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How (Difficult Is It) to Build Consensus on (European) Consensus?

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1.1 Introduction: The Consensus 'Game'

'Consensus' is a 'riddle, wrapped in a mystery, inside an enigma'.[1] It has various meanings,[2] is used in miscellaneous contexts and for a variety of purposes, and may therefore perform diverse roles. The core component that remains constant across its different definitions, conceptions and uses is the existence of some sort of agreement that enables the 'making' of a decision. Yet, the precise nature and extent of the agreement that underpins consensus is elusive. It spans from anything between a broad, shared understanding (in the sense of concurrence, like-mindedness or general opinion) to (explicit or implied) unanimity that entails a veto power for anyone who participates in the consensus-making process. Different shades of consensus exist between the two extremes of this continuum, depending on the 'looseness' or 'rigidity' of the rules of its formation.

The pluralism or ambiguity – depending on one's point of view – in the conceptualisation of consensus is but one of the complexities with which it is fraught. Even if one were to ignore or avoid the definitional pitfalls, consensus cannot become fully operational as a decision-making tool unless the 'rules of the game' have been established: who are the eligible 'players', what are the conditions of validity for its formulation, what is the effect of a consensus/no-consensus outcome, and who is the arbiter of the outcome, that is, who has the authority to recognise the

[1] This famous turn of phrase is borrowed from Winston Churchill, who used it in a BBC radio broadcast on 1st October 1939 to describe Russia's unpredictable reactions. See www.churchill-society-london.org.uk/RusnEnig.html.

[2] See the chapters contained in Part I of this book, and especially Chapters 4 and 8 by C. Djeffal and S. Douglas-Scott, respectively.

existence of consensus? Clarity in outlining these 'contours' of consensus translates into (legal) certainty on its *modus operandi* and its outputs. The 'contours', of course, are arguably as important as its definition, as together they are necessary conditions for the functionality of consensus and for its effectiveness. Consensus as a decision-making tool, therefore, encapsulates a paradox: its ability to operate effectively is predicated on the existence of consensus[3] on its meaning and on the layout of its 'contours'. And this inevitably requires an *authority*[4] that will set the rules of the 'game'.

Speaking of games, the allure of consensus apparently transcends the boundaries of academic discourse, judging from the homonymous board game that relies on the assumption that in any given group of people, even the most trivial question is bound to attract a variety of different responses.[5] The rules of the board game are simple. Each player must vote which of the nouns on their common list best matches the adjective on the board. The answer favoured by the majority of players wins. Thus, in the 'Consensus' game, the majority rules[6] and the designer of the game is the authority that defines the meaning, function and purpose of the term 'consensus', as well as the framework in which consensus operates (e.g., the conditions of validity for 'contributing' to a consensus outcome, the rules regarding the recognition of a consensus outcome, and the conditions of eligibility for potential players).

This book explores consensus in the context of the system of the European Convention on Human Rights (ECHR). Within this system, the 'players' of the European consensus (EuC) 'game' are *prima facie*[7] the signatories to that instrument. The designer of the consensus 'game' and, hence, its rule-setter, is the European Court of Human Rights (ECtHR). This raises two interconnected sets of questions: the first concerns the

[3] The intentional pun, which has also inspired the title of this book and its introduction, is gratefully borrowed from L. Wildhaber, A. Hjartarson and S. Donnelly, 'No consensus on consensus? The practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248–63.

[4] See footnote 61. See also V. P. Tzevelekos and K. Dzehtsiarou, 'International custom making and the ECtHR's European consensus method of interpretation' (2016) 16 *European Yearbook of Human Rights* 313–44.

[5] See http://consensusgame.com/index.php.

[6] As the box cover of the board game eloquently points out.

[7] See Section 1.3.1 regarding the constitutive role that the ECtHR may have in the construction of EuC.

'game' itself and its rules; the second relates to the value of the 'game' in the context of (international) human rights adjudication. These two sets of questions broadly correspond to the *first* and *second* Parts of this book, respectively, although the borders between the two are inevitably porous, as attested by several of the chapters contained therein.[8] The *third* Part of the book explores the transferability of EuC in other juridical contexts or its comparability with potentially analogous methods employed in different legal systems within and outside Europe, both at the national and the inter/supra-national level.

The remainder of this introductory note is structured as follows. Section 1.2 offers a brief overview of EuC, with the express caveat that its aim is *not* to convey certainties as to the 'what' and the 'how' of EuC. Had such certainty existed, this book and the scholarly work it hosts would perhaps be redundant. We intentionally limit the overview to what we consider the necessary minimum that readers with no prior knowledge of EuC will require to approach the rest of the chapters with some confidence. As such, our outline leaves several questions unanswered and should be read with a critical eye. As all aspects of EuC are open to competing and often conflicting interpretations, any attempt to draw a conceptual map can (and should) be open to challenge – and challenging existing knowledge and presumed certainties on EuC is one of the main objectives of this book. To that end, our outline is primarily designed to raise some of (the very many) questions pertaining to the function, evaluation and transferability of EuC, and to pave the way for the critical analysis that will follow. Section 1.3 endeavours to explain why any attempt to build consensus on EuC is bound to face significant hurdles and to identify the causes of the diverging academic opinions on EuC. It also offers a justification of our (partial) 'agnosticism' vis-à-vis EuC and of our reluctance to provide a more detailed overview of its role and function in this introduction. Section 1.4 describes the contribution this book aspires to make and lays down signposts to guide readers through the structure and the main questions discussed in each of the three Parts. Section 1.5 concludes by acknowledging the limits and limitations of the book, while issuing a rallying call for more research on (European) consensus in human rights adjudication.

[8] See, for example, the chapters in the book by K. Dzehtsiarou (Chapter 2), L. Van den Eynde (Chapter 5), K. Henrard (Chapter 7), A. Follesdal (Chapter 9), T. Kleinlein (Chapter 10) and F. de Londras (Chapter 14).

1.2 EuC at a Glance

The text of the ECHR is general and abstract by design. It is destined to acquire its concrete normative content and produce tangible effects when its laconic provisions are brought to bear on the facts of a specific case through judicial interpretation. In performing this task, the ECtHR can avail itself of a plethora of interpretive methods, techniques and tools. Some of these methods are available to all (international) courts and can be found in the 1969 Vienna Convention on the Law of Treaties (VCLT).[9] They include resorting to the *travaux* of the ECHR as a means to identify the original will of the signatories[10] or investigating the ordinary meaning of a term appearing in the text of the ECHR.[11] Other interpretive tools may be common across different systems, but acquire a particular *gravitas* in the ECHR system because of the latter's 'speciality'[12] as a 'constitutional' instrument enshrining foundational European values.[13] This is, for instance, the case with the use of the 'object and purpose' of human rights law as an interpretive signpost associated with

[9] VCLT, Articles 31–33. On the interrelationship and possible overlap between the methods contained in the VCLT and EuC, see, in this book, the chapters by J. Větrovský (Chapter 6), A. Follesdal (Chapter 9) and especially C. Djeffal (Chapter 4).

[10] VCLT, Article 32. See, for example, *Banković and Others* v. *Belgium and Others* (Appl. no. 52207/99), decision on admissibility, 12 December 2001, paras 19–21, 58, 63 and 65; *Nolan and K.* v. *Russia* (Appl. no. 2512/04), Judgment, 12 February 2009, paras 48 and 110.

[11] VCLT, Article 31(1). See, for example, *Banković and Others* v. *Belgium and Others*, para. 65. In this book, see the chapters by L. Lixinski (Chapter 15), C. Djeffal (Chapter 4) and especially J. Větrovský (Chapter 6).

[12] The term 'special' is used here not in the sense of *lex specialis*, but to denote the distinctive importance of (international) human rights law. This distinctiveness is reflected in the classification of international human rights rules as obligations *erga omnes* and in the legal effects that this class of obligations produces (in particular, collective enforcement). See ILC, A/CN.4/L.682, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, Fifty eighth session, 1 May–9 June and 3 July–11 August 2006, paras 380–409 and, for human rights as a special regime of international law (i.e., a question that partially overlaps with speciality as *lex specialis*), paras 128–33 and 161–4.

[13] ECHR's speciality is linked with the idea of a regional, European public order and transforms the ECHR into a regional 'constitutional' instrument. See, for example, *Chrysostomos, Papachrysostomou and Loizidou* v. *Turkey* (Appl. nos. 15299/89, 15300/89 and 15318/89), decision on admissibility, 4 March 1991, paras 20 and 22; *Loizidou* v. *Turkey* (Appl. no. 15318/89), judgment (on preliminary objections), 23 March 1995, para. 75.

the teleological method of interpretation.[14] Finally, one can also identify tools of interpretation that are exclusive to the ECtHR.[15] Whether or not EuC is, indeed, one such tool, is very much an open question. Strong arguments could be made that similar methods of interpretation are well established in other legal systems,[16] or that EuC overlaps with and may even be seen as a particular type of the evolutive/dynamic method of interpretation, which clearly extends beyond the confines of the ECHR system.[17] But this is not a question that we wish to consider here. Instead, what we argue is that EuC is, perhaps, not exclusive to the ECHR system, but is certainly an idiosyncratically European method of interpretation. This is not only because EuC, as a method (or a set of methods[18]) of interpretation, has been 'invented' and developed by the ECtHR, but also because its *raison d'être* is to act as a barometer of evolution primarily, if not exclusively, within the European continent. This raises complex questions regarding the precise role EuC must play in the ECHR interpretive ecosystem, especially in view of its seemingly symbiotic

[14] VCLT, Article 31(1). In the ECHR system, the object and purpose of the Convention are associated with the principle of effectiveness, that is, the Convention's *effet utile*, and the idea that the rights it enshrines ought to be 'practical and effective, not theoretical and illusory'. See the origins of the principle of effectiveness in *Marckx* v. *Belgium* (Appl. no. 6833/74), judgment, 13 June 1979, para. 31; *Airey* v. *Ireland* (Appl. no. 6289/73), judgment, 9 October 1979, para. 24.

[15] For instance, the margin of appreciation doctrine (footnote 68) or the autonomous interpretation (originating from *Engels and others* v. *the Netherlands*, Appl. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, judgment, 8 June 1976, para. 81) are, arguably, unique to the ECHR system, in the sense that they have been created by the ECtHR (irrespective of possible subsequent 'spill-over' to other legal systems).

[16] See all the chapters in Part III of this book.

[17] In the ECHR system, evolutive interpretation is associated with the living instrument doctrine, which requires the Convention to be interpreted in light of present-day conditions. It originates from *Tyrer* v. *the United Kingdom* (Appl. no. 5856/72), judgment, 25 April 1978, para. 31. On evolutive interpretation, see footnote 66. See also VCLT, Article 31(3)(c), V. P. Tzevelekos, 'The use of Article 31(3)(c) of the VCLT in the case-law of the ECtHR. An effective anti-fragmentation tool or a selective loophole for the reinforcement of the teleology of human rights? Between evolution and systemic integration' (2010) 31 *Michigan Journal of International Law* 621–90 and ILC, A/CN.4/L.682, paras 410–80.

[18] According to Dzehtsiarou, for instance, consensus can be classified into four types: consensus stemming from the comparative analysis of the laws and practice of the signatories to the ECHR, consensus based on international treaties, internal consensus within the respondent state(s), and (scientific) consensus among experts. K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015), pp. 39–56. See also Wildhaber, Hjartarson and Donnelly, 'No consensus on consensus?', 252–6.

relationship with the evolutive method of interpretation,[19] but also in situations in which European and international trends are not moving in the same direction.[20]

A common hypothesis is that the ECtHR is particularly keen on employing the EuC method when it is faced with (morally, politically or socially) sensitive, controversial or ambiguous questions. It is well known that the Court enjoys discretion in choosing the most appropriate method(s) of interpretation for each case. But it is exactly this discretion that makes it difficult to pinpoint what triggers the use of EuC in some cases but not in others and makes it even more difficult to gauge whether EuC is being used consistently across different types of issues involving different Convention rights. This is all the more troubling when one considers that the function of EuC is such that the ECtHR will often resort to it in order to identify the emergence (or not) of a common standard with regard to a particular question of interpretation. It is evident, then, that the issues of selectivity and (in)consistency in the use of EuC are but the tip of a pretty sizeable iceberg. In fact, the list of questions is virtually endless, ranging from the more abstract philosophical difficulties in fixing the position of EuC within the normative foundations of the ECHR and in establishing the authority of the Court to rely on it, to the more 'technical' problems of deciphering the 'ingredients' that make up EuC,[21] detecting the types of human rights questions that are suitable for consensus analysis and ascertaining whether 'consensus exclusion zones' may exist within the Convention.[22] Per our earlier disclaimer, we will tread with caution and refrain from taking a

[19] For instance, all the chapters in this book refer to the interrelationship between the margin of appreciation and EuC. See in particular the chapters by S. Douglas-Scott (Chapter 8), A. Follesdal (Chapter 9), K. Henrard (Chapter 7) and especially T. Kleinlein (Chapter 10). See also footnote 68. Regarding evolutive interpretation and its interrelationship with EuC, see, in this volume, for example, the chapters by C. Djeffal (Chapter 4), K. Henrard (Chapter 7), A. Follesdal (Chapter 9) and T. Kleinlein (Chapter 10). See also footnote 66.

[20] See, for example, *Christine Goodwin* v. *the United Kingdom* (Appl. no. 28957/95), judgment, 11 July 2002, paras 84–5, where the absence of EuC was 'remedied' by the existence of an international trend that trumped European states' practice.

[21] See footnote 18.

[22] This is often associated in the literature with counter-majoritarian approaches to human rights, especially regarding the protection of minority rights. In this book, see especially the chapter by D. Kagiaros (Chapter 13). More generally, *inter alia*, see the seminal works by E. Benvenisti, 'Margin of appreciation, consensus, and universal standards' (1999) 31 *New York University Journal of International Law and Politics* 843–54 at 848–53; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*

stance on any of these questions here. Suffice it to say that, among a plethora of possible components,[23] EuC consists in the comparative analysis of the prevailing legal trends and common understandings of a right, with a principal focus on the national legal orders of the signatory parties.[24] The core element of EuC, therefore, is, arguably, practice at the national level, which, in turn, raises yet another set of questions regarding the nature of such practice, the threshold numbers of states needed for a consensus finding, and the thoroughness, transparency and methodological robustness of the comparative exercise undertaken by the ECtHR for the purposes of EuC.

In so far as the effects of EuC are concerned, things are somewhat clearer. Although one might still argue that the picture is not entirely free from inconsistencies,[25] it is possible to suggest that, in principle, if the Court diagnoses consensus, it permits itself to establish pan-European standards that are binding on all states under its jurisdiction.[26] In this regard, EuC may be seen as a tool to expand the semantic scope of the ECHR, possibly beyond the rights that are explicitly included in its text.[27] In the absence of EuC, states and their national authorities enjoy a wider

(Oxford: Oxford University Press, 2007), especially chapters 3, 5 and 6; Dzehtsiarou, *European Consensus*, especially pp. 116–29. See also footnote 51.

[23] See footnote 18.

[24] See, for example, *Konstantin Markin* v. *Russia* (Appl. no. 30078/06), judgment, 22 March 2012, paras 71–5 and 140.

[25] The obvious example is *A, B & C*, where the Court went against EuC. See *A, B & C* v. *Ireland* (Appl. no. 25579/05), judgment, 16 December 2010, especially paras 231–37. See, in this book, the chapter by F. de Londras (Chapter 14) and her illuminating discussion of *A, B & C*.

[26] See, for instance, Council of Europe, Parliamentary Assembly (2000) *Execution of Judgments of the European Court of Human Rights*. Resolution 1226, para. 3, http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=16834&lang=EN. 'The principle of solidarity implies that the case-law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* (to all the other parties). This means that the states parties not only have to execute the judgments of the Court pronounced in cases to which they are party, but also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice'.

[27] In *Vallianatos*, for instance, the ECtHR relied on EuC to conclude that the respondent state had violated Article 14 in conjunction with Article 8 of the ECHR because it excluded same-sex couples from the scope of legislation recognising a 'civil union' as an official form of partnership other than marriage. The right to a civil union as an alternative to marriage is not explicitly prescribed in Article 8 ECHR. See *Vallianatos and Others* (Appl. nos. 29381/09 and 32684/09), judgment, 7 November 2017, especially para. 91.

margin of appreciation[28] and the ECtHR typically applies a looser proportionality test in determining the lawfulness of national rules and of executive, administrative or judicial practice that may limit Convention rights.[29] Therefore, it is possible to argue that the Court exercises judicial self-restraint and, in doing so, it favours the regulatory autonomy of national authorities by empowering them to decide on the matter at issue domestically. This may be described as an expression of the principle of subsidiarity.[30] As a result, in the absence of EuC, Europe may accommodate multiple human rights standards in the spirit of (constitutional) pluralism.[31]

We conclude this overview by reiterating that the controversy surrounding EuC and the lack of clarity on its meaning, normative place and *modus operandi* cannot be overplayed.[32] Our brief *tour d'horizon* was designed to cover the core of EuC, with a view to providing readers with

[28] See, for example, *Chapman* v. *the United Kingdom* (Appl. no. 27238/95), judgment, 18 January 2001, paras 93 and 104.

[29] *Evans* v. *the United Kingdom* (Appl. no. 6339/05), judgment, 10 April 2007, para. 77; *Dickson* v. *the United Kingdom* (Appl. no. 44362/04), judgment, 4 December 2007, para. 78.

[30] See Article 1 of the 15th Protocol to the ECHR (not yet entered into force) and the connection it establishes between the margin of appreciation and subsidiarity. See also the Brighton declaration, paras 11 and 12, and especially 12(b). European Court of Human Rights, 'High level conference on the future of the European Court of Human Rights' (19–20 April 2012), www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf. See also A. Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 313–41.

[31] On constitutional pluralism, see N. Krisch, 'The open architecture of European human rights law' (2008) 71 *The Modern Law Review* 183. N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010). For an overview, comparing constitutional pluralism with the constitutionalisation narrative, see L. Lixinski, 'Taming the Fragmentation Monster through Human Rights? International Constitutionalism, "Pluralism Lite" and the Common Territory of the Two European Legal Orders', in V. Kosta et al. (eds.), *The EU Accession to the ECHR* (Oxford: Hart, 2014), pp. 219–33. For a collection of essays on constitutional pluralism regarding the EU and beyond that legal order, see M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart, 2012). In this book, see especially the chapters by S. Douglas-Scott (Chapter 8) and L. Van den Eynde (Chapter 5).

[32] As a former President of the Court has authoritatively explained, no full consensus exists on consensus partly because the 'Court's case-law is in some respects fluid and even fuzzy' (Wildhaber, Hjartarson and Donnelly, 'No consensus on consensus?', 262). It is inevitable, then, that different authors in this book 'read' consensus in different ways. Compare, for instance, the chapters by J. Větrovský (Chapter 6) and O. Bassok (Chapter 11), or the chapters by the latter author (in so far as the concept of public confidence is concerned) and T. Kleinlein (Chapters 11 and 10, respectively).

little or no background knowledge a basic understanding of the object of this book. We also tried to offer a glimpse of the nature and volume of questions raised by the conceptualisation and *modus operandi* of EuC. The next section of this introductory chapter identifies the inherent challenges when attempting to study EuC. Its tripartite structure mirrors the division of the book into three Parts.

1.3 Building Consensus on EuC: Mission Impossible?

1.3.1 Impediments to the Conceptualisation of EuC

As already explained, it is the ECtHR that invented the term 'European consensus' and developed it as an interpretive technique. This entails that the Court enjoys considerable discretion in choosing when to use EuC together with or instead of other methods of interpretation, in defining what consensus consists in and in evaluating the evidence on convergence of standards in Europe and beyond.[33] Along the same lines, it is the Court that defines the parameters of the legal question on which consensus is sought, and it is the Court that decides which elements should be taken into account for the purposes of that inquiry.[34]

Yet the designer and game master of the EuC 'game' has not (yet) provided a full, clear and detailed 'manual' on the definition of consensus and on the rules and outputs of the game.[35] Although the ECHR monitoring system has used the EuC technique from the 1970s onwards,[36] no comprehensive and authoritative guidance has been forthcoming. For instance, although it is evident that a considerable number of states must have developed a common practice for EuC to emerge, it is unclear where the cut-off point is (i.e., how many states will be required to reach the

[33] Tzevelekos and Dzehtsiarou, 'International custom making', 325.

[34] As to the discretion the ECtHR enjoys regarding the legal question it will examine, see the dissenting opinion of Judge Tulkens in *Leyla Şahin* v. *Turkey* (Appl. no. 44774/98), judgment, 10 November 2005, para. 3 of the opinion. See also Dzehtsiarou, *European Consensus*, pp. 109–10.

[35] We only have limited knowledge based on sporadic guidance provided by the Court and on the work of scholars, who establish hypotheses that lead to varied interpretations as to what EuC is and how it operates.

[36] *Tyrer* v. *the United Kingdom,* para. 31; *Marckx* v. *Belgium* (Appl. no. 6833/74), judgment, 13 June 1979, para. 41; *Dudgeon* v. *the United Kingdom* (Appl. no. 7525/76), judgment, 22 October 1981, para 60. On the origins of EuC in the practice of the ECHR institutions, and especially of the European Commission on Human Rights, see the chapter by E. Bates (Chapter 3) in this volume.

'consensus' threshold).[37] In the same vein, no detailed explanation has been provided regarding the different 'shades' of consensus and how these may correspond to the different terms that make up the 'consensus lexicon' employed by the ECtHR.[38] This might be due to a lack of consensus[39] (in the sense of an absence of unanimous agreement) among the ECtHR judges, which would hardly be surprising, given their number, the fact that they do not all sit in a single plenary formation and the fact that they do not serve for life. But (our) ignorance about EuC might also be the result of a strategic choice on the part of the ECtHR. The absence of a 'manual' on EuC entails increased flexibility in its use and the ensuing trade-off between judicial discretion and legal certainty, foreseeability and consistency may be what the Court is after when offering its sporadic guidance.[40] Either way, it is scholarship that strives to bridge this gap by observing the Court's normative attitude and trying to extrapolate the rules of the consensus 'game' from it. Hypothesising and extrapolating, however, comes at a price. When no analytical evaluation of EuC can be premised on an authoritative foundation of the Court's own making, it is inevitable that our understanding of EuC will remain partial and fragmented, even in so far as its most basic conceptual and functional elements are concerned.[41]

Scholars are not alone, of course, in attempting to cover this *lacuna*. National governments and their civil service, human rights lawyers representing victims of violations, civil society organisations (especially

[37] What we know for certain is that unanimity is not required for the establishment of EuC, although some type of majority will more often than not be deemed necessary. See, for example, *Vinter and Others* v. *the United Kingdom* (Appl. no. 66069/09, 130/10 and 3896/10), judgment, 9 July 2013, paras 68 and 117, where the Court relied on the practice of the large majority of the contracting states. There are instances in the practice of the Court where the identification of a tendency towards emerging EuC (*Schalk and Kopf* v. *Austria*, Appl. no. 30141/04, judgment, 24 June 2010, para. 105) or of emerging consensus *per se* (*Christine Goodwin* v. *the United Kingdom*, para. 84) was not sufficient to reach the consensus threshold.

[38] See the Preface in this book by Judge C. L. Rozakis, as well as the chapter by K. Henrard (Chapter 7), who explores the wealth of linguistic choices to which the ECtHR resorts in order to engage with consensus analysis. See also Wildhaber, Hjartarson and Donnelly, 'No consensus on consensus?', 257–8.

[39] For the 'copyright' of this play on words, see footnote 3.

[40] See, for example, footnotes 28, 29 and 37 on elements of such guidance.

[41] Such ambiguity is evident, for instance, when considering whether elements outside of the practice of the signatories to the ECHR (such as expert opinion or scientific knowledge, and trends informed by the practice of actors outside Europe) can be taken into account for the formulation of consensus. See also footnote 18.