Chapter 9: The Strategic Approach: Consensus as Legitimacy-Enhancement

I. Introduction

"The key rationale behind the ECtHR's consensus method is legitimacy".[1365] This statement by Tobias Lock succinctly puts forward a sentiment that is extremely widespread in the academic literature on European consensus[1366] – to the point that its popularity has long since surpassed the defence of consensus based on its (indirectly) democratic credentials or its contribution to an ethos-focussed jurisprudence. Any justification or critique of the use of European consensus must therefore grapple with the idea of consensus as legitimacy-enhancement.

The use of the term "legitimacy" (and indeed its recurring and insistent use[1367]) is quite interesting, since it is notoriously ambiguous: I will therefore begin this chapter by recalling the basic distinction between normative and sociological legitimacy, which one might parse (very roughly) as investigating whether an object of legitimacy is *justifiable* within a certain institutional context, on the one hand, and whether it is *perceived as justified* by certain actors, on the other. My argument is that (in contrast to the lines of reasoning canvassed so far) legitimacy-based defences of European consensus commonly refer to the latter notion, but they do so in a way that invests the initially empirical perspective of sociological legitimacy with normativity: in other words, sociological legitimacy *should* be nour-

1365 Lock, "The Influence of EU Law on Strasbourg Doctrines" at 817.

1366 See in particular Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights"; Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 14; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 143; Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 35; Lixinski, "The Inter-American Court of Human Rights' Tentative Search for Latin American Consensus" at 340, as well as infra, note 1410; see also, with a primarily historical ambit, Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights".

1367 Pildes, "Supranational Courts and The Law of Democracy: The European Court of Human Rights" at 160 calls it "overused".

ished so as the generate support for the ECtHR, European consensus helps to do so, and hence European consensus *should* form part of the ECtHR's reasoning (II.1.).

This idea that consensus should be used so as to ensure support for the ECtHR deeply resonates with the political situation within which the ECtHR finds itself – as Clare Ryan has vividly put it, "[g]iven the challenges that the ECtHR faces in a Europe that is pulling apart at the seams", a pragmatic approach to adjudication is regarded as indispensable.[1368] I will therefore spend some time specifying the background assumptions as to why a pragmatic approach based on sociological legitimacy matters, particularly the sense that the ECtHR is facing a "legitimacy crisis" which needs to be mitigated (II.2.). It is in this context that the idea of consensus as legitimacy-enhancement needs to be understood: this becomes particularly clear when considering the way in which the States parties to the ECHR are framed as the most important agents of legitimacy, since it is their support of the ECtHR which is deemed most crucial (II.3.). Since European consensus refers back to the legal systems of the States parties, it is assumed to cater towards them. This argument may assume a number of different forms; in what I take to be its most important version, which I will primarily foreground in this chapter, it holds that consensus sets the pace for an incremental development of the ECtHR's case-law which is acceptable to the States parties (II.4.).

When introduced under the heading of "legitimacy-enhancement", the implications of this approach do not necessarily become clear. Given the "twofold coding of the concept" of legitimacy as both normative and sociological,[1369] arguing the European consensus increases the ECtHR's legitimacy has a rather pleasant ring to it and thus covers up, to some extent, the normative tensions involved in justifying consensus in this way.[1370] I will argue that it is important to realise that consensus as legitimacy-enhancement proposes a particular form of *strategy* to enable the ECtHR to retain the support of the States parties to the ECHR and set increasingly higher human rights standards. Such a strategic approach to adjudication

1368 Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 521.

1369 Michael Zürn, "Perspektiven des demokratischen Regierens und die Rolle der Politikwissenschaft im 21. Jahrhundert," (2011) 52 *Politische Vierteljahresschrift* 603 at 606 ("*doppelte Kodierung des Konzepts (normative und empirisch)*").

1370 On similar dynamics in the use of the notion of legitimacy more generally, see Koskenniemi, "Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism" at 371.

resonates with the perceived need for pragmatism in light of a "legitimacy crisis", but it also means that the focus of the argument shifts away from a consideration of individual judgments to a long-term view of the ECtHR as an institution (II.5.).

If we thus take the argument in favour of consensus based on legitimacy-enhancement to be a strategic argument based on the recurring reliance of consensus to set the pace for an incremental development of the ECtHR's case-law, then there are (at least) two lines of questioning to which it is exposed. The first is principled and takes issue with the very notion of a strategic approach to the reasoning of a human rights court: I will turn to this criticism in the following chapter. The second line of questioning is more practically oriented and relates specifically to the viability of using consensus as the basis for an incremental development which boosts the ECtHR's sociological legitimacy. After all, if the motivation for justifying the use of consensus in this way comes from the assumed need to mitigate the ECtHR's "legitimacy crisis", then it is important to assess whether consensus is up to the task.

I approach this difficult question by recalling some general characteristics of consensus touched upon throughout this and previous chapters – its use of the notion of commonality, its relative formality, and its reliance on incremental development over time – and setting these in relation to certain patterns of opposition to the ECtHR. My argument is that European consensus may not be well-suited to form the basis of a strategic approach which aims to prevent the most relevant and high-profile forms of opposition to the ECtHR, and hence its role in mitigating an assumed "legitimacy crisis" is fairly limited (III.). Yet this limitation might itself be construed as a strength, since unmitigated strategy need not be normatively desirable. I therefore conclude by situating consensus as legitimacy-enhancement as a *less starkly* strategic approach than some other proposals (IV.). This classification will form the basis of its further evaluation in the following chapter.

II. European Consensus as Legitimacy-Enhancement

1. Investing Sociological Legitimacy with Normativity

If the key rationale behind European consensus is indeed legitimacy-enhancement, as many academic commentators claim, then it is crucial to grasp precisely in which sense the term "legitimacy" is being used. It is, Richard Fallon wrote in 2005, "a term much invoked but little analysed in

constitutional debates".[1371] Over a decade later, the same could be said of debates concerning international law and human rights law – as Samantha Besson has noted, for example, different understandings of legitimacy continue to be used and intermingled without much clarification.[1372]

The most foundational distinction is that between *normative* and *sociological* legitimacy. The denominations make their differing perspectives clear: while the prior implies a normative assessment of a certain issue, the latter takes a sociological approach and investigates certain actors' positions, *in fact*, on that issue. In a sense, it adds an additional layer, since it does not deal with (normative) legitimacy head-on but rather with other peoples' takes on it. Accordingly, we might say that sociological legitimacy is acquired not by means of justification according to a certain normative standard, but rather by being *perceived* as justified.[1373] Perhaps the most famous example of a sociological account is that of Max Weber, who spoke of "Legitimitätsglauben", i.e. the *belief in* legitimacy.[1374]

While it is seldom made explicit, most legitimacy-based defences of European consensus refer (at least primarily) to a *sociological* notion of legitimacy.[1375] This becomes quite clear, for example, from the chapter on

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1371 Richard H. Fallon, Jr., "Legitimacy and the Constitution," (2005) 118 *Harvard Law Review* 1789 at 1789; see also e.g. Lovett, "Can Justice Be Based on Consent?" at 80 (in footnote 3).

1372 Samantha Besson, "The Legitimate Authority of International Human Rights. On the Reciprocal Legitimation of Domestic and International Human Rights," in *The Legitimacy of International Human Rights Regimes. Legal, Political and Philosophical Perspectives*, ed. Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013) at 69; see also Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 103; Andreas Føllesdal, "The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory," (2013) 14 *Theoretical Inquiries in Law* 339 at 341.

1373 Nienke Grossman, "Legitimacy and International Adjudicative Bodies," (2009) 41 *George Washington International Law Review* 107 at 110 and 115; Thomas M. Franck, "Legitimacy in the International System," (1988) 82 *American Journal of International Law* 705 at 706; see also Daniel M. Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?," (1999) 93 *American Journal of International Law* 596 at 600-602.

1374 E.g. Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 5th ed. (Tübingen: Mohr Siebeck, 1972), at 450.

1375 Explicitly (though critically) see Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 200, who calls it "social legitimacy"; contrast e.g. the explicit use of *normative* legitimacy by Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 127 (in footnote 68).

legitimacy in Kanstantsin Dzehtsiarou's monograph, *European Consensus and the Legitimacy of the European Court of Human Rights*. The "legitimacy challenges" he identifies there are well-known controversies of substantive political morality which we have considered, in various forms, over the course of the previous chapters: for example, is it desirable (or, one might say, normatively legitimate) for international courts to make important decisions, considering that such decisions may conflict with States' sovereign and democratic choices? Yet this is not the perspective from which Dzehtsiarou considers these questions. His definition of legitimacy takes it to mean

> the *respect and support* for the Court that emanates *from stakeholders' conviction* that the Court will decide cases consistently and in a manner that respects the nature of both the European Convention on Human Rights […] (as a human rights instrument) and its jurisdiction (as subsidiary and limited), as well as by reference to clear and transparent evidence.[1376]

Dzehtsiarou's reference to support emanating from stakeholders' convictions adds the empirical layer of sociological legitimacy to the "legitimacy challenges" he considers. Despite the thematic overlap with the normative questions, considered directly, the entire chapter thereby takes on a different, more empirically oriented meaning:[1377] the question is no longer what the proper place of an international court should be, but what the States parties' stances on the issue are.

This shift is emblematic of the differences between normative and sociological legitimacy. Whatever manifold connections can be drawn between them, particularly in the legal context,[1378] they nonetheless imply fundamentally different perspectives.[1379] Because one is normative and the other empirical, they are kept apart by the age-old distinction between the *ought*

1376 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 143 (emphases added).

1377 E.g. "the Court creates an *impression* that it is constrained by a legal argument" (at 164) or "counting does create an *impression*, if not of a real acceptance, at least of a perceived acceptance of a particular rule" (at 175), emphases added.

1378 For a succinct but informative overview, see Johan Karlsson Schaffer, Andreas Føllesdal, and Geir Ulfstein, "International Human Rights and the Challenge of Legitimacy," in *The Legitimacy of International Human Rights Regimes*, ed. Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2014) at 13-14.

1379 This is strongly emphasised by Habermas, *Between Facts and Norms*, at 69-70.

and the *is*. So long as this separation is indeed upheld, there is logically no possibility of conflict between normative and sociological legitimacy: they operate on different planes, as it were. As always, however, this separation can be bridged by providing reasons for referring to facts so as to conjoin the is and the ought,[1380] as when (factual) acceptance is regarded as part of (normative) legitimacy because it provides for a form of output-based feedback from the governed to the governing.[1381]

In a similar vein, when legitimacy is referred to in discussions of European consensus, its proponents do not content themselves with the empirical insights which accounts of sociological legitimacy offer, but rather *invest their initially empirical approach with normativity*.[1382] As Tom Franck put it: "If legitimacy can be studied, it can also be deliberately nourished."[1383] Proponents of European consensus as legitimacy-enhancement further make the (normative) claim that sociological legitimacy *should* be deliberately nourished, and that European consensus can assist in doing so. In other words, European consensus is introduced as a partial solution to the empirically understood "legitimacy challenges" which the ECtHR is said to face[1384] and, conversely, its use is considered to be justified because of this. Increasing sociological legitimacy becomes a normatively acknowledged goal. Why?

1380 See generally Chapter 2, II.3.

1381 See Utz Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt. Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrechts im europäischen Mehrebenensystem* (Tübingen: Mohr Siebeck, 2004), at 179 ("*Akzeptanz als Rückkoppelung der Legitimität zu den Herrschaftsunterworfenen*").

1382 Mann, "Non-ideal Theory of Constitutional Adjudication" at 20 makes this shift particularly clear; see also e.g. Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 92.

1383 Franck, "Legitimacy in the International System" at 711; on legitimacy as a mechanism for increasing compliance, see Ian Hurd, "Torture and the Politics of Legitimation in International Law," in *The Legitimacy of International Human Rights Regimes. Legal, Political and Philosophical Perspectives*, ed. Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013) at 166-173; critically Koskenniemi, "An Essay in Counterdisciplinarity" at 18.

1384 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 143 and 175-176; see also Merris Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?," in *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 258-259.

2. The Background Assumption: Overcoming a "Legitimacy Crisis"

To understand the strong pull which this approach is currently exerting on academic commentators, it is important to explicate the background assumptions against which it is set: the focus on nourishing sociological legitimacy can best be explained by worries about (allegedly) increasing criticism of the ECtHR and the sense that such criticism must be mitigated. Again, Dzehtsiarou's account offers the clearest example of this, though it is by no means idiosyncratic. It is telling that his monograph opens by asking whether the ECtHR has "lost its legitimacy" – and while the answer is given in the negative, it is somewhat tentative (softened by the caveat of a "perhaps") and discussion immediately turns to the importance of nourishing sociological legitimacy to ensure enforcement of the ECtHR's judgments.[1385] When discussing the ECtHR's legitimacy in more detail later on, Dzehtsiarou notes that "[i]n recent years, the Court has been widely criticised by nearly all stakeholders – national governments, local judges, the media, Convention commentators and even the Pope";[1386] and he conjures up the image of a Court no longer "able to set standards in the area of human rights protection" if its sociological legitimacy were to lessen further, or indeed of the utter "collapse of the Strasbourg system".[1387] Accordingly, before taking up the "legitimacy challenges" he identifies, Dzehtsiarou adds a chapeau section on the importance of being perceived as legitimate.[1388] In this way, he sets the scene for the claim that legitimacy-enhancement is necessary: sociological legitimacy invested with normativity.

It is worth nothing that this focus within the literature on European consensus is hardly surprising in light of the discourse surrounding human rights law in general and the ECtHR in particular in recent years. Jean-Paul Costa, then President of the ECtHR, summarised the Court's situation in 2011 as follows:

> [I]n certain states, including some of those who founded the system and who ratified the European Convention on Human Rights at the outset, very strong criticism of the Court was voiced in the press as

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1385 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 1.

1386 Ibid., 147 (footnotes omitted, though it is worth noting that they are numerous and of above-average length).

1387 Ibid., 146 and 147.

1388 Ibid., 145.

> well as by public representatives, calling its legitimacy or its putative 'activism' into question. Some of the Court's judgments have met with strongly negative reactions.[1389]

Or, as Michael O'Boyle has somewhat wryly put it: one could be "forgiven for believing that the Court is about to be towed into the middle of the Rhine and scuppered by a coalition of unhappy State Parties".[1390]

Such criticism has been connected to the (implicitly: sociological) legitimacy of the ECtHR by various commentators. Nils Muižnieks, the Council of Europe's Commissioner for Human Rights, warned in 2016 that "[i]n recent years direct challenges to the authority of the Court within a handful of member states have […] become more explicit and vocal" and that such challenges are "of particular concern because the integrity and *legitimacy* of the Convention system is at stake".[1391] Colm O'Cinneide has recently posited with regard to human rights law in general that it "has entered stormy waters", its "scope and content is increasingly contested", and it is facing "a full-blown *legitimacy crisis*".[1392] Faced with such a diagnosis, it seems eminently sensible to emphasise the importance of winning back sociological legitimacy. Enter European consensus as "an important legit-

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1389 Jean-Paul Costa, "On the Legitimacy of the European Court of Human Rights' Judgments," (2011) 7 *European Constitutional Law Review* 173 at 174; for similar sentiments, see e.g. Thorbjørn Jagland, "Communication on the Occasion of the First Part of the 2016 Parliamentary Assembly Session," available at <https://www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMvl0SKOUrv/content/communication-on-the-occasion-of-the-first-part-of-the-2016-parliamentary-assembly-session>; Parliamentary Assembly of the Council of Europe, "The Implementation of Judgments of the European Court of Human Rights," Resolution 2178 (2017) of 29 June 2017, at para. 8.

1390 O'Boyle, "The Future of the European Court of Human Rights" at 1862.

1391 Nils Muižnieks, "Non-implementation of the Court's Judgments: Our Shared Responsibility," available at <https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility> (emphasis added).

1392 Colm O'Cinneide, "Rights under Pressure," (2017) *European Human Rights Law Review* 43 at 43-44 (emphasis added); see also Kanstantsin Dzehtsiarou and Alan Greene, "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners," (2011) 12 *German Law Journal* 1707 at 1707; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 129; B.M. Oomen, "A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands," (2016) 20 *International Journal of Human Rights* 407 at 409.

imising tool" which is said to be particularly "useful at a time when certain political factions are discussing leaving the Council of Europe".[1393]

3. The States Parties as Agents of Legitimacy

If the goal is to nourish sociological legitimacy, however, then it becomes crucial to identify the *agents* of legitimacy, by which I mean those actors (or "stakeholders"[1394]) whose beliefs are regarded as relevant in establishing the measure of respect and support which the institution enjoys. Whose support actually matters – whose criticism is supposed to be mitigated? Needless to say, one's take on sociological legitimacy depends decisively on the actors selected as relevant agents, since their perspectives, though potentially interlinked, may differ greatly[1395] – Nienke Grossman calls this the "agent-relative" nature of sociological legitimacy.[1396] There is a multitude of options:[1397] the general public, the public in a certain State, or individual applicants; the States under a Court's jurisdiction, collectively or individually; certain State organs such as national courts; international organisations or foreign States; non-governmental organisations or the academic community; the list goes on.

In the literature on international courts in general, the tendency seems to be to acknowledge the multiplicity of relevant stakeholders, but to nonetheless focus primarily on the States under the jurisdiction of the court at issue.[1398] This approach has been mirrored with regard to the ECtHR, with commentators noting, for example, the potential relevance of the positions taken by "applicants, non-governmental organisations (NGOs) or the academic community", but nonetheless arguing that "the Court has a particular need to maintain functioning relationships with

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1393 Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 38; see also at 42.

1394 Supra, note 1376.

1395 Costa, "On the Legitimacy of the European Court of Human Rights' Judgments" at 178.

1396 Grossman, "Legitimacy and International Adjudicative Bodies" at 116.

1397 Føllesdal, "The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory" at 342-343.

1398 See e.g., with different points of emphasis, Shai Dothan, "How International Courts Enhance Their Legitimacy," (2013) 14 *Theoretical Inquiries in Law* 455 at 457; Grossman, "Legitimacy and International Adjudicative Bodies" at 116; Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach," (2012) 106 *American Journal of International Law* 225 at 267.

contracting parties, i.e. states".[1399] The focus on the States parties goes some way toward explaining the connection to European consensus – after all, consensus refers, by definition, to the legal systems of the States parties to the Convention, rather than integrating the position of other stakeholders into the ECtHR's reasoning.[1400]

The importance of the States parties as agents of legitimacy is usually explained, above all, by their "power to affect the court's interests".[1401] For one thing, any individual Member State might, if it does not perceive the Court and its judgments as legitimate, refuse to implement said judgments (whether when directly concerned as respondent State or proactively based on rulings against other States) or even denounce the Convention entirely (Article 58 ECHR).[1402] Collectively,[1403] the Member States might refuse to enforce certain judgments (in their role as members of the Committee of

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1399 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 145-146, citing de Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 527 (but see 545); see also Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 131; Gerards, "Judicial Deliberations in the European Court of Human Rights" at 412; for an emphatic counter-point, see Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?" at 273 (focussing on non-governmental organisations); see also Wayne Sandholtz, "Expanding Rights: Norm Innovation in the European and Inter-American Courts," in *Expanding Human Rights. 21st Century Norms and Governance*, ed. Alison Brysk and Michael Stohl (Cheltenham: Edward Elgar, 2017) at 169; and, more generally, Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts," (2018) 14 *International Journal of Law in Context* 197 at 204, criticising a "state-centric approach to backlash".

1400 At least in the sense in which I understand it for present purposes: see Chapter 1, III.

1401 Dothan, "How International Courts Enhance Their Legitimacy" at 457.

1402 It is worth noting in passing that, besides passing over the role of civil society (supra, note 1399), the conceptualisation of the States parties as unitary actors (rather than distinguishing e.g. between the executive, legislative, and judiciary) leads the strategic approach to a somewhat simplistic notion of implementation; contrast e.g. Dia Anagnostou and Alina Mungiu-Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter," (2014) 25 *European Journal of International Law* 205 at 207. For one example of how this impacts European consensus in particular, see infra, III.

1403 On the distinction between individual and collective action by States, see further infra, note 1499.

Ministers[1404]), withdraw funding from the Court, reform it in such a way as to suit their preferences or, at the extreme, give up the Convention system as a whole – recall the worry about the "collapse of the Strasbourg system".[1405]

While these very different worries are often jumbled together without further specification, the overall impression is that the ECtHR's position as an *international* court – in light of States' "fierce protection of [their] sovereignty" – makes it particularly precarious.[1406] Since "there is no democratic 'State' at the Convention-wide level within which those judges are embedded" and the ECtHR's judges are hence "considerably more distant from the domestic systems" than national judges would be, they are assumed to be "more likely to be viewed as lacking legitimacy than their domestic counterparts"[1407] – the focus on their *perception* as lacking legitimacy making it clear that the issue here is one of sociological, not (only) normative legitimacy. Simultaneously, they are thought of as *more in need* of such sociological legitimacy – especially so in the light of the "legitimacy crisis", but again also by reference to their position as judges of an international court. In particular, national courts are said to profit from "a better infrastructure ensuring execution of their judgments than the judgments of international tribunals".[1408] With its relatively weak enforcement mechanisms, the ECtHR is, by contrast, considered to face a "substantial

1404 For the composition of the Committee of Ministers, see Article 14 Statute of the Council of Europe; for its role in the execution of the ECtHR's judgments, see Article 46 ECHR; see further the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements; and, on the more complex realities, e.g. Elisabeth Lambert Abdelgawad, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability," (2009) 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 471. Perhaps noteworthy is that the Committee of Ministers has recently made use of Article 46 (4) ECHR for the first time: see Interim Resolution CM/ResDH(2017)429 of 5 December 2017.

1405 Supra, note 1387.

1406 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 144 (and from 149 on "international constitutional challenges").

1407 Pildes, "Supranational Courts and The Law of Democracy: The European Court of Human Rights" at 161.

1408 Kanstantsin Dzehtsiarou, "Book Review of Shai Dothan, Reputation and Judicial Tactics. A Theory of National and International Courts," (2015) 15 *Human Rights Law Review* 391 at 394-395; see also Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 257; Posner and Yoo, "Judicial Independence in International Tribunals" at 56; it is open to doubt, however, whether

structural deficiency" – in other words, a particular need to nourish sociological legitimacy as an alternative to coercive enforcement of its judgments, so as to ensure their implementation.[1409]

In this way, the focus on the States parties as agents of legitimacy (and hence the reference to their positions by way of European consensus) is introduced as a way of placating the most powerful stakeholders and thus mitigating the ECtHR's "legitimacy crisis" to enable its proper functioning despite a myriad of obstacles and threats following from its position as an international court. It is difficult to overstate the importance of this point. While the notion of European consensus as legitimacy-enhancement has become increasingly popular, some proponents of consensus do not explicitly frame their argument in those terms, much less specify that it is sociological rather than normative legitimacy that they are concerned with. Yet concerns about a potential lack of cooperation by the States parties are found, in one way or the other, at the heart of the overwhelming majority of arguments in favour of European consensus.[1410] By conceptualising consensus as a way of retaining or regaining the States parties' support and en-

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this line of reasoning holds up to scrutiny: see Yonatan Lupu, "International Judicial Legitimacy: Lessons from National Courts," (2013) 14 *Theoretical Inquiries in Law* 437 at 439-440.

1409 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 1; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 129; echoed by Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 43; see also de Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 544; Başak Çalı, Anne Koch, and Nicola Bruch, "The Legitimacy of the European Court of Human Rights: The View from the Ground" (2011), at 5; Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 249; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 478; more generally on the lack of enforcement mechanisms and the importance of legitimacy for international courts e.g. Clifford James Carrubba and Matthew Joseph Gabel, "Courts, Compliance, and the Quest for Legitimacy in International Law," (2013) 14 *Theoretical Inquiries in Law* 505 at 509.

1410 In order to drive home the popularity of this line of reasoning, I would like to cite its proponents extensively (though by no means exhaustively): Bribosia, Rorive, and Van den Eynde, "Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience" at 19; Mike Burstein, "The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights," (2006) 24 *Berkeley Journal of International Law* 423 at 438-439; Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human

dorsing its use for this very reason, reference is unavoidably, if sometimes

Rights" at 82; Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 14-15; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 154; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 129; Dzehtsiarou and Lukashevich, "Informed Decision-Making" at 275; Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 249; Forowicz, *The Reception of International Law in the European Court of Human Rights*, at 9; Gerards, "Judicial Deliberations in the European Court of Human Rights" at 432; Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine" at 108-109; Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 35 and 42-43; Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 137; Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication" at 315-317; Henrard, "How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion" at 414; Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights" at 288; Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, at 139-140; Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 253-257; Lock, "The Influence of EU Law on Strasbourg Doctrines" at 808 and 818; Mahoney and Kondak, "Common Ground" at 121; McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 30; Nussberger, *The European Court of Human Rights*, at 88; Ostrovsky, "What's So Funny About Peace, Love, and Understanding?" at 59; Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 230; Roberto Perrone, "Public Morals and the European Convention on Human Rights," (2014) 47 *Israel Law Review* 361 at 370; Cesare Pitea, "Interpretation and Application of the European Convention on Human Right[s] in the Broader Context of International Law: Myth or Reality?," in *Human Rights and Civil Liberties in the 21st Century*, ed. Yves Haeck and Eva Brems (Dordrecht: Springer, 2014) at 6; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 472-474; Schlüter, "Beweisrechtliche Implikationen der margin of appreciation-Doktrin" at 58; Senden, *Interpretation of Fundamental Rights*, at 121; Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251; Wintemute, "Consensus Is the Right Approach for the European Court of Human Rights"; see also, summarising such arguments without necessarily agreeing, Carozza, "Uses and Misuses of Comparative Law" at 1227; critically also Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 124; Erdman, "The Deficiency of Consensus in Human Rights Protection: A Case Study of Goodwin v. United Kingdom and I. v. United Kingdom" at 333; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 159 and 162-163; Shahid, "The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in

implicitly, made to a sociological notion of legitimacy invested with normativity as discussed above.

4. European Consensus as the Basis of Incremental Development

The fact that the States parties are foregrounded as the relevant agents of legitimacy thus sheds further light on the motivation behind legitimacy-enhancement as the rationale for using European consensus: safeguarding the interests of the Court in the face of a "legitimacy crisis". One might imagine many different ways of attempting to enhance the ECtHR's sociological legitimacy, including what Madsen, Cebulak and Wiebusch call "out-of-court judicial diplomacy":[1411] informal dialogue with national judges[1412] and education on or public discussion of human rights[1413] are just two examples. For present purposes, however, I am interested in accounts of legitimacy-enhancement which are "in-court" rather than "out-of-court", i.e. which relate directly to the ECtHR's reasoning and its decisions and in particular to the use of European consensus. Even if there is an intuitive connection between the States parties to the Convention as agents of legitimacy and the reference to their legal systems by way of European consensus, it remains to be explained more precisely *how* consensus is said to contribute to an increase in legitimacy.

While this part of the case in favour of consensus as legitimacy-enhancement is not often made explicit, quite a few different yet overlapping

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Recent Judgments Concerning Equal Marriage Rights" at 195; for a similar rationale with regard to vertically comparative references within the Inter-American system, see Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 115; and for the European Court of Justice, see Lenaerts, "Interlocking Legal Orders" at 879; Koen Lenaerts and José A. Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law," (2010) 47 *Common Market Law Review* 1629 at 1636; Sibylle Seyr, "Verfassungsgerichte und Verfassungsvergleichung. Der EuGH," (2010) 18 *Journal für Rechtspolitik* 230 at 233.

1411 Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 214.

1412 See Jean-Paul Costa, "The Relationship between the European Court of Human Rights and the National Courts," (2013) *European Human Rights Law Review* 264 at 272.

1413 On the crucial importance of this approach, see Anagnostou and Mungiu-Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter" at 221 and 227.

strands of reasoning have by now been offered.[1414] My intention here is not to examine them exhaustively,[1415] but merely to identify some common themes so as to lay the groundwork for discussing the merits and limits of consensus as legitimacy-enhancement. I will therefore focus on those arguments which relate most specifically to European consensus by building on its core characteristics as identified in Chapter 1. The first such characteristic is its *verticality* which, of course, supplies the connection between the ECtHR and the States parties to the ECHR as the relevant agents of legitimacy.

The second characteristic is that European consensus regards the legal orders of the States parties through the prism of *collectivity* – is there "common ground" between them or not? I argued in Chapter 3 that this aspect is closely connected to the ECtHR's institutional context as a transnational institution: foregrounding the individual national ethos of the respondent State would run danger of negating the ECtHR's judicial function, but ethical normativity can be retained by focussing instead on the notion of a pan-European ethos as identified through the States parties' legal systems viewed collectively.[1416] The argument there was not concerned with sociological legitimacy,[1417] but a similar point can be made in that regard by switching from the consideration of the States parties' collective will as an expression of ethical normativity to the States parties' preferences as the basis of sociological legitimacy. For example, Kanstantsin Dzehtsiarou at one point takes as his starting assumption that the States parties "wish to be condemned for human rights violations as rarely as possible (preferably

1414 In particular by Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Chapter 6.

1415 Besides the focus on incrementalism in this chapter, some further strands of reasoning are considered in Chapter 10.

1416 See Chapter 3, IV.3.

1417 In Chapter 3, I cited Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 115, arguing that "letting each state be the judge of its own human rights obligations" would negate the effect of human rights, but that this "does not entail that the substantive evolution of the regional human rights regime must be independent of the regional *community of states*" (emphasis in original); I read Neuman's point as principled (he speaks of "legitimation" in a way which seems to refer primarily to *normative* legitimacy since it builds on ideas of self-commitment and collective self-determination), but it *also* contains an element of (sociological) legitimacy-enhancement in its reference to ensuring the "effectiveness" of human rights, for example by making "national enforcement more feasible".

never)".[1418] However, he hastens to add, "giving the Contracting Parties *carte blanche* would probably undermine the whole idea behind the ECtHR as an effective international human rights arbiter", so reference should instead be made to "commonly accepted rules that build up European public order as reflected by European consensus".[1419] Because of the prism of collectivity, in other words, the States parties' preferences can be taken as the basis of the ECtHR's decision so as to ensure its sociological legitimacy without undermining its supervisory role entirely.

This approach to European consensus as legitimacy-enhancement places a strong emphasis on the connection between (lack of) consensus and the outcome of any given case: the idea is that consensus allows the ECtHR to develop its case-law in such a way that it keeps pace with, but does not surpass, the stance taken by the majority of the States parties. Dzehtsiarou again: European consensus "positively impacts the legitimacy of the ECtHR as it *prevents the Court from going beyond those developments that the Contracting Parties are able to accept*".[1420] Or, as Holning Lau has put it, "the Court needs to defer to Contracting States to elicit their cooperation" and consensus "is a means through which the Court achieves such deference",[1421] because it only requires States "to implement legal standards that a critical mass of Contracting States has already adopted".[1422] More generally, this approach is commonly dubbed *incrementalism*: the ECtHR only incrementally develops its case-law, with European consensus setting the pace.[1423] Since the focus is on incrementally developing human rights

1418 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 153.

1419 Ibid., 153-154 (emphasis in original); see also Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 494.

1420 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 150 (emphasis added); see also Senden, *Interpretation of Fundamental Rights*, at 67.

1421 Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 257.

1422 Ibid., 254.

1423 For various connections between incrementalism and European consensus, see e.g. Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication" at 314-317; de Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 544; Yourow, *The Margin of Appreciation Doctrine*, at 196; Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg," (2014) 14 *Human Rights Law Review* 503 at 536-537; Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 253-256; Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 20; see

standards by reference to European consensus, its connection to the *outcome* of the ECtHR's judgments is crucial.

As I mentioned above, further arguments may be made to explain why consensus contributes to the ECtHR's sociological legitimacy[1424] – indeed, different arguments are sometimes cited alongside one another and might be seen as mutually reinforcing. Regarding consensus as the basis for an incremental development of the ECtHR's case-law is of particular interest, however, not only because it seems to have been the most influential understanding of consensus as legitimacy-enhancement but also because of the conceptualisation of consensus which it implies. If consensus is seen as an indicator of whether or not the ECtHR should find a violation of the Convention while incrementally developing its case-law, then its use is quite strictly prescribed: for the incremental build-up to be successful, consensus would have to be deployed in such a way that it forms a stabilising and predictable element within the ECtHR's reasoning which clearly influences the ECtHR's conclusion in a significant number of cases.[1425]

This points towards a relatively formulaic approach to consensus – e.g. constructed by reference to domestic law rather than international law,[1426] geared at a specific issue rather than involving different levels of generali-

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also Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach" at 268-269.

1424 In particular, other strands of argument are more focussed on the legitimacy-enhancing merits of consensus as a form of reasoning *mentioned* in processes of justification, regardless of the outcome of the case, arguing e.g. that consensus makes the ECtHR seem well-informed (Dzehtsiarou and Lukashevich, "Informed Decision-Making" at 274) and presents it as willing to engage in judicial dialogue (Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 157; see generally on strategic use of judicial dialogue Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, at 126). I focus instead on consensus in relation to outcomes, partly because this line of argument seems more relevant in generating legitimacy (see generally Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 212) and partly because its focus on determinate outcomes contrasts more strongly with the framework which I have been advocating for.

1425 Although this approach is self-described as a "moderate" view: Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1740; but see Chapter 10, III.1. for its implications.

1426 Indeed, the main claim of Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 127-133 is that international law (with the exception of Council of Europe materials) is less suited to increasing the ECtHR's legitimacy, even going so far as to claim a causal relation between reliance on "exter-

ty,[1427] and endowed with strong normative force, making counter-arguments the exception rather than the rule.[1428] Accepting an account of consensus as legitimacy-enhancement which focusses on its connections to the outcome of any given case so as to allow for the incremental development of the ECtHR's case-law would, in brief, serve to reinstate consensus as an "objective element" external to the ECtHR – precisely the understanding which I have been arguing against throughout. In light of this tension, it is this kind of argument in favour of consensus as legitimacy-enhancement based on incrementalism which I primarily focus on in what follows.

5. The Court as the Object of Legitimacy: Strategic Implications

The notion of incrementalism brings us to a consideration of the *object* of legitimacy, in other words: the legitimacy of who or what is being considered? This could be, for example, a regime, a constitution, an institution, a norm, or a judgment. Since European consensus forms part of the ECtHR's reasoning which aims to justify its decision in a certain case, as mandated by the Convention (Article 45 (1) ECHR),[1429] one might assume that the primary reference is *to that decision or judgment*. However, on an account of consensus as legitimacy-enhancement which emphasises the *incremental development of the ECtHR's case-law*, the idea is that consensus should influence the ECtHR's conclusions in such a way that its case-law develops in a manner acceptable to the States parties *over time*.

The implication is that the scope of enquiry should be broadened to include not just individual judgments, but rather the overall performance of the Court: what accounts of consensus as legitimacy-enhancement based on the notion of incrementalism arguably have in common is a normative commitment to the human rights project *as a whole*, and hence to the ECtHR *as an institution* rather than its individual judgments. At the same time, however, the latter remains connected to the former. In the vocabulary of legitimacy, this is often reflected in a certain oscillation between

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nal" sources and the ECtHR's "legitimacy crisis" (at 117-118 and 129); for conceptual criticism of his distinction between "internal" and "external" sources, see Chapter 6, IV.4.

1427 See explicitly ibid., 132.

1428 Ibid., 130; on the preponderance of reliance on consensus in the ECtHR's case-law, particularly when the margin of appreciation is concerned, see Chapter 8, IV.

1429 See also Rule 74 (1) h Rules of the Court.

two objects of legitimacy: individual judgments (and the concrete norm they set) and the ECtHR itself (as an institution).[1430]

A popular way to refine this framework is by reference to David Easton's distinction between diffuse and specific support.[1431] Specific support relates to the content of an institution's output – an example would be support for a certain judgment because one agrees with its result. Diffuse support means support for an institution that is, to the contrary, not contingent on satisfaction with the content of particular results – for example, continued support of the ECtHR and implementation of its judgments even when a State does not agree with the concrete norm at issue. Diffuse support is needed to maintain a system in force permanently,[1432] but it depends in part on the generation of specific support.[1433]

In light of the distinction between diffuse and specific support, an account of consensus as legitimacy-enhancement focussing on the incremental development of the ECtHR's case-law could be specified roughly as follows. While individual States' stances may be overruled in particular judgments, their position will usually influence the conclusions reached by the Court since it forms part of European consensus. Assuming that the State parties will support those judgments which cohere with the position of

1430 Most clearly: Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, chapter 6 ("Legitimacy of the Court and legitimacy of its judgments" and mostly focussing on the prior, e.g. at 145; the title of this book also refers to the legitimacy of the ECtHR as a whole); Costa, "On the Legitimacy of the European Court of Human Rights' Judgments" (referring to judgments in its title but mostly to the Court in its content, e.g. at 174); see also Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" at 536; generally on legitimacy "of institutions – rather than […] actors or decisions": Çalı, Koch, and Bruch, "The Legitimacy of the European Court of Human Rights: The View from the Ground" at 4; in their terminology, I am concerned here with social legitimacy insofar as it relates to performance dimension of the ECtHR (see ibid. at 9-10).

1431 David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965), at 273; see e.g. de Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 526; Zwart, "More Human Rights Than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How It Can Be Done" at 81; Dothan, "How International Courts Enhance Their Legitimacy" at 456.

1432 Easton, *A Systems Analysis of Political Life*, at 269.

1433 Dothan, "How International Courts Enhance Their Legitimacy" at 456; Lupu, "International Judicial Legitimacy: Lessons from National Courts" at 441.

their legal system and take a critical stance towards those that do not,[1434] giving strong weight to European consensus and deciding cases accordingly will, on this account, ensure specific support often enough to generate diffuse support – the cases in which a State either forms part of the inter-State majority (spur effect) or there is no violation of the Convention (rein effect), and it thus does not have to adapt its legal system to newly set standards, will outweigh the cases in which it has to do so because it forms part of the inter-State minority (spur effect). These assumptions, it seems to me, underlie proposals of incrementalism based on European consensus, since they specify why consensus could be said to prevent the Court from "going beyond those developments that the Contracting Parties are able to accept".[1435]

This reconstruction of consensus as legitimacy-enhancement resonates with approaches that see the use of consensus as a "strategy of majoritarian activism",[1436] meaning that the Court is constrained by the States parties' preferences but has an important role both in extending progressive standards accepted by the majority to laggard States and in preventing regression from common standards, thus contributing to the overall improvement of human rights standards.[1437] Beyond the substantive argument at issue, this denomination ("strategy of majoritarian activism") is interesting because it makes explicit a point which is not often acknowledged in accounts of consensus as legitimacy-enhancement: they are, at heart, *strategic* accounts.[1438] Helen Fenwick, for example, has acknowledged this while discussing the role of consensus in cases relating to same-gender marriage.

1434 Supra, note 1418.

1435 Supra, note 1420.

1436 Alec Stone Sweet and Thomas L. Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization," (2013) 1 *Journal of Law and Courts* 61 at 78; Helfer and Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" at 4; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 494; the term was coined in the context of EU law: see Miguel Poiares Maduro, *We The Court: The European Court of Justice and The European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Oxford: Hart, 1998), at 11.

1437 Burstein, "The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights" at 425.

1438 See supra, I. for comments on the vocabulary of "legitimacy"; for acknowledgements of the strategic aspect, see e.g. Gerards, "Giving Shape to the Notion of 'Shared Responsibility'" at 40; Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Pro-

She concludes that its use is "*strategically understandable* at the present time when a number of states have taken the step of enshrining their opposition to same-sex marriage in recent amendments to the Constitutions".[1439]

We are faced, then, with a strategic approach which aims to maintain the sociological legitimacy of the ECtHR (as the object of legitimacy) vis-à-vis the States parties (the agents of legitimacy) over time. The deeper assumption underlying the strategic approach – the "ultimate end" of its strategy[1440] – lies in the postulation of a better future. As Benvenisti has rather lyrically put it in describing (and criticising) the use of European consensus, the ECtHR is conceptualised as "guiding the communal ship towards more enlightened standards, yet taking into account the prevailing winds and sea conditions".[1441] The notion of "prevailing winds" perhaps harkens back to a piece of advice to princes given by Machiavelli, which contains similar language (in some translations, at least): "To preserve the state", Machiavelli opines, the prince "often has to do things […] against humanity" because "he has to have a mind ready to shift as the winds of fortune and varying circumstances of life may dictate".[1442] The proximity to Machiavelli is telling, but it need not necessarily be read as negative. The suspicion that the ECtHR's institutional power is being preserved for its own sake is, of course, ever present, and realist accounts would be quick to foreground it.[1443] But at least on a benevolent reading of the notions of incrementalism and majoritarian activism, the strategic approach is primarily about enhancing the ECtHR's sociological legitimacy so that it may continue to effectively set human rights standards in the

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cedural Rationality Control" at 880; Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, at 139-140; see also Nic Shuibhne, "Consensus as Challenge and Retraction of Rights: Can Lessons Be Drawns from - and for - EU Citizenship Law?" at 441 who speaks of "appropriate deference to and respect for (or even, more cynically, strategic appeasement of) the relevant states parties".

1439 Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 269 (emphasis added).

1440 In the terminology of Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach" at 232.

1441 Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 852.

1442 Niccolò Machiavelli, *The Prince*, section XVIII.

1443 See André Nollkaemper, "International Adjudication of Global Public Goods: The Intersection of Substance and Procedure," (2012) 23 *European Journal of International Law* 769 at 783 (in footnote 92), noting "the tendency of all organizations to see themselves as indispensable".

long run.[1444] These long-term implications are crucial, however: Benvenisti's naval metaphor is spatial, but the strategic approach in fact contains a *temporal* element.

This temporal element has shone through at several points – for example, in the notion of incremental development over time or in Fenwick's admission that the ECtHR's take on same-gender marriage is "strategically understandable *at the present time*"[1445] – and is largely considered self-evident, yet it is important to note that the presumed benefits of the strategic approach are *removed from the present*. The notion of European consensus as the basis of an incremental or slow-and-steady build-up not for normative, but for strategic reasons ("cautiously",[1446] with an "awareness of political boundaries"[1447]) implies that while adequate human rights standards may not be attainable at present, they will be at a later point in time.[1448] As Nico Krisch has put it, incrementalism "helps to avoid clashes with member states and their courts while keeping alive the promise of a more effective human rights protection in the future".[1449] The present is thus operationalised strategically in the service of the future.

III. The Practical Limitations of Consensus as Legitimacy-Enhancement

The strategic approach is concerned, as explored over the course of the preceding section, with nourishing the ECtHR's sociological legitimacy in order to mitigate criticism by the States parties, with the ultimate end of securing their support for the Court so that it may set higher human rights standards in the long term. With regard to European consensus, this ap-

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1444 This focus is established as a normative demand by Mann, "Non-ideal Theory of Constitutional Adjudication" at 21 and 42.

1445 Supra, note 1439.

1446 Yourow, *The Margin of Appreciation Doctrine*, at 196.

1447 Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication" at 314.

1448 Janneke Gerards has explicated the strategic approach and long-term implications of incrementalism with particular force: see Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights"; see also, more generally on strategy as the basis for "effectiveness and compliance *in the long term*" (emphasis added), Jed Odermatt, "Patterns of Avoidance: Political Questions Before International Courts," (2018) 14 *International Journal of Law in Context* 221 at 222.

1449 Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, at 140 and 150 on incrementalism, and at 141 for the quote.

proach is combined with the claim that use of consensus will indeed help to boost the ECtHR's sociological legitimacy by pointing the Court towards decisions which the majority of the States parties will be ready to honour. Accepting, for present purposes, the normative premises of the strategic approach, one might nonetheless inquire whether European consensus can, in fact, fulfil the role assigned to it in boosting the ECtHR's sociological legitimacy. Given the sense of urgency underlying accounts of a "legitimacy crisis" and the need to respond to it, this is a crucial issue. It is this aspect that I will explore in the present section.

A sceptical take on the practical aspects of operationalising European consensus strategically would hold that there is simply not sufficient evidence that consensus plays a role in nourishing the sociological legitimacy of the ECtHR and its judgments – as Merris Amos has put it, "there has been very little assessment of the validity of the […] assumption that this method [i.e. European consensus] enhances the legitimacy of judgments".[1450] Further, it seems quite difficult to make such an assessment since consensus is not only used differently in different cases,[1451] but also embedded in a complicated socio-political context which renders generalisations difficult.[1452] My aim here is therefore not to provide an empirical assessment of the effectiveness of consensus as legitimacy-enhancement in practice, but rather to provide a conceptual account of how use of consensus relates to some prominent forms of criticism directed at the ECtHR.

To this end, I suggest recalling, once more, some characteristics of European consensus which *set consensus as legitimacy-enhancement apart from other strategic approaches*. One might imagine, for example, a strategy which approaches each judgment of the ECtHR in a highly contextualised manner, assessing the strategic merits of finding a violation or non-violation by reference to the subject-matter of the case, the political climate in the respondent State, and other factors.[1453] This is not the approach taken by

1450 Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?" at 259; see also Peat, *Comparative Reasoning in International Courts and Tribunals*, at 163.

1451 See Chapters 5 to 8.

1452 See Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 123.

1453 I am thinking, for example, of Dothan's approach based on a calculation of material and reputational costs of compliance in any given case: see Shai Dothan, "Judicial Tactics in the European Court of Human Rights," (2011-2012) 12 *Chicago Journal of International Law* 115; for the interplay be-

those who see consensus as the basis for strategic incrementalism.[1454] For one thing, the *prism of collectivity*[1455] means that the focus is on the community of States parties as a whole, not primarily on the position of the respondent State. The reliance on *incremental development* of the case-law points away from an individualised consideration of the case at issue and its subject-matter, instead placing its hopes on the aggregation of diffuse support over time. A similar effect is also achieved by the *relative formality* of European consensus: as discussed in Chapter 1, I understand it as a form of vertically comparative law, i.e. referring to formal legal acts rather than, for example, to public opinion.[1456] European consensus may be considered "evidence" of the States parties' preferences,[1457] but its relative formality due to its legal nature means that it does not attempt to capture the broader political discourse surrounding any given issue.

The merits and limits of this particular kind of strategic approach should be considered specifically in light of the ECtHR's situation as a regional court. Even in the best of cases, it is difficult to gauge how judgments will impact on a court's sociological legitimacy since the "social consequences, especially the long-term social consequences, of adopting

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tween such a more individualised strategic approach and European consensus, see Dothan, "Judicial Deference Allows European Consensus to Emerge"; but note also that Dothan now also places consensus in relation to legitimacy-enhancement (ibid. at 403); for his take on European consensus more generally, see Chapter 4, II.

1454 I continue to focus on the particular strategic account of consensus as described above (II.4.-5.), i.e. consensus setting the pace for incremental development of the ECtHR's case-law. Given the malleability of consensus, there are clearly "opportunities for strategic definitions" (Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 196) which may lead to strategic approaches different from the one I am foregrounding. But since *any* kind of judicial reasoning may hide strategic considerations (see e.g. Mann, "Non-ideal Theory of Constitutional Adjudication" at 24), this kind of strategy would not be specific to consensus and therefore would have no added value in justifying its use. I therefore leave it aside here; but see Chapter 10, III.1. on how these questions re-emerge in practice.

1455 See supra, II.4.

1456 See Chapter 1, III.

1457 Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1743; Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 139; see also Nußberger, "Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte" at 200-201.

one legal rule rather than another are notoriously difficult to calculate".[1458] As Simmons has put it, determining the political possibility and likely effectiveness of various strategies "will require reasonably specialized knowledge of the structure and workings of […] particular societies".[1459] Such determinations are likely to be even more difficult for the ECtHR as a transnational court. Dzehtsiarou, for example, has argued that "national constitutional courts always face only one possible respondent and, therefore, they can predict the reaction to their judgment better than their international counterparts".[1460] Lupu makes a similar point regarding the "larger audiences" of international courts, leading to "a constituency with sharply divided preferences".[1461] He argues that this makes controversy more likely but also, relatedly, that it is more difficult for international courts to gauge the preferences of the States parties: "Especially with a diverse audience, it is often difficult for international courts to discern the preferences of the public and of the political actors in the applicable states".[1462]

There are, in other words, (at least) two related difficulties at play in specifying a strategic approach for the ECtHR: identifying the preferences of the States parties and taking into account that these preferences are likely to be diverse and sometimes conflicting. An approach based on European consensus as the basis for incremental development of the ECtHR's case-law could be considered a response to these difficulties in light of some of the characteristics of consensus identified above. Comparative reasoning carries its own methodological and epistemological difficulties

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1458 Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), at 103 (on consequentialist arguments in general).

1459 Simmons, "Ideal and Nonideal Theory" at 19; accordingly, one of Roni Mann's criteria for the admission of strategic considerations into constitutional adjudication is that there be "*sociologically-grounded evidence* that the social backlash of an ideal decision would be counterproductive": Mann, "Non-ideal Theory of Constitutional Adjudication" at 45 (emphasis added); see also Pablo Gilabert and Holly Lawford-Smith, "Political Feasibility: A Conceptual Exploration," (2012) 60 *Political Studies* 809 at 823 ("best available evidence").

1460 Dzehtsiarou, "Book Review of Shai Dothan, Reputation and Judicial Tactics. A Theory of National and International Courts" at 394.

1461 Lupu, "International Judicial Legitimacy: Lessons from National Courts" at 452; see also Pildes, "Supranational Courts and The Law of Democracy: The European Court of Human Rights" at 160.

1462 Lupu, "International Judicial Legitimacy: Lessons from National Courts" at 453.

(and indeed European consensus is hardly a form of comparative reasoning which owns up to these difficulties),[1463] but its relative formality could be regarded as providing the ECtHR with a kind of shortcut to assessing the preferences and possible reactions of the States parties in more detail.[1464] Furthermore, the reference to the legal orders of the States parties through the prism of collectivity, rather than focussing primarily on the respondent State, attempts to grapple with the conflicting preferences as reflected in the differences among the legal orders. It thus takes into account that, although the ECtHR's judgments are formally binding only inter partes (Article 46 (1) ECHR), they also have broader effects erga omnes, i.e. for the States parties other than the respondent State.[1465] The possibility of conflicting preferences also explains why consensus relies on incremental development of the ECtHR's case-law *over time*, thus aiming to generate sufficient diffuse support for the ECtHR to overcome the inevitable lack of specific support by some States in some cases.

Basing a strategic approach on European consensus thus has certain advantages; but the very features of consensus on which these advantages are based also point to significant limitations. In essence, it seems to me that they combine in such a way as to create a curious disconnect from the kind of criticism and political pressure facing the ECtHR – from the very "legitimacy crisis" which motivates the turn to a strategic approach in the first place.[1466] Because the strategic approach to consensus which I have been considering relies on its relative formality, on the prism of collectivity, and on the generation of diffuse support over time it does not take into account, for example, for States' unusually strong reactions to the finding of a violation in politically sensitive cases[1467] – or in any case that can be

1463 See Chapter 1, III.

1464 All the more so in cases involving international law as consensus: see Chapter 6, VI.

1465 See Chapter 3, IV.4. for further references.

1466 Supra, II.2.

1467 The general gist of my argument thus resonates with Helfer's and Alter's suggestion that international courts may "spark controversy due to the domestic political consequences of their rulings" rather than generalist considerations of an ostensible "legitimacy crisis" or specifically expansionist rulings per se: Laurence R. Helfer and Karen J. Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts," (2013) 14 *Theoretical Inquiries in Law* 479 at 502; see also Ximena Soley and Silvia Steininger, "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights," (2018) 14 *International Journal of Law in Context* 237 at 242. Dzehtsiarou,

politicised if the general political climate in the respondent State is such that there is a tendency to criticise the ECtHR.[1468]

To underline the kinds of political discourse which lie outside the conceptual ambit of this kind of strategic approach based specifically on European consensus, I would like to cite some examples of criticism which the ECtHR has faced in practice, focussing on criticism emanating from the United Kingdom and Russia as two cases often cited as emblematic of the ECtHR's "legitimacy crisis". Of course, on some level these examples are bound to appear disingenuous: no strategy could ever prevent criticism in all cases (nor would such a strategy be normatively desirable[1469]) and European consensus is clearly no panacea, so it is easy to point at instances in which criticism was levelled at the ECtHR despite its use. Perhaps, after all, they would be harsher or more numerous or if the Court had not relied on consensus and reached other conclusions?[1470] But my point is not simply to draw attention to criticism of the ECtHR in and of itself, but to sketch how the form which such criticism takes makes it difficult to account for within the conceptual framework of a strategic approach based specifically on European consensus.

Consider, then, the political climate in the United Kingdom. Merris Amos has recently conducted a thorough survey of various high-profile judgments, their use of European consensus, and the political reactions to these judgments within the United Kingdom. The focus on high-profile judgments is already telling, since their notoriety is hardly politically innocent: as Amos puts it, the heated criticism of the ECtHR "centres very much on a limited selection of case law from an earlier era".[1471] For example, a key policy paper by the Conservative Party expresses "mounting concern at Strasbourg's attempts to overrule decisions of our democratically elected Parliament".[1472] It mentions four areas of concern which the

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"What Is Law for the European Court of Human Rights?" at 123 admits that, "[v]ery often, effective implementation of judgments depends on the political will of the Contracting Parties".

1468 See generally Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 201.

1469 See Chapter 10, II.

1470 In Clare Ryan's words, "it is impossible to know what would have happened had the Court ruled otherwise": Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 512-513.

1471 Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?" at 267.

1472 Conservative Party, "Protecting Human Rights in the UK" (2014), at p. 3.

ECtHR has ruled on: voting rights for prisoners, prisoners' right to go through artificial insemination with their partners, non-refoulement of foreign nationals who have committed crimes, and "banning whole life sentences even for the gravest crimes" (a misrepresentation of *Vinter v. the United Kingdom*, which in fact concerned the need for review of whole life tariffs rather than whole life tariffs per se).[1473] Based on this very limited and inaccurate overview, the Conservative Party proposes a number of reform objectives which essentially aim to greatly restrict the role of the ECtHR; otherwise, the paper notes in a thinly veiled threat, there would be "no alternative but to withdraw from the European Convention on Human Rights".[1474] This exemplifies the kind of political sentiment which is somewhat disconnected from the framework of consensus as legitimacy-enhancement, since it demonstrates that findings of a violation in some cases cannot necessarily be counter-balanced by other cases with results more acceptable to a State party. Rather, the focus remains exclusively on a limited number of politicised cases which are presented as sufficient evidence that the Convention system as a whole lacks legitimacy.

Beyond such general criticism, another form of negative reaction by States parties which the strategic approach aims to mitigate is non-compliance.[1475] The United Kingdom fares somewhat better in this regard, usually implementing controversial judgments despite its threatening political gestures. The ECtHR's judgment in *Hirst v. the United Kingdom (No. 2)* on

1473 Ibid.; see ECtHR (GC), Appl. Nos. 66069/09, 130/10 and 3896/10 – *Vinter and Others*; for the other issues, see ECtHR (GC), Appl. No. 44362/04 – *Dickson*; ECtHR, Appl. No. 8139/09 – *Othman (Abu Qatada) v. the United Kingdom*, Judgment of 17 January 2012; and infra, note 1476, on prisoners' voting rights.

1474 Conservative Party, "Protecting Human Rights in the UK" at p. 8; Brexit has since distracted somewhat from foundational criticism of the ECtHR, but the Conservative Party's more recent manifesto stating that the United Kingdom will remain a signatory of the ECHR "for the duration of the next parliament" still carries a threatening undercurrent for the future: Conservative Party, "Forward, Together. Our Plan for a Stronger Britain and a Prosperous Future" (2017), available at <https://www.conservatives.com/manifesto>, p. 37. Under Boris Johnson, too, there have been repeated squabbles over opting out of (parts of) the Convention, especially insofar as it prevents certain deportations of foreign nationals, although these have been more focussed on amendments to domestic legislation.

1475 See e.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 145, as well as supra, text to notes 1401-1405.

prisoners' voting rights is, of course, the infamous counter-example.[1476] Its conclusion that the United Kingdom's blanket ban on prisoners voting violates Article 3 of Protocol No. 1 has not only been subject to a barrage of criticism within the United Kingdom, but was also repeatedly rejected politically.[1477] Accordingly, proponents of consensus as legitimacy-enhancement often point to this judgment and the reaction to it to underline the need for a strategic approach so as to avoid a "legitimacy crisis".[1478] Yet while *Hirst* certainly exemplifies a certain form of backlash against judgments of the ECtHR, it seems somewhat ironic to cite it in favour of a strategic approach based specifically on European consensus, since the ECtHR's reasoning did make reference to consensus: while it acknowledged that "the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote", it nonetheless held that "it is a minority of Contracting States in which a blanket re-

1476 ECtHR (GC), Appl. No. 74025/01 – *Hirst*; see also ECtHR, Appl. Nos. 60041/08 and 60054/08 – *Greens and M.T. v. the United Kingdom*, Judgment of 23 November 2010; confirmed in: ECtHR, Appl. Nos. 47784/09 et al. – *Firth and Others v. the United Kingdom*, Judgment of 12 August 2014; ECtHR, Appl. No. 51987/08 and 1,014 others – *McHugh and Others v. the United Kingdom*, Judgment of 10 February 2015; ECtHR, Appl. Nos. 44473/14 et al. – *Millbank and Others v. the United Kingdom*, Judgment of 30 June 2016; see also, with different respondent States but nonetheless closely connected to the (arguably varying) standards set by Strasbourg: ECtHR, Appl. No. 20201/04 – *Frodl v. Austria*, Judgment of 8 April 2010; ECtHR (GC), Appl. No. 126/05 – *Scoppola v. Italy (No. 3)*, Judgment of 22 May 2012; ECtHR, Appl. Nos. 11157/04 and 15162/05 – *Anchugov and Gladkov v. Russia*, Judgment of 4 July 2013 (see further infra, text to note 1487); ECtHR, Appl. No. 29411/07 – *Söyler v. Turkey*, Judgment of 17 September 2013; ECtHR, Appl. No. 9540/07 – *Murat Vural v. Turkey*, Judgment of 21 October 2014; ECtHR, Appl. No. 63849/09 – *Kulinski and Sabev v. Bulgaria*, Judgment of 21 July 2016.

1477 For an overview, see Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg"; most recently, a compromise has been reached. See CM/Del/Dec(2017)1302/H46-39: The Ministers' Deputies consider, "in light of the wide margin of appreciation in this area", that the (very minimal) measures proposed by the United Kingdom "respond to the European Court's judgments in this group of cases". The examination was officially closed by CM/ResDH(2018)467 of 6 December 2018.

1478 E.g. Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 43; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 147.

striction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote".[1479]

As Amos has summarised it: "What the reaction to *Hirst* indicates is that consensus based reasoning is no match for a highly politicised issue resulting in an adverse judgment"; rather, in such instances, "the Court's use of consensus seems to add nothing at all".[1480] Neither, one might add, did the ECtHR's use of consensus in cases preceding and succeeding *Hirst* – including the operationalisation of its rein effect in favour of the United Kingdom in high-profile cases like *Animal Defenders International v. the United Kingdom*[1481] – lead to results generating sufficient diffuse support to overcome the lack of specific support in *Hirst* itself. Instead, the issue was presented as one of heightened political and emotional stakes, perhaps exemplified by David Cameron's declaration that giving prisoners the right to vote makes him feel "physically ill".[1482] Again, this kind of rhetoric is conceptually difficult to set in relation to the aggregate-type and relatively formal framework of consensus as legitimacy-enhancement as described above.

As a further example, consider Russia – one of the "most vocal criticizers" of the ECtHR along with the United Kingdom.[1483] Russia's recent resistance must be seen in the context of "a significant worsening of political

1479 ECtHR (GC), Appl. No. 74025/01 – *Hirst*, at para. 81; the tendency was thus towards the spur effect, with reference to a lack of consensus being phrased as a hypothetical ("even if"); however, *Hirst* also very clearly exemplifies the malleability of consensus (see e.g. Chapter 5, III.1. on numerical issues and Chapter 7, II. on the level of generality used, both of which are relevant here); see further e.g. Pildes, "Supranational Courts and The Law of Democracy: The European Court of Human Rights"; Shai Dothan, "Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement," in *Comparative International Law*, ed. Anthea Roberts, et al. (Oxford: Oxford University Press, 2018).

1480 Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?" at 268.

1481 ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 123.

1482 HC Deb., Vol. 517, Col. 921 (3 November 2010).

1483 Lauri Mälksoo, "Concluding Observations. Russia and European Human-Rights Law: Margins of the Margin of Appreciation," in *Russia and European Human-Rights Law: The Rise of the Civlizational Argument*, ed. Lauri Mälksoo (Leiden: Brill, 2014) at 222; see also e.g. Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" at 126-128.

and economic relations between Russia and the West",[1484] so that the ECtHR's own jurisprudence in any case can only form part of a bigger picture.[1485] Nonetheless, it is easy to identify a number of areas in which the ECtHR's stance has led to particular opposition: they span from discrimination based on sex in the Russian army,[1486] over the right of prisoners to vote (in conflict with an explicit provision in the Russian constitution),[1487] to gay rights with regard to freedom of assembly and expression,[1488] as well as a number of other controversial judgments.[1489] As in the case of the United Kingdom, it seems unlikely that the criticism of these highly politicised cases would abate because of the ECtHR's position in other cases, rendering it difficult to imagine how the use of European consensus over time would generate sufficient diffuse support to overcome the lack of specific support in these cases.

A formalised critical stance on the ECtHR in juridical terms has since been provided by the Russian Constitutional Court in a judgment which emphasised the primacy of the Russian Constitution and derived therefrom a right not to implement judgments of the ECtHR insofar as they are in conflict with it.[1490] This was swiftly followed by the passing of a law for-

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1484 Lauri Mälksoo, "Russia's Constitutional Court Defies the European Court of Human Rights," (2016) 12 *European Constitutional Law Review* 377.

1485 This kind of political backdrop may be what Dzehtsiarou has in mind when he mentions challenges to the ECtHR which "are linked to profound disagreement with the European project and cannot be changed by any means" – at least not by European consensus; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 147-148.

1486 ECtHR (GC), Appl. No. 30078/06 – *Konstantin Markin*.

1487 ECtHR, Appl. Nos. 11157/04 and 15162/05 – *Anchugov and Gladkov*.

1488 ECtHR, Appl. Nos. 4916/07, 25924/08 and 14599/09 – *Alekseyev v. Russia*, Judgment of 21 October 2010; ECtHR, Appl. Nos. 67667/09 et al. – *Bayev and Others*; see also, on broadly similar themes with different respondent States, e.g. ECtHR, Appl. No. 1543/06 – *Bączkowski and Others v. Poland*, Judgment of 3 May 2007; ECtHR, Appl. No. 1813/07 – *Vejdeland and Others v. Sweden*, Judgment of 9 February 2012; ECtHR, Appl. No. 9106/06 – *Genderdoc-M v. Moldova*, Judgment of 12 June 2012; ECtHR, Appl. No. 20981/10 – *Mladina D.D. Ljubljana v. Slovenia*, Judgment of 17 April 2014; ECtHR, Appl. No. 73235/12 – *Identoba and Others v. Georgia*, Judgment of 12 May 2015.

1489 E.g.: ECtHR (GC), Appl. No. 36376/04 – *Kononov v. Latvia*, Judgment of 17 May 2010 (indirectly dealing with war crimes of a Soviet partisan); ECtHR, Appl. No. 14902/04 – *OAO Neftyanaya Kompaniya Yukos v. Russia* (*Just Satisfaction*), Judgment of 31 July 2014 (compensation of almost two billion euros in a highly politicised case).

1490 Constitutional Court of the Russian Federation, Judgment No. 21-P of 14 July 2015.

mally establishing a procedure to obtain the Constitutional Court's judgment in this regard,[1491] a procedure which has since been used to declare the implementation of *Anchugov and Gladkov v. Russia* as well as *Yukos v. Russia* unconstitutional.[1492] The effect of judicialising opposition to the ECtHR by basing it on a review of constitutionality by the Constitutional Court is quite interesting for present purposes. It need not depoliticise the issue – to the contrary, the Constitutional Court's Chairman, Valery Zorkin, is one of the most vocal critics of the ECtHR – but it leads to each controversial case being considered *individually* and, at least formally, on the basis of its legal merits.

In other words, where the conceptual framework of consensus as the basis for incremental development of the ECtHR's case-law depends on generating diffuse support by obtaining specific support for *a number of judgments over time*, the Constitutional Court's perspective formally considers *only one case at a time* and thus operates in a rather different framework. Again, this points to a form of non-implementation which European consensus seems unsuited to mitigate since its aggregate-type approach puts it on a different level. Of course, the primacy of a national constitution over international obligations of the State, in and of itself, is hardly unusual (in fact, the Russian Constitutional Court builds on similar, albeit less far-reaching judgments in other States parties), and if sufficient diffuse support for the ECtHR had been generated in Russia, then some form of adjustment to accommodate obligations under the ECHR would no doubt have been possible. The issue must, therefore, be read against the backdrop of the more generally critical Russian position as mentioned above. It exemplifies how general political opposition and formal legal responses can work together in the context of non-implementation in way that European consensus is ill equipped to counter.

1491 "On amendments to the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation'", Law No. 7-FKZ of 14 December 2015.

1492 For an overview, see Rachel M. Fleig-Goldstein, "The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court Should Respond to Russia's Refusal to Execute ECtHR Judgments," (2017) 56 *Columbia Journal of Transnational Law* 172 at 207; for a somewhat different perspective, see Bill Bowring, "Russia and the European Convention (or Court) of Human Rights: The End?," (2020) *Revue québécoise de droit international* 201 (and see also ibid. at 217-218 for further constitutional amendments pertaining to the enforceability of decisions made by international institutions in mid-2020).

In sum, the core characteristics of European consensus make it difficult to relate its use to the mitigation of some of those forms of strong opposition which are commonly cited as the basis for the ECtHR's "legitimacy crisis" and hence motivated the turn to a strategic approach. Its focus on collectivity contrasts with the way in which certain issues become particularly controversial within individual political systems.[1493] The hope for the States parties' collective acquiescence to an incremental development of the ECtHR's case-law *over time* likewise contrasts with the politicisation of certain substantive issues (or, to put it in more explicitly temporal terms: the "short time horizons" of many political actors which lead to a focus on "the material or political impact of legal decisions"[1494]) as well as, potentially, the individual consideration of certain issues by national constitutional courts. Finally, the politically and emotionally charged responses to the ECtHR's rulings on certain issues cannot be accounted for within the relatively formal purview of European consensus: the assumed rationality of "counting"[1495] pales in the face of political rhetoric.

I would emphasise again that my point here is not to claim that a strategy based on European consensus *should have* prevented the examples of criticism given above or that it *cannot at all* contribute to enhancing the ECtHR's sociological legitimacy, but merely to suggest that, conceptually, a strategic account based on consensus must acknowledge the limitations which follow from its focus on collectivity, its aggregate-type approach with long-term temporal horizons, and its relative formality. These limitations are somewhat obscured by presenting European consensus as a response to the ECtHR's (ostensible) "legitimacy crisis", the depiction of which builds, in turn, on forms of high-profile opposition to the ECtHR which *European consensus is not necessarily well-suited to mitigate*. Incrementalism based on consensus may ensure that the ECtHR "moves as Europe

1493 Accordingly, Andreas Føllesdal criticises reliance of European consensus in the context of legitimacy-enhancement because "the most important target constituency in the short term is the violating government and the population in that state": Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 200.

1494 Karen J. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001), at 186.

1495 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 175.

moves",[1496] but keeping pace with European developments is hardly the primary concern of most critics of the Court.[1497]

One might argue that the kind of worst-case scenarios which are commonly cited as potential consequences of the "legitimacy crisis" – withdrawal of funding, reforms of the ECtHR curtailing its competences, or even dismantling the Convention system entirely[1498] – are more liable to be prevented by the use of European consensus since they rely on forms of *collective* rather than *individual* action by the States parties.[1499] In that vein, Sandholtz has argued that a strategy of majoritarian activism (such as a strategic account of European consensus as the basis for incremental development of the ECtHR's case-law) "protects the court from *generalized* backlash because a majority of the states would support the court's interpretation".[1500] One might certainly argue that mitigating "generalized backlash" is a worthy goal, and one need only point to the controversies surrounding the Brighton reform process and the recent Copenhagen Declaration to substantiate that collective action by the States parties could have restrictive effects for the ECtHR.[1501]

Still, these processes *also* exemplify that the reaction of individual States to certain politicised issues, as well as their general scepticism towards ex-

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1496 Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 497.

1497 For example, Ryan argues that consensus is pragmatically helpful to appease the States parties since it refers to "the very terms established *collectively* by the Member States" (ibid., 494; emphasis added), yet herself repeatedly cites *nationalism* as a major factor propelling backlash against the Court (ibid., 472-473, 490 and 522); see also on this tension Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus" at 167; see further on consensus not (only) in the sense of vertically comparative law, but (also) in the sense of general political will towards "the idea of the European human rights supervision project" Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights" at 42. Of course, the ECtHR only has limited influence over such factors (see supra, note 1485), but the fact remains that other kinds of strategy could (for better or worse) respond to them more fully.

1498 See supra, II.3.

1499 For the distinction, see Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 204.

1500 Sandholtz, "Expanding Rights: Norm Innovation in the European and Inter-American Courts" at 159.

1501 For an overview, see Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?" at 204; see also Chapter 1, IV.4.

ternal scrutiny by the ECtHR, cannot be discounted even within the context of collective action by the States parties: it is arguably because of this that the most restrictive proposals were put forward by certain States.[1502] One particularly transparent example is the Danish Draft Copenhagen Declaration, which bluntly stated that, in "cases related to asylum and immigration", the ECtHR should "assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, avoid intervening except in the most exceptional circumstances".[1503] Since the ECtHR's case-law on asylum and immigration is known to have caused significant concern in Denmark (and, for that matter, in some other States parties to the ECHR),[1504] this speaks volumes as to (part of) the overall motivation for drafting the Copenhagen Declaration in a manner unfavourable to the ECtHR.

1502 See e.g. Laurence R. Helfer, "The Burdens and Benefits of Brighton," ESIL Reflections Vol. 1, issue 1 (2012), available at <http://esil-sedi.eu/node/138>, at 1 (on *Hirst* and the political atmosphere in the United Kingdom as a backdrop to the Brighton Conference).

1503 Draft Copenhagen Declaration, para. 26; see critically on this point e.g. the Joint NGO Response to the Draft Copenhagen Declaration of 13 February 2018 at 6-7, available at <http://www.omct.org/files/2018/02/24721/joint_ngo_response_to_the_copenhagen_declaration___13_february_2018.pdf>: "This paragraph […] seeks, without justification, to single out asylum and immigration cases as meriting a lesser and inadequate standard of review by the Court"; even the ECtHR's very diplomatic and measured response to the Draft Declaration contained the telling caveat "Insofar as it is appropriate to single out one particular aspect of the Court's case-law" before commenting on this point: Opinion on the draft Copenhagen Declaration, adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018, available at <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf>.

1504 For Denmark, see Jacques Hartmann, "A Danish Crusade for the Reform of the European Court of Human Rights," available at <https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>; Silvia Adamo, "Protecting International Civil Rights in a National Context: Danish Law and Its Discontents," (2016) 85 *Nordic Journal of International Law* 119 at 139 and 142; for some other examples, see e.g. the United Kingdom, supra, notes 1472-1473; as well as, infamously, Nicolas Bratza, "The Relationship between the UK Courts and Strasbourg," (2011) *European Human Rights Law Review* 505 at 505 (on "xenophobic" opposition to the ECtHR); or the Netherlands: Oomen, "A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands", throughout but especially at 418.

Of course, after an outpouring of protest from various quarters including academia and non-governmental organisations,[1505] the form in which the Copenhagen Declaration was finally adopted dropped not only the express reference to "cases related to asylum and immigration", but also many other restrictive formulations.[1506] One might read this as a confirmation of European consensus as legitimacy-enhancement, since there seems to have been sufficient diffuse support for the ECtHR from a sufficient number of States parties to mitigate generalised backlash. There may be some truth to this, although I would suggest that the process leading up to the Copenhagen Declaration also points towards the importance of *counter-resistance*,[1507] as well as the relevance of manifold actors other than the States parties who are side-lined in accounts of consensus as legitimacy-enhancement.[1508] In the end, Merris Amos's assessment stands as true as ever: the connection between European consensus and the ECtHR's legitimacy remains rather nebulous.[1509]

IV. Interim Reflections: Abstract Strategizing

In this chapter, I have aimed to elaborate upon and critically assess the popular argument that European consensus should be used by the ECtHR so as to enhance its legitimacy. I have argued that the kind of legitimacy at play here is sociological rather than normative – the point is to increase actual support for the ECtHR, not to justify its role by reference to normative standards – but that the notion of European consensus as legitimacy-enhancement does not retain the empirical perspective which this implies.

1505 E.g. Joint NGO Response to the Draft Copenhagen (supra, note 1503); Response by the Danish Helsinki-Committee of Human Rights of 16 February 2018, available at <http://helsinkicommittee.dk/6957-2/>; for academic criticism, see e.g. the blog posts on StrasbourgObservers, available at <https://strasbourgobservers.com/category/by-topic/copenhagen-declaration/>, or on EJIL:Talk!, available at <https://www.ejiltalk.org/?s=copenhagen+declaration>.

1506 Janneke Gerards and Sarah Lambrecht, "The Final Copenhagen Declaration: Fundamentally Improved With a Few Remaining Caveats," available at <https://strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats/>.

1507 See generally Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 205-206 and 217.

1508 Supra, note 1399.

1509 Supra, note 1450.

Instead, it invests the initially sociological approach with normativity: the ECtHR's sociological legitimacy *should* be nourished to mitigate its presumed "legitimacy crisis". Allen Buchanan's description of the connection between sociological legitimacy and normativity more generally sums up the dynamic quite succinctly: "Sociological legitimacy is [considered to be] normatively important, to the extent that an institution's ability to perform its functions depends on whether it is perceived to have authority or warrant respect".[1510]

The primary agents of legitimacy are assumed to be the States parties to the ECHR, since it is they who are seen as having the power to affect the Court's interests. To retain or regain their support for the ECtHR is therefore seen as crucial so as to allow it to incrementally but effectively set human rights standards in the long term (the ECtHR's main "function", if we apply Buchanan's phrasing). This motivation explains, in turn, why the object of legitimacy shifts from individual judgments of the ECtHR to encompass also the ECtHR itself as an institution. European consensus is said to assist in nourishing the ECtHR's sociological legitimacy vis-à-vis the States parties: because it refers back to their legal orders and thus provides "evidence" of their take on a certain issue, it is assumed to promote decisions which are, by and large, acceptable to them.

I have argued that the use of European consensus in order to nourish the ECtHR's legitimacy is *strategic*: it operationalises the case before the Court in the service of assumed future chances to set higher human rights standards. I have also, however, pointed out some limitations of a strategic approach based on European consensus. While there may be an intuitive connection between the position taken by the legal orders of the States parties and their support for similar positions taken by the ECtHR, there is arguably a disconnect between European consensus (referring to legal orders and focussing only on the collective of the States parties with a long-term outlook) and the way in which support for or criticism of the ECtHR is actually generated (in a more political and emotionally charged forum, geared towards substantive issues on the basis of a short time horizon, as well as within individual States rather than a European collective).

Against this backdrop, one might simply discount European consensus as an inadequate reference point for a strategic approach to adjudication. While this is correct on some level, I would argue that there is more to it. The characteristics of European consensus which have guided my conceptual exploration in this chapter – its relatively formal, collectivity-oriented

1510 Buchanan, *The Heart of Human Rights*, at 112.

and aggregate-type approach – share a common feature: they all point *away from strategic considerations that are specific to any given case*. In light of this, it seems that consensus as legitimacy-enhancement constitutes what one might call a form of *abstract strategizing*: it is driven by strategic concerns, but because the way in which these are operationalised do not take into account of the specifics of individual cases, it is *less starkly strategic* than some other approaches.[1511] Instead, my impression is that it operates as a kind of barely tangible background strategy – an impression which resonates with the difficulties encountered in attempting to specify more precisely *how* the use of consensus enhances the ECtHR's legitimacy.

On the basis of a resolutely strategic approach, this kind of abstract strategizing is bound to appear deficient. But larger questions need to be considered. Should strategy be the starting point of a human rights court in the first place? How do strategic considerations relate to the more principled arguments discussed over the course of the preceding chapters? From a more normatively probing perspective, reliance on incremental development based on European consensus might have significant advantages over other forms of strategy. For example, its focus on collectivity makes it less likely to privilege certain powerful (or "high-reputation") States than more individualised forms of strategy would, hence retaining a more principled stance in the face of the divided preferences of its audience.[1512] Because of its relative formality, European consensus is also less liable to allow the ECtHR's more principled stances to be watered down by deliberate threats of non-compliance or restrictive reform.[1513]

Yet, simultaneously, consensus as legitimacy-enhancement does remain a strategic approach itself, however abstract. Like other strategic approaches, it therefore has to face up to the difficult questions which follow from the inclusion of strategic considerations in the jurisprudence of a human rights court. Branding the strategic approach to consensus as "legitimacy-enhancement" makes these questions seem less pressing, but the potential conflicts between principled and strategic approaches to consensus must nonetheless be addressed. This is the task of the next chapter.

1511 Although the specifics of individual cases may reemerge in deciding how to apply consensus: see Chapter 10, III.1.

1512 See Dothan, "How International Courts Enhance Their Legitimacy" at 461.

1513 See generally Mann, "Non-ideal Theory of Constitutional Adjudication" at 42 on the "problem of reflectivity".