

EUROPEAN CONSENSUS AS INTEGRATIVE DOCTRINE OF TREATY INTERPRETATION: JOINING CLIMATE SCIENCE AND INTERNATIONAL LAW UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

The “European consensus” is a key doctrine in the jurisprudence of the European Court of Human Rights. It assists the Court in establishing international human rights standards vis-à-vis national margins of appreciation. This Article examines how the doctrine of European consensus can be engaged to resolve urgent questions surrounding the concretization of State obligations in addressing climate change, working with the existing legal fabric that has evolved under the European Convention on Human Rights. The Article argues that the consensus doctrine has two integrative functions. The first integrative function concerns the Court’s reference to an existing or absent scientific consensus in cases that are open to scientific determination. The second integrative function relates to the elaborate account of State practice that accompanies the Court’s reasoning on the European consensus, which this Article explains under Article 31(3)(b) of the Vienna Convention on the Law of Treaties. On that basis, it is demonstrated how science and emerging legal practices shape a European consensus that narrows States’ discretion in tackling climate change under the European Convention on Human Rights. Conceptualized as an integrative judicial doctrine, European consensus promises to join science and law in a

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systematic process of treaty interpretation in the context of a major global challenge. The European consensus doctrine could be a significant law-harmonizing tool in the battle against climate change.

I. INTRODUCTION

The “European consensus” is a key doctrine in the jurisprudence of the European Court of Human Rights (The Court or ECtHR). The Court relies on this doctrine to delimit the margin of appreciation that it grants a respondent State, and it uses the doctrine to justify supervision and intervention against the “outlier State” when the legal practices of Member States of the European Convention on Human Rights (The Convention or ECHR) reflect a certain commonality.¹ To determine this commonality, the Court uses a comparative approach that includes not only the domestic legal orders of Member States but also analysis of wider international trends derived from international law and developments under other human rights instruments. This Article reconceptualizes European consensus as an integrative judicial doctrine and examines how the Court integrates scientific findings into the analysis. It explains European consensus as a means of treaty interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties (The Vienna Convention or VCLT). On that basis, the Article examines the European consensus and its oversight function in the context of the response in international human rights law to the challenge of climate change, a specific area of the law where the doctrine has not yet received adequate attention.

The unprecedented impacts of anthropogenic climate change and the corresponding scientific evidence have already played a crucial role for domestic courts in recognizing a rights dimension of climate change. Scientific evidence has helped to define the yardsticks necessary for greenhouse gas (GHG) emissions reductions to protect present and future generations,² review administrative decision-making for major infrastructure projects,³ and clarify the obligations of

¹ European Convention on Human Rights, originally: Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No.005.

² Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18 (Ger.), the decision strengthens the rights of future generations through acknowledging the “advance interference-like effect” of current climate targets, [hereinafter *Neubauer*]; *Staat der Nederlanden v. Stichting Urgenda*, Hoge Raad der Nederlanden, (2019), NJ 2020, 19/00135 (Neth.) [hereinafter *Stichting Urgenda*]; *Thomson v. Minister for Climate Change Issues* NZHC 733 (N.Z.) (2017) [hereinafter *Thomson*]; *Backsen v. Germany*, Verwaltungsgericht Berlin [VG] [Administrative Trial Court] Case 10 K 412.18 (2019), (Ger.). Courts are not always provided with the most elaborate account of climate or indeed attribution science, see further Rupert F. Stuart Smith, Friederike E. L. Otto, Aisha Saad, Gaia Lisi, Petra Minnerop, Kristian Cedervall Lauta, Kristin van Zwieten & Thom Wetzler, *Filling the Evidentiary Gap in Climate Litigation*, 11 NATURE CLIMATE CHANGE, 651 (2021); see also Maria L. Banda, CLIMATE SCIENCE IN THE COURTS: A REVIEW OF U.S. AND INTERNATIONAL JUDICIAL PRONOUNCEMENTS (Environmental Law Institute, 2020), <https://www.eli.org/sites/default/files/eli-pubs/banda-final-4-21-2020.pdf> (last visited July 20, 2021); Elizabeth Fisher, Eloise Scotford & Emily Barritt, *The legally disruptive nature of climate change*, 80 MOD. L. REV., 173 (2017).

³ *Bushfire Survivors for Climate Action Incorporated v. EPA* [2011] NSWLEC 92 (Austr.); *Natur og Ungdom v. The Government of Norway*, Norges Høyesterett, (Supreme Court of Norway) 2020-04-

private actors.⁴ The Intergovernmental Panel on Climate Change (IPCC)⁵ in Working Group I to the Sixth Assessment Report (AR6) confirmed in unequivocal terms the scientific basis of our rapidly changing climate.⁶ In courts around the world, the number of climate-related cases continuously rise; litigation strategies are being refined and are spreading across a broader range of State jurisdictions.⁷ Climate litigation has also generated a rich body of literature in academic scholarship.⁸ Domestic courts and tribunals are regularly asked to decide upon

20, 20-051052SIV-HRET, ¶¶ 165-167, (2020) (Norway) [hereinafter *Natur og Ungdom*], Appeal from Borgarting lagmannsrett (Borgarting Court of Appeal) 18-060499ASD-BORG/03, (2020) (Norway); *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7 (2019) (Austr.) [hereinafter *Gloucester*]; *Earthlife Johannesburg v. Minister of Environmental Affairs* 2017, Case No. 65662/16, (2017) (S. Afr.) [hereinafter *Earthlife Johannesburg*]; *Save Lamu v. National Environmental Management Authority* (2019) Case No. NEMA/ESIA /PSL/3798 (2019) (Kenya) [hereinafter *Save Lamu*]; *R. (on the application of Plan B Earth Ltd.) v. Secretary of State for Transport, EWCA (Civ) 214*, (2020) (Eng.); *R. (on the application of Friends of the Earth Ltd. and others) v. Heathrow Airport Ltd*, UKSC 42, (2020) (Eng.); *Massachusetts v. EPA*, 549 U.S. 497, 504-05, (2007).

⁴*Milieudefensie v. Royal Dutch Shell*, Rechtbank Den Haag, C/09/571932 / HA ZA 19-379, (2021) (Neth.); still pending at evidentiary stage but conclusively argued according to the Court is *Lliuya v. RWE AG*, I-5 U 15/17, Oberlandesgericht Hamm [OG] [Higher Regional Court of Hamm] OLGZ, (2018) (Ger.).

⁵ The IPCC is the United Nations body for assessing the science on climate change and findings are included in regular assessment reports and special reports. It was created in 1988 by the World Meteorological Organization and the United Nations Environment Programme. See further <https://www.ipcc.ch/about/>.

⁶ IPCC (Aug. 2021), *Summary for Policymakers*, in: CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Valerie Masson-Delmotte et al., 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf [hereinafter *IPCC (Aug. 2021), Working Group I*].

⁷ See UNEP Climate Litigation Report, 2020 Status Review, <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>. [hereinafter *UNEP Litigation Report*]. Around 1,387 cases were filed in the United States, 454 in courts in 39 other countries, and 13 in international regional courts and tribunals. There are at least 58 cases in 18 Global South jurisdictions. More than half of the decided cases had favorable outcomes for increased climate protection. See further, Joana Setzer & Catherine Higham, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2021 SNAPSHOT, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy (2021), <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/> (last visited July 29, 2021) and the most recent report of 2022 (available via the website).

⁸ 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); Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 *AJIL* 679 (2019); Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 114 *AJIL UNBOUND* 56, 56-60 (2020); RICHARD J. LAZARUS, *THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT* (2020); MARGARETHA WEWERINKE-SINGH, *STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW* (2019); SUMUDU ATAPATTU, *HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE* (2016); Margaret Rosso Grossman, *Climate Change and the Individual*, 66 *AM. J. COMPAR. L.* 345, 353 (2018); Brian J. Preston, *The Evolving Role of Environmental Rights in Climate Change litigation*, 2 *CHINESE J. ENV'T L.* 131 (2018); Jaqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENV'T L.* 37 (2017); Jacqueline Peel, Hari Osofsky & Anita Foerster, *Shaping the "Next Generation" of Climate Change Litigation in Australia*, 41 *MELB. U. L. REV.* 793 (2017); Geetanjali Ganguly, Joana Setzer, Veerle Heyvaert, *If at First You*

scientific evidence in a variety of legal areas, and to develop⁹ and apply¹⁰ legal concepts vis-à-vis varying degrees of scientific confidence levels and probabilities.¹¹ There is a growing tendency to heed judicial pronouncements of courts in foreign jurisdictions in an emerging inter-jurisdictional judicial discourse on global and scientifically complex issues.¹²

Academic literature has queried the capacity of international courts and tribunals to consider scientific evidence.¹³ This discussion surrounding the validity of scientific fact-finding, especially in international courts, is at least partly rooted in different understandings of what exactly judicial assessment of scientific data entails.¹⁴

In this Article, this judicial assessment of scientific evidence is not used to imply judicial scrutiny or determination of the *credibility* or *viability* of data presented in court. This would neglect the dialectic between “methods of science” and “methods of law.”¹⁵ Rather, scientific evidence establishes a foundation for judicial analysis within and according to legal parameters.¹⁶ Any court that considers itself unable to distinguish between established factual and uncertain scientific information, based on parties’ submissions, may rely on further expert opinion.¹⁷ If judicial assessment of scientific evidence is understood to require presenting expert opinion to inform the legal reasoning, including on the scientific probabilities and uncertainties, international courts have the capacity to assess scientific evidence. The International Court of Justice (ICJ), for example, has made use of Article 50 of its statute¹⁸ in order to broaden its factual knowledge

Don't Succeed: Suing Corporations for Climate Change, 38 OXFORD J. LEGAL STUD. 841 (2018); Petra Minnerop, *The First German Climate Case*, 22 ENV'T L. REV. 215 (2020); David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, 64 FLA. L. REV. 15 (2012).

⁹ A very recent example of a highest court that further advanced an existing concept of constitutional law in order to protect future generations and promote intergenerational equity through the notion of “advance interference-like effect,” is the German Federal Constitutional Court in *Neubauer*, *supra* note 2.

¹⁰ *Stichting Urgenda*, *supra* note 2; *Gloucester*, *supra* note 3; *Earthlife Johannesburg*, *supra* note 3; *Thomson*, *supra* note 3.

¹¹ *Stichting Urgenda*, *supra* note 2, ¶ 562; *Neubauer*, *supra* note 2, ¶¶ 31-37; *Natur og Ungdom*, *supra* note 3, ¶¶ 50-56; *Gloucester*, *supra* note 3, ¶¶ 431-435; *Save Lamu*, *supra* note 3, ¶¶ 138, 139.

¹² Minnerop & Røstgaard, *supra* note 8, at 847, 919.

¹³ Makane Moïse Mbengue, *Scientific Fact-finding by International Courts and Tribunals*, 3 J. INT'L DISP. SETT'L., 509, 516 (2012).

¹⁴ *Id.*

¹⁵ Makane Moïse Mbengue, *International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication*, 34 LOY. L.A. INT'L & COMP. L. REV. 53, 56 (2011).

¹⁶ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 ICJ REP. 14, ¶ 168 (Apr. 20). ICJ decisions are available online at <http://www.icj-cij.org/>.

¹⁷ *See id.*, Joint Diss. Opinion of Judges Al-Khasawneh and Simma, ¶ 5.

¹⁸ Art. 50 ICJ statute provides: “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion,” <https://www.icj-cij.org/en/statute>.

base for legal analysis.¹⁹ The ICJ used specifically science-based expert knowledge in *Whaling in the Antarctic*, where it observed that the definition of scientific research was a matter of scientific opinion. However, the ICJ confirmed this must be distinguished from the interpretation of the Convention, a task reserved for the Court.²⁰ In a specific approach to the valuation of environmental damage to ecosystems, the ICJ had recourse to scientific research when it adjudicated compensation for environmental damage in 2018 for the first time.²¹ Similarly influenced, the ICJ appointed scientific experts to calculate the loss to natural resources resulting from unlawful exploitation during the Ugandan armed forces' occupation of parts of Congolese territory.²²

One court that stands at the forefront of international adjudication, where legal analysis is regularly situated within the context of a variety of complex scientific issues, is the ECtHR.²³ The ECtHR is instrumental in harmonizing human rights standards in Europe. Appraised as a constitutional instrument,²⁴ the Convention paves the way for a European or even cosmopolitan legal order.²⁵ In cases that are open to scientific determination, the ECtHR emphasizes the role of medical and scientific developments alongside assessment of a convergent legal practice among parties. The ECtHR does this by determining the margin of appreciation that States have to define domestic standards of human rights protection.²⁶ The Court has employed scientific determination to align its judicial

¹⁹ *Corfu Channel* (UK v. Alb.), Order, 1948 ICJ REP. 7, 124 (Dec. 17); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Cost. Ric. v. Nic.), Order, 2016 ICJ REP. 235 (May 31).

²⁰ *Whaling in the Antarctic* (Austl. v. Jap.), 2014 ICJ REP. 226, ¶ 82 (Mar. 31).

²¹ In *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicar.) (Compensation) 2018 ICJ REP. 15, ¶ 34 (Feb. 2) the ICJ stated: "In cases of alleged environmental damage [...], particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered." See also *id.*, ¶ 78.

²² *Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Order (Decision to obtain an expert opinion), ¶¶ 13-16 (Sept. 8, 2020), for the decision on the merits see *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, ¶ 216 (Dec. 19).

²³ See e.g., *Ibrahim v. The United Kingdom*, App. Nos. 50541/08, 50571/08, 50573/08 and 40351/09, Eur. Ct. H.R., ¶¶ 288, 291 (Sept. 13, 2016), (unreported); *S. and Marper v. The United Kingdom*, 2008-V Eur. Ct. H.R. 167, ¶¶ 70, 105; *Evans v. The United Kingdom*, 2007-I Eur. Ct. H.R. 353, ¶ 81 [hereinafter *Evans*].

²⁴ Kanstantsin Dzehtsiarou, *What Is Law for the European Court of Human Rights?* 49 GEO. J. OF INT'L L. 89, 131 (2017); see also WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* (2015).

²⁵ Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 J. GLOB. CONST. 53, 80 (2011), notes two strands, the first being the rulings of the ECtHR concerning extradition in cases where the risk of inhumane and degrading treatment exists, and the second strand where the Court has extended coverage of the Convention to acts that harm people living outside of the territory of the Council of Europe.

²⁶ *Christine Goodwin v. The United Kingdom*, 2002-VI Eur. Ct. H.R. 1, ¶¶ 83, 100 [hereinafter *Christine Goodwin*]; *S.H. v. Austria*, 2011-V Eur. Ct. H.R. 295, ¶ 97 [hereinafter *S.H. v. Austria*].

function with the evolving nature of rights protection in ever-changing conditions, utilizing and advancing the character of the Convention as a “living instrument.”²⁷ Both the existence and absence of a scientific consensus are intertwined with the breadth of the margin of appreciation.²⁸

This Article argues that a harmonizing function of the European consensus doctrine incorporates evidence provided by climate scientists and aligns it with a common legal trajectory across parties to the Convention. An approach that takes evolving scientific understanding and corresponding legal developments into account not only prevents the Court from operating in a value-free vacuum²⁹ but also bodes well for a body of judicial work that enables higher standards in rights protection alongside dynamically evolving scientific evidence.³⁰ A science-based consensus, therefore, can safeguard internationally-determined standards under the Convention where the Court’s role typically solicits caution towards treaty interpretation exclusively placed upon State practice.³¹

Defining the requirements of rights protection from adverse impacts of climate change would require the Court to hear an array of scientific facts about climate change, including its already occurring and forecasted impacts on human health.³² Finding a scientific consensus, which is reflected in corresponding legal measures at domestic levels, could define the outcomes of climate change cases before the ECtHR.

This is an impactful and important prospect. It is impactful because it could determine measures that parties must adopt to fulfill their obligations under

²⁷ *Glor v. Switzerland*, 2009-III Eur. Ct. H.R. 33, ¶ 75; *Lee v. The United Kingdom*, App. No. 25289/94, ¶ 95 (Jan. 18, 2001), (unreported); *Demir v. Turkey*, 2008-V Eur. Ct. H.R. 333, paras. 76–86 [hereinafter *Demir*].

²⁸ *Hatton v. The United Kingdom*, 2003-VIII Eur. Ct. H.R. 189, ¶¶ 97-101 [hereinafter *Hatton*].

²⁹ It should be noted that the Court has held that while it acknowledges the margin of appreciation in a “matter of morals, particularly in an area [...] which touches on matters of belief concerning the nature of human life,” it “cannot agree that the State’s discretion in the field of the protection of morals is unfettered and unreviewable,” *Open Door v. Ireland*, App. No. 14234/88; 14235/88, ¶ 68 (Oct. 29, 1992), (unreported) [hereinafter *Open Door*]; see generally George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. OF INT’L LAW 509 (2010).

³⁰ *Airey v. Ireland*, App. No. 6289/73, ¶ 26 (Feb., 6, 1981), (unreported); *Loizidou v. Turkey*, App. No. 15318/89, (preliminary objections), ¶ 71 (Mar. 23, 1995) [hereinafter *Loizidou, Prel. Obj.*].

³¹ It has been noted that “the specific nature of the Convention as a human rights instrument solicits a cautious approach” towards relying on state practice for interpreting the scope of obligation of states under the Convention, Anja Seibert-Fohr, *The Effect of Subsequent Practice on the European Convention on Human Rights. Considerations from a General International Law Perspective in THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW*, 62 (Anne van Aaken & Julia Motoc eds., 2018).

³² See, e.g., *Duarte Agostinho v. Portugal*, Communicated Case No. 39371/20 (Nov. 13, 2020), <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-206535%22> [hereinafter *Duarte Agostinho*], Intervention of the UN Special Rapporteur on toxics and human rights, para. 13, <https://ln.sync.com/dl/383819540/pwjkt7x-uy5x8334-sib42xf2-pk8wkc9b/view/doc/5917189570010>.

the Convention. If conceptualized as an integrative judicial doctrine,³³ European consensus promises to join science and law in a systematic process of treaty interpretation in the context of a global challenge. This is important and axiomatic for framing the wider discussion of legitimacy of the European consensus paradigm and its connection to the societies it serves. However, in order to be applied as a global standard, the doctrine must be applied in a consistent manner, pursuant to the parameters of treaty interpretation in international law. By doing so, the doctrine enhances predictability in science-related disputes.

Climate change cases in which the role of the European consensus in science and law could be tested are no longer expectations for a distant future. In September 2020, the first climate case was brought before the ECtHR by six young Portuguese nationals.³⁴ The claimants have asserted that thirty-three Council of Europe States (the twenty seven Member States of the European Union, the United Kingdom, Switzerland, Norway, Russia, Turkey, and Ukraine) have failed to take sufficient steps to address climate change under the 2015 Paris Agreement on Climate Change.³⁵ In line with the Paris Agreement's efforts to keep increases in global average temperature to well below 2°C of pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C,³⁶ the claimants argued that limiting global warming to 1.5°C above pre-industrial levels would “significantly reduce the risks and effects of climate change.”³⁷ The claimants asserted in particular that amplified forest fires in Portugal directly resulted from global warming. Given the urgency of their country's situation, the claimants have submitted that it was crucial for the Court to grant an exemption from the obligation to exhaust domestic remedies in each Member State.³⁸

In October 2020, the Court allowed the request to “be examined as a matter of priority” in accordance with Article 41 of the Rules of the Court.³⁹ The case invokes States' obligations arising under the right to life enshrined in Article 2 ECHR and the right to family life of Article 8 of the ECHR—provisions that the

³³ This coheres with the view of Judge Christos L. Rozakis that the function of the Court is to construe the law so that it can be applied at a pan-European level, *The European Judge as Comparatist*, 80 Tul. L. Rev. 257, 272 (2005).

³⁴ *Duarte Agostinho*, *supra* note 32.

³⁵ Paris Agreement, Dec. 12, 2015, 55 Int'l Legal Materials 740 (2016); Dec. 1/CP.21, Adoption of the Paris Agreement, ¶ 17, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

³⁶ *Duarte Agostinho*, *supra* note 32.

³⁷ *Id.*

³⁸ *See id.*, 2.

³⁹ *Id.*; Article 41 of the Rules of Court (Feb. 1, 2022) states: “In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application,” https://www.echr.coe.int/documents/rules_court_eng.pdf.

ECtHR uses in case law to offer protection from environmental harm.⁴⁰ In addition, the claim is based on Articles 1, 3, 8, 14 and 34 of the Convention⁴¹ and Article 1 of Protocol No. 1.⁴² The claimants questioned if the respondent States had fulfilled their obligations, “having regard to their margin of appreciation in the field of the environment,”⁴³ and emphasized rights under the Convention in light of Article 3(1) of the United Nations Convention on the Rights of the Child⁴⁴ and the principle of intergenerational equity.⁴⁵ As a result, concrete obligations of the respondent States to define their legal response to climate change under the Convention could emerge if they have exceeded their margins of appreciation through insufficient climate action.

This narrowing of States’ margins of appreciation presupposes that science and law are joined within the consensus doctrine. This is the central argument of this Article. This argument combines a law-external question (the function of scientific evidence) with a systematic-interpretative method towards international law (interpretation of treaties). The approach is, thus, interdisciplinary, and it integrates different legal orders in a comparative approach.⁴⁶ Yet, it is not realist, constructivist, liberal, or critical.⁴⁷ Instead, this Article’s focus is how international law *works*—or *could work*—in solving a major global challenge. In particular, this Article examines how the doctrine of European consensus can be engaged to resolve urgent questions surrounding the concretization of State obligations in addressing climate change, working with the existing legal fabric that has evolved under the ECHR.

The discussion herewith is particularly timely. Since Protocol No. 15 to the Convention entered into force on August 1, 2021, States added a new recital confirming that they have the primary responsibility to secure the rights and

⁴⁰ This concerns either situations where dangerous activities or natural hazards interfered with effective rights protection. See *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 79, ¶ 69 [hereinafter *Öneryıldız*]; *L.C.B. v. The United Kingdom*, 1998-III Eur. Ct. H.R., ¶ 36; *Budayeva v. Russia*, 2008-II Eur. Ct. H.R. 267, ¶ 128 [hereinafter *Budayeva*]; *Osman v. The United Kingdom*, App. No. 87/1997/871/1083, ¶ 116 (Oct. 28, 1998), (unreported); *López Ostra v. Spain*, Application No. 16798/90, ¶¶ 51, 58 (Dec. 9, 1994), (unreported); *Hatton*, *supra* note 28, ¶ 122; Alan Boyle, *Human Rights and the Environment: Where Next?* 23 EUR. J. OF INT’L LAW 613 (2012).

⁴¹ See *Duarte Agostinho*, *supra* note 32, at 2-3.

⁴² See *id.*; see further the explanatory note at https://echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.

⁴³ *Duarte Agostinho*, *supra* note 32, at 2.

⁴⁴ *Id.*; the Convention on the Rights of the Child (Nov. 20, 1989), 1577 U.N.T.S. 3.

⁴⁵ The claimants derive the principle of intergenerational equity from several international instruments, including the Rio Declaration of 1992 on Environment and Development, the Preamble to the Paris Agreement and the United Nations Framework Convention on Climate Change. *Id.*

⁴⁶ RAN HIRSCHL, *COMPARATIVE MATTERS* (2014), the instructive chapter on research design, 224-281.

⁴⁷ For a comprehensive and timely discussion of the various approaches to international law see Daine Abebe, Adam Chilton, & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHIC. J. INT’L L., 1, 5, 6, 23 (2021).

freedoms enshrined in the Convention.⁴⁸ The recital emphasizes that States enjoy a margin of appreciation in doing so, while the jurisdiction of the Court mainly serves a supervisory function.⁴⁹ Defining the breadth of the margin of appreciation, in line with existing doctrine, is therefore even more important.

This Article proceeds in four parts. Part II explains the doctrine of European consensus and its integrative functions. It explains the terminology and methodology in the Court's judicial pronouncements on European consensus in the context of its general approach towards international law, and it places the doctrine within the current scholarly debate. Part III turns to the role of science in shaping a European consensus. It analyzes the scientific element of the doctrine as an observable phenomenon of more recent case law where scientific and legal consensus have become interconnected and determinative for resolving certain types of disputes. Part IV explains European consensus as a means of treaty interpretation. It demonstrates that even without explicitly mentioning Article 31(3)(b) VCLT, the Court deploys with this judicial doctrine an authentic means of treaty interpretation, embedded within the wider system of treaty interpretation in international law. It is demonstrated that the European consensus incorporates a common understanding of parties on the substance of the Convention through a comparative analysis of parties' legal measures. The VCLT and the Court's general reliance on this "treaty on treaties,"⁵⁰ in conjunction with findings from the United Nations International Law Commission's (ILC) "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties," define the analytical framework in this part.⁵¹ Part V applies the insights of Parts III and IV to identify a European consensus on effective climate action. It re-conceptualizes the European consensus as a means of interpreting the Convention that integrates science and State practice in the specific context of climate change.

⁴⁸ The Protocol No. 15 entered into force on Aug. 1, 2021, CETS 213 – Convention for the Protection of Human Rights (Protocol No. 15), 24.VI.2013. Art. 1 of Protocol 15 states: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention," *see also* the Explanatory Note, https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

⁴⁹ *Id.*

⁵⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. Anthony Aust, *Vienna Convention on the Law of Treaties (1969)* in MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (Anne Peters, ed.), opil.ouplaw.com.

⁵¹ Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). The report will appear in Yearbook of the International Law Commission, 2018, vol. II, Part Two; https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf. [hereinafter: *Draft Conclusions*].

Intuitively, the assumption is that a European consensus on States' obligations to enact legally sound and effective climate mitigation and adaptation measures, based upon the latest scientific findings, already exists. This Article provides necessary conceptual and analytical groundwork for turning this assumption into a well-reasoned insight. On that basis, it adds two new perspectives to the persistent debate concerning the criticality and legitimacy of a frequently challenged doctrine. The conclusion in Part VI provides a summary of this Article's contribution to a conceptual analysis that joins law and science in addressing a global challenge to human rights protection, thereby providing an argument transferable to other human rights frameworks.

II. EUROPEAN CONSENSUS AS INTEGRATIVE DOCTRINE

With the Court's jurisprudence comes a corollary of legal concepts and doctrines, and these have in turn become a source of judicial inspiration for other courts.⁵² One of these is the doctrine of European consensus. The Court uses the consensus doctrine to counter a wide margin of appreciation that States claim at the domestic level for the protection of human rights.⁵³ As recognized by the ILC, the rights and obligations under the Convention must be "correctly transformed, *within the given margin of appreciation*, into the law, the executive practice and international arrangements of the respective State party."⁵⁴ Parties to the Convention generally heed the judgments of the Court in accordance with their treaty obligations.⁵⁵ The ECtHR's judgments resonate widely in national courts⁵⁶ and are recognized by other international courts⁵⁷ and human rights bodies.⁵⁸

The ECtHR has famously classified the Convention as a "living instrument", as noted earlier. It flows from here that both the Convention and the consensus doctrine are capable of evolving over time, corresponding to the nature

⁵²*Ahmadou Sadio Diallo* (Rep. of Guinea v. Dem. Rep. of the Congo), Merits, 2010 ICJ REP. 63, ¶ 68 (Nov. 30); *Natur og Ungdom*, *supra* note 3, ¶¶ 165-167; *State v. Ncube* (543/90) ZASCA 6 (Feb., 22 1993) (S. Afr.).

⁵³ *Evans*, *supra* note 23, ¶ 77; *X, Y Z v. UK*, 1997-II Eur. Ct. H.R., ¶ 44 [hereinafter *X, Y, Z v. UK*]; *Fretté v. France*, 2002-I Eur. Ct. H.R., 345, ¶ 41 [hereinafter *Fretté v. France*]; *Christine Goodwin*, *supra* note 26, ¶ 85; *A, B and C v. Ireland*, 2010-VI Eur. Ct. H.R. 185, ¶ 232 [hereinafter *A, B and C v. Ireland*].

⁵⁴ *Draft Conclusions*, *supra* note 51, conclusion 9, commentary, ¶ 4, at 72 (italics added by the author).

⁵⁵ There are, of course, exceptions to this general rule. For example, after the judgment in *Markin v. Russia*, 2012-III Eur. Ct. H.R. 77, the Russian Constitutional Court changed its attitude towards the interaction with the ECtHR, *see further* Alexei Trochev, *The Russian Constitutional Court and the Strasbourg Court: Judicial pragmatism in a dual state in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT* 125 (Lauri Mälksoo & Wolfgang Benedek eds., 2017).

⁵⁶ *Staat der Nederlanden v. Stichting Urgenda*, Rechtbank Den Haag, AB 2018, 417, ¶ 42 (Oct. 9, 2018) (Neth.); *Natur og Ungdom*, *supra* note 3, ¶¶ 165-167.

⁵⁷ *Ahmadou Sadio Diallo*, *supra* note 52.

⁵⁸ Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. OF INT'L L. & POL. 843 (1999).

of human rights protection as a “perpetual work in progress.”⁵⁹ A rich body of literature analyzes European consensus, and the legitimacy and the consistency of the consensus paradigm have attracted much debate.⁶⁰

This Article adds two perspectives that have so far not been part of the discussion. The first perspective flows from a more recently observed phenomenon in the case law concerning the role of science in establishing a European consensus and the function of that scientific consensus for the emerging legal commonalities. In cases that are open to a scientific discussion, such as the definition of the beginning of life⁶¹ or in-vitro fertilization,⁶² the ECtHR has increasingly found that a scientific *and* a legal consensus must exist either “on the interest at stake” or on “the means to protect an interest.” This “combined” consensus in science and law, on either one or both of these elements (the “interest at stake” or the “means to protect”), can limit States’ discretion in defining the human rights standard.⁶³

The second perspective stems from the characterization of the doctrine within international law. It is argued here that European consensus is an integrative doctrine of treaty interpretation under the VCLT,⁶⁴ and that the Court articulates the subsequent agreement of States, derived from subsequent practice in the application of the treaty, regarding the interpretation of the ECHR. Explaining the European consensus as an integrative doctrine of treaty interpretation that is anchored in Article 31(3)(b) VCLT captures two distinctly different relations of the doctrine with international law. This differentiation has important consequences for discussions about the doctrine’s legitimacy.

The first relation with international law concerns the nature of European consensus as a means of treaty interpretation pursuant to Article 31(3)(b) of the VCLT. This Article argues that European consensus integrates the “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” (Article 31(3)(b)) into the Court’s reasoning. This defines the international legal nature of the interpretative instrument. The

⁵⁹ This also entails that the Court is free to depart from an earlier judgment if there are “cogent reasons.” See DAVID HARRIS, MICHAEL O’BOYLE & WARBICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (4th ed. 2018); Laurence R. Helfer & Erik Voeten, *Walking Back Human Rights in Europe?* 31 *EUR. J. OF INT’L LAW* 797 (2020).

⁶⁰ For a discussion, see Part B.

⁶¹ *Vo v. France*, 2004-VIII Eur. Ct. H.R. 67, ¶ 77 [hereinafter *Vo v. France*], *A, B and C v. Ireland*, *supra* note 53, ¶ 232.

⁶² *S.H. v. Austria*, *supra* note 26, ¶ 118; *Evans*, *supra* note 23.

⁶³ *Vo v. France*, *supra* note 61, ¶ 82.

⁶⁴ Oliver Dörr, *Article 31*, in *VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY*, 557, 611 (Oliver Dörr & Kirsten Schmalenbach eds., 2018); RICHARD GARDINER, *TREATY INTERPRETATION*, 478 (2d ed. 2015); see further Jan Klabbers, *Virtuous Interpretation*, in *TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON* (Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris eds., 2010).

Court uses a means of treaty interpretation under international law and articulates what it has found to be a sufficiently well-established commonality across contracting parties, which limits the wide margin of appreciation that they assumed prior to the development of this European consensus.

The second relation with international law pertains to the content of European consensus. As will be explained below, the Court has held that the defining commonality can be derived from European jurisdictions or it can be rooted in international law, thereby going beyond the scope of the legal orders of the Council of Europe Member States. It will be discussed below how this international commonality can be relevant for defining a European human rights standard. Finding commonality in European or in international law (or in both), however, concerns not the *nature* of the instrument but the specific *content* of the European consensus. In other words, even if the consensus (only) exists across the Council of Europe Member States, the doctrine can still qualify as a means of treaty interpretation in international law. Only the commonality that the Court finds in that case is derived from a distinctive European approach as opposed to a wider international standard.⁶⁵

The doctrine's two integrative functions, which span the intersections of international law with science and doctrine, are not only crucial for effective rights protection. These functions potentially instill clarity, predictability, and legitimacy for a doctrine that—as far as can be seen—the ECtHR will not abandon in the near future.⁶⁶ The underlying rationale of European consensus and its application could therefore play a crucial role when the Court decides on a minimum threshold of rights protection in the climate change context.

A. The Court's Terminology and Methodology

The Court has used inconsistent terminology when referring to European consensus. It introduced the concept to capture and express the nature of the Convention as a “living instrument” in *Tyrer v. The United Kingdom*,⁶⁷ where it relied on domestic policy, and developed its consensus analysis further in *Marckx*

⁶⁵ The Court has used “international standard” and “international consensus” or “international trend” and the terminology and methodology will be discussed below.

⁶⁶ In addition to the principle above about the margin of appreciation being wide in this area, the Court recalls that the quality of the parliamentary and judicial review of the necessity of a general measure, such as the disputed disenfranchisement, imposed as a consequence of declaring a person legally incompetent, is of particular importance. This includes the operation of the relevant margin of appreciation, *see*, among others, *Animal Defenders International v. The United Kingdom*, 2013-II Eur. Ct. H.R. 203, ¶ 108; and *Correia de Matos v. Portugal*, App. No. 56402/12, ¶¶ 117, 129 (Apr. 4, 2018), (unreported); *Strobye and Rosenlind v. Denmark*, App. Nos. 25802/18 and 27338/18, ¶ 114 (Feb. 2, 2021), (unreported), a request for referral to the Grand Chamber is pending.

⁶⁷ *Tyrer v. The United Kingdom*, App. No. 5856/72, ¶ 31 (Apr. 25, 1978).

v. *Belgium*,⁶⁸ where it included international conventions in its reasoning. In a similar vein, the “marked changes which have occurred . . . in the domestic laws of the Member States” were recognized as decisive factors in *Dudgeon v. The United Kingdom*.⁶⁹ Particularly in its early case law, the Court used a variety of terminology in applying European consensus; it held that there was no development of the law in the majority of States into a “clear direction,”⁷⁰ or no “common ground.”⁷¹ The Court introduced the phrases “emerging international consensus among contracting states of the Council of Europe,”⁷² “emerging consensus,”⁷³ “general consensus,”⁷⁴ and “consensus and common values,”⁷⁵ as well as “broad consensus at the international and European level”⁷⁶ or simply “European consensus.”⁷⁷ Further descriptions include “common European standard,”⁷⁸ “common ground,”⁷⁹ “evolving”⁸⁰ developments in science and law, and “increasing emphasis.”⁸¹ Thus, the terminology indicates that there can be different degrees of commonality; and while unanimity is not required, at least a dynamic development across jurisdictions towards an increasingly higher standard of rights protection is necessary.

The methodological core of this approach forms a comparison between the level of protection that is offered in the majority of Member States of the Council of Europe⁸² and the standard applicable in the defendant State. Measures of the legislature are not beyond judicial scrutiny, and the Court will carefully

⁶⁸ *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A), ¶ 41 (1979).

⁶⁹ *Dudgeon v. The United Kingdom*, App. No. 7525/76, ¶¶ 56, 60 (Oct. 22, 1981), (unreported), (criminalization of homosexual acts between consenting adults) [hereinafter *Dudgeon*].

⁷⁰ *Marckx*, *supra* note 68, ¶ 41; *Dudgeon*, *supra* note 69, ¶ 60.

⁷¹ *Sørensen and Rasmussen v. Denmark*, 2006-I 1, ¶¶ 40-41 (1984); *Rees v. The United Kingdom*, App. No. 9532/81, ¶ 37 (Oct. 17, 1986), (unreported); *Cossey v. The United Kingdom*, App. No. 10843/84, ¶ 40 (Sept. 27, 1990), (unreported); *Dosier- und Fördertechnik GmbH v. Netherlands*, App. No. 15375/89, ¶ 68 (Feb. 23, 1995), (unreported).

⁷² *Chapman v. The United Kingdom*, 2001-I, Eur. Ct. H.R. 41, ¶ 93, 2001.

⁷³ *Id.*, ¶ 70.

⁷⁴ *Opuz v. Turkey*, 2009-III, Eur. Ct. H.R. 107, ¶¶ 138, 2009 [hereinafter *Opuz*].

⁷⁵ *Id.*, ¶ 164.

⁷⁶ *M.S.S. v. Belgium and Greece*, 2011-I, Eur. Ct. H.R. 255, ¶¶ 251, 2011 [hereinafter *M.S.S. v. Belgium*].

⁷⁷ *Lautsi v. Italy*, 2011-III, Eur. Ct. H.R. 61, ¶ 70, 2011.

⁷⁸ *X, Y, Z v. UK*, *supra* note 53, ¶ 44.

⁷⁹ *Id.*, ¶ 44; *Fretté v. France*, *supra* note 53, ¶ 41.

⁸⁰ *S.H. v. Austria*, *supra* note 26, ¶ 118: “. . .the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States.”

⁸¹ *Kafkaris v. Cyprus*, 2008-I, Eur. Ct. H.R. 223, ¶ 92 (2008).

⁸² *Opuz*, *supra* note 74, ¶ 138. The Court stated that it had “examined the practice in the Member States” and it proceeded to list a number of factors that must be taken into account by any state in deciding to pursue prosecution. The interpretation of the Convention can “catch up” with the legal developments domestic law, see Christian Walter, *Decentralised Constitutionalisation in National and International Courts: Reflections on comparative law as an approach to public law*, in THEORISING THE GLOBAL LEGAL ORDER, 253, 260 (Andrew Halpin & Volker Roeben eds., 2009).

assess the arguments that were considered during the legislative process to determine whether a fair balance has been struck.⁸³

The Court remarked in *A, B and C v. Ireland* that, when dealing with different legal approaches towards abortion, it has “previously found reliance on consensus instructive in considering the scope of Convention rights.”⁸⁴ This includes the “consensus amongst Contracting States and the provisions in specialized international instruments and evolving norms and principles of international law.”⁸⁵ Hence, the Court first establishes a threshold that embodies a commonality between parties based on the comparative analysis of State practice, then compares this with measures of the defendant State that strike a balance between different rights or between individual rights and other conflicting interests.⁸⁶ This way, the Court establishes whether or not the defendant State is an “outlier.” States’ relevant practices can be evidenced by their domestic legal frameworks,⁸⁷ or can emerge from specialized international instruments,⁸⁸ as well as the evolution of norms and principles in international law through other developments.⁸⁹ These instruments can appear even if they are of a non-binding nature,⁹⁰ or not directly related to the Convention.⁹¹ In line with a general approach that emphasizes States’ own choices and that views the Court in a subsidiary role as a guardian of human rights,⁹² the Court has regularly emphasized that it is not part of “European supervision” to answer “the question whether a different solution could have been adopted in striking a fairer balance under a certain right.”⁹³ The margin of appreciation thus comprises the State’s

⁸³ *S.H. v. Austria*, *supra* note 26, ¶ 97; *Parrillo v. Italy*, 2015-V, 249, ¶ 170 (2015) [hereinafter *Parrillo*]; for a discussion concerning the extent to which the parliamentary debate itself will be scrutinized, see Thomas Kleinlein, *Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control*, 28 EUR. J. OF INT’L LAW 871, 876 (2017).

⁸⁴ *A, B and C v. Ireland*, *supra* note 53, ¶ 174.

⁸⁵ *Id.*

⁸⁶ For example, the economic interest of the State.

⁸⁷ In *Parrillo*, the Court compared the different domestic laws. *Parrillo*, *supra* note 83, ¶ 178.

⁸⁸ *Id.*

⁸⁹ Opuž, *supra* note 74, ¶ 164.

⁹⁰ *Id.*, citing further Opinion No. 15, adopted on 14 November 2000 by the European Group on Ethics in Science and New Technologies to the European Commission and Resolution 1352 (2003) of the Parliamentary Assembly of the Council of Europe on human stem cell research.

⁹¹ *Id.*

⁹² The Protocol No. 15 has now entered into force, CETS 213 – Convention for the Protection of Human Rights (Protocol No. 15), 24.VI.2013, see *supra* note 48.

⁹³ *S.H. v. Austria*, *supra* note 26; see *Ndidi v. The United Kingdom*, App. No 41215/14, ECtHR, ¶ 76 (Sept. 14, 2017): “The margin of appreciation has generally been understood to mean that, where independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.”

decision to enact legislation and the content of its rules to balance competing public and private interests.⁹⁴

The Court has consistently held that the principles applicable to assessing a State's positive and negative obligations under the Convention are similar.⁹⁵ It draws no conceptual distinctions between cases where the applicant claims that an interference with a right exists, or whether a standard for a positive obligation is at stake.⁹⁶ In both instances, a fair balance must be struck between the competing interests of the individual and of the community as a whole.⁹⁷ Furthermore, the Court regularly remarks "that a number of factors must be taken into account, when determining the breadth of that margin."⁹⁸ The margin will be restricted, "where a particularly important facet of an individual's existence or identity is at stake,"⁹⁹ and the Court generally attaches considerable importance to the broad consensus at the international and European level that there is a need for special protection of vulnerable groups.¹⁰⁰ Instances where national authorities fail to comply with their own courts' judgments, including in cases concerning the right to a healthy environment, indicate that there has been a breach of the Convention.¹⁰¹

Conversely, if a State has complied with its own legal frameworks and there is no emerging consensus within the Member States of the Council of Europe, either concerning the importance of the interest at stake or the best means of protecting it, the margin will be wider.¹⁰² This is particularly so in cases that require consideration of sensitive moral or ethical issues, including health-care policies, where the State is once again best placed to define the standard of rights

⁹⁴ *Hämäläinen v. Finland*, 2014-IV Eur. Ct. H.R. 369, ¶ 65 [hereinafter *Hämäläinen*]; *X, Y, Z v. The United Kingdom*, *supra* note 53, ¶ 44; *see further* HARRIS, O'BOYLE & WARBICK, *supra* note 59, at 24.

⁹⁵ *Hämäläinen*, *supra* note 94, ¶ 65; *see, for example*, *Boultif v. Switzerland*, 2001-IX Eur. Ct. H.R. 119, ¶ 4; *Levakovic v. Denmark*, App. No. 7841/14, ¶ 38 (Oct. 23, 2018), (unreported) [hereinafter *Levakovic*].

⁹⁶ *López Ostra*, *supra* note 40, ¶ 51.

⁹⁷ *Id.*; *Gaskin v. The United Kingdom*, 160 Eur. Ct. H.R. (ser. A), ¶ 42 (1989); *Roche v. The United Kingdom*, 2005-X Eur. Ct. H.R. 87, ¶ 157.

⁹⁸ *Hämäläinen*, *supra* note 94, ¶ 67.

⁹⁹ *Dickson v. The United Kingdom*, 2007-V Eur. Ct. H.R. 99, ¶ 78; *Parrillo*, *supra* note 83, ¶ 169; *Hämäläinen*, *supra* note 94, ¶ 67; *X, Y, Z v. UK*, *supra* note 53, ¶¶ 24, 27; *Christine Goodwin*, *supra* note 26, ¶ 90; *see Pretty v. The United Kingdom*, 2002-III Eur. Ct. H.R. 155, ¶ 71.

¹⁰⁰ For example, in relation to the status of asylum seekers, the Court has emphasized that a broad consensus at the international and European level concerning the need for special protection exists, *see M.S.S. v. Belgium*, *supra* note 76, ¶ 251.

¹⁰¹ *Okyay and Others v. Turkey*, App. 2005-VII Eur. Ct. H.R. 125, ¶¶ 74-75, found a violation of Art. 6(1) of the Convention.

¹⁰² *Stübing v. Germany*, App. No. 43547/08, ¶ 60 (Apr. 12, 2012), (unreported); *Hristozov v. Bulgaria*, 2012-V Eur. Ct. H.R. 457, ¶¶ 118, 124; *Hirst v. The United Kingdom*, 2005-IX Eur. Ct. H.R. 187, ¶¶ 81-82 [hereinafter *Hirst*]; *Dickson*, *supra* note 99, ¶ 78; *A, B and C v. Ireland*, *supra* note 53, ¶ 232.

protection in a concrete social context.¹⁰³ The margin will also be wider in cases where the State is required to balance competing private and public interests or Convention rights.¹⁰⁴

However, it is important to note that even if there are factors that widen the margin of appreciation of the State, a rights violation can still exist.¹⁰⁵ For example, in the context of the requirement to legally recognize gender reassignment surgery, the Court has held that despite having a wide margin of appreciation in these sensitive issues and in the absence of a common European approach, States must nevertheless provide measures for individuals to amend their personal data to reflect their gender identity, in accordance with States' positive obligations under Article 8 ECHR.¹⁰⁶

Therefore, even if a wide margin of appreciation exists and in the absence of a common European legal approach, a violation of the ECHR can be found.¹⁰⁷ Conversely, finding a common approach will regularly, but not without further consideration of the nature of the issues involved, lead to the finding that a violation of the ECHR occurred.¹⁰⁸ Whether parties follow a common approach is an important factor of the Court's analysis but is not the only one. Instead, the Court uses the doctrine as one means of treaty interpretation among others, and the issues that are involved and the facts of the concrete case require specific consideration and, ultimately, determine the findings of the Court. In addition, changes in societal perceptions as well as scientific developments over time can influence the limits of the margin of appreciation.¹⁰⁹ Therefore, European

¹⁰³ *Hämäläinen*, *supra* note 94, ¶ 67; *see X, Y, Z v. UK*, *supra* note 53, ¶ 44; *Fretté v. France*, *supra* note 53, ¶ 41.

¹⁰⁴ *Hämäläinen*, *supra* note 94, at ¶ 68; *Fretté v. France*, *supra* note 53, ¶ 42; *Odièvre v. France*, 2003-III Eur. Ct. H.R. 51, ¶ 44-49; *Evans*, *supra* note 23, ¶ 77; *Dickson*, *supra* note 99, ¶ 78; *S.H. v. Austria*, *supra* note 26, ¶ 94.

¹⁰⁵ Instructive is *Hirst*, *supra* note 102, ¶ 81: "Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue," for the opposite situation where a European consensus was found but no rights violation, *see A, B and C v. Ireland*, *supra* note 53, ¶ 232.

¹⁰⁶ *Christine Goodwin*, *supra* note 26, ¶ 85, *see* the end of that paragraph where the Court emphasized that an international trend existed: "clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals"; *Van Kück v. Germany*, 2003-VII Eur. Ct. H.R. 1, ¶¶ 76-84 [hereinafter *Van Kück*]; *Grant v. The United Kingdom*, 2006-VII Eur. Ct. H.R. 1, ¶¶ 40-4 [hereinafter *Grant*]; *L. v. Lithuania*, 2007-IV Eur. Ct. H.R. 1, ¶¶ 56, 59.

¹⁰⁷ *Christine Goodwin*, *supra* note 26, ¶ 85; *Hirst*, *supra* note 102, ¶¶ 81,82; *see further* Dean Spielmann, Renate Jaeger & Roderick Liddell, *The role of consensus in the system of the ECHR in DIALOGUE BETWEEN JUDGES* (Council of Europe) (Jan. 25, 2008), 15, 21, https://www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf.

¹⁰⁸ *A, B and C v. Ireland*, *supra* note 53, ¶ 94; *Handyside v. The United Kingdom*, App. No. 5493/72, ¶¶ 48-50 (Dec. 7, 1976), (unreported); *Vo v. France*, *supra* note 61, ¶ 82; *Schalk and Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, ¶¶ 61, 62 [hereinafter *Schalk and Kopf*].

¹⁰⁹ *Schalk and Kopf*, *id.*, ¶ 61; *Christine Goodwin*, *supra* note 26, ¶¶ 84,92; *Van Kück*, *supra* note 106, ¶ 76; *Grant*, *supra* note 106, ¶¶ 40-4.

consensus is not only a means for perpetual treaty interpretation, but it is also in itself a standard that is capable of developing over time. The doctrine's role and complexity go beyond the function of a mere adjunct of the margin of appreciation.¹¹⁰ The following section sheds light on the scholarly discussion and the disappointment with these many layers of the doctrine, and points out that some of these concerns, especially evolving around the issue of legitimacy, can be resolved by explaining European consensus alongside its two integrative functions.

B. Challenged Legitimacy

The ECtHR has never considered it necessary to explain or classify the conceptual approach it takes when searching for and defining the content of European consensus. In particular, the Court has abstained from linking the use of the doctrine explicitly to either Article 31 or Article 32 of the VCLT, while it acknowledges more explicitly that pursuant to Article 31(3)(c), account is to be taken of “any relevant rules of international law applicable in the relations between the parties.”¹¹¹

This general lack of clarity on how the European consensus is construed and embedded within the means of treaty interpretation has angered academic scholars.¹¹² Furthermore, given the limiting function of the concept for the regulatory and legislative choices of the States, it is not surprising that the concept has led to intense debate, with equal shares of supporting¹¹³ and fiercely opposing

¹¹⁰ Luzius Wildhaber, Arnaldur Hjartson & Stephen Donnelly, *No Consensus on Consensus? The Practice of the European Court of Human Rights*, 33 HUMAN RIGHTS JOURNAL, 248 (2013); JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 227-358 (2009); Eva Brems, *The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, 230, (1996).

¹¹¹ *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R., ¶ 43 [hereinafter *Loizidou*]; *Golder v. The United Kingdom*, 18 Eur. Ct. H.R. (ser. A), ¶ 29 (1975) [hereinafter *Golder*]; *Al-Adsani v. The United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 55 [hereinafter *Al-Adsani*]; *Demir*, *supra* note 27, ¶ 85.

¹¹² Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L. J. 133, 135 (1993); Benvenisti, *supra* note 58, at 843; Fiona De Londras & Konstantin Dzehtsiarou, *Managing Judicial Innovation in the European Court of Human Rights*, 15 HUM. RTS. L. REV. 523, 546 (2015).

¹¹³ Konstantin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L. J., 1730, 1734 and 1743 (2011); Ineta Ziemele, *European Consensus and International Law in THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW* (Anne van Aaken & Julia Motoc eds., 2018), 23, 39; MAGDALENA FOROWICZ, THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS (2010) 9; STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS. ACHIEVEMENTS, PROBLEMS AND PROSPECTS (2006) 203, 213; Başak Çalı, Anne Koch & Nicola Bruch, *The Social Legitimacy of Human Rights Courts: A Grounded Interpretivist Theory of the Legitimacy of the European Court of Human Rights*, 35 HUM. RTS. Q. 955 (2013).

views.¹¹⁴ One school of thought contests the role of the Court as a guardian of human rights because of its use of European consensus, and suggests that its capacity to safeguard minority rights is diminished.¹¹⁵ It has been argued that this judicial doctrine and the consensus rationale are not objective,¹¹⁶ but instead flawed and serve as “convenient subterfuge for implementing the court’s hidden principled decisions.”¹¹⁷ From that perspective, both the process and outcome of defining the consensus are counter-productive and futile in serving the Court’s core functions.

Another school of thought has undertaken to justify the Court’s approach and concentrates on the methods of identifying the commonality that defines the consensus. It emphasizes the need for coherence and procedural consistency in conducting a comparative analysis of Member States’ laws¹¹⁸ and proposes that other jurisdictions should follow the doctrine.¹¹⁹

It is surprising that the “consensus debate,” and with it, the entire discourse on an important facet of the Convention’s legitimacy, have so far been largely neglected by the wider scholarship on international law,¹²⁰ particularly

¹¹⁴ Benvenisti, *supra* note 58, at 852; George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy in CONSTITUTING EUROPE* 106 (Andreas Føllesdal, Birgit Peters & Geir Ulfstein eds., 2013); Shai Dothan, *Judicial Deference Allows European Consensus to Emerge*, 18 CHI. J. INT’L L. 393, 411 (2018); Nazim Ziyadov, *From Justice to Injustice: Lowering the Threshold of European Consensus in Oliari and Others versus Italy*, 26 IND. J. GLOBAL L. STUD. 631, 634 (2019).

¹¹⁵ Benvenisti, *supra* note 58, at 852; George Letsas, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007); Letsas, *supra* note 114; *see generally* the discussion by Dimitrios Kagiarios, *When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Right*, in BUILDING CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND 283 (Panos Kapotas & Vassilis Tzevelekos eds., 2019).

¹¹⁶ Judge John L. Murray made reference to Judge Posner that indeed it may even be that “truth” or an objective standard are irrelevant for consensus, since “to equate truth to consensus would imply that the earth was once flat,” *Consensus: Concordance, or Hegemony of Majority* in DIALOGUE BETWEEN JUDGES, at 27 (Jan. 25, 2008), https://www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE, 113 (1990).

¹¹⁷ Benvenisti, *supra* note 58, at 852.

¹¹⁸ Pawel Lacki, *Consensus as a Basis for Dynamic Interpretation of the ECHR – A Critical Assessment*, 21 HUM. RTS. L. REV. 186 (2021); Kleinlein, *supra* note 83; Nikos Vogiatzis, *The Relationship between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court*, 25 EUR. PUB. L. 445 (2019); Helfer, *supra* note 112; Vassilis Tzevelekos & Panos Kapotas, *European Consensus and the Legitimacy of the European Court of Human Rights*, 53 COMMON MARKET L. REV. 1145 (2016); Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L. J. 1730, 1740 (2011); KANSTANT SIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2015) [hereinafter DZEHTSIAROU, EUROPEAN CONSENSUS]; Eszter Polgári, *European Consensus: A Conservative and a Dynamic Force in European Human Rights Jurisprudence*, 12 VIENNA J. INT’L AND CONST. L. 59 (2018).

¹¹⁹ Rebecca Huertas, *Putting the Nail in the Coffin: Isn’t it Time to Let the European Consensus Doctrine Put an End to the Use of the Death Penalty in the United States?*, 29 HAGUE Y.B. INT’L L. 103 (2016).

¹²⁰ With the exception of Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 INT’L & COMP. L. Q. 217, (2007); Ziemele, *supra* note 113; Seibert-Fohr, *supra*

regarding the specific challenges posed by the interpretation of human rights treaties in the context of global environmental degradation, and climate change,¹²¹ and related tenets such as the extraterritorial application of human rights treaties.¹²²

Developing and employing existing interpretative tools under the Convention might therefore not only be conducive to concretizing States' obligations to protect individual rights in situations of dangerous climate change, but it could also intersect human rights and international law scholarship. This is important for the development of rights protection under the ECHR and other human rights instruments, where courts and human rights bodies equally adopt a methodology of evolutive interpretation in the light of present-day conditions.

For instance, the Inter-American Court of Human Rights (IACtHR) recognized in its 1989 Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man that the American Declaration "ha[s] to be interpreted in the context of the evolution of American Law."¹²³ The IACtHR used the guidance provided by the ICJ in its *Namibia Advisory Opinion* that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"¹²⁴ and found that this was "particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection."¹²⁵ The United Nations Human Rights Committee (UNHRC) also recognizes the importance of temporal development in the practice of States for the protection of human rights.¹²⁶

note 31; and most recently a discussion on the intersection with international law that focuses on Art. 31(3)(c) VCLT, by JEN T. THEILEN, *EUROPEAN CONSENSUS BETWEEN STRATEGY AND PRINCIPLE*, 215 (2021).

¹²¹ Benoit Mayer, *Climate Change Mitigation as an Obligation under Human Rights Treaties?* 115 *AJIL* 109 (2021).

¹²² CONALL MALLORY, *HUMAN RIGHTS IMPERIALISTS. THE EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, (Hart 2020); Yuval Shany, *The Extraterritorial Application of International Human Rights Law*, 409 *RECUEIL DES COURS* 9, 28 (2019); Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction amounts to*, 25 *LEIDEN J. OF INT'L L.* 857 (2012).

¹²³ *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of the Art. 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R. Advisory Opinion, OC-10/89 (July 14, 1989).

¹²⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, 1971 *ICJ REP.* 16, 31 (Jun. 21).

¹²⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-Am. Ct. H.R., Advisory Opinion, OC-16/99, ¶ 114 (Oct. 1, 1999); see further *Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R., ¶ 106 (Sept. 15, 2005); see generally Carlos Enrique Arévalo Narváez & Paola Andrea Patarroyo Ramírez, *Treaties over time and human rights: a case law analysis of the Inter-American Court of Human Rights*, 10 *Anuario Colombiano de Derecho Internacional*, 295, 315 (2017).

¹²⁶ *Roger Judge v. Canada*, CCPR/C/78/D/829/1998, UN Human Rights Committee (HRC), ¶ 10.3 (Aug. 13, 2003), <https://www.refworld.org/casesHRC.404887ef3.html>.

The scholarly discussion surrounding the consensus doctrine underlines that there is a need and an incentive to fill a conceptual gap. Furthermore, a new facet of European consensus has emerged in the Court's more recent case law concerning the intersection between science and the law. Aligning human rights protection with a global goal defined according to law-external scientific evidence, such as the Paris Agreement's temperature target, rebuts the argument that the Court uses European consensus arbitrarily. If it can be demonstrated that a scientific consensus exists on how to maintain an adequate standard of human rights protection in the context of climate change as a global and increasingly dangerous challenge, then evolutive interpretation and accordingly, limiting the margin of appreciation in order to require protective measures of States, assumes a new dimension of legitimacy.

Therefore, the following Part sets out to explain a relatively new phenomenon in the Court's judicial practice: the role of science in finding European consensus. On that basis, it is then argued that the ECtHR deploys authentic means of treaty interpretation. These two integrative functions have not been discussed within the remit of the European consensus doctrine. This analysis therefore expands previous research and advances the discussion in the literature.

III. EUROPEAN CONSENSUS AND THE ROLE OF SCIENCE

At the cusp of a new century, the ECtHR articulated its appreciation for the significance of scientific evidence in answering legal questions. For example, in *A, B and C v. Ireland*, the Court found that the determination when the right to life begins came within the States' margin of appreciation since no European Consensus on the scientific and legal definition of the beginning of life existed.¹²⁷ The identified absence of a consensus on the science-related aspect of the dispute, in the form of a definition of the beginning of life, translated into a wider margin of appreciation for the State. This was regardless of the fact that there was an emerging legal trend between the contracting parties.

This function of science in determining the outcome of cases where a scientific consensus is absent, but equally in situations where a scientific consensus exists, calls for a closer scrutiny of the actual relevance of the science/law relationship. Does the reasoning that the absence of scientific consensus justifies a different legal approach (*e.g.*, Ireland's approach as opposed to the approach taken across Europe), despite a common legal trend (in the other European countries), mean that if a *scientific* consensus had been established, the defendant State's margin of appreciation would have been narrower? The Court's

¹²⁷ *A, B and C v. Ireland*, *supra* note 53, ¶ 237.

conclusion in *A, B and C v. Ireland* implies the answer is yes. This would assign the scientific consensus a decisive role. The following Section discusses the two elements upon which the Court has placed the scientific and legal consensus-reasoning before scrutinizing how science influences the scope of rights.

A. Two Constitutive Elements: Interest at Stake and Means to Protect the Interest

The Court regularly differentiates within the doctrine of European consensus between the “relative importance of the interest at stake” and the “means of protecting it.”¹²⁸ Consensus on either one of these elements could narrow the margin. A consensus placed upon scientific evidence has been termed “expert consensus” in the literature.¹²⁹ It has been argued that this type of consensus is rarely used and treated as supplementary rather than decisive.¹³⁰ While this may be true for some of the earlier case law in which the Court included scientific evidence in its search for a common approach among parties, more recent case law draws a different picture. The Court in these cases has moved towards incorporating scientific evidence as a self-standing element of the consensus doctrine, next to legal consensus. This elevates the role of science, especially in highly complicated cases where a unified legal approach is still missing. A number of cases shed light on the Court’s approach.

In *Christine Goodwin*, a case that concerned the legal recognition of transgender people,¹³¹ the Court included in its scrutiny for consensus the question of whether a medical and scientific consensus had emerged across Europe. It held that, while the scientific debate as to transgender individuals was ongoing, there was growing acceptance in this debate regarding prenatal determination of sexual differences in the brain. However, the Court found that the scientific proof for this theory was far from complete.¹³² Examining the state of “any European and international consensus,” the Court built on previous case law indicating the developmental and transitional situation of the law¹³³ and eventually confirmed

¹²⁸ *Id.*, at ¶ 232; *Khoroshenko v. Russia*, 2015-IV Eur. Ct. H.R. 329, ¶ 120.

¹²⁹ Dzehtisarou, *European Consensus*, *supra* note 118, at 55.

¹³⁰ *Id.* at 56, 71.

¹³¹ See *Christine Goodwin*, *supra* note 26.

¹³² *Christine Goodwin*, *supra* note 26, ¶ 81.

¹³³ In the very early case of *Rees v. The United Kingdom*, the Court explained that the need for appropriate legal measures to legally recognize transsexuals should be kept under review, “having regard particularly to scientific and societal developments,” App. No. 9532/81, ¶ 47 (Oct. 17, 1986), (unreported); in *Sheffield and Horsham v. The United Kingdom*, App. No. 31–32/1997/815–816/1018–1019, ¶¶ 55–57 (July 30, 1998), (unreported), the Court noted the evolving consensus in a rather subtle manner, ¶ 57, stating that: “As to legal developments in this area, the Court has examined the comparative study [...]”. However, the Court was “not fully satisfied” that the legislative trends were sufficient.

an emerging consensus within contracting States in the Council of Europe on the legal recognition of transgender people following gender reassignment surgery.¹³⁴ Nevertheless, the Court still noted that the diversity of protective approaches in the European context was not surprising given the diverse legal systems and traditions represented. This led to the conclusion that the respondent State must enjoy a wide margin of appreciation regarding the *means to protect the interest at stake*.¹³⁵ However, this margin only extended to the *choice of protective means*. Conversely, as far as the *interest at stake* was concerned, the Court was satisfied that:

In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.¹³⁶

Despite the growing scientific certainty on the interests at stake, the Court found that “nothing had effectively been done to further reform proposals” and the UK Court of Appeal¹³⁷ had noted that “there were no plans to do so.”¹³⁸ The Court reiterated that it had already stressed the importance of reviewing the State’s measures in the context of scientific and societal developments in previous cases.¹³⁹ Consequently, the claim that the matter fell within the margin of appreciation, as far as the *interest at stake* was concerned, had become untenable “save as regards the appropriate means of achieving recognition of the right protected under the Convention.”¹⁴⁰

This finding is significant because it acknowledges that the margin of appreciation was narrowed due to the scientific and legal consensus on one of the constitutive elements of the consensus doctrine (the interest at stake), while the means to protect this interest were still within the State’s choice. Transgressing the margin of appreciation and choosing *not* to legally protect the interest were

¹³⁴ *Christine Goodwin*, *supra* note 26, ¶ 84.

¹³⁵ *Id.*, ¶ 85.

¹³⁶ *Id.*, ¶ 90.

¹³⁷ *Bellinger v. Bellinger*, EWCA Civ 1140 (2001), ¶ 96 (UK). The Appeal was dismissed in the House of Lords but a declaration of incompatibility was made and the judge held that the words “male” and “female” in the Matrimonial Causes Act 1973 s.11(c), were to be defined in accordance with the reference to biological criteria as set out in *Corbett v. Corbett* (otherwise Ashley) (No.1) [1971] at 83, [1970] 2 WLUK 3 (UK).

¹³⁸ *Christine Goodwin*, *supra* note 26, ¶ 92.

¹³⁹ *Id.*

¹⁴⁰ *Id.*, ¶ 93.

therefore sufficient for the verdict that a breach of Article 8 ECHR had occurred.¹⁴¹ In *Hämäläinen v. Finland*, the Court confirmed that a consensus on either of the two elements, the *interest at stake* or the *means of protecting* it, determined the breadth of the margin of appreciation. It would be wider if no consensus existed “either as to the relative importance of the interest at stake or as to the best means of protecting it.”¹⁴²

B. The Pivotal Role of the Scientific Consensus

In *Vo v. France*, the Court elaborated on the role of scientific consensus for the emerging legal consensus. The Court gave two reasons for affording France a wide margin of appreciation in defining the legal status of an embryo and/or fetus: “[F]irstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate . . . and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life.”¹⁴³

This absence of a scientific and legal definition for the beginning of life across the Council of Europe Member States determined the outcome of the case.¹⁴⁴ The Court devoted attention to the factor time for the development of consensus, as it had done in *Goodwin*, and stated that while “there is no consensus on the nature and status of the embryo and/or foetus” they “are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation.”¹⁴⁵ Scientific developments thus determined this trajectory of increasing protection, and the Court concluded that, despite differences, the current legal status at the European level could be regarded at least as a “common ground between States that the embryo/foetus belongs to the human race.”¹⁴⁶

However, the Court could not find evidence that this emerging scientific consensus had been incorporated into international law, given that the Oviedo Convention on Human Rights and Biomedicine¹⁴⁷ did not include a legal

¹⁴¹ *Id.*

¹⁴² *Hämäläinen*, *supra* note 94, ¶ 67.

¹⁴³ *Vo v. France*, *supra* note 61, ¶ 82.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*, ¶ 84.

¹⁴⁶ *Id.*, with reference again to France and the UK, where the protection is granted in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Art. 2 ECHR.

¹⁴⁷ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ETS 164 (Apr. 4, 1997), <https://rm.coe.int/168007cf98>.

agreement on the scientific definition of the beginning of life.¹⁴⁸ The Court supported this reasoning with the approach taken in the Additional Protocol on the Prohibition of Cloning Human Beings¹⁴⁹ and in the Additional Protocol on Biomedical Research,¹⁵⁰ where a definition of the terms “everyone” and “human being” respectively, were not provided.¹⁵¹ A scientific consensus *on its own* is thus not capable of shaping the margin of appreciation unless it can also be traced in the practice of parties, thereby harking back to the consent of States.

In *A, B and C v. Ireland*, the Court further developed the role of scientific consensus alongside the two constitutive elements of its consensus doctrine.¹⁵² Of central importance for the deferral to the State’s wide margin of appreciation was the finding, as already stated in *Vo v. France*, that no European consensus on the scientific and legal definition of the beginning of life existed. In *A, B and C v. Ireland*, this lack of a widely agreed upon scientific definition of the beginning of life entailed that there was no clear indication as to how to legally disentangle two overlapping rights-spheres: the right to respect for private life of the mother and the right to life of the unborn. Without clear scientific guidance, these rights remained inextricable from one another, leaving it to the State to decide how the margin of appreciation could be delineated.

This reasoning has two main implications. First, the Court acknowledged that the case concerned a matter where a consensus could potentially be defined by science. The case thus concerned a subject matter that was open to scientific determination rather than exclusively governed by political and legal determinations. The Court confirmed that the term “life” as a normative expression did “not exclude” scientific debate.¹⁵³ Secondly, the finding of the Court implicitly acknowledges that if there had been a scientific consensus on the beginning of life, this would have paved the way for a different legal reasoning. Only in the absence of scientific certainty and determination were different legal approaches to the protection of the unborn acceptable. It is impossible to ascertain counterfactually if a scientific consensus would have changed the outcome in this

¹⁴⁸ Commentary to Art. 1: “The Convention does not define the term ‘everyone’ (in French ‘toute personne’). *Id.* The Court had already, in *Glass v. The United Kingdom*, interpreted Art. 8 of the Convention in the light of the standards enshrined in the Oviedo Convention on Human Rights and Biomedicine, even though that instrument had not been ratified by all parties to the Convention. *Glass v. The United Kingdom*, 2004-II Eur. Ct. H.R. 25, ¶ 58.

¹⁴⁹ Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, ETS 168 (Jan. 12, 1998), <https://rm.coe.int/168008371a>.

¹⁵⁰ Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, ETS 195 (Jan. 25, 2005), <https://rm.coe.int/168008371a>.

¹⁵¹ *Vo v. France*, *supra* note 61, ¶ 84. The Court noted that under Art. 29 of the Oviedo Convention, a request for an Advisory Opinion on the interpretation can be made.

¹⁵² *A, B and C v. Ireland*, *supra* note 53, ¶ 232; *see Evans*, *supra* note 23, ¶ 77.

¹⁵³ *A, B and C v. Ireland*, *supra* note 53, ¶ 237.

case with absolute certainty. The absence of scientific consensus in this case could be either a causal factor or indicate mere correlation for the case's outcome; in the latter case, it would represent a supplementary argument rather than a constitutive element of the Court's reasoning. However, the Court's reasoning does not foreclose that scientific certainty regarding the beginning of life could have changed the outcome in this case.

The Court held that it was unable to narrow the State's margin of appreciation in order to allow abortion on wider legal grounds as in other European States and abstained from judging whether the State had struck a fair balance between two margins of appreciation.¹⁵⁴ Not surprisingly, this conclusion has been criticized for denying the emerging European consensus the interpretative weight that it had been assigned in other situations, thereby allowing the defendant State to deviate from the developing legal standard. The case has been criticized as an unfortunate example of "trumping" European consensus through a State's internal majority consensus.¹⁵⁵

If the absence of scientific consensus is given such considerable weight in the legal reasoning, as it appears to be the case in *A, B and C v. Ireland*, it would be challenging—if not contradictory—to argue that the presence of a scientific consensus would not have an equally significant role to play.

In summary, consensus can be identified either for the interest at stake only, or it can comprise also the means of protecting the interest at stake. Two further criteria must be fulfilled for each of these constitutive elements. The consensus must exist in science and, as such, must be incorporated into the practice of States. This consensus can be expressed in the practice of States either as a European or as a wider international commonality (in situations where international practice ties in with the protected rights under the Convention). The following Part examines how the European consensus, thus constituted, can be situated among the means of treaty interpretation in international law.

IV. EUROPEAN CONSENSUS AS A MEANS OF TREATY INTERPRETATION

The previous Part has demonstrated that European consensus is a doctrine that integrates science and law in cases that are open for scientific determination, and that this scientific consensus must have found an expression in parties' legal practice. This Part examines how the Court, in using the practice of parties, embeds the doctrine within the international law on treaty interpretation

¹⁵⁴ *Id.*; see *Open Door*, *supra* note 29, ¶ 68.

¹⁵⁵ Fiona De Londras & Kanstantsin Dzehtsiraou, *Grand Chamber of the European Court of Human Rights, A, B and C v. Ireland, Decision of 17 December 2010*, 62 INT'L & COMP. L. Q. 250, 252 (2013); see generally Benvenuti, *supra* note 58.

that is enshrined in the VCLT and recognized as customary international law. It argues that the Court applies European consensus as an authentic means of treaty interpretation under Article 31(3)(b) of the VCLT. This ranks the consensus doctrine next to other authentic means of treaty interpretation. The constitutive criteria that form the “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” according to Article 31(3)(b) of the VCLT must be satisfied. The 2018 ILC Draft Conclusions on subsequent agreement and subsequent practice of parties for the interpretation of treaties provide guidance for the interpretation of these requirements, and, as such, form an essential part of the analytical framework under Article 31(3)(b) of the VCLT.¹⁵⁶

The argument will be developed in two steps: firstly, by investigating the Court’s approach towards the VCLT generally and, secondly, by analyzing how the doctrine of European consensus can be embedded in Article 31(3)(b) of the VCLT in accordance with the elements of that provision.

A. The Analytical Framework of Treaty Interpretation

The ICJ has emphasized that the VCLT reflects rules recognized in customary international law.¹⁵⁷ This includes the rules on treaty interpretation that Article 31 and Article 32 set forth, which are, therefore, binding upon all States.¹⁵⁸ Even though it has been observed that there is a compelling difference in the application of the VCLT in the ECtHR’s approach when compared to the ICJ’s jurisprudence,¹⁵⁹ the Court has consistently emphasized that “the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part”¹⁶⁰ and it follows a constant practice of

¹⁵⁶ *Draft Conclusions*, *supra* note 51.

¹⁵⁷ Most recently confirmed in *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, 2020 ICJ REP. 455, ¶ 70 (Dec. 18); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar v. Colom)*, Preliminary Objections, 2016 ICJ REP. 116, ¶ 33 (Mar. 17, 2016); Aust, *supra* note 50. One exception is Art. 66 Vienna Convention on the Law of Treaties.

¹⁵⁸ JAMES CRAWFORD, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, at 367–368 (9th ed., 2018), (where the Convention does not reflect customary law, there it has started the process for customary law formation).

¹⁵⁹ Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 5 (2007).

¹⁶⁰ *Al-Adsani*, *supra* note 111, ¶ 55; *Waite and Kennedy v. Germany*, 1999-I Eur. Ct. H.R. paras 54, 55; HARRIS, O’BOYLE & WARBICK, *supra* note 59, at 6; Ineta Ziemele, *Customary International Law in the Case-Law of the European Court of Human Rights – The Method*, 12 THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 243, 244 (2013).

“interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties.”¹⁶¹

Article 31 of the VCLT, which contains the “general rule of interpretation,” provides in paragraph 3 that:

[T]here shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.¹⁶²

The Court has stressed that while the ECHR must be applied in the light of the rules of the VCLT,¹⁶³ reaching beyond international law and applying a tighter standard is possible when assessing the validity of reservations under the ECHR as a standard-setting treaty.¹⁶⁴ In particular, the Court has determined the territorial scope of its jurisdiction in line with Article 31(1) of the VCLT,¹⁶⁵ and it has defined the material scope of substantial rights under the Convention in accordance with the rules on State immunity under general international law.¹⁶⁶ In doing so, it has indicated the importance of legal developments regarding the prohibition of torture and recognized the strong evidence for the qualification of the prohibition of torture as *jus cogens* under international law.

In accordance with Article 31(3)(c) VCLT, the Court has acknowledged that account has to be taken of any relevant rules of international law applicable in the relations between parties.¹⁶⁷ Hence, it has been noted in the literature that not only can the ECHR be seen as an integral part of international law, it also

¹⁶¹ *Hassan v. The United Kingdom*, 2014-VI Eur. Ct. H.R. 1, ¶ 100 [hereinafter *Hassan*]; *Golder*, *supra* note 111, ¶ 29; FOROWICZ, *supra* note 113, at 9; see further *Dialogue Between Judges: The Role of Consensus in the System of the European Convention on Human Rights* (European Court of Human Rights, 2008), www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf.

¹⁶² VCLT, *supra* note 50.

¹⁶³ *Al-Adsani*, *supra* note 111, ¶ 54; *Loizidou*, *supra* note 111, ¶ 44; *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. ¶ 55 [hereinafter *Banković*]; see further *Wildhaber*, *supra* note 120, at 221.

¹⁶⁴ *Loizidou, Prel. Obj.*, *supra* note 30, ¶¶ 96-98.

¹⁶⁵ *Banković*, *supra* note 163, ¶¶ 59, 60, 67; *Al-Skeini v. The United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶ 142.

¹⁶⁶ *Al-Adsani*, *supra* note 111, ¶¶ 54, 55. The decision was adopted by a small majority of nine votes to eight. The ICJ noted the “growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”, *id.*, ¶ 66.

¹⁶⁷ *Banković*, *supra* note 163, ¶¶ 59-61.

contributes to the further development of international law, where human rights and the jurisprudence of the ECtHR may act as a driving force of legal developments.¹⁶⁸ The Court has made literal use of the rule in Article 31(3)(c) of the VCLT in a number of cases of central importance, namely the abolition of the death penalty,¹⁶⁹ the binding nature of interim measures,¹⁷⁰ and the validity of reservations entered by States.¹⁷¹

Subsequent practice of parties has been acknowledged under Article 31(3)(b) as establishing the “agreement of Contracting Parties [sic] regarding the interpretation of a Convention provision” but is regularly not interpreted to create new rules and obligations under the Convention.¹⁷²

It is striking that in cases where the Court explicitly mentions European consensus, it regularly makes *no* reference to Article 31(3)(b) of the VCLT, and on the few occasions where the provision *was* cited, it was not directly linked to the doctrine. For example, in *Hassan v. The United Kingdom*, while the Court did apply Article 31(3)(b), it did so without explicitly citing European consensus. The Court found, however, that “a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation, but even to modify the text of the Convention.”¹⁷³ This indicates that the interpretative function of consistent subsequent practice could even be elevated beyond the level of mere norm interpretation and constitute law-making.

In the literature, various types of consensus have been identified and each of these depends on the legal source used by the ECtHR to define the content of consensus.¹⁷⁴ The normative rules from which the content of the consensus is derived determines this typology of the consensus. For example, a consensus that emerges from international law represents an international consensus. This Section offers a novel perspective. By examining European consensus as a doctrine of international law within the architecture of Article 31(3)(b), the conceptual nature is at the forefront, *independently* from the substantive content that defines consensus. Finding the concrete content concerns the second step of the inquiry. From that perspective, European consensus is placed upon a unifying rationale of treaty interpretation, and the various ways in which the consensus is constituted remain, albeit important, descriptors of its normative content. This

¹⁶⁸ *Wildhaber*, *supra* note 120, at 221; FOROWICZ, *supra* note 113, at 38.

¹⁶⁹ *Soering v. The United Kingdom*, App. No. 14038/88, ¶¶ 102-103 (July 7, 1989), (unreported) [hereinafter *Soering*]; *Al-Saadoon and Mufdi v. The United Kingdom*, 2010-II Eur. Ct. H.R. 61, ¶ 126.

¹⁷⁰ *Mamatkulov and Askarov v. Turkey*, 2005-I Eur. Ct. H.R. 293, ¶ 11.

¹⁷¹ *Loizidou. Prel. Obj.* *supra* note 30, ¶¶ 96-96.

¹⁷² *Cruz Varas v. Sweden*, App. No. 15576/89, ¶ 100, (Mar. 20, 1991), (unreported); *Soering*, *supra* note 169, ¶ 103.

¹⁷³ *Hassan*, *supra* note 161, ¶ 101.

¹⁷⁴ DZEHTSIAROU, EUROPEAN CONSENSUS, *supra* note 118, at 71.

conceptualization of the European consensus doctrine does not deny that the consensus can develop in international law, regional law, or trends in national jurisdictions. However, these different legal sources do not assume the function of defining the rationale or the typology of European consensus; this remains rooted, as a means of treaty interpretation, in Article 31(3)(b). The approach explains and categorizes the doctrine within international law,¹⁷⁵ and bolsters its legitimacy within this legal order into which the ECHR is integrated as regional framework.

B. The Elements of Article 31(3)(b) of the VCLT and the ILC Draft Conclusions

The International Law Commission (ILC or the Commission) was established in 1947 by the United Nations General Assembly (General Assembly) for the “codification and progressive development of international law.”¹⁷⁶ The ILC originally included the topic “Treaties in time” in its program of work¹⁷⁷ and then changed the format and the title of this work to “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” in 2012.¹⁷⁸ In 2018, the ILC adopted the Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties with commentaries (Draft Conclusions),¹⁷⁹ and the General Assembly welcomed the conclusion of the work in December 2018.¹⁸⁰ These conclusions provide authoritative guidance on the interpretation of Article 31(3)(a) and (b) of the VCLT. They are based on a thorough analysis of State practice and of the practice of international courts and tribunals.¹⁸¹

The ILC emphasizes that subsequent agreements and practices of States under Article 31(3)(a) and (b) are “authentic” means of treaty interpretation.¹⁸² The Commission states that the “common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning

¹⁷⁵ Cf. Laurence Boisson de Chazournes, *Subsequent Practice, Practices, and ‘Family Resemblance’: Towards Embedding Subsequent Practice in its Operative Milieu in TREATIES AND SUBSEQUENT PRACTICE* 53, 59 (Georg Nolte ed., 2013).

¹⁷⁶ See generally International Law Commission, <https://legal.un.org/ilc/> (last visited July 14, 2022).

¹⁷⁷ G.A. Res. 63/123, ¶ 6 (Dec. 11, 2008).

¹⁷⁸ See Analytical Guide to the Work of the International Law Commission, http://legal.un.org/ilc/guide/1_11.shtml (last visited July 14, 2022).

¹⁷⁹ See *Draft Conclusions*, *supra* note 51.

¹⁸⁰ G.A. Res. 73/202 (Dec. 20, 2018).

¹⁸¹ Petra Minnerop, *The Legal Effect of the Paris Rulebook under the Doctrine of Treaty Interpretation*, in *THE GLOBAL ENERGY TRANSITION* (Peter Cameron, Xiaoyi Mu & Volker Roeben eds., 2021), 101.

¹⁸² Draft Conclusion 2 “situates subsequent agreements and subsequent practice as a means of treaty interpretation within the framework of the rules on the interpretation of treaties set forth in Art. 31 and 32 of the 1969 Vienna Convention”, *Draft Conclusions*, *supra* note 51, at conclusion 2, commentary, ¶ 1, at 16.

of the treaty, even after the conclusion of the treaty.”¹⁸³ It does not differentiate between various forms in which such subsequent agreement is expressed by States, or in which legal order; their common will can be derived from domestic, regional, or international law. This illustrates that separate and distinguishable aspects of the consensus are how it materializes and how it functions as the interpretive doctrine of treaty interpretation.

Furthermore, there is a fine distinction between a means of treaty interpretation that qualifies as “authentic” and the deployment of an authentic means of treaty interpretation. The ILC has stressed that the qualification of interpretation as “authentic” is reserved to States.¹⁸⁴ In identifying consensus, therefore, the ECtHR articulates subsequent agreement of States that it has identified based on their subsequent practice—it thereby *uses* an authentic means of treaty interpretation. This makes methodological consistency in finding the relevant commonalities extremely important. Admittedly, finding subsequent agreement based on practice involves not only identifying but also interpreting the relevant practice through the Court.¹⁸⁵ The process necessarily comprises aspects of “judicialization of the political.”¹⁸⁶ However, this interpretative process cannot effectively replace the agreement of States and must conform to objective criteria. The crucial point is that Article 31(3)(b) of the VCLT and the ILC Draft Conclusions offer guidance for this endeavor. Application of the provision’s elements instills discipline and clarity into the analysis of State practice and the articulation of subsequent agreements of States vis-à-vis their obligations under the Convention.

It is important to note that any finding of subsequent agreement based on State practice will form part of the judicial consideration of several factors of the case, but it will neither define the case’s outcome nor will it be solely decisive for the definition of a treaty provision.¹⁸⁷ The ILC has emphasized that the formulation of subsequent agreement of parties based on the definition of a treaty provision does not necessarily imply a conclusive effect, given that such agreement “shall be taken into account, together with the context” in the process of treaty interpretation, which consists in a “single combined operation.”¹⁸⁸

¹⁸³ *Id.*, conclusion 3, commentary, ¶ 3, at 24.

¹⁸⁴ *Id.*, conclusion 3, commentary, ¶ 4, at 24.

¹⁸⁵ See THE PSYCHOLOGY OF JUDICIAL DECISION MAKING (David E. Klein & Gregory Mitchell eds., 2010); Anne van Aaken, *The Cognitive Psychology of Rule of Interpretation in International Law*, AJIL Unbound 258 (July 20, 2021) (advancing the argument that judicial decision-making should be reserved to “System 2”); see DANIEL KAHNEMAM, THINKING, FAST AND SLOW, at 20 (2012) for the differentiation between “System 1” and “System 2”.

¹⁸⁶ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI. 93, 96 (2008).

¹⁸⁷ *Draft Conclusions*, *supra* note 51, conclusion 3, commentary, ¶ 4, at 24.

¹⁸⁸ *Id.*, conclusion 2, ¶ 5, at 17.

The wording of Article 31(3) of the VCLT reflects this understanding of treaty interpretation as a single combined operation where none of the elements are considered to be inferior. This understanding is the result of careful considerations at the time of the drafting of the provision in 1966:

[T]he elements in paragraph 3 [subsequent agreement and subsequent practice] . . . should follow and not precede the elements in the previous paragraphs to the text. But these three elements are all of an obligatory character and by their very nature could not be considered to be norms of interpretation in any way inferior to those which precede them.¹⁸⁹

Consequently, while Article 31(3)(b) of the VCLT does not contain or even aspire to establish a clear evidentiary threshold for establishing subsequent agreement,¹⁹⁰ the provision's elements form an analytical framework in which it can be ensured that the practice is given weight in so far as it is "objective evidence of the understanding of parties as to the meaning of the treaty."¹⁹¹ These elements are addressed below and the doctrine of European consensus will be assessed within this framework.

1. "Practice" as "Conduct"

The notion of "practice" in Article 31(3)(b) is widely interpreted and includes any type of positive action, legislation, court decisions, and omissions in the application of a treaty.¹⁹² Draft Conclusion 4 stipulates that the practice must consist of "conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty."¹⁹³ The meaning of "conduct" in the ILC's definition is derived from Article 2 of the ILC's articles on Responsibility of States for Internationally Wrongful Acts.¹⁹⁴ It includes acts, omissions, and relevant silence.¹⁹⁵ The relevant

¹⁸⁹ 1966 Draft Articles on the Law of Treaties with Commentaries, ILC Yearbook, 1966, vol. II, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf [1966 Draft Articles].

¹⁹⁰ Cf. *Draft Conclusions*, *supra* note 51, conclusion 2, ¶ 5, at 17.

¹⁹¹ See 1966 Draft Articles, *supra* note 189, at 221, ¶ 15; *Draft Conclusions*, *supra* note 51, conclusion 3, commentary, ¶¶ 1, 3, at 23.

¹⁹² *Id.*, at conclusion 7, ¶ 1, 51; see generally JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24 (8th ed., 2012).

¹⁹³ *Id.*, conclusion 4 ¶ 2, at 27; *id.*, conclusion 4, commentary, ¶ 17, at 31.

¹⁹⁴ *Id.*, conclusion 4, commentary, ¶ 17, at 31; for the draft articles on Responsibility of States for Internationally Wrongful Acts see Yearbook of the International Law Commission, 2001, vol. II (Part Two) https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf.

¹⁹⁵ Humphrey Waldock, *Third report on the Law of Treaties*, Y.B. Int'l L. Comm'n 2, 1964, U.N. Doc. A/CN.4/167 and Add.1-3, at 60, ¶ 25; *Temple of Preah Vihear* (Cambodia v. Thai), 1962 ICJ REP. 6,

conduct can occur in the exercise of a party's executive, legislative, judicial, or other functions.¹⁹⁶ This is consistent with the ECtHR's approach. For example, in *Evans v. The United Kingdom*, the Court investigated the position within the Council of Europe and in certain other countries,¹⁹⁷ wherein the Court referred to legislative provisions and the jurisprudence of the Israeli Supreme Court¹⁹⁸ and to United States case law.¹⁹⁹

The lawyer or Registry preparing the case file will consider relevant practice as outlined by the research template, which requires considering case law of the ECtHR, comparative law,²⁰⁰ international law, and EU law.²⁰¹ Instructive in that regard is the decision in *Söderman v. Sweden*, where the Court investigated the lack of protective measures in Sweden against the non-consensual filming of an individual in the legal orders of parties, finding that many of them included provisions in either criminal or civil law.²⁰² Conversely, other conduct, including conduct by non-State actors, does not qualify on its own as subsequent practice under Articles 31 and 32. However, it can be relevant in assessing the subsequent practice of parties to a treaty and give rise to further practice.²⁰³

2. "In the Application of the Treaty"

The conduct must regularly occur in the application of the treaty. This can include:

statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.²⁰⁴

23 (Jun. 15); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 410, ¶ 39 (Nov. 26); see also *Draft Conclusions*, *supra* note 51, conclusion 10, ¶ 2, at 75.

¹⁹⁶ *Id.* conclusion 5, ¶ 1, at 37.

¹⁹⁷ *Evans*, *supra* note 23, ¶¶ 37-42.

¹⁹⁸ CivA 5587/93 *Nachmani v. Nachmani* 50(4) PD 661 (1995)(Isr.); *Evans*, *id.*, ¶ 49.

¹⁹⁹ *Evans*, *id.*, ¶¶ 43, 80.

²⁰⁰ *Opuz*, *supra* note 74, ¶ 87.

²⁰¹ *Dzehtsiarou*, *European Consensus*, *supra* note 118, at 87.

²⁰² *Söderman v. Sweden*, App. No. 5786/08 2013-VI Eur. Ct. H.R. 203, ¶ 105.

²⁰³ *Draft Conclusions*, *supra* note 51, conclusion 5, ¶ 2, at 37.

²⁰⁴ *Id.*, conclusion 4 at 32, commentary, ¶ 18.

The ILC clarified that Article 27 of the VCLT does not exclude domestic legislation as a subsequent State practice.²⁰⁵ It stressed that international judicial pronouncements demonstrate that there is a difference between relying on domestic laws to justify a breach of a treaty obligation (which Article 27 forbids) and referring to national legislation to interpret an international treaty.²⁰⁶

As a general rule, the relevant practice is in the application of a treaty when it occurs in fulfilling a treaty obligation: “subsequent conduct that is not motivated by a treaty obligation is not in the application of the treaty or regarding its interpretation.”²⁰⁷ This would question the validity or even the possibility of a consensus under the ECHR if the relevant practice is related to other international law instruments. However, the ILC has adopted a different position on human rights treaties. It has acknowledged that the ECtHR, often “mindful of the Convention’s special character as [a] human rights treaty,”²⁰⁸ assumes that conduct of the parties will reflect their obligations under the ECHR. Indeed, the ECtHR “rarely asks whether a particular legal situation results from a legislative process during which the possible requirements of the Convention were discussed.”²⁰⁹ This is justified by the very nature of human rights treaties, where a presumption can be made that parties, when legislating or otherwise acting, are “conscious of their obligations under the Convention and that they act in a way that reflects their understanding of their obligations.”²¹⁰ The subsequent practice of parties that affects the protection of Convention rights, *even without* making explicit reference to the Convention, therefore still represents persuasive authority for the protection of rights under the Convention.

3. Qualification of “Practice” as “Subsequent Agreement” and its Interpretative Weight

Draft Conclusion 10 concerns the qualification of the practice as a subsequent agreement. The practice that is relevant under Article 31(3)(b) gives evidence of subsequent agreement when it demonstrates a common understanding between the parties, in line with the similar demand placed upon subsequent

²⁰⁵ *Id.*, conclusion 4 at 32, commentary, ¶ 19.

²⁰⁶ *Id.*; *Kart v. Turkey*, App. No. 8917/05, 2009-VI Eur. Ct. H.R. 49, ¶ 54; *Sigurður A. Sigurjónsson v. Iceland*, 264 Eur. Ct. H.R. (ser. A), ¶ 35 (1993).

²⁰⁷ *Draft Conclusions*, *supra* note 51, conclusion 6, commentary, ¶ 7, at 45.

²⁰⁸ *Loizidou*, *supra* note 111, ¶ 43.

²⁰⁹ *Draft Conclusions*, *supra* note 51, conclusion 6, commentary, ¶ 24, at 47; *see also* *Marckx*, *supra* note 68, ¶ 41; *Jorgic v. Germany*, 2007-III Eur. Ct. H.R. 263, ¶ 69; *Mazurek v. France*, 2000-II Eur. Ct. H.R. 23, ¶ 52.

²¹⁰ “Country Factsheets” Department for the Execution of Judgments of the European Court of Human Rights, <https://www.coe.int/en/web/execution/country-factsheets>.

agreement under Article 31(3)(a) of the VCLT.²¹¹ In other words, a common understanding must exist for both these alternatives that Article 31(3) sets forth. It must be demonstrated for the interpretation of a provision in the direct form of a subsequent agreement (Article 31(3)(a)), and for the practice that forms the basis for identifying the agreement (Article 31(3)(b)).²¹² Once the subsequent practice qualifies as a subsequent agreement of the parties regarding the treaty's interpretation, Draft Conclusion 7 explicates the effect of the practice. It can result in "narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties."²¹³

The interpretative weight of subsequent practice under Article 31(3)(b) can, however, vary. It depends, for example, on whether and how often the practice is repeated.²¹⁴ This is reflected in the jurisprudence of the ECtHR when it states that the law is "in transitional stage[s]."²¹⁵ Not all parties need to engage in uniform practice to establish subsequent agreement,²¹⁶ however, the strength of the agreement depends on the number of parties engaging in the practice and the duration of the practice.²¹⁷ Even silence of a party can qualify as accepting the subsequent practice "when the circumstances call for some reaction."²¹⁸ The 2018 ILC's Draft Conclusions on the identification of customary international law include a similar approach in Draft Conclusion 6, whereby "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction."²¹⁹

From that perspective, European consensus appears as a process, and only when it has clearly coalesced into a traceable standard can it be used to narrow the breadth of the margin of appreciation. This is illustrated in *Christine Goodwin*, where the fact that time had passed contributed to the respondent State's

²¹¹ *Draft Conclusions*, *supra* note 51, conclusion 10, ¶ 1, at 75.

²¹² *Id.*, conclusion 10, commentary, ¶¶ 1, 2, at 75.

²¹³ *Id.*, conclusion 7, ¶ 1, at 51.

²¹⁴ *Id.*, conclusion 9, ¶ 2, at 70.

²¹⁵ *X, Y, Z v. UK*, *supra* note 53, at ¶ 44.

²¹⁶ *Draft Conclusions*, *supra* note 51, conclusion 10, ¶ 2, at 75. Such a strict requirement would go beyond what is necessary to establish "practice" in the process of finding a rule of customary international law, where the ILC concluded that the practice must be "widespread." *Id.*, at 64, conclusion 8.

²¹⁷ *Id.*, conclusion 9, ¶ 2, at 70: "In addition, the weight of subsequent practice under article 31, paragraph 3(b), depends, *inter alia*, on whether and how it is repeated," *see further id.*, conclusion 6, commentary, ¶ 10, at 45.

²¹⁸ *Id.*, conclusion 10, ¶ 2, at 75.

²¹⁹ Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10). Yearbook of the International Law Commission, 2018, vol. II, Part Two.

falling behind in adopting protective measures that other States had enacted and that had merged into a sufficiently firm converging approach.²²⁰

Further differentiation is required between the subsequent practice that establishes the agreement of the parties under Article 31(3)(b) of the VCLT and the subsequent practice that may be considered as supplementary means of interpretation. Practice that does not (yet) establish the agreement of parties on the interpretation of the treaty does not carry the same weight for interpretation. It can be considered under Article 32 of the VCLT. However, this will not constitute an authentic means of interpretation and thus, it carries less interpretative weight under the Convention than a consensus that is placed upon the practice that qualifies as an agreement under Article 31(3)(b).²²¹

V. A EUROPEAN CONSENSUS IN SCIENCE AND LAW ON CLIMATE CHANGE?

The previous Parts II and III have demonstrated that the scientific consensus is the point of departure in seeking European consensus in cases that are open to scientific assessment and that the consensus doctrine can be explained as a restatement of the subsequent agreement of parties that the Court infers from their legal practice. This legal practice must depict some degree of uniformity and commonality to form a sufficiently concrete subsequent agreement on the applicable international human rights standard.

This final Part joins law and science in finding a consensus on the “interest at stake” and the “means to protect it”, in the specific context of human-induced climate change. In addressing a global challenge and its multifaceted and far-reaching consequences, scientific evidence is indispensable for solidifying the common goals and the trajectory of rights protection under the Convention. Only a scientifically informed analysis of the scale and magnitude of climate risks and the available pathways to stabilize the climate can lead to an effective assessment and definition of how legal frameworks must adapt to guarantee continued and effective rights protection. The reality of climate protection is, as with other areas of environmental law such as the protection of the ozone layer or biodiversity, that it constitutes what I call a “heterogeneous” community interest.²²² This

²²⁰ *Christine Goodwin*, *supra* note 26.

²²¹ *Draft Conclusions*, *supra* note 51, conclusion 3, commentary, ¶ 12, at 27.

²²² *See generally*, for the protection of community interests, Jutta Brunnée, *International Environmental Law and Community Interests in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW* 151, 165 (Eyal Benvenisti & Georg Nolte eds., 2018). Climate change has been described as a challenge that is “dizzying in its complexity, daunting in its implications, and multifaceted in a way that eludes easy categorization,” JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INT’L. LAW: AN INTERACTIONAL ACCOUNT*, 126 (2010).

interest cannot be protected except through collective action²²³ and abstaining from prioritizing States' self-interest and conflicting short-term objectives. Climate change exposes those already vulnerable to increased risks and extreme events, often in situations where adaptation to climate impacts will be difficult, if not impossible to achieve. This perpetuates existing vulnerabilities.

Leaving vulnerable groups exposed to the risk of human rights violations directly contravenes the general approach of the ECtHR as a judicial organ that has been attentive to the vulnerabilities of specific groups.²²⁴ As Judge Trinidad remarked: “[O]ver the years, the ECtHR acknowledged the vulnerability of children, and disabled persons, among other victimized individuals.”²²⁵ Generally, international case law acknowledges human vulnerability, especially the lack of protection for specific populations.²²⁶

This Part emphasizes the significant function of the consensus doctrine for protecting rights from further climate change. It applies the criteria that the Court has used in cases that are open to scientific approaches as discussed in the two previous Parts, to the challenge posed by climate change and, to offer reflections on how these elements shape the scope of Convention rights and obligations of States thereunder. The first Section establishes the *scientific* consensus on the interest at stake and the means of protecting it. The second Section explains the extent to which a corresponding *legal* consensus can be derived from the parties' domestic and international legal practices on the interest at stake and the means to protect it. The final Section discusses the legitimacy of the consensus doctrine, based on the two integrative functions that this Article has examined.

This Part does not provide legal analysis of current climate cases that are now pending before the Court, nor does it attempt to predict their outcome. It will not directly interfere with the discussion of the procedural hurdles or the substantive issues, although important questions have been raised concerning the admissibility of the case and the attribution of emissions to the defendant

²²³ There are other areas of international law where global and collective interests can only be protected through common action, *see* the discussion by James Crawford, *The Current Political Discourse Concerning International Law*, 81 MOD. L. REV. 1, 4.

²²⁴ *M.S.S. v. Belgium*, *supra* note 76, ¶¶ 233-4, 264; *Mayeka v. Belgium*, 2006-XI Eur. Ct. H.R. 267, ¶¶ 59-63.

²²⁵ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed.), Provisional Measures, Diss. Opinion Judge Trinidad, 2017 I.C.J. REP. 155, ¶ 19 (Apr. 17).

²²⁶ Armed Activities on the Territory of Congo (Dem. Rep. of the Cong. v. Uganda), Provisional Measures, 2000 I.C.J. REP. 111, ¶¶ 42-43 (July 1); Application of the International Convention against All Forms of Racial Discrimination (Georgia v. Russ. Fed.), Provisional Measures, 2008 II.C.J. REP. 353, ¶ 43 (Oct. 15).

countries in *Duarte Agostinho*.²²⁷ There is no doubt that the analytical work undertaken here is closely linked to the clarification that applicants seek in this case from the Court concerning the role of the Convention in protecting their rights from climate impacts. The focus remains on identifying changes in the margin or appreciation of States through European consensus to support the argument that concrete obligations of States in the context of climate change exist under the Convention and that they continue to evolve.

A. Scientific Consensus on the “Interest at Stake” and the “Means to Protect it”

There is a widespread scientific consensus on the interest at stake: without rapidly changing the global emissions trajectory, present and future generations will live in a fundamentally altered world and there is limited time to reduce greenhouse gas (GHG) emissions to effectively stabilize the climate conditions and protect ecosystems, human life and, more generally, planetary health.²²⁸ Human influence has warmed the earth’s atmosphere at a rate that is unprecedented in at least the last 2000 years.²²⁹

Scientists agree that human-induced climate change is already affecting many weather and climate extremes, such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and the attribution of the observed changes to human influence has strengthened since the Fifth Assessment Report (AR5).²³⁰ Further impacts in natural and human systems have been attributed with high confidence to slow-onset processes, such as ocean acidification, sea level rise, and regional changes in precipitation.²³¹ Global temperatures have reached around

²²⁷ See Paul Clark, Gerry Liston & Ioannais Kalpouzos, *Climate Change and the European Court of Human Rights: The Portuguese Youth Case*, EJIL: Talk!, (Oct. 6, 2020), <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> (last visited Nov. 17, 2022); Jenny Sandvic, Peter Dawson & Marit Tjelmeland, *Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?* EJIL Talk! (June 23, 2021), <https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/> (last visited Nov. 17, 2022); Ole W. Pedersen, *The European Convention of Human Rights and Climate Change – Finally*, EJIL Talk! (Sept. 22, 2020), <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> (last visited Nov. 17, 2022).

²²⁸ Myles R. Allen, Opha P. Dube & William Solecki, *Framing and Context, in* GLOBAL WARMING OF 1.5°C, AN IPCC SPECIAL REPORT, 56-67 (Valérie Masson-Delmotte, et al. eds., 2019).

²²⁹ IPCC (Aug. 2021), *Working Group I, supra* note 6, at 7, *Summary for Policy Makers*.

²³⁰ *Id.*, at 8.

²³¹ Slow onset events refer to the risks and impacts associated with e.g., increasing temperature means, desertification, decreasing precipitation, loss of biodiversity, land and forest degradation, glacial retreat and related impacts, ocean acidification, sea level rise, and salinization (<https://interactive-atlas.ipcc.ch>); see also IPCC Working Group II, IPCC (February 2022), *Summary for Policymakers, in* Climate Change 2021: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Hans O. Pörtner et al., 2022), at 9 (B.1.1), <https://www.ipcc.ch/report/ar6/wg2/>.

1.2°C above pre-industrial levels,²³² and feedback cycles in conjunction with polar amplification lead to higher increases locally; for example, approximately a 3°C rise in north-western Canada.²³³ Every thousand gigatons of carbon dioxide (GtCO₂) of cumulative CO₂ emissions is likely to cause a 0.27°C to 0.63°C increase in global surface temperature, with a best estimate of 0.45°C.²³⁴ Human influence has *likely* increased the chance of compound extreme events since the 1950s.²³⁵ Climate change acts as a direct driver that increasingly exacerbates the impact of other drivers which adversely affects nature and human well-being.²³⁶ Climate change and biodiversity loss mutually reinforce one another; according to the Global Assessment Report on Biodiversity and Ecosystem Services, under a business-as-usual scenario, “climate change will be the fastest growing driver negatively impacting biodiversity by 2050.”²³⁷

The 2021 report of the IPCC’s Working Group I to the Sixth Assessment Report establishes five new greenhouse gas emissions reduction pathways. For each of the pathways, the temperature target of 1.5°C will *more likely than not* be reached around 2040 and global surface temperature will continue to increase until at least the mid-century.²³⁸ The IPCC recognizes that the attribution of observed changes in extremes to human influence has substantially advanced since AR5, “in particular for extreme precipitation, droughts, tropical cyclones, and compound extremes (*high confidence*).”²³⁹ Some specific recent hot extreme events would have been *extremely unlikely* without human influence.²⁴⁰ Furthermore, there will be “an increasing occurrence of some extreme events

²³² *Id.*, at 21.

²³³ Nick Watts et al., *The 2019 report of The Lancet Countdown on health and climate change: ensuring that the health of a child born today is not defined by a changing climate*, 394 THE LANCET, 1836–78 (Nov. 13, 2019), [https://doi.org/10.1016/S0140-6736\(19\)32596-6](https://doi.org/10.1016/S0140-6736(19)32596-6); for the physical science basis see Mathew Collins et al., *Long-term Climate Change: Projections, Commitments and Irreversibility*, in THE PHYSICAL SCI. BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REP. OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Thomas F. Stocker et al. eds., 2013), ¶ 12.5.5, https://archive.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter12_FINAL.pdf [hereinafter *IPCC AR5, Working Group I*].

²³⁴ *IPCC (Aug. 2021), Working Group I, supra* note 6, at 36, *Summary for Policy Makers*.
²³⁵ *Id.*, at 11, *Summary for Policy Makers*. The IPCC defines compound extreme events as follows: “Compound extreme events are the combination of multiple drivers and/or hazards that contribute to societal or environmental risk. Examples are concurrent heatwaves and droughts, compound flooding (e.g., a storm surge in combination with extreme rainfall and/or river flow), compound fire weather conditions (i.e., a combination of hot, dry, and windy conditions), or concurrent extremes at different locations.” *Id.*

²³⁶ *Id.*, at 8, 23.
²³⁷ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Servs., *2019 Global Assessment Report on Biodiversity and Ecosystem Services* (Brondízio, E. S., et al. eds., 2019).
²³⁸ *IPCC (Aug. 2021), Working Group I, supra* note 6, *Summary for Policy Makers*, at 17, 18.
²³⁹ *Id.*, *Technical Summary*, at 73.

²⁴⁰ *Id.*, at 74.

unprecedented in the observational record with additional global warming, even at 1.5°C of global warming”.²⁴¹

For some extreme events, attribution studies establish a causal link between the event and certain emitters.²⁴² The 2021 report of Working Group I relies for the first time on attribution studies which synthesize information from climate models and observations. The scientific consensus comprises the links between climate change and human exposure to larger, longer lasting, and more frequently occurring extreme events. Thus, our climatically-altered world creates new, and exacerbates existing, vulnerabilities globally.

Children and those over the age of sixty-five are particularly vulnerable to suffering adverse effects of climate change, and those living in poorer countries are more exposed to climate change-induced risks. The lethality of extreme events has increased, and larger parts of the global population are negatively affected by extreme events and climate change-induced disasters.²⁴³

Global health trends in climate-sensitive diseases show that transmissions from climate change-induced disease for many pathogens are rising²⁴⁴ and that they disproportionately affect children.²⁴⁵ A child born today “will experience adulthood in a world that is four degrees Celsius warmer than the pre-industrial average.”²⁴⁶ Air pollution, which is driven largely by fossil fuel production and consumption and exacerbated through heat and wildfires, damages vital organs throughout childhood and adolescence with negative effects accumulating over time and resulting in premature death.²⁴⁷ Older populations are particularly vulnerable to extreme heat, and recent studies demonstrate that heat wave exposure has increased in frequency and intensity, with one study indicating that every heat wave is hotter and lasts longer because of climate change.²⁴⁸

²⁴¹ *Id.*, *Summary for Policy Makers*, at 15.

²⁴² *Id.*, at 67, 78; 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); Stuart-Smith, *et al.*, *supra* note 2, 651.

²⁴³ Nick Watts, Markus Amann, Nigel Arnell, Sonja Ayeb-Karlsson, Jessica Beagley, Kristine Belesova, *et al.*, *The 2020 Report of the Lancet Countdown on health and climate change: responding to converging crises*, 397 THE LANCET, 129, 138 (Jan. 9, 2021).

²⁴⁴ Watts, *et al.*, *supra* note 233, at 1846.

²⁴⁵ For example, nine of the ten most suitable years for the transmission of dengue fever occurred since 2000, *id.* at 1836.

²⁴⁶ *Id.*

²⁴⁷ Ambient air pollution: a global assessment of exposure and burden of disease. Geneva, Switzerland: World Health Organization (2016). <https://apps.who.int/iris/handle/10665/250141>; Climate Change and Health (2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

²⁴⁸ Frank Kreienkamp *et al.*, *Rapid attribution analysis of the extraordinary heatwave on the Pacific Coast of the US and Canada June 2021* (2021) (on file with Earth Syst. Dynam. Discuss.), stating that “[b]ased on observations and modeling, the occurrence of a heatwave with maximum daily temperatures ... as observed in the area 45 °N–52 °N, 119 °W–123 °W, was found to be virtually impossible without human-caused climate change.” <https://www.worldweatherattribution.org/wp-content/uploads/NW-US-extreme-heat-2021-scientific-report-WWA.pdf>.

In addition to this scientific consensus on the interest at stake, there is a strong scientific consensus on the means to protect this interest, i.e. what needs to be done to protect biodiversity and humanity from progressing climate change. The IPCC has calculated that there is a small remaining carbon budget available while still reaching the global temperature target of between 1.5°C and 2°C.²⁴⁹ This remaining carbon budget translates into emissions reduction pathways that will not exceed the 1.5°C threshold.²⁵⁰ All potential pathways foresee a combination of three primary strategies. They include rapid and large reductions in CO₂, deep reductions in non-CO₂ greenhouse gases, and accelerated development of technologies to remove CO₂ from the air.²⁵¹ The likelihood with which either the lower or the upper-temperature limitation of Article 2(1)(a) Paris Agreement can be maintained over the next decades depends on the ambition, rigor, and timeliness with which we pursue these three strategies. For pathways to limiting warming to 1.5°C, we must reach net-zero CO₂ emissions globally by around 2050 (2046–55), with negative emissions thereafter. This means that if one country achieves a lesser emissions reduction, then others have to balance the global emissions account by increasing their ambition and action, in order to achieve the same global temperature outcome.²⁵²

The described scientific consensus on what is required to *mitigate* climate change is complemented by a strong scientific consensus that *adaptation measures* are increasingly crucial to protect lives and livelihoods. Climate change is the reality of the present and the future and adaptation has become a “monstrous challenge” that requires “infrastructure, migration support, income and food security” as well as finance flows from rich to poor countries.²⁵³ Adaptation refers to a range of country-specific and regional measures that States must provide to address climate impacts, and establish early warning systems for heatwaves, floods, and hurricanes that are growing in frequency and intensity.²⁵⁴ The most recent floods in Europe, China, and India demonstrate that countries are falling

²⁴⁹ Myles R. Allen, et al., *Technical Summary*, in GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT 25, 31, 33 (Valérie Masson-Delmotte, et al. eds., 2019).

²⁵⁰ Joeri Rogelj, et al., *Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development*, in GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT 25, 31, 104 (Valérie Masson-Delmotte, et al. eds., 2019) <https://www.ipcc.ch/sr15/download/#full>; IPCC (Aug. 2021), *Working Group I, supra* note 6; *Summary for Policy Makers*, at 17, 18.

²⁵¹ Joeri Rogelj, Oliver Geden, Annette Cowie & Andy Reisinger, *Three ways to improve net-zero emissions targets*, 591 NATURE, 365, 368 (Mar. 18, 2021).

²⁵² *Id.*, at 368.

²⁵³ Ezra Klein, *It Seems Odd That We Would Just Let the World Burn*, Open Editorial, NEW YORK TIMES (July 15, 2021).

²⁵⁴ Ian R. Noble et al., *Adaptation Needs and Options*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY. PART A: GLOBAL AND SECTORAL ASPECTS. CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 833 (C. B. Field et al. eds., 2014), https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap14_FINAL.pdf.

behind on adaptation and that the magnitude of risks is increasing faster than earlier assessments predicted.²⁵⁵ Adaptation planning and risk management decisions will depend on the different temperature scenarios for future decades.²⁵⁶

B. The Corresponding Legal Consensus

Particularly in the aftermath of the 1.5°C Special Report of the IPCC, the lower temperature mark enshrined under Article 2(1)(a) of the Paris Agreement, began to dominate the scientific and political discussion. However, the International Energy Agency found that while global CO₂ emissions declined by 5.8 percent in 2020, global energy-related CO₂ emissions grew by around 5 percent in 2021,²⁵⁷ due to a rebound for coal demand that is expected to reach record highs in 2022.²⁵⁸ How, then, does the scientific consensus translate into a legal consensus, on the interest at stake and the means to protect it? While there is a strong corresponding legal consensus on the interest at stake, and this will be explained below, at the levels of domestic law and international law, the consensus on the means to protect this interest is less clearly formed and lags behind the rapid developments in climate science.

Considering the legal consensus on either of the two constitutive elements of the European consensus presupposes that there is a link between climate action and rights protection under the Convention. A legal response to climate change can only count as State practice under the ECHR, and thus shape the margin of appreciation of States under the Convention, if it can be shown that their climate measures equate to rights protection under the ECHR. Only then can the State practice be relevant for the interpretation of the ECHR. As was discussed earlier, it is not necessary that States refer to the ECHR when adopting climate measures for these to account as relevant State practice.²⁵⁹

²⁵⁵ See, e.g., the most recent report of the Climate Change Committee of the United Kingdom, INDEPENDENT ASSESSMENT OF UK CLIMATE RISK: ADVICE TO GOVERNMENT FOR THE UK'S THIRD CLIMATE CHANGE RISK ASSESSMENT, 14 (2021), <https://www.theccc.org.uk/publication/independent-assessment-of-uk-climate-risk/>. The Climate Change Committee is an independent, statutory body that was established under the UK Climate Change Act 2008, in order to advise the UK Government and the devolved administrations on climate change mitigation and adaptation.

²⁵⁶ IPCC (Aug. 2021), *Working Group I, supra* note 6, *Technical Summary*, at 72.

²⁵⁷ International Energy Agency, *Global Energy Review 2021*, 10 (2021), <https://iea.blob.core.windows.net/assets/d0031107-401d-4a2f-a48b-9eed19457335/GlobalEnergyReview2021.pdf>; International Energy Agency, *Coal 2021. Analysis and forecast to 2024*, 7 (2021), <https://www.iea.org/reports/coal-2021/executive-summary>.

²⁵⁸ *Id.*, *Global Energy Review 2021*, at 17, 18; *id.*, *Coal 2021*, at 13.

²⁵⁹ See Part IV., B. 2.

1. Climate Protection as Rights Protection

The Convention does not provide for an explicit right to a healthy environment; however, the ECtHR has recognized several international texts on the right to a healthy environment.²⁶⁰ These texts include the 1992 Rio Declaration on Environment and Development,²⁶¹ especially Principle 10 of this Declaration,²⁶² and the Recommendation 1614 (2003) on environment and human rights of the Parliamentary Assembly of the Council of Europe.²⁶³ Guided by the object and purpose of the Convention as an instrument for the protection of fundamental freedoms and the foundation of justice, the Court famously uses a “greening of human rights” approach for environmental cases.²⁶⁴ It has recognized that where an individual is “directly and seriously affected by noise or other pollution, an issue may arise under Article 8 of the Convention”,²⁶⁵ however, no violation will be found unless the State exceeded its discretionary power by failing to strike a fair balance between the interests of the individual and of the community as a whole.²⁶⁶ A failure to comply with domestic environmental regulation indicates an interference with protected rights²⁶⁷ and the Court has

²⁶⁰ *Okyay*, *supra* note 101, ¶¶ 51-52.

²⁶¹ *Rio Declaration on Environment and Development*, REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, Annex I, A/CPM.151/26 (vol. 1), (Aug. 12, 1992),

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

²⁶² Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided,” at <https://www.cbd.int/doc/ref/rio-declaration.shtml>.

²⁶³ The Assembly recommends that the Governments of Member States:

“i. ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the European Convention on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;

ii. recognise a human right to a healthy, viable and decent environment which includes the objective obligation for States to protect the environment, in national laws, preferably at constitutional level;

iii. safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention.”

²⁶⁴ *Öneryıldız*, *supra* note 40, ¶ 69; *see also* Manual on Human Rights and the Environment, Art 2: 35 (2d ed. 2012) www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf; *id.*, at Art 8: 44; Alan Boyle, *Human Rights and the Environment: Where Next?* 23 EUR. J. OF INT’L LAW 614 (2012).

²⁶⁵ *Greenpeace v. Germany*, App. No. 18215/06, ¶ 1 at 4 (May 12, 2009), (unreported) [hereinafter *Greenpeace*]; *Hatton*, *supra* note 28, ¶ 96; *López Ostra*, *supra* note 40, ¶ 51.

²⁶⁶ *Greenpeace*, *supra* note 265.

²⁶⁷ *Tătar v. Romania*, App. No. 67021/01, ¶ 109 (Jan. 27, 2009), (unreported) [hereinafter *Tătar*].

recognized that the precautionary principle²⁶⁸ demands from States not to delay taking measures against severe and potentially irreversible environmental harm in the absence of scientific certainty.²⁶⁹

Parties to the Convention are required, as part of their positive obligations arising under Article 2 of the ECHR, to take appropriate steps to safeguard life, in the context of environmental hazards arising from dangerous activities²⁷⁰ or natural disasters.²⁷¹ The Court has, however, not yet decided a case on climate change. As a domestic court, the Supreme Court of the Netherlands has used Articles 2 and 8 of the ECHR in *Urgenda* and held that the Netherlands was under the obligation to reduce GHG emissions by 25 percent by the end of 2020.²⁷² The judgment demonstrates not only how human rights law informs environmental obligations of States, but it also strengthens the role of the judiciary in reviewing the adequacy of emissions reduction targets for effective rights protection.²⁷³

Generally, environmental and climate protection have become part of contemporary human rights doctrine,²⁷⁴ and are safeguarded by procedural administrative rules, such as Environmental Impact Assessments, that aim at preserving ecosystems, environmental integrity, and halting environmental degradation.²⁷⁵ Judgments of international and domestic courts and statements of international human rights bodies have solidified the link between climate and rights protection,²⁷⁶ a development that led to the notion of “climate rights.”²⁷⁷

The UNHRC has recognized the specific link between human rights and States’ environmental obligations in stating that “Obligations of States parties

²⁶⁸ United Nations Conference on Environmental Development, *Rio Declaration on Environment and Development*, UN A/CONF.151/26 (Vol. I) (1992). Principle 15 states, “[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

²⁶⁹ *Tătar*, *supra* note 267, ¶ 109 (only in French): “Par ailleurs, le principe de précaution recommande aux États de ne pas retarder l’adoption de mesures effectives et proportionnées visant à prévenir un risque de dommages graves et irréversibles à l’environnement en l’absence de certitude scientifique ou technique.”

²⁷⁰ *López Ostra*, *supra* note 40, ¶ 51.

²⁷¹ *Budayeva*, *supra* note 40, ¶¶ 129, 132.

²⁷² *Stichting Urgenda*, *supra* note 2.

²⁷³ John H. Knox (Special Rapporteur), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean and Healthy and Sustainable Environment*, UN GA A/HRC/37/59, ¶ 13 (Jan. 24, 2018).

²⁷⁴ *Gabčíkovo-Nagymaros Project* (Hung. V. Slov.), 1997 I.C.J. REP. 7, 88, 91-92 (Sept. 25, 1997) (Separate Opinion of Vice-President Weeramantry), <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-03-EN.pdf>; John H. Knox, *id.*

²⁷⁵ See Brunnée, *supra* note 222; Minnerop & Røstgaard, *supra* note 8, at 872.

²⁷⁶ The Environment and Human Rights (State Obligations in Relation to The Environment), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017), *Neubauer*, *supra* note 2.

²⁷⁷ *UNEP Litigation Report*, *supra* note 7, at 31.

under international environmental law should thus inform the contents of Article 6 of the Covenant, and [...] the obligation of State parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.²⁷⁸ It has stated that “without robust national and international efforts,” the “effects of climate change in receiving [S]tates may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending [S]tates” and that the “risk of an entire country becoming submerged under water is such an extreme risk,” that the conditions of life in a risk country may indeed become “incompatible with the right to life with dignity” even before the risk is realized.²⁷⁹ In a similar vein, the Committee on the Rights of the Child recognized the challenges of protecting children’s rights in particular from the adverse effects of environmental degradation and climate change, and decided in June 2021 to prepare its next General Comment with the theme of children’s rights and the environment, with a special focus on climate change.²⁸⁰ Given this well-established link between climate change and human rights implications, climate measures are capable of qualifying as relevant State practice under the Convention.

2. *Protecting the Interest at Stake in Domestic and International Law*

Apart from the above-discussed general recognition that climate action is a requirement of effective and *continued* rights protection amidst *increasing* risks, and thus capable of defining standards under the Convention, is there a legal consensus on the interest at stake at the level of domestic and international law? Across parties to the Convention, climate change is recognized as a major threat

²⁷⁸ General Comment No. 36 (CCPR/C/GC/36), ¶ 62 (Oct. 30, 2018); *see further* Human Rights Committee, CCPR/C/127/D/2728/2016, ¶ 9.4 (Oct. 24, 2019); *see on the Environmental Impact Assessment*, Brian J. Preston, *Contemporary Issues in Environmental Impact Assessment*, 37 ENV’T & PLAN. L. J., 423 (2020).

²⁷⁹ *Id.*, CCPR/C/127/D/2728/2016, ¶ 9.11.

²⁸⁰ Media Center of the Office of the High Commissioner for Human Rights, *The UN Committee on the Rights of the Child commits to a new General Comment on Children’s Rights and the Environment with a Special Focus on Climate Change*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27139>.

in the political²⁸¹ and legal discourse²⁸² that requires action under the pillars of mitigation and adaptation of the Paris Agreement. Most countries acknowledge the 1.5°C target in the political discourse as the global temperature target.²⁸³ Of the forty-seven parties to the ECHR, all parties have national energy policies in place to increase the use of renewable energies and ten parties, including the European Union, already have net-zero GHG emissions reduction targets enshrined in law.²⁸⁴ A further fourteen parties have policy documents that set forth net-zero emissions targets by 2050. Internationally, approximately 53 percent of the Global Economy has set or is intending to set net-zero targets by 2050.²⁸⁵

In addition to the national and regional legal measures, international law in particular provides several core treaties that translate the scientific consensus on the interest at stake. All of these international treaties demonstrate that there is a growing concern for and understanding of the adverse effects of anthropogenic climate change and that limiting humanity's impact on ecosystems and the climate is necessary to protect human rights, especially the right to life.²⁸⁶ The core treaties on climate change include most notably the United Nations Framework Convention on Climate Change, the Kyoto Protocol,²⁸⁷ and the Paris Agreement. The wider legal framework includes the Vienna Convention for the Protection of the Ozone Layer²⁸⁸ and the Kigali Amendment of 2016²⁸⁹ which has turned the

²⁸¹ See UN Climate Change News, *2020 Is a Pivotal Year for Climate – UN Chief and COP26 President*, United Nations Framework Convention on Climate Change (Mar. 9, 2020), <https://unfccc.int/news/2020-is-a-pivotal-year-for-climate-un-chief-and-cop26-president>; statement of the UN Secretary General, *Message to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons* (Dec. 8, 2014), where he stated "...we are failing to meet the challenges posed by poverty, climate change, extremism and the destabilizing accumulation of conventional arms", at https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Message_from_UN_Secretary_General.pdf.

²⁸² United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, enshrines in its Article 2 the objective of "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."

²⁸³ It has been noted that "Unlike his predecessor, Mr. Biden took seriously the scientific consensus that the world needs to keep global temperatures from rising more than 1.5 degrees Celsius above preindustrial levels in order to avert irreversible planetary damage — including, but not limited to, die-offs of coral reefs, sea level rise, drought, famine, wildfires and floods" Editorial Board of the New York Times, *Joe Biden's Monumental Environmental Gambits* (July 17, 2021).

²⁸⁴ Energy & Climate Intelligence Unit, Data-Driven EnviroLab, Oxford Net Zero & NewClimate Institute, *Net Zero Tracker*, <https://zerotracker.net/>.

²⁸⁵ John Lang, *Net Zero: The Scorecard*, Energy & Climate Intelligence Unit (Oct. 18, 2021) <https://eciu.net/analysis/briefings/net-zero/net-zero-the-scorecard>.

²⁸⁶ For the analysis of national pledges so far, see UNFCCC, *Synthesis Report on Nationally Determined Contributions under the Paris Agreement*, UN FCCC/PA/CMA/2021/2 (Feb. 26, 2021), https://unfccc.int/sites/default/files/resource/cma2021_02E.pdf [hereinafter *NDC Synthesis Report*].

²⁸⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 UNTS 162.

²⁸⁸ Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 UNTS 293.

²⁸⁹ Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (Reg. No. 26369), Oct. 15, 2016 [hereinafter *Kigali Amendment*].

Montreal Protocol on Substances that Deplete the Ozone Layer²⁹⁰ into a climate protection agreement.²⁹¹ The Montreal Protocol was originally intended to address the need to eliminate hydrofluorocarbons (HFCs) introduced as long-term substitutes for ozone-depleting substances. Scientists discovered that HFCs—while not being as harmful for the ozone layer—have indeed a high radiative forcing potential. In other words, protecting the ozone layer came at the cost of adding potent greenhouse gasses in the form of HFCs. An unconstrained use of these HFCs would partly offset efforts of GHG emissions reductions under the Paris Agreement.²⁹²

Furthermore, there is scientific evidence that the production and consumption of plastic under a business-as-usual scenario would alone account for between 10-13 percent of the global annual 1.5°C carbon budget by 2050, with annual emissions reaching more than 2.75 billion metric tons of CO₂ from plastic production and incineration.²⁹³ Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes adopted an amendment to the Convention in 2019 to incorporate plastic waste into the regulatory framework, in order to ensure that plastic management becomes more transparent and safer for “human health and the environment,”²⁹⁴ thereby reducing GHG emissions.

The commitment of States to these international treaties supports the argument that there is a strong legal consensus within the international community that stabilizing GHG emissions in the atmosphere and not exceeding the Paris Agreement’s global temperature limit are crucial and paramount to protecting human rights from the even more severe consequences which a higher temperature increase would precipitate.²⁹⁵ In other words, climate measures that

²⁹⁰ Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, 1522 UNTS 3.

²⁹¹ Petra Minnerop, *Climate Protection Agreements*, in MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW (Anne Peters, ed.), opil.ouplaw.com.

²⁹² See the text of the *Kigali Amendment*, *supra* note 289.

²⁹³ Centre for International Environmental Law (CIEL), *Plastic & Climate: The Hidden Costs of a Plastic Planet* 1, 5 (May 2019), <https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-FINAL-2019.pdf>.

²⁹⁴ In 2019, parties to the 1989 Basel Convention (COP14) adopted amendments to Annexes II, VIII and IX to the Basel Convention on the Control of Transboundary Movements of hazardous Wastes, to include plastic waste in a legally-binding framework and established the Partnership on Plastic Waste, see Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 UNTS 57, for background and objectives see, <http://www.basel.int/Implementation/Plasticwaste/Amendments/Overview/tabid/8426/Default.aspx>; <https://www.basel.int/Implementation/Plasticwastes/Overview/tabid/6068/Default.aspx>; and <https://legal.un.org/avl/ha/bcctmhwd/bcctmhwd.html>.

²⁹⁵ John H. Knox, *Human Rights Principles and Climate Change*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 213, 226–27 (Cinnamon P. Carlame, Kevin R. Gray & Richard Tarasofsky eds., 2016); Lavanya Rajamani, *Human Rights in the Climate Change Regime*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 236, 250 (John Knox & Ramin Pejan eds., 2018); Christina Voigt, *The Paris Agreement: What Is the Standard of Conduct for Parties?*, 26 QUESTIONS INT’L L. 17 (2016); Jutta Brunnée & Stephen J. Toope, *Climate Change in LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW* 126 (2013); Petra Minnerop, *Integrating the “Duty of Care”*

comply with the temperature limitation of the Paris Agreement qualify as State practice on human rights protection, under the ECHR and beyond. This legal consensus on the interest at stake already limits the margin of appreciation. In addition to these legislative measures, climate adjudication has increasingly resulted in favorable outcomes with a steadily growing number of cases relying on fundamental and human rights. Courts generally no longer view adjudicating the adequacy of national climate targets as a judicial “no go area.”²⁹⁶

3. A Legal Consensus on the Means to Protect the Interest at Stake?

Less clear is the legal consensus on the means to protect the interest at stake. At the domestic level, States are under the obligation to pursue measures that implement their international legal commitments. Legal frameworks that correspond to ambitious net-zero policies through credible long-term strategies and legal measures are, in many instances, still evolving. One example of a developing comprehensive legal framework is that of the European Union. It has adopted several legal measures in support of the Paris Agreement’s commitments of Member States, and it recently introduced its first European Climate Law that aims to make the objectives of the European Green Deal legally binding.²⁹⁷ The European Climate Law stresses the importance of the EU’s own role as a leader in the global transition towards a net-zero greenhouse gas emissions economy.²⁹⁸ It recognizes the urgency to reduce GHG emissions and limit warming to 1.5°C.²⁹⁹ It respects “the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Article 37 thereof which seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development.”³⁰⁰ It also emphasizes that efforts to enhance adaptive capacity, strengthen resilience, and reduce vulnerability are crucial.³⁰¹

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).

²⁹⁶ See the *UNEP Litigation Report*, *supra* note 7, at 10, 13-9; see, e.g., *Stichting Urgenda and Thomson*, *supra* note 2.

²⁹⁷ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.7.2021, 1–17, at 5 ¶ 26 and the objectives in Art. 2.

²⁹⁸ *Id.*, at 3 ¶ 16.

²⁹⁹ *Id.*, at 2 ¶ 3.

³⁰⁰ *Id.*, at 2 ¶ 6.

³⁰¹ *Id.*, at 6 ¶ 31.

At the international law level, existing legal frameworks require States to adopt, in certain cases, very concrete measures, for example the phasing-down and phasing-out schemes of the Montreal Protocol. However, international legal frameworks in most instances fall short of directing or even dictating how exactly States should achieve the necessary reductions or environmental goals. It is the very nature of international law that it regularly does not spell out how States must give effect to their treaty obligations, and climate change is no exception. The implementation gap that can arise is often perceived as a weakness of international law, even though it rather constitutes failure at the national level.

The Paris Agreement pursues a global temperature goal to which all parties have committed yet leaves the concretization of reduction measures to States' own ambitions and self-perception of their own national capacities. Yet, it couples this leeway with provisions in the treaty and sub-treaty rules that aim to achieve enhanced transparency, consistency, comparability, and, ultimately, progressive ambition to achieve the treaty's goals.³⁰² The Paris Agreement in particular combines an ambitious temperature limitation target with the mandate that States must define their fair share in making an effective contribution, and be increasingly ambitious in doing so.³⁰³ The Agreement calls on developed parties to continue taking the lead by undertaking economy-wide absolute emissions reduction targets³⁰⁴ and envisages a five-year cycle of increasingly ambitious, nationally determined contributions (NDCs),³⁰⁵ informed by the outcome of the global stocktake (Article 14 Paris Agreement) as the centerpiece of the new oversight mechanism.³⁰⁶ This paradigm of progression is laid down in Article 3 of the Paris Agreement and in several other provisions.³⁰⁷ Additionally, it is also included in the guidance on NDC submissions. For example, the guidance on the "Information necessary for Clarity, Transparency and Understanding" and the guidance on "Accounting" both use the factor time to turn a strong recommendation in relation to first NDCs into an obligation for parties for second and subsequent NDCs.³⁰⁸

However, achievements in GHG emissions reductions so far suggest that the means to protect the interest at stake (climate protection as a means of human

³⁰² *Minnerop*, *supra* note 181; for the "Paris Agreement Rulebook" that was adopted at COP24 in Katowice, see UNFCCC, *Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session*, FCCC/PA/CMA/2018/3 (Mar. 19, 2019), https://unfccc.int/sites/default/files/resource/CMA_2018_3.pdf.

³⁰³ See Paris Agreement, *supra* note 35, at Arts. 3, 4(3).

³⁰⁴ See *id.*, at Art. 4(4).

³⁰⁵ The national submissions are available in the Interim NDC Registry, at NDC Registry (Interim), UNFCCC, <https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx>.

³⁰⁶ See Paris Agreement, *supra* note 35, at Art. 14.

³⁰⁷ Paris Agreement, *supra* note 35, at Arts. 4(3), (4); 9(3).

³⁰⁸ *Paris Agreement Rulebook*, *supra* note 302, Decision 4/CMA.1, Annex I and Annex II, https://unfccc.int/sites/default/files/resource/4-CMA.1_English.pdf.

rights protection) remain insufficient, and this applies for mitigation as well as for adaptation. The Interim NDC Synthesis Report that the UNFCCC Secretariat published in 2021 states that “more parties than previously communicated absolute emissions reduction targets, with some moving to economy-wide targets, resulting in most Parties having economy-wide NDCs covering all sectors defined in the 2006 IPCC Guidelines.”³⁰⁹ This reflects some progression, however, there are significant shortcomings: the final version of the Synthesis Report predicts that “the global GHG emissions level in 2030, taking into account implementation of all the latest NDCs, is expected to be 16.3 percent above the 2010 level.”³¹⁰ This is considerably less than the necessary 45 percent reduction that would be required for a pathway consistent with no or limited overshoot of the 1.5°C temperature goal.³¹¹ Many States still lack quantified, economy-wide GHG emissions reduction targets in their domestic laws.

As mentioned above, some domestic courts have already reviewed the adequacy of national climate targets in the context of the commitments to the Paris Agreement and fundamental or human rights provisions.³¹² Especially vis-à-vis the necessity of increasingly tighter standards, the Federal Constitutional Court of Germany in 2021 confirmed that at the level of constitutional supervision, domestic legislative measures remained under its review. New evidence could require that the legislature must adopt an even stricter temperature target than the Paris Agreement, as a result of the State’s general objective to protect the climate according to Article 20a of the German Basic Law³¹³ and the requirement to effectively protect fundamental rights.³¹⁴

Nevertheless, it is challenging to infer a consistent legal consensus across parties’ jurisdictions on the “means to protect” from the current legal landscape. A significant gap between the strong scientific consensus and a corresponding legal consensus on the *means to protect* human rights from climate change still exists. As the scientific evidence is corroborated further, there is the risk that this gap will widen if the law fails to adequately respond to new scientific evidence.

³⁰⁹ *NDC Synthesis Report*, *supra* note 286, at ¶ 5(c).

³¹⁰ *NDC Synthesis Report*, FCCC/PA/CMA/2021/8, ¶ 13 (Sept. 17, 2021). This version of the synthesis report synthesizes information from the 164 latest available nationally determined contributions communicated by Parties to the Paris Agreement as of 30 July 2021.

³¹¹ *Id.*

³¹² See notes 1, 8, and 9 and corresponding text.

³¹³ Grundgesetz [Federal Republic of Germany Basic Law], Art. 20a (stating that: “mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0116.

³¹⁴ *Neubauer*, *supra* note 2; Petra Minnerop, *The Advance Interference-Like Effect of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court*, 34 JOURNAL OF ENVIRONMENTAL LAW 135 (2022).

However, as demonstrated in Part III, the ECtHR has already found that scientific and corresponding legal consensus on the *interest at stake* are capable of narrowing the breadth of the margin of appreciation. Therefore, it is suggested here that the existing strong scientific consensus on the interest at stake and on the means to protect the climate, coupled with a legal consensus on the interest at stake, and an emerging legal trend of developing concordant measures to protect the climate in some States (the means to protect), is even under the most cautious consideration evaluated as a European consensus that narrows the margin of appreciation under the Convention.

C. Increased Legitimacy of European Consensus Through Science?

As indicated earlier,³¹⁵ European consensus is a doctrine that is often challenged on grounds such as coherency, methodology, and conceptual clarity. This final Section will only concentrate on the effects that the integrative functions of the doctrine have for the legitimacy debate, and through that lens, add some reflections to the discussion about the interpretation of human rights treaties in the climate change context.³¹⁶

The first consideration concerns the observed phenomenon that was discussed above,³¹⁷ whereby the Court relies on scientific evidence as the point of departure for finding a correlated legal consensus in the practice of States. While scientific consensus on its own is not sufficient for defining the scope of the Convention's rights, it narrows the margin of appreciation if it is integrated and reflected in the legal practice of States. The effectiveness and legitimizing function of scientific and/or normative-legal presuppositions for legal practices are crucial in the context of the legitimacy debate.³¹⁸ Including scientific evidence in concretizing the required standard of rights protection addresses the concern that evolutive interpretation might not reflect a "real change in human rights protection" but a "perceived or desired" one³¹⁹ that is based on the Court's own principled decision-making, see for these concerns that were expressed in the literature the discussion above.³²⁰ Especially in relation to climate change, scientific evidence not only marks the pivotal point for the legal analysis of the

³¹⁵ See above Part II. B.

³¹⁶ Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66 INT'L & COMP. L. Q. 557 (2017); Benoit Mayer, *Climate Change Mitigation as an Obligation under Human Rights Treaties?* 115 AJIL 409 (2021).

³¹⁷ Part III., B.

³¹⁸ JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG, 11 (1998), cf. Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW, 309 (Rüdiger Wolfrum & Volker Röben eds., 2008).

³¹⁹ See for the discussion, Dzehtsiarou, *European Consensus*, supra note 118, at 150.

³²⁰ Part II., B.

effectiveness of rights protection, but also enables States to define a common goal and establishes pathways for achieving it.

Legal measures can then be evaluated against the yardsticks of scientific parameters that predict the effects of measures for different outcome-scenarios and the consequences of delayed and insufficient actions. The relevant scenarios for the magnitude of future climate change impacts are defined by today's emissions reduction pathways that lead to predictable temperature increases. The functionality of the law and its contribution to resolving the global climate crisis is determined by the law's capacity to follow and incorporate this law-external knowledge. This choice to adapt the law to climate change requires a shared understanding across societies. With the consensus doctrine, the ECtHR holds a unique and impactful tool that could support and articulate a shared understanding, in accordance with the criteria of Article 31(3)(b) VCLT.

International instruments in their connectivity can be used to identify this shared understanding; the doctrine of European consensus is a legitimate tool to maintain and foster it. All parties to the ECHR have endorsed the scientific consensus on the temperature limitation that forms the core objective of the Paris Agreement. They share the understanding that a higher temperature rise would have devastating consequences for humanity and biodiversity. Human rights are under an increased risk if GHG concentrations in the atmosphere are not stabilized, and the temperature exceeds 1.5°C or 2°C. Therefore, this temperature limitation enables parties to follow a trajectory of rights protection amidst the global threat that climate change represents. For the definition of what exactly constitutes effective rights protection, scientific evidence provides a measure of objectivity and clarity through connecting emissions pathways with temperature outcomes and temperature outcomes with forecasts of corresponding climate impacts. Using the consensus doctrine to join climate science and the law in order to define and concretize Parties' obligations under the Convention accounts for the role that the Court itself assigns to scientific evidence in its jurisprudence and ensures that the doctrine, and with it the Convention's legal architecture, remain significant in the context of climate change.

The second integrative function of the doctrine concerns the argument that the Court deploys an authentic means of treaty interpretation. The Court harks back to the consent of States, expressed in their legal practice as shared understanding.³²¹ Explaining the doctrine as an articulation of the common understanding of parties through the Court provides procedural safeguards based on norms for treaty interpretation that are widely recognized as customary international law, as valid norms *outside* the ECtHR. These norms of treaty

³²¹ *Brunnée & Toope*, *supra* note 222, at 56.

interpretation themselves meet criteria for legality³²² and they provide a framework for the analysis of States' conduct. The national legal measures that are considered for this subsequent practice are the outcome of a chain of legitimately approved decisions within each State.³²³

Analyzing and applying these national legal measures within the norms of treaty interpretation justifies and legitimizes the legal effect that the subsequent agreement has: ultimately limiting the margin of appreciation and defining a respondent State's obligation under the Convention. The elements of Article 31(3)(b) of the VCLT in conjunction with the interpretative Draft Conclusions offer an analytical framework that is crucial to prevent unsolicited judicial intervention into a political sphere and, in the long term, only rules-based interpretation can nurture parties' shared understanding.

A science-based consensus can consequently safeguard standards under the Convention and prevent that rights interpretation is placed *exclusively* on either the Court's "principled decisions" or the view of the majority of States as found *de lege lata*³²⁴ which could stagnate a trajectory of improving rights protection. It balances objectivity with parties' evolving practices and thereby enables the ECtHR to maintain its judicial function as a universal standard-setting Court.

VI. CONCLUSION

The doctrine of European consensus concretizes States' obligations under the ECHR and limits their margin of appreciation. As we navigate the legal response to the climate crisis, the consensus doctrine could become an important vehicle for balancing effective measures for climate action with each State's room to maneuver. It is a model for a legal instrument that is not agnostic to science, but instead uses science to effectively and legitimately strike a balance in order to identify legal obligations. This approach is transferable to other human rights systems, both universal and regional.

In cases open to scientific determination, the ECtHR is supported in its search for European consensus by evidence that defines an objective science-based consensus, from which the legal commonalities can emerge. This emerging legal consensus can be derived either from international legal practice or the

³²² Cf. for this requirement *id.*, at 130.

³²³ Rüdiger Wolfrum, *Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations*, in LEGITIMACY IN INTERNATIONAL LAW 1, 7 (Rüdiger Wolfrum & Volker Röben eds., 2008).

³²⁴ It has been noted that "the specific nature of the Convention as a human rights instrument solicits a cautious approach" towards relying on state practice for interpreting the scope of obligation of states under the Convention, *Seibert-Fohr*, *supra* note 31, at 62.

domestic laws of parties. It can be re-conceptualized as subsequent practice in the application of the European Convention on Human Rights, which establishes the agreement of the parties regarding its interpretation. Article 31(3)(b) of the VCLT in conjunction with the Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties set forth an analytical framework that this Article has used, and that the Court should apply more explicitly and consistently, in order to provide procedural safeguards in its endeavor to find European consensus.

More than two decades ago, Tom Franck expressed the hope that the appeal to States' consciences, based on firm data and fundamental principles of legitimacy, might convince them to agree to distributive formulas.³²⁵ This Article has provided an analytical and conceptual groundwork for the argument that European consensus as a doctrine is based on firm data and fundamental principles of legitimacy. It has demonstrated that a consensus on the necessity of effective climate action for human rights protection exists in science and in law.

However, it should be noted that while the legal consensus, and particularly the evolving tendency of incorporating quantified and economy-wide GHG emissions reduction targets and reduction pathways in national laws and long-term strategies, is shaped by the underlying scientific evidence, other factors and interests can facilitate or disturb the incorporation of the scientific consensus into law. Consensus is, by its very nature, a frail status.

Climate change is a global crisis with an underlying fairness discourse³²⁶ between nations and between generations, coupled with interdependence within an international community where no State on its own can bring about the urgent transformational changes across all sectors of the economy. Fairness within and among States is a significant element in the search for consensus on States' obligations vis-à-vis rights protection in the climate change context. Agreeing to distributive formulas remains a continuous process of international cooperation, and its uncertain outcomes make the necessity to test and adjust legal doctrine to protect a heterogeneous community interest even more important.

Success in appealing to States' consciences on the basis of European consensus in light of the increasingly occurring and longer-lasting extreme weather events and slow onset events, and maintaining the role of law throughout the normative hierarchy to effectuate transformational changes, will define our climate future.

³²⁵ THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW, 436 (1998).

³²⁶ STEPHEN M. GARDINER, A PERFECT MORAL STORM: THE ETHICAL TRAGEDY OF CLIMATE CHANGE (2011); STEPHEN M. GARDINER & DAVID A. WEISBACH, DEBATING CLIMATE ETHICS (2016); Friederike Otto, Petra Minnerop et al., *Causality and the fate of climate litigation: The role of the social superstructure narrative*, Global Policy (2022), <https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.13113?af=R>.