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EXPLAINING MASS ATROCITY THROUGH CULTURE: THE MISSING LINK FOR INTERNATIONAL CRIMINAL JUSTICE

ILIAS BANTEKAS*

ABSTRACT

The approach of international courts and tribunals to mass criminality is to examine blameworthiness in isolation of commonly-held beliefs and aspirations of victims and perpetrators, as well as their associated communities. This has allowed political elites to use pertinent legal judgments to exorcise the communities of which a convicted person is a member. This Article argues that anthropological analyses should inform all aspects of the international criminal justice process. Such analyses could be particularly helpful in determining how protagonists' underlying assumptions and external factors affect their beliefs about the types of actions that conflict-ridden societies should take.

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INTRODUCTION

International criminal justice enforcement generally requires that an actor satisfy strict evidentiary burdens of any given crime. Did the conduct of the accused satisfy the *mens rea* and *actus reus* of a crime? This deceptively simple deduction fails to capture the complexities underpinning mass crimes and the collective perceptions of perpetrators and victims.[1] This unspoken context is important because it elucidates the motives behind conduct, which allows the criminal justice system to fully understand *why* crimes occurred and *who* should bear the greatest responsibility. Accusing actor A of committing five murders, for example, is an altogether different proposition from accusing A, an uneducated farmer, of murdering five people because he and fellow clan members were under the common belief that the victims were part of an inferior race intent on destroying their culture. International criminal courts and tribunals rarely, if at all, try to map common cultural beliefs to decipher the complexity of mass crimes committed by multiple actors from the same group. Here, we encounter an interplay between psychology and anthropology. Unlike psychology, which is interested in ascertaining and explaining the inner workings of individuals, anthropology is focused on understanding and translating collective cultural phenomena. There is thus both a qualitative and a quantitative difference between the two disciplines. There cannot be a single psychological evaluation of more than one person because of the inherently unique traits and characteristics of each personality—this of course does not prevent the exposition of theories and conditions of general application. On the other hand, it is natural that shared or common understandings between a group of people (culture) exist in all members of the group, thus rendering them collective phenomena. It is thereafter a matter of appropriate methodology as to how they will be studied.[2] Of course, there is a

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[1] Criminal lawyers have long made use of forensic science, genetics (particularly DNA-related), and psychology/psychiatry in order to understand deviance and the way that criminals think and operate. This has led them to raise valid questions about the role of victims and witnesses, particularly the psychological impact of adversarial proceedings and their effect on memory and eyewitness perceptions among others. *See, e.g.*, BRIAN L. CUTLER and STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW (1995).

[2] There have been numerous approaches to collective phenomena by non-anthropologists which possess a very solid anthropological dimension, even if not wholly intended. A prominent example is the theory of interpretative communities, coined by Stanley Fish, which posits that actors within a given community (be it social, intergovernmental, or industry-related) share common understandings about the culture and environment of their community and as a result, interpret relevant underlying assumptions in a uniform manner. The transnational arbitration, banking and construction industries no doubt verify Fish's theory. *See* STANLEY FISH, IS THERE A TEXT IN THE CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES (1980).

great degree of overlap between anthropology and psychology. For example, when we delve into the "perceptions" of end users of criminal justice (e.g., accused, victims, witnesses, counsel, judges, prosecutors), we necessarily investigate their culture as demonstrated by their individual experiences, biases, understandings, and other personal characteristics. However, what is different between the perspective of culture and society provided by anthropology and the perspectives provided by other social sciences is its focus on the direct participants under observation.[3] The anthropologist is interested in the way that his or her subjects view family, lineage, religion, work, socialization and everything else that makes them who they are and influences how they behave. It is therefore no accident that the term "cultural relativism" that is so prevalent in human rights discourse[4] originated in anthropology, although the term had a very different meaning at the outset. Boas, who first conceived of but did not coin the term, was dissatisfied with evolutionist theories of his time that viewed some civilizations as superior to others. To him, cultural relativism was a method of examining cultural variation free from prejudice. Given that prejudice is inherent in all observation of the external world, Boas sought to see the world through the eyes of the informants or native peoples from different cultures.[5]

The process of understanding cultural perceptions requires a structure and a methodology by which to communicate to members of the group. The mediator must first understand the cultural underpinnings of the particular cultural perception. Once this has been achieved, the mediator must promote the use of cognitive tools (or heuristics) that are appropriate for the circumstances and adapted to match the cognitive tools of the subject community,[6] while at the same time recognizing the distinct moral intuitions[7] of that community.[8]

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[3] *See* SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (2013); FERNANDA PIRIE, ANTHROPOLOGY OF LAW (2013); JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION (2007); LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION (2008); SALLY F. MOORE, LAW AND ANTHROPOLOGY: A READER (2004).

[4] In human rights it is taken to mean that culture ultimately validates the legitimacy and application of particular rights, thereby rejecting the notion that human rights apply to all without distinction, i.e., that human rights are universal. This conception of culture risks justifying violations of human rights, as is the case with the practice of female genital mutilation. *See* Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RTS. QUARTERLY, 400 (1984).

[5] Franz Boas, *Museums of Ethnology and their Classification* 9 SCIENCE, 589 (1887).

[6] This is known as the ecological rationality of the group. *See* GERD GIGERENZER, Heuristics, *in* HEURISTICS AND THE LAW (Gerd Gigerenzer and Christoph Engel eds., M.I.T. Press 2006), 7ff.

[7] *See* Daniel Kahneman and Cass R. Sunstein, *Indignation: Psychology, Politics, Law*, (J. M. Olin L. & Econ. Working Paper No. 346, 2007).

[8] One can view communities broader than simply on the basis of religion, ethnicity, tribe or religion. Consumer culture(s) provide a firm ground for this. Some successful corporations have gone as far as shutting down (or threatening to do so) to remain loyal to their shareholders' religious convictions. In the US, Hobby Lobby Stores, Inc., a chain of crafts stores, decided not to offer (certain forms of) contraceptive coverage to its employees because of the particular Evangelical Christian beliefs of their

This Article attempts to demonstrate the significance of anthropology in mass crimes typically falling within the ambit of crimes against humanity and genocide. International criminal tribunals are advantageously suited to study anthropological phenomena. These tribunals generally explore the background of a conflict, albeit mostly from a military point of view, and are accustomed to the complexities of mass criminality.[9] More importantly, international criminal trials ultimately give rise to a narrative, or fragments of a narrative, that the victim group and its elites use for political power or political bargains. A clearer exposition of the complexities, social, cultural, environmental, or other, associated with a situation of genocide or crimes against humanity would both decrease the likelihood of exorcising the entire losing faction and of condemning its members to an indefinite period of political victimization.[10] This may alleviate the impact of uncomfortable truths.[11] Finally, criminal judgments resonate far more with the general public than observations and decisions by an ever-growing body of human rights courts and quasi-courts/committees. A final judgment of a criminal court is conclusive as to an individual's criminal liability and apportionment of blame.[12]

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sole owners (the Green family). This decision was made despite its being in conflict with relevant health legislation, namely the Affordable Care Act. The Tenth Court of Appeals ruled in favor of the corporation, *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). Values are, therefore, important to corporations in many different ways.

[9] The Special Tribunal for Lebanon further undertook an extensive analysis of Lebanon's political landscape. *See* Melia A Bouhabib, *Power and Perception: The Special Tribunal for Lebanon*, 3 BERKELEY J MIDDLE E. & ISLAMIC L., 173 (2010) (arguing that the Tribunal's legitimacy in this respect was strongly debated by the various factions in the country).

[10] There is an abundance of literature on criminal networks assuming some degree of charitable institutions. *See* Henrik Vigh, *Life's Trampoline: On Nullification and Cocaine Migration in Bissau*, *in* AFFECTIVE CIRCUITS: AFRICAN MIGRATION TO EUROPE AND THE PURSUIT OF SOCIAL REGENERATION 213 (Jennifer Cole, Christian Groes eds., 2016), 223; Henrik Vigh, *Caring Through Crime: Ethical Ambivalence and the Cocaine Trade in Bissau* 87 AFR., J. OF THE INT'L AFR. INST., 479 (2017).

[11] *See* Didier Fassin, *Beyond Good and Evil? Questioning the Anthropological Discomfort with Morals*, 8 ANTHROPOLOGICAL THEORY, 333 (2008); Erella Grassiani, *Moral Othering at the Checkpoint: The Case of Israeli Soldiers and Palestinian Civilians*, 35 CRITIQUE OF ANTHROPOLOGY, 373 (2015).

[12] Two legitimacy-based approaches have been advanced in the literature and these have been adapted in turn to explain the concept of judicial legitimacy from the perspective of international law, namely: sociological (or descriptive) and normative legitimacy. The sociological approach is chiefly concerned with the perception of legitimacy ascribed to a particular judicial institution, whereas the normative approach investigates whether such institution deserves to be regarded as authoritative (or whether its authority is justified). Irrespective of the source of authority of an international tribunal, its legitimacy is guaranteed only where its outcomes and processes are in the public interest, namely if they adhere to fundamental human rights standards (or whichever of the two generates a higher standard). Von Bogdandy and Venzke argue that international courts are multifunctional actors who exercise public authority and therefore require democratic legitimacy. Their perception of a public law theory of international adjudication is predicated on three main building blocks, namely: multi-functionality, the notion of an international public authority, and democracy. *See* ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? ON THE FUNCTIONS, A PUBLIC LAW THEORY ON INTERNATIONAL ADJUDICATION 528 (2014).

An accurate anthropological account would divorce personal culpability from group accountability and emphasize how similar situations may be avoided. This Article does not consider the destruction of what may be termed "cultural rights,"[13] namely tangible or intangible property associated with a group's cultural identity, such as monuments, artifacts, language or common practices.

I.
WHY ANTHROPOLOGY IS RELEVANT TO THE INVESTIGATION OF INTERNATIONAL CRIMES

Anthropology and law seem, at first glance, to have little in common. The first seeks to elucidate collective human behavior and assess the participants' (also called informants in anthropological parlance) particular understandings, whereas the second is concerned with rules and order. However, it is evident that rules and order are not produced in a void. Rather, they aim to regulate human relations. It follows, then, that law is a necessary component of culture, just as work, leisure, art, religion and other core elements of life are.[14] Law need not necessarily be formal, as is otherwise the case with legislation promulgated under strict constitutional procedures. It may just as well be informal without governmental sanctions. This informal law lives not only in past and present rural societies in the heartlands of Africa and Asia,[15] but also exists in the very midst of industrialized Western societies. The so-called *lex mercatoria* and the pursuit of self-regulation by particular industries, as is the very concept of contract and party autonomy thereto,[16] is evidence of man's desire to regulate human

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[13] On this issue, *see* Marina Lostal, Kristin Hausler & Pascal Bongard, CULTURE UNDER FIRE: ARMED NON-STATE ACTORS AND CULTURAL HERITAGE IN WARTIME 25 (2018); International Journal of Cultural Property 12-26; Eleni Polymenopoulou, *Cultural rights in the Case-Law of the International Court of Justice* (2014), 27; (2) (Leiden Journal of International Law), 447-464, (discussing the case of the Bosnian genocide).

[14] *See generally*, John M Conley and William M O'Barr, *Legal Anthropology comes Home: A Brief History of the Ethnographic Study of Law*, 27 Loy. of LA L. Rev. 41 (1993).

[15] For what may now have a pejorative connotation, *see* the classic work of Alfred Radcliffe-Brown, *Primitive Law 35 Man 47* (1935). Customary/tribal law is now recognized as having the same standing as quality as other statutory law. This is true of most jurisdictions, even if such law is not fully codified. The New Zealand Supreme Court in *Trans-Tasman Res. Ltd v. Taranaki- Whanganui Conservation Bd. et al.* 127 NZSC (2021), held that tikanga-based customary rights and interests constituted "existing interests" when considering "any effects on the environment or existing interests of allowing the activity" under a section in the New Zealand Exclusive Economic Zone (EEZ) Act. The Court further held that tikanga as law must be taken into account as "other applicable law." NZSC 127 (2021).

[16] According to Teubner, the ultimate validation of *lex mercatoria* rests on the fact that not all legal orders are created by the nation State and accordingly that private orders of regulation can create law. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 15 (Teubner ed., 1997).

interaction by means of informal, but no less binding, prescriptions. Aside from regulating human relations, both formal and informal law, particularly the latter, provide evidence of social relations, status, and social interaction within a given community. By way of illustration, the village chief is typically the judge and the recognized authority in the interpretation of customary law and, as such, is regarded as a revered figure. Equally, the male warriors of the tribe, whose authority to hunt is recognized as a customary entitlement, may enjoy first rights to the tribe's game. Social status and the existence of complex roles and rules are also evident in the internal sphere of criminal gangs operating in industrialized settings.[17] In Islamic law, too, the *social* from the *legal* is inseparable in countries strictly adhering to classical *Shariah law*.[18]

The study of social interaction should have been of primary importance to international criminal tribunals, but in practice it has been peripheral if not outright absent. The Office of the Prosecutor (OTP) in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) did assess the background of the conflicts in Yugoslavia and Rwanda, but the emphasis was on political and military organization. The prosecutors and their assistants were lawyers. Although some were successful prosecutors in their own jurisdictions, they were not anthropologists, and where the nature of crimes was fairly straightforward, the background assessments were deemed unnecessary. Hence, no one even considered that the participants' own perceptions about class, ethnicity, race, symbolism, peace, and aggression were of any significance to the work of the tribunals. Notably, two of the stated aims of the tribunals were to record history and promote reconciliation.[19] It is certainly difficult to record the nature of discord without a solid understanding of the views and perceptions of the participants in

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[17] *See* James D Vigil, *Urban Violence and Street Gangs*, 32 ANN. REV. OF ANTHROPOLOGY 225 (2003); *See generally* Deborah Lamm Weisel, CONTEMPORARY GANGS: AN ORGANISATIONAL ANALYSIS (LBF Scholarly Publishing, 2002).

[18] Polygamy is illustrative of this approach, where English courts were unsure how to handle a practice lawful under the subjects' personal law, but abhorrent under English law. *See* LAW COMMISSION FOR ENGLAND AND WALES, *Family Law: Report on Polygamous Marriages* (HMSO, 1972) and later LAW COMMISSION, *Private International Law: Polygamous Marriages—Capacity to Contract a Polygamous Marriage and Related Issues Report No. 146* (HMSO, 1985). *See also* Prakash A Shah, *Attitudes to Polygamy in English Law*, 369 INT'L & COMPAR. L. Q. 52 (1993).

[19] For example, reference to universally-accepted anthropological thinking about aggression could have been incorporated into the historical analyses of the tribunals' judgment. According to this, there is no empirical basis for the contention that aggression is an inborn quality. In fact, the word itself is unknown in the more traditional societies, such as the Chewong in the Malay peninsula. If anything, humans exhibit a disposition towards solidarity and peace. *See* SIGNE HOWELL & ROY WILLIS (Eds.), SOCIETIES AT PEACE 25 ff. (1989). Without such an analysis, the tribunal may, inadvertently or otherwise, give the impression to the entire world that the perpetrator's entire ethnic group is naturally inclined to violent crime, which cannot surely lead to any sort of reconciliation and explains to a large degree the hostility of the Serbian people towards the ICTY.

the turmoil. Equally, reconciliation is meaningless unless one is acutely aware of the divisions between the feuding parties as expressed and felt by them alone; although admittedly external, unbiased, views are also significant.

The ICTY, in a very cursory manner, opined that Bosnian Muslim identity and culture could be traced to "the long Turkish" occupation,[20] during which the three ethnic groups (i.e. Muslim, Serb, and Croat) lived largely in separate villages but often intermarried[21] and all considered themselves Slav.[22] It concluded its analysis by claiming that "politics began to divide along the lines of ethno-national communities."[23] This explanation fails to say anything about the actual identity and culture professed by Bosnians given that it was not concerned with such matters in its legal assessment of the facts of that case or even to challenge the narrative of the genocide. Similarly, several years later, the International Criminal Court (ICC) missed an historic opportunity to determine whether there exists an Islamic culture, as claimed by the accused, which compelled them to destroy non-Islamic artefacts and institutions.[24] Recent scholarship denies the existence of a common Islamic culture that allows Muslims to destroy cultural heritage.[25] Perhaps the ICC saw this question as difficult because of its significant political and inter-cultural implications. This is defined in the introduction of this Article as the sort of uncomfortable truths that anthropological inquiries may well discover.[26] The ICC was content with defining the concept of crimes against cultural property.[27]

Culture is a complex phenomenon and scholars, such as Geertz, have viewed it as a web of shared meanings expressed through public communication, not in the sense of sharing the same knowledge and skills, but in the sense that

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[20] Prosecutor v. Tadić, Case No. IT-94-1, ¶ 56 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). In reality, a Turkish nation and distinct Turkish culture were proclaimed in the early 1920s, although the Neo-Turkish movement was active at least a decade before. From the fourteenth to the early twentieth century what the ICTY calls "Turkish" was in fact distinctly Ottoman which was quintessentially multicultural, as are all empires.

[21] *Id*. ¶ 64.

[22] *Id*. ¶ 67.

[23] *Id*. ¶ 83.

[24] *Situation in the Republic of Mali in the Case of the prosecutor v. Ahmad Al Faqi Al Mahdi, Pre-Trial Chamber I*, ICC-01/12-01/15-84-Red 24-03-2016, and ICC-01/12-01/15, (September 27, 2016), Public Judgment and Sentence [hereinafter '*Al Mahdi* judgment']. Al Mahdi was charged under art.8 (2) (e)(iv) of the ICC Statute for planning and overseeing the attacks against cultural sites in Mali.

[25] Eleni Polymenopoulou, *Caliphs, Jinns and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic law*, 36 Emory Int'l L. Rev. (2022).

[26] *See* Mohammed E Badar & Noelle Higgins, *Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi*, 17 Int'l Crim. L. Rev. 486, 500-502 (2017). The authors argue that the Wahhabi school of Islamic thought has generally accepted the legitimacy of destroying tombs, including even that of the son of Ali (the son of the Prophet and fourth Caliph).

[27] Paige Casaly, *Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. Int'l Crim. Just. 1199 (2016).

persons who share a culture also share a common world view that is expressed through common symbols and language.[28] What is this Slavic world view in Bosnia and what metaphors or literal meanings are used to express it? Moreover, if the people of Bosnia had achieved social integration, how was this possible given their conflicting individual/clan tendencies? There are various ways of thinking about this conundrum, so I will only mention two, namely *doxa* and opinion, as expounded in the sociology/anthropology literature. Barth believed that shared values, expressed through interaction, are the result of strategic and calculated *transactions* between agents driven by a desire to achieve value maximization.[29] For Bourdieu, in order to assess whether the members of a group share or do not share common values, one must distinguish that which is taken for granted by the group and is beyond discussion (*doxa*), such as faith in God or unquestionable adherence to a political system, from things that are actively discussed among group members and are not therefore axiomatic (opinion).[30] If we knew precisely what constituted common or disparate *doxic* perceptions among the various groups in Bosnia, pertinent choices would have been severely curtailed and we would also understand by default which *doxic* beliefs may have shifted to the realm of opinion over time. In fact, anthropology has largely dismissed the notion of static ethnic identity based merely on the enjoyment of a particular culture and belonging to a specific ethnic group.[31] Boundaries between ethnic groups, especially those living in close proximity to one another, are ambiguous and in a state of continuous fluctuation. The ICTY's characterization that the Slav population of Bosnia in 1993 identified itself along three ethnic groups with some inter-marriages was inaccurate and not predicated on any scientific data. Anthropologists studying Bosnian society agreed with the general theory that variations among ethnic groups are greater regarding key indicators (such as religion or ethnic origin) than with respect to systematic differences. They dismissed theories that the conflict(s) was ethnic or easily explained by reference to culture and ancient animosities. The conflicts were relatively recent and were not caused in any way by cultural differences. In important respects, the differences between town and country were greater than between Serbs and Croats within a given territory.[32]

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[28] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973).
[29] FREDRIK BARTH, MODELS OF SOCIAL ORGANISATION (Royal Anthropological Institute Occasional Paper No. 23, 1966). These transactions are numerous and are continuously negotiated by the relevant actors.
[30] PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 164-70 (1977).
[31] *See* FREDRIK BARTH, ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANISATION OF CULTURE DIFFERENCE (1969).
[32] THOMAS HYLLAND ERIKSEN, WHAT IS ANTHROPOLOGY? 158 (2004).

As this Article will subsequently demonstrate, anthropological research is important for reasons beyond gaining a clear understanding of the background of conflicts and the motives of the immediate perpetrators and their victims. It also provides the international community with the tools necessary for deciphering the elements of international crimes by contextualizing terms such as "racial",[33] "ethnic" and "religious" in genocide, and "kinship",[34] "loyalty" and "clan membership" as they relate to accessory liability. All these terms lose their meaning when subject merely to strict legal characterizations.

On yet another dimension, the labors and methods of anthropology assist us in distinguishing between myth and reality and give us a fundamental idea about *mens rea* and *mens rea*-related defenses and excuses. A defendant concedes that he killed his mother but, in fact, it could very well have been a distant cousin, simply because his linguistic tradition uses a single word for all females in his lineage. This is pretty clear to him but not to a foreign judge without any anthropological or linguistic insights into the defendant's culture. The Japanese word *aoi*, for example, encompasses what in Europe we conceive as green, blue, and pale (as in a pale demure) and the Welsh language had, until recently, similar color connotations that departed from those employed by their English neighbors.[35] Below, this Article examines the mythology and symbolism of cannibalism in Sierra Leone and the limitations of language therein, but it is instructive at this point to emphasize that what are otherwise rather straightforward notions, which cannot under any circumstances possess a third meaning, are in fact diffuse and ambiguous to other cultures. In a landmark study of the 1920s, Rivers examined the Melanesian people of the Solomon Islands. What is particularly striking is the use of the local word *mate* which translates as "dead," but also "very sick" and "very elderly". Clearly, this is not in accord with

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[33] It is interesting to note that the science of genetics has long disproved the existence of distinct races as such. Nonetheless, race as a social construction remains important because it tells us how people view themselves and others.

[34] In Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 81 (Sept. 2, 1998), the Trial Chamber made some mention of kinship, arguing that Rwandan society was comprised of eighteen clans whose distinguishing feature was lineage as opposed to ethnicity. Even so, the tribunal argued, the demarcation line was blurred and people could pass through each clan. The Trial Chamber then discussed the views and considerations not of the local population about their membership but of their colonizers, *id.* ¶ 82-84. This lacked any sound methodology and when later the Chamber was forced to admit that the Genocide Convention does not encompass conduct against members of one's own ethnic or racial group. The Trial Chamber then had to turn to the particular perceptions of the perpetrators and the victims. This selective anthropology is misleading and is utilized only to serve a particular conclusion. The vast literature on African kinship would have made it abundantly clear that in weakly integrated African nations the operational level of political power is located at the kinship level of the periphery. As a result, *de facto* power based on kinship is usually much stronger than *de jure* power structures. *See* LADISLAV HOLY, ANTHROPOLOGICAL PERSPECTIVES ON KINSHIP (1996).

[35] *See* EDWIN ARDENER (ed.), SOCIAL ANTHROPOLOGY AND LANGUAGE xxiv, xxii (1971).

our strict distinction between dead and alive. In English, a person can only be one or the other. Rivers understood this to project a classification, rather than a biological determination, from the point of view of the Melanesians. The very infirm and the very elderly were as good as dead because they could no longer partake in the group's activities and the idea was to draw a dividing line between the *mate* and the *toa* (alive).[36] Under this light, it would have been perfectly acceptable for the Melanesians to eliminate all the *mate* in their midst. However, from the perspective of international criminal justice such an act would not only be reprehensible, but would also no doubt constitute a crime against humanity. The juristic and ethical problem here is obvious. Is it legitimate to convict someone of conduct undertaken throughout their lifetime that constitutes part of their culture? Even without discussing whether this anthropological finding is pertinent to excusing the accused from liability (as a defense) or in mitigation of punishment, the reader surely understands the implications. I am certainly not defending the contention that unchecked, self-proclaimed cultural relativism is a valid defense to all international crimes.[37] Rather, my desire is to offer a new, or additional, perspective to our understanding and application of international criminal norms through the study of *context*.

II. INFUSING ANTHROPOLOGICAL RESEARCH METHODS IN INTERNATIONAL CRIMINAL INVESTIGATIONS

The principal research method for anthropological research is *participant observation* through fieldwork. This requires framing a research question from the outset and identifying a community for observation. Fieldwork is generally constant and significant periods of time must be spent living with the observed group and mastering the group's particular language, if possible, for a thorough investigation to be completed. One year is generally considered the minimum length of time required for such an investigation. Once fieldwork has been completed, notes and interviews are taken back home and the researcher must try to make sense of them with the goal of shedding light on their research question. The researcher may or may not compare their findings to those about other groups.[38]

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[36] William HR Rivers, *The Primitive Conception of Death*, 10 Hibbert J. 393, 406 (1911-12).

[37] The proponents of such arbitrary cultural relativism have claimed that the recruitment of children in Africa to fight in armed conflicts is largely voluntary and the enlisters do not consider their actions as legally or morally culpable. TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 146-70 (2009). *See also*, from a socio-legal perspective, Ilias Bantekas, *Individual Responsibility and the Application of Ignoratio Juris Non Excusat in International Law*, 19 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 85 (2011).

[38] For an excellent practical guide, *see* KAREN O'REILLY, ETHNOGRAPHIC METHODS (2d ed. 2012).

If prompted, prosecutors would likely contend that there is little time to send out an anthropologist for a year to conduct field research. This is not an insurmountable problem, however, given that it typically takes at least three years, and often much longer, from the time international criminal tribunals are established to render their first judgment. This time frame is more than sufficient for a group of anthropologists—who are experts in the particular group(s)—to undertake thorough field work and come up with concrete findings for the tribunal or commission.[39] The ICC may well require six months to a year before embarking on solid prosecutions. The more serious methodological concern is that the situation before and after the commission of widespread atrocities will, in all likelihood, be fundamentally different. Several parameters of culture will necessarily change—although this has not been tested—and previous power structures will be altered by the disappearance of the perpetrators for fear of revenge or prosecution.

If any form of participant observation is to take place at all in post-conflict societies, it must be undertaken with this context in mind (i.e., post-conflict power shifts) and with very specific research agendas.[40] Fortunately, most societies have been studied by anthropologists in one form or another. That is to say, there is a significant body of literature on most social groups, though it does not encompass all their cultural traits and social interactions. [41] Hence, the courts, with the assistance of experts, can readily turn to the existing body of knowledge and decide whether more research is necessary to fill in gaps. The abundance of material collected by the prosecutor and non-governmental organizations (NGOs) in the course of their investigation, or gathered in the course of providing assistance to victims and witnesses should also be accessible to anthropologists.[42]

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[39] It is assumed that mass offences such as crimes against humanity are prosecuted by domestic or international criminal tribunals. However, it is not unusual for several serious international offences to be handled by truth commissions, whether UN-based or other. The findings in this Article are pertinent to the work of these commissions even if they are composed solely of people belonging to the same ethnic group as the perpetrators. It should not be assumed that they have a perfect understanding of their culture. We have already discussed Bordieu's concept of *doxa*. Anthropologists frequently refer to *homeblindedness* as a methodological limitation. This refers to fieldwork undertaken by someone well-versed in the society under examination which prevents him from gaining deeper insights because he takes things for granted and looks at them through a distorting lens.

[40] By agenda we refer here to the framing of a prosecutorial strategy encompassing a coherent understanding of cultural dynamics. *See*, *e.g.*, Anita-Kalunta Crumpton, RACE AND DRUG TRIALS: THE SOCIAL CONSTRUCTION OF GUILT AND INNOCENCE (2018), which traces the impact that courts have upon the representation of black people in criminal statistics in the UK.

[41] For an African perspective, *see* Frank Knowles Girling & Okot P'Bitek, LAWINO'S PEOPLE: THE ACHOLI OF UGANDA (2019); William Allan, THE AFRICAN HUSBANDMAN (2005); Aidan Southall, ALUR SOCIETY: A STUDY IN PROCESSES AND TYPES OF DOMINATION (2004); Audrey Richards, LAND, LABOUR IN DIET IN NORTHERN RHODESIA: AN ECONOMIC STUDY OF THE BEMBA *Tribe* (1995).

[42] This will aid not only prosecutorial efforts per se, but also the cultural sensitivities of witnesses and victims and will further contribute to post-conflict processes. *See* Richard Ashby Wilson, INCITEMENT

Much of this evidence may appear irrelevant either because it is hearsay, repetitive, or biased, but an anthropologist may be able to detect solid patterns linked to existing findings that are not repudiated by the scholarly community. These observations do not suggest that judges must confer their fact-finding and judicial role to anthropologists, but rather that judges must take cognizance of social relationships with which they are unfamiliar to serve both the narrow (dispensing of justice) and broad (history-writing, reconciling) aims of international criminal justice.[43] A necessary caveat should, of course, underlie all interactions between judges and anthropologists: namely, "publication" confirmation bias. Confirmation bias is, essentially, a distortion in human information processing where reviewers or editors of books and scientific journals accept papers that support their views for publication while ignoring and discrediting those that do not.[44] This phenomenon is more prevalent in the humanities than in legal scholarship because of the tendency to set up doctrinal "schools" upon which succeeding scholars base their theoretical and empirical work. Hence, tribunals should verify the veracity of their information from multiple sources if possible.[45]

III. ANTHROPOLOGY AS A TOOL FOR ASSESSING COMPLEX LIABILITIES

At a fundamental level, with respect to assessing complex liabilities pertinent to international crimes such as command responsibility, anthropology can assist with ascertaining those elusive *de facto* indicia that are necessary for constructing authority, power, and, ultimately, effective control. Anthropology

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ON TRIAL: PROSECUTING INTERNATIONAL SPEECH CRIMES (2017); Holly Porter, AFTER RAPE: VIOLENCE, JUSTICE, AND SOCIAL HARMONY IN UGANDA (2016); Louisa Lombard, STATE OF REBELLION: VIOLENCE AND INTERVENTION IN THE CENTRAL AFRICAN REPUBLIC (2016).

[43] *See* Brianne N McGonigle, *Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles*, 22 LEIDEN J. OF INT'L L. 127 (2009); Charles Trumbull, *The Victims or Victim Participation in International Criminal Proceedings*, 29 MICHIGAN J. OF INT'L L. 779 (2008); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor* 95 AM. J. INT'L L. 952 (2001).

[44] Michael J Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RSCH. 161 (1977).

[45] *See* Gordon W Allport, THE NATURE OF PREJUDICE (1958); Craig Cooley & Brent E Turvey, *Observer Effects and Examiner Bias: Psychological Influences on the Forensic Examiner*, Crime Reconstruction (2007); John Earman, BAYES OR BUST? A CRITICAL EXAMINATION OF BAYESIAN CONFIRMATION THEORY (1996); Lisa E Hasel, *Evidentiary Independence: How Evidence Collected Early in an Investigation Influences the Collection and Interpretation of Additional Evidence*, Memory & L. 142 (2013); David Klahr, *Designing Good Experiments to Test "Bad" Hypotheses*, , Computational Models of Discovery and Theory Formation 335 (2000); Hannah R Rothstein et al., PUBLICATION BIAS IN META-ANALYSIS: PREVENTION, ASSESSMENT AND ADJUSTMENTS (2005); Brent D Slife & Richard N Williams, WHAT'S BEHIND THE RESEARCH? DISCOVERING HIDDEN ASSUMPTIONS IN THE BEHAVIORAL SCIENCES (1995).

also allows us to understand whether the "subordinates" that committed the crimes were under sufficient compulsion or control by their superior such that the latter's conviction, despite the absence of direct fault, would be justified. However, I must note an important observation that relates to semantics. If anthropology is viewed as a method through which to draw conclusions pertinent to the fault-liability paradigm or complex liabilities, then this method requires an appropriate language for communicating concepts and ideas in the sphere of law.[46] Communication is crucial not only because certain words are not translatable from one language to another, as has been discussed above, but also because wholesale concepts and ideas themselves are alien from one culture to another.[47] The so-called Sapir-Whorf hypothesis, elaborated by anthropologists in the 1930s, suggests that language gives rise to fundamental differences between respective life-worlds that the various groups inhabit.[48] In their case study, the North American native Hopi language was found to contain few nouns but many verbs that connoted action and movement. Anthropologists concluded from this study that the Hopi world was founded upon movement and that it was largely disinterested in material objects.[49]

Another poignant example is the case against Liberian President Charles Taylor. A witness for the prosecution, "ZigZag" Marzah, was quite "clearly unfamiliar with the Western idiom of remorse and conscience."[50] Marzah also claimed to be involved in the cannibalism of enemy corpses, arguing that this practice was expected of all warriors battling on the side of Charles Taylor.[51] Regardless of the validity of this statement, it certainly stirred a wealth of emotions in the Western psyche and reinforced myths and stereotypes associated

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[46] *See* Elizabeeth Mertz, *Language, Law and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law* 26 L. & SOC. REV. 413 (1992).

[47] *See* Mark Van Hoecke, LAW AS COMMUNICATION (2002), in which the author's central thesis is that all legal relations are to be understood in terms of dialogue, conversation and communicative processes, rather than as traditional command-obedience structures. Legal anthropologists such as Bohannan argued that Western legal terms and categories should not be employed to study the organization and order of non-Western societies. He believed that such a methodology prevented a comprehensive understanding of other cultures and argued in favor of using native legal terms whose meaning would become evident within an ethnographic context. *See also* Paul Bohannan, JUSTICE AND JUDGMENT AMONG THE TIV (1957). This also leads to the so-called methodological distortion of *ethnocentrism*.

[48] Edward Sapir, CULTURE, LANGUAGE AND PERSONALITY (1958); Benjamin L Whorf, *Science and Linguistics*, 35 TECH. REV. 229 (1940).

[49] The most contemporary manifestation of the hypothesis is currently known as *linguistic relativity* which posits that language does have some effect on thought, but this is small as opposed to decisive. *See* Paul Kay, Willett Kempton, *What is the Sapir-Whorf Hypothesis?* 86 American Anthropologist 65 (1984).

[50] Gerhard Anders, *Testifying about Uncivilised Events: Problematic Representations of Africa in the Trial against Charles Taylor* 24 LEIDEN J. OF INT'L L. 937, 944-45 (2011).

[51] *Id*. at 948-49.

with "primitive Africa."[52] Up until the mid-1990s, scholarly output suggested that the origin of cannibalism was historically unknown,[53] and, at the very least, alien to contemporary African societies. Contemporary research, on the basis of archaeological findings, begs to differ.[54] Critics argue that the older anthropological scholarship was convinced that any association of colonized people with cannibalism would be tainted by neo-imperialism.[55] Of course, this research does not necessarily change the popular Western imagery of cannibalism. Anders recalls the *Human Leopards* case investigated by a Special Commission Court established by British colonial authorities in early twentieth century Sierra Leone.[56] There, without any corroborating forensic evidence, the court was convinced that members of a secret society dressed up in leopard skins and committed ritual cannibalism. The story was described by insider witnesses whose communication with their colonizers must have been agonizing through language fraught with significant misunderstanding and symbolism. Moreover, this story was read through two very different socio-cultural perspectives.[57] Anders accurately captures this story as follows:

> In Sierra Leone and Liberia, as in many parts of Africa, social relationships and personal development are framed in a rich language of eating and consumption. Initiation into secret societies such as the *poro* is also expressed in an idiom of being eaten or devoured by the bush spirits in order to be reborn as a full member of the community. The political sphere, in particular, is conceptualised as a potentially dangerous terrain where powerful people 'eat' each other in order to grow 'big'. This has been famously coined by Bayart as the politics of the belly, who describes

[52] *Id.*
[53] For the sake of scientific accuracy, it must be said that a good number of anthropologists reject the claim that cannibalism is just a myth created from prejudice. Works such as that of William F Arens, THE MAN-EATING MYTH: ANTHROPOLOGY AND ANTHROPOPHAGY (1980) are reflective of the attitude that rejects cannibalism. More recent forensic research of human bones from an Anasazi pueblo in southwestern Colorado reveals that nearly 30 men, women and children were butchered and cooked there around 1100 AD. *See* Tim D White, PREHISTORIC CANNIBALISM AT MANCOS 5MTUMR—2346 (1992).
[54] More recent forensic research of human bones from an Anasazi pueblo in southwestern Colorado reveals that nearly 30 men, women and children were butchered and cooked there around 1100 AD. *See* Christy G. Turner II & Jacqueline A. Turner, MAN CORN: CANNIBALISM AND VIOLENCE IN THE PREHISTORIC AMERICAN SOUTHWEST (2009).
[55] *See* Ann B McGinness, *Between Subjection and Accommodation: The Development of José de Anchieta's Missionary Project in Colonial Brazil* 1 J. of Jesuit Studs. 227 (2014); Neil Whitehead, HANS STADEN'S TRUE HISTORY: AN ACCOUNT OF CANNIBAL CAPTIVITY IN BRAZIL (2008).
[56] Anders, *supra* note 51 at 956.
[57] *Id.*

> the consumption of the State's resources by politicians and bureaucrats. In Sierra Leone, corrupt politicians are referred to as *bobor bele* – literally, guys with a belly eating . . . the State's resources. Therefore, the frequent cannibalism accusations in West Africa must not always be read literally. They should rather be interpreted in terms of a highly symbolic political language and critique of existing injustices.[58]

To a Western audience, it may seem implausible that anyone could genuinely confuse symbolism with reality or, to put it concretely, confuse actual cannibalism with its metaphors. How is it that symbolism can be so easily transformed into action? These issues are perhaps better reserved for another article; nevertheless, it is widely argued in anthropological literature that ideas of witchcraft, spirit possession, and shamanistic injunctions had a normative effect on members of the vast majority of traditional societies.[59] The same is largely true today in the industrialized world for pious members of religious groups. To illustrate this point, I shall offer two case studies.

A significant part of the Rwandan genocide was predicated on a myth reiterated and propagated by the Hutu that the Tutsi were cockroaches and inferior beings. The same is true of other genocidal campaigns.[60] Whereas no Hutu would typically act on this myth unilaterally, it was the seed for future events when animosity was stirred through artificial means. Given those circumstances, a largely illiterate and highly polarized populace was unable to separate myth from reality.[61] Anthropological research on the Rwandan genocide tends to show that one of the principal cultural metaphors in Rwanda, the "flow," may shed light on Hutu killing and torture methods. Flow, in general, represents something healthy, as is the case with our blood stream, the transformation of food into feces, and insemination into childbirth; blockage of flow is then associated with disease and death. The genocide in Rwanda was characterized by conduct that comes across as utterly horrendous and senseless. One method included the impalement of victims from the anus to the mouth, the aim of which was to symbolize the end of

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[58] *Id.*

[59] *See* STANLEY H. BRANDES, POWER AND PERSUASION: FIESTAS AND SOCIAL CONTROL IN RURAL MEXICO (1988); *see also* Harold M. Bergsma, *Tiv Proverbs as a Means of Social Control* 40 AFR.: J. INT'L AFR'N. INST. 151 (1970).

[60] *See* Ben Kiernan, *Myth, Nationalism and Genocide* 3 J. GENOCIDE RCSH. 187 (2001) (tracing myths perpetuated by the Khmer Rouge in Cambodia in order to justify the annihilation of the country's intelligentsia).

[61] *See* David Newbury, *Canonical Conventions in Rwanda: Four Myths of Recent Historiography in Central Africa* 39 HIST. IN AFR. 41 (2012).

flow and hence the end of the victims' being.[62] From a prosecutorial point of view, it is clear that the leaders of the genocide made use of a myth in a way that stimulated public animosity against the Tutsi. Such a conclusion allows us to understand why a large portion of the Hutu population would engage in this degree of violence against their neighbors.

The second example, Nazi propaganda, similarly fueled the psyche of a much more literate population. Nazi propaganda prior to the onset of World War II in 1939 was characterized by a process of dehumanizing its enemies, such as Slavs (mainly Russians), communists, and Jews. In a world where international travel was exceptional and propaganda had crept into every aspect of social life (school, private clubs, censoring of all publications and broadcasts), it did not take long for the Nazi Party to render the German population doubtful about the humanity of other races and peoples. This dehumanization was nothing more than myth-creation,[63] as was the case for the superiority of the Aryans.[64] It is well known that such myths occupy a significant place in the collective consciousness of a nation, which is susceptible to manipulation for committing crimes against class or other enemies[65] or to achieve less "innocuous" political objectives.[66]

In the context of the ICTR's investigation, legal anthropology played a significant part in the reconstruction of liability for genocide, albeit largely unbeknownst to the judges.[67] In its first case, that of Jean-Paul Akayesu, the tribunal was reluctant to apply the exact terms of Article II of the Genocide Convention, which required that the crime be committed against members of another ethnic, national, religious, or racial group. Forensic evidence demonstrated that the Hutu and the Tutsi were not ethnically or racially distinct. Their respective "ethnic" designations were created by Belgian colonizers and subsequently evolved into distinctions of class or social status. The Tribunal

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[62] Christopher C. Taylor, *The Cultural Face of Terror in the Rwandan Genocide*, *in* ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 137-78 (2002).

[63] Johannes Steizinger, *The Significance of De-Humanization: Nazi Ideology and its Psychological Consequences* 19 POLS., RELIGION & IDEOLOGY 139 (2018) (arguing that significance of dehumanization in the context of National Socialism can be understood only if its ideological dimension is taken into account. The author concentrates on Alfred Rosenberg's racist doctrine and shows that Nazi ideology can be read as a political anthropology that grounds both the belief in the German privilege and the dehumanization of the Jews.).

[64] DANIEL J. GOLDHAGAN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996).

[65] *See* Cheng C. Wang, WORDS KILL: CALLING FOR THE DESTRUCTION OF CLASS ENEMIES IN CHINA, 1949-1953 (2004).

[66] An interesting, highly critical, insight is offered by Chomsky on the imagery employed in liberal nations to achieve pre-ordained social and political goals by elites. NOAM CHOMSKY, NECESSARY ILLUSIONS: THOUGHT CONTROL IN DEMOCRATIC SOCIETIES (1989).

[67] *See* Anders, *supra* note 51, resting her thesis on the fact that a big part of the debate in the ICTR and Sierra Leone cases was anthropological in nature—e.g., whether Tutsis constitute a distinct group from the Hutus—but the judges approached the pertinent issues from a legal perspective).

therefore turned to legal anthropology to construct a more objective theory of victimhood for the purposes of the Genocide Convention. It held that beyond external characteristics such as race and ethnic origin, membership of a group may also come about by the personal belief of a group's members as to their distinctiveness.[68] Thus far, this is on par with the fundamental tenets of social anthropology. However, personal self-distinction and self-categorization are only sanctioned if perceived as such by the group under consideration itself (informants) and not by external observers. The tribunal offered no prior study, nor did it commission one itself, to clarify the views of the informants. This anecdote demonstrates how international criminal tribunals perceive extra-legal matters as common knowledge, not worthy of further scientific research, upon which a reasonable person is well-suited to reach a reasonable conclusion.

This is, no doubt, a convenient mechanism to construct group characteristics in an artificial rather than a social scientific manner. Its foundation is hardly scientific; it is based on the judges' effort to fit the groups under discussion, and their members, within the terms of the Genocide Convention and other forms of criminal liability. Whether or not the tribunal's assessment of collective identity would stand up to thorough anthropological research is a different issue altogether. It is, therefore, critical that foreign judges receive assistance from a team of anthropologists who are experts on the people in question when assessing the criminal liability of persons from those cultures they know little about. The experts' objective must be to map the various social interactions and institutions of the pertinent people to provide a guide as to what is acceptable in the community, distinguish myth and symbolism from reality, and apprise the tribunal of those cultural factors that may inhibit witnesses and victims from testifying. This will no doubt assist the prosecutor and the defense in asking the right questions, saving precious judicial time.

IV. OBEDIENCE AND EFFECTIVE CONTROL IN SOCIAL CULTURE: UNDERSTANDING LEADERSHIP AND COMMAND IN ARMY AND REBEL OUTFITS

One of the key issues in war crimes trials is the degree to which a subordinate would obey a superior order, not as a matter of military compulsion,

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[68] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment ¶ 320 (Sep. 2, 1998). In Prosecutor v. Al-Bashir, …, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Al-Bashir ¶ 137 (Mar. 4 2009) [*Al-Bashir Warrant Decision*], an ICC Pre-Trial Chamber claimed that three Sudanese tribal groups living in the same area, namely the Fur, the Masalit and the Zaghawa constituted distinct ethnic groups because each possesses its own language, tribal customs and traditional links to its lands. Without realizing it, the Pre-Trial Chamber made an anthropological observation with legal significance.

but as a matter of ingrained culture. An assessment of such a culture, in combination with class or similar social constructs, is important because it signifies the degree to which one may assume effective control of jungle-based armies and militias. An assessment of this nature helps to provide an understanding of the structure of hierarchical systems and their distinct organization, which has troubled law-makers and courts since complex liabilities—such as command responsibility—first appeared on the legal map with the *Yamashita* case.[69] There, it was controversially held that Yamashita retained effective control over Japanese troops that went on the rampage against civilians in Manila, even though he had split the Japanese forces in the Philippines into four distinct groups and all communication between those groups had been severed by their adversaries. The tribunal maintained that the atrocities were so widespread that Yamashita must have known about them and could have prevented them, despite the accused's argument that he had given strict instructions to the Manila-based commander to evacuate the island and return to Japan. Clearly, in the absence of any direct orders, the tribunal could not have constructed Yamashita's command liability without arbitrarily assuming that he enjoyed effective control of all Japanese forces on the island.

Regardless of the facts on the ground, anthropological data would no doubt clarify a retrospective examination of effective control. Again, this Paper will not go into any significant detail, but given that the case hung on whether Yamashita's subordinates had, in fact, disobeyed his orders to evacuate and do no harm to civilians, it is worth investigating Japanese military culture at the time. In 1890, Japan adopted Shinto as its official State religion, establishing an imperial cult in which the emperor's divinity was based on his descendance from the Goddess Amaterasu. This meant that the emperor's commands, and by implication those of his representatives, were to be obeyed without objection. This unswerving loyalty to the emperor as the basis of the Japanese State (known as *kokutai*, which may be translated manifoldly, particularly as "sovereign" or "national essence") was institutionalized earlier by the introduction of universal conscription, which resulted in the indoctrination of the country's youth and continued through subsequent generations.[70] This cultural dimension, coupled undoubtedly with fear and other elements, accounts for the acceptance of brutality within the ranks of the Japanese army and its members' loyalty-to-the-death. As

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[69] *See Trial of General Tomoyuki Yamashita*, 4 L. REPS. OF TRIALS OF WAR CRIMS. 1.

[70] In fact, *kokutai* was introduced as a fundamental building block in Article 4 of Japan's 1890 Constitution, also known as the Meiji Constitution, on account of the Tenno dynasty which assumed power through the 1868 Meiji restoration, remaining in power until 1945. *See* GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN, 1868-1891 (1957).

a result, it would have been characteristically unusual and illogical for the forces under Yamashita's de jure command to disobey their commander's direct orders. By logical implication, no distinction can be made between de jure and de facto command with respect to Japanese military organization during World War II because even if separated from their commanders, units and subunits would, nevertheless, religiously adhere to their superiors' original orders—unless of course there were no other available orders. This observation also suggests that in this particular socio-military context, the absence of material capacity to prevent or punish is irrelevant in establishing de facto or de jure command because the conduct of subordinates is uniform irrespective of the person under command.

In the Rwanda conflict, de facto command and control became a central issue because, unlike the military-styled paramilitary groups on the territory of the former Yugoslavia, a significant amount of authority was exercised on the basis of traditional socio-economic structures. Rwandan society, like most of Africa, is tribal and class-based, with authority and privileges typically belonging to the elite in each tribe or clan.[71] As a result, authority and wealth go hand-in-hand, meaning the elite are also the richest and most educated among the tribe. Until the creation of the ICTR, the construction of command responsibility had been applied to regular armies and, at worst, to tightly-structured paramilitary units, which resembled regular armies principally because they were formed and run by ex-military personnel, as was the case with indictments before the ICTY. The most complex cases had been those dealt by subsequent WWII military tribunals in respect of civilians, particularly industrial and political leaders.[72]

The ICTR paid particular attention to these distinct anthropological features in its construction of hierarchies and authority in Rwandan society, although admittedly inadvertently and without the requisite methodological or scientific rigor. In the *Akayesu* case, the accused was the burgomaster of Taba commune, a position akin to that of mayor in Western parlance. Whereas Western mayors generally have limited authority to enact peripheral by-laws and set the municipality's economic agenda on the basis of municipal taxes and other income,

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[71] For an excellent anthropological account, *see* Rene Lemarchand, *Power and Stratification in Rwanda: A Reconsideration* 6 CAHIERS D' ÉTUDES AFRICAINES 592 (1996).

[72] *See, e.g., Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Roechling* 14 Trials of War Criminals before the Nuremberg Military Tribunals [Trials] 1097; *USA v Flick* 6 Trials 1187, and; *USA v von Weizsaecker* [*Ministries* case] 14 Trials 383. Once again, although no direct anthropological questions were asked by these tribunals, it was deemed implicit that those to whom powers were delegated by the Nazi regime enjoyed sufficient control over persons committing particular crimes. This was a direct consequence of Nazi culture which permeated all elements of the Reich's socio-economic raison d'être.

the burgomaster in Rwanda enjoyed far greater authority.[73] His powers were much wider than his *de jure* authority.[74] In fact, he was perceived as the "father" of the people, whose every order was to be obeyed without question or deviation.[75] Clearly, informal law and power arrangements, whether explicit or implicit, played an important role in ascertaining the enjoyment of effective control over the actions of civilian populations acting as mobs, random groups or under a self-perceived identity. The existence of such effective control is further reinforced by class and education. This Rwandan case study exemplifies the tribunal's desire to construct (or expand) complex liabilities on the basis of anthropological observations in order to reach a just conclusion; in the case at hand, to establish the liability of an influential figure urging those under his circle of influence to commit genocide.

A. THE ROLE AND ORIGIN OF *INFLUENCE* IN SIERRA LEONE'S ARMED GROUPS

I have already made extensive reference to myth and symbolism in the popular culture of Sierra Leonean society. The Sierra Leone Special Court (SLSC) has only indirectly examined the anthropological dimension of the various armed groups and its relevance to our understanding of conduct and hierarchies. With respect to the latter, the jurisprudence of the SLSC has revealed two broad types of military authority. The first is consistent with that found in regular armies and rebel forces, based on a strict or not so strict hierarchical structure. This appears to be the case with the Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF). The second type of authority depends less on formal hierarchies and is instead entrenched in symbolism and mythology. This is true of the *Komajors* and their Civil Defence Forces (CDF). No doubt, elements of both types of authority are found in all groups in one form or another.

Mythology, mysticism, and symbolism played a significant role in the military organization of Sierra Leone's factions. This was further facilitated by the fact that, although the country is home to twenty African groups (the largest of which are the *Temne* and *Mende*), it is multi-religious and the war did not start along ethnic or religious lines. Rebel groups and militias were thus ethnically and religiously diverse, a phenomenon already reflected in the membership of the country's secret societies, particularly the *poro* and the *bondo*. Exceptionally, the composition of the *Kamajors* was *Mende*-based, though their aim was not

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[73] This is confirmed by the vast literature in respect of weakly integrated nations where the real power lies with powerful individuals in the periphery. *See, e.g.*, John Gledhill, POWER AND ITS DISGUISES: ANTHROPOLOGICAL PERSPECTIVES ON POLITICS (1994).
[74] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment ¶ 57 (Sep. 2, 1998).
[75] *Id*. at ¶¶ 55, 74.

necessarily to engage in inter-ethnic rivalries.[76] That the Special Court made a serious effort to explain the mythology and mysticism underlying the organization of the *Komajors* is evidence of the fact that social phenomena are of acute relevance in ascribing the attributes of authority when constructing complex liabilities. Recall that the ICTY largely rejected or, at least, ignored such factors on the assumption that Bosnian factions were neatly divided along ethnic and religious lines and, as a result, there was no need to inquire into shared traits between members of different groups.

One element that should have influenced the jurisprudence of the Special Court is the use of power or authority to "influence" as an indication or evidence of effective control. In the *Čelebići* case, the accused Delalič was found to be a highly influential figure in the Bosnian army.[77] He had authority to sign contracts, release orders in a prisoner-of-war (POW) camp, and liaise with the highest echelons of the Bosnian Muslim authorities. Yet, he did not possess formal authority over other subordinates, especially those in the POW camp. The Tribunal did not consider that this highly influential individual, lacking any direct subordinates, yielded sufficient control over those running the POW camp such that he could have intervened in the commission of crimes against the prisoners.[78] This conclusion was drawn at a time when the construction of the complex liability of command responsibility did not warrant open-ended expansion. It was enough for the Tribunal that only persons exercising effective control over subordinates were subject to the doctrine. The Tribunal rightly felt that if everyone wielding influence could be subject to command responsibility, it would be opening the floodgates to convict persons who were not at fault.[79] The key word here is *fault*. If D, a boy scout leader, has exerted and continues to exert significant influence over a group of boy scouts who were recruited as minors by a rebel group, it cannot seriously be claimed that he possesses sufficient control over all their future actions, particularly when they are spatially and geographically removed from him. A defendant clearly lacks fault for failing to use his powers of influence to dissuade the youths. However, if the defendant was in proximity

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[76] KENDRA DUPUY & HELGA M. BINNINGSBØ, POWER-SHARING AND PEACE-BUILDING IN SIERRA LEONE, at 3–4 (2007).

[77] *See* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 577 (1999).

[78] Prosecutor v. Delalić, Case No. ICTR 96-21-T, Trial Chamber Judgment ¶¶ 266, 653–58 (Nov. 16, 1998).

[79] This is particularly reflected in its pronouncements in Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-T, Trial Chamber Judgment ¶¶ 276, 281 (Int'l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004); Prosecutor v. Naletilić, Case No. IT-98-34-T, Trial Chamber Judgment ¶ 68 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 21, 2003). These judgments certainly influenced the decision of the State Court of Bosnia and Herzegovina in Prosecutor v. Alić, Case No. X-KR-06/294, Trial Chamber Judgment, (Apr. 11, 2008) at 46.

to the minors and was an influential figure in the broader echelons of the group, he possesses the material capacity to employ his influence over the minors, even if he does not enjoy effective control by reason of direct subordination. In this latter scenario, the defendant is at material fault, although the determination as to whether this fault may substantiate command responsibility or other types of complex liabilities will depend on the particular circumstances, such as the defendant's material capacity to act.[80] It defies logic and the dictates of justice to assert that a person with direct capacity to save hundreds of lives by forestalling would-be perpetrators bears no liability simply because he was not incumbent with a pre-existing duty to act. This is not merely an iteration or transplantation of the duty to save strangers typically associated with civil law jurisdictions. It goes to the very heart of material fault and all that it stands for.

It is not clear whether the SLSC shares this conviction given that it has not expressly rejected or upheld this thesis.[81] The Special Court was unaware of the scholarly literature suggesting that power of influence is possible even in the absence of authority over one's target audience.[82] Imagine that influence and authority are merged into a single entity. Had the Special Court been cognizant of such arguments, it might have taken up the proposition that in situations where power relations and social status between several individuals are chaotic, direct subordination is not necessary for the more influential person to establish effective control.[83] This chaotic power gap existed in the context of the military factions engaged in Sierra Leone's bloody wars. The spiritual leader of the *Kamajors*, Kondewa, is an interesting case study. The *Kamajors* originally organized as a group of *Mende* hunters who responded to the directives of their various chiefs to protect people from the rebels.[84] As a result, its members did not possess the military skills and discipline of a regular or rebel army. They needed the

[80] This is why Mettraux sides with the judgments of the ICTY to reject influence as establishing *de facto* control. *See* GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 183–87 (2009).
[81] In Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgement ¶ 788 (June 20, 2007), the Special Court referred to a number of indicia as evidence of effective control. These may implicitly be read—although one could argue otherwise—as encompassing cases of significant and overpowering influence.
[82] See LINDA A. HILL, EXERCISING INFLUENCE WITHOUT FORMAL AUTHORITY: HOW NEW MANAGERS CAN BUILD POWER AND INFLUENCE (2008); ALAN R COHEN & DAVID L BRADFORD, INFLUENCE WITHOUT AUTHORITY (3d ed. 2017). Hill's motto, a pioneer on this topic, is that: "all influential managers have power but not all powerful [sic] managers have influence".
[83] "Influence" is probably not the appropriate term here and this certainly explains why the ad hoc tribunals have rejected influence-based effective control out-of-hand. It should be understood as possessing the material and mental power to compel another to do or abstain from doing something.
[84] Prosecutor v. Fofana, Case No. SCSL-04-14-T, Trial Chamber Judgment ¶ 354 (Aug. 2, 2007).

organization and guidance of military and spiritual leaders to become an organized fighting unit.[85] Kondewa was a spiritual leader:

> He was the head of all the CDF initiators initiating the *Kamajors* into the *Kamajor* society in Sierra Leone. His job was to prepare herbs which the *Kamajors* smeared on their bodies to protect them against bullets. Kondewa was not a fighter, he himself never went to the war front or into active combat, but whenever a *Kamajor* was going to war, he would go to Kondewa for advice and blessing. (…) The *Kamajors* believed in the mystical powers of the initiators, especially Kondewa, and that the process of the initiation and immunisation would make them bullet-proof. The *Kamajors* looked up to Kondewa and admired the man with such powers. (…) Because of the mystical powers Kondewa possessed, he had command over the *Kamajors* from every part of the country.[86]

The Special Court opined that Kondewa's spiritual or mystical powers did not automatically confer upon him military authority over the recruits and their operations.[87] However, his *de jure* position of High Priest of the CDF granted him some degree of effective control in certain situations. He was found to enjoy effective control with respect to these situations only.[88]

The Special Court missed a golden opportunity to defy the *Čelebići* myth—that significant influence does not entail a degree of power—by failing to expressly stipulate that, under certain circumstances, the yielding of influence between asymmetric actors can give rise to effective control irrespective of the military, civilian, or other context in which it is exercised. If a person can convince another that he will be unaffected by his adversaries' weapons by following a ritual, it is absurd to claim that this person does not possess powers akin, if not far superior, to those enjoyed in a superior-subordinate relationship. Such powers of influence are no doubt rare, but in Sierra Leone where the mystical and the symbolic coincide with the real and the brutal, the anthropological basis of the relevant relationships should have been given far more weight. Just as the results of one anthropological study cannot be transplanted into another, the findings of the Special Court need not be accepted as immutable truths applicable to all future conflicts. I am not convinced by the argument that influence can never give rise

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[85] Even so, universal discipline remained problematic because some fighters "acted on their own without knowledge of central command because their area of operation was so wide." *Id*. para. 358.
[86] *Id*. paras. 344-346.
[87] *Id*. para. 806.
[88] *Id*. para. 686.

to effective control-type situations. This position is sustainable as long as it is proven that the person in question had the material capacity to prevent or punish the crimes committed by those persons over whom he enjoyed significant influence. I can only hope that the jurisprudence will take anthropological evidence into consideration and finally move in this direction.

V. CULTURE AND ENVIRONMENT IN THE DARFUR CONFLICT

We are still quite far from comprehending the origins of mass crimes in communities whose cultures evade our understanding. In the Darfur conflict, much was rightly said about the harmful role played by the Al-Bashir government, but such criticism has failed to discuss the onslaught of desertification and the failure of the government to take action as contributing factors.[89] The UN's Environment Program (UNEP) viewed Sudan's environmental issues at the time as contributing causes to conflict rather than root causes themselves.[90] It listed, specifically, competition over oil and gas reserves, water and timber, and confrontations over the use of agricultural land, with particular emphasis on rangeland and rain-fed land in the drier parts of the country, such as Darfur.[91] The government of Darfur has kept precipitation records since 1917 and the data clearly showed that a dramatic decrease in rainfall in the region had turned millions of hectares of semi-desert land to desert plains.[92] Instructively, between 1946-1975 the average annual rainfall in Northern Darfur was 272.36 mm, while in 1976-2005 it had fallen to 178.90 mm, constituting a decrease of 34 percent. Within the same time period, Southern Darfur experienced a decrease in rainfall of 16 percent, while the decline in Western Darfur was approximately 24 percent.[93] Lack of sufficient rainfall has rendered 24 percent of Sudanese territory real deserts. Desertification forced pastoralists to move to greener belts, consequently leaving more people to share less land. The absence of proper agricultural management brought about the last cycle in this environmental catastrophe. Farmers cut down millions of hectares of woodlands to make way for grazing grounds for their cattle and to otherwise free up land for cultivation.

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[89] *ICC Prosecutor v Al-Bashir* (Warrant of Arrest Re Situation in Darfur) ICC Doc ICC-02/05-01/09 (4 March 2009). Note that there is nothing in the indictment regarding Al-Bashir's intentional or reckless environmental policy. This should not deter the ICC Prosecutor, however, when formulating more detailed charges to lay some stress on this matter, even if only to underline the seriousness of the matter.

[90] *See generally* DOUGLAS H. JOHNSON, THE ROOT CAUSES OF SUDAN'S CIVIL WARS (2003).

[91] UNEP, Sudan: Post-Conflict Environmental Assessment, 8, UNEP Doc DEP/0816/GE (2007).

[92] Sudan's desertification has in fact been documented as early back as 1953. *See* EP STEBBING, THE CREEPING DESERT IN THE SUDAN AND ELSEWHERE IN AFRICA (1953).

[93] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment ¶ 60 (Sep. 2, 1998).

Deforestation in Sudan occurred at a rate of 0.84 percent per annum and it is estimated that between 1990 and 2005, the country lost 11.6 percent of its forest cover. In Darfur alone, a third of the forest cover was lost between 1973 and 2006.[94] The uncontrolled and wholly unsustainable agricultural policy of Sudan was aptly reflected in its livestock breeding. Numbers rose from 28.6 million livestock in 1961, to 134.6 million in 2004. This dramatic increase in livestock under particularly arid conditions due to lack of rainfall resulted in widespread degradation of rangelands that could not subsequently be restored.[95] Conflict was inevitable. Even so, localized conflicts are not a recent phenomenon in Sudan. Between 1930 and 2000, competition for pastoral land among Sudan's pastoralists was a constant source of conflict.[96] The twist in the Darfur crisis, however, lay in the following factors: (a) desertification persisted at an alarming rate, thus shrinking available arable lands; (b) dramatic increase in livestock; (c) depletion of natural resources, particularly water; and (d) sharp increase in population growth.[97] The combination of all these combustive elements in such a small time frame was more than enough to ignite a bitter conflict between pastoralist and farmer groups in Darfur competing for space. None of this is to say that ethnic rivalries and the intervention of the Sudanese government have not played a role in the ensuing humanitarian catastrophe. In fact, other causes are more significant than the effect of environmental scarcity, and it is now evident that the Al-Bashir government has inflamed the conflict through its support of Arab Darfurians.[98]

The cultural narratives of the various groups in Darfur, whether painted by environmental degradation, poor environmental management, land scarcity, or other external calamities, were never made known. In mass crimes, it is much more expedient to identify the human element (i.e., *actus reus* and *mens rea*) behind criminal conduct, as opposed to other factors that require anthropological research or a combined approach from various disciplines that seem far removed from the courtroom, such as environmental science.[99] Ultimately, while apportioning criminal blameworthiness is quintessential to attaining justice and rule of law, international courts and tribunals must not make themselves oblivious to the complexities underpinning collective human behavior. International

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[94] *Id*. paras. 10-11.
[95] *Id*. para. 10.
[96] *Id*. para. 83.
[97] *Id*. para. 87.
[98] *See* UNEP, Understanding Environment, Conflict, and Cooperation, 6-7, UNEP Doc DEW/0571/NA (2004). The authors of the report start as far back as the Peloponnesian war between Athens and Sparta.
[99] Brian F. Chase, Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT, 14 Third World Q. 749 (1993) (arguing as far back as 1993 that poverty was the most serious cause for African deforestation).

criminal courts and tribunals would do well to look at the practices of many courts in developed nations that delve into the parties' cultural choices to offer more just outcomes.[100]

CONCLUSION

This Article has demonstrated the centrality of culture in cases or situations involving armed conflict between dissident groups, particularly where mass crimes have occurred, whether genocide or crimes against humanity. Anthropological research must become one of the first axes of any international criminal investigation, particularly where a part of the civilian population has participated, whether actively or passively, in the criminal activity instigated by the group's leadership. The outcomes of rigorous anthropological research will assist the appointing entity (international tribunal or organ of the United Nations) in several respects: (a) by demonstrating how particular leaders manipulated a myth/narrative in order to instigate animosity among the public, with a view to concretizing the case for leader-related criminal liability charges; (b) by painting a more accurate account of the underlying context of the conflict, its history, and the role of myth, with a view to re-writing the myth in post-conflict life of embattled groups; and (c) by allowing genuine reconciliation to take place on the understanding that popular narratives are distorted and manipulated. To add a timely example, the majority of the Russian public's conviction that the invasion in Ukraine is justified is very much the result of several official narratives that seek to perpetuate the myth that the Russian-speaking population in Ukraine is subjected to genocide by a Nazi regime.

The cultural dimensions of international criminal proceedings have certainly been underestimated and to a very large degree rejected by prosecutors and judges. Both are expected to operate under a considerable degree of stress and produce speedy outcomes with minimal expenses. As a result, prosecutors avoid any considerations that do not involve strict evidence gathering processes, as they are unable to comprehend their value in the overall universe of transitional justice of which criminal trials are only a single part. When the judges themselves attempt to paint a non-legal picture of the underlying conflict, they do so in the absence

[100] Exceptionally, the courts will look at the wife's disadvantaged position in the pertinent Muslim jurisdiction as was the case in *NA v MOT* [2004] EWHC 471 (Fam), para. 2, where the court examined the wife's options for divorce under Iranian law. It held that, if the wife wanted a divorce in Iran, she would have to negotiate the amount of the marriage portion she would have to forgo in exchange for her freedom. If the price was too high, she would be forced to remain married, but, in reality, she would be separated. Ultimately, however, the court applied Iranian law and did not seek to deviate from it in order to alleviate the wife's position. *See also Otobo v Otobo* [2002] EWCA Civ 949.

of solid anthropological evidence and only as a means of introduction to the legal context. It is not therefore surprising that international criminal proceedings seldom, if at all, culminate in meaningful platforms for national reconciliation. Entire populations (including child soldiers, brainwashed civilians and others) are conflated with those leaders that manipulated them or abducted them (in the case of child soldiers) and are then pitted against the group that was victimized.

The key finding of this Paper is that an anthropological component must be embedded in all existing and future international criminal tribunals, truth and reconciliation commissions, and international commissions of inquiry. This component should be independent from both the judicial and prosecutorial chamber in order to avoid conflicts of interest. Its role would be to offer an informed account of the history and cultural account of the relationship of the warring parties, which would allow the prosecutor to better apportion culpability and assist the Court and subsequent national processes. It is important for this proposed anthropological component of criminal proceedings to be institutionalized so that it is not side-lined by its stakeholders (i.e., courts, prosecutor, public defender, UN entities, and organs). Although courts retain their independence and inherent competence to decide the relevance and veracity of anthropological findings, they should not lightly dismiss them in the absence of strong evidence to the contrary. To this end, it is imperative that the process be open and transparent so that it cannot be tainted by bias. Hopefully, anthropology will become a key component of the international community's post-conflict reconstruction and reconciliation processes in the future.

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

PETRA MINNEROP*

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

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[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 Wetzer, *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 Hoyesterett, (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

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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 develop[9] and apply[10] 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 statute[18] in order to broaden its factual knowledge

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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. SETTL., 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

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[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 vacuum[29] 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

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[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); *Demír v. Turkey*, 2008-V Eur. Ct. H.R. 333, paras. 76–86 [hereinafter *Demír*].

[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/pwjktn7x-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

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[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 Convention[41] 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 Child[44] 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

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[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.

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[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 courts[56] and are recognized by other international courts[57] 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

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[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 life[61] 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

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[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. Portuga*l, 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 Europe[82] and the standard applicable in the defendant State. Measures of the legislature are not beyond judicial scrutiny, and the Court will carefully

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[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

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[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] Opuz, *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

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[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 andC 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

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[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 supporting[113] and fiercely opposing

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[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 FUR 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*]; *Demír, 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, at843; Fiona De Londras & Konstantsin Dzehtisarou, *Managing Judicial Innovation in the European Court of Human Rights*, 15 HUM. RTS. L. REV. 523, 546 (2015).

[113] Kanstansin Dzetsiarou, *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' laws[118] 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

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[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 Kagiaros, *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 Criticial 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 Tzevelokos & 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); KANSTANTSIN 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]

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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 law[133] and eventually confirmed

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[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 Appeal[137] 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

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[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 Biomedicine[147] did not include a legal

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[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 Beings[149] 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

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[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

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[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* Benvenisti, *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

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[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

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[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 consensuses 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

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[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 work[177] 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

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[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]

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[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

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[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, BROWNLIE'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 Court[198] 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]

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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

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[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

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[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

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[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 action[223] 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 Trinidade 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

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[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 Trinidade, 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

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[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 ($GtCO_2$) of cumulative CO_2 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

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[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; 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 rising[244] 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]

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[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 ºN–52 ºN, 119 ºW–123 ºW, 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 CO_2, deep reductions in non-CO_2 greenhouse gases, and accelerated development of technologies to remove CO_2 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 CO_2 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

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[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 CO_2 emissions declined by 5.8 percent in 2020, global energy-related CO_2 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]

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[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 rights[267] and the Court has

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[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 principle[268] 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 activities[270] 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

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[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 political[281] and legal discourse[282] 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 Layer[288] and the Kigali Amendment of 2016[289] which has turned the

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[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 Layer[290] 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 CO_2 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

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[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. Carlarne, 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 targets[304] 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

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[302] *Minnerop*, *supra* note 181; for the "Paris Agreement Rulebook" that was adopted at COP24 in Katowice, *see* UNFCC, *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 Law[313] 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.

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[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" one[319] 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

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[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 legality[322] 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

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[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 discourse[326] 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.

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[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.

A DANGEROUS SYMBIOSIS: GAPS IN INFORMATION TRANSPARENCY AND SECURITY AMONG HUMAN RIGHTS MECHANISMS

LISA REINSBERG*

ABSTRACT

What obligations do supranational human rights bodies have as guardians of sensitive and vital information and administration of international justice? To keep individuals' private data secure? To proactively publish the decisions that result from their petitions? Advocates, in particular, face significant risks when their communications are intercepted, and their work is frustrated when they cannot obtain necessary information. Cognizant of such concerns, human rights bodies are increasingly requiring States to ensure individuals' rights to data privacy, access to information, and use of encrypted communication channels.

Yet, human rights bodies themselves lack formal policies and consistent practices with regard to receiving, processing, and sharing information. At times, their information management methods imperil advocates and impede access to justice. Advocates and human rights bodies depend on one another for information and impact, but inattention to these risks may perpetuate a dangerous symbiosis.

This article provides a first, comprehensive overview of United Nations and regional human rights bodies' public-facing information management practices.

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It identifies the gaps between those practices and international human rights norms, and offers recommendations for future policy development.

I. ERIKA'S DILEMMA: INFORMATION FLOWS BETWEEN THE HUMAN RIGHTS ADVOCATES AND ACCOUNTABILITY MECHANISMS

Erika stares past the open door to the dust still floating down onto fresh tire tracks in the sandy earth of the Honduran coast. A few feet out, the tracks fade, along with any clues as to where her colleague Daniel might be. The armed men who dragged him away wore balaclavas.[1] She fears his name will join the ever-growing list of fellow activists killed for opposing land grabs and development projects in the deadliest country in the world for environmental defenders.[2] Erika looks at her mobile phone. If she calls local law enforcement, she could put Daniel in greater danger. Someone could be listening and the authorities may already be complicit. She has heard the Inter-American Commission on Human Rights (IACHR)—all the way in Washington, D.C.—could intervene, but how can she request its help?

Though she is fearful that the government or private actors could be monitoring her online activity, Erika turns to the internet for answers. Her search leads to the IACHR webpage on "precautionary measures."[3] Erika reads that the IACHR can grant precautionary measures "in serious and urgent situations" involving a "risk of irreparable harm to persons."[4] Would Daniel's situation meet these criteria?

It is difficult to tell. The list of previously-granted measures[5] is organized by year and there is no full-text search function, subject matter filter, or country filter. The webpage on human rights defenders[6] lists precautionary measures

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[1] This account is fictional, but the scenario is familiar for many human rights advocates. *See, e.g.*, Comunidades Garífunas de Triunfo de la Cruz y Punta Piedra v. Honduras, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (ser. E) No. 4, ¶ 8 (Sept. 2, 2020), https://www.corteidh.or.cr/docs/medidas/garifuna_se_04.pdf.

[2] GLOBAL WITNESS, HONDURAS: THE DEADLIEST PLACE TO DEFEND THE PLANET (2017) https://www.globalwitness.org/documents/18798/Defenders_Honduras_full_report_single_v5_AH12dtf.pdf.

[3] *About Precautionary Measures*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/jsForm/?File=/en/iachr/decisions/about-precautionary.asp (last visited Sept. 4, 2022).

[4] *See id.*

[5] *Inter-American Commission on Human Rights, Precautionary Measures, Grants and Extensions*, INTERNET ARCHIVE, https://web.archive.org/web/20210113035203/http://www.oas.org/en/iachr/decisions/precautionary.asp (Jan. 13, 2021). In a welcome development, in approximately March 2021, the IACHR published a new version of this webpage that does have a search function and country filter. *See Inter-American Commission on Human Rights, Precautionary Measures*, INTER-AM. COMM'N H.R., https://www.oas.org/en/IACHR/decisions/MC/precautionary.asp (last visited Sept. 4, 2022).

[6] *Inter-American Commission on Human Rights, Rapporteurship on Human Rights Defenders and Justice Operators*, INTERNET ARCHIVE, https://web.archive.org/web/20210418221256/https://www.oas.org/en/iachr/defenders/protection/pre

granted to protect advocates, but the most recent are from 2013 and the files are not text-searchable.[7] Reading through each document would take time that Erika does not have. Next, she conducts an internet search for precautionary measures involving her community, the Garifuna people. She finds a link to an IACHR hearing. To her disappointment, the audio and video files are all missing.[8]

Erika hopes someone at the IACHR can give her guidance, but she does not see any way to contact the IACHR via an end-to-end encrypted channel,[9] such as Signal, which would help keep her identity and message confidential.[10] There are no forms or instructions for making information requests on the IACHR website. She finds the portal[11] for requesting precautionary measures, but the website terms refer to the IACHR's "privileges and immunities" while disavowing responsibility for the security of any personal information—including names and addresses—that Erika provides.[12] How can she help secure Daniel's safety while protecting her own?

Erika's conundrum reflects a broader question: how should human rights mechanisms handle the incoming and outgoing information that is their lifeblood? For the people of the Americas, the IACHR represents a chance for justice and accountability; its work promoting and protecting human rights is invaluable and effective. However, for victims and advocates, interacting with the IACHR can be costly and challenging. Individuals often expend significant time and effort to obtain necessary information and may face retaliation from governmental or private actors. If the IACHR does not transparently, consistently, and securely

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cautionary.asp (Apr. 18, 2021). In another welcome development, the IACHR published a new version of this webpage in April 2021 that includes a text search function, as well as more recent precautionary measures resolutions that are available in searchable PDF format. *See Rapporteurship on Human Rights Defenders, Precautionary Measures*, INTER-AM. COMM'N H.R., https://www.oas.org/en/IACHR/jsForm/?File=/en/IACHR/r/dddh/MC.asp (last visited Sept. 4, 2022).

[7] *See, e.g.*, Iván Hernández Carrillo v. Cuba, Precautionary Measure 245-13, INTER-AM. COMM'N H.R. (Oct. 28, 2013), http://www.oas.org/es/cidh/decisiones/pdf/MC245-13-esp.pdf.

[8] *Audiencias, 124 Período de Sesiones*, INTER-AM. COMM'N H.R., https://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=es&Session=19&page=2 (last visited Sept. 4, 2022) (none of the audio, video, or image files are available for any of the hearings on this page).

[9] End-to-end encryption generally requires both the sender and receiver to use personalized keys in order to access a message. *See, e.g.*, *A Deep Dive on End-to-End Encryption: How do Public Key Encryption Systems Work?*, ELECTRONIC FRONTIER FOUNDATION, https://ssd.eff.org/en/module/deep-dive-end-end-encryption-how-do-public-key-encryption-systems-work (last visited Mar. 22, 2022).

[10] *Contact the IACHR*, INTER-AM. COMM'N H.R., https://www.oas.org/en/iachr/about/contactus.asp (last visited Sept. 4, 2022).

[11] *IACHR Individual Petition System Portal*, OAS, https://www.oas.org/ipsp/default.aspx?lang=en (last visited Sept. 4, 2022).

[12] *IACHR Web Site Terms*, INTER-AM. COMM'N H.R., https://www.cidh.oas.org/disclaimer.htm (last visited Sept. 4, 2022). *See also Terms & Conditions*, OAS, https://www.oas.org/en/terms_conditions.asp (last visited Sept. 4, 2022).

manage the information it disseminates and receives online, it risks imperiling individuals' safety and privacy, as well as losing the trust—and input—of the advocates who are essential to its relevance and impact.

The Inter-American Commission is not alone in its inattention to information management. The United Nations and regional intergovernmental organizations, including the African Union, Council of Europe, and Organization of American States, have established dozens of specialized courts, commissions, committees, and other independent expert bodies to monitor human rights conditions in nearly every country of the world. Yet, despite increased communication between these human rights mechanisms[13] and advocates, particularly via the internet, none has shared an information management policy, let alone one adapted to the digital era. This gap has already had profound consequences, exposing advocates to excessive obstacles and risks.

At the same time, human rights mechanisms are defining and enforcing States' obligations under international law to, *inter alia*, ensure access to public information and to justice, promote the work and security of human rights advocates, and protect individuals' privacy and correspondence. These standards arguably bind human rights mechanisms themselves as well, and, at minimum, should guide the development of necessary information management policies.

While the term "information management" covers many topics, including internal case management software and overall cybersecurity, I focus here on three issues of particular concern for human rights advocates: security of communications, protection of personal data processed by human rights mechanisms, and public access to documents and other information human rights mechanisms produce. In Part II, I argue that information management policies are necessary due to the expansion and evolution of human rights oversight in the digital era, and introduce the regional and universal mechanisms covered in this article. Part III focuses on whether intergovernmental organizations, or the human rights mechanisms they have created, have international human rights obligations, and therefore, may have a legal duty to adopt certain information management policies. In Parts IV, V, and VI, I address encryption, data protection, and access to information, respectively, reviewing the human rights mechanisms' corresponding policies and practices. In each of these parts, I also identify relevant human rights treaty provisions and soft law that shape States' obligations in these areas. With regard to individual rights related to data protection and access to

[13] I use the term "human rights mechanisms" to refer to the independent human rights oversight bodies created by the United Nations and regional intergovernmental organizations, which are the focus of this article. *See infra* Part I.A for an overview of these mechanisms. I use the term "advocates" to refer to lawyers and non-lawyers who engage in documentation, reporting, litigation, and advocacy to protect or vindicate human rights, whether in a professional or voluntary capacity.

information, I suggest these norms may have reached customary status. Finally, VII concludes with recommendations for human rights mechanisms' consideration.

II. HUMAN RIGHTS OVERSIGHT IN THE DIGITAL AGE

Twenty-five years ago, human rights protection was a paper world. Human rights mechanisms published their decisions and reports in thick volumes; their corridors were lined with cabinets overstuffed with letters, domestic court records, and photographs. Evidence of the abuses they investigated was hidden, not infrequently, in stacked cardboard boxes.[14] Then, at the very end of the twentieth century, human rights mechanisms began to move online. Their new websites included online complaint forms and became the primary method of disseminating their growing body of caselaw.[15] These developments facilitated the receipt and dissemination of critical information while also deepening dependence on the internet in the field of human rights. And then, time largely stood still. Since those early days of the digital era, human rights secretariats—from Geneva to Banjul—have mostly used the same channels to impart, receive,

[14] *See, e.g.*, Janowiec and Others v. Russia [GC], App. Nos. 55508/07 and 29520/99, 2013-V Eur. Ct. H.R. 203, ¶ 38 (in 1990, the president of the USSR handed documents to the Polish president from a secret archive concerning responsibility for the 1940 Katyn massacre); Ginger Thompson, *Mildewed Police Files May Hold Clues to Atrocities in Guatemala*, N.Y. TIMES (Nov. 21, 2005), https://www.nytimes.com/2005/11/21/world/americas/mildewed-police-files-may-hold-clues-to-atrocities-in.html; Giles Tremlett, *Operation Condor: the Cold War Conspiracy that Terrorised South Americ*a, GUARDIAN, Sept. 3, 2020, https://www.theguardian.com/news/2020/sep/03/operation-condor-the-illegal-state-network-that-terrorised-south-america (relating the 1992 discovery of General Alfredo Stroessner's secret police archive containing "half a million sheets of paper").

[15] Many human rights mechanisms appear to have first created websites between 1997 and 2002. *See, e.g.*, *Office of the High Commissioner for Human Rights*, INTERNET ARCHIVE, https://web.archive.org/web/19970421200705/http://www.unhchr.ch/ (Apr. 21, 1997); *European Court of Human Rights*, INTERNET ARCHIVE, https://web.archive.org/web/19981211234741/http://194.250.50.200/ (Dec. 11, 1998); Afr. Comm'n Hum. & Peoples' Rts., *Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights: 2001-2002*, 22 (2002), https://www.achpr.org/public/Document/file/English/achpr30and31_actrep15_20012002_eng.pdf. *See also African Commission on Human & Peoples' Rights*, INTERNET ARCHIVE, https://web.archive.org/web/20020223204742/http://www.achpr.org/html/africancommissiononhuman.html (Feb. 22, 2002).

and manage online communications.[16] Like their practices, their policies have evolved very little, very slowly.[17]

Meanwhile, the broader digital landscape has transformed. Over the past 15 years, the number of people using the internet has quadrupled to more than 4 billion.[18] Human rights advocates now rely on digital technologies, which have expanded and reshaped their methods and reach.[19] States and private actors have also gained technological capabilities, enabling targeted and mass collection of data and communications, for example.[20] Unlawful or arbitrary surveillance of communications "continues without evident constraint" in a climate of secrecy and weak regulation.[21]

Against this backdrop, human rights advocates and the general public are interacting with human rights mechanisms much more than in prior decades. For example, in 2000, the IACHR received 658 individual complaints of human rights violations; that number soared to 3,034 in 2019.[22] The United Nations Special Procedure mandate holders (independent experts appointed to monitor and promote human rights with respect to particular themes or countries) carried out eighty-four country visits in 2019, compared to forty-eight in 2006.[23] At the same

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[16] For example, the first iteration of the Inter-American Commission on Human Rights' website, apparently published in January 1999, included an online form for submitting petitions (complaints). *See Inter-American Commission on Human Rights: Complaint Form*, INTERNET ARCHIVE, https://web.archive.org/web/19990428003528/http://www.cidh.oas.org/email.htm (Apr. 28, 1999). The original European Court of Human Rights' website included its HUDOC case law database. *See HUDOC INTERnet*, INTERNET ARCHIVE, https://web.archive.org/web/19990202141539/http://194.250.50.200/hudoc/default.htm (Feb. 2, 1999). The early OHCHR website also allowed visitors to search its document databases. *See Office of the High Commissioner for Human Rights*, INTERNET ARCHIVE, https://web.archive.org/web/19970804040956/http://www.unhchr.ch/search.htm (Aug. 4, 1997).

[17] *See* discussion, *infra* Parts I.B (overview), 0 (data protection), and 0 (access to information).

[18] *See* ITU, *Measuring digital developments: Facts and figures 2019*, 1 (2019), https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf.

[19] *See generally* Mallika Dutt & Nadia Rasul, *Raising Digital Consciousness: An Analysis of the Opportunities and Risks Facing Human Rights Activists in a Digital Age*, 20 SUR 427-35 (2014); *Digital Security and Privacy for Human Rights Defenders*, FRONT LINE, https://equalit.ie/esecman/index.html (last visited Sept. 4, 2022); *see also* DIGITAL WITNESS (Sam Dubberley, Alexa Koenig & Daragh Murray eds., 2020); NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE (Molly K. Land & Jay D. Aronson eds., 2018).

[20] *See, e.g.*, Likhita Banerji, *A Dangerous Alliance: Governments Collaborate with Surveillance Companies to Shrink the Space for Human Rights Work*, AMNESTY INT'L (Aug. 16, 2019), https://www.amnesty.org/en/latest/research/2019/08/a-dangerous-alliance-governments-collaborate-with-surveillance-companies-to-shrink-the-space-for-human-rights-work/ (last visited Sept. 4, 2022).

[21] *See* David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Surveillance and Human Rights*, U.N. Doc. A/HRC/41/35 (May 28, 2019), https://www.undocs.org/A/HRC/41/35.

[22] *Statistics by Year, Petitions Received*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/multimedia/statistics/statistics.html (last visited Sept. 4, 2022).

[23] *See* U.N. Hum. Rts. Council, *Facts and figures with regard to the special procedures in 2019* 16 (Mar. 10, 2020), https://undocs.org/en/A/HRC/43/64/Add.1; Off. High Comm'r Hum. Rts., *United Nations Special Procedures: Facts and Figures 2006*, 3, https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/factsfigures2006.pdf. Prior to the

time, States are ratifying more treaties and complaint procedures,[24] while creating new regional and universal oversight bodies, making human rights protections available—at least in theory—to many more people and in many more situations.[25]

Unfortunately, the world is also witnessing a growth in reprisals against human rights advocates. Indeed, States have retaliated against advocates *because of* their purportedly private digital communications with human rights mechanisms.[26] In many countries, this phenomenon has dovetailed with the suppression of domestic civic space. In summarizing the situation in Mexico, for example, the IACHR described "high levels of disappearances and attacks on the lives of human rights defenders and journalists, harassment, threats, surveillance, [and] communication interception, as well as . . . legislation that directly or indirectly criminalizes social protest and the work of human rights defenders."[27] Reports make clear that when advocates contact human rights mechanisms, they often face real harm. In addition to self-censoring as a result of digital surveillance, advocates have reported feeling fear, exhaustion, and depression.[28]

OHCHR's March 2022 website redesign, this document was available at a different link (https://www.ohchr.org/Documents/HRmechanisms/SP/factsfigures2006.pdf), which no longer works.

[24] For example, thirty-two of the forty-two States currently party to the European Social Charter ratified that instrument in the year 2000 or later. *See European Social Charter, Signatures & ratifications*, COE, https://www.coe.int/en/web/european-social-charter/signatures-ratifications (last visited Sept. 4, 2022). The European Committee of Social Rights was authorized to begin accepting collective complaints in 1998. *See Chart of signatures and ratifications of Treaty 158*, COE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=F3KSQtYr. Additionally, the individual complaint mechanisms for the Committee on Economic, Social and Cultural Rights and for the Committee on the Rights of the Child became operational in 2013 and 2014, respectively.

[25] The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established in 2001. *See ACERWC Secretariat*, AFR. UNION, https://au.int/en/sa/acerwc (last visited Sept. 4, 2022). In 2019, there were fifty-six United Nations Special Procedure mandates, compared to forty-one in 2006. *See* U.N. Hum. Rts. Council, *Facts and figures with regard to the special procedures in 2019* 16, *supra* note 23, at 3; Off. High Comm'r Hum. Rts., *United Nations Special Procedures: Facts and Figures 2006*, *supra* note 23, at 1. Four of the ten United Nations human rights treaty bodies - the Committee on the Rights of Persons with Disabilities (2008), Committee on the Rights of Migrant Workers (2003), Committee on Enforced Disappearances (2010), and Subcommittee on Prevention of Torture (2006) - have come into being since 2003. Their individual complaint mechanisms have also become operational, except in the case of the Committee on the Rights of Migrant Workers, whose envisioned individual complaint mechanism has not yet been accepted by the requisite number of States. *See generally Ch. IV: Human Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en.

[26] *See, e.g.*, Press Release, Human rights: Reported reprisals continue unabated, says UN, Off. High Comm'r Hum. Rts. (Sept. 30, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26322&LangID=E.

[27] Inter-Am. Comm'n H.R., *Integral Protection Policies for Human Rights Defenders* ¶ 94 (2017), http://www.oas.org/en/iachr/reports/pdfs/Defensores-eng-2017.pdf.

[28] Front Line Defenders, *Living Under Digital Surveillance: Human Rights Defender Perceptions and Experience* (June 23, 2016), https://www.frontlinedefenders.org/en/resource-publication/living-under-digital-surveillance (last visited Sept. 4, 2022).

Moreover, advocates identify gaps in access to documents and other information on human rights mechanisms' activities as significant barriers to their effectiveness as rights defenders.[29] When advocates cannot safely communicate with human rights mechanisms or obtain the information they need, their ability to investigate, document, and report human rights abuses is hampered and may even be foreclosed. Such obstacles, of course, have broader consequences for the protection of human rights worldwide. Human rights mechanisms' impact depends on advocates' capacity to inform them of emerging or ongoing abuses, submit complaints, and advocate for States' implementation.

A. Relevant Mechanisms and Their Mandates

This article focuses on the seventy-six regional and United Nations human rights mechanisms that both regularly receive sensitive information directly from advocates and publish materials that advocates use to assess and promote States' implementation of their human rights commitments.[30] These seventy-six mechanisms comprise eight regional bodies, ten U.N. treaty bodies, and fifty-eight U.N. Special Procedures. Specifically, the eight regional human rights mechanisms included here are the African Commission on Human and Peoples' Rights (ACHPR); African Committee of Experts on the Rights and Welfare of the Child (ACERWC); African Court on Human and Peoples' Rights (AfCHPR); Council of Europe (COE) Commissioner for Human Rights; European Committee of Social Rights (ECSR); European Court of Human Rights (ECtHR); Inter-American Commission on Human Rights (IACHR); and Inter-American Court of Human Rights (IACtHR).[31]

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[29] *See, e.g.*, INT'L JUST. RES. CTR., CIVIL SOCIETY ACCESS TO INTERNATIONAL OVERSIGHT BODIES: AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 15, 19 (2018), https://ijrcenter.org/wp-content/uploads/2018/10/Civil-Society-Access-ACHPR-2018.pdf; INT'L JUST. RES. CTR., CIVIL SOCIETY ACCESS TO INTERNATIONAL OVERSIGHT BODIES: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 33, 43 (2019), https://ijrcenter.org/wp-content/uploads/2019/05/Civil-Society-Access-IACHR-2019.pdf.

[30] This article does not include the Association of Southeast Asian Nations Intergovernmental Human Rights Commission or Arab Human Rights Committee, which do not generally receive confidential information from advocates. Also excluded are the various, smaller regional human rights mechanisms, such as the European Commission against Racism and Intolerance and the Working Group on the Protocol of San Salvador, as well as mechanisms whose mandate is limited to systemic abuses or general discussion or review of States' human rights practices, such as the Human Rights Council or Commission on the Status of Women. However, a closer look at their information management practices is also called for.

[31] *See generally African Human Rights System*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/african/ (last visited Sept. 4, 2022); *European Human Rights Bodies*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/europe/ (last visited Sept. 4, 2022); *Inter-American Human Rights System*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/inter-american-system/ (last visited Sept. 4, 2022).

The relevant United Nations human rights mechanisms include the ten treaty bodies[32] established to oversee States' implementation of a specific United Nations human rights agreement, and the fifty-eight Special Procedures composed of one or more experts authorized by the United Nations Human Rights Council to monitor human rights according to specific themes or in particular countries.[33] Physically and online, the United Nations Office of the High Commissioner for Human Rights (OHCHR) serves as the home and secretariat for treaty bodies and Special Procedures.[34] As such, the OHCHR is the point of contact for advocates engaging with United Nations human rights mechanisms.

These regional and United Nations mechanisms define States' human rights obligations and hold them to account through processes that are intended to be public and transparent. Their methods of oversight include deciding complaints, undertaking country visits, or regularly reviewing States' implementation of their treaty commitments. These bodies also depend at least as much on civil society input as on State participation, in order to understand and react to human rights conditions across a region or around the world.[35] As such, their information management policies are of particular importance.

B. Sending Up a Flare

Regional and United Nations human rights mechanisms appear to be recognizing some information management gaps and initiating reforms, though incrementally. The ACHPR, for example, has recently adopted a communications strategy (although it is not available online).[36] The IACHR is in the process of

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[32] These are the Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee Against Torture; Committee on Enforced Disappearances; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination against Women; Committee on the Rights of Persons with Disabilities; and the Committee on the Rights of the Child; Committee on Migrant Workers; and Subcommittee on the Prevention of Torture. *See UN Human Rights Treaty Bodies*, INT'L JUST. RES. CTR., https://ijrcenter.org/un-treaty-bodies/ (last visited Sept. 4, 2022).

[33] *See Special Procedures of the Human Rights Council*, Off. High Comm'r Hum. Rts, https://www.ohchr.org/en/special-procedures-human-rights-council (last visited Sept. 4, 2022) (indicating there are fifty-eight special procedures as of October 2021).

[34] *See* G.A., Res. 48/141, High Commissioner for the Promotion and Protection of All Human Rights (Dec. 20, 1993), https://undocs.org/A/RES/48/141.

[35] *See generally* Off. High Comm'r Hum. Rts., *Procedures and Practices in Respect of Civil Society Engagement with International and Regional Organizations: Report of the United Nations High Commissioner for Human Rights*, ¶ 56, U.N. Doc. A/HRC/38/18 (Apr. 2018), https://undocs.org/a/hrc/38/18 (describing "[t]he effective functioning of international and regional organizations," including their human rights mechanisms, as "inexorably linked to civil society participation"). (The International Justice Resource Center, of which the author is executive director, contributed to the preparation of this report.)

[36] *See* Afr. Comm'n Hum. & Peoples' Rts., *Final Communique of the 65th Ordinary Session of the African Commission on Human and Peoples' Rights* ¶ 35 (2019),

developing a policy on public access to its information, more than a decade after resolving to do so.[37] The United Nations Secretary-General has adopted principles to shape its eventual data protection policy[38] and the African Union (AU) is developing new standards on data protection, cybersecurity, and access to information that would apply to all its organs.[39]

In addition to being slow to take shape, these envisioned developments have progressed incrementally. For example, an AfCHPR representative suggested that a privacy policy would only be necessary if its new website allowed public comments—a suggestion that does not take into consideration the ways in which the AfCHPR already collects information of individuals online, such as through its newsletter subscription form.[40] Separately, the IACHR's new "User Support" section is meant to "[g]uide users in the use of the most suitable means of submission or tools according to their requirements,"[41] but merely directs visitors to use the general IACHR email address for questions.[42] Consider the millions and millions of people entitled to turn to each of these bodies for protection and redress, and the lack of clarity and security around the exchange of information seems woefully inadequate. An appropriate starting point for mapping the necessary reforms may be to identify the legal standards human rights mechanisms must, or should, satisfy in their information management.

III. GOOD GUYS AND THE GOLDEN RULE: DO ACCOUNTABILITY MECHANISMS HAVE HUMAN RIGHTS OBLIGATIONS?

Must human rights mechanisms adhere to external norms? Are they obligated, for example, to respect individuals' rights to information and to

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https://www.achpr.org/public/Document/file/English/Final%20Communique%2065%20OS.ENG.pdf.

[37] Inter-Am. Comm'n H.R., *Strategic Plan: 2017-2021* 52 (2017), http://www.oas.org/en/iachr/mandate/StrategicPlan2017/docs/StrategicPlan2017-2021.pdf; Inter-Am. Comm'n H.R. Res. 2/09, Documents and Historical Archives of the Inter-American Commission on Human Rights (Nov. 13, 2009), https://www.oas.org/en/iachr/docs/Resolutions/Resolucion.02.09.ENG.pdf.

[38] *See* U.N., *Personal Data Protection and Privacy Principles* (Oct. 11, 2018), https://archives.un.org/sites/archives.un.org/files/_un-principles-on-personal-data-protection-privacy-hlcm-2018.pdf.

[39] Email from IT specialist with the AfCHPR, Dec. 12, 2020 (on file with author).

[40] On the AfCHPR's website, the Newsletter page invites visitors to sign up to receive certain announcements via email. *See Newsletter*, AFR. CT. HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/ (last visited Sept. 4, 2022).

[41] *User Support Section, Areas of Action*, INTER-AM. COMM'N H.R., http://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/usersupport/areasaccion.asp (last visited Sept. 4, 2022).

[42] *User Support Section, Contact Us*, INTER-AM. COMM'N HUM. RTS., http://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/usersupport/contact.asp (last visited Sept. 4, 2022).

privacy? If so, to what extent and under what body of law? These questions are not only significant as a matter of legal principle but also for aligning mechanisms' information management policies with the appropriate standards.

Answers to these questions are still speculative. Intergovernmental organizations (IGOs) undoubtedly have legal personality,[43] making them capable of assuming rights and obligations, in addition to responsibility for the acts of their agents.[44] However, despite their self-described autonomy,[45] it seems clear that most, perhaps all, human rights mechanisms themselves lack independent legal personhood; they are merely organs of the "parent" IGO.[46] While human rights courts enjoy greater autonomy than non-judicial mechanisms, their founding instruments typically do not specify that they have independent legal

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[43] *See, e.g.*, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ REP. 174 (Apr. 11, 1949); Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 ICJ REP. 73, 89–90 ¶ 37 (Dec. 20, 1980); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ REP. 66, 78, ¶ 25 (July 8, 1996); Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, arts. 1, 57 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[44] *See* Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organizations*, in G.A. Res. 66/100, Responsibility of International Organizations, U.N. Doc. A/RES/66/100, annex (Dec. 9, 2011), https://undocs.org/en/A/RES/66/100; s*ee also* Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organizations, with Commentaries* (2011), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

[45] *Compare, e.g.*, Organization of American States, American Convention on Human Rights art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 *with* Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, art. 1 (2013), http://www.oas.org/en/iachr/mandate/Basics/rulesiachr2013.pdf *and* Inter-Am. Comm'n H.R., Statute of the Inter-Am. Ct. H.R., art. 1 (1979), https://www.oas.org/36ag/english/doc_referencia/Estatuto_CIDH.pdf. *See* OAS, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act (1960), Res. VIII, Human Rights, Part II, https://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf.

[46] *See* Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organizations, with Commentaries*, *supra* note 44, art. 2, p. 52, note 82 (identifying the Charter of the OAS as an example of a constitutive document that lists the IGO's organs, among them the IACHR); s*ee also* American Convention on Human Rights, *supra* note 45, art. 33; Organization of African Unity, African Charter on Human and Peoples' Rights art. 30, Jun. 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 1, Jun. 10, 1998; African Charter on the Rights and Welfare of the Child art. 32, July 11, 1990, CAB/LEG/24.9/49 (1990); Eur. Ct. H.R., *The European Convention on Human Rights: A Living Instrument* 5 (2020), https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf (describing the Court as the "judicial organ of the Council of Europe." Note, however, that the Court's relationship to the COE is not explicitly spelled out in the Convention or the Rules of Court.); Council of Europe Committee of Ministers, Res. (99) 50 on the Council of Europe Commissioner for Human Rights of 7 May 1999, Commissioner for Human Rights, art. 12(1), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e305a (establishing the Office of the Commissioner for Human Rights "within" the General Secretariat of the COE). *Cf.* UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY (Helen Keller & Geir Ulfstein eds., 2012); Geneva Academy, *The Secretariat Support to the United Nations Treaty Bodies: What is the High Commissioner for Human Rights' Mandate?: A role in Need of Clarification* 3 (June 2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20Secretariat%20Support%20to%20UN%20TBs.pdf.

personality.[47] The precise contours of human rights mechanisms' obligations, and the extent of their capacity to engage the legal liability of the "parent" IGO, would be a worthy focus of future scholarship. In the meantime, this discussion is focused on the IGOs themselves, which bear responsibility for their organs' actions and are also highly involved in human rights information management. After all, it is the IGOs that often provide the online platforms, communications infrastructure, administrative policies, and budgets that human rights mechanisms employ.

Despite their legal personhood, IGOs have thus far managed to avoid any obligation to ensure access to information or protect individuals' privacy. They, and their representatives, are often immune from liability under domestic law.[48] IGOs have argued that domestic or regional legal requirements do not apply to them.[49] At the international level, IGOs do not have any relevant treaty obligations of their own[50] and have so far opted only to recommend—rather than require—

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[47] In contrast, for example, the International Criminal Court was explicitly granted independent legal personality. *See* Rome Statute of the International Criminal Court art. 4(1).

[48] IGOs' founding documents and other agreements grant them, and their experts, privileges and immunities. *See, e.g.*, Charter of the United Nations; Convention on the Privileges and Immunities of the United Nations arts. II-VI, (General Agreement) (Feb. 13, 1946), https://www.un.org/en/ethics/assets/pdfs/Convention%20of%20Privileges-Immunities%20of%20the%20UN.pdf; Charter of the OAS, arts. 133-136, https://www.cidh.oas.org/basicos/english/Basic22a.Charter%20OAS.htm; General Convention on the Privileges and Immunities of the Organization of African Unity, https://au.int/sites/default/files/treaties/7760-treaty-0001_-_general_convention_on_the_privileges_and_immunities_of_the_oau_e.pdf; Statute of the Council of Europe art. 40, https://rm.coe.int/1680306052; General Agreement on Privileges and Immunities of the COE, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063729; *see also* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Reports 62 (Apr. 29), https://www.icj-cij.org/public/files/case-related/100/100-19990429-ADV-01-00-EN.pdf (concluding that a U.N. Special Rapporteur was entitled to the privileges and immunities of a U.N. expert on mission, including immunity from legal process, when acting in his official capacity).

[49] *See, e.g.*, U.N., *Comments of the United Nations Secretariat on behalf of the United Nations System Organizations on the "Guidelines 2/2020 on articles 46(2)(a) and 46(3) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies" adopted by the European Data Protection Board on 18 January 2020* ¶ 16 (May 14, 2020), https://edpb.europa.eu/sites/edpb/files/webform/public_consultation_reply/2020.05.14_letter_to_edpb_chair_with_un_comments_on_guidelines_2-2020.pdf; Vince Chadwick, *UNICEF data leak reveals personal info of 8,000 online learners*, DEVEX, Sept. 9, 2019 (quoting UNICEF official saying, "U.N. entities are not subject to GDPR."); *see also* U.N., *Personal Data Protection and Privacy Principles*, *supra* note 38. *See also* Broadbent v. Organization of Am. States, 628 F.2d 27 (D.C. Cir. 1980) (in which the Organization of American States, as respondent, argued it was immune from service of process and the United Nations, as amicus curiae, argued that domestic courts lack jurisdiction over disputes relating to IGOs' employment contracts.) *See also* Brief for the United Nations as *Amicus Curiae*, 1980 U.N. Jurid. Y.B. 227, https://legal.un.org/unjuridicalyearbook/pdfs/english/by_volume/1980/chpVIII.pdf.

[50] *Cf., e.g.*, *Multilateral Treaties Deposited with the Secretary General, Participant Search*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/TreatyParticipantSearch.aspx?clang=_en (last visited Sept. 4, 2022) (indicating that the United Nations is party only to the Vienna Convention on the Law of Treaties between States and International Organizations or between International

their own compliance with a limited number of international standards relevant to information management.[51]

Despite this resistance, there is appreciable consensus that IGOs *are* bound by at least some international norms.[52] Legal scholars have proposed that IGOs have human rights obligations, in particular, by virtue of: 1) their charters or other foundational texts, to the extent that they reference the promotion or protection of human rights; 2) their status as subjects of international law, bound by the norms that bind all such subjects; or, 3) the obligations of their Member States.[53] The first theory posits that IGOs are obligated to respect (not violate) human rights because their founding documents give them duties related to the advancement of human rights. Pursuant to this theory, for example, the United Nations Charter's requirement that the U.N. "promote" human rights must be viewed as an evolving obligation, in light of the Charter's purpose and with the understanding that States would not have intended to authorize rights violations by the United Nations itself.[54] The second theory proposes that IGOs, as subjects of international law, are bound by customary or shared norms, no matter their specific treaty obligations.[55] This view enjoys greatest support among scholars.[56] Notably, it is the position featured in the U.N. Audiovisual Library of

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Organizations); *Chart of signatures and ratifications of Treaty 205, COE Convention on Access to Official Documents*, COUNCIL OF EUROPE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=DgWsCboQ (listing no IGO parties as of Sept. 4, 2022).

[51] *See* G.A. Res. 45/95, Guidelines for the regulation of computerized personal data files, U.N. Doc. A/RES/45/95 (Dec. 14, 1990), https://undocs.org/A/RES/45/95 (adopting the guidelines and "request[ing] governmental, intergovernmental and non-governmental organizations to respect" them); U.N. Comm'n Hum. Rts., *Revised version of the guidelines for the regulation of computerized personal data files prepared by Mr. Louis Joinet, Special Rapporteur*, U.N. Doc. E/CN.4/1990/72, Part II.B: Application of the guidelines to personal data files kept by governmental international organizations (Feb. 20, 1990), https://undocs.org/E/CN.4/1990/72.

[52] *See generally* CARLA FERSTMAN, INTERNATIONAL ORGANIZATIONS AND THE FIGHT FOR ACCOUNTABILITY: THE REMEDIES AND REPARATIONS GAP (2017).

[53] *See* Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 Harvard Int'l L. J. 2 (2016), 325; Andrew Clapham, *Non-State Actors*, in INTERNATIONAL HUMAN RIGHTS LAW (2016); Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L LAW 3, 446-501 (2009); Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities,* HUM. RTS Q., Vol. 25, No. 2, at 317-18 (May 2003).

[54] Mégret & Hoffmann, *supra* note 53, at 317-18. *See also* Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organizations, with Commentaries*, *supra* note 44, at 63 ("the international obligation 'may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order'").

[55] *See* Mégret & Hoffmann, *supra* note 53.

[56] *See, e.g.*, Noëlle Quénivet, *Binding the United Nations to Customary (Human Rights) Law*, 17 INT'L ORGS. L. REV. 2 (2020), https://uwe-repository.worktribe.com/output/852692/binding-the-united-nations-to-customary-human-rights-law; Daugirdas, *supra* note 53.

International Law in a lecture by Kristina Daugirdas.[57] Finally, the third theory argues that IGOs are "bound 'transitively' by international human rights standards as a result and to the extent that [their] members are bound" because States should not be able to avoid their own obligations by creating an intergovernmental organization that can violate them.[58]

Depending on which of these three theories hold, an IGO's human rights obligations are those 1) recognized in the human rights treaties adopted under its auspices and entered into by its Member States, or 2) that form part of "general international law." General international law includes customary international law (principles established by the consistent practice of States acting out of a sense of legal obligation),[59] *jus cogens* norms (peremptory norms from which no derogation is allowed, such as the prohibition on torture),[60] and general principles of law (a fuzzy concept referring to principles generally recognized in national legal systems).[61] For purposes of this Article the most relevant bodies of law are international human rights treaties and customary international norms relating to information management, to the extent that they exist.

To identify the substance of these norms, and how current practices align with them, let us begin with the initial digital contact between an advocate and a human rights mechanism. What are the vulnerabilities in existing communication channels? Can international standards help us understand what human rights mechanisms can be doing to mitigate them?

IV. SNIFFING, SPOOFING, AND OTHER RISKS TO DIGITAL COMMUNICATIONS

Information passed between advocates and human rights mechanisms may be exposed or exploited when it is intercepted in transit, which leads to risks for advocates. Governments and private actors have used various methods to monitor or interfere with advocates' digital communications. These methods include packet sniffers, through which others can view and capture data sent over

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[57] *International Organizations: How and Why International Law Binds International Organizations*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, https://legal.un.org/avl/ls/Daugirdas_IO.html (last visited Sept. 4, 2022).
[58] *See* Mégret & Hoffmann, *supra* note 53, at 318.
[59] *See, e.g.*, *Customary International Law*, ENCYCLOPEDIA OF HUMAN RIGHTS (David P. Forsythe ed., 2009); s*ee also* Int'l Law Comm'n, *Draft Conclusions on Identification of Customary International Law with commentaries* (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.
[60] *See, e.g.*, *Jus Cogens*, ENCYCLOPEDIA OF HUMAN RIGHTS (David P. Forsythe ed., 2009).
[61] *See* Int'l Law Comm'n, *First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, U.N. Doc. A/CN.4/732 (Apr. 5, 2019), https://undocs.org/en/A/CN.4/732; *see also* GIORGIO GAJA, *General Principles of Law*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Apr. 2020).

a particular computer or wireless network.[62] Another technique utilizes spoofing, which allows a third party to mimic an email or website in an attempt to collect information from targets.[63] Malware installed on cloned apps on mobile devices can give third parties access to an individual's contacts, camera, or communications.[64] Governmental mass surveillance programs have used fiber-optic splitters to copy digital data as well.[65] In the absence of strong encryption and other security measures, advocates' purportedly confidential communications may be compromised.

Human rights mechanisms have signaled their awareness of these vulnerabilities and their consequences. For example, in 2015, Michel Forst, then-UN Special Rapporteur on the situation of human rights defenders, wrote: "Fear of reprisals perpetrated by non-State or governmental actors deters some defenders from cooperating with the United Nations and regional mechanisms [in view of] surveillance exercised over them."[66] Such surveillance, the OHCHR noted a year earlier, "has been shown to lead to arbitrary detention, sometimes to torture and possibly to extrajudicial killings."[67]

A. Relevant International Standards and Recommendations

International standards provide a relevant and useful measure of advocates' rights (vis-a-vis States) and expectations with regard to online security and confidentiality. These norms are particularly important in light of ongoing efforts by States to prohibit or limit some encryption tools.[68] While human rights mechanisms have not offered comprehensive guidance regarding the existence, or scope, of positive obligations related to online encryption and anonymity, they

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[62] *See, e.g.*, Andy O'Donnell, *What Are Packet Sniffers and How Do They Work?*, LIFEWIRE, https://www.lifewire.com/what-is-a-packet-sniffer-2487312 (June 25, 2021); Chet Hosmer, *Python Forensics: A Workbench for Inventing and Sharing Digital Forensic Technology* 238 (2014), https://doi.org/10.1016/B978-0-12-418676-7.09991-6.

[63] *See, e.g.*, *The Motherboard e-Glossary of Cyber Terms and Hacking Lingo*, VICE, July 26, 2016, https://www.vice.com/en/article/mg79v4/hacking-glossary.

[64] *See, e.g.*, ACCESS NOW, HOW JOURNALISTS AND HUMAN RIGHTS DEFENDERS ARE TARGETED ONLINE: A DETAILED REPORT ON THE MIDDLE EAST AND NORTH AFRICA (2019), https://www.accessnow.org/cms/assets/uploads/2019/06/MENA-report.pdf.

[65] *See, e.g.*, *NSA Spying, How It Works*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/nsa-spying/how-it-works (last visited Sept. 4, 2022).

[66] Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Situation of Human Rights Defenders: Report of the Special Rapporteur on the situation of human rights defenders* ¶ 89, U.N. Doc. A/70/217 (July 30, 2015), https://undocs.org/A/70/217.

[67] Off. High Comm'r Hum. Rts., *The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/27/37 (Jun. 30, 2014), https://undocs.org/A/HRC/27/37.

[68] *See, e.g.*, Press Release, U.S. Dep't of Justice, *International Statement: End-to-End Encryption and Public Safety* (Oct. 11, 2020), https://www.justice.gov/opa/pr/international-statement-end-end-encryption-and-public-safety.

have identified some minimum requirements.[69] These nascent norms are rooted in the rights to freedom of expression and privacy, as well as in soft law standards concerning protection of human rights advocates and their work. Communication between advocates and human rights mechanisms is an area of focus in this growing body of guidance.

1. The Right to Communicate Freely, Anonymously and Privately

Numerous human rights instruments protect the rights to freedom of expression and privacy.[70] The right to freedom of expression includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" through any medium.[71] Similarly, the right to privacy protects individuals from interference with their privacy and correspondence.[72] Both rights apply online and offline.[73] States may interfere with individuals' enjoyment of these rights only insofar as any restriction is provided by law, serves a legitimate interest such as public health, and is necessary to further that interest.[74]

With regard to digital communications, human rights experts have urged States not to limit anonymous and confidential speech by restricting technologies such as end-to-end encryption. In the words of former Inter-American Special

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[69] *But see* Danaja Fabčič Povše, *Protecting Human Rights Through a Global Encryption Provision*, *in* SECURITY AND LAW (2019), https://fentec.eu/sites/default/files/fentec/public/content-files/article/202001-%20Protecting%20Human%20Rights%20through%20a%20Global%20Encryption%20Provision.pdf (analyzing whether international law recognizes a State obligation to mandate encryption in order to protect data security and privacy).

[70] For example, as of September 4, 2022, 173 of 193 United Nations Member States have ratified the International Covenant on Civil and Political Rights (ICCPR). *See* U.N. Treaty Collection, Chapter IV: Human Rights, 4. International Covenant on Civil and Political Rights, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Sept. 4, 2022). Some of the States that are not party to the ICCPR have ratified other instruments that recognize these rights. For example, Comoros and South Sudan have ratified the African Charter on Human and Peoples' Rights. *See* Afr. Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights* (June 15, 2017), https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf.

[71] *See, e.g.*, International Covenant on Civil and Political Rights art. 19(2), December 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[72] *See, e.g.*, *id*. at art. 17.

[73] *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 34, Article 19: Freedoms of opinion and expression ¶ 12, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), https://undocs.org/CCPR/C/GC/34; Off. High Comm'r Hum. Rts., *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/39/29, ¶ 11 (Aug. 3, 2018), https://undocs.org/A/HRC/39/29.

[74] *See, e.g.*, ICCPR, *supra* note 71, at art. 19(3). *See also* U.N. Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Freedom of Expression and Responses to Conflict Situations* (2015), ¶ 2(c), https://www.oas.org/en/iachr/expression/showarticle.asp?artID=987&lID=1.

Rapporteur for Freedom of Expression Catalina Botero, "[t]he protection of the right to private life involves at least two specific policies related to the exercise of the right to freedom of thought and expression: the protection of anonymous speech and the protection of personal data."[75] In this regard, the Declaration of Principles on Freedom of Expression and Access to Information in Africa asserts that everyone has the right "to secure the confidentiality of their communications and personal information from access by third parties through the aid of digital technologies."[76] The IACHR has described end-to-end encrypted messaging systems as "essential to protect privacy—and consequently, freedom—of citizens' communications." Therefore, they must not be inappropriately limited by States.[77]

According to human rights mechanisms, States must do more than "[r]efrain from arbitrary or unlawful restrictions on the use of encryption and anonymity technologies." They must also actively protect and promote the use of these technologies, including as part of the State obligation to "create enabling environments for freedom of expression."[78] For example, the Declaration of Principles on Freedom of Expression and Access to Information in Africa directs States not to "condone acts of indiscriminate or untargeted collection . . . of a person's communications" by third parties.[79] Regional human rights experts, in particular, have identified a *positive* obligation "to take appropriate steps to protect digital communications systems against cyber-attacks and to bolster digital safety and security for those who are at risk of such attacks for exercising their right to freedom of expression."[80] This entails "enabling the anonymous use of digital technologies."[81] The COE, for example, has urged its Member States to

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[75] Inter-Am. Comm'n H.R., *Freedom of Expression and the Internet* ¶ 133 (2013), http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20_WEB.pdf.
[76] Afr. Comm'n Hum. & Peoples' Rts., *Declaration of Principles on Freedom of Expression and Access to Information in Africa* (2019), Principles 40(2), 41(1), https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf.
[77] Inter-Am. Comm'n H.R. & OAS, *Guide to Guarantee Freedom of Expression Regarding Deliberate Disinformation in Electoral Contexts* 25 (2019), https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf. *See also* U.N. Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Freedom of Expression and Responses to Conflict Situations*, *supra* note 74, at ¶ 8(e).
[78] *See, e.g.*, Inter-Am. Comm'n H.R., *Twentieth Anniversary of the Joint Declaration: Challenges to Freedom of Expression in the Next Decade* (2019), https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1146&lID=1.
[79] Afr. Comm'n Hum. & Peoples' Rts., *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, *supra* note 76, Principles 40(2), 41(1).
[80] U.N. Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Media Independence and Diversity in the Digital Age* (2018), Principle 5(d), https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1100&lID=1.
[81] *Id*., Principle 1(a)(iii), https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1100&lID=1.

"ensure that search engine providers apply the most appropriate security measures to protect personal data against unlawful access . . . includ[ing] 'end-to-end' encryption of the communication between the user and the search engine provider."[82] Former Special Rapporteur David Kaye likewise recommended that States "adopt laws and policies that provide comprehensive protection for and support the use of encryption [and anonymity] tools."[83]

In summary, human rights mechanisms have encouraged States to protect and not unduly restrict encryption, and in some instances, to ensure its use by third parties. However, they have not yet identified State obligations to either guarantee the general availability of encrypted communication channels or to make such channels available to individuals in their correspondence with governmental entities.

2. Specific Rights of Human Rights Advocates

In contrast, various soft law instruments, governments, and human rights mechanisms have declared that human rights advocates are entitled to communicate securely and confidentially with international human rights mechanisms.[84] The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms ("Declaration on Human Rights Defenders") states that "everyone has the right, individually and in association with others, to unhindered access to and communication with international human rights bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms."[85] The

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[82] Council of Europe Comm. of Ministers, Appendix to Recommendation CM/Rec(2012)3 of the Committee of Ministers to Member States on the protection of human rights with regard to search engines *(Adopted by the Committee of Ministers on 4 April 2012 at the 1139th meeting of the Ministers' Deputies)*, ¶ 10, https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Rec(2012)3.

[83] Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Encryption and Anonymity follow-up report* (Jun. 2018), ¶ 47, https://www.ohchr.org/Documents/Issues/Opinion/EncryptionAnonymityFollowUpReport.pdf.

[84] *See, e.g.*, G.A., Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. Doc. A/RES/53/144 (Mar. 8, 1999), https://undocs.org/A/RES/53/144 [hereinafter "Declaration on Human Rights Defenders"]. *See generally* Inter-Am. Comm'n H.R., *Integral Protection Policies for Human Rights Defenders* (2017), http://www.oas.org/en/iachr/reports/pdfs/Defensores-eng-2017.pdf.

[85] Declaration on Human Rights Defenders, *supra* note 84, at art. 9(4). While the Declaration does not use the term "human rights defenders" and instead applies to "everyone," its adoption was motivated in part by repression of human rights defenders and States and human rights mechanisms have used it to define protections for this group. *See* Petter Wille and Janika Spannagel, *The History of the UN Declaration on Human Rights Defenders: Its Genesis, Drafting and Adoption*, UNIVERSAL RIGHTS GROUP (Mar. 11, 2019), https://www.universal-rights.org/blog/the-un-declaration-on-

ACHPR's Guidelines on Freedom of Association and Assembly in Africa state: "Associations shall be able to comment publicly and privately on reports submitted by States to national human rights institutions and regional and international human rights bodies, including prior to the submission of the reports in question."[86] Relatedly, the guidelines require "States [to] protect associations, including their principal and most visible members, from threats, harassment, interference, intimidation or reprisals by third parties and non-State actors."[87]

Various entities of the United Nations have recommended that intergovernmental organizations and organs themselves take steps to protect advocates' online security, in order to ensure their ability to seek international justice or protection. In 2015, former U.N. Special Rapporteur on freedom of opinion and expression David Kaye "urgently call[ed] upon entities of the United Nations system, especially those involved in human rights and humanitarian protection, to support the use of communication security tools in order to ensure that those who interact with them may do so securely."[88] Michel Forst expanded that call, urging regional intergovernmental organizations to address advocates' "digital security" and "facilitate the internalization of security awareness individually and collectively."[89] The Office of the High Commissioner for Human Rights (OHCHR) urged regional and universal intergovernmental organizations to "ensur[e] secure information channels" and to "[e]nsure the safety and security

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[86] Afr. Comm'n Hum. & Peoples' Rts., *Guidelines on Freedom of Association and Assembly in Africa* ¶ 27 (2017), https://www.achpr.org/public/Document/file/English/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf (emphasis added).

[87] *See id*., ¶ 30. *See also* Afr. Comm'n Hum. & Peoples' Rts.*, supra* note 76, Principle 20(2) (indicating that the Declaration applies to human rights defenders); U.N. Special Rapporteur on Freedom of Opinion and Expression et al., *Joint Declaration on Protecting and Supporting Civil Society At-Risk* (2021), https://www.osce.org/representative-on-freedom-of-media/501697 (calling on international and regional bodies to facilitate access to human rights complaint mechanisms and ensure civil society's full participation with human rights bodies). (Note, the OHCHR, IACHR, and ACHPR all announced this joint declaration by sharing the link on the OHCHR website: https://www.ohchr.org/Documents/Issues/FAssociation/newpage_jointdeclaration_9dec2021_en.pdf. *See, e.g.*, Press Release, Inter-Am. Comm'n H.R., Human Rights Experts Urge States to Protect at-Risk Civil Society Actors (Dec. 10, 2021), https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1221&lID=1. When the OHCHR redesigned its website in March 2022, this link ceased to work.)

[88] David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*), Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, U.N. Doc. A/HRC/29/32 (May 22, 2015), https://www.undocs.org/A/HRC/29/32. *See also* David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*), Encryption and Anonymity Follow-up Report*, U.N. Doc. A/HRC/38/35/Add.5 (July 13, 2018), https://undocs.org/A/HRC/38/35/Add.5.

[89] Michel Forst (Special Rapporteur on the Situation of Human Rights Defenders), *Report of the Special Rapporteur on the situation of human rights defenders* ¶ 115(b), U.N. Doc. A/HRC/31/55 (Feb. 1, 2016), https://undocs.org/A/HRC/31/55.

of persons seeking to engage with [them], including online" in a 2018 report.[90] Separately, the United Nations Educational, Scientific and Cultural Organization recommends that all stakeholders, including international organizations, "[u]se and promote the use of open-source encryption technologies such as HTTPS Everywhere,[91] so as to facilitate more secure channels" of communication.[92]

With respect to their own role, some human rights mechanisms have explicitly recommended internal measures to help protect advocates' right to communicate confidentially with them. For example, the United Nations human rights treaty bodies have emphasized "[t]he need to respect the 'do-no-harm' principle, participation, confidentiality, safety, security, and free and informed consent" in their own efforts to protect individuals from reprisals for engaging with the treaty bodies.[93] Accordingly, the treaty bodies suggested preventive measures that "could include permitting requests from individuals or groups to provide information . . . in a confidential manner."[94] Together, these non-binding regional and United Nations statements support the argument that advocates have a right to use secure and confidential channels of communication when contacting human rights mechanisms and that States or international bodies themselves have a corresponding obligation to provide—or ensure the availability of—those channels.

Have human rights mechanisms heeded these calls to establish and protect secure communication channels for advocates? The following subsections review human rights mechanisms' various digital communication channels, and assess the vulnerabilities of each.

B. Methods and Vulnerabilities of Communication

In many of their interactions with human rights mechanisms, advocates expect that the existence and content of their communications will remain confidential. Specifically, advocates may reasonably have an expectation of confidentiality with regard to: 1) bilateral communication or meetings with a

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[90] Off. High Comm'r Hum. Rts., *Procedures and Practices in Respect of Civil Society Engagement with International and Regional Organizations: Report of the United Nations High Commissioner for Human Rights*, *supra* note 35, at ¶¶ 61(e)-(f).

[91] HTTPS Everywhere is a browser extension created by the Electronic Frontier Foundation and The Tor Project to encrypt users' communications via HTTPS. *See* HTTPS Everywhere, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/https-everywhere.

[92] UNESCO, *Building Digital Safety for Journalism: A Survey of Selected Issues* (2015), 52, https://unesdoc.unesco.org/ark:/48223/pf0000232358.

[93] Chairs of the Human Rights Treaty Bodies, *Guidelines against Intimidation or Reprisals ("San José Guidelines")*, U.N. Doc. HRI/MC/2015/6, ¶ 5(e) (July 30, 2015), https://undocs.org/HRI/MC/2015/6.

[94] *See id*. at ¶ 18.

human rights body's members or staff; 2) submissions and correspondence related to a complaint or request for interim measures that has not yet been communicated to the State (which may not happen for years, if ever);[95] 3) submission of background or general information not explicitly intended, or requested, for dissemination; and 4) arrangements related to attending or participating in a hearing, session, or country visit.[96] Additionally, even in complaint filings that will be disclosed or referred to in published decisions, advocates may request anonymity for themselves vis-a-vis the State and public or request anonymity for the victim vis-a-vis the public.[97]

However, each human rights body uses a unique combination of tools to receive communications from advocates—including websites, email, call and messaging apps, and video conferencing software—and each type of tool has its own weaknesses. Some are more susceptible to interception and may not satisfy advocates' privacy expectations.

1. Websites

All of the regional human rights mechanisms and the OHCHR have websites through which they primarily share information with the public. Some of these are hosted on the "parent" IGO domain and others are not.[98] While the security of most of these websites has improved in recent years, some vulnerabilities remain.

Beginning in 2017, human rights mechanisms implemented hypertext transfer protocol (HTTPS) on their websites.[99] The AfCHPR and IACHR were

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[95] The IACHR, for example, typically rejects more than 75 percent of petitions before they are communicated to the State. In 2019, it decided to open only 733 petitions while declining to open 2,460. *See Statistics by Year*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/multimedia/statistics/statistics.html (last visited Sept. 4, 2022).

[96] *See* discussion, *infra* Part **Error! Reference source not found.** for an explanation of human rights bodies' practices and policies regarding protection of individuals' personal information.

[97] *See, e.g.*, Afr. Ct. Hum. & Peoples' Rts., Rules of Court, Rule 41(5)-(8) (2020), https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf; Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure of the African Commission on Human and Peoples' Rights, Rule 115(2)(b) (2020), https://www.achpr.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf ; Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 45, art. 28(2); Eur. Ct. H.R., Rules of Court, Rule 47(4) (2022), https://www.echr.coe.int/documents/rules_court_eng.pdf.

[98] *See* INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/default.asp; EUR. CT. H.R., https://echr.coe.int/Pages/home.aspx?p=home; EUR. COMM. SOCIAL RTS., https://www.coe.int/en/web/european-social-charter/home; COE COMM'R HUM. RTS., https://www.coe.int/en/web/commissioner.

[99] Many mechanisms implemented Secure Sockets Layer (SSL), technology that secure the connection between a website and a user through encryption, between mid 2017 and mid 2019. The OHCHR implemented SSL in June 2018. *See Office of the High Commissioner for Human Rights*, INTERNET ARCHIVE, https://web.archive.org/web/20180101000000*/https://www.ohchr.org/ (Jan. 1, 2018). The COE implemented SSL in approximately September 2017. *Compare Council of Europe*,

the last mechanisms to implement HTTPS in December 2020 and April 2021, respectively.[100] HTTPS provides users some protection from attacks and surveillance by encrypting each website's connection. HTTPS also conceals the content of communications or information shared via a website, but does not prevent the monitoring or collection of data concerning an individual's internet history or location.[101] In the words of Amnesty International, "[w]hen websites use HTTPS, it ensures that, even if data is intercepted by an unauthorised party while transiting the internet, it is more secure against being read than if you were using an unencrypted connection (over plain HTTP)."[102] However, even secure websites have vulnerabilities. For example, in March 2021, the ACHPR website was hit with a malware attack that filled most of the webpage on the State Parties to the African Charter with explicit text.[103]

A separate concern is the proliferation of external or personal websites, which often do not use HTTPS. United Nations Special Procedure mandate

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INTERNET ARCHIVE, https://web.archive.org/web/20170902051840/http://www.coe.int/en/web/portal/home (Sept. 2, 2017) *with Council of Europe*, INTERNET ARCHIVE https://web.archive.org/web/20171019061020/https://www.coe.int/en/web/portal/home (Oct. 19, 2017).
The ACHPR implemented SSL in approximately July 2019. *Compare African Commission on Human and Peoples' Rights,* INTERNET ARCHIVE, https://web.archive.org/web/20190627101338/http://www.achpr.org/ (Jun. 27, 2019) *with African Commission on Human and Peoples' Rights,* INTERNET ARCHIVE, https://web.archive.org/web/20190708194045/https://www.achpr.org/ (July 8, 2019). The ACERWC implemented SSL upon launching its new website, at a new URL, in 2019. *Compare African Committee of Experts on the Rights and Welfare of the Child,* INTERNET ARCHIVE, https://web.archive.org/web/*/http://acerwc.org/ *with African Committee of Experts on the Rights and Welfare of the Child*, INTERNET ARCHIVE, https://web.archive.org/web/*/https://acerwc.africa. *See also* ACERWC, Facebook post on January 28, 2019, https://www.facebook.com/acerwc/posts/1192561330918912.

[100] As of October 2020, the websites of the IACHR and AfCHPR were not HTTPS. *See Inter-American Commission on Human Rights*, INTERNET ARCHIVE, https://web.archive.org/web/20201021101312/www.oas.org/en/iachr/ (Oct. 21, 2020); *African Court on Human and Peoples' Rights*, INTERNET ARCHIVE, https://web.archive.org/web/20201020130015/http://www.african-court.org/en/ (Oct. 20, 2020). The AfCHPR implemented https with its new website and URL in December 2020. *See* AFR. CT. H.P.R., https://www.african-court.org/wpafc/. The IACHR implemented HTTPS in April 2021, but some pages remain HTTP.

[101] *See generally HTTPS*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/pages/https (last visited Sept. 4, 2022). *See also* Kaveh Waddell, *Encryption Won't Stop Your Internet Provider from Spying on You*, ATLANTIC, Mar. 29, 2017, https://www.theatlantic.com/technology/archive/2017/03/encryption-wont-stop-your-internet-provider-from-spying-on-you/521208/.

[102] AMNESTY INT'L, ENCRYPTION: A MATTER OF HUMAN RIGHTS 7 (2016), https://www.amnestyusa.org/files/encryption_-_a_matter_of_human_rights_-_pol_40-3682-2016.pdf.

[103] *State Parties to the African Charter*, AFR. COMM'N HUM. & PEOPLES' RTS., https://www.achpr.org/statepartiestotheafricancharter. On March 22, 2021, this webpage included a new section titled "I'm glad I now signed up" that was filled with explicit terms and links. Screenshot on file with author.

holders have indicated that there are logistical barriers and time delays in updating their official OHCHR webpages.[104] As such, many have turned to websites that they can directly control.[105] These websites are not hosted by the OHCHR, are often unsecure (not HTTPS), and would not be subject to any security measures implemented by the OHCHR.[106]

2. Email

All human rights mechanisms, except the European Court of Human Rights, invite email correspondence from the public.[107] Most mechanisms' email accounts use the same domain as the body's website, but some are distinct. For example, the ACHPR lists two institutional email addresses[108] hosted by the AU and Yahoo. In addition, human rights mechanisms' members or mandate holders often use external or personal email addresses in their work-related communications.[109] This appears to be particularly true for mechanisms whose

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[104] Based on private conversations.

[105] *See, e.g.*, EXTREME POVERTY AND HUMAN RIGHTS, https://srpoverty.org/; HUMAN RIGHTS & TOXICS, http://www.srtoxics.org/; FREE ASSEMBLY, http://freeassembly.net/; U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO HOUSING, http://unhousingrapp.org/; U.N. SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT, http://www.srenvironment.org/; UNITED NATIONS SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, https://independence-judges-lawyers.org/; RIGHT TO FOOD, http://www.righttofood.org/; JAMES ANAYA, https://unsr.jamesanaya.org/; ANTI-TORTURE INITIATIVE, http://antitorture.org/; U.N. SPECIAL RAPPORTEUR ON RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, https://antiracismsr.org/.

[106] *See, e.g.*, UNITED NATIONS SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, http://www.protecting-defenders.org/en (Google cautions would-be visitors to the site that their "connection is not private" and "[a]ttackers might be trying to steal your information" from the site.)

[107] *See Contact Information*, EUR. CT. H.R., https://echr.coe.int/Pages/home.aspx?p=contact&c= (last visited Sept. 4, 2022) (noting, "We would draw your attention to the fact that applications to the Court and all documents relating to the application must be sent by post, even if they have been faxed beforehand. Please bear in mind that any documents or questions relating to applications must also be sent to the Court by post."); *Contact the Court*, EUR. CT. H.R., https://app.echr.coe.int/Contact/EchrContactForm/English/22 (last visited Sept. 4, 2022). Note, however, that States and applicants may file subsequent pleadings electronically, at the Court's discretion, after the complaint has been communicated to the State. *See* EUR. CT. H.R, *Practice Directions: Written Pleadings*, https://www.echr.coe.int/Documents/PD_written_pleadings_ENG.pdf.

[108] While the URL africa-union.org is not functional, it is the domain used for AU email addresses, including those of the ACHPR staff. Separately, the AU website is: https://au.int/.

[109] For example, I have corresponded with U.N. Special Procedure mandate holders and elected members of the IACHR and AfCHPR, in matters related to their mandates, using their email addresses provided by Gmail, Yahoo, Hotmail, or their institution of regular employment.

members are elected to part-time positions,[110] which is the case for all except the ECtHR and the COE Commissioner for Human Rights.[111]

Email is notoriously vulnerable to surveillance and has long been a security concern for human rights advocates.[112] In 2005, Frontline Defenders wrote, "[i]t is imperative for human rights workers to use encryption to protect themselves and the people they are trying to help" "[s]ince unencrypted emails can be accessed and read by almost anyone."[113] Some email providers use secure sockets layer (SSL) or transport layer security (TLS) to encrypt emails. TLS protects the contents of an email, particularly if the sender and recipient use this technology.[114] Still, the use of encryption, particularly as a default, is not universal among email providers.[115]

Human rights mechanisms generally use technology that supports SSL/TLS encryption for the duration of the email's journey from sender to receiver, at least for their official email addresses. According to the STARTTLS Everywhere site, the TLS-related security of the email domains of the ACHPR, ECtHR, and other COE mechanisms is "great"[116] but the IACtHR's is "not great."[117] With regard to the IACtHR, the site warns, "This means that when you

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[110] As just one example, former U.N. Special Rapporteur David Kaye invited correspondence to his University of California, Irvine email address while fulfilling his six-year mandate. *See Freedex.org*, INTERNET ARCHIVE (Oct. 3, 2018), https://web.archive.org/web/20181003133040/https://freedex.org/contact-us/.

[111] *See* Council of Europe, European Convention on Human Rights art. 21(3), Nov. 4, 1950, E.T.S. 5; Council of Europe Committee of Ministers, Res. (99) 50 on the COE Commissioner for Human Rights, May 7, 1999, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e305a.

[112] *See, e.g.*, FRONT LINE DEFENDERS, PROTECTION MANUAL FOR HUMAN RIGHTS DEFENDERS 100 (2005), https://www.frontlinedefenders.org/sites/default/files/protection_manual_-_english.pdf; Sydney Li & Jeremy Gillula, *Announcing STARTTLS Everywhere: Securing Hop-to-Hop Email Delivery*, ELECTRONIC FRONTIER FOUNDATION (Jun. 24, 2018), https://www.eff.org/deeplinks/2018/06/announcing-starttls-everywhere-securing-hop-hop-email-delivery; Nate Lord, *What Is Email Encryption? Definition, Best Practices & More*, DIGITAL GUARDIAN (Jan. 3, 2019), https://digitalguardian.com/blog/what-email-encryption.

[113] FRONT LINE DEFENDERS, *supra* note 112, at 100.

[114] *See, e.g., Google Workspace Admin Help, Require Mail to be Transmitted via a Secure (TLS) Connection*, GOOGLE, https://support.google.com/a/answer/2520500?hl=en (last visited Sept. 4, 2022) (explaining, "a secure TLS connection requires that both the sender and recipient must use TLS.").

[115] *See, e.g., Google Transparency Report, Email encryption in transit*, GOOGLE, https://transparencyreport.google.com/safer-email/overview; *Gmail Help, Email encryption in transit*, GOOGLE, https://support.google.com/mail/answer/6330403?hl=en (last visited Sept. 4, 2022) (explaining how to set up encryption in transit); Justinas Mazūra, *How to Encrypt Emails?*, CYBERNEWS, https://cybernews.com/secure-email-providers/how-to-encrypt-email/ (last visited Sept. 4, 2022).

[116] *See STARTTLS Everywhere, africa-union.org results*, ELECTRONIC FRONTIER FOUNDATION, https://starttls-everywhere.org/results/?africa-union.org (last visited November 7, 2020) (indicating that africa-union.org supports the use of TLS, uses a secure version of TLS, and presents a valid certificate.

[117] *See STARTTLS Everywhere, corteidh.or.cr results*, ELECTRONIC FRONTIER FOUNDATION, https://starttls-everywhere.org/results/?corteidh.or.cr (last visited Nov. 7, 2020) (indicating that the

send e-mail to this domain, anyone listening in on your network, your recipient's network, or on corteidh.or.cr networks can read your e-mails, and some can even alter them!"[118]

Even when human rights mechanisms encrypt emails in transit, however, risks to confidentiality and security persist. When using SSL/TLS, the contents of a message in transit may be accessible to the email service provider[119] or read by governmental authorities who get court-approved access through the email service provider or via mass surveillance.[120] The email metadata, including the sender, recipient, time, subject text, and the presence of any attachments,[121] would also be visible to such eavesdroppers.[122] Other threats to the security and confidentiality of email include phishing[123] and malware[124] attacks, which rely on users opening fraudulent emails. For example, human rights advocates who use Microsoft Outlook—which is used by the ACHPR[125] —have been the target of phishing scams.[126] Different email providers implement distinct protections against these kinds of attacks.[127] Only when both the sender and receiver are using

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corteidh.or.cr domain does not present a valid certificate).

[118] *See id*.

[119] *See, e.g., Surveillance Self-Defense, Communicating with Others*, ELECTRONIC FRONTIER FOUNDATION (Jun. 9, 2020), https://ssd.eff.org/en/module/communicating-others (noting that "your messaging service provider - or the website you are browsing, or the app you are using - can see unencrypted copies of your messages" when they are encrypted with TLS, and not end-to-end encryption).

[120] 18 U.S.C. §2516, Authorization for interception of wire, oral, or electronic communications. *See also, e.g.,* Theodoric Meyer, *No Warrant, No Problem: How the Government Can Get Your Digital Data*, PROPUBLICA (Jun. 27, 2014), https://www.propublica.org/article/no-warrant-no-problem-how-the-government-can-still-get-your-digital-data; *Data Law, About our practices and your data*, MICROSOFT, https://blogs.microsoft.com/datalaw/our-practices (last visited Sept. 4, 2022).

[121] *See, e.g.*, TACTICAL TECHNOLOGY COLLECTIVE, HOLISTIC SECURITY: A STRATEGY MANUAL FOR HUMAN RIGHTS DEFENDERS 78, https://holistic-security.tacticaltech.org/media/sections/chapterpdfs/original/HS_Complete_HiRes.pdf.

[122] *See What Should I Know About Encryption*, ELECTRONIC FRONTIER FOUNDATION, https://ssd.eff.org/en/module/what-should-i-know-about-encryption (last visited Sept. 4, 2022); *Protect the Privacy of Your Online Communication*, SECURITY IN-A-BOX (Sept. 15, 2021), https://securityinabox.org/en/communication/private-communication/ (last visited Sept. 4, 2022).

[123] For an explanation of phishing attacks and their use against human rights defenders, see Amnesty Int'l, *Evolving Phishing Attacks Targeting Journalists and Human Rights Defenders from the Middle-East and North Africa* (Aug. 16, 2019), https://www.amnesty.org/en/latest/research/2019/08/evolving-phishing-attacks-targeting-journalists-and-human-rights-defenders-from-the-middle-east-and-north-africa/.

[124] For an overview of malware, including how it may be introduced to a computer or smartphone by email, see Security in-a-box, *Protect Against Malware* (June 17, 2021), https://securityinabox.org/en/phones-and-computers/malware/ (last visited Sept. 4, 2022).

[125] A recent email from an ACHPR staff member read, "Get Outlook for iOs" at the bottom of the email.

[126] *See Evolving Phishing Attacks Targeting Journalists and Human Rights Defenders from the Middle-East and North Africa*, AMNESTY INT'L (Aug. 16, 2019), https://www.amnesty.org/en/latest/research/2019/08/evolving-phishing-attacks-targeting-journalists-and-human-rights-defenders-from-the-middle-east-and-north-africa/.

[127] *See, e.g.*, Whitson Gordon, *Switch from Your Internet Provider's Email to Something Better*, N.Y. TIMES, Jan. 24, 2020, https://www.nytimes.com/article/how-to-change-email-address.html.

an email application with end-to-end encryption are messages secure from phishing and malware attacks.[128]

In response to specific requests for information, the human rights mechanism staff members that I connected with did not know which, if any, security measures protected their email correspondence. These staff members also did not know if their institutions did, or would, accept communications through end-to-end encrypted channels such as Signal.[129] This lack of awareness regarding encryption among human rights mechanisms' staff members, as well as the absence of any relevant information (such as public keys for receiving encrypted communications)[130] on human rights mechanisms' websites and email correspondence, seems to indicate that mechanisms do not routinely or formally use end-to-end encryption[131] programs when sending messages and documents. Consequently, any advocate seeking to understand their security risks in communicating with a human rights body or seeking to use an encryption program for correspondence would need to first contact the body using its regular, less secure channels.

3. Calls and Messaging

Formally, all human rights mechanisms use traditional landlines for receiving telephone calls. They do not publicly provide mobile phone numbers or details for use on voice over internet protocol (VOIP) or messaging technology. Informally, however, staff members often use personal cell phones, Skype, and WhatsApp to communicate with advocates, who are also using those same tools.[132]

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[128] *See, e.g.*, Dave Johnson, *A Guide to End-to-End Encryption, the System that Keeps Your Transmitted Data and Communication Secure*, BUSINESS INSIDER (May 14, 2021), https://www.businessinsider.com/end-to-end-encryption; Kate O'Flaherty, *How Private Is Your Gmail, and Should You Switch?*, GUARDIAN, May 9, 2021, https://www.theguardian.com/technology/2021/may/09/how-private-is-your-gmail-and-should-you-switch; *Proton Mail Encryption Explained*, PROTON, https://proton.me/support/proton-mail-encryption-explained (last visited Sept. 4, 2022).

[129] I requested information on digital security policies and practices from the OHCHR, ECtHR, IACHR, IACtHR, ACHPR, and AfCHPR. To date, the IACHR, AfCHPR, and ACHPR have responded substantively. The IACHR's User Support Section indicated they could not provide an answer as this information was outside their purview; the AfCHPR's IT specialist indicated that policies are under development on each of these questions; the ACHPR – via the African Union – provided a copy of the ACHPR's new Media Relations and External Communication Strategy, which does not mention encryption or security.

[130] *See A Deep Dive on End-to-End Encryption: How Do Public Key Encryption Systems Work?*, ELECTRONIC FRONTIER FOUNDATION, *supra* note 9.

[131] In correspondence with each of the human rights mechanisms, I have never had to use a key to send or receive an email.

[132] Based on personal experience.

These communication channels have varying degrees of security and have been subject to governmental surveillance and third-party hacking.[133] Some States have a long and expansive history of listening in on phone calls or collecting phone call metadata from advocates and international bodies.[134] Skype users have been targeted with malware attacks and governmental hacking.[135] Microsoft, Skype's parent company, has reportedly voluntarily shared user information with third parties and helped authorities to monitor communications.[136] WhatsApp has also been compromised by spyware attacks aimed at human rights advocates, although it has since taken steps to address its vulnerabilities.[137] As with other tools, the specific security weaknesses depend on which programs advocates and human rights mechanisms use and how they use them, as well as on the surveillance practices of the countries where they are located.[138]

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[133] *See, e.g.*, *Surveillance Self-Defense, The Problem with Mobile Phones*, ELECTRONIC FRONTIER FOUNDATION (Oct. 30, 2018), https://ssd.eff.org/en/module/problem-mobile-phones (last visited Sept. 4, 2022); Paul Blake, *How an Attempt to Hack a Top Human Rights Activist Exposed Unprecedented iPhone Vulnerabilities*, ABC NEWS (Aug. 27, 2016), https://abcnews.go.com/Technology/attempt-hack-top-human-rights-activist-exposed-unprecedented/story?id=41671098.

[134] *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN, Jun. 6, 2013, https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order; *ACLU History: Wiretapping: A New Kind of 'Search and Seizure,'* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/other/aclu-history-wiretapping-new-kind-search-and-seizure (last visited Sept. 4, 2022); Tess McClure, *Why Were Police Tapping the Phones of NZ Human Rights Activists?*, VICE, Oct. 9, 2017, https://www.vice.com/en/article/59d85d/why-were-police-tapping-the-phones-of-nz-human-rights-activists; *US Plan to Bug Security Council: The Text*, GUARDIAN, Mar. 2, 2003, https://www.theguardian.com/world/2003/mar/02/iraq.unitednations1; Off. High Comm'r Hum. Rts., *Human Rights Defenders: Protecting the Right to Defend Human Rights*, Fact Sheet No. 29, 12 (2004), https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet29en.pdf ("[h]uman rights defenders are kept under surveillance and have their telephone lines cut or tapped").

[135] *See, e.g.*, Scott Shane Matthew Rosenberg & Andrew W. Lehren, *WikiLeaks Releases Trove of Alleged C.I.A. Hacking Documents*, N.Y. TIMES, Mar. 7, 2017, https://www.nytimes.com/2017/03/07/world/europe/wikileaks-cia-hacking.html; Kim Zetter, *Leaked Documents Show German Police Attempting to Hack Skype*, WIRED, Jan. 29, 2008, https://www.wired.com/2008/01/leaked-document/.

[136] Ryan Gallagher, *Did Skype Give a Private Company Data on Teen WikiLeaks Supporter Without a Warrant?*, SLATE, Nov. 9, 2012, https://slate.com/technology/2012/11/skype-gave-data-on-a-teen-wikileaks-supporter-to-a-private-company-without-a-warrant-report.html; Craig Timberg & Ellen Nakashima, *Skype Makes Chats and User Data More Available to Police*, WASH. POST, July 25, 2012, https://www.washingtonpost.com/business/economy/skype-makes-chats-and-user-data-more-available-to-police/2012/07/25/gJQAobI39W_story.html; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, Jun. 7, 2013, https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

[137] Samuel Gibbs, *WhatsApp Hack: Have I Been Affected and What Should I Do?*, GUARDIAN, May 14, 2019, https://www.theguardian.com/technology/2019/may/14/whatsapp-hack-have-i-been-affected-and-what-should-i-do.

[138] *See, e.g.*, *Surveillance Self-Defense, How to: Use WhatsApp on Android*, ELECTRONIC FRONTIER

4. Online Forms

Several human rights mechanisms regularly use online forms to solicit information or receive communications from advocates and others. These include forms that are built into the mechanism's website (and self-hosted),[139] as well as forms that are built or hosted by third parties like Google.[140] Whether the information submitted via these forms may be intercepted depends on both the security of the connection and the security practices of the receiving entity. For example, the IACHR hosts its petition portal on an HTTPS site, which it asserts is "secure."[141] However, the petition portal's terms of use state that "any message or information you send to the Portal may be read or intercepted by others, even if there is a special notice that a particular transmission . . . is encrypted."[142] This disclaimer is necessary because even encrypted web traffic may be monitored through "man-in-the-middle" attacks, in which a third party intercepts connections to a website by impersonating the site.[143] Similarly, some tools provide varying levels of security depending on the user's account and practices and may be subject to governmental data requests.[144]

FOUNDATION, https://ssd.eff.org/en/module/how-use-whatsapp-android (last visited Sept. 4, 2022).

[139] For example, the IACHR's Individual Petition System Portal allows individuals to submit petitions and check on their status through a platform hosted on the OAS domain. *See IACHR Individual Petition System Portal*, OAS, https://www.oas.org/ipsp/default.aspx?lang=en (last visited Sept. 4, 2022).

[140] For example, the ACHPR has asked individuals to register for events using Google Forms. *See* Afr. Comm'n Hum. & Peoples' Rts., Register Questions and Request to Take the Floor, https://www.achpr.org/announcement/detail?id=99 (linking to a Google Form at https://docs.google.com/forms/d/e/1FAIpQLSdxD5iHGZLSb-AR7QfaV5CO_JBNLC2_ML6Dm5ZzgtPwRpN1xQ/viewform). The OHCHR has used other third-party service providers to conduct surveys. *See, e.g.*, *OHCHR, Survey on Good Practices in the Protection of Human Rights Defenders*, INTERNET ARCHIVE, https://web.archive.org/web/20200919165530/https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Survey.aspx (Sept. 19, 2020) (linking to Qualtrics form https://york.qualtrics.com/jfe/form/SV_cGPcviVNX3BI6z3?Q_JFE=qdg). After the OHCHR redesigned its website in March 2022, this link led to a page stating, "Sorry, we couldn't find that page." *See Sorry, we couldn't find that page*, OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Survey.aspx.

[141] *IACHR Individual Petition System Portal*, OAS, *supra* note 139 (indicating, "This Portal offers several advantages: It is a secure site.")

[142] *IACHR Individual Petition System Portal: Terms and Conditions of Use*, INTER-AM. COMM'N H.R. & OAS, https://www.oas.org/ipsp/help/Terms_EN.htm (last visited Sept. 4, 2022).

[143] Elie Bursztein, *Understanding the Prevalence of Web Traffic Interception*, CLOUDFLARE BLOG (Sept. 12, 2017), https://blog.cloudflare.com/understanding-the-prevalence-of-web-traffic-interception/; David Meyer, *Nokia: Yes, We Decrypt Your HTTPS Data, but Don't Worry about It*, GIGAOM (Jan. 10, 2013), https://gigaom.com/2013/01/10/nokia-yes-we-decrypt-your-https-data-but-dont-worry-about-it/; Josh Harkinson, *Report: NSA Mimics Google to Monitor "Target" Web Users*, MOTHER JONES, Sept. 12, 2013, https://www.motherjones.com/politics/2013/09/flying-pig-nsa-impersonates-google/.

[144] *See* J.D. Biersdorfer, *Keeping Your Files Safe in Google's Cloud*, N.Y. TIMES, Sept. 6, 2017,

5. Video Conferencing

Many human rights mechanisms, particularly during the COVID-19 pandemic, have relied on video conferencing software to conduct their activities and consult with advocates, giving rise to additional security concerns.[145] For most of 2020 and 2021, the ACHPR and IACHR, in particular, conducted their public sessions via Zoom and invited advocates to register and participate via that platform.[146] In 2020, the prevalence of "Zoombombing" helped expose security weaknesses on Zoom, including the lack of the end-to-end encryption the company had claimed was in place.[147] Advocates and journalists also reported that Zoom blocked activists' accounts pursuant to Chinese authorities' requests, meaning those advocates could not participate in any convening held via Zoom.[148] Previously, some mechanisms used Skype or other tools to allow (limited) remote participation by advocates in meetings and hearings.[149] As mentioned above, data stored by Skype and communications conducted over the service may be subject to interception. Internal videoconferencing systems also have vulnerabilities, as evidenced by the US National Security Agency's successful attempt in 2012 to break the encryption on the UN's conferencing system.[150] Whether human rights

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https://www.nytimes.com/2017/09/06/technology/personaltech/security-google-cloud.html; Theodoric Meyer, *No Warrant, No Problem: How the Government Can Get Your Digital Data*, PROPUBLICA, Jun. 27, 2014, https://www.propublica.org/article/no-warrant-no-problem-how-the-government-can-still-get-your-digital-data.

[145] *See, e.g.*, Citlalli Ochoa & Lisa Reinsberg, *Cancelled, postponed, virtual: COVID-19's impact on human rights oversight*, OPENGLOBALRIGHTS (July 17, 2020), https://www.openglobalrights.org/cancelled-postponed-virtual-covid-19-impact-on-human-rights-oversight/.

[146] *See, e.g.*, *Upcoming Session, 67th Ordinary Session of the African Commission on Human and Peoples' Rights,* AFR. COMM'N HUM. & PEOPLES' RTS. (Oct. 5, 2020), https://www.achpr.org/sessions/info?id=337; *IACHR Announces Calendar of Public Hearings for 178th Period of Sessions*, INTER-AM. COMM'N H.R. (Nov. 20, 2020), http://www.oas.org/en/iachr/media_center/PReleases/2020/279.asp (linking to calendar with Zoom registration links: http://www.oas.org/en/iachr/sessions/docs/CalendarioAudiencias_178PS_en.pdf).

[147] Kari Paul, *'Zoom is Malware': Why Experts Worry about the Video Conferencing Platform*, GUARDIAN, Apr. 2, 2020, https://www.theguardian.com/technology/2020/apr/02/zoom-technology-security-coronavirus-video-conferencing.

[148] Paul Mozur, *Zoom Blocks Activist in U.S. After China Objects to Tiananmen Vigil*, N.Y. TIMES, Jun. 11, 2020, https://www.nytimes.com/2020/06/11/technology/zoom-china-tiananmen-square.html; Lily Kuo & Helen Davidson, *Zoom Shuts Accounts of Activists Holding Tiananmen Square and Hong Kong Events*, GUARDIAN, Jun. 11, 2020, https://www.theguardian.com/technology/2020/jun/11/zoom-shuts-account-of-us-based-rights-group-after-tiananmen-anniversary-meeting.

[149] *See, e.g.*, INT'L JUST. RES. CTR., CIVIL SOCIETY ACCESS TO INTERNATIONAL OVERSIGHT BODIES: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 29, at 4; Amnesty Int'l, et al., *Position Paper on Strengthening the Human Rights Treaty Bodies in 2020 and Beyond* (2019), https://www.amnesty.org/download/Documents/IOR4012182019ENGLISH.pdf.

[150] *US Intelligence Wiretapped United Nations Headquarters*, DER SPIEGEL, Aug. 25, 2013, https://www.spiegel.de/politik/ausland/nsa-hoerte-zentrale-der-vereinte-nationen-in-new-york-ab-a-

bodies use external platforms or their own systems for video calls, risks of interception or introduction of malware exist.

C. Assessment of Vulnerabilities

If advocates have a right to communicate with human rights mechanisms privately and without fear of reprisals, as discussed in Part IV.A.2, confidential and secure channels of communication must be available for this purpose. This requires action on the part of mechanisms because precautions taken by advocates alone will be insufficient to fully protect their communications. The security vulnerabilities of the channels currently used by human rights mechanisms will continue to expose advocates to risk. If human rights mechanisms send unencrypted emails or if they solicit advocates' information via unsecured websites, human rights advocates' identities and the content of their communications may be revealed. While many mechanisms have made important improvements in recent years, such as increased use of encryption for their websites and email, significant gaps in technology, policies, and transparency remain.

Many channels used by human rights mechanisms have been or could be compromised by hacks or surveillance, creating risks that advocates would not necessarily perceive. Though no communication channel can provide absolute privacy and security, some are less secure than others, as reviewed above. It is exceedingly difficult for a member of the public to determine how vulnerable their own web use or digital communications might be to monitoring or interceptions. Individuals typically have little knowledge of what metadata or content a human rights mechanism or third-party service provider has access to, where and how it is stored, and whether that information might be disclosed to authorities either voluntarily or by court order. As such, advocates may have little insight into the potential risks of sharing information with human rights mechanisms using common digital channels. Moreover, human rights mechanisms do not offer accessible guidance to help advocates mitigate the risks.

If we follow advocates' communications further along their path, what other risks arise? Are human rights mechanisms responsibly and securely managing individuals' data once it is in their possession?

V. THE ADMINISTRATOR SHALL NOT BE LIABLE: PROTECTION OF INDIVIDUAL'S DATA

918421.html.

In 2019, the United Nations Under-Secretary for Global Communications tweeted a photograph of a Syrian child refugee holding up a document that revealed her last name, location, and family phone number. The Office of the United Nations High Commissioner for Refugees retweeted the image to its 2.3 million followers.[151] Based on the information divulged in that photograph, the girl and her family could have been identified and located. In light of the documented human rights abuses taking place in Syria at that time, the ongoing nature of the conflict in the country, and the precarity of many refugees' existence, exposing these details created serious risks for this refugee family and any relatives still in Syria.[152] The "astonishing" lapse exemplified an extreme version of some human rights mechanisms' routine practice of posting photographs and videos of advocates and victims to their social media channels, without ensuring those posts will not create or exacerbate safety risks for these individuals.[153]

In 2019 the United Nations also experienced an "unprecedented number" of cybersecurity threats aimed at accessing its systems or information in its possession, including 1.8 billion malicious emails, more than 20,000 "highly sophisticated attacks," and 200 compromised email accounts.[154] The United Nations OHCHR, which was among the agencies targeted in 2019, did not notify affected individuals of the breach of its system until a news outlet reported it six months later.[155] Separately, and perhaps most disturbingly, a whistleblower

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[151] *See* Karen McVeigh, *UN communications chief under fire for tweeting refugee's details*, GUARDIAN, Sept. 3, 2019, https://www.theguardian.com/global-development/2019/sep/03/un-communications-chief-under-fire-for-tweeting-refugees-details.

[152] *See, e.g.*, Commission of Inquiry on the Syrian Arab Republic, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/49/77 (Feb. 8, 2022), https://undocs.org/A/HRC/49/77.

[153] The IACHR and ACHPR, for example, publish videos and photographs of participants and observers during their sessions and country visits. *See, e.g.*, Inter-Am. Comm'n H.R., FLICKR, https://www.flickr.com/photos/cidh/albums; Afr. Comm'n Hum. & Peoples' Rts., YOUTUBE, https://www.youtube.com/channel/UCgwJmiMTr59J0jYZJJtfzuw/videos. The U.N. human rights treaty bodies broadcast the public portions of their sessions on UN Web TV, where advocates who attend may also be visible. *See Human Rights Treaty Bodies*, UN WEB TV, https://media.un.org/en/search/categories/meetings-events/human-rights-treaty-bodies (last visited Sept. 4, 2022). To my knowledge, no human rights mechanism has a consistent practice for allowing participants or observers to decline to be photographed or recorded.

[154] G.A., Proposed programme budget for 2021, Part VIII: Common support services, § 29C: Office of Information and Communications Technology 1 (Apr. 28, 2020), https://undocs.org/A/75/6(Sect.29C). Relatedly, the Board of Auditors for the IT strategy has repeatedly flagged weaknesses in the U.N.'s digital security. *See, e.g.*, G.A., Third annual progress report of the Board of Auditors on the implementation of the information and communications technology strategy, U.N. Doc. A/74/177 (July 16, 2019), https://undocs.org/A/74/177.

[155] Press Release, Off. High Comm'r Hum. Rts., Clarification of circumstances surrounding hacking of OHCHR systems (Jan. 29, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25509&LangID=E; Ben Parker, *Exclusive: The cyber attack the UN tried to keep under wraps*, NEW HUMANITARIAN (Jan.

accused the OHCHR of sending Chinese authorities information on Uyghur dissidents and other advocates who had registered to participate in United Nations activities.[156] These incidents illustrate the urgent need for international organizations like the U.N. to adopt comprehensive data protection standards.

I focus here on data protection within the United Nations for purposes of a clear assessment and comparison with relevant international standards. However, it must also be noted that the African and Inter-American human rights mechanisms (and their parent IGOs) lack data protection policies, while the COE and its human rights mechanisms have adopted policies that fall short of regional standards.[157] Part A of this section identifies international human rights standards relevant to data protection and analyzes whether these standards have crystallized into a customary norm. Part B reviews the development of data protection standards at the regional level and among other IGOs, in comparison with the United Nations. Finally, part C details the status of internal United Nations data privacy norms.

A. International Human Rights Standards on Data Protection

Assuming that the United Nations has international human rights obligations, as discussed in Part II, to what extent would it be required to protect individuals' data? The answer depends on whether the United Nations is transitively bound by United Nations human rights treaties or, rather, by customary law.

1. International Human Rights Instruments

The human right to privacy is at the core of data protection and is enshrined in numerous instruments. The Universal Declaration of Human Rights

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29, 2020), https://www.thenewhumanitarian.org/investigation/2020/01/29/united-nations-cyber-attack.

[156] *See, e.g.*, Letter from David Kaye, U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ref. OL OTH 17/2017 (Aug. 9, 2017), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23269; *Former UN Official Calls for Probe of Rights Body Confirming Dissident Testimonies to China*, RADIO FREE ASIA, Nov. 6, 2020, https://www.rfa.org/english/news/uyghur/testimonies-11062020164710.html; Press Release, Off. High Comm'r Hum. Rts., UN rights office categorically rejects claims it endangered NGOs (Feb. 2, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21139&LangID=E.

[157] *Compare Disclaimer*, COUNCIL OF EUROPE, https://www.coe.int/en/web/portal/disclaimer *and Privacy Statement*, EUR. CT. H.R., https://www.echr.coe.int/Pages/home.aspx?p=privacy&c= *with* Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Treaty No. 223, https://rm.coe.int/convention-108-convention-for-the-protection-of-individuals-with-regar/16808b36f1.

and the International Covenant on Civil and Political Rights, among other United Nations and regional standards, recognize privacy as a fundamental right.[158] Each of these agreements explicitly recognizes the right to be free from unlawful or arbitrary interference with one's privacy, family, home, and correspondence. Each agreement also includes an entitlement to legal protection of the right to privacy. Arbitrary interference with this right includes invasions of privacy that are not necessary to further a legitimate governmental purpose or to protect others' rights.[159]

IGOs and human rights accountability mechanisms have repeatedly interpreted the right to privacy to apply to personal information that is digitally processed or stored, including via new technologies.[160] Recently, for example, the United Nations General Assembly adopted a resolution recognizing data protection as a component of the right to privacy, "[e]mphasizing that . . . the unlawful or arbitrary collection of personal data . . . as highly intrusive acts, violate[s] the right to privacy."[161] The resolution urges States "[t]o consider adopting or maintaining data protection legislation, regulation and policies, including on digital communication data, that comply with their international human rights obligations."[162] It further calls on companies to share their data management policies and to respect key data protection principles, including lawful processing, data minimization, legitimate purpose, accuracy, confidentiality, access, and correction.[163]

While the law will undoubtedly continue to evolve, human rights mechanisms agree that the right to privacy requires States to ensure that governmental entities and private actors only collect personal data lawfully, fairly, and transparently; for a legitimate purpose; and, in a manner that respects the data

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[158] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 12 (Dec. 10, 1948); International Covenant on Civil and Political Rights, *supra* note 71, art. 17; Convention on the Rights of the Child art. 16, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of All Migrant Workers and Members of Their Families art. 14, Dec. 18, 1990, 2220 U.N.T.S. 3; European Convention on Human Rights art. 8, *supra* note 111; American Convention on Human Rights, *supra* note 45, art. 11; African Charter on the Rights and Welfare of the Child, *supra* note 46, art. 10.

[159] These requirements are specific to Article 8 of the European Convention on Human Rights, but have also been read into the other treaties. *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 16: Article 17 (Right to Privacy), U.N. Doc. HRI/GEN/1/Rev.9 (Vol.I) 191 (Apr. 8, 1988), https://undocs.org/HRI/GEN/1/Rev.9(Vol.I).

[160] *See, e.g., id*., ¶ 10. *Cf.* Inter-Am. Comm'n H.R., Declaration of Principles on Freedom of Expression, Principle 3, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26 (identifying the rights of access and correction as part of freedom of expression).

[161] G.A., Res. 75/176, The right to privacy in the digital age, U.N. Doc. A/RES/75/176, Preamble (Dec. 28, 2020), https://undocs.org/A/RES/75/176.

[162] *Id*., ¶ 7(h).

[163] *Id*., ¶ 8.

subject's rights of access and correction.[164] These core protections are considered integral and fundamental to the human right to privacy under United Nations human rights treaties.[165] At the regional level, human rights mechanisms have also urged States to adopt legislation respecting those core data protection principles.[166]

The OHCHR's 2018 report on privacy in the digital age provides the most comprehensive guidance to date, recommending that all States adopt legislation that incorporates a broad range of data protection principles.[167] It urges States to ensure that data processing is: 1) fair, lawful, and transparent; 2) based on consent or another lawful, legitimate basis; 3) necessary and proportionate to a specific, legitimate purpose; 4) limited in amount, type, and duration; 5) accurate; 6) minimized via anonymization and pseudonymization techniques, whenever possible; 7) protected by adequate security measures; and 8) subject to accountability.[168] Moreover, it asserts that individuals "have a right to know that personal data has been retained and processed, to have access to the data stored, to rectify data that is inaccurate or outdated and to delete or rectify data unlawfully or unnecessarily stored."[169] The report refers to these as "minimum standards that should govern the processing of personal data by States"[170] and describes them as

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[164] *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 16: Article 17 (Right to Privacy), *supra* note 159, ¶ 10; Joseph A. Cannataci (Special Rapporteur on the Right to Privacy), *Right to Privacy: Report of the Special Rapporteur of the Human Rights Council on the right to privacy*, U.N. Doc. A/72/540, ¶¶ 71–75 (Oct. 19, 2017), https://undocs.org/A/72/540. –

[165] *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 16: Article 17 (Right to Privacy), *supra* note 159, ¶ 10; Inter-Am. Comm'n H.R., *Standards for a Free, Open, and Inclusive Internet* (2016), ¶¶ 204–08, http://www.oas.org/en/iachr/expression/docs/publications/internet_2016_eng.pdf; Eur. Ct. H.R., *Factsheet: Personal Data Protection* (Oct. 2020), https://www.echr.coe.int/Documents/FS_Data_ENG.pdf. *See also* Joseph A. Cannataci (Special Rapporteur on the Right to Privacy), *Right to Privacy: Report of the Special Rapporteur on the right to privacy*, U.N. Doc. A/74/277 (Aug. 5, 2019), https://undocs.org/A/74/277.

[166] *See, e.g.*, S. and Marper v. United Kingdom [GC], 2008-V Eur. Ct. H.R. 167, ¶ 103; Afr. Comm'n Hum. & Peoples' Rts., *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, *supra* note 76, Principle 42. *See generally* Eur. Ct. H.R., *Factsheet: Personal Data Protection* (Oct. 2020), *supra* note 165; Carlos Affonso Souza, Caio César de Oliveira, Christian Perrone & Giovana Carneiro, *From privacy to data protection: the road ahead for the Inter-American System of human rights*, INT'L J. HUM. RTS. (2020), https://doi.org/10.1080/13642987.2020.1789108.

[167] Off. High Comm'r Hum. Rts., *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, *supra* note 73. More recently, in her July 2022 report, the United Nations Special Rapporteur on privacy identified and compared the "common elements" of legality, lawfulness and legitimacy, consent, transparency, purpose, fairness, proportionality, minimization, quality, responsibility, and security among regional and universal data protection standards. *See* Ana Brian Nougrères (Special Rapporteur on the Right to Privacy), *Principles Underpinning Privacy and the Protection of Personal Data*, U.N. Doc. A/77/196, 2 (Jul. 20, 2022), https://undocs.org/A/77/196.

[168] Off. High Comm'r Hum. Rts., *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, *supra* note 73, ¶ 29.

[169] *Id.* at ¶ 30.

[170] *Id.* at ¶ 28.

"the key privacy principles."[171] The OHCHR recommends States ensure adequate protection of personal data transferred internationally and establish data protection oversight bodies.[172]

International standards on data protection continue to develop, and not all human rights mechanisms have comprehensively defined States' relevant obligations under specific universal or regional treaties. At a minimum, though, it is clear that human rights mechanisms *recommend* the adoption of legislation implementing the principles of lawfulness, legitimate purpose, transparency, and individual access and correction.

2. Customary International Law

Separate from any specific human rights treaty requirements, legal scholars, the International Law Commission, and others have increasingly pointed to the possible emergence of a customary right to data protection, although a significant portion of this discussion has focused on the context of mass surveillance.[173] Customary norms bind all States and crystallize when States generally recognize the norm through their actions (State practice) and subjectively believe that their practice is required by law (*opinio juris*).[174] The tentative conclusion that data protection obligations have reached customary status is based in part on the fact that at least 126 of 193 United Nations Member States have enacted data privacy laws, and others have drafted relevant legislation.[175]

The most well-known example is the European Union's General Data Protection Regulation (GDPR).[176] Generally, the GDPR requires that public and private entities collect and store as little personally identifiable information

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[171] *Id*. at ¶ 62(c).
[172] *Id*. at ¶¶ 32, 33.
[173] *See, e.g.*, Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 592–94 (2016), https://repository.law.umich.edu/mjil/vol37/iss4/1; Monika Zalnieriute, *An international constitutional moment for data privacy in the times of mass-surveillance*, INT'L J. L. & INFO. TECH., Volume 23, Issue 2, Summer 2015, pp. 99–133, https://doi.org/10.1093/ijlit/eav005.
[174] *See, e.g.*, G.A., Res. 73/203, Identification of Customary Law, U.N. Doc. A/RES/73/203, Annex, Conclusion 2 (Dec. 20, 2018), https://undocs.org/A/RES/73/203.
[175] *See, e.g.*, Graham Greenleaf & Bertil Cottier, *2020 Ends a Decade of 62 New Data Privacy Laws*, 163 PRIVACY LAWS & BUSINESS INT'L REPORT (2020) 24–26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572611 (indicating that, as of December 2019, 142 countries and territories, including 16 that are not Members of the United Nations, had enacted data privacy laws). *See also* Graham Greenleaf, *Global Tables of Data Privacy Laws and Bills (6th Ed January 2019)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572611.
[176] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 OJ (L 119) 1 [hereinafter GDPR].

(PII)[177] as is necessary for specific, legitimate purposes, using appropriate security measures; and that they process PII in lawful, fair, and transparent ways. The GDPR specifies that compliance with these standards is subject to governmental oversight.[178]

Such protection measures, even in the digital world, are not particularly new. For example, in 1980 and 1981, respectively, both the Organization for Economic Cooperation and Development (OECD) and the COE adopted guidelines and a treaty to protect the privacy of personal data.[179] They focused on "automatic processing" and included principles and language that are very similar to those of the GDPR. These standards have also inspired many national data protection laws, increasing safeguards for people around the world.[180] Intergovernmental organizations and agencies have implemented their own internal data protection policies as well.[181] Most relevantly, the COE has long had an internal data protection policy in place.[182]

Legal scholar Graham Greenleaf and others note that national data protection laws vary in their requirements and stringency, but also that they are generally "comprehensive" in covering all private and public entities.[183] Many countries share common minimum standards for data protection, and a number of

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[177] Personally identifiable information, or "personal data," is defined in GDPR Article 4(1) to mean "any information relating to an identified or identifiable natural person, including the person's name, identification number, location data, online identifier, or by factor(s) specific to the person's "physical, physiological, genetic, mental, economic, cultural or social identity."

[178] *See* GDPR, *supra* note 176 art. 5.

[179] *See* OECD, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980), https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm; Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108.

[180] *See* Paul M. Schwartz, *Global Data Privacy Law: the EU Way*, 94 N.Y.U. L. REV. 771 (2019), 777–78, https://www.nyulawreview.org/issues/volume-94-number-4/global-data-privacy-the-euway/ (citing a 2017 study finding 120 countries had adopted national data privacy laws in the style of the GDPR). *See also* DLA Piper, *Data Protection Laws of the World: Full Handbook*, https://www.dlapiperdataprotection.com/index.html?t=world-map (as downloaded Oct. 16, 2020).

[181] Regulation (EU) 2018/1725 of the European Parliament and of the Council (Oct. 23, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1725.

[182] *See, e.g.*, *Privacy Statement*, EUR. CT. H.R., https://www.echr.coe.int/Pages/home.aspx?p=privacy&c= (last visited Sept. 4, 2022); COE, Secretary General's Regulation of 17 April 1989 instituting a system of data protection for personal data files at the Council of Europe, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680684608.

[183] *See* Graham Greenleaf & Bertil Cottier, *Comparing African Data Privacy Laws: International, African and Regional Commitments* (Apr. 22, 2020), University of New South Wales Law Research Series, https://ssrn.com/abstract=3582478; David Banisar, *National Comprehensive Data Protection/Privacy Laws and Bills 2019* (Nov. 30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951416.

countries have adopted data protection laws closely modeled on the OECD Guidelines, the EU Data Protection Directive, or, more recently, the GDPR.[184]

Based on its review of international instruments, national legislation, and judicial decisions, in 2006 the International Law Commission identified "a number of core principles, including: (a) lawful and fair data collection and processing; (b) accuracy; (c) purpose specification and limitation; (d) proportionality; (d) transparency; (f) individual participation and in particular the right to access; (g) non-discrimination; (h) responsibility; (i) supervision and legal sanction; (j) data equivalency in the case of transborder flow of personal data; and (k) the principle of derogability."[185] These principles incorporate the concepts of minimization, necessity, legitimacy, correction, and accountability. For example, the International Law Commission specifies that the principle of lawful and fair collection "presupposes that the collection of personal data would be restricted to a necessary minimum."[186] The principle of purpose specification and limitation includes a requirement of individual consent or knowledge or legal authorization for the collection of data.

In subsequent years, new agreements and principles have further recognized the international consensus on data protection. For example, in 2014 the African Union adopted its Convention on Cyber Security and Personal Data Protection.[187] Among other bodies, the Department of International Law of the Organization of American States (OAS) endorsed shared principles similar to those identified by the International Law Commission as "the basis for data protection legislation worldwide."[188] The OHCHR's 2018 report draws similar conclusions, pointing to "a growing global consensus on minimum standards."[189]

In addition to widespread State practice, there is ample evidence that States believe they are required to respect individuals' data privacy. The many national and regional standards that expressly cite the human right to privacy as a core motivation for their enactment are relevant to this *opinio juris* requirement.

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[184] *See* Daniel J. Solove & Paul M. Schwartz, *International Privacy Law*, *in* PRIVACY LAW FUNDAMENTALS 2019 (2019); Int'l Law Comm'n, *Annex IV: Protection of Personal Data in Transborder Flow of Information*, *in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 2006, Volume II, Part Two 219–20 (2006), https://legal.un.org/ilc/reports/2006/english/annexes.pdf#page=27.

[185] *See* Int'l Law Comm'n, *Annex IV: Protection of Personal Data in Transborder Flow of Information*, *supra* note 184, ¶ 11.

[186] *See id*. ¶ 23.

[187] *See* African Union Convention on Cyber Security and Personal Data Protection (not yet in force), https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection.

[188] OAS, *Preliminary Principles and Recommendations on Data Protection*, OEA/Ser.G/CP/CAJP-2921/10/rev.1/corr.1 (Oct. 17, 2011), http://www.oas.org/dil/CP-CAJP-2921-10_rev1_corr1_eng.pdf. *See also* OAS *Principles on Privacy and Personal Data Protection with Annotations*, http://www.oas.org/en/sla/dil/docs/CJI-doc_474-15_rev2.pdf.

[189] *See* Off. High Comm'r Hum. Rts., *The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights*, *supra* note 73, ¶¶ 28–33.

For example, the European Union Data Protection Directive of 1995 repeatedly references the individual "right to privacy" as a foundational principle and legal obligation driving its adoption.[190] The preface to the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data lists the various European countries that had already adopted laws "to prevent what are considered to be violations of fundamental human rights, such as the unlawful storage of personal data, the storage of inaccurate personal data, or the abuse or unauthorised disclosure of such data."[191] The Economic Community of West African States (ECOWAS) referred to the African Charter on Human and Peoples' Rights in its Supplementary Act on data protection and described the "urgen[t] need to ensure that national laws protect privacy and freedom of information in the online space."[192] Similarly, the Mexican data protection law states that its overarching purpose is to "guarantee privacy and the right to informational self-determination" of individuals.[193]

The numerous national laws and regional agreements on data protection, together with apparent State acceptance that the right to privacy includes data protection, provide strong support for a customary international norm obligating States to adopt legislation in keeping with the "core principles" of data protection. As such, if the United Nations is bound by customary international law,[194] it may be required to implement data protection policies in line with those core principles.

B. Evolving Status of Data Protection at the UN

To date, the United Nations remains a step behind many of its Member States and peer intergovernmental organizations because of its continuing failure

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[190] Directive 95/46/EC of the European Parliament and of the Council, Preamble ¶ 10 (Oct. 24, 1995), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML. *See also* EU Regulation 2018/1725, Preamble (Oct. 23, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1725.

[191] OECD, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, *supra* note 179. *See also* OECD, *Recommendation of the Council concerning the Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data*, *in* THE OECD PRIVACY FRAMEWORK 11 (2013) ("recognising that Member countries have a common interest in promoting and protecting the fundamental values of privacy, individual liberties and the global free flow of information").

[192] ECOWAS, Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS (Feb. 16, 2010), http://www.tit.comm.ecowas.int/wp-content/uploads/2015/11/SIGNED-Data-Protection-Act.pdf. *See also* Greenleaf & Cottier, *2020 Ends a Decade of 62 New Data Privacy Laws*, *supra* note 175.

[193] Ley Federal de Protección de Datos Personales en Posesión de los Particulares, DOF 05-07-2010, Cap I, art. 1, http://www.diputados.gob.mx/LeyesBiblio/pdf/LFPDPPP.pdf (translation is the author's).

[194] *See* discussion *supra* Part **Error! Reference source not found.**.

to adopt binding internal data protection requirements. In 2018, the United Nations adopted its internal Personal Data Protection and Privacy Principles, a non-binding, brief list of recommended standards.[195] The two-page document sets out ten principles intended to apply to all personal data processed by, or on behalf of, United Nations entities "in carrying out their mandated activities."[196] The Principles indicate that United Nations entities "should" adhere to the following principles: 1) fair and legitimate processing; 2) purpose specification; 3) proportionality and necessity; 4) retention for minimum length of time; 5) accuracy; 6) confidentiality; 7) security; 8) transparency; 9) transfers only with appropriate protection; and, 10) accountability via "policies and mechanisms" for adherence. While the Principles broadly align with the GDPR's themes, they offer radically simplified, less rigorous, and optional standards. To date, the United Nations has not yet put them into practice by creating internal rules, technological changes, staff positions, or oversight procedures.

Pending the adoption of a comprehensive policy, online visitors have few clues about what data the United Nations collects through its websites, how that data is managed, and whether they can access or correct it. The United Nations has a limited privacy notice on its website, which the OHCHR links to from its separate domain. The United Nations notice indicates that any PII collected via forms "will be used only for statistical purposes," but that the United Nations "assumes no responsibility for the security of this information."[197] The related "Terms and Conditions of Use of United Nations Websites" state repeatedly that the United Nations is not liable for any negative consequence to users of United Nations websites.[198] The OHCHR links to this notice from its main site, and several of its databases contain specific terms of use with similar language disclaiming liability.[199]

Considering the volume and sensitivity of the data the United Nations collects, and the fact that the United Nations may also share that information with other agencies, these notices are inadequate to ensure data protection.[200] Every day, the OHCHR receives emails and online form submissions from advocates

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[195] *See* U.N., *Personal Data Protection and Privacy Principles*, *supra* note 38.
[196] *Id*.
[197] *Privacy Notice*, U.N., https://www.un.org/en/sections/about-website/privacy-notice/ (last visited Sept. 4, 2022).
[198] *Terms of Use*, U.N., https://www.un.org/en/sections/about-website/terms-use/index.html (last visited Sept. 4, 2022).
[199] *See* OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/ohchr_homepage (last visited Sept. 4, 2022) (linking to the U.N. terms of use at the bottom of the page); *Communication Report and Search, Terms of Use*, OFF. HIGH COMM'R HUM. RTS., https://spcommreports.ohchr.org/About/TermOfUse (last visited Sept. 4, 2022), *Jurisprudence Database, Terms of use*, OFF. HIGH COMM'R HUM. RTS., https://juris.ohchr.org/About/TermOfUse (last visited Sept. 4, 2022).
[200] *See Indico*, U.N. GENEVA, https://indico.un.org/ (last visited Sept. 4, 2022).

and victims of human rights abuses that contain complaints, reports, requests for accreditation to attend meetings, and queries.[201] These submissions regularly contain PII.[202] Additionally, people from around the world regularly visit the OHCHR website for informational purposes, including to sign up for email communications.[203] Yet these individuals, including human rights advocates, have almost no control over or insight into what PII the United Nations collects, stores, or shares.

C. A Hole to Be Filled

Data protection policies are urgently needed to safeguard the privacy and security of the advocates and victims who rely on the United Nations to promote and protect human rights worldwide. Thus far, the United Nations and OHCHR have declined to adopt mandatory data protection standards, provide individuals clear channels for access or correction, or publicly share any safeguards or policies already in place. The principles and plans endorsed to date are voluntary in both their adoption and their implementation.[204] Furthermore, their primary goals often include improving organizational functioning and impact,[205] rather than protecting individuals' privacy and security. For example, the Secretary-

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[201] For an indication of the volume of communications, note that in 2019, the human rights treaty bodies reviewed 133 States (a process that involves written and in-person interventions from as many civil society organizations as want to participate); registered 640 new individual complaints and 248 "urgent actions;" and received 27,771 emails to the OHCHR email address for complaints. *See* Off. High Comm'r Hum. Rts., *UN Human Rights Report 2019* 420-21 (2020), https://web.prod.ohchr.un-icc.cloud/en/publications/annual-report/ohchr-report-2019.

[202] For example, registering to participate in-person in a session of the U.N. Committee Against Torture requires providing one's name, date of birth, email address, organizational affiliation, permanent address, telephone number, occupation, photograph, gender, passport details, and temporary address in Geneva via an online system for managing event participation, called Indico (https://indico.un.org/). Staff at the OHCHR review these applications and communicate via email (from the cat@ohchr.org address) with those seeking accreditation to confirm receipt of the Indico request and, separately, confirm approval.

[203] While the OHCHR does not report publicly on its website traffic, SimilarWeb indicates ohchr.org received 2,500,000 visits in August 2022. *See OHCHR.org*, SIMILARWEB, https://www.similarweb.com/website/ohchr.org/ (last visited Sept. 4, 2022).

[204] *See* U.N., *Personal Data Protection and Privacy Principles*, *supra* note 38. The Principles cite no legal obligation on the part of the U.N. to protect personal data, and "encourage" U.N. entities to adhere to them, including in their development of more detailed policies and guidelines.

[205] *See, e.g.*, U.N. Development Group, *Data Privacy, Ethics and Protection: Guidance Note on Big Data for the Achievement of the 2030 Agenda* (2017), https://unsdg.un.org/sites/default/files/UNDG_BigData_final_web.pdf (noting that the guidance is "not a legal document" and identifying three objectives: 1) establishing common principles to support the operational use of big data for achievement of the Sustainable Development Goals; 2) providing a risk-management tool; and, 3) setting principles with regard to data obtained from the private sector); U.N. Secretary-General, *Data Strategy of the Secretary-General for Action by Everyone, Everywhere with Insight, Impact and Integrity: 2020-22*, https://www.un.org/en/content/datastrategy/images/pdf/UN_SG_Data-Strategy.pdf (setting out goals and principles for using data to maximize impact and improve decision making).

General's data strategy describes the goal of improving United Nations data protection and privacy practices to retain partners' trust, avoid fragmentation, and maximize the use of data for public good.[206] This makes it appear less likely that a formal policy, once adopted, will address advocates' concerns and meet increasingly global data protection standards.

The existence of a human right to data protection under international human rights treaty law or customary law potentially bestows legal obligations on the U.N. and should guide its development of obligatory internal standards. While the United Nations Personal Data Protection and Privacy Principles largely recognize certain core rights and obligations to protect data, translating these affirmations into mandatory requirements grounded in specific legal standards would increase the security and confidence of advocates seeking to engage with United Nations human rights mechanisms. Doing so would also increase both predictability and transparency. Importantly, conforming to international standards would add oversight and redress mechanisms that are currently lacking but essential to effective data protection at the United Nations.

Having examined the policies and standards on encryption of communications and the collection and storage of personal data, this article turns to freedom of information in the subsequent section. When advocates seek information from human rights accountability mechanisms, what can they expect to find? What rights do they have to obtain the information they seek?

VI. ACCESS TO INFORMATION: OF 404S, FORMATS, AND FAQS

While regional and United Nations human rights mechanisms publish a plethora of information, they do not hold themselves to any particular accessibility standard. As shown in Table 1 at the end of subsection B, no human rights body has publicly adopted a comprehensive policy on accessibility of information.[207] Only two relevant IGOs—the OAS[208] and COE[209]—have access-to-information policies, but such policies largely exempt regional human rights mechanisms. For

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[206] *See* U.N. Secretary-General, *Data Strategy of the Secretary-General for Action by Everyone, Everywhere with Insight, Impact and Integrity: 2020-22*, *supra* note 205, at 60.

[207] Other intergovernmental organizations and agencies have adopted relevant policies, in contrast. *See, e.g.*, World Bank, *Bank Policy: Access to Information* (2015), https://policies.worldbank.org/en/policies/all/ppfdetail/3693. As discussed *infra* Part VI.A.0, many States have also adopted access-to-information legislation. *See also, e.g.*, Freedom of Information Act, 5 U.S.C. § 552.

[208] General Secretariat of the OAS, *Access to Information Policy* (2012), http://www.oas.org/legal/english/gensec/EXOR1202.DOC.

[209] *See generally Documents, Records and Archives*, COUNCIL OF EUROPE, https://www.coe.int/en/web/documents-records-archives-information; Council of Europe, *Council of Europe Records and Archives Policy*, DGA/DIT (2018) 1, https://rm.coe.int/council-of-europe-records-and-archives-policy/168090759d.

example, the OAS policy states that the OAS will not disclose "any document relating to the Inter-American Commission on Human Rights and its Executive Secretariat."[210] The situation has not changed since 2017, when David Kaye, then-Special Rapporteur on freedom of expression, described the lack of such policies at the United Nations and other international organizations as "intolerable."[211] Moreover, as discussed in subsection C and shown in Table 2, human rights mechanisms have inconsistent practices in their publication, translation, and dissemination of case decisions, details on their own internal composition, and other critical information.

A. Relevant International Standards and Recommendations

What rights do individuals have to access information, generally? What obligations do public entities have to provide—or facilitate—access to their documents, and what exceptions, procedural rights, and oversight are allowed or required? This section reviews the current state of treaty and customary law on the individual's right of access to information.

1. International Human Rights Instruments

Two years before adopting the Universal Declaration of Human Rights, which enshrines the right to "seek, receive and impart information and ideas through any media and regardless of frontiers,"[212] the United Nations General Assembly resolved: "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."[213] Regional and United Nations human rights treaties drafted in the following decades similarly guarantee a right to receive—and, sometimes, to seek—"information and ideas without interference by public authority."[214] While these initial statements were more of a rejection of censorship than an endorsement of any governmental obligation of transparency,[215] a specific right

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[210] General Secretariat of the OAS, *Access to Information Policy*, *supra* note 207, § IV(1)l.
[211] David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc. A/72/350, 2 (Aug. 18, 2017), https://undocs.org/A/72/350.
[212] Universal Declaration of Human Rights, *supra* note 158, art. 19.
[213] G.A., Res. 59(1), *Calling of an International Conference on Freedom of Information*, U.N. Doc. A/RES/59(I) (Dec. 14, 1946), https://undocs.org/en/A/RES/59(I).
[214] European Convention on Human Rights, *supra* note 111, art. 10(1). *See also* African Charter on Human and Peoples' Rights, *supra* note 46 art. 9(1); ICCPR, *supra* note 71, art. 19(2); American Convention on Human Rights, *supra* note 45, art. 13(1).
[215] This is clear from the following sentence of Resolution 59(1), which states, "Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without

of "access to information" held by governmental entities began to take shape in subsequent years.

Recognition of the right to access public information first appeared in national legislation[216] and then in international developments including a 1981 COE Committee of Ministers recommendation.[217] In the 1990s, States emphasized the importance of access to information when they created a United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[218] and an OAS Special Rapporteur for Freedom of Expression,[219] and adopted the United Nations Declaration on Human Rights Defenders.[220] Pursuant to these views, governments have a positive obligation to make information available to the public via formalized processes and as a default, subject only to narrow limits established in law.[221]

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fetters." *See* G.A., Res. 59(1), *supra* note 213, Preamble. *See also, e.g.*, Toby Mendel, *Freedom of Information: A Comparative Legal Survey* 8 (2d ed. 2008), https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/CL-OGI_Toby_Mendel_book_%28Eng%29.pdf.

[216] By 1980, five U.N. Member States had enacted national legislation establishing a right of access to information. *See Right2Info*, INTERNET ARCHIVE, https://web.archive.org/web/20200918101415/https://www.right2info.org/resources/publications/countries-with-ati-laws-1/view (Sept. 18, 2020) (housing the Open Society Justice Initiative factsheet entitled *States that Guarantee a Right of Access to Information (RTI) in National/Federal Laws or Decrees + Dates of Adoption & Significant Amendments: 127 (out of 193) UN member states + 2 non-member states, as of May 2019*).

[217] Council of Europe Committee of Ministers, *Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities* (Nov. 25, 1981), https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-81-19-of-the-committee-of-ministers-to-member-states-on-the-access-to-information-held-by-public-authorities.

[218] *See* U.N. Comm'n Hum. Rts., *Right to freedom of opinion and expression*, U.N. Doc. E/CN.4/1993/L.48, ¶ 11 (Mar. 4, 1993), https://undocs.org/E/CN.4/1993/L.48.

[219] *See Special Rapporteurship for Freedom of Expression, History*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/expression/showarticle.asp?artID=52&lID=1 (last visited Sept. 4, 2022) (describing the creation of the Office of the Special Rapporteur for Freedom of Expression, in 1997).

[220] Declaration on Human Rights Defenders, *supra* note 84.

[221] *See, e.g.*, Inter-Am. Comm'n H.R. Declaration of Principles on Freedom of Expression, Principle 4 (Oct. 2000), http://www.oas.org/en/iachr/mandate/Basics/declaration-principles-freedom-expression.pdf; Abid Hussain (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36*, U.N. Doc. E/CN.4/2000/63, ¶¶ 42-44 (Jan. 18, 2000), https://undocs.org/en/E/CN.4/2000/63 (endorsing the Article 19 principles entitled "The Public's Right to Know: Principles on Freedom of Information Legislation" and identifying key considerations for the adoption of national freedom of information legislation); Abid Hussain (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1997/26*, U.N. Doc. E/CN.4/1998/40, ¶¶ 11–12 (Jan. 28, 1998), https://undocs.org/E/CN.4/1998/40.

Subsequent case law and soft law[222] have clarified the core components of the right of access to information.[223] According to these outputs from United Nations, Inter-American, and African human rights mechanisms, the core components include a State obligation of maximum disclosure of information, subject only to limited exceptions, and a duty to proactively publish information of public interest. Governmental entities must also establish simple, quick, and free or low-cost processes for requesting information. Denials must be reasoned and appealable.

The OHCHR recently endorsed these core principles in its 2022 report, requested by the Human Rights Council, on good practices for the protection of the right of access to information.[224] The report indicates "in accordance with international human rights law, the normative framework [governing access to information] should be recognized by law, based on a principle of maximum disclosure, provide for proactive publication, incorporate procedures that facilitate access and include independent oversight and review." The report reiterates that the right of access to information belongs to "everyone" and "covers

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[222] *See* Inter-Am. Comm'n H.R., Declaration of Principles on Freedom of Expression, *supra* note 221; Claude Reyes et al. v. Chile. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 151 (Sept. 19, 2006), https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf; U.N. Hum. Rts. Comm., General Comment No. 34, *supra* note 73; Afr. Comm'n Hum. & Peoples' Rts., *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, *supra* note 76. *See also* Inter-Am. Comm'n H.R., *The Inter-American Legal Framework Regarding the Right to Access to Information* (2d ed. 2012), http://www.oas.org/en/iachr/expression/docs/publications/2013%2005%2020%20NATIONAL%20JURISPRUDENCE%20ON%20FREEDOM%20OF%20EXPRESSION.pdf; Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc. A/68/362 (Sept. 4, 2013), https://undocs.org/A/68/362; Inter-Am. Comm'n H.R., *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression* (2004), http://www.oas.org/en/iachr/expression/basic_documents/declarations.asp; Afr. Comm'n Hum. & Peoples' Rts., Model Law on Access to Information for Africa (2013), https://www.achpr.org/presspublic/publication?id=82; OAS, Model Inter-American Law on Access to Public Information and its Implementation Guidelines (2012), http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf. *See also* UNESCO, Brisbane Declaration, Freedom of Information: The Right to Know (2010), http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/2010/brisbane-declaration/.

[223] *See* Sandra Coliver, *The Right of Access to Information Held by Public Authorities: Emergence as a Global Norm*, *in* REGARDLESS OF FRONTIERS 57, 69–70 (Lee C. Bollinger & Agnes Callamard eds., 2021). *See also* Off. High Comm'r Hum. RTS., *Factsheet: Access to Information* (2013), https://www.ohchr.org/Documents/Issues/Expression/Factsheet_5.pdf; David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Disease pandemics and freedom of opinion and expression*, U.N. Doc. A/HRC/44/49, ¶ 20 (Apr. 23, 2020), https://undocs.org/a/hrc/44/49.

[224] Off. High Comm'r Hum. Rts., *Freedom of Opinion and Expression: Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/49/38 (Jan. 10, 2022), https://undocs.org/A/HRC/49/38.

information held by public authorities" across "all branches of government," "irrespective of the content of the information and the manner in which it is stored."[225]

The ECtHR is an outlier in its more restrictive views.[226] In 2016, the Grand Chamber of the European Court of Human Rights confirmed the Court's understanding that a right of access to information only arises in certain circumstances. Specifically, such a right exists when ordered by a court or when the requestor serves a "watchdog" function by seeking to publicize information related to the public interest that is "ready and available" for the government.[227] While the new COE Convention on Access to Official Documents[228] changes this calculus with respect to its States parties,[229] the treaty still falls short of the UN, Inter-American, and African standards in its description of a more limited universe of public information that must be accessible.[230]

Separately, some human rights instruments and mechanisms have directly addressed freedom of information for persons with disabilities. Broader treaties that include a right of access to information prohibit States from discriminating against persons with disabilities.[231] More specifically, the 185 States party[232] to the United Nations Convention on the Rights of Persons with Disabilities must "take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice." This

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[225] *Id*. at ¶ 4.

[226] *See* Magyar Helsinki Bizottság v. Hungary [GC], App. No. 18030/11 (Nov. 8, 2016), http://hudoc.echr.coe.int/eng?i=001-167828. *See generally* Eur. Ct. H.R., *Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression* 71 (Aug. 31, 2020), https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf; Council of Europe, *Explanatory Report to the COE Convention on Access to Official Documents*, ¶¶ 2, 17, 71–73, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836.

[227] *See Magyar Helsinki Bizottság v. Hungary* [GC], App. No. 18030/11, ¶¶ 158–70.

[228] Council of Europe, Convention on Access to Official Documents ("Tromsø Convention"), June 18, 2009, CETS No. 205.

[229] *See* Council of Europe, Chart of signatures and ratifications of Treaty 205, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures (last visited Sept. 4, 2022).

[230] *See* Tromsø Convention, *supra* note 228, art. 1(2)(a)(2) (limiting the Convention's application to legislative and judicial bodies only "insofar as they perform administrative functions according to national law").

[231] *See, e.g.*, ICCPR, *supra* note 71, at arts. 2, 26; American Convention on Human Rights, *supra* note 45, at arts. 1(1), 24; African Charter on Human and Peoples' Rights, *supra* note 46, at arts. 2, 3; European Convention on Human Rights, *supra* note 111, at art. 14; Protocol No. 12 to the European Convention on Human Rights, Nov. 4, 2000, CETS No. 177; Tromsø Convention, *supra* note 228, at art. 2(1).

[232] *See* U.N. Treaty Collection, Ch. IV: Human Rights, 15. Convention on the Rights of Persons with Disabilities, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (last visited Sept. 4, 2022).

obligation entails specific services and accommodations, including the provision of information in accessible formats.[233] A limited collection of treaties and soft law statements supports these obligations at the regional level.[234]

In summary, universal and regional human rights treaties recognize a right to receive and share information which has been increasingly interpreted as requiring governments to provide access to information. Except for the ECtHR, all human rights mechanisms agree that this right imposes on States an obligation of maximum disclosure of information, subject to limited and defined exceptions. Per this obligation, the public must be able to request information via processes that are straightforward and not overly burdensome, either financially or otherwise. The public also has the right to appeal denials of those requests. Additionally, States have a duty to publish certain information even in the absence of a specific request, particularly when the information relates to matters of public interest. However, outside of some mechanisms' specific rule provisions, which are discussed below, human rights standards do not impose additional requirements for online publication, formatting, searchability, or translation. Moreover, beyond the direct application of the Convention on the Rights of Persons with Disabilities, human rights mechanisms have not mandated access-to-information requirements for persons with disabilities.

2. Customary International Law

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[233] Convention on the Rights of Persons with Disabilities art. 21, Dec. 13, 2006, 2515 U.N.T.S. 3.

[234] *See* Afr. Comm'n Hum. & Peoples' Rts., *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, *supra* note 76, at Principles 7, 31(3); Organization of American States, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, 7 June 1999, AG/RES. 1608 (XXIX-O/99); Afr. Comm'n Hum. & Peoples' Rts., Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Jan. 29, 2018, arts. 15, 23, 24 (as of March 28, 2022, the Protocol has been ratified by three States and has not yet entered into force. *See* Afr. Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa* (Mar. 28, 2022), https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%E2%80%99%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20PERSONS%20WITH%20DISABILITIES%20IN%20AFRICA.pdf. *See also* Council of Europe Committee of Ministers, Rec. CM/Rec(2009)8 of the Committee of Ministers to Member States on Achieving Full Participation through Universal Design (Oct. 21, 2009), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d0459. *See also* Catalina Devandas Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), *Report of the Special Rapporteur on the rights of persons with disabilities*, U.N. Doc. A/HRC/31/62 (Jan. 12, 2016), https://undocs.org/en/A/HRC/31/62. *Cf.* U.N. Hum. Rts. Comm., General Comment No. 34, *supra* note 73 (containing no references to the needs of persons with disabilities, aside from a statement, in para. 12, that sign language is a form of expression protected by the ICCPR). For more on this topic, *see* Eliza Varney, *Convention on the Rights of Persons with Disabilities: ensuring full and equal access to information*, in THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION: CRITICAL PERSPECTIVES 171 (Tarlach McGonagle & Yvonne Donders eds., 2015).

Both legislation and scholarly consensus support the conclusion that the right to access to information has become a rule of customary international law. In 2021, freedom of information lawyer and advocate Sandra Coliver argued, "it may be concluded that the right of access to information ripened into a [customary-international-law] right by 2011, if not earlier" based on the proliferation of national freedom of information legislation and human rights mechanisms' authoritative interpretations of human rights instruments.[235] It was in 2011 that the Human Rights Committee issued General Comment No. 34, describing "a right of access to information held by public bodies" and urging States to, *inter alia*, enact freedom of information legislation.[236]

As of 2020, between 118 and 126 United Nations Member States had adopted national legislation ensuring a right of access to information held by public authorities.[237] Coliver notes that such legislation is in place in countries "representing 90 percent of the world's population, and that it is taking hold in all regions, with only minor regional variations."[238] Other human rights mechanisms have recognized the proliferation of such legislation as evidence of consensus on the existence of such a right.[239] In its 2006 judgment in *Claude Reyes v. Chile*, citing OAS General Assembly resolutions and other regional documents, the IACtHR "emphasize[d] that there is regional consensus among the [OAS Member States] about the importance of access to public information and the need to protect it."[240] Similarly, in *Magyar Helsinki Bizottság v. Hungary*, the Grand Chamber of the ECtHR noted, "there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest."[241] In its 2022 report on access to information, the OHCHR described the recognition of this right as "universal."[242] Several scholars have also

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[235] Coliver, *supra* note 223 at 68.
[236] U.N. Hum. Rts. Comm., General Comment No. 34, *supra* note 73, at 18, 19.
[237] *See* Coliver, *supra* note 223, at 62 (Figure 2.1, listing 126 U.N. Member States with such legislation as of June 2020); UNESCO, *Powering Sustainable Development with Access to Information: Highlights from the 2019 UNESCO Monitoring and Reporting of SDG Indicator 16.10.2 - Access to Information* 4 (2019), https://unesdoc.unesco.org/ark:/48223/pf0000369160 (identifying 125 countries with such legislation, as of February 2019); *By Country*, GLOBAL RIGHT TO INFORMATION RATING, http://www.rti-rating.org/country-data/ (listing 126 U.N. Member States and two non-Member States with relevant legislation) (last visited Sept. 4, 2022).
[238] *See* Coliver, *supra* note 223, at 74.
[239] *See, e.g.*, David Kaye, *Report of the Special Rapporteur of the Human Rights Council on the promotion and protection of the right to freedom of opinion and expression*, *supra* note 211, ¶ 58 (referring to the "broad global acceptance that the right of access to information held by public authorities is rooted in international law").
[240] *Claude Reyes v. Chile*, Merits, Reparations and Costs, ¶¶ 78–80.
[241] *Magyar Helsinki Bizottság v. Hungary* [GC], ¶ 148.
[242] *See* U.N. Hum. Rts. Council, *Freedom of Opinion and Expression: Report of the Office of the United Nations High Commissioner for Human Rights*, *supra* note 224, ¶ 53.

documented the widespread recognition of a right of access to information, both at the national and international levels.[243]

The timing of international legislation recognizing the right to access information, as well as the timing of States' actions and statements in support of such legislation, suggests that States have enacted their access-to-information legislation out of a sense of legal obligation, or *opinio juris*. By 2002, most States were already party to one or more relevant human rights treaties,[244] and the United Nations, African, European, and Inter-American systems had all expressly recognized a human right of access to information.[245] Since then, at least seventy-eight countries have enacted access-to-information legislation, constituting nearly two-thirds of States with ATI laws.[246]

Numerous access-to-information laws adopted since 2002 specifically reference human rights standards. The language in these laws refers to a need to "recognize" or "guarantee" an existing "fundamental" or "indispensable" right of access to information, or cites directly to international human rights instruments. Examples can be found across the globe, including in Guatemala, South Sudan, Afghanistan, Montenegro, Uruguay, Tunisia, Luxembourg, and the Philippines.[247]

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[243] *See, e.g.*, Coliver, *supra* note 208; Mendel, *supra* note 215, at 7 (noting "there is very widespread support for [the] contention" that "the right to information ha[s] been internationally recognised as a fundamental human right"); Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 HUM. RTS L. REV. 1, 22-55 (2013).

[244] *See* U.N. Treaty Collection, Chapter IV: Human Rights, 4. International Covenant on Civil and Political Rights, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (status as at: 25-03-2021) (143 of 173 States ratified the ICCPR prior to 2000). All States party to the American Convention on Human Rights ratified it prior to 1994. *See* OAS, Multilateral Treaties, American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm (last visited Sept. 4, 2022). Fifty-four of fifty-five African Union Member States ratified the African Charter prior to 2000. *See* Afr. Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights*, *supra* note 70. Forty-two of forty-seven COE Member States ratified the European Convention on Human Rights prior to 2000. *See Chart of signatures and ratifications of Treaty 205: Convention for the Protection of Human Rights and Fundamental Freedoms (Status as of 04/09/2022)*, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005 (last visited Sept. 4, 2022).

[245] *See* Afr. Comm'n Hum. & Peoples' Rts., *Declaration of Principles on Freedom of Expression in Africa, Preamble*, Part IV, *supra* note 76 (recognizing "the right of access to information held by public bodies and companies" and detailing this right in Part IV); IACHR Declaration of Principles on Freedom of Expression, Principle 4 (Oct. 2000), http://www.oas.org/en/iachr/mandate/Basics/declaration-principles-freedom-expression.pdf; Abid Hussain, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36*, U.N. Doc. E/CN.4/2000/63, *supra* note 221, ¶ 43; Council of Europe Committee of Ministers, Rec. No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities (Nov. 25, 1981).

[246] *See Country Data*, GLOBAL RIGHT TO INFORMATION RATING, http://www.rti-rating.org/country-data/ (last visited Sept. 4, 2022).

[247] *See, e.g.*, Congreso de la República de Guatemala, Decreto Número 57-2008, http://www.rti-rating.org/wp-content/uploads/Guatemala.pdf; Right of Access to Information Act (2013), Act. No. 65, Laws of South Sudan, ¶ 4(2), https://www.rti-rating.org/wp-content/uploads/2018/09/South-

Additionally, as members of intergovernmental organizations' political organs, States themselves recognized a right of access to public documents in, for example, the Declaration on Human Rights Defenders,[248] the European Union Charter of Fundamental Rights,[249] and resolutions and recommendations on access to public information.[250] Similarly, in the context of the Universal Periodic Review, States have on many occasions recommended that their peers ensure access to public information in their national legislation.[251] Governments have framed these statements, principles, and recommendations in relation to human rights standards, meaning that they identify an obligation grounded in international human rights law to adopt access-to-information legislation. In 2004, for example, the OAS General Assembly encouraged Member States to "provide the citizenry with broad access to public information" through their laws or regulations, and directed the OAS Special Rapporteur for Freedom of Expression to assist interested States in developing such laws.[252] The resolution references human rights instruments[253] and "reiterate[s] that states are obliged to

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Sudan.RTI_.2013.pdf; Islamic Republic of Afghanistan, Access to Information Law (2019), https://www.rti-rating.org/wp-content/uploads/2020/01/Afghan.RTI_.Decree.May18.Amend_.Oct19.pdf (unofficial translation); Law on Free Access to Information (Montenegro), http://www.rti-rating.org/wp-content/uploads/Montenegro.pdf; Ley No. 18.381, Derecho de Acceso a la Información Pública (Uruguay), art. 1, http://www.rti-rating.org/wp-content/uploads/Uruguay.pdf; Loi organique no. 2016-22 du 24 mars 2016, relative au droit d'accès à l'information (Tunisia), http://www.rti-rating.org/wp-content/uploads/Tunisia.pdf; Accessibilite des documents, Droit d'acces (Luxembourg), art. 1 (2018), https://www.rti-rating.org/wp-content/uploads/2019/09/Luxembourg.RTI_.Sep18.pdf; Law of the Republic of Armenia on Freedom of Information, art. 6 (Sept. 23, 2003), http://www.rti-rating.org/wp-content/uploads/Armenia.pdf; Senate Bill No. 3308, Fourteenth Congress of the Republic of the Philippines (3 June 2009), https://legacy.senate.gov.ph/lis/bill_res.aspx?congress=14&q=SBN-3308. *See also* Ley de Transparencia y Acceso a la Información Pública, Decreto No. 170-2006 (Honduras), http://www.rti-rating.org/wp-content/uploads/Honduras.pdf.

[248] *See* Declaration on Human Rights Defenders, *supra* note 84, art. 6 (adopted in 1998).

[249] Charter of Fundamental Rights of the European Union arts. 11, 42, Dec. 18, 2000, 2000 O.J. (C364).

[250] *See, e.g.*, OAS G.A., AG/RES. 1932 (XXXIII-O/03), Access to Public Information: Strengthening Democracy (Jun. 10, 2003), http://www.oas.org/en/sla/dil/docs/AG-RES_1932_XXXIII-O-03_eng.pdf; Council of Europe Committee of Ministers, Rec.(2002)2 of the Committee of Ministers to Member States on access to official documents (Feb. 21, 2002), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c6fcc. While adopted in 2002 and 2003, these documents had been in development for years.

[251] *See, e.g.*, U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review: Marshall Islands*, U.N. Doc. A/HRC/46/14, Rec. 106.60 (Dec. 22, 2020) (recommendation by the Dominican Republic that the Marshall Islands "[t]ake the necessary measures to ensure freedom of access to public information and consider adopting relevant legislation). For additional recommendations, search the Universal Human Rights Index, https://uhri.ohchr.org/.

[252] OAS G.A., AG/RES. 2057 (XXXIV-O/04), Access to Public Information: Strengthening Democracy (Jun. 8, 2004), ¶¶ 1–3, 6, http://www.oas.org/en/sla/dil/docs/AG-RES_2057_XXXIV-O-04_eng.pdf.

[253] Inter-American Press Association, Declaration of Chapultepec, https://media.sipiapa.org/adjuntos/185/documentos/001/795/0001795833.pdf. The Declaration

respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application."[254] The African model law on access to information similarly refers to human rights standards.[255]

Taken together, the broad coverage of human rights treaties guaranteeing a general right of access to public information, the many intergovernmental statements recognizing and promoting this right, and the proliferation of national legislation provide strong evidence for the existence of a customary international norm.

Considering those standards, what are human rights mechanisms' policies and practices regarding access to information? The following sub-section examines the status quo among the relevant bodies, as compared to international norms, while also raising additional accessibility and transparency considerations that may go beyond the formal requirements of freedom of information standards.

B. Formal Rules on Information Accessibility

While only the OAS and COE have (limited) access-to-information policies, all the relevant IGOs and human rights mechanisms have instituted some rules and policies governing information transparency. These include standards regarding which documents are considered public or confidential, what information must be published, when translation is required, and what degree of accessibility is required for persons with disabilities.

1. Confidentiality and Classification

All human rights mechanisms keep their internal and deliberative documents confidential, and some also limit the publication of submissions or decisions.[256] For example, "[a]ll documents prepared by the deliberations of the

states, in Principle 3, "The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector."

[254] OAS G.A., AG/RES. 2057 (XXXIV-O/04), *supra* note 252, ¶ 2.

[255] *See* Afr. Comm'n Hum. & Peoples' Rts., Model Law on Access to Information for Africa, Preamble (2013), https://www.achpr.org/public/Document/file/English/Model%20Law%20on%20Access%20to%20Information%20for%20Africa%202013_ENG.pdf.

[256] *See, e.g.*, ACERWC, Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child, Rule 32 (2018), https://www.acerwc.africa/wp-content/uploads/2018/04/Revised-rules-of-procedures-final.pdf; Inter-Am. Ct. H.R., Rules of Procedure of the Inter-American Court of Human Rights, art. 15(2) (2009), https://www.corteidh.or.cr/reglamento.cfm?lang=en. *Cf.* Eur. Ct. H.R., Rules of Court, *supra* note 97, Rule 22 (2022).

[European Committee of Social Rights] . . . shall never be made public."[257] The Committee Against Torture, for instance, "may consider, at its discretion, that information, documentation and written statements received [regarding State implementation of the Convention] are confidential and decide not to make them public."[258]

Additionally, some mechanisms reserve the right to request that an individual or State keep a submission, complaint, or decision confidential.[259] In fact, the ACHPR has interpreted its founding treaty as prohibiting complainants from publishing their submissions or the ACHPR's decisions regarding a complaint until the African Union Assembly of Heads of State and Government approves the publication of the ACHPR's activity report announcing the final resolution of that complaint. The AU Executive Council has also directed the ACHPR to remove references to certain decisions from its activity reports, thereby precluding their publication.[260] This runs counter to the ACHPR's communications strategy, which identifies access to information as a core value and expresses an intent to "ensure that all decisions and actions of the ACHPR are accessible to the public, in order to fully comply with international standards on freedom of expression."[261]

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[257] Eur. Comm. Social Rts., Rules of Procedure, Rule 38 (2022), https://www.coe.int/en/web/european-social-charter/rules. *See also* Inter-Am. Comm'n H.R., Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 45, arts. 14(3), 20(1), 43(2) (2013). *See also* Eur. Ct. H.R., Access to case files (undated), https://www.echr.coe.int/Documents/Practical_arrangements_ENG.pdf.

[258] Committee Against Torture, Rules of Procedure, Rule 63(4), U.N. Doc. CAT/C/3/Rev.6 (Sept. 1. 2014), https://undocs.org/CAT/C/3/Rev.6.

[259] *See, e.g.*, U.N. Hum. Rts. Comm., Rules of Procedure of the Human Rights Committee, Rule 111(4), U.N. Doc. CCPR/C/3/Rev.12 (Jan. 4, 2021), https://undocs.org/CCPR/C/3/Rev.12; U.N. Comm. Rts. Persons with Disabilities, Rules of Procedure, Rule 76(4), U.N. Doc. CRPD/C/1/Rev.1 (Oct. 10, 2016), https://undocs.org/CRPD/C/1/Rev.1; Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure of the African Commission on Human and Peoples' Rights, *supra* note 97, Rule 118(4). *See also* Inter-Am. Ct. H.R., Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 257, art. 58(c).

[260] *See* African Charter on Human and Peoples' Rights, *supra* note 46, art. 59; Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure of the African Commission on Human and Peoples' Rights, *supra* note 97, Rule 118(4). For a discussion of the consequences of this requirement, *see* Dr. Ruth Nekura & Sibongile Ndashe, *Confidentiality or Secrecy? Interpretation of Article 59, and Implications for Advocacy on Pending Communications before the African Commission in* Equality Now, LITIGATING THE MAPUTO PROTOCOL: A COMPENDIUM OF STRATEGIES AND APPROACHES FOR DEFENDING THE RIGHTS OF WOMEN AND GIRLS IN AFRICA (K. Kanyali Mwikya, Carole Osero-Ageng'o & Esther Waweru eds., 2021), https://live-equality-now.pantheonsite.io/wp-content/uploads/2021/11/Compendium_of_Papers_on_the_Maputo_Protocol_Equality_Now_2020_Final.pdf. *See also Status of Communication 383/10, Al-Asad v. Djibouti, Before the African Commission on Human and Peoples' Rights*, CTR. HUM. RTS. & GLOBAL JUST. (July 6, 2020), https://chrgj.org/2020/07/06/status-of-communication-383-10-al-asad-v-djibouti-before-the-african-commission-on-human-and-peoples-rights/.

[261] Afr. Comm'n Hum. & Peoples' Rts., *Media Relations and External Communication Strategy for the African Commission on Human and Peoples' Rights* (2019) (on file with author). The ACHPR formally adopted the strategy at its 65th Ordinary Session in October – November 2019. *See* Afr.

2. Publication

Few specific rules govern the publication of different categories of documents, and there are few standards on timing or format. Critically, most bodies' rules do not mandate that public documents be made available online. The ECSR and ACHPR are exceptions, given that they require online publication of non-confidential documents.[262]

Regarding complaints, most human rights mechanisms require admissibility decisions and judgments to be made public, while keeping friendly settlement negotiations and initial review or screening decisions confidential.[263] For example, the AfCHPR's new Rules of Court generally require publication of pilot judgments, decisions, and requests for advisory opinions.[264] Some mechanisms do not disclose parties' submissions.[265]

Mechanisms' rules typically do not require logistical information to be published. An exception is the ACERWC, whose session agendas and related documents must be published "in the public domain at least [twenty-one] days before the opening of an Ordinary Session."[266]

3. Languages

IGOs and human rights mechanisms have official languages and working languages, but often do not clearly explain how these designations affect the availability of documents in those languages.[267] Some human rights mechanisms

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Comm'n Hum. & Peoples' Rts., *Final Communiqué of the 65th Ordinary Session of the African Commission on Human and Peoples' Rights* ¶ 35(v) (Nov. 10, 2019), https://www.achpr.org/sessions/info?id=317.

[262] *See, e.g.*, Eur. Comm. Social Rts., Rules of Procedure, *supra* note 257, Rule 35(5); Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure, *supra* note 97, Rule 21(d), (i).

[263] *See, e.g.*, Eur. Ct. H.R., Rules of Court, *supra* note 97, Rule 104A (providing that "[a]ll judgments, all decisions and all advisory opinions shall be published" except, *inter alia*, single-judge decisions); Inter-Am. Comm'n H.R. Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 45, Rule 40(5) (publication of friendly settlements) and Rule 44 (publication of merits decisions).

[264] Afr. Ct. Hum. & Peoples' Rts., Rules of Court, *supra* note 97, Rules 21(2)(q), 66(5), 76(1), 83(2).

[265] *Compare* Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure, *supra* note 97, Rule 24(1) (mandating confidentiality of case files) *with* Inter-Am. Ct. H.R. Rules of Procedure, *supra* note 256, art. 32(1)(b) (requiring the Court to make public the "documents from the case file, except those considered unsuitable for publication").

[266] ACERWC, Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child, *supra* note 256, Rule 35(2). *See also* Inter-Am. Comm'n H.R. Rules of Procedure, *supra* note 45, arts. 64(4), 66(5).

[267] *Cf. Minimum standards for multilingualism of United Nations websites*, U.N., https://www.un.org/en/sections/web-governance/minimum-standards-multilingualism-united-nations-websites/index.html (last visited Sept. 4, 2022).

formally require translation of certain documents into all official languages,[268] though they may not always comply with this requirement in practice. Others leave the public guessing as to which languages they will use, as is the case at the IACtHR and ACERWC, which retain the option of choosing one or more unspecified working languages.

4. Accessibility for Persons with Disabilities

Most human rights mechanisms have not formally addressed accessibility to their documents or information for persons with disabilities, with several key exceptions.[269] The United Nations Human Rights Council instructed the Special Rapporteur on the rights of persons with disabilities to produce reports "in accessible formats, including Braille and easy-to-read reports, and international sign language interpretation and closed captioning during the presentation of the reports."[270] Some treaty bodies specify that their public records should be made available in "accessible formats."[271] The Committee on the Rights of Persons with Disabilities, in particular, has in place requirements to increase the accessibility of its activities and information.[272]

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[268] *See, e.g.*, Afr. Ct. Hum. Peoples' Rts., Rules of Court, *supra* note 97, Rule 76.
[269] *Cf.* G.A., Res. 61/106: Convention on the Rights of Persons with Disabilities, U.N. Doc. A/RES/61/106, ¶ 4 (Dec. 13, 2006), https://undocs.org/A/RES/61/106; *Accessibility Guidelines for UN Websites*, U.N., https://www.un.org/en/webaccessibility/ (last visited Sept. 4, 2022).
[270] *See* U.N. Hum. Rts. Council, Res. 44/10, *Special Rapporteur on the rights of persons with disabilities*, U.N. Doc. A/HRC/RES/44/10 (July 16, 2020), https://undocs.org/A/HRC/RES/44/10.
[271] *See, e.g.*, U.N. Comm. Rts. Persons with Disabilities, Rules of Procedure, *supra* note 259, Rule 27(4).
[272] *Id.*, Rules 7, 24, 25.

Public Availability of Written Rules or Policies, as of April 2021:

Entity	Access to Information	Data Protection	Encryption	Confidentiality /Classification	Website Privacy	Translation△	Publication △	Timing of Publication △	Info Request Procedure	Unlimited Classification Discretion	Requesting Confidentiality of Others	Accessibility	Availability of Recordings
UN	✗	✗	✗	✓	✓	✓	✗	✗	✗	✗	✗	✓	✗
OHCHR	✗	✗	✗	✓	✗	✗	✗	✗	✓◆	✗	✗	✗	✗
CAT	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✗	✗	✗
CED	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✓	✗	✗
CEDAW	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✓	✗	✗
CERD	✗	✗	✗	✗	✗	✓	✗	✗	✗	✓	✗	✗	✗
CESCR	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✓	✗	✗
CMW	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✗	✗	✗
CRC	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✗	✗	✓
CRPD	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✓	✓	✗
HRC	✗	✗	✗	✗	✗	✓	✓	✗	✗	✓	✓	✗	✗
SPs	✗	✗	✗	✗	✗	✗	✗✢	✗	✗	✗	✗	✗*	✗
AU	✗	✗	✗	✗	✗				✗			✗	✗
ACERWC	✗	✗	✗	✗	✗	✗	✓	✓	✗	✓		✗	✗
ACHPR	✗	✗	✗	✗	✗	✗	✓	✓	✗	✓	✓	✗	✗
AfCHPR	✗	✗	✗	✗	✗	✓	✓	✓	✗			✗	✗
OAS	✓	✗	✗		✗		✗	✗	✓	✗	✗	✗	✗
IACHR	✗	✗	✗	✗	✗	✗	✓	✓	✗	✓	✓	✗	✗
IACtHR	✗	✗	✗	✗	✗	✗	✓	✗	✗	✓	✓	✗	✗
COE	✓	✓	✗	✓	✓				✓	✗	✗	✓	✗
Comm'r	✗	✓○	✗	✗	✓○	✗	✗	✗	✗	✗	✗	✓○	✗
ECSR	✗	✓○	✗	✗	✓○	✗	✓	✗	✗	✓	✗	✓○	✗
ECtHR	✗	✓	✗	✓□	✓	✓	✓	✗	✓	✗	✗	✗	✗

△ Of certain documents.

○ Policy adopted by the "parent" intergovernmental organization.

□ Policy exists, but is not made publicly available.

◆ Policy is limited to classified records.

* The Special Rapporteur on the rights of persons with disabilities is an exception.

✢ The Working Group on Arbitrary Detention is an exception.

C. Availability of Necessary Information in Practice

In scope or implementation, the few existing rules on information accessibility are of limited value to advocates for three primary reasons. First, human rights mechanisms routinely fail to abide by some of their own rules, especially rules governing translation. Second, advocates depend on information and documents, such as treaty ratifications, session dates, or staff contacts, that are not covered by the rules and are unevenly available. Third, the relevant rules do not address formatting, organization, or presentation of information, which all have significant consequences for accessibility. Table 2 compares human rights mechanisms' online publication of certain documents and information, as well as their translation and searchability. The following subsections review these practical concerns, provide examples, and identify common gaps.

1. Publication of Critical Information

Human rights mechanisms publish a great deal of information on their websites. This information includes the texts of their treaties, rules and other basic documents, ratification information, judgments and decisions, opportunities for input and participation, recordings, and institutional information and contacts. Inconsistency, inaccuracy, untimeliness, and incompleteness in publishing practices cause the key gaps in the accessibility of this information.

Inconsistencies arise within and across human rights mechanisms. The ECtHR, for example, issues press releases announcing judgments in some cases, but not all.[273] The ACERWC posts some of its session videos to YouTube[274] and others to Facebook,[275] but none on its own website. In an example of disparate practices, the IACtHR and ECSR publish incoming complaints or related briefs while other bodies do not, even when those documents are not classified as confidential.[276]

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[273] *See, e.g.*, Press Release, Eur. Ct. of H.R., Judgments of 16.03.2021 (Mar. 16, 2021), http://hudoc.echr.coe.int/eng-press?i=003-6965141-9374633 (announcing four judgments and identifying individual press releases on four other judgments announced the same day). The decision to issue a case-specific press release does not entirely correspond to the scale used to identify the "importance level" of judgments.

[274] *See* ACERWC, YOUTUBE, https://www.youtube.com/channel/UC06SYs77p7tTLK1rL_3XyYg/videos (last visited Sept. 4, 2022).

[275] ACERWC, FACEBOOK, https://www.facebook.com/pg/acerwc/videos/?ref=page_internal (last visited Sept. 4, 2022).

[276] *See, e.g.*, *Escritos principales de Casos con Sentencia*, INTER-AM. CT. OF H.R., https://corteidh.or.cr/listado_escritos_principales.cfm (last visited Sept. 4, 2022); *Pending complaints*, EUR. COMM. SOCIAL RTS., https://www.coe.int/en/web/european-social-charter/pending-complaints (last visited Sept. 4, 2022); *Processed complaints*, EUR. COMM. SOCIAL RTS.,

Inaccuracies also plague human rights mechanisms' online information. For example, the ACHPR's map of the continent does not portray South Sudan[277] and the list of ratifications[278] indicates that the State never deposited an instrument of ratification of the African Charter on Human and Peoples' Rights. In reality, South Sudan ratified the Charter in 2013 and deposited its instrument of ratification in 2016.[279] Someone relying on the ACHPR's information would erroneously believe that South Sudan does not have any regional human rights obligations and, moreover, is not subject to the jurisdiction of the ACHPR.

Publication lag time varies across human rights mechanisms, but is particularly detrimental to civil society participation. For example, the ACHPR often announces its country visits on its website only a few days in advance.[280] Even when advocates are aware of an opportunity and request to participate in a country visit, they may only have a week's notice that they will be allowed to participate.[281] Considering that human rights mechanisms have vast geographic jurisdiction, such short notice may be inadequate for many advocates to prepare for in-person participation. In two studies carried out between 2017 and 2019, advocates recommended that the Inter-American and African human rights commissions provide greater advance notice of upcoming sessions and other activities, increase the accessibility of such notices, and clarify the requirements and modes of participation.[282]

Finally, incomplete or missing information hampers advocates' engagement and the public's familiarity with human rights mechanisms.[283] Information on personnel[284] and on elected members' term dates and election

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https://www.coe.int/en/web/european-social-charter/processed-complaints (last visited Sept. 4, 2022).

[277] *African Charter on Human and Peoples' Rights*, AFR. COMM'N HUM. & PEOPLES' RTS.; https://www.achpr.org/legalinstruments/detail?id=49 (last visited Sept. 4, 2022) (showing a unified Sudan).

[278] *Ratification Table: African Charter on Human and Peoples' Rights*, AFR. COMM'N HUM. & PEOPLES' RTS., https://www.achpr.org/ratificationtable?id=49 (last visited Sept. 4, 2022).

[279] Afr. Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Human and People's Rights*, *supra* note 70.

[280] *See* INT'L JUST. RES. CTR., CIVIL SOCIETY ACCESS TO INTERNATIONAL OVERSIGHT BODIES: AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, *supra* note 29, at 30.

[281] *See, e.g.*, INT'L JUST. RES. CTR., CIVIL SOCIETY ACCESS TO INTERNATIONAL OVERSIGHT BODIES: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *supra* note 29, at 24, 41.

[282] *See id.*

[283] Recognition of this challenge can also be inferred from, *inter alia*, the IACHR's joint "roadmap" on coordination with the U.N. Committee on Enforced Disappearances, which commits both mechanisms to "[i]nstitutionalized information sharing" with regard to their outputs, secretariat staff, contacts, session dates, and other details. *See* Inter-Am. Comm'n H.R. & U.N. Human Rights Treaty Bodies, *Roadmap on the Coordination between the United Nations Committee on Enforced Disappearances and the Inter-American Commission on Human Rights* 4 (Dec. 16, 2021), https://www.oas.org/en/iachr/media_center/preleases/2021/Roadmap_CED_IACHR_ENG.pdf.

[284] *Compare The Secretariat*, ACERWC, https://www.acerwc.africa/the-secretariat/ (last visited Sept. 4, 2022) (listing personnel); *Commissioner for Human Rights, Who Is Who*, COUNCIL OF

cycles is often limited, particularly among regional mechanisms.[285] The ECtHR, for instance, indicates when each judge's term began, but not when it will end.[286] No human rights mechanism provides, or links to, information on upcoming member elections. For example, one needs to know to look for the African Union Executive Council's draft session agenda[287] to see whether it will elect ACHPR or AfCHPR members.

2. Website Organization and Functionality

The organization of human rights mechanisms' websites poses its own challenges. No two human rights body websites are alike, and many are not intuitive. For example, the date of ACHPR sessions that are more than a few weeks in the future can be found only in the "final communiqué" from the Commission's most recent session, and not in the text of its "Sessions" webpage.[288] The ACERWC's "Legal Instruments" webpage is blank, but its general comments can be found, in random order, under the tab "Our Work."[289] The United Nations Human Rights Committee and other treaty bodies share their most recent decisions on complaints at the bottom of the webpage for the session during which those decisions were adopted, and not in their "Jurisprudence

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EUROPE, https://www.coe.int/en/web/commissioner/who-is-who (last visited Sept. 4, 2022) (listing personnel); *Staff*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/mandate/staff.asp (last visited Sept. 4, 2022) (listing personnel); *and Human Resources*, INTER-AM. CT. H.R., https://corteidh.or.cr/recursos_humanos.cfm (last visited Sept. 4, 2022) (not listing personnel); *with Structure*, AFR. COMM'N HUM. & PEOPLES' RTS., https://www.achpr.org/structure (last visited Sept. 4, 2022) (indicating that the ACHPR has a Secretary and Secretariat, but not identifying those individuals or other personnel). *See also Registrars & Deputy Registrars of the ECHR*, EUR. CT. H.R., https://www.echr.coe.int/Pages/home.aspx?p=court/registrars&c= (last visited Sept. 4, 2022) (identifying Registrar and Deputy Registrar, but no other personnel).

[285] *Cf. Elections of Treaty Body Members*, OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/EN/HRBodies/Pages/ElectionsofTreatyBodiesMembers.aspx (last visited Sept. 4, 2022); *Nomination, Selection and Appointment of Mandate Holders*, OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/EN/HRBodies/HRC/SP/Pages/Nominations.aspx (last visited Mar. 19, 2021) (providing detailed information and schedules on elections and composition).

[286] *See Composition of the Court*, EUR. CT. H.R., https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c= (last visited Sept. 4, 2022) (this page does link to or provide additional information on the election process, generally).

[287] *See, e.g.*, Afr. Union, Executive Council, Draft Agenda: Thirty-Eight Ordinary Session, Feb. 3-4, 2021, https://au.int/sites/default/files/documents/39915-doc-ex_cl_draft_1_xxxviii_e.pdf.

[288] *See, e.g.*, Afr. Comm'n Hum. & Peoples' Rts., *Final Communiqué of the 69th Ordinary Session of the African Commission on Human and Peoples' Rights* ¶ 51 (Dec. 5, 2021) (identifying the dates and format for the Commission's next session, the 70th Ordinary Session), https://www.achpr.org/sessions/info?id=377.

[289] *Resources, Legal Instruments*, ACERWC, https://www.acerwc.africa/legal-instruments/ (last visited Sept. 4, 2022); *Our Work, General Comments*, ACERWC, https://www.acerwc.africa/general-comments/ (last visited Sept. 4, 2022).

database" or list of "Recent jurisprudence."[290] Such practices reduce the visibility and accessibility of the mechanisms' work.

3. Searchability

Most human rights mechanisms' websites have limited search tools, but they are an improvement over what existed a decade ago.[291] At one end of the spectrum are the COE's HUDOC databases, including for the ECtHR[292] and ECSR,[293] which are highly searchable and filterable and contain most official outputs. On the other end of the spectrum is the IACHR's website,[294] which until recently only included a general search bar and did not allow users to filter results. The IACHR website now allows users to "search" its decisions,[295] but—like the ACHPR's website—this function returns results based only on the names of cases and petitions, rather than the full textual content.

4. Document Formats and Linking

A separate but related concern is the formatting and searchability of individual documents. For instance, the AfCHPR, for many years, published scanned images of its judgments that were not machine-readable.[296] This means,

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[290] For example, the views on complaints adopted by the Human Rights Committee at its October-November 2020 session, as of September 2022, were only listed on the 130 Session webpage (https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1375&Lang=en) but did not appear in the Jurisprudence Database (https://juris.ohchr.org/en/Search/Documents), which listed decisions from July 2020 and earlier.

[291] Users can conduct an advanced search of the ECtHR website, using full-text, title, or date fields, and filtering by type of document, webpage, State, and other criteria. *See Search*, EUR. CT. H.R., https://www.echr.coe.int/sites/search_eng/pages/search.aspx (last visited Sept. 4, 2022).

[292] *Eur. Ct. H.R.*, HUDOC, https://hudoc.echr.coe.int/eng# (last visited Sept. 4, 2022) (database of all published content, searchable in full-text and filterable by multiple criteria, including State involved, keyword, and judge).

[293] *European Social Charter*, HUDOC, https://hudoc.esc.coe.int/ (last visited Sept. 4, 2022) (including all complaints, decisions, and conclusions on State reports, as well as follow-up).

[294] *See* INTER-AM. COMM'N H.R., https://www.oas.org/en/iachr/default.asp (last visited Sept. 4, 2022) (see the search bar in the top right corner).

[295] Additionally, while in 2021 the IACHR announced, and linked to, a new searchable database of its decisions created and maintained by the Rule of Law Program for Latin America of the Konrad Adenauer Stiftung, the database is available in Spanish only and the scope of its contents are not clearly identified. *See* IUSLAT, https://www.iuslat.com/#search-advanced/content_type:2/* (last visited Sept. 4, 2022).

[296] *Compare* Mohamed Selemani Marwa v. Tanzania, App. No. 014/2016 (Afr. Ct. Hum. & Peoples' Rts. Dec. 2, 2021), https://www.african-court.org/cpmt/storage/app/uploads/public/61b/73f/214/61b73f214df12497608780.pdf (machine readable) *with* Michelot Yogogombaye v. Senegal, App. No. 001/2008 (Afr. Ct. Hum. & Peoples' Rts. Dec. 15, 2009), https://www.african-court.org/cpmt/storage/app/uploads/public/62a/c6b/570/62ac6b57004ca870862237.pdf (not machine readable).

among other consequences, that a reader cannot use the "Control+F" function to search through text. Other mechanisms upload some documents only in Word format,[297] meaning that any link directly downloads the document rather than displaying it in a browser window. Automatic downloads may make individuals uneasy because of the possibility that the document might be infected with a virus. Downloaded Word documents are also more cumbersome to access and share than links because the formatting may change (or be altered) and because they can only be disseminated via email or a file sharing tool. These additional steps in accessing or sharing a document also introduce opportunities for viruses or malware to spread.[298]

More broadly, few mechanisms hyperlink to materials referenced in their decisions and other outputs. A merits decision, for example, typically will not include a hyperlink to the preceding admissibility decision or to any of the precedents cited.[299] The lack of connectivity between documents can make it difficult or labor intensive to locate related decisions, particularly if the case name changes or the citation to a prior decision is incomplete.

5. Link Rot and Website Changes

As with all online content, human rights mechanisms' websites suffer from instances of link rot—when hyperlinks stop leading to the intended file or webpage because the content has been moved or taken down. Though sometimes a link to an external site stops working,[300] link rot is more often attributable to human rights mechanisms' practices. For example, in 2013, the OHCHR completed a new website but failed to ensure that links to its prior site would redirect to this new site. Instead, visitors to some prior pages are greeted with a

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[297] For example, the IACHR's merits decisions from 2010 to 2013 download directly as Word documents, only, with no option to open the document in a web browser or download a PDF. *See generally Merits Reports*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/decisions/merits.asp (last visited Sept. 4, 2022).

[298] *See, e.g.*, *Protect yourself from macro viruses*, MICROSOFT, https://support.microsoft.com/en-us/office/protect-yourself-from-macro-viruses-a3f3576a-bfef-4d25-84dc-70d18bde5903 (last visited Sept. 4, 2022).

[299] *See, e.g.*, *Virgilio Maldonado Rodriguez v. United States of America*, Inter-Am. Comm'n H.R., Report No. 333/21, OEA/Ser.L/V/II, doc. 343 (2020), https://www.oas.org/en/iachr/decisions/2021/USPU12871EN.pdf.

[300] *See, e.g.*, *Human Rights Committee*, OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/treaty-bodies/ccpr (last visited Sept. 4, 2022) (see the External Links section in the right sidebar, featuring a link to "Amnesty International" that no longer works (http://web.amnesty.org/pages/treaty-countries-ai-eng)). *See also supra* note 8 (IACHR videos hosted by OAS no longer work).

404 message reading "File or directory not found"[301] or a 403 message saying "Forbidden: Access is denied."[302] Readers of the OHCHR brochure on United Nations human rights treaty bodies, which is still featured on the OHCHR website, receive a 404 message if they click on the links for more information.[303] While most links continue to work following the OHCHR's March 2022 website redesign, many files are no longer accessible, some pages no longer exist, and some links lead to error messages.[304] Regional mechanisms have also broken many links when launching new websites, leading to additional link rot.[305]

Other digital detritus includes abandoned social media accounts, like the OHCHR's former official Twitter handle @UNrightswire,[306] and channels that human rights mechanisms use inconsistently. For example, the IACtHR website links to its videos on both YouTube and Vimeo, but the former channel includes more recent videos than the latter.[307]

6. Erasure of History and Historical Documents

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[301] The old site's address for Human Rights Council annual reports (https://www2.ohchr.org/english/bodies/hrcouncil/annual_reports.htm) leads to a 404 message. It should redirect here https://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx.

[302] The old address for the Human Rights Council (http://www2.ohchr.org/english/bodies/hrcouncil/) leads to a 403 message.

[303] *See* Off. High Comm'r Hum. Rts., *The United Nations Human Rights Treaty System: Fact Sheet No. 30 (Rev. 1)* (2012), https://digitallibrary.un.org/record/735527?ln=en, p. 46 (linking to http://www2.ohchr.org/english/bodies/treaty/newsletter_treaty_bodies.htm). Following the March 2022 redesign of the OHCHR website, the former link to the Fact Sheet itself (https://www.ohchr.org/documents/publications/factsheet30rev1.pdf), which appears in the Google Search results for the publication name, also no longer works, leading instead to a page that says "The requested page could not be found."

[304] For example, as of September 2022, the prior link for the OHCHR webpage on the Human Rights Council (https://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx) now leads to a blank page with the words "Default title" and the page can be found at a different URL (https://www.ohchr.org/en/hrbodies/hrc/home). *See also* discussion *supra* notes 23, 87, and 140 (referring to links broken in the OHCHR's March 2022 website redesign).

[305] For example, the prior link to the advisory opinions page on the AfCHPR's website (http://www.african-court.org/en/index.php/cases/2016-10-17-16-19-35) now redirects to the new homepage (https://www.african-court.org/wpafc/). Additionally, the prior link to the host agreement between Tanzania and the AfCHPR (https://en.african-court.org/images/Protocol-Host%20Agrtmt/agreement-Tanzania%20and%20AU.pdf) is broken and returns an "Internal Server Error" message.

[306] *U.N. Human Rights, Twitter*, INTERNET ARCHIVE, https://web.archive.org/web/20130314210702/https://twitter.com/UNrightswire (Mar. 14, 2013). *See also* AfricanCommissionHPR, TWITTER, https://twitter.com/ACHPR (last used in December 2012; replaced by https://twitter.com/achpr_cadhp); IACHR, TWITTER, https://twitter.com/IACHumanRights (last used in December 2019); U.N. Human Rights LIVE, TWITTER, https://twitter.com/UNrightsLIVE (last used in November 2015).

[307] *Compare* Corte Interamericana de Derechos Humanos, YOUTUBE, https://www.youtube.com/channel/UCD1E1io4eeR0tk9k4r5CI9w/featured (showing hearings from the August 2022 session and other videos) *with* Corte IDH, VIMEO, https://vimeo.com/corteidh (most recent video is from June 2021).

In addition to failing to redirect or update online content, some human rights mechanisms have a tendency to post content in temporary, ephemeral ways, thus erasing their own history, complicating research, and obscuring practical details that are useful to advocates. This happens when mechanisms delete content or links, such as when the AfCHPR issued new Rules of Court and removed links to the old Rules, leaving litigants in the dark as to what the prior rules said.[308]

The OHCHR, in particular, does this with time-specific information, such as the logistics of country visits and sessions. For example, prior to her visit to Canada in 2018, the United Nations Special Rapporteur on violence against women issued a call for inputs[309] in which she identified her key areas of focus. Such calls are not linked to any webpage or publication,[310] and they are undated, not given United Nations document numbers, and excluded from the online archives, so they are only discoverable by those who already have the link or know to look for them.[311]

7. Accessibility for Persons with disabilities

While some intergovernmental organizations have implemented design criteria[312] to facilitate use of their websites by persons with disabilities, most human rights mechanisms have not.[313] In 2016, the United Nations Special

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[308] *Basic Documents*, AFR. CT. HUM. PEOPLES' RTS., https://www.african-court.org/wpafc/documents/ (last visited Sept. 4, 2022) (listing only the 2020 Rules and not the prior version).

[309] *Call for submission – Visit to Canada, April 2018*, INTERNET ARCHIVE, https://web.archive.org/web/20180514021850/http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/VisitCanada.aspx (May 14, 2018). Following the March 2022 redesign of the OHCHR website, the link to this call (https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/VisitCanada.aspx) no longer works.

[310] *Cf.* Press Release, Off. High Comm'r Hum. Rts., *UN Expert on Violence against Women to Visit Canada* (Apr. 9, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22929&LangID=E; *SR Women, Country Visits*, OFF. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/special-procedures/sr-violence-against-women/country-visits.

[311] *See Official Document System, Help*, U.N., https://documents.un.org/prod/ods.nsf/xpHelp.xsp (last visited Sept. 4, 2022) (explaining that the Official Document System does not include "unsymbolled documents").

[312] *See Accessibility Guidelines for UN Websites*, U.N., https://www.un.org/en/webaccessibility/index.shtml (last visited Sept. 4, 2022); *Accessibility*, Council of Europe, https://juris.ohchr.org/en/About/accessibility/ (last visited Sept. 4, 2022).

[313] The OHCHR Jurisprudence Database includes a link marked "accessibility" which leads to a page noting that "this website was developed and is maintained using World Wide Web Consortium (W3C) guidelines for accessibility" and invites users to contact OHCHR for more information or assistance. *Jurisprudence: Accessibility*, OFF. HIGH COMM'R HUM. RTS., https://juris.ohchr.org/en/About/accessibility/ (last visited Sept. 4, 2021). For an explanation of website accessibility and relevant standards, *see* Catherine Eastern, *Revisiting the Law on Website Accessibility in Light of the UK's Equality Act 2010 and the United Nations Convention on the Rights of Persons with Disabilities*, 20 INT. J. L. & TECH. 1 (2012), 19-47.

Rapporteur on the rights of persons with disabilities noted the widespread failure to make information accessible in practice: "Generally, decision-making bodies and mechanisms neither produce nor disseminate information in accessible formats (such as easy-to-read), nor do they ensure the availability of sign language interpretation, guide interpreters for deafblind persons, or captioning during public debates."[314] The Special Rapporteur also noted that the participation of persons with disabilities depends on "the availability of procedures and information in accessible formats" and accordingly urged the United Nations and regional bodies to "increase efforts in this regard."[315] So far, unfortunately, no human rights mechanism appears to have heeded her call.

8. Translations

Regardless of their language policies, all mechanisms favor a language and that language is almost always English.[316] For example, among United Nations human rights treaty bodies, recent documentation is often available only in English.[317] Additionally, the IACHR, which operates primarily in Spanish, typically translates into Portuguese only its decisions regarding Brazil.[318] Similarly, the AfCHPR only rarely publishes Portuguese or Arabic versions of its judgments.[319] In some instances, human rights mechanisms have ordered States to translate human rights decisions into Indigenous or minority languages, but then do not publish those translations on their own websites.[320]

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[314] Catalina Devandas Aguilar, *supra* note 234, ¶ 76.
[315] *Id*. at ¶ 93.
[316] For example, as of September 4, 2021, the ECtHR's database contained 9,520 press releases in English and 7,396 in French. *See European Court of Human Rights: Press*, HUDOC, https://hudoc.echr.coe.int/eng-press#%20 (last visited Sept. 4, 2021).
[317] *See, e.g.*, *CERD - International Convention on the Elimination of All Forms of Racial Discrimination, 107 Session (08 Aug 2022 – 30 Aug 2022)*, OFF. HIGH COMM'R HUM. RTS., https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2556&Lang=en (last visited Sept. 4, 2022) (listing session document links, which mostly show only English-language versions when opened).
[318] *See Informes de Admissibilidade: 2019*, INTER-AM. COMM'N H.R., http://www.oas.org/pt/cidh/decisiones/admisibilidades.asp?Year=2019 (last visited Sept. 4, 2021).
[319] *See generally*, *AFCHPR Cases: Finalised Cases*, AFR. COMM'N HUM. & PEOPLES' RTS., https://www.african-court.org/cpmt/finalised (last visited Sept. 4, 2021) (with English, French, Portuguese, and Arabic interfaces, although documents are not all available in those languages).
[320] *See, e.g.*, *Garífuna Punta Piedra Community and Its Members v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 304 (Oct. 8, 2015), http://www.corteidh.or.cr/docs/casos/articulos/seriec_304_esp.pdf.

Online Publication of Certain Documents and Information, as April 2021

Entity	Instruments	Ratifications	Decisions & Opinions	Announcement of Decisions	Complaints & Briefs	Other Inputs ○	Translation of Outputs	Search *	Sessions & Opportunities	Recordings	Election Details △	Term Dates □	Staff & Titles
UN	✓	✓	-	-	-	-	-	○	✓	✓	○	○	✗
OHCHR	✓	○	-	-	-	✓	○	○	✓	✗	✗	✗	✗
CAT	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
CED	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
CEDAW	✓	○	✓	○	✗	✓	○	○	○	✓	✓	✓	✗
CERD	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
CESCR	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
CMW	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
CRC	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
CRPD	✓	○	✓	○	✗	✓	○	○	○	✓	✓	○	✗
HRC	✓	○	✓	○	✗	✓	○	○	○	✓	✓	✓	✗
SPs	✓	-	○	✗	✗	○	○	○	○	✗	✓	○	✗
AU	✓	○	-	-	-	-	○	✗	○	○	○	○	✗
ACERWC	✓	✓	✓	✗	✗	✗	○	✗	○	✗	✗	○	✓
ACHPR	✓	○	○	✗	✗	✗	○	○	○	○	✗	✗	✗
AfCHPR	✓	✓	✓	✓	✗	-	○	✗	○	○	✗	○	✗
OAS	✓	✓	-	-	-	-	○	○	✓	✓	✗	✗	✓
IACHR	✓	○	✓	○	✗	✗	○	○	○	○	✗	✓	○
IACtHR	✓	○	✓	✓	○	-	○	✗	✓	○	✗	✗	✗
COE	✓	✓	-	-	-	-	○	○	✓	○	✗	✗	✓
Comm'r	✓	-	-	-	-	-	○	✗	✗	○	✗	○	✓
ECSR	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	✗	○	✗
ECtHR	✓	○	✓	○	✗	-	○	✓	✓	○	✗	✗	✗

○ Inconsistently available or incomplete.
- Not applicable.
○ Refers to submissions by civil society, including for purposes of State reviews, thematic reports, or country visits.
* Indicates existence of a searchable database or other tool for finding particular documents, beyond a basic search bar on the website.
△ Refers to information on the timing, process, and candidates in the election of human rights bodies' members or intergovernmental organization's secretary, on the entity's own website.
□ Where current and former term dates (start and end) are readily available.

D. Assessment of Human Rights Mechanisms' Practices

How do the access-to-information policies and practices of human rights mechanisms stack up against international norms? The answer: very poorly. Human rights mechanisms' information falls within the scope of access-to-information standards. Multiple national and international interpretations expressly require the disclosure of information on human rights violations and investigations (or, rather, prohibit exceptions to disclosure of such information).[321] Moreover, the United Nations Human Rights Committee and other entities have specified that individuals have a right of access to information with respect to any public body, including intergovernmental organizations.[322] Even the ECtHR's more limited understanding of the right of access to information extends to civil society organizations seeking information for the purposes of advocating for human rights. However, while IGOs and human rights mechanisms do share considerable information online, they fail to satisfy the most fundamental components of access to information, which include having an established policy and process.

Yet even adherence to international standards might not be enough. Or perhaps a discussion focused on the legal application of those standards "misses the most salient points."[323] After all, human rights mechanisms are only as effective as they are accessible; human rights advocates can only hold governments accountable to those standards, or via those mechanisms, that they know of and understand. Moreover, transparency is an essential component of trust. Individuals would not be expected to put their faith in national courts whose members are selected in secret, nor would they be eager to solicit the help of a national human rights institution that does not operate in some of the major languages of its jurisdiction. Generally speaking, people cannot just show up at the doorstep of a human rights body to find out who to talk to or to request the

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[321] *See, e.g.*, OAS, Inter-American Model Law 2.0 on Access to Public Information, art. 27, https://www.oas.org/en/sla/dil/docs/publication_Inter-American_Model_Law_2_0_on_Access_to_Public_Information.pdf. *See also Country Data*, GLOBAL RIGHT TO INFORMATION RATING, *supra* note 247 and national laws of Bangladesh, Guatemala, India, Kenya, Tunisia, and Uruguay cited therein.

[322] *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 34, *supra* note 73, ¶ 7; UNESCO, Brisbane Declaration: Freedom of Information – The Right to Know (2010); OFF. HIGH COMM'R HUM. RTS., *Factsheet: Access to Information*, *supra* note 223 (stating, "The right of access to information equally applies within and towards international organizations, such as the United Nations"). *Contrast* Alan Boyle & Kasey McCall-Smith, *Transparency in International Law-making*, *in* TRANSPARENCY IN INTERNATIONAL LAW 419–35, 434-35 (Andrea Bianchi & Anne Peters eds., 2013) (arguing "it is doubtful whether the principle of access to information has any direct application to international organizations or treaty bodies: they may choose to make a great deal of information available, but there is only a limited basis for compelling them to do so").

[323] David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, *supra* note 211, ¶ 18.

information they need. The headquarters in Geneva, Banjul, Washington, and Strasbourg are thousands of miles from many of the people whose rights they protect and even for those who make the journey, a contact, an appointment, and identification are likely to be required. In their online presence, then, human rights mechanisms should meet a higher standard of transparency, whether or not required by international law. Their legitimacy depends on it.

E. Benefits and Challenges of Outside Resources and Tools

Given the gaps in access to human rights mechanisms' information, third parties have stepped in to fill the void.[324] Academic institutions, non-governmental organizations, governments, and others have built databases of different categories of human rights documents, with a particular focus on case law. Some databases, such as African Human Rights Case Law Analyser[325] and WorldCourts,[326] upload machine-readable versions of international courts' and human rights mechanisms' decisions and make them searchable and filterable using multiple criteria. Others, such as the Columbia Global Freedom of Expression Case Law database[327] and ESCR-Net Caselaw Database[328] offer a searchable collection of summaries of select significant decisions from international (and national) bodies, along with links to the primary documents. Some other databases include resolutions, general comments, policy documents, and other outputs from intergovernmental and human rights mechanisms, often in connection with a particular theme.[329]

These databases vastly improve access to human rights mechanisms' documents and have pushed forward the free-access-to-law movement[330] more broadly, setting new standards for transparency, accessibility, and user

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[324] The author is on the board of Human Rights Information and Documentation Systems (HURIDOCS), one of the organizations building libraries of human rights legal documents.
[325] *See* AFRICAN HUMAN RIGHTS CASE LAW ANALYSER, http://caselaw.ihrda.org/.
[326] *See* WORLDCOURTS, http://worldcourts.com/.
[327] *See Global Freedom of Expression: Case Law*, COLUMBIA UNIVERSITY, https://globalfreedomofexpression.columbia.edu/cases/.
[328] *See Caselaw Database*, ESCR-NET, https://www.escr-net.org/caselaw.
[329] *See, e.g.*, RIGHTDOCS, https://www.right-docs.org/ (containing Human Rights Council resolutions and reports to the Council, including by special procedure mandate holders); *Girls' Rights Platform*, PLAN INTERNATIONAL, https://database.girlsrightsplatform.org/en/library (containing a multitude of U.N. and regional documents on girls' rights under international law); REFWORLD, https://www.refworld.org/cgi-bin/texis/vtx/rwmain (containing documentation related to country conditions and international law and policy documents related to refugee rights).
[330] In this regard, an enormous debt is owed to the Legal Information Institutes, which also increasingly provide access to international caselaw. For a brief history of the LIIs and free access to law movement, *see* Graham Greenleaf, Philip Chung & Andrew Mowbray, *UPDATE: Legal Information Institutes and the Free Access to Law Movement* (Feb. 2018), GLOBALEX, https://www.nyulawglobal.org/globalex/Legal_Information_Institutes1.html.

experience. Some of the key innovations of these tools are greater visibility of (and user interaction with) metadata: displaying the relationships between documents, hyperlinking references in the text, and using machine learning applications to improve online searching. However, external databases often have their own limitations in terms of scope, timeliness, language versions, and search functionality.

External databases raise fundamental questions. One key concern is whether these databases provide an excuse for intergovernmental organizations and human rights mechanisms to shirk their information management responsibilities. Another is what standards, if any, external databases must adhere to regarding transparency and timeliness. Given precarious funding, whether and how their work can be sustained in perpetuity is another open question. External databases pose a threat to human rights mechanisms in terms of how the public views the authenticity or authoritativeness of their versions of documents. They contribute to the fragmentation or siloing of geographic and thematic areas of human rights law. While it seems likely that third parties will always have an interest in curating particular document collections—for example, by theme from across multiple systems—it is less clear that external databases should be *necessary* in order to provide fundamental public access to human rights mechanisms' documents. After all, if the public has a right of access to this information, then human rights mechanisms have a duty to provide it.

VII. CONCLUSION: MOVING FROM LACUNA TO LEADERSHIP

For as long as governments choose to support them, human rights accountability mechanisms will remain vital for the elucidation, documentation, codification, and vindication of individuals' and groups' fundamental rights. These mechanisms must be built to last. Decades into the digital era, human rights mechanisms are alarmingly behind the times. How might they catch up?

First, human rights mechanisms would do well to keep Erika, and her dilemma, at the center of their approach. Advocates' information needs fit into a broader discussion related to human-centered design,[331] victim-focused

[331] *See, e.g.*, Margaret Hagan, *A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly*, 6 IND. J.L. & SOC. EQUAL. 199 (2018).

approaches to advocacy and reparation,[332] and procedural justice.[333] While each mechanism's relationship with the public is distinct, the image that stays with me is of the ACHPR's sessions, where civil society is relegated to the back of the room, with less comfortable chairs, fewer microphones, shorter speaking times, and the occasional admonishment to be a bit less demanding and a bit more appreciative.[334] Those seeking accountability for human rights abuses are not peripheral or incidental to the oversight mechanisms' missions; they are at the core.

Moreover, human rights mechanisms—or, more specifically, their parent IGOs—are likely bound by customary international norms to protect individuals' data privacy and freedom of information. Explicitly recognizing that the public is entitled to access information and communicate with human rights mechanisms without unnecessarily risking their safety or privacy could change the current dynamic and frame policy development for the better. As first steps, mechanisms could conduct an objective assessment of their public-facing digital security vulnerabilities and information management practices and survey users regarding their information and digital security needs.

Second, human rights mechanisms should look to available examples of good information management practices. Newspapers like *The Guardian* have long advised would-be whistleblowers on how to confidentially or anonymously communicate with them, and they provide the digital channels to do so using widely available technology.[335] The European Union and its Court of Justice[336] demonstrate how an intergovernmental organization can handle data privacy[337] and operate in multiple languages[338] with transparency. For its part, the

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[332] *See, e.g.,* Sarah Knuckey et. al., *Power in Human Rights Advocate and Rightsholder Relationships: Critiques, Reforms, and Challenges*, 33 HARV. HUM. RTS. J. 1 (2020). *See also* Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279 (2011).

[333] *See, e.g.,* Eric Stover, Mychelle Balthazard & K. Alexa Koenig, *Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia*, 93 INT'L REV. RED CROSS 503, 531-33 (2011).

[334] *See* INT´L JUST. RES. CTR., CIVIL SOCIETY ACCESS TO INTERNATIONAL OVERSIGHT BODIES AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, *supra* note 29, at 23.

[335] *See How to Contact the Guardian Securely,* GUARDIAN, https://www.theguardian.com/help/ng-interactive/2017/mar/17/contact-the-guardian-securely (last visited Sept. 4, 2022). *See also*, *How to Contact the Guardian and Observer*, GUARDIAN, https://www.theguardian.com/help/contact-us (last visited Sept. 4, 2022); *Privacy*, GUARDIAN, https://www.theguardian.com/info/privacy (last visited Sept. 4, 2022); *Cookie Policy*, GUARDIAN, https://www.theguardian.com/info/cookies (last visited Sept. 4, 2022).

[336] *See The Institution: Protection of Personal Data*, CT. JUST. EUR. UNION, https://curia.europa.eu/jcms/jcms/p1_2699100#protection_donnees_juridictionelles (last visited Sept. 4, 2022).

[337] *See Privacy Policy*, EUR. UNION, https://europa.eu/european-union/abouteuropa/privacy-policy_en (last visited Sept. 4, 2022).

[338] *See Languages on our websites*, EUR. UNION, https://europa.eu/european-union/abouteuropa/language-policy_en (last visited Sept. 4, 2022).

Organization of American States' access-to-information policy is straightforward and easily replicable.[339] Furthermore, human rights mechanisms' own statements and interpretations provide ample guidance on individuals' right to access public information.

Human rights mechanisms can also learn much from their peers in making their work more accessible and transparent beyond what may be required by international human rights law. While the Council of Europe human rights mechanisms showcase the premier document databases, the ACERWC goes further in transparency by sharing its staff list, and the OHCHR is far ahead of the curve in providing advanced, detailed information on treaty bodies' elections. The IACHR's nascent User Support Section is a welcome development that other mechanisms could emulate. As they consider the needs of individuals with disabilities, mechanisms should follow the lead of the United Nations Special Rapporteur on the rights of persons with disabilities and the Committee on the Rights of Persons with Disabilities.

Third, human rights mechanisms must marshal additional human and financial resources to develop new policies, efficiently handle requests related to data protection and information, implement new technology, and increase translation, among other necessary tasks. Most human rights mechanisms are chronically and critically underfunded. For example, in 2021, the OHCHR missed the deadline to submit its Human Rights Council-mandated report on access-to-information standards because of "ongoing financial constraints."[340] Such constraints cannot be the excuse for improperly managing the information that is their lifeblood. Human rights mechanisms should specifically request funding for improved public-facing information management.

Member States may be receptive to the idea that human rights mechanisms need to keep pace, given how many of them have adopted data protection and freedom of information legislation. There are also signs that some funders are eager to help bring human rights mechanisms fully into the digital age. This is exemplified by Microsoft's partnership with the OHCHR and Google's funding to the IACHR.[341] States that already provide significant financial support, such as the United States, might be persuaded to see the wisdom and economic

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[339] *See Frequently Asked Questions on Access to Information*, OAS, http://www.oas.org/airf/access_to_information_faq.aspx (last visited Sept. 4, 2022).

[340] U.N. Hum. Rts. Council, Freedom of Opinion and Expression: Report of the United Nations High Commissioner for Human Rights – Note by the Secretariat, U.N. Doc. A/HRC/47/48 (May 18, 2021), https://undocs.org/A/HRC/47/48.

[341] *See Technology for Human Rights: UN Human Rights Office Announces Landmark Partnership with Microsoft*, OFF. HIGH COMM´R HUM. RTS. (May 16, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21620&LangID=E; INTER-AM. COMM'N HUM. RTS., *Ch. VI: Institutional Development*, *in* ANNUAL REPORT 2020, 1109, https://www.oas.org/en/iachr/docs/annual/2020/Chapters/IA2020cap.6-en.pdf.

logic of helping safeguard human rights mechanisms' integrity in the face of hacking and its consequences such as diminished public confidence. Once implemented, increased transparency and security could also help expand human rights mechanisms' visibility and, in turn, public support.

Fourth, human rights mechanisms should develop, adopt, and implement policies on access to information and on users' digital security and privacy. These policies must, at minimum, satisfy customary international norms. From a moral and common-sense perspective, the relevant policies should also meet or exceed the recommendations human rights mechanisms have made to States based on their treaty obligations. In formulating their policies, mechanisms should solicit and incorporate public input, as discussed above. Upon adoption, these documents must be readily available online, along with information on the associated processes. Consistent implementation is critically important. For example, when budget cuts or unforeseen circumstances prevent or delay full adherence to a policy—such as with regard to translation—mechanisms should quickly and clearly inform the public.

Finally, in policy and practice, human rights mechanisms should implement internal safeguards and accountability measures for when lapses or breaches occur. For example, each institution should have a designated data protection officer to oversee internal compliance with its data protection policy. The European Commission provides a useful model. Human rights mechanisms should also include statistics on information requests, for example, in their annual reports. In a break with current practice, they should also proactively and publicly report hacking attempts and other illicit interceptions and directly inform the affected individuals.

As with any violation of an individual's human rights, a remedy must be available when a mechanism manages information in a way that contravenes human rights standards. This remedy could take many forms, although challenges include the lack of an existing, separate judicial institution to hear such claims, and the fact that human rights mechanisms' digital infrastructure is often intertwined with that of their parent IGOs. A possible model is available in the European Union, where individuals may file complaints with the European Court of Justice concerning the EU's handling of their data.[342] Perhaps IGOs' administrative tribunals or other supranational courts, such as the Court of Justice of the Economic Community of West African States, could be expanded to process complaints by the public against human rights mechanisms. These are

[342] *See* Parliament & Council Regulation 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices, and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, 2018 OJ (L 295) 39-98, arts. 63, 64, https://eur-lex.europa.eu/eli/reg/2018/1725/oj.

complicated questions. Prior efforts to hold IGOs accountable for human rights violations also demonstrate institutional resistance to judicial oversight. Nonetheless, they are questions worthy of discussion and resolution.

Technological advances mean we cannot quite know what the future holds. Will quantum computing render encryption useless? Will external search tools using artificial intelligence reduce the importance of, or the need for, human rights mechanisms' own document databases? Only time will tell. Meanwhile, human rights mechanisms can be better prepared for the future by maintaining an open dialogue with their constituents about their needs and vulnerabilities, by implementing policies tied to fundamental principles rather than particular technologies, by advocating for adequate resources, and—perhaps most importantly—by taking accountability for information transparency and security.