EU:T:2019:324, para. 49 (May 8, 2019). The case is under appeal. *See* Appeal Notice, *supra* note 19.

[108] *Backsen*, *supra* note 22.

[109] *Friends of the Irish Environment v. Ireland*, *supra* note 22, para. 7.24.

[110] *Grande-Synthe*, *supra* note 19, paras. 3–7.

[111] Ronald Dworkin, Taking Rights Seriously 6 (1997).

[112] *See* Daniel Bodansky, *Introduction: Climate Change and Human Rights: Unpacking the Issues Symposium: International Human Rights and Climate Change*, 38 Georgia J. Int'l & Comp. L. 511, 514 (2010). *See also, e.g.*, *Misdzi Yikh*, *supra* note 22, paras. 19, 72. *See generally* William J. Aceves, *Cost-Benefit Analysis and Human Rights*, 95 St. John's L. Rev. 431 (2018).

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of human rights treaties, (2) the interpretation of human rights obligations as "collective obligations," and (3) the existence of other-regarding obligations of cooperation as part of human rights treaties. Third, as an alternative theory, this Part submits that a state's obligation to protect a human right should be interpreted as implying a narrower, inward-looking obligation of cooperation, according to which a state must cooperate on the mitigation of climate change only to the extent that this may effectively benefit the enjoyment of that right by individuals within the state's territory or under its jurisdiction.

A. The Problem

Acting on its own, a state is not generally capable of achieving mitigation outcomes that will make any real difference for the protection of the human rights of individuals within its territory or under its jurisdiction.[113] For instance, in *Urgenda*, the Netherlands was ordered to enhance its mitigation action in such a way as to achieve 9 percent reduction in its projected level of emission for 2020,[114] that is, about 0.03 percent reduction in global GHG emissions that year.[115] Even if the same increase of ambition had been imposed on China, the largest GHG emitter, it would have translated into only about 2 percent reduction in global emissions.[116] Such incremental changes in global GHG emissions (a flow) would translate, after many years, only in very small differences in GHG concentration in the atmosphere (a stock), hence in very little tangible mitigation outcomes.

Incremental mitigation outcomes may unquestionably be worth achieving if one considers their diffuse, global, long-term benefits—even a tiny contribution to addressing "the greatest threat to human rights in the twenty-first century"[117] should be welcomed, as addressing a tiny part of an enormous problem. Yet, most of these benefits do not fall within the scope of what human rights treaties require states to do. In particular, a key obstacle to interpreting human rights treaties as the source of an obligation to mitigate climate change is that a state's human rights obligations are generally limited to its jurisdiction or territory,[118] whereas the impacts of climate change are global in nature.[119] When one only takes into account the

[113] *See* Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 EUR. J. INT'L L. 613, 640–41 (2012).

[114] *See* the Netherlands' Second Biennial Report under the UNFCCC 54 (Dec. 29, 2015), *at* https://unfccc.int/documents/198934 (predicting that existing measures would result in emissions around 181 $MtCO_2eq$ by 2020). The courts ordered the state to achieve 25% emissions reduction compared with 1990 levels. Assuming, as suggested by the same report, 1990 levels at 219 MtCO2eq, 25% emission reduction would require the state to reduce its emissions to 164 $MtCO_2eq$ by 2020.

[115] Calculated based on the World Resources Institute's CAIT Climate Data Observer, 2017 GHG emissions data including LULUCF, retrieved from Climate Watch, Historical GHG Emissions (2021), *at* https://www.climatewatchdata.org/ghg-emissions.

[116] Outcome of a 9% reduction in China's 2017 emissions, calculated based on data from *id.*

[117] *See* Robinson, *supra* note 42.

[118] *See* ICCPR, *supra* note 33, Art. 2(1); ECHR, *supra* note 58, Art. 1; MARKO MILANOVIĆ, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 263 (2011); *see generally* Section III.B.1 *infra*. This problem applies *a fortiori* in relation to constitutional rights, which states are not typically trying to apply to non-nationals outside their territory. *See, e.g.*, Agency for International Development v. Alliance for Open Society International Inc., 140 S. Ct. 2082, 2086 (2020). *See also Natur og Ungdom*, *supra* note 17, para. 149 (noting that the constitutional right to a healthy environment "does not generally protect against acts and effects outside the Kingdom of Norway").

[119] *See* Knox, *Climate Change and Human Rights Law*, *supra* note 26, at 197; Boyle, *Climate Change, the Paris Agreement and Human Rights*, *supra* note 30, at 771. *See also* Communicated Case (*Duarte Agostinho*), *supra* note 20, first question to the parties.

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benefits of a state's mitigation action that take place within the state's own territory, these mitigation outcomes appear not just tiny, but vanishingly small.

It is therefore likely that, within a state's territory or under its jurisdiction, the costs of any ambitious mitigation action will outweigh its benefits. For instance, all other things being equal, the inhabitants of the Netherlands would surely be better off if additional mitigation action had *not* been imposed on the state, hence eventually on them: *Urgenda* imposed significant public expenditure, and presumably higher energy prices, on the state's residents,[120] for vanishingly small benefits for their human rights. A state (especially a small one), taken in isolation, would often do a better job at protecting the rights of individuals within its territory or under its jurisdiction by deciding *not* to burden them with mitigation action, investing instead in adaptation action or in various other policies that could achieve more tangible human rights benefits within the state's jurisdiction (e.g., police training, public education, or road safety). Thus embedded in human rights treaties is precisely the issue that has constantly plagued the UNFCCC negotiations: each state seeks to protect its own population—and, human rights treaties seem to suggest, is bound to do so—rather than pursuing their common interest in mitigating climate change.[121]

This problem is exacerbated by other limitations of human rights treaties: as these treaties focus on the rights of humans, they do not fully comprehend the utility of climate change mitigation for human welfare,[122] future generations,[123] or ecological resources.[124] Yet, addressing these exacerbating factors would not solve the key problem of territorial limitation. Human rights treaties may well evolve toward the recognition of new rights (e.g., to a healthy environment)[125] but, as long as they remain treaties on the protection of human rights, they will maintain generally an individualistic approach to human welfare,[126] an anthropocentric approach to ecological resources,[127] and, overall, a territorial approach to state obligations,[128] thus remaining indifferent to important benefits of mitigation action beyond the treaty rights. Likewise, even if human rights treaties were to be interpreted as granting rights to "future generations,"[129] the cost that a state incurs when implementing mitigation action would

[120] *See* Watts, *supra* note 64 (referring to Urgenda's estimate that compliance measures cost would amount to about €3bn euros).

[121] *See* text at note 3 *supra*.

[122] *See* Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008).

[123] *See Natur og Ungdom*, *supra* note 17, paras. 163, 168 (discounting the importance of climate impacts that "will not appear until far into the future"). *But see Neubauer*, *supra* note 22, para. 182 (finding that the German lawmaker breached its obligation to protect the right to life by failing to adopt adequate mitigation action applicable in the 2020s, as this would result in a need for more drastic mitigation action post-2030, with a disproportionate impact on future generations). *See generally* Anthony D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AJIL 190 (1990); Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AJIL 198 (1990).

[124] *See* Conor Gearty, *Do Human Rights Help or Hinder Environmental Protection?*, 1 J. HUM. RTS & ENV'T 7 (2010).

[125] *See, e.g.,* Ademola Oluborode Jegede, *Arguing the Right to a Safe Climate Under the UN Human Rights System*, 9 INT'L HUM. RTS. L. REV. 184 (2020).

[126] Desgagné, *supra* note 94, at 283–84, 294.

[127] *See* Boyle, *Climate Change, the Paris Agreement and Human Rights*, *supra* note 30, at 768.

[128] Sumudu Atapattu, *The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 252, 265 (John H. Knox & Ramin Pejan eds., 2018); ATAPATTU, *supra* note 26, at 63.

[129] *See* Bridget Lewis, *The Rights of Future Generations within the Post-Paris Climate Regime*, 7 TRANSNAT'L ENVTL. L. 69 (2018); PETER LAWRENCE, JUSTICE FOR FUTURE GENERATIONS: CLIMATE CHANGE AND INTERNATIONAL LAW (2014).

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often exceed the long-term benefits for present and future generations within its territory—most of the benefits that justify ambitious mitigation action in any one country are those that would be enjoyed by the future population living *in other countries*.

B. Invalid Solutions

Three main arguments have been made in attempts to overcome the problem described above and to justify the interpretation of human rights treaties as the source of an obligation to cooperate on the mitigation of climate change. The first argument is that human rights treaties create extraterritorial obligations relevant to climate change mitigation. The second argument is that states have "collective obligations" to protect human rights that require them to act in concert on climate change mitigation. The third argument is that human rights treaties include an extensive obligation for states to cooperate on the international protection of human rights, hence also on the mitigation of climate change. The following refutes these three arguments.

1. Extraterritorial Obligations

Scholars have highlighted the evolution of the case law regarding the extraterritorial application of human rights treaties to suggest that it could extend to the impacts of a state's failure to mitigate climate change.[130] But while the question of extraterritorial application has long been unsettled, it is now relatively well established that states' human rights obligations apply extraterritorially only in limited circumstances—mainly where the state exercises "effective control" over an area or a person,[131] for instance in cases relating to "[b]elligerent occupation and physical custody over detained individuals."[132] The capacity of a state to achieve incremental emission reduction does not imply any "effective control," for instance, on the human rights impact of a heatwave occurring decades later in a different part of the world.[133] A few authorities continue to suggest an extension of the geographical scope of some treaty obligations, in particular with regard to the right to life, to situations where a state merely exercises "power" (not necessarily amounting to "effective control") upon an individual's right in such

[130] *See,* Boyle, *Human Rights and the Environment: Where Next?*, *supra* note 113, at 617; John H. Knox, *Human Rights Principles and Climate Change*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 213, 226–27 (Cinnamon P. Carlarnet, Kevin R. Gray & Richard Tarasofsky eds., 2016); Humphreys, *supra* note 58, at 5. *See also* CEDAW, et al., *supra* note 14, paras. 1, 3; Helen Duffy & Lucy Maxwell, *People v Arctic Oil Before Supreme Court of Norway: What's at Stake for Human Rights Protection in the Climate Crisis?*, EJIL:*TALK!* (Nov. 13, 2020), *at* https://www.ejiltalk.org/people-v-arctic-oil-before-supreme-court-of-norway-whats-at-stake-for-human-rights-protection-in-the-climate-crisis.

[131] *See* M.N. v. Belgium, App. No. 3599/18, paras. 96–126 (May 5, 2020), *at* http://hudoc.echr.coe.int/eng?i=001-202468; The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 2, para. 81 (Nov. 15, 2017); Al-Skeini v. United Kingdom, 2011-IV Eur. Ct. H.R. 99, para. 131; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ Rep. 168, para. 216 (Dec. 19); *Construction of a Wall*, *supra* note 118, para. 109. *See also* Olivier De Schutter, Asbjørn Eide, Asfaq Khalfan, Marcos Orellanan, Margot Salomon & Ian Seiderman, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084, 1104–05 (2012).

[132] Yuval Shany, *The Extraterritorial Application of International Human Rights Law*, 409 RECUEIL DES COURS 9, 28 (2019).

[133] *See, e.g.,* Stephen Humphreys, *Competing Claims: Human Rights and Climate Harms*, *in* HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 26, at 55. *See also* text at notes 101–102 *supra*.

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a way as to affect that individual "in a direct and reasonably foreseeable manner"[134]—but it is difficult to see how a state's capacity to achieve nominal reductions in global GHG emissions could constitute such power or affect individuals' rights in any "direct" manner.

A 2017 advisory opinion of the Inter-American Court of Human Rights (IACtHR) on human rights and the environment pointed out that individuals whose rights are affected by transboundary environmental harm could be found to be under the effective control of the state of origin.[135] The Court, however, insisted that such extraterritorial application of human rights obligations is limited to "exceptional situations"[136] and occurs only where "there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory."[137] In other words, a state's failure to prevent transboundary environmental harm may, but does not *necessarily*, imply a breach of its obligation to protect human rights. For the human rights impact to be within the state's effective control, the causal link between the state's conduct and the human rights impacts must at the very least be significant, probably even relatively proximate, rather than remote and tenuous.[138] Thus, Walter Kälin and Jörg Künzli compare the advisory opinion with a case where a bullet had been shot at someone across an international border.[139] By contrast to what may happen in certain cases of direct transboundary environmental harm, there is no "smoking gun" (or factory) to blame for the impacts of climate change on human rights. As such, it is implausible that the impacts of climate change could ever fall within the effective control of a state—or that they could be considered the direct and reasonably foreseeable consequence of a state's conduct—on the sole ground of the state's ability to achieve marginal reductions in global GHG emissions.[140]

There is no obvious possibility for the judicial interpretation of human rights treaties to evolve in ways that would apply human rights obligations to the global impacts of a state's GHG emissions. In many cases, a broad extraterritorial application would be irreconcilable with the text of human rights treaties whose geographical scope is explicitly limited to the state's "territory" or "jurisdiction."[141] These treaty provisions would be devoid of any effectiveness (*effet utile*)[142] if every individual affected by the state's conduct was considered *ipso*

[134] H.R. Comm., General Comment No. 36, *supra* note 35, para. 63. *See* Afr. Comm'n Hum. & Peoples Rts., General Comment No. 3, The Right to Life (Article 4), para. 14 (2015) ("conduct which could reasonably be foreseen to result in an unlawful deprivation of life"); Andreou v. Turkey, App. No. 45653/99, para. 25 (Oct. 27, 2009), *at* http://hudoc.echr.coe.int/eng?i=001-95295 ("direct and immediate cause of . . . injuries").

[135] Advisory Opinion OC-23/17, *supra* note 131, para. 104.

[136] *Id.*, para. 104(d).

[137] *Id.*, paras. 101, 103, 104(h), 120, 238.

[138] *See* De Schutter, et al., *supra* note 131, at 1109.

[139] KÄLIN & KÜNZLI, *supra* note 32, at 133–34, referring to *Andreou*, *supra* note 134.

[140] *But see* Jutta Brunnée, *Procedure and Substance in International Environmental Law*, 405 RECUEIL DES COURS 75, 180–81 (2019); Annalisa Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, 9 CLIMATE L. 244, 255 (2019); Christopher Campbell-Duruflé & Sumudu Anopama Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, 8 CLIMATE L. 321 (2018); Monica Feria-Tinta & Simon C. Milnes, *The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights*, 27 Y.B. INT'L ENVTL. L. 64, 78–79 (2016).

[141] *See, e.g.*, KÄLIN & KÜNZLI, *supra* note 32, at 134.

[142] On the doctrine of effectiveness (*effet utile*) in treaty interpretation, see Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment on Preliminary Objections, 2011 ICJ Rep. 70, para. 133; Territorial Dispute (Libya /Chad), 1994 ICJ Rep. 25,

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facto within that state's "jurisdiction." Even with regard to treaties without explicit jurisdictional limitation, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),[143] an extensive extraterritorial application of positive human rights obligations would be inconsistent with subsequent state practice:[144] states do not generally take the same measures to protect, for instance, the right to health beyond their territory as they do within it.[145] Thus, the authors calling for an extensive interpretation of extraterritorial jurisdiction generally "accept that States cannot be legitimately expected to be held accountable for all acts or omissions that somehow adversely affect the enjoyment of human rights by all individuals, anywhere in the world."[146]

2. *"Collective Obligations"*

Another line of argument suggests that, when approaching climate change mitigation as a human rights obligation, states must set their national interests aside and discharge their obligations as a group (i.e., the international community or the group of the parties to a treaty). Such a "collective obligation,"[147] if it is understood as an obligation held by a collective, is probably a contradiction in terms: only an (individual) legal person can incur an obligation and be held responsible for its breach.[148] No source or authority demonstrates the existence of a "collective obligation" of the international community as a whole or the parties to a treaty, as a single legal person, to protect human rights or to mitigate climate change.

The Supreme Court in *Urgenda* relied on a similar assumption when suggesting that the Netherlands, while unable to achieve globally significant mitigation outcomes on its own, had nonetheless to do its best. The Court asserted that the state's obligation to protect human rights is to be interpreted in light of a "joint responsibility" under the UNFCCC, which

para. 51 (Feb. 3); Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), Order, 1929 PCIJ (ser. A) No. 22, at 13 (Aug. 19).

[143] ICESCR, *supra* note 33, Art. 2(1).

[144] Vienna Convention on the Law of Treaties, Art. 31(3)(b), May 23, 1969, 1155 UNTS 331 [hereinafter VCLT]. *See generally Construction of a Wall*, *supra* note 118, para. 112 (noting that the ICESCR "guarantees rights which are essentially territorial"); KÄLIN & KÜNZLI, *supra* note 32, at 126. *But see* CESCR, General Comment No. 24, State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, para. 30, UN Doc. E/C.12/GC/24 (Aug. 10, 2017); CESCR, General Comment No. 14, Right to Health (Art. 12), para. 39, UN Doc. E/C.12/2000/4 (Aug. 11, 2000).

[145] For instance, in addressing the COVID-19 pandemic, states have generally not made as much effort to make vaccines available to the populations of foreign countries as they have done for the benefit of their own population. *See* OHCHR Press Release, Statement by UN Human Rights Experts: Universal Access to Vaccines Is Essential for Prevention and Containment of COVID-19 Around the World (Nov. 9, 2020), *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484 (acknowledging widespread "supply and vaccine nationalism"); Oxfam, *Small Group of Rich Nations Have Bought Up More Than Half the Future Supply of Leading COVID-19 Vaccine Contenders* (Sept. 17, 2020), *at* https://www.oxfam.org/en/press-releases/small-group-rich-nations-have-bought-more-half-future-supply-leading-covid-19.

[146] Shany, *supra* note 132, at 29.

[147] *E.g.*, Anna Huggins, *The Evolution of Differential Treatment in International Climate Law: Innovation, Experimentation, and "Hot" Law*, 8 CLIMATE L. 195, 204 (2018); Jacqueline Peel, *Climate Change*, *in* THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW 1009, 1024 (André Nollkaemper & Ilias Plakokefalos eds., 2017); Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMP. & INT'L ENVTL. L. 142, 145–47 (2016); Rajamani, *supra* note 4, at 503; Christina Voigt, *The Paris Agreement: What Is the Standard of Conduct for Parties?*, 26 QUESTIONS INT'L L. 17, 17 (2016).

[148] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 171, 179 (Apr. 11).

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translates into a "partial responsibility" of the Netherlands to "do 'its part'" in global mitigation action.[149] Regrettably, the Court did not specify the source of this "joint responsibility." Climate treaties define collective *objectives* on climate change mitigation (e.g., the long-term goal of holding global warming "well below 2 °C" and to pursue efforts toward 1.5 °C)[150] and *principles* guiding burden-sharing (e.g., common but differentiated responsibilities and respective capabilities), but they do not impose any joint or collective *obligations*.[151] These treaties require each party to take unspecified measures on climate change mitigation,[152] not to "do its part" to ensure the achievement of the treaty's objective.[153] Nor can such an obligation arise from customary international law[154] or from subsequent practice in application of a treaty, for lack of consistent state practice: states, on their own admission, have not generally been communicating and implementing mitigation action consistent with the temperature targets included in the Paris Agreement.[155]

John Knox appeared to envisage a comparable argument nested under human rights treaties when discussing their extraterritorial application. He suggested that "*the states contributing most to the warming*" could be considered to have effective control over "particularly extreme impacts [of climate change], such as the effect of climate change on small island states."[156] For the reasons exposed above,[157] it is unlikely that an individual state would exercise "effective control" over the impacts of climate change. Knox may have been suggesting that a different conclusion could be reached if one considered the largest GHG emitters as a group, *collectively* holding an obligation to protect human rights. However, there is no evidence that human rights treaties create any such "collective obligation."

[149] *Urgenda* (HR), *supra* note 16, para. 5.7.1.

[150] Paris Agreement, *supra* note 1, Arts. 2(1)(a), 4(1); Dec. 10/CP.21, para. 4, UN Doc. FCCC/CP/2015/10/Add.2 (Jan. 29, 2016). *See also* Dec. 1/CP.16, *supra* note 55, para. 4.

[151] *See* Maiko Meguro, State of the Netherlands v. Urgenda Foundation, 114 AJIL 729, 734 (2020). *But see* Alexander Zahar, *Collective Obligation and Individual Ambition in the Paris Agreement*, 9 TRANSNAT'L ENVTL. L. 165 (2020).

[152] *See, e.g.*, UNFCCC, *supra* note 1, Art. 4(1)(b); Paris Agreement, *supra* note 1, Art. 4(3) (requiring NDCs to reflect the party's "highest possible ambition," without explicit link to the treaty objective on climate change mitigation). *See also* Meguro, *supra* note 151, at 733.

[153] *See R v. Heathrow Airport, supra* note 76, para. 71 (noting, in relation to the Arts. 2 and 4(1) objectives, that "the Paris Agreement did not impose an obligation on any state to adopt a binding domestic target to ensure that those objectives were met"); Benoit Mayer, *Temperature Targets and State Obligations on the Mitigation of Climate Change*, 33 J. ENVTL. L. (forthcoming).

[154] Unless one follows a purely deductive approach to the identification of customary international law, which, however, the doctrine has generally rejected. *See* text at note 85 *supra*.

[155] *See, e.g.*, Dec. 1/CP.21, *supra* note 5, pmbl., paras. 10, 17; Dec. 1/CP.25, *supra* note 5, para. 8; Dec. 1/CMA.2 para. 5, UN Doc. FCCC/PA/CMA/2019/6/Add.1 (Mar. 16, 2020). *See also, e.g.*, UNEP, EMISSIONS GAP REPORT 2020 (2020); UNFCCC Secretariat, Aggregate Effect of the Intended Nationally Determined Contributions: An Update, para. 42, UN Doc. FCCC/CP/2016/2 (2016). With regard to long-term low greenhouse gas emission development strategies communicated so far, see Climate Action Tracker, *Paris Agreement Turning Point* 1 (Dec. 2020), *at* https://climateactiontracker.org/publications/global-update-paris-agreement-turning-point (suggesting that, when read in line with existing NDCs, these strategies would likely result in a warming of 2.9 °C). With regard to new and updated NDCs communicated by the end of 2020, see UNFCCC Secretariat, Nationally determined contributions under the Paris Agreement: Synthesis Report by the Secretariat, para. 13, UN Doc. FCCC/PA/CMA/2021/2 (2021), concluding that these commitments continue to "fall far short of what is required."

[156] Knox, *Climate Change and Human Rights Law*, *supra* note 26, at 204 (emphasis added).

[157] See text at note 116 *supra*.

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Such arguments are often based on a misreading of the law of state responsibility. The applicants in *Duarte Agostinho*, a case currently pending before the European Court of Human Rights, refer to the Guiding Principles on Shared Responsibility to support their claim that states have a "shared responsibility" for the impacts of climate change on human rights.[158] Similarly, Margaretha Wewerinke-Singh relies on the concept of joint and several responsibility to invoke the obligation of a state to contribute to climate change mitigation.[159] Yet, neither the Guiding Principles on Shared Responsibility nor the concept of joint and several responsibility support the purported conclusions. The Guiding Principles seek to define the *content* of a state's responsibility when one or several other states are concurrently responsible for an internationally wrongful act; these Principles do not define primary obligations or any other of the *conditions* under which one or several states may initially be considered to be in breach of a primary obligation.[160] Likewise, the doctrine of joint and several responsibility, if applicable in international law at all, determines the consequences of a state's responsibility, not its existence.[161]

These arguments often converge toward Article 47 of the Articles on State Responsibility, which envisages the situation where several states are responsible for the same internationally wrongful act.[162] However, the International Law Commission made it clear that Article 47 is only interested in the situation "where *a single course of conduct* is at the same time attributable to several states and is *internationally wrongful to each of them*,"[163] and that Article 47 does not constitute an exception to the principle of independent responsibility.[164] The Commentary thus notes that Article 47 does not apply *ipso facto* to situations "where several States by separate internationally wrongful conduct have contributed to causing the same damage," for instance where "several States . . . contribute to polluting a river by separate discharge of pollutants."[165] In such situations, the Commission adds, "the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations."[166] Thus, nothing in the law of state responsibility extends to a group of states taken as a whole the obligation applicable individually to each of them.

[158] Application Form, Annex, paras. 11–13, Duarte Agostinho v. Portugal, *supra* note 20, *available at* http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al. *See* Paul Clark, Gerry Liston & Ioannis Kalpouzos, *Climate Change and the European Court of Human Rights: The Portuguese Youth Case*, EJIL: *TALK!* (Oct. 6, 2020), *at* https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case; Gerry Liston, *Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "Fair Share Question" in the Context of International Human Rights Law*, 9 CAMB. INT'L L.J. 241, 250–54 (2020).

[159] WEWERINKE-SINGH, *supra* note 26, at 93–96. *See Urgenda* (HR), *supra* note 16, para. 5.7.6 (referring to DARSIWA, *supra* note 88, Art. 47).

[160] *See* André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin Nataša Nedeski & Ilias Plakokefalos, *Guiding Principles on Shared Responsibility in International Law*, 31 EUR. J. INT'L L. 15, 24 (Princ. 2, cmt. para. 2) (2020).

[161] *See* Oil Platforms (Iran v. U.S.), Judgment on Merits, 2003 ICJ Rep. 324, paras. 73–74 (Nov. 6) (sep. op., Simma, J.) [hereinafter *Oil Platforms*]; DARSIWA, *supra* note 88, Art. 47, cmt. para. 3.

[162] *See, e.g.*, *Urgenda* (HR), *supra* note 16, para. 5.7.6; WEWERINKE-SINGH, *supra* note 26, at 92; Liston, *supra* note 158, at 251–54.

[163] DARSIWA, *supra* note 88, Art. 47, cmt. para. 3 (emphasis added).

[164] *Id.*

[165] *Id.*, para. 8. *See* Corfu Channel (UK v. Alb.), Judgment, 1949 ICJ Rep. 4, 22–23 (Apr. 9).

[166] DARSIWA, *supra* note 88, Art. 47, cmt. para. 8.

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3. *Other-Regarding Obligations of Cooperation*

It is only through international cooperation that global GHG emissions can be reduced in ways that benefit all.[167] This observation led Knox, in an influential report to the Human Rights Council, to point out that all states have an obligation to cooperate in addressing issues of international concern, as spelled out in particular under Article 55 of the UN Charter and the preamble to the UNFCCC.[168] This general international law obligation of cooperation, Knox suggests, "provides a framework for considering the application" of positive obligations on the protection of human rights in relation to climate change.[169] If a state must take the interests of other states into account, then, arguably, it must seek to mitigate climate change. Crucially, Knox considers this other-regarding[170] obligation of cooperation as one of "the human rights obligations of States in relation to climate change."[171] On this basis, Knox suggests that, under human rights law, states have "not only to implement current intended contributions, but also to strengthen those contributions to meet the [temperature] targets set out in article 2 of the Paris Agreement."[172]

Yet, while states certainly have an obligation to cooperate on climate change mitigation under general international law,[173] this obligation cannot readily be characterized as a "human rights obligation." Article 55 of the UN Charter mentions "*respect* for, and *observance* of, human rights"[174] as one of the fields in which states must cooperate, but it does not—at least not expressly—create an obligation to cooperate on the *protection* of human rights.[175] If climate change mitigation falls within the ambit of the obligation of cooperation under the UN Charter, it is more convincingly under the first two paragraphs of Article 55: as either an issue affecting "standards of living . . . and conditions of economic and social progress and development," or as the source of "international economic, social, health, and related problems."[176]

Overall, human rights treaties do not typically include any obligation of international cooperation. The few human rights treaties that mention "international assistance and cooperation" at all, like the ICESCR,[177] have often been construed as requiring states to consider

[167] *See* note 1 *supra*.

[168] Knox, 2016 Report, *supra* note 26, paras. 43–44, *citing* UN Charter, Arts. 55–56; UNFCCC, *supra* note 1, pmbl., para. 7. *See also, e.g.*, De Schutter, et al., *supra* note 131, at 1091, 1095–96.

[169] Knox, 2016 Report, *supra* note 26, para. 45.

[170] I borrow the phrase from Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AJIL 295 (2013).

[171] Knox, 2016 Report, *supra* note 26, para. 48.

[172] *Id.*, para. 77.

[173] *See, e.g.*, UN Charter, Arts. 55–56. Knox's argument runs parallel to an interpretation of the customary international law obligation of due diligence as requiring states to mitigate climate change. *See* text at notes 81–85 *supra*. The obligation of states to prevent transboundary environmental harm and their obligation to cooperate come hand in hand when global cumulative environmental harm is concerned.

[174] UN Charter, Art. 55(c) (emphasis added). *See, e.g.*, Declaration on the Right to Development, Art. 6(1), GA Res. 41/128 (Dec. 4, 1986).

[175] *Cf.* De Schutter, et al., *supra* note 131, at 1103–04.

[176] UN Charter, Art. 55(a)–(b). *See generally* Tobias Stoll, *International Economic and Social Co-operation, Article 55 (a) and (b), in* THE CHARTER OF THE UNITED NATIONS 1536, para. 70 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus & Nikolai Wessendorf eds., 2012).

[177] *See* ICESCR, *supra* note 33, Art. 2(1); Convention on the Rights of the Child, *supra* note 34, Art. 4; Convention on the Rights of Persons with Disabilities, Art. 4(2), Dec. 13, 2006, 2515 UNTS 3.

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receiving the international assistance and cooperation that they need—it is not clear whether these treaties create an obligation for states to *provide* assistance and cooperation when they can.[178] Even if they do, this obligation—which must be interpreted within the confines of subsequent state practice[179]—surely does not amount to a full-fledged obligation for a state to protect economic, social, and cultural rights abroad in just the same way as it does within its own territory.[180]

Knox suggests that a similarly broad obligation of cooperation may be inferred from any human rights treaty notwithstanding the absence of express provision. Recalling the obligation to perform treaties in good faith and its implication that every state must act "so as not to undermine the ability of other States to meet their own obligation," he contends that the failure of states to cooperate on the mitigation of climate change would "prevent individual States from meeting their duties under human rights law."[181] Knox's observation relies on the doctrine of abuse of rights, which suggests that states must "*abstain* from acts *calculated* to frustrate the object and purpose and thus impede the proper execution of the treaty."[182] This doctrine has generally been envisaged as the source of an obligation *not* to act in a way that would defeat the object and purpose of the treaty; it is unclear whether it can also create an obligation to act in such a way as to enable the realization of the object and purpose of the treaty, especially one as open-ended and possibly as demanding as the obligation to cooperate could be.[183] Besides, although a state's failure to cooperate on the mitigation of climate change hinders the enjoyment of human rights, it does not impede other states from fulfilling their obligation to take appropriate measures to protect human rights.[184] In any case, a state's failure to cooperate on the mitigation of climate change is not "calculated" to prevent other states from complying with their human rights obligations.

States have a broad, other-regarding obligation of cooperation under general international law, but not under human rights treaties. This broad obligation of cooperation cannot be invoked by applicants under the same advantageous conditions as the obligation to protect human rights—in particular, it cannot be applied by treaty bodies or regional human rights courts. The next Section shows however that a narrower, inward-looking obligation of

[178] *See* CESCR, General Comment No. 3, The Nature of States Parties' Obligations, para. 13, UN Doc. E/1991/23 (Dec. 14, 1990); BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 139 (2014); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 191 (1987). On the Convention on the Rights of the Child, see John Tobin, *Art. 4: A State's General Obligation of Implementation*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY, 108, 146–47 (John Tobin ed., 2019). On the Convention of Persons with Disabilities, see Andrea Broderick, *Article 4: General Obligations*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY, 106, 133 (Ilias Bantekas, Michael Ashley Stein & Dimitris Anastasiou eds., 2018).

[179] VCLT, *supra* note 144, Art. 31(3)(b).

[180] *See* note 145 *supra*. *But see* Paul Hunt & Rajat Khosla, *Climate Change and the Right to the Highest Attainable Standard of Health*, *in* HUMAN RIGHTS AND CLIMATE CHANGE, *supra* note 26, at 252.

[181] Knox, 2016 Report, *supra* note 26, para. 44 (n. 27). *See* VCLT, *supra* note 144, Art. 26.

[182] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 367 (2008), *cited in* Knox, 2016 Report, *supra* note 26, para. 44 (n. 27) (emphasis added).

[183] *See* Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, para. 158, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998); ILC, 16th Sess., 727th Mtg. para. 17, UN Doc. A/CN.4/SR.727 (May 20, 1964) (Waldock); ILC, Third Report on the Law of Treaties, by Sir Humphrey Waldock, at 7, UN Doc. A/CN.4/167 (Mar. 3, 1964) (Art. 55(2)).

[184] *See* text at note 36 *supra*.

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cooperation could be inferred from a state's obligation to protect the human rights of individuals within its territory or under its jurisdiction.

C. An Alternative Solution: An Inward-Looking Obligation of Cooperation

The obligation to protect human rights requires a state to take the "necessary steps" or, more broadly, to implement "appropriate measures,"[185] to protect the rights of individuals within its territory or under its jurisdiction. As shown above, a state's action on climate change mitigation, in itself, cannot be considered as a necessary or appropriate measure because it would result in virtually no benefit to the rights of individuals within that state's territory or under its jurisdiction;[186] in fact, such measure would rather undermine the rights of the individuals under the state's jurisdiction by placing a burden on them and on public resources.[187] By contrast, international cooperation could be an effective strategy—and therefore an "appropriate measure," or even arguably a "necessary step"—for a state to protect the human rights of individuals within its territory or under its jurisdiction. By engaging in international cooperation or at least by "try[ing] to influence the international community," a state can contribute to the realization of global mitigation outcomes which, over time, could bring in some real benefit for the enjoyment of human rights by individuals under its jurisdiction.[188]

Human rights treaty bodies have sometimes construed the obligation to protect human rights as implying an inward-looking obligation of cooperation. For instance, the Human Rights Committee interpreted the obligation to protect the human rights of the child as implying that states must cooperate to ensure that every child has a nationality[189] and to facilitate family unity or reunification.[190] The application of a similar reasoning in relation to climate change mitigation is supported by the context in light of which human rights treaties are to be interpreted—states have repeatedly and emphatically recognized that climate change "calls for the widest possible cooperation by all countries."[191] Having recognized that climate change affects the enjoyment of human rights[192] and that cooperation is essential to the mitigation of climate change, states have accepted that cooperation on climate change mitigation could be an appropriate measure to protect human rights. In contrast to other-regarding obligations of cooperation under general international law, this obligation derives from human rights treaties and, as such, it can be applied as part of these treaties. By analogy, the Federal Constitutional Court of Germany interpreted a constitutional provision on the right to life as requiring the state to seek a solution to climate change on the international plane.[193]

[185] *See* notes 33–34 *supra*.

[186] *See* text at notes 113–116 *supra*.

[187] *See* text at note 120 *supra*.

[188] Knox, *Climate Change and Human Rights Law*, *supra* note 26, at 198.

[189] H.R. Comm., General Comment No. 17, Article 24 (Rights of the Child), para. 8 (Apr. 7, 1989), *reproduced in* UN Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

[190] H.R. Comm., General Comment No. 19, Article 23 (The Family), para. 5 (July 27, 1990), *reproduced in* HRI/GEN/1/Rev.1 (July 29, 1994).

[191] *E.g.*, UNFCCC, *supra* note 1, pmbl., para. 7; H.R. Council Res. 41/21, *supra* note 43, pmbl., para. 11. *See also, e.g.*, Paris Agreement, *supra* note 1, pmbl., para. 6; GA Res. 70/1, para. 31 (Sept. 25, 2015).

[192] *E.g.*, H.R. Council Res. 41/21, *supra* note 43, para. 1.

[193] *See Neubauer*, *supra* note 22, para. 149.

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A potential objection to the identification of this inward-looking obligation of cooperation is that a state's attempt to cooperate on climate change mitigation does not ensure that others will follow suit and, thus, that any tangible mitigation outcome will be achieved. In fact, cooperation by a given state is neither strictly necessary, nor sufficient, to ensure the realization of any mitigation outcome: efforts implemented by other states can always fill the gap. Instead of "wasting" scarce national resources in an attempt at triggering international cooperation—the objection goes—a state should rather pursue national priorities that are more directly effective for the protection of human rights, leaving it for other states to devise and implement mitigation action from which that state would benefit. This objection points out that free riding on other states' mitigation action is a state's best possible strategy to protect the human rights of the individuals under its jurisdiction[194]—unless, that is, other states follow the same reasoning.[195]

This objection must be discarded because it relies on the impermissible premise that a state could (or should) attempt to deceive other states. The obligation to interpret and perform treaties in good faith[196] requires states to act in a "spirit of honesty"[197] and "to refrain from taking unfair advantage"[198] of others. This obligation precludes a state from seeking to free ride on mitigation action implemented by other states—to benefit from their action while avoiding their fair contribution to the costs.[199] This reasoning is confirmed by states' call for cooperation[200] and for equity[201] in responses to climate change. To comply in good faith with a treaty obligation to protect a human right, any given state must act in a way it considers fair and which would ensure, if other states followed the same precept, an optimal level of protection to the rights of everyone under that state's jurisdiction.

This implied obligation of cooperation does not require as much from states as the other-regarding obligation of cooperation that arises from general international law. The latter requires states essentially to set their national interests aside and to address international concerns in a spirit of global partnership by implementing their fair share of mitigation action.[202]

[194] On each state's incentive to free ride on the mitigation action of others, see, e.g., Robert Stavins, et al., *International Cooperation: Agreements & Instruments*, *in* CLIMATE CHANGE 2014: MITIGATION, *supra* note 46, at 1007. *See also* references in note 3 *supra*.

[195] This objection could perhaps be countered on the basis of game theory: a state's true interest is to act in a way that will persuade others to implement mitigation action, even if this may imply that the state needs to implement at least some level of mitigation action. *See generally id.*, at 1012, noting that the literature has grown substantially but remains largely inconclusive.

[196] VCLT, *supra* note 144, Arts. 26, 31(1). *See* Nuclear Tests (Austl. v. Fr.), 1974 ICJ Rep. 253, para. 46 (Dec. 20).

[197] Interpretation of the Algerian Declarations of 19 January 1981 (Claims Against U.S. Nationals), 62 ILR 595, 605 (Iran-United States Claims Tribunal 1981).

[198] VILLIGER, *supra* note 182, at 425. On the applicability of good faith to the interpretation of human rights treaties, see Verein gegen Tierfabriken v. Switzerland, 2009-IV Eur. Ct. H.R. 1, para. 87; H.R. Comm., General Comment No. 33, Obligations of States Parties Under the Optional Protocol para. 15, UN Doc. CCPR/C/GC/33 (June 25, 2009).

[199] POSNER & WEISBACH, *supra* note 3, at 181–83; Evan J. Criddle & Evan Fox-Decent, *Mandatory Multilateralism*, 113 AJIL 272, 320 (2019).

[200] *See* note 191 *supra*.

[201] *E.g.*, UNFCCC, *supra* note 1, Art. 3(1); Paris Agreement, *supra* note 1, Art. 2(2).

[202] *Urgenda* (HR), *supra* note 16, paras. 5.7.1, 6.3, 6.5. *See generally* Rio Declaration on Environment and Development, Princ. 7, UN Doc. A/C0NF.151/26/Rev.1 (Vol. l), Annex I (Aug. 12, 1992), *reprinted in* 31 ILM 874 (1992).

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Thus, when the general international law obligation of cooperation is applied to climate change, as Knox points out, it suggests that every state must contribute to climate change mitigation notwithstanding its own interest in mitigation outcomes.[203] By contrast, the obligation of cooperation derived from human rights treaties requires a state to cooperate only if and inasmuch as international action contributes to the protection of the human rights of individuals within that state's territory or under its jurisdiction. If—for argument's sake[204]—a state were entirely immune from any impact of climate change, or otherwise able to manage all impacts affecting it through cost-effective adaptation measures, this state would not be bound to mitigate climate change under an inward-looking obligation of cooperation under human rights treaties, even though it would be bound to do so by other-regarding obligations of cooperation under general international law. As states are diversely exposed and vulnerable to the impacts of climate change,[205] their inward-looking obligation of cooperation varies in intensity. The content of this inward-looking obligation depends on the right in relation to which it is invoked (e.g., rights to life, health, property, or livelihood) and on the foreseeable benefits of climate change mitigation for the protection of that right for individuals under the state's jurisdiction.[206]

To comply with this inward-looking obligation of cooperation, any state would presumably be expected at least to play a constructive role in international negotiations on climate change mitigation, facilitating rather than hindering the adoption of ambitious agreements. The inward-looking obligation of cooperation may also be interpreted as requiring that a state seek to limit or reduce GHG emissions within its territory, not for the sake of achieving nominal reduction in global GHG emissions, but as an integral part of global efforts on climate change mitigation. But a state with few GHG emissions within its territory or few realistic ways of reducing them could cooperate in other ways, for instance by providing financial or technical support to emission reduction activities conducted overseas. Regulating the importation or consumption of GHG-intensive goods and services, or even imposing sanctions on non-complying states, could also be appropriate measures to promote cooperation as long as these measures are compatible with other international law obligations.[207]

The implementation of this inward-looking obligation of cooperation on climate change mitigation is facilitated by the various procedures associated with human rights treaties. When applicants have standing to invoke a state's obligation to protect human rights before a national court,[208] they would presumably also be allowed to invoke the implications of this obligation with regard to international cooperation. Likewise, treaty bodies could discuss compliance with these implied obligations in their concluding observations on national

[203] Knox, 2016 Report, *supra* note 26, para. 46.

[204] *But see* Kian Mintz-Woo & Justin Leroux, *What Do Climate Change Winners Owe, and to Whom?*, ECON. & PHIL. (forthcoming) (suggesting the existence of "net winners"—states that benefit from the positive consequences of climate change more than they are affected by its adverse impacts); Norwegian Ministry of Climate and Environment, Norway's Seventh National Communication Under the Framework Convention on Climate Change, 19 (2018), *at* https://unfccc.int/documents/198283 (suggesting that "[t]he Norwegian society is in a good position to adapt to the effects of climate change").

[205] *See* Field, et al., *supra* note 37, at 75.

[206] *See* Section IV.C.1 (variable 3) *infra*.

[207] *See* Michael A. Mehling, Harro van Asselt, Kasturo Das, Susanne Droege & Cleo Verkuijl, *Designing Border Carbon Adjustments for Enhanced Climate Action*, 113 AJIL 433 (2019).

[208] *See* notes 103–108 *supra*.

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reports and general comments. Interstate dispute settlement mechanisms and advisory proceedings before regional human rights courts or human rights treaty bodies should also be able to implement these implied obligations.

IV. The Interpretation of Implied Mitigation Obligations

The previous Part demonstrated that, under human rights treaties, states have an inward-looking obligation of cooperation on the mitigation of climate change. The present Part explores how this implied mitigation obligation can be interpreted. In light of the principle of systemic integration, the interpreter of this implied mitigation obligation must *take into account* other relevant rules of international law, which could include general mitigation obligations arising from climate treaties[209] and customary international law.[210] This, however, does not necessarily mean that compliance with an implied mitigation obligation requires compliance with its general mitigation obligations. This Part identifies and refutes a common assumption according to which human rights-based mitigation obligations *incorporate* general mitigation obligations in their entirety. It then advances an alternative theory according to which human rights treaties open only some "*windows*" onto general mitigation obligations. A human rights treaty requires a state to comply with general mitigation obligations, it is argued, only if and only inasmuch as justified by the protection of the treaty rights of individuals within its territory or under its jurisdiction.

A. Systemic Integration

The interpretation of human rights treaties generally follows the tenets of treaty interpretation, at least as a starting point.[211] Among these tenets is the principle of systemic integration, which reflects the idea that a rule of international law must be interpreted within the context provided by other rules of international law.[212] Article 31(3)(c) of the Vienna Convention on the Law of Treaties suggests that a rule must be "taken into account" in the interpretation of a treaty if this rule is (1) "relevant" and (2) "applicable in the relations between the parties."[213]

The condition of relevance is understood broadly: the referential rule "need have no particular relationship with the treaty other than assisting in the interpretation of its terms";[214] it

[209] *See* note 78 *supra*.

[210] *See* note 81 *supra*.

[211] *See* Malgosia Fitzmaurice, *Interpretation of Human Rights Treaties*, *in* The Oxford Handbook of International Human Rights Law 741–42 (Dinah Shelton ed., 2013); Richard Gardiner, Treaty Interpretation 478 (2d ed. 2015); David Harris, Michael O'Boyle, Ed Bates & Carla Buckley, Law of the European Convention on Human Rights 6 (4th ed. 2018). *See also* "Mapiripán Massacre" v. Colombia, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 134, para. 106 (Sept. 15, 2005); Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), para. 29 (1975); Hassan v. U.K., 2014-VI Eur. Ct. H.R. 1, para. 100.

[212] *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 Int'l & Comp. L. Q. 279 (2005); ILC, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, para. 4, UN Doc. A/CN.4/L.682/Add.1 (May 2, 2006); ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, paras. 410–80, UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

[213] VCLT, *supra* note 144, Art. 31(3)(c).

[214] Villiger, *supra* note 182, at 432. *See* Gardiner, *supra* note 211, at 305; Ulf Linderfalk, On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna

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may have been adopted before or after the rule that is being interpreted.[215] For instance, the International Court of Justice in *Gabčíkovo-Nagymaros* held that a treaty on the implementation of a development project had to be interpreted in light of subsequent norms on the evaluation of environmental risks.[216] Thus, general mitigation obligations arising from climate treaties or customary international law are certainly relevant to the interpretation of the mitigation obligations derived from human rights treaties.

The second condition—the applicability of the referential rule "in the relations between the parties"—has also, oftentimes, been construed broadly, permitting reference to rules applicable to *most*, or even just to *some* of the parties to the treaty at issue, notwithstanding whether the referential rule was applicable to the parties to the dispute in relation to which the interpretation was taking place.[217] This broad approach to systemic integration suggests that any general mitigation obligation arising from climate treaties or customary international law should be taken into account when interpreting a human rights treaty as the source of an implied obligation on climate change mitigation. Some scholars, however, suggest a stricter approach to systemic integration, limiting reference to rules applicable to *all* parties to the treaty at issue.[218] This stricter approach could occasionally prevent the interpreter of some human rights treaties from taking climate treaties into account,[219] but it would not preclude references to customary international law. Either way, some general obligations on climate change mitigation, from climate treaties or at least from customary international law, are among the applicable rules that a court could take into account when interpreting a human rights treaty as the source of an obligation on climate change mitigation.

Human rights treaty bodies and regional courts have embraced the principle of systemic integration and, generally, they have followed a broad approach to it.[220] For instance, the European Court of Human Rights in *Loizidou* highlighted that the ECHR "cannot be interpreted and applied in a vacuum"; rather, the interpreter must "take into account any relevant rules of international law."[221] The Court found evidence of "common ground in modern

CONVENTION ON THE LAW OF TREATIES 178 (2007); Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 ICJ Rep. 177, para. 113 (June 4).

[215] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Res. 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, para. 53 (June 21); Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), 2009 ICJ Rep. 213, para. 70 (July 13).

[216] Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ Rep. 7, para. 140 (Sept. 25).

[217] *See* GARDINER, *supra* note 211, at 310–17; McLachlan, *supra* note 212, at 315; Proceedings Pursuant to the OSPAR Convention (Ireland/UK), 23 RIAA 119, paras. 9–10 (July 2, 2003) (diss op., Griffith).

[218] *See* Oliver Dörr, *Article 31*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 557, 611 (Oliver Dörr & Kirsten Schmalenbach eds., 2018); LINDERFALK, *supra* note 214, at 178; VILLIGER, *supra* note 182, at 433.

[219] For instance, this would exclude references to the UNFCCC when interpreting the Convention on the Rights of the Child because the Holy Sea has ratified the latter but not the former, and the brief withdrawal of the United States from the Paris Agreement would have implied that, for a few months, this treaty could not be used as a referential rule for the interpretation of any human rights treaties to which the United States is a party.

[220] *See, e.g.*, Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66 INT'L & COMP. L. Q. 557 (2017); Birgit Schlütter, *Aspects of Human Rights Interpretation by the UN Treaty Bodies*, *in* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 261, 295 (Geir Ulfstein & Helen Keller eds., 2012).

[221] Loizidou v. Turkey, 1996-VI Eur. Ct. H.R., para. 43. *See* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, para. 55; Demír v. Turkey, 2008-V Eur. Ct. H.R. 333, para. 85.

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societies" on the basis of poorly ratified treaties[222] and non-binding documents.[223] Human rights treaties have been interpreted in light of other human rights treaties,[224] treaties in other fields of international law[225] (including environmental law treaties),[226] and customary international law.[227] The interest for systemic integration generally stems from the fact that it facilitates the adaptation of human rights treaties (as "living instruments")[228] to changing circumstances[229] and provides judges with convenient benchmarks to interpret treaty rules that are otherwise "unclear or open-textured."[230] On the other hand, as Birgit Schlütter pointed out, this method creates a risk that human rights bodies could "go cherry-picking when determining the international rules that are held to govern a particular interpretation" of the treaty.[231]

It is thus perfectly natural for the interpreter of an implied mitigation obligation to turn to the doctrine of systemic integration to determine the nature, scope, and content of these obligations. Accordingly, the Human Rights Committee suggested that the obligations of states "under international environmental law should . . . inform" the content of Article 6 of the International Covenant on Civil and Political Rights (ICCPR) on the right to life.[232] However, a line needs to be drawn between an interpretation of human rights treaties that is *informed by*—that is, takes into account—general mitigation obligations, and one that *defers entirely to* these general mitigation obligations. As the following shows, scholarship and judicial practice have failed to draw this line.

B. Refutation of the Incorporation Theory

The principle of systemic integration has generally been understood to suggest that, for a state to comply with a mitigation obligation implied from a human rights treaty, it must fully comply with all its general mitigation obligations. This incorporation theory has been tacitly

[222] *Demír*, *supra* note 221, para. 86; Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), para. 41; Mazurek v. France, 2000-II Eur. Ct. H.R. 1, para. 49.

[223] *See* Goodwin v. U.K., 2002-VI Eur. Ct. H.R. 1, para. 100; Sørensen v. Denmark, 2006-I Eur. Ct. H.R. 1, para. 74.

[224] *See* González ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, para. 43 (Nov. 16, 2009); García Lucero v. Chile, Preliminary Objection, Merits, and Reparation, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267 (Aug. 28, 2013); Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, para. 88 (1989); Hassan v. United Kingdom, 2014-VI Eur. Ct. H.R. 1, paras. 102–11.

[225] *See* Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, para. 170; Sabeh El Leil v. France, App. No. 34869/05, para. 48 (June 29, 2011), *at* http://hudoc.echr.coe.int/eng?i=001-105378 (unreported).

[226] *See Demír*, *supra* note 221, paras. 85–86; Taşkın v. Turkey, 2004-X Eur. Ct. H.R. 179, paras. 98–99.

[227] *See Sabeh El Leil*, *supra* note 225, para. 58

[228] *See Soering*, *supra* note 224, para. 103; The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, paras. 114–15 (Oct. 1, 1999); H.R. Comm., Views, para. 10.3, Commc'n No. 829/1998, Judge v. Canada, UN Doc. CCPR/C/78/D/829/1998 (Aug. 13, 2003).

[229] Philip Alston & Ryan Goodman, International Human Rights 117–18 (2d ed. 2012). *See* George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, *in* Constituting Europe 106 (Andreas Føllesdal, Birgit Peters & Geir Ulfstein eds., 2013).

[230] ILC, Conclusions on Fragmentation, *supra* note 212, para. 20(a).

[231] Schlütter, *supra* note 220, at 302.

[232] H.R. Comm., General Comment No. 36, *supra* note 35, para. 62.

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accepted rather than carefully demonstrated. Closer scrutiny shows that it is inconsistent with the tenets of treaty interpretation.

1. *Tacit Acceptance*

The incorporation theory suggests that, if a human rights treaty implies a state's obligation to mitigate climate change, this obligation requires the state to fully comply with any obligation it has, under any source of international law, with regard to the mitigation of climate change. This theory has generally materialized in judicial practice and academic literature as a tacit assumption. Nonetheless, it has been instrumental, in particular, in national court decisions interpreting states' human rights obligations as the source of an obligation to mitigate climate change.

Thus, the judgment of the Supreme Court of the Netherlands in *Urgenda* relied on the Vienna rule on systemic integration and the "common ground" method in European human rights law, according to which the interpretation of the ECHR must "[take] generally accepted standards into account."[233] On this basis, the Court asserted that, in order to comply with its obligation to protect the rights to life and to private and family life, the Netherlands had to comply with its customary law and climate treaty obligations[234]—which, in the Court's analysis, implied that the state had to reduce its emissions by 25 percent by 2020, compared with 1990.[235] The Court thus largely followed the opinion of the procurator general, which called it to "base" its decision on customary international law.[236]

Similarly, the Supreme Court of Colombia ordered the state to comply with its international commitment to stop deforestation in order to fulfill its constitutional obligation to protect the rights to life, food, and a healthy environment by mitigating climate change.[237] In doing so, the Court assumed that compliance with the former was a necessary condition for compliance with the latter.

The practice of treaty bodies reflects the same assumption. For instance, the Committee on the Rights of the Child recommended that Japan "reduc[e] its emissions of [GHGs] *in line with its international commitments*,"[238] while the CESCR called on Norway to "intensify its efforts to achieve its [NDC] under the Paris Agreement."[239] These recommendations are admittedly of an ambivalent nature—treaty bodies do not generally distinguish between observations that interpret the state's legal obligations from those that are mere policy recommendations[240]—but they do reflect the prevailing understanding, on the part of these quasi-judicial bodies, that protecting human rights means complying with any and all norms on climate change mitigation, and that reviewing a state's compliance with its human rights obligations justifies a review of its compliance with general mitigation obligations.

[233] *Urgenda* (HR), *supra* note 16, para. 5.4.3.
[234] *Id.*, para. 5.7.5.
[235] *Id.*, para. 7.3.6.
[236] Conclusions of the Procurator General, para. 2.74, *id.*, unofficial translation: ECLI:NL:PHR:2019:102 (Oct. 8, 2019).
[237] *Barragán*, *supra* note 10, paras. 6, 14.
[238] CRC, Fourth and Fifth Periodic Reports of Japan, *supra* note 15, para. 37(d) (emphasis added).
[239] CESCR, Sixth Periodic Report of Norway, *supra* note 15, para. 11.
[240] *See* Geir Ulfstein, *Law-Making by Human Rights Treaty Bodies*, *in* INTERNATIONAL LAW-MAKING: ESSAYS IN HONOUR OF JAN KLABBERS 249 (Rain Liivoja & Jarna Petman eds., 2014).

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In fact, quasi-judicial bodies have often implemented the incorporation theory along with an extensive interpretation of referential "rules"—including non-binding objectives. For instance, the CESCR suggested that the approval of fossil-fuel extraction projects ran against Ecuador's "commitments under the Paris Agreement,"[241] even though neither the Paris Agreement nor Ecuador's NDC define any commitment relating to fossil fuel extraction.[242] In another instance, the CESCR recommended that Norway take on more ambitious commitments on climate change mitigation than it already had within the climate regime.[243] A joint statement by five treaty bodies asserted that states "*must* adopt and implement policies" aimed at realizing "the *objectives* of the Paris Agreement,"[244] even though, as noted above, the treaty creates no obligation for states to realize its mitigation objectives,[245] while state practice does not generally reflect acceptance of an obligation to adopt and implement mitigation action consistent with these objectives.[246]

Legal scholarship, likewise, has often assumed that, whenever a human rights treaty implies an obligation to mitigate climate change, it requires states, at least, to comply with any other treaty or customary obligation they have on climate change mitigation. For instance, Wewerinke-Singh suggests that the interpreter of human rights treaties should "consider international climate change law as providing minimum standards of protection" and hold "States to account for non-compliance with the standards they have set for themselves in domestic and international legal frameworks related to climate change."[247] She and Ashleigh McCoach welcomed the Court's application of the common ground approach in *Urgenda* as an "elegant way" of interpreting a specific benchmark that can be associated with open-textured human rights obligations.[248] Similarly, Petra Minnerop and Ida Røstgaard assume that, if a mitigation obligation can be implied from Norway's constitutional obligation to protect the right to a healthy environment, and if this obligation can be interpreted in light of international law, then this obligation should be understood as requiring compliance with the state's general mitigation obligations under the UNFCCC.[249] Boyd asserts that "[a] failure to fulfil international climate change commitments is a prima facie violation of the State's obligations to protect the human rights of its citizens."[250]

[241] CESCR, Fourth Periodic Report of Ecuador, *supra* note 15, para. 12. *See* CESCR, Fourth Periodic Report of Argentina, *supra* note 15, paras. 13–14.

[242] *See* República del Ecuador, *Primera Contribución Determinada a Nivel Nacional para el Acuerdo de París* (Mar. 2019). On the absence of commitments, see generally Michael Lazarus & Harro van Asselt, *Fossil Fuel Supply and Climate Policy: Exploring the Road Less Taken*, 150 CLIMATIC CHANGE 1 (2018); *Natur og Ungdom*, *supra* note 17, para. 174.

[243] *See* CESCR, Sixth Periodic Report of Norway, *supra* note 15, para. 11.

[244] CEDAW, et al., *supra* note 14, para. 2 (emphasis added) (referring to Art. 2(1) of the Paris Agreement).

[245] *See* note 151 *supra*.

[246] *See* note 155 *supra*.

[247] WEWERINKE-SINGH, *supra* note 26, at 132.

[248] Margaretha Wewerinke-Singh & Ashleigh McCoach, The State of the Netherlands v. Urgenda Foundation*: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation*, REV. EUR. COMP. & INT'L ENVTL. L. (forthcoming) (early view at 5).

[249] Petra Minnerop & Ida Røstgaard, *In Search of a Fair Share: Article 112 Norwegian Constitution, International Law and an Emerging Inter-jurisdictional Discourse in Climate Litigation*, 44 FORDHAM INT'L L.J. 847 (2021).

[250] David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), Report, para. 74, in UN Doc. A/74/161 (July 15, 2019).

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Like treaty bodies, scholars have often suggested that human rights treaties should actually be interpreted as requiring *more* mitigation action than what states had accepted under climate treaties or customary international law. Paul Hunt and Rajat Khosla suggest that, to comply with their obligation to protect the right to health, in light of the impact of climate change on the enjoyment of this right, "states have a core obligation to take reasonable steps to stabilize [GHG] concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system,"[251] thus alluding to the "ultimate objective" of the UNFCCC[252] rather than to any particular "commitments" to which the parties had consented.[253] Similarly, Knox asserts that the 1.5 and 2 °C temperature targets are "consistent with the obligations of States . . . to protect human rights from the dangerous effects of climate change"[254]—adding that each party to a human rights treaty must immediately strengthen its NDC in accordance with these temperature targets.[255] Commenting on Knox's report, Boyle suggests that "[t]he UN special rapporteur is right in principle to argue that human rights law as a whole requires States to comply with expectations set out" by the mitigation objectives of the Paris Agreement.[256] Boyle asserts that "human rights commitments could and should require States to implement Paris, and their record in doing so can and should be monitored and assessed by UN human rights bodies."[257]

Yet, as Boyle himself concedes just a few pages earlier, "the argument that a policy which complies with the UN climate regime nevertheless violates the existing human rights obligation of States is not easy to make."[258] Boyle then turns to Knox's "more insightful approach,"[259] but he does not explain how Knox, in his view, managed to make this uneasy argument. In a similar line, André Nollkaemper and Laura Burgers are skeptical of the analysis of the Supreme Court in *Urgenda* in that it blurs the "distinction between law and non-law"[260]—the 25 percent emission reduction target, after all, had only been mentioned (or rather alluded to) in non-binding party decisions.[261] But while Nollkaemper and Burger question the way the incorporation theory was implemented in *Urgenda*, they did not interrogate the theory itself. Neither Boyle nor Nollkaemper and Burger objected to the possibility for a court, when interpreting a human rights treaty as implying a mitigation obligation, to require the state to comply at least with any or all its obligations on climate change mitigation arising from any source.

[251] Hunt & Khosla, *supra* note 180, at 249.

[252] UNFCCC, *supra* note 1, Art. 2.

[253] *Id.* Arts. 4(1)(b), (2)(a).

[254] Knox, 2016 Report, *supra* note 26, para. 73.

[255] *Id.*, paras. 77, 80.

[256] Boyle, *Climate Change, the Paris Agreement and Human Rights*, *supra* note 30, at 777. *See also* H.R. Council Res. 41/21, *supra* note 43, pmbl., para. 15.

[257] Boyle, *Climate Change, the Paris Agreement and Human Rights*, *supra* note 30, at 775.

[258] *Id.* at 773. Boyle then turns to Knox's "more insightful approach," but does not explain how Knox's approach could make this uneasy argument.

[259] *Id.*

[260] André Nollkaemper & Laura Burgers, *A New Classic in Climate Change Litigation*: *The Dutch Supreme Court Decision in the* Urgenda *Case*, EJIL: *Talk!* (Jan. 6, 2020), *at* https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case.

[261] *See also* Benoit Mayer, The State of the Netherlands v. Urgenda Foundation, 8 Transnat'l Envtl. L. 167, 186–87 (2019).

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2. *Refutation*

The problem with the incorporation theory is that it denatures the process of legal interpretation. Instead of merely taking general mitigation obligations *into account* to make sense of a human rights treaty, this theory overlooks the text as well as the object and purpose of the treaty at issue, focusing exclusively on general mitigation obligations.[262] Human rights treaties are thus reduced to a Trojan horse allowing extraneous rules and objectives to take hold of human rights institutions. When the incorporation theory operates, human rights treaties no longer pursue the objective of protecting the enjoyment of human rights, being instead entirely aimed at the mitigation of climate change.

The interpretation of a treaty should depend, among other things, on its text; its application, in turn, should take relevant, case-specific circumstances into account. Thus, Knox points out that "the content of the obligations of States to protect against environmental harm depends on the content of their duties with respect to the particular rights threatened by the harm."[263] Yet, similar conclusions will inevitably be reached, when applying obligations arising from various treaties recognizing different rights in diverse national circumstances, if one assumes—as Knox does—that, "[i]n applying their duty to protect against environmental harm that interferes with the enjoyment of human rights, . . . *States must implement and comply with the standards that they have adopted*."[264]

This reasoning is incongruous. The obligation to protect the right to life, for instance, probably does not imply exactly the same mitigation obligation as the obligation to prevent discrimination against women, and these obligations should apply differently in states where the enjoyment of these rights is more or less exposed to climate impacts that mitigation action could avoid. To take an extreme example, the obligation of a state to protect the right of coalminers to an adequate standard of living may not necessarily imply the state's obligation to mitigate climate change at all, for closing coalmines—a measure that the state would likely take to mitigate climate change—would deprive the coalminers of their livelihood.[265]

This incongruity can be observed for instance, in *Urgenda*, by comparing the judgment of the District Court of the Hague with that of the Supreme Court. The District Court thought that it could not apply the ECHR in a public interest litigation;[266] its judgment, instead, relies on the duty of care of the state under Dutch tort law. By contrast, the Supreme Court held that it could apply the ECHR in public interest litigations, and it relied exclusively on this substantive ground. Nevertheless, the two courts arrived at exactly the same conclusion. Furthermore, the Supreme Court made no difference between the impacts of climate change on the right to life on the one hand, and on the right to private and family life on the other hand, asserting that the state was expected to "take the same measures"[267] pursuant to both

[262] On the risk of the principle of systemic integration leading to a denaturation of legal interpretation, see generally Rachovitsa, *supra* note 220, at 561, 564, 588.

[263] Knox, 2016 Report, *supra* note 26, para. 65.

[264] *Id.*, para. 67 (emphasis added).

[265] On another, somewhat extreme example—an association of senior women claiming that Switzerland's obligation to protect their right to life and to private and family life requires full compliance with general mitigation obligations and more—see the reference in note 99 *supra*. The case was dismissed for lack of standing.

[266] *Urgenda* (Rb), *supra* note 10, para. 4.45.

[267] *Urgenda* (HR), *supra* note 16, para. 5.2.4. The Court cites Brincat v. Malta, App. No. 60908/11, para. 102 (July 24, 2014), *at* http://hudoc.echr.coe.int/eng?i=001-145790 (unreported), which states that the scopes of

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rights. From whichever ground or angle they looked at the issue, the Dutch courts found that the state had to comply with its customary obligation on climate change mitigation, which they interpreted as requiring at least 25 percent emissions reduction by 2020 compared with 1990 levels.

However, there is no reason to assume that the mitigation obligation derived from the protection of the right to life involves exactly the same standard of care as the mitigation obligation derived from the right to private and family life does,[268] or that these two obligations, in turn, are identical to the obligation that arises under the duty of care of the state under tort law. Rather, one would expect that the standard of due diligence applicable in relation to these various obligations would vary, in particular "according to the importance of the interest requiring protection."[269] A risk of interference with the right to life is arguably a more pressing consideration than a risk of interference with the right to private and family life; and the duty of care arguably allows broader consideration for the need for mitigation action as it relates not only to the enjoyment of human rights, but also of human welfare in general. The two courts arrived at the same conclusion because, while claiming to apply tort law or European human rights law *in light of* customary international law,[270] they were, in fact, applying customary international law.

The incorporation theory is problematic because it allows judges to bypass rules on jurisdiction and admissibility. The applicants in *Urgenda* had standing to invoke the duty of care of the state and its obligation to protect human rights, but not its customary international law obligations.[271] Likewise, treaty bodies and regional human rights courts have jurisdiction to interpret human rights treaties, but not to apply general mitigation obligations arising from climate treaties or customary international law. Systemic integration provides no justification for overlooking the absence of state consent to jurisdiction with regard to the application of the referential rule.[272]

Questions about the implications of the principle of systemic integration for a court's jurisdiction are not entirely new or specific to climate change mitigation. Judge Buergenthal accused the International Court of Justice in *Oil Platforms* of using this principle "to apply international law on the use of force simply because that law may also be in dispute between the parties before it and bears some factual relationship to the dispute of which the Court is seised."[273] The Court firmly denied doing so.[274] Subsequently, in *Pulp Mills*, the Court

obligations relating to these two rights "may overlap," but this does not justify the Supreme Court's assertion that, in the case at issue, the scopes of these obligation *did* "largely overlap." *See generally* Petra Minnerop, *Integrating the "Duty of Care" Under the European Convention on Human Rights and the Science and Law of Climate Change: The Decision of The Hague Court of Appeal in the* Urgenda *Case*, 37 J. ENERGY & NAT. RESOURCES L. 149, 161 (2019).

[268] *See* Ingrid Leijten, *The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease*, LEIDENLAWBLOG (Oct. 22, 2018), *at* https://leidenlawblog.nl/articles/the-dutch-climate-case-judgment-human-rights-potential.

[269] Study Group on Due Diligence in International Law, *supra* note 80, at 1082.

[270] *Urgenda* (Rb), *supra* note 10, para. 4.43; *Urgenda* (HR), *supra* note 16, para. 5.7.1.

[271] *Urgenda* (Rb), *supra* note 10, para. 4.42; *Urgenda* (HR), *supra* note 16, para. 1.1.6. *See* André Nollkaemper & Laura Burgers, The State of the Netherlands v. Urgenda *(Neth. Sup. Ct.)*, 59 ILM 811, 812 (2020).

[272] *See* Status of the Eastern Carelia, Advisory Opinion, 1923 PCIJ (ser. B) No. 5, at 27 (July 23).

[273] *Oil Platforms*, *supra* note 161, 2003 ICJ REP. 161, para. 29 (sep. op., Buergenthal, J.). *See* McLachlan, *supra* note 212; Rosalyn Higgins, *A Babel of Judicial Voices: Ruminations from the Bench*, 55 INT'L & COMP. L. Q. 791, 802–03 (2006).

[274] *Oil Platforms*, *supra* note 161, paras. 41–42.

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stated in the clearest possible terms that systemic integration had "no bearing on the scope of the jurisdiction conferred on the Court"[275] and, accordingly, that Argentina could not claim the application of general international law under the pretense of interpreting the treaty under which the Court had jurisdiction. Consistently, the Court held in *Jadhav* that its jurisdiction to interpret and apply the Vienna Convention on Consular Relations allowed it to take the ICCPR into account, but not to apply it by entertaining claims of human rights violations per se.[276]

Thus, the principle of systemic integration does not justify a monolithic application of international law where a court, having jurisdiction to interpret a treaty, could apply any related rule of international law. Richard Gardiner's guide to treaty interpretation highlights the distinction to be drawn, under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, "between using rules of international law as part of the apparatus of treaty interpretation and applying the rules of international law directly to the facts in the context of which the treaty is being considered." As Gardiner points out, "[t]he former is within the scope of the Vienna rules, the latter is not."[277] Alexander Orakhelashvili, likewise, notes that "the purpose of interpreting by reference to 'relevant rules' is . . . not to defer the provisions being interpreted to the scope and effect of those 'relevant rules,' but to clarify the content of the former by referring to the latter."[278] International courts and tribunals have consistently recognized that every rule has a "separate existence" even when several rules point to the same direction or are expressed in similar terms.[279] Thus, taking general mitigation obligations into account to interpret human rights treaties does not justify the incorporation of the former into the latter.

C. An Alternative Theory: Windows of Applicability

1. The Theory

An obligation on the mitigation of climate change that derives from a human rights treaty is to be interpreted based on the terms of the treaty from which it is implied, its context, and its object and purpose.[280] Its interpreter is to take general mitigation obligations into account together with the context of the treaty, in light of the principle of systemic integration,[281] but without deferring to these general mitigation obligations.

The terms of human rights treaties and their objects and purposes generally allow consideration for the benefits of international cooperation on climate change mitigation with regard to the enjoyment of human rights,[282] but these treaties are not interested in the broader

[275] *Pulp Mills*, *supra* note 81, para. 66.

[276] Jadhav (India v. Pak.), 2019 ICJ Rep. 418, paras. 36–37, 135 (July 17).

[277] GARDINER, *supra* note 211, at 320.

[278] Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 537 (2003).

[279] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment on Merits, 1986 ICJ Rep. 132, para. 178 (June 27); MOX Plant (Ir. v. UK), Order on Provisional Measures of Dec. 3, 2001, ITLOS Rep. 95, para. 50. *See* Proceedings Pursuant to the OSPAR Convention (Ir./UK), XXIII RIAA 59, para. 141 (July 2, 2003); Inst. Int'l L. Res., Problems Arising from a Succession of Codification Conventions on a Particular Subject, Sept. 1, 1995, 66(I) Y.B. INST. INT'L L. 245, 247 (Conclusion 10).

[280] VCLT, *supra* note 144, Art. 31(1).

[281] *Id.* Art. 31(3)(c).

[282] *See* Section III.C *supra*.

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benefits of climate change mitigation for human welfare, the interests of future generations, and the protection of nature per se.[283] By contrast, general mitigation obligations arising from climate treaties or customary law take at least some of these broader benefits into account. States' general obligations arising under climate treaties[284] pursue the ultimate objective of preventing "dangerous anthropogenic interference with the climate system,"[285] a phrase which invites consideration for an open-ended list of values, among which climate treaties highlight sustainable development,[286] food security,[287] ecological integrity,[288] and intergenerational equity,[289] among other things.[290] On the other hand, customary international law requires states to exercise due diligence to protect the various rights of other states (e.g., the right to exploit natural resources),[291] including their right to protect the rights of their citizens.[292] As human rights treaties only take into account some of the benefits of climate change mitigation that inform general mitigation obligations, human rights treaties only require a part of the mitigation action that states must implement under their general mitigation obligations.

This Article uses the metaphor of a windows to suggest that a state's obligation to protect a human right of individuals within its territory or under its jurisdiction provides only, at most, a limited opportunity to take the benefits of climate change mitigation into account, hence, to apply general mitigation obligations. For a state to comply with an implied mitigation obligation, it only needs to comply with the part of its general mitigation obligations that can be sighted through the window that the human rights treaty opens onto these general mitigation obligations. The size of this window of applicability —that is to say, the content of implied mitigation obligations, for instance in terms of a standard of due diligence[293]—is contingent on the treaty, the right, and the national circumstances.[294] More specifically, windows of applicability depend on the following four variables.

Variable 1: The personal scope of the treaty. Some human rights treaties protect the rights of everyone within the state's territory or under its jurisdiction; other treaties protect only a

[283] *See* notes 122–124 *supra*.

[284] *See* notes 76 and 78 *supra*.

[285] UNFCCC, *supra* note 1, Art. 2 (emphasis added).

[286] *Id.* Arts. 2, 3(4); Paris Agreement, *supra* note 1, Art. 2(1).

[287] UNFCCC, *supra* note 1, Art. 2; Paris Agreement, *supra* note 1, pmbl., para. 10.

[288] UNFCCC, *supra* note 1, Art. 2; Paris Agreement, *supra* note 1, pmbl., para. 14.

[289] UNFCCC, *supra* note 1, pmbl., para. 24, Art. 3(1).

[290] *Id.*, pmbl., para. 8 (referring to "the pertinent provisions" of the Stockholm Declaration on the Human Environment).

[291] *E.g.*, Rio Declaration on Environment and Development, *supra* note 202, Princ. 2.

[292] Mavrommatis Palestine Concessions (Greece v. UK), Judgment, 1924 PCIJ (ser. A) No. 2, at 12 (Aug. 30). *See also* references at note 81 *supra*.

[293] The emphasis here is on substantive obligations, but the analysis could be replicated *mutatis mutandis* to procedural obligations. The size of a window of applicability could determine the scope of a state's procedural obligations on climate change mitigation compliance with which is required under a human rights treaty—for instance whether and how diligently it needs to envisage climate change mitigation in environmental assessments. On general mitigation obligations of a procedural nature, see, e.g., Benoit Mayer, *Climate Assessment as an Emerging Obligation under Customary International Law*, 68 INT'L & COMP. L. Q. 271 (2019).

[294] *See generally* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GER. Y.B. INT'L L. 9, 44 (1992) (noting that "the degree of diligence that the state must observe depends, largely, on the particular circumstances of each specific case").

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specific category of population.[295] All other things being equal, general human rights treaties justify more ambition on climate change mitigation than specific human rights treaties because the former perceive the benefits of climate change mitigation for a larger population than the latter do.[296] For instance, the obligation to protect the right to life under the ICCPR (where it applies to the entire population within the state's territory and under its jurisdiction) requires more ambitious mitigation action than the obligation to protect the same right under the Convention on the Rights of the Migrant Workers (where it applies only to a subcategory of the same population).[297]

Variable 2: The relative importance of the right. Despite the absence of formal hierarchy among rights,[298] more weight is generally attached to the protection of certain rights, in particular the rights that cannot be derogated to even in case of emergency (e.g., the right to life), as these rights often constitute a necessary condition for the effective enjoyment of other rights.[299] States are held to a higher standard when protecting objectives to which a higher value is attached:[300] they are expected to invest more resources to prevent a potential interference with the right to life, for instance, than they are to prevent an interference with the right health, if only because the enjoyment of the former is a necessary condition for the enjoyment of the latter. Thus, all other things being equal, a state's obligation to protect the right to life commands greater ambition on climate change mitigation than its obligation to protect the right to health.

Variable 3: The potential benefits of climate change mitigation for the protection of the right within the state's territory or under its jurisdiction. Human rights treaties require states to mitigate climate change only as a way to protect the enjoyment of the rights that they have to protect. The benefits of climate change mitigation for the enjoyment of a right depend on national circumstances—the population's exposure and vulnerability to the impacts of climate change[301] and the likelihood that climate change mitigation may alleviate these impacts. For instance, the content of the mitigation obligation that can be inferred from a state's obligation to protect the right to food depends on whether climate change would likely affect food security within the state, and also on whether successful mitigation action remains capable of reducing this impact. In general, the rights to life and health would likely be severely affected

[295] *E.g.*, Convention on the Rights of the Child, *supra* note 34.

[296] *See* Paul de Guchteneire & Antoine Pécoud, *Introduction: The UN Convention on Migrant Workers' Rights*, *in* MIGRATION AND HUMAN RIGHTS 1, 8 (Ryszard Cholewinski, Paul de Guchteneire & Antoine Pécoud eds., 2009).

[297] An exception to this could arise—in application of variables 2 and 3—in circumstances where a specific human rights treaty imposes more stringent obligations or broader rights than general treaties. *See, e.g.*, Convention on the Rights of the Child, *supra* note 34, Art. 3(1) (requiring "the best interests of the child" to be taken as "a primary consideration"); Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494 (2008).

[298] *But see* Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 EUR. J. INT'L L 917 (2001); Tom Farer, *The Hierarchy of Human Rights Conference on Human Rights, Public Finance, and the Development Process*, 8 AM. U. J. INT'L L. & POL'Y 115 (1992).

[299] *See* H.R. Comm., General Comment No. 36, *supra* note 35, paras. 2, 20; McCann v. United Kingdom, App. No. 19009/04, 47 Eur. H.R. Rep. 40, para. 147 (2008); R v. Home Secretary *ex p* Bugdaycay [1987] 1 All ER 940, 952 (Eng.).

[300] *See* note 269 *supra*.

[301] On the heterogeneity of risks associated with climate change, see generally Field, et al., *supra* note 37, at 75–84.

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in developing countries,[302] whereas developed countries are more exposed to economic loss,[303] which could be framed as an interference with the right to property. Where it is recognized, the right to a healthy environment could also justify relatively broad mitigation obligations, although it remains unable to account for all the impacts of climate change on human welfare, future generations and ecological resources.[304]

Variable 4: The potential unintended consequences of mitigation action for the enjoyment of treaty rights within the state's territory or under its jurisdiction. A state's obligation under a human rights treaty can justify mitigation action only to the extent that the benefits of mitigation action for the enjoyment of treaty rights prevail over its unintended consequences. This observation calls, in particular, for considering the state's capacity to mitigate climate change without hindering other priorities instrumental to the protection of the rights of individuals within its territory or under its jurisdiction (e.g., economic development, poverty eradication, or climate change adaptation).[305] As such, developing countries may generally be held to a lower standard on climate change mitigation under their human rights treaty obligations, to the extent that they may not be able to invest in ambitious mitigation action without hindering the pursuance of these other priorities.[306]

On the basis of these four variables, the windows-of-applicability theory provides for an interpretation of implied mitigation obligations in line with the tenets of treaty interpretation. This theory reflects the terms as well as the object and purpose of human rights treaties by requiring a state to mitigate climate change only if and inasmuch as this contributes to the effective protection of the treaty rights. The theory also takes the context of application into account, acknowledging that not every right has the same implications for climate change mitigation in every country.

2. *Applications*

A few illustrations can help to explain the ramification of the windows-of-applicability theory when compared with the incorporation theory. Applied to *Urgenda*, for instance, the windows-of-applicability theory would have attached great weight to the fact that the Netherlands is particularly exposed to life-threatening impacts of climate change[307] and to

[302] *See* Rajendra K. Pachauri, Leo Meyer & The Core Writing Team, IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT, at 15, 16 (2014). *See generally* notes 37–38 *supra*.

[303] *See* Solomon Hsiang, et al., *Estimating Economic Damage from Climate Change in the United States*, 356 SCIENCE 1362 (2017); Francisco Estrada, W.J. Wouter Botzen & Richard S.J. Tol, *Economic Losses from US Hurricanes Consistent with an Influence from Climate Change*, 8 NATURE GEOSCIENCE 880 (2015).

[304] *See* Atapattu, *supra* note 128, at 265; *Natur og Ungdom*, *supra* note 17, paras. 78–145. *See also* notes 122–124 *supra*.

[305] *See* Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15 L. & POL'Y 39 (1993); David Schlosberg, *Further Uses for the Luxury/Subsistence Distinction*, 21 BRIT. J. POL. & INT'L REL. 295 (2019).

[306] Thus, climate treaties recognize the need for differentiation based, in particular, on capacity, as well as the need to ensure that mitigation action does not come at the expense of economic development and poverty eradication. *See* UNFCCC, *supra* note 1, pmbl., paras. 4, 7, Arts. 3(1)–(2), (4) –(5), 4(7); Paris Agreement, *supra* note 1, pmbl., paras. 4, 6, Art. 2(2). *See generally* Study Group on Due Diligence in International Law, *supra* note 80, at 1074–79.

[307] This is in particular because a large part of the state's territory is situated below sea-level. *See* Ministry of Economic Affairs and Climate Policy, Seventh Netherlands National Communication Under the United Nations Framework Convention on Climate Change 125 (2018), *available at* https://unfccc.int/sites/default/files/resource/Seventh%20Netherlands%20National%20Communication%20under%20the%20UNFCCC%20update%202018.pdf (noting life-threatening implications of heat waves and flooding).

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its large financial capacity, in light of variables 3 and 4.[308] Moreover, if the Supreme Court of the Netherlands had followed the windows-of-applicability theory, it would have distinguished the implications of the right to life from those of the right to private and family life as variables 2 and 3 apply differently in relation to these two rights. The Court's interpretation of the right to life as implying a far-reaching mitigation obligation is not entirely implausible given the fundamental importance that the ECHR attaches to this right and the benefits that international cooperation on climate change mitigation could bring to its enjoyment within the territory of the Netherlands; the Court's identical interpretation of the right to private and family life is less convincing.[309]

Overall, if the Supreme Court of the Netherlands had followed the windows-of-applicability theory, it would not have assumed that the state's obligation to protect either of these rights requires full compliance with its general mitigation obligation (e.g., under customary international law).[310] An obligation to protect the right to life, or *a fortiori* the right to private and family life, does not justify as much mitigation action as the general mitigation obligations that the state accepted in light of a broader consideration of the impacts of climate change. An unusual degree of judicial discretion would then, unavoidably, have been involved in assessing the precise level of mitigation action implied by obligation of the Netherlands to take appropriate measures to protect these two rights. The judges could of course have concluded that, while the human rights treaty implies a far-reaching mitigation obligation, the state was already acting consistently with this obligation.[311] In fact, if the "common ground" method is taken seriously, it should be expected that most states would, most of the time, be found to be acting in compliance with their obligation. Thus, the Court in *Urgenda* would likely, but not necessarily, have found that the Netherland's preexisting policies and actions on climate change mitigation were sufficiently ambitious to be consistent with its obligation to protect the right to life. By contrast, as far as the right to private and family life is concerned, a finding of compliance would have been virtually unescapable.

As the windows-of-applicability theory recognizes the relevance of national circumstances, it is suspicious of any attempt to transplant *Urgenda* to other countries. In one of the first attempts to do so, the applicants in *Natur og Ungdom* failed to provide any evidence that climate change would significantly affect either the right to life or that of private and family life

[308] The Dutch courts took these elements into account, but not expressly as essential conditions to reaching their conclusions. *See in particular Urgenda* (HR), *supra* note 16, paras. 5.6.2, 7.3.4.

[309] The right to private and family life may admit a broad range of limitations and it can be derogated from in time of emergency. *See* ECHR, *supra* note 58, Arts. 8(2), 15. Moreover, the causal link with climate change is arguably less obvious than it is under the right to life, even considering the European Court of Human Rights' broad interpretation of the right to private and family life as implying a right to a healthy home environment. *See* Leijten, *supra* note 268.

[310] *See Urgenda* (HR), *supra* note 16, para. 5.7.1.

[311] As of 2015, the Netherlands expected to reduce its GHG emissions from 196 $MtCO_2eq$ in 2013 to 181 $MtCO_2eq$ in 2020. *See* the Netherlands's Second Biennial Report, *supra* note 114, at 54. The Netherlands was also participating in efforts to achieve the EU's objective of a 20% emission reduction in the EU's aggregate emissions reduction by 2020, compared with 1990 levels. *See* Doha Amendment to the Kyoto Protocol Art. 1(A), Dec. 8, 2012, in Dec. 1/CMP.12, UN Doc. FCCC/KP/CMP/2016/8/Add.1 (*entered into force* Dec. 31, 2020); Subsidiary Body for Scientific and Technological Advice, Compilation of Economy-Wide Emission Reduction Targets to Be Implemented by Parties Included in Annex I to the Convention, paras. 11–13, UN Doc. FCCC/SBSTA/2014/INF.6 (May 9, 2014). The EU projected that it would overachieve this objective with 24% emission reduction by 2020. *See* Second Biennial Report of the European Union Under the UN Framework Convention on Climate Change 38 (Dec. 2015), *at* https://unfccc.int/documents/198913.

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within Norway's territory or under its jurisdiction.[312] As such, the Supreme Court of Norway justly—at least on the basis of the parties' submissions—dismissed the applicants' submission that a far-reaching mitigation obligation could be implied from Norway's obligation to protect these rights.[313] Likewise, the windows-of-applicability theory provides a skeptical outlook on the applicants' contention, in *Duarte Agostinho*, that the thirty-three high-income member states of the Council of Europe must enhance their ambition on climate change mitigation in order to comply with their obligation to protect the rights to life and to private and family life.[314] The interpretation of the ECHR proposed by the applicants is certainly not supported by state practice, and it does not constitute a common ground among the member states of the Council of Europe, if—as the applicants contend—none of the thirty-three respondent states complies with it.

Overall, the windows-of-applicability theory suggests that human rights treaty bodies do not all have a role to play in promoting mitigation action. On the one hand, there is no denial that the Human Rights Committee and the CESCR may be able to interpret the obligation of some states to protect some rights under, respectively, the ICCPR and ICESCR, as implying substantive mitigation obligations, given in particular the broad personal scope of these treaties and the potential benefits of climate change mitigation for the enjoyment of these rights in many countries.[315] On the other hand, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Migrant Workers Convention do not easily lend themselves to such interpretations: their personal scope is more limited and (by contrast to the Convention on the Rights of the Child) the rights that these treaties protect are not uniquely affected by the impacts of climate change.[316] For instance, even though climate change may have different impacts on men and women,[317] climate change mitigation is unlikely to be a particularly effective way to fight against discrimination against women.[318]

3. *Discussion*

The windows-of-applicability theory results in a complex but nuanced interpretation of human rights treaties as the source of an obligation on climate change mitigation. On the

[312] The plaintiffs mentioned physical impacts of climate change on the state's territory (e.g., warming), but they did not demonstrate any impact on the enjoyment of the rights at issue. *See* Writ of Summons, Secs. 6-7, Oslo Tingrett [Oslo District Court], 16-166674TVI-OTIR/06, translation *available at* http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy (Nor.); Notice of Appeal, Sec. 3.2.2, HR-2020-2472-P, Dec. 22, 2020, Case No. 20-051052SIV-HRET, translation *available at* http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy (Nor.). *See also* note 204 *supra* (on Norway's assertion that it is "in a good position to adapt to the effects of climate change").

[313] *Natur og Ungdom*, *supra* note 17, paras. 168, 171.

[314] Application Form, *supra* note 158, Annex, para. 31; Communicated Case, *supra* note 20.

[315] *See, e.g.*, note 12 *supra*.

[316] *See generally* notes 13–14 *supra*.

[317] *See* Field, et al., *supra* note 37, at 50.

[318] *But see, e.g.*, CEDAW, Concluding Observations, Ninth Periodic Report of Guyana, para. 41, UN Doc. CEDAW/C/GUY/CO/9 (July 30, 2019) (expressing concern that Guyana's "continuing and expanding extraction of oil and gas in the State party and the resulting [GHG] emissions could undermine its obligations to women's empowerment and gender equality, as the resulting environmental degradation and potential natural disasters have a disproportionate impact on women").

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one hand, this theory does not categorically exclude the possibility of interpreting human rights obligations as implying an obligation to mitigate climate change. Compliance with human rights treaties requires a state to implement mitigation action to the extent that this may effectively promote the enjoyment of the treaty's rights within the state's territory or under its jurisdiction. This interpretation would most likely be arrived at in relation to general human rights treaties, rights of a fundamental importance (such as the right to life), and states whose population is particularly likely to benefit from mitigation action without being adversely affected by its unintended consequences. In this sense, *Urgenda* provided a relatively strong case for the recognition of a mitigation obligation under a human rights treaty in relation to the right to life.

On the other hand, this theory opposes the use of human rights treaties as a Trojan horse at the service of climate change mitigation. Human rights treaties are not a back door for judges to impose on states the obligations on climate change mitigation that states have never accepted;[319] nor can human rights institutions be transformed into substitutes for the full-fledged compliance mechanism that states decided not to create under the Paris Agreement.[320] This theory thus challenges any suggestion that human rights law "may secure higher standards" on climate change mitigation than general mitigation obligations do.[321] Windows of applicability are always relatively narrow because many of the impacts of climate change that general mitigation obligations seek to avoid cannot be framed as human rights impacts. It remains however that the impacts of climate change are arguably so severe that even a narrow window of applicability could conceivably allow a judge to raise serious concerns for the protection of human rights and to infer relatively far-reaching mitigation obligations—but the argument is neither obvious nor easy to make, and it can unfold successfully only in very specific national circumstances.

There is no denial that the windows-of-applicability theory is particularly difficult to implement. A judge can certainly not fully rely on any objective method to assess and weigh the four variables relevant to determining the size of a window of applicability. In particular, there is no generally accepted or objective way of measuring or comparing a state's vulnerability to climate change,[322] let alone the benefits of climate change mitigation for the protection of a right. Surely, the difficulty of interpreting the law does not normally release a judge from her duty to adjudicate.[323] Nor should this difficulty necessarily lead to an

[319] *Contra, e.g.*, WEWERINKE-SINGH, *supra* note 26, at 132; Knox, 2016 Report, *supra* note 26, para. 77; Hunt & Khosla, *supra* note 180, at 249.

[320] *See* note 87 *supra*. *Contra, e.g.*, WEWERINKE-SINGH, *supra* note 26, at 133; Boyle, *Climate Change, the Paris Agreement and Human Rights*, *supra* note 30, at 775.

[321] Boyle, *Human Rights and the Environment: Where Next?*, *supra* note 113, at 613. *See* notes 251–256 *supra*. There may be circumstances where an implied mitigation obligation is more demanding than *a specific commitment* (e.g., the obligation to pursue the implementation of an NDC, under Art. 4(2) of the Paris Agreement, in relation to an NDC that fails to reflect the state's highest possible ambition). However, an implied mitigation obligation cannot be as far-reaching as the general commitment under Art. 4(1)(b) of the UNFCCC and the general obligation of due diligence under customary international law, as these general obligations reflect a broader rationale for climate change mitigation.

[322] *See* James D. Ford, Lea Berrang-Ford, Alex Lesnikowski, Magda Barrera & S. Jody Heymann, *How to Track Adaptation to Climate Change: A Typology of Approaches for National- level Application*, 18 ECOLOGY & SOC'Y 40 (2013).

[323] *See* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 3 (1933); *Misdzi Yikh*, *supra* note 22, para. 56.

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extension of the deference that judges show to policy decisions[324]—to the contrary, one could argue that the risk of widespread impacts on fundamental rights justifies closer judicial scrutiny. What precisely a state must do to comply with its implied obligation to cooperate on climate change mitigation under a specific human rights treaty and in relation to a particular right, or what precisely it must do in order to comply with its general mitigation obligations under the UNFCCC and under customary international law, are not questions that can be answered with mathematical accuracy, but they may nevertheless be judicial questions.

V. Conclusion

Human rights treaties may be interpreted as requiring a state to cooperate on climate change mitigation in good faith to the extent that this helps to protect the rights of individuals within its territory or under its jurisdiction. This implied mitigation obligation allows the interpreter of human rights treaties to open a window onto general mitigation obligations arising from climate treaties and customary law. Yet, this window is generally narrow: as human rights treaties do not fully take into account the broad benefits of climate change mitigation on human welfare, the interests of future generations, and the protection of nature per se, they do not require full compliance with general mitigation obligations. The size of a window of applicability—that is to say, how far a human rights treaty requires a state to comply with its general mitigation obligations—depends on the personal scope of the treaty and the importance of the right at issue, as well as the potential benefits of climate change mitigation for the enjoyment of the right, and its unintended consequences for the enjoyment of rights, within the state's territory or under its jurisdiction.

This analysis thus suggests that human rights treaties may have a rather limited role to play with regard to climate change mitigation.[325] In fact, the interpretation of human rights treaties as the source of mitigation obligations faces some of the major hurdles that have hindered international cooperation on climate change mitigation in the last three decades. For one thing, human rights treaties view nature mostly in instrumental terms, and largely ignore the interests of future generations. Overall, international human rights law encourages each state to protect the rights of individuals within its territory rather than to cooperate on the global common good. This inherent tension between national interests and international cooperation will not be solved through an incremental extension of international human rights law, be it through the recognition of new rights (e.g., to a healthy environment or a sustainable climate),[326] the identification of fictitious rights-holders (e.g., "future generations" or "Mother Earth"),[327] or the extension of the extraterritorial application of human rights treaties—not, that is, without betraying the text, and the object and purpose, of human rights treaties, and using them as a Trojan horse at the service of extraneous objectives.

[324] *But see Neubauer*, *supra* note 22, para. 152 (suggesting that the Court would find a violation of the state's obligation to protect human rights only if the state has taken no measure at all, if the measures it has taken are obviously unsuitable, or if these measures fall significantly short of the requisite level of mitigation action).

[325] *Contra* Peel & Osofsky, *supra* note 11. On the implications for *Urgenda*, *Natur og Ungdom*, and *Duarte Agostinho*, *see* text at notes 311, 313, and 314 *supra*, respectively.

[326] *Contra* David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, *in* The Human Right to a Healthy Environment, *supra* note 128, 17, at 41.

[327] *See, e.g.*, UNFCCC, *supra* note 1, pmbl., para. 24; Paris Agreement, *supra* note 1, pmbl., para. 14.

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