Review of Covid-19 measures by the European Court of Human Rights: How to avoid the ‘fair’, the ‘balance’ and ‘the fair balance’

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Published in:
Constitutional Dimensions of Emergency Law

2025

Document Version:
Early version, also known as pre-print

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How to avoid the 'fair', the 'balance' and 'the fair balance'

in Sanja Bogojevic and Xavier Groussot (eds) *Constitutional Dimensions of Emergency Law*

(Hart Publishing 2025)

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1. Introduction

The Covid-19 crisis revealed the breadth of powers that European States have at their disposal. To address the crisis, a panoply of restrictive and intrusive measures was applied – restrictions of movement,[1] denial of family contacts,[2] prohibitions of assemblies[3] and gatherings,[4] imposition of medical interventions such as vaccinations,[5] closure of schools,[6] restriction of 'harmful' speech,[7] to name some. These measures resembled nothing close to any restrictions that European societies have experienced after the Second World War. This makes their legal scrutiny a very important task despite the limited duration of the restrictions and despite the

[1] *Pešić v Serbia* App no 48973/20 (communicated 5 January 2023); *Bado v Slovakia* App no 23445/21 (communicated 10 July 2023); *Terheş v. Romania*, App no 49933/20 decision of 13 April 2021 (inadmissible since the restrictions did not amount to deprivation of liberty in the sense of Article 5 ECHR); *Árus v Romania* App no 39647/21, 30 May 2023 (restriction on freedom of movement due to the obligation to wear a mask in public spaces).

[2] *Michalski v Poland* App no 34180/20 (communicated 17 November 2021) (general ban on family visits introduced in the applicant's prison); *Guhn v Poland* App no 45519/20 (communicated 17 November 2021) (general ban on family visits in prison).

[3] *Szivarvany Misszio Alapitvany v Hungary* App no 32272/21 (communicated 27 Nov 2023) (blanket ban on all public assemblies); *Jambor v Hungary* App no 50723/21 (communicated 27 Nov 2023); *Jarocki v Poland* App no 39750/20 (communicated 17 November 2021); *Central Unitaria de Traballadores/AS v Spain* App no 49363/20 (communicated 13 October 2021); *Szivárvány Misszió Alaítvány v Hungary* App no 32272/21 (communicated 27 November 2023); *Jámbor v Hungary* App no 50723/21 (communicated 27 November 2023).

[4] *Mégard v France* App no 32647/22 (communicated 19 September 2022); *Figel v Slovakia* App no 12131/21 (communicated 12 December 2022).

[5] *Mittendorfer v Austria* App no 32467/22 (inadmissible 4 July 2023); *Thevenon v France* App no 46061/21 (decision of 13 September 2022).

[6] *M.C.K. and M.H.K.-B. v Germany* App no 26657/22 (communicated 20 December 2022); *Nemytov v Russia* App no 1257/21 (communicated 22 September 2021).

[7] *Jeremejevs v Latvia* App no 44644 (communicated 17 January 2022) (criminal proceedings for posts on social media); *Petrova v Bulgaria* App no 938/21 (communicated 26 August 2022) (the applicant called for protests against the Covid-19 restrictions on her Facebook page, as a result of which a criminal investigation was opened against her); *Avagyan v Russia* App no 36911/20 (communicated on 4 November 2020).

efforts of our societies to move forward so that energy can be redirected towards speedy recovery.

The restrictive measures imposed during the Covid-19 crisis implicate human rights law and in one way or another can be a basis for formulating applications, in the European context, to the European Court of Human Rights (ECtHR). At the time of writing, the Court has already delivered judgments and decisions related to some of the measures under the European Convention on Human Rights (ECHR); while numerous applications are still pending. In light of the pending applications that have not yet been decided or even communicated to the States and the many other cases that will be brought to the Court after the exhaustion of the relevant domestic remedies, there is still uncertainty as to how the Court will approach its role and what substantive human rights law standards it might choose to develop in relation to the Covid-19 crisis.

Yet it is still possible to understand the current approach based on the already delivered judgments and decisions and based on the questions asked by the Court in the communicated cases. Equally important is the already existing leading Grand Chamber judgment on the topic that will be specifically taken note of in the analysis below since it is likely to become a benchmark.[8] This chapter therefore takes account of the judgments, the decisions and the communicated cases since March 2020 up to March 2024, that directly relate to the measures taken during the Covid-19 crisis.[9] To assess them, the analysis is informed by the established standards in the ECtHR case law.

One caveat has to be made immediately. This concerns the distinction between cases *directly* related to the measures as opposed to cases that are only indirectly related. Given the pervasiveness of the measures the States initiated in the beginning of 2020, it can be expected

[8] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] App no 21881/20, 27 November 2023.
[9] The Factsheet 'Covid-19 health crisis' was used as a starting point. After that additional searches were conducted in the HUDOC database with Covid-19 as a search word.

that every sphere of life was affected. In this sense, many cases whose factual basis refers to circumstances arising after March 2020 are likely to include some consideration of the Covid-19 context and the related restrictive measures. My focus however lies on cases where the applicants invoke breaches of obligations, as corelated to a right enshrined in the ECHR, whose content are measures adopted by States and/or claimed to be necessary for responding to the spread of the virus.[10] In this sense, the harm caused by the virus and/or the harm caused by the measures against the spread of the virus,[11] was not simply an aggravating factor in the wider factual substratum of the cases, but the sole or dominant reason for claiming breach of obligations under the ECHR.[12]

Another distinction might be relevant to the efforts to examine the case law. A group of cases can be identified where the harm is directly related to the restrictive measures during the pandemic, but the obligations invoked before the Court are procedural in nature.[13] This group

[10] A case like *Khokhlov v Cyprus* App no 53114/20, 13 June 2023, where the extradition of the applicant was delayed, among other reasons because of the Covid-19 pandemic, and where the Court found a violation of Article 5(4) ECHR, will *not* fall in the category of directly related cases. See also *Feilazoo v Malta* App no. 6865/1911 (ECHR June 2021). A borderline case is perhaps *O. and R. v Slovenia* App no 19938/20, 8 February 2022, where the Court found a violation of Article 6(1) due to very lengthy foster care proceedings. In the Court's view, the restrictions necessitated by the Covid-19 crisis could have understandably had an adverse effect on the processing of the case before the domestic court. However, in the present case the State could not absolve itself, because it could have dealt with it as an urgent case. Here it seems that the Covid-19 measures were only one element causing the delay, albeit an important one. For other cases that do *not* fall within the category of directly related cases, see *Faia v Italy* App no 17222/20 (communicated 5 May 2021) and *Hafeez v the United Kingdom* App no 14198/20 (inadmissible 28 March 2023) where Covid-19 was an aggravating factor. See also *Grgičin v Croatia* App no (inadmissible 12 December 2023); *Kristić v Serbia* App no 35246/21 (ECtHR, 16 December 2021) (extradition to USA).

[11] I use the term 'harm' here in the sense of harmful effects on important interests protected by the rights enshrined in the ECHR. This is without prejudice to the determination whether this harm can be translated into a violation of any specific ECHR right and thus into state responsibility under the ECHR.

[12] Questions can be also raised as to the distinction between sole reason and dominant reason. Examples of cases that fall within the first category are *Ait Oufella v France* App no 51860/20; *E.B. v Serbia* App no 50086/20 (communicated 5 November 2021) and *A.A. v Serbia* App no 50898/20 (communicated 5 November 2021) where the applicants' deprivation of liberty or extension of deprivation of liberty was a direct result of the Covid-19 emergency situation.

[13] An example to this effect is *Piro Planet D.O.D. v Slovenia* App no 34568/22 (communicated 22 May 2023), where the applicant company complained about a ban on selling pyrotechnics, which had been introduced and then prolonged by the Governmental Decrees Concerning COVID-19 Prevention. As a result of the ban, the company suffered a significant decrease in its annual sales revenue. In addition to the right to property, Article 6(1) ECHR was invoked since, as the applicant argued, the Constitutional Court arbitrary rejected its petition for constitutionality review. See also *Galatasaray Sportif Sinau ve Ticari Yatirimlar A.Ş. v Turkey* App no 59957/21 (communicated 21 November 2023), where the harm was the fine imposed on the applicant company (a football club) because it did not observe the Covid-19 measures (admission of more spectators than allowed and violation of mask rules). In this sense, the harm was directly related to the Covid-19 restrictive measures. The obligations

can be distinguished from cases where restrictive measures justified by the States as necessary to prevent the spread of the virus, directly caused limitations of procedural rights, as protected by the Convention. In this sense latter sense, the harm can be framed as procedural.[14] To the extent that it is possible to isolate them, procedural harm and procedural obligations will not be at the core of this chapter. Undeniably, making all these distinctions between different forms of harm and different obligations might be difficult. It is still, however, useful to make them.

To understand the ECtHR's approach to the Covid-19 measures, this chapter will be structured as follows. Section 2 will explain that generally the cases expose tensions between important interests, which are not easy to resolve to start with. Such tensions indeed permeate human rights law and, in this sense, there is nothing extraordinary in facing them and trying to address them.[15] Yet there seems to be at least two interrelated distinguishing features. First, a claim is made in the cases that they reveal not simply a tension between general interests and individual interests as enshrined in the ECHR. Rather, there are also tensions (even possible conflicts) between obligations held by States.[16] The second distinguishing feature concerns the invocation of crisis and emergency, which has an impact on how these tensions might be resolved.[17] Having generally explained the complexities that the cases manifest, Section 3

arguably breached were procedural (Article 6 ECHR) since the company's claim to challenge the fine was dismissed at the domestic level. See also *Scheffer v Slovakia* App no 16627/21 (communicated 24 January 2023), where the right to property alone and in conjunction with Article 13 (the right to effective remedy) was invoked. See also *Panta Rhesi S.R.O. v Slovakia* App no 38283/21 (communicated 15 May 2023); *Lyžiarsky Klub Baba-Pezinko v Slovakia* App no 34483/21 (communicated 30 May 2023); *Denim Retail S.R.O. v Slovakia* App no 21846/21 (communicated 10 July 2023).

[14] An example to this effect is *Kucera v Austria* App no 13810/22 (communicated 14 June 2023), where the applicant claimed a violation of Article 6 ECHR since the domestic court based on the rules for the prevention of the spread of Covid-19, decided to hold an oral hearing in a criminal case via video conference. See also *Pratesi v Italy* App no 28342/21 (communicated 3 April 2023).

[15] L Zucca, *Constitutional Dilemmas* (OUP 2007); S Smet, 'Conflicts of Rights in Theoretical and Comparative Perspective' in S Smet and E Brems (eds) *When Human Rights Clash at the European Court of Human Rights* (OUP 2017) 1; S Besson*, The Morality of Conflict* (Hart 2005) 432; E Brems (ed) *Conflicts between Fundamental Rights* (Intersentia 2008); V Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (OUP 2023).

[16] On the distinction between conflicts and tensions, see Bomholl and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights' (2006) 2 European Constitutional Law Review 424.

[17] For literature on addressing the tensions in the context of the Covid-19, see K Meßerschmidt, 'COVID-19 Legislation in the Light of the Precautionary Principle' (2020) 8 Theory and Practice of Legislation (2020) 267, 287–290; K Lachmayer, 'Democracy, Death and Dying: The Potential and Limits of Legal Rationalisation', in MC Kettemann and K Lachmayer (eds.), *Pandemocracy in Europe. Power, Parliaments and People in Times of*

shows that currently the Court's approach is one of avoidance; namely, the Court evades engagement with the tensions on their merits by declaring the cases inadmissible. In this way, the Court avoids engaging with the difficulties of balancing the competing interests for resolving any tensions. Section 4 shows that even if the Court proceeds with reasoning on the merits, it avoids directly assessing whether the balance struck at the national level was 'fair' by invoking a wide margin of appreciation. Section 5 discusses three factors (severity of the interference; counterbalancing measures; and the temporality of the restrictive measures) that although linked with the margin of appreciation, can be identified in the Court's reasoning on the merits as having an important role in assessing the fairness of the balance struck at national level between competing interests. I will explain that the way these three factors are utilized in the Court's reasoning is problematic since they ultimately undermine the 'fair balance' test as a tool for human rights law reasoning. In this sense, not only does the Court avoid the 'balance' by declaring applications inadmissible (see Section 3) and the question about the fairness of the balance struck at national level (see Section 4), but it might also undermine the idea of 'fair balance'. The final section concludes by offering reflections about the implications from the Court's avoidance strategy.

2. Typical tensions and extraordinary crises

An overview of the judgments, decisions and pending applications reveals a relatively specific context where applicants invoke the responsibility of States under the ECHR, on competing grounds. In some cases, the applicants argue that the States did not do enough; these are cases

COVID-19 (Hart 2022) 47, 52; P Dąbrowska-Kłosińska, 'The Protection of Human Rights in Pandemics – Reflections on the Past, Present, and Future' (2021) 22 German Law Journal (2021) 1028, 1036–1037; L Vyhnánek et al, 'The Dynamics of Proportionality: Constitutional Courts and the Review of COVID-19 Regulations' (2024) German Law Journal 1.

where States' positive obligations can be invoked.[18] There is a second group of cases, where the applicants argue that States did too much since the measures were disproportionately intrusive and restrictive; these are the cases where applicants invoke breaches of States' negative obligations under the ECHR.[19] Currently, the second group of cases dominate in terms of the nature of the claims in decisions already issued by the Court and in applications communicated to the respondent States. This means that currently applicants predominantly claim that the measures meant to respond to the Covid-19 crisis were too restrictive and intrusive and thus in violation of States' negative human rights law obligations.

At the time of writing, no violation has been found in the first group of cases. This implies that the Court has not made a pronouncement that a State has failed to fulfil its positive obligations under the ECHR by not sufficiently protecting the lives and physical integrity of persons within its jurisdiction. As to the second group, no violation has been found either.[20] In *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland*, the Chamber did find a violation of Article 11 (freedom of peaceful assembly);[21] however, this was reversed by the Grand Chamber for reasons that will be explained below. Such a reversal is an important signal

[18] *Le Mailloux v France*, decision 5 November 2020 (inadmissible); *Fenech v Malta* App no 19090/20, 1 March 2022; *Ünsal and Timtik v Turkey* App no 36331/20 (decision of 8 June 2021) (inadmissible since the application is manifestly ill-founded); *Riela v Italy* App no 17378/20, 9 November 2023, para 21; *Maratsis and Others v Greece* App no 30335/20 (communicated 25 February 2021); *Vasilakis and Others v Greece* App no 30379/20 (communicated 25 February 2021); *Vlamis and Others v Greece* App no 29655/20 (committed 16 April 2021), where detainees complain that they were not sufficiently protected during the Covid-19 crisis.

[19] In some context such as prison, where the applicants are under the complete control of the authorities, it might be difficult to make the distinction between positive and negative obligations. See, for example, *Gözütok v Turkey* App no 41412/21 (communicated 20 June 2023). On this distinction, see V Stoyanova, 'Framing Positive Obligations under the ECHR: Mediating between the Abstract and the Concrete' (2023) 23(3) Human Rights Law Review 1; J Vorland Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) Human Rights Review; M Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) Heidelberg Journal of International Law 691, 694.

[20] With the important clarification that it depends how narrowly this group of cases is delimited. In *O and R v Slovenia* App no 19938/20, 8 February 2022, the Court did find a violation of Article 6(1) due to very lengthy foster care proceedings. In *Narbutas v Lithuania* App no 14139/21, 19 December 2023, the Court did find a violation of Article 8 since the information issued by the authorities during the criminal investigation against the applicant, while contributing to a public debate about the purchase of Covid-19 tests, was overall not justifiable. However, in my classification these cases are not directly related.

[21] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* App no 21881/20, 15 March 2022.

from the Court to the effect that it is not willing to review whether and to what extent the restrictive measures were proportionate and thus 'fair'.[22]

In relation to the second group of cases, it is relevant to observe that while the applicants invoke negative obligations as a basis for the alleged breaches, States invoke not only legitimate general interests to limit rights (i.e. public health), but also their positive human rights law obligations. This implies that positive obligations are utilised by States to justify the restrictive measures. These utilisations are not rejected by the Court.[23] All of this means that although, as mentioned above, no breach of a positive obligation has yet been found in a concrete case concerning a concrete applicant, the Court has accepted at a very general and abstract level that States had the unspecified positive human rights obligation to, for example, protect life and health under the ECHR during the Covid-19 crisis. Protection of life and health therefore was not 'one possible option available to the States; it is rather an obligation, imposed on them by the Convention.'[24] In *Fenech v Malta*, for example, the Court went to great lengths to outline the positive obligation upon States 'to put in place effective methods of prevention and detection of contagious diseases in prisons'.[25] All of this foregrounds an understanding that there are tensions or even outright conflicts between competing obligations (i.e. the general *unspecified* positive obligation to protect life and health versus the negative obligation upon the State not to take *concrete* measures that are possibly disproportionately intrusive and restrictive in relation to the *specific* applicant).[26]

[22] On proportionality in the context of the ECHR generally, see J Gerards, *General Principles of the European Convention on Human Rights* (CUP 2023) 349.
[23] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* App no 21881/20, 15 March 2022, para 84; *Spînu v Romania* App no 29443/20 (11 October 2022) para 63. Such invocations of positive obligations can be traced back to *Vavřička and Others v the Czech Republic* [GC] App no 47621/13, 8 April 2021, para 282.
[24] Concurring Opinion of Judge Krec, para 4 in *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* App no 21881/20, 15 March 2022.
[25] *Fenech v Malta* App no 19090/20, 1 March 2022, paras 127–129. See also *Spînu v Romania*, App no 29443/20, 11 October 2022.
[26] See S Besson, *The Morality of Conflict* (Hart 2005) which explains that for there to be an actual tension, the two obligations would have to be framed at the same level of specificity.

While the general interests (i.e. protection of public health) that might justify restrictions were undoubtedly legitimate, questions can be raised about the suitability and the necessity of the restrictive measures for actually achieving these general interests.[27] Similar causation questions can be asked about the appropriateness of invoking positive human rights obligations where the object of protection (i.e. an individual) was unspecified and unknown. These are challenging questions to address in human rights law, which has more generally justified the Court's deferential approach in applying the tests of suitability and necessity that are relevant for assessing breaches of negative obligations.[28]

As to the invocation of positive obligations, not only are they circumscribed by the test of reasonableness,[29] but if they were to be applied in a specific case, additional factors would circumscribe their content and scope. For example, in *Fenech v Malta* the Court correctly observed that[30]

> without diminishing the seriousness of this sometimes deadly virus [Covid-19], the Court cannot consider that individuals are a victim of an alleged violation of Article 2 without substantiating that in their own circumstances the acts or omissions of the State have or could have put their life at *real and imminent risk*.

The reality and the imminence of the risk for those who arguably had to be protected, is an important consideration in determining the content and the scope of positive obligations and determining their breach.[31]

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[27] Admittedly, the Court does not generally question the suitability of restrictive measures that might be in breach of negative obligations. Basak Çali, 'Proving Bad Faith in International Law: Lessons from the Article 18 Case law of the European Court of Human Rights,' in G Kajtar, B Çali and M Milanovic (eds) *Secondary Rules of Primary Importance in International Law* (OUP 2022).
[28] E Brems and L Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139.
[29] V Stoyanova, *Positive Obligations*.
[30] *Fenech v Malta* App no 19090/20, 1 March 2022, para 104 (emphasis added).
[31] V Stoyanova, *Positive Obligations*.

The challenges how to apply these tests and who is better placed to apply them seem to be exacerbated at times of crisis and emergencies (actual or perceived),[32] which might justify even more deference from the Court. The following pronouncements by the Court are suggestive in this respect. In particular, the ECtHR has characterised the specific context of the Covid-19 pandemic as a 'public health emergency.'[33] It has also added that[34]

> the Covid-19 pandemic is liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an 'exceptional and unforeseeable context'.

The Court has also accepted that 'the authorities were confronted with a novel situation such as a global pandemic – unprecedented in recent decades – as a result of a new strain of coronavirus (called Covid-19) to which they had to react in a timely manner.'[35] In *Bah v the Netherlands*, 'the difficult and unforeseen practical problems with which the State was confronted during the first weeks of the Covid-19 pandemic' had a key role for the Court to conclude that it was not incompatible with Article 5(4) to assess the applicant's detention order without securing his attendance at the hearing in person or by videoconference.[36] The Court has also referred to the 'exceptional circumstances of the Covid-19'.[37]

[32] VP Tzevelekos and K Dzehtsiarou, 'Normal as Usual? Human Rights in Times of COVID-19', (2020) 1(2) European Convention on Human Rights Law Review 141, 143.
[33] *Fenech v Malta* para 96.
[34] *ibid*; *Terheş v Romania* App no 49933/20 (decision 13 April 2021).
[35] *Fenech v Malta* para 129.
[36] *Bah v the Netherlands* App no 35751/20 (inadmissible decision 22 June 2021) para 41.
[37] *Perstner v Luxembourg* App no 7446/21, 16 February 2023, para 48.

Admittedly, the deference that the Court has shown so far can be perceived as part of a wider phenomenon: namely the Court's expression of respect for the principle of subsidiarity,[38] which precedes the Covid-19 pandemic and the pandemic-related case law. Yet the above-quoted pronouncements are indicative of even stronger deference. The rejection of many applications as inadmissible supports this indication.

3. Avoiding the 'balance'

Most of the current cases are declared inadmissible due to the absence of victim status and/or non-exhaustion of domestic remedies. This section will explain these two grounds.

3.1 No *actio popularis*

As to the first ground related to the requirement for victim status, the Court has been consistent in saying that it is not its role 'to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention.'[39] This relates to the Court's primary objective to provide individual rather than constitutional justice,[40] which is also reflected in the admissibility requirement that the applicant must be a victim of an alleged violation.[41] The latter means that he or she has to be specifically affected. The starting point is therefore that the Court cannot perform a purely abstract review. This expresses the idea that human rights justice is individual-centered. Human rights justice is therefore placed 'not in the abstraction of general situations which law-makers have regard for, but in the concreteness of

[38] L Glas, 'The Age of Subsidiarity? The ECtHR's Approach to the Admissibility Requirement that Applicants Raise Their Convention Complaint before Domestic Court' (2023) 41(2) Netherlands Quarterly of Human Rights 75, 82.
[39] *McCann and Others v The United Kingdom* [GC] App no 18984/91, 27 September 1995 para 153; *Marckx v Belgium* App no 6833/74, 13 June 1979 para 27. For further references, see Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque in *Vallianatos and Others v Greece* [GC] App no 29381/08 and 32684/09, 7 November 2013.
[40] On the interplay between these objectives see Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23 Oxford Journal of Legal Studies 405.
[41] Article 34 ECHR.

particular cases, irreducible in their singularity.'[42] In this sense, the Court does not directly review national regulatory frameworks.[43] It can only do so indirectly once these frameworks have affected a concrete individual, who in the proceedings before the Court has standing as a victim.[44] In this respect, the Court has established that[45]

> In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure: the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention.

It has also clarified that 'in order for applicants to be able to claim victim status, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect.'[46]

The requirement for victim status has been applied with some flexibility. An applicant can still be found to fulfil it even 'in the absence of an individual measure of implementation'. In this case, however, the applicant needs to demonstrate that he or she is 'required either to adjust his conduct or risks being prosecuted *or* if he is a member of a class of people who risk

[42] Tulkens and Van Drooghenbroeck, 'La Cour de cassation et la Cour européenne des droits de l'homme. Les voies de la banalisation', in Imperat Lex. Liber Amicorum Pierre Marchal (Larcier, 2003) 133, cited in Tulkens, 'Different Standards of Judicial Review. The Nature and Object of the Judgment of the European Court of Human Rights' (2011) 4 Constitutional Law Review 31.
[43] V Stoyanova, *Positive Obligations*.
[44] J Gerards, 'Abstract and Concrete Reasonableness Review by the European Court of Human Rights' (2020) 1 European Convention on Human Rights Law Review 2018, 226.
[45] *Tănase v Moldova* [GC] App no 7/08, 27 April 2010 para 104.
[46] *Zambrano v France* (dec) App no 41994/21, 21 September 2021, para 42; *Le Mailloux v France* (dec) [Committee], App no 18108/20, 5 November 2020, para 11; *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] App no 21881/20, 27 November 2023, paras 105–106.

being *directly* affected by the legislation.'[47] It follows that in these two situations an applicant can be a potential victim and his or her application to the Court still accepted as admissible.

However, a direct link needs to be established between the general measures that the applicant complains of, and any potential harm suffered by the specific applicant. The Chamber in *CGAS v Switzerland* concluded that there was such a direct link since the applicant association refrained from organising public meetings to avoid the criminal penalties provided for in Ordinance COVID-19 no. 2. The latter imposed a ban on public events and was amended to the effect that the possibility for exemptions from the ban was removed.[48]

The Grand Chamber disagreed on this point since, according to the ordinance, only individual members could have been criminally sanctioned; any criminal responsibility of the association as such could not be engaged.[49] The Grand Chamber also added that 'there is nothing to suggest that the mere fact of taking administrative steps to organise public events would have amounted to conduct that was likely to be sanctioned.'[50] The Chamber and the Grand Chamber therefore approached the potential victim standard in very different ways. The Chamber's approach was relatively abstract and flexible, with focus on the consequences of the ban (against organising public meetings). In contrast, the Grand Chamber focused on the specific technicalities (i.e., no criminal sanctions on the association as such and no criminal sanctions for taking administrative steps to organise an event as such). Such a formalistic and technical approach allowed the Grand Chamber to ignore the overall context and the consequences (e.g., limiting political expression in a democratic society).[51]

[47] See generally *Burden v the United Kingdom* [GC] App no 13378/05, paras 33–34; *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] App no 21881/20, 27 November 2023, para 115.
[48] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] paras 118–120.
[49] *ibid*, para 112.
[50] *ibid*, para 124.
[51] It can be argued that it is excessively formalistic to say that since the association was not criminally liable, there was no risk of sanctions. Criminal sanctions could have been imposed on the association's representatives and persons participating in the events organised by it.

In the other inadmissibility decisions issued so far, there was no need to even offer much justification with reference to technicalities. The fact that the restrictive measures were imposed on the entire population as a response to the virus has therefore been a major obstacle to engaging with the cases on their merits.[52] *Tomáš Lörinc and Others v Slovakia,*[53] *Dalibor Magdić v Croatia*,[54] *Piperea v Romania*,[55] *Mittendorfer v Austria*,[56] and *Pernechele and Others v Italy*,[57] were declared inadmissible since the applicants generally complained about the restrictive measures without being able to show they were harmed in any specific way *different from everybody else*. For example, in the inadmissibility decision in *Dalibor Magdić v Croatia*, the Court reasoned that[58]

> the applicant complained that the measures in question had breached his freedom of religion but failed to indicate to which religious community he belongs. Likewise, while complaining about the breach of his freedom of assembly, he failed to specify which public gatherings he could not attend because of the measures in question. Similarly, he complained of the breach of his freedom of movement without mentioning where and when he intended to travel but could not because of the impugned measures.

The complete absence of any such individual particulars makes it impossible for the Court to conduct an individual assessment of the applicant's situation. It thus appears that the applicant

[52] It can be expected that the requirement for a link between the harm alleged by a specific applicant and any omissions by the State would be even more difficult to establish in cases where applicants claim breaches of positive obligations under the ECHR. This difficulty relates to the nature of omissions as a basis for state responsibility. See V Stoyanova, 'Framing Positive Obligations under the ECHR'. See *Le Mailloux v. France* App no 18108/20 (decision of 5 November 2020); *Fenech v Malta* paras 104 and 107.
[53] *Tomáš Lörinc and Others v Slovakia* App no 27877/21, 5 April 2022 (inadmissible).
[54] *Dalibor Magdić v Croatia* App no 17578/20, 5 July 2022, paras 10–12.
[55] *Piperea v Romania* App no 24183/21 inadmissible 5 July 2022.
[56] *Mittendorfer v Austria* (inadmissible 4 July 2023).
[57] *Pernechele and Others v Italy* App no 7222/22 (inadmissible 31 October 2023).
[58] *Dalibor Magdić v Croatia* App no 17578/20, 5 July 2022, paras 10–12

wishes to complain about the impugned measures in a general manner, contemplating that, as a result of their adoption, his freedoms were automatically violated. [59]

The reasoning was similar in *Pernechele and Others v Italy*, which concerned a complaint by Italian lawyers regarding the requirement for a Covid certificate so that they could access courts and detention centres. They argued that this requirement was in violation of Article 8 ECHR. To declare it inadmissible, the Court observed that[60]

> the applicants did not submit any information about their situation except for their identity and occupation. They provided no data to show how exactly the impugned measures had affected, or would have been likely to have affected them directly or to target them because of their possible individual characteristics. In particular, the applicants did not indicate whether there had been scheduled hearings that they should have attended during the relevant period or whether they had needed to meet with detained clients in person. Similarly, they did not indicate whether alternative means of participation in hearings or of contact with detainees had been available, for example through videoconferences, telephones calls or in writing. Lastly, five of the six applicants had not attained the age of 50 at the time the application was lodged with the Court. Thus, the vaccination requirement did not apply to them.

In *Mittendorfer v Austria* the applicant also tried to challenge the vaccination mandates. The Court held that 'he has not substantiated in any form how the Vaccination Act affected him personally.' [61] An interesting aspect in the reasoning here was the usage of the timeframe of

[59] *ibid*.
[60] *Pernechele and Others v Italy* App no 7222/22 (31 October 2023) para 13.
[61] *Mittendorfer v Austria* App no 32467/22 (inadmissible 4 July 2023).

the challenged measures and, more specifically, their temporary nature. In particular, the Court observed that[62]

> the applicant was neither at risk of being affected by the Vaccination Act when he lodged his application with the Court, given that it had already been suspended by that stage, nor that he will face such a risk in the future, given that the Act has since been repealed.

In light of this reasoning, the mandates as introduced in Austria under the Vaccination Act can barely be challenged by anybody for their compatibility with the ECHR. Given the suspension and the repeal of the mandates, hardly anybody can therefore fulfil the victim requirement. Yet such mandates in themselves constitute an infringement on private life and bodily integrity,[63] whose proportionality should be tested.

Oleg Yuriyovych Makovetskyy v Ukraine is distinct from the previously mentioned cases in that the applicant was actually individually affected in a specific way since he refused to comply with the restrictive measures, as a result of which he was sanctioned.[64] The case concerned the question of whether the administrative-offence proceedings regarding the refusal by the applicant to wear a face mask (part of the measures to control the spread of the virus) were in breach of the applicant's rights under Articles 6 and 7 of the Convention. The intrusive measure itself (i.e. the requirement to wear a mask) was therefore not at the heart of the case; rather, the procedural question regarding the fairness of the national proceedings was at the core of the case. In declaring the application inadmissible, the Court first noted the very low amount of the fine imposed on the applicant (4.90 euros at the time). Then it added that[65]

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[62] *ibid*.
[63] *Vavřička and Others v the Czech Republic* [GC] App no 47621/13, 8 April 2021, where Article 8 was found breached, but not violated.
[64] *Oleg Yuriyovych Makovetskyy v Ukraine*, App no 50824/21, 19 May 2022
[65] *ibid*, paras 7–8.

> the applicant, who was present at the first-instance court hearing, essentially argued that the imposition of pandemic-control measures, including the requirement to wear a face mask and the consequent actions of the police in fining him, had been unlawful. The domestic courts duly examined the applicant's arguments, established that he had committed an administrative offence punishable under the legislation in force and found against him. Accordingly there is no indication that the applicant was prevented in any way from making his case or that the findings of the domestic courts were arbitrary or manifestly unreasonable.

As to Article 7, given the negligible sum of 4.90 euros, it was found that 'the proceedings in question did not involve the determination of a "criminal charge" within the meaning of Article 6 of the Convention and that this provision accordingly did not apply to those proceedings under its criminal limb.' Article 7 of the Convention therefore could not be regarded as applicable either.[66] A case like *Makovetskyy v Ukraine* therefore indicates that even if the applicants try to invoke procedural harm and procedural obligations, they face serious difficulties.

3.2 Strict approach to the requirement for exhaustion of domestic remedies

Applications have also been declared inadmissible on the basis of the applicants' failure to exhaust domestic remedies. The cases demonstrate the obstacles that applicants encounter when trying to initiate administrative or constitutional proceedings for review of the harms caused by the general restrictive measures adopted by States in respond to Covid-19.[67] In addition, there

[66] *ibid*, paras 11–12.
[67] See generally Arianna Vedaschi and Chiara Graziani, 'New Dynamics of the 'Post-COVID-19 Era': A Legal Conundrum' (2023) German Law Journal 1, 31.

is an uncertainty as to the availability and effectiveness of domestic remedies for reviewing specifically the various issues raised by the novel and unprecedented situation created with the Covid-19 measures.[68] Relatedly, these difficulties and uncertainties pose challenges as to how flexibly the Court should apply the requirement for exhaustion of domestic remedies. These challenges are further complicated in light of the importance of the principle of subsidiarity.

Similarly to the victim status requirement, the Court has developed certain standards as to the application of the rule for exhaustion of domestic remedies and has noted that 'some degree of flexibility' and no 'excessive formalism' are necessary.[69] Yet, this flexibility has its limits since 'mere doubts as to the effectiveness of a remedy are not a valid reason for an applicant's failure to use it.'[70] In *CGAS v Switzerland* the Grand Chamber reaffirmed that '[t]he existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust the avenue of redress.'[71] Flexibility could strike against the principle of subsidiarity, leading the Court to show preference in favour of more formalism (focus on technicalities), which facilitates the finding that the application is inadmissible. The public health context and the crisis context have definitely added important nuances as to the scope of flexibility the Court is willing to allow. In *CGAS v Switzerland,* after drawing attention to its 'fundamentally subsidiary role', the Grand Chamber invoked precisely these two contexts in support of its formalistic approach.

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[68] See, for example, *Rus v Romania* App no 2621/21, 9 May 2023 (inadmissible). The core of the applicant's complaint lay in the coronavirus infection he contracted in prison. The Court reasoned by analogy: 'The Government base their plea of non-exhaustion on the fact that a tort action may be brought to determine the medical circumstances and conditions of an infection with the SARS CoV 2 coronavirus, and that some proceedings of this kind are pending before the domestic courts, although no final decision appears to have been handed down in any such proceedings up to the date of the Government's observations.' In declaring the application inadmissible, the Court reasoned that it 'has already held that an action in tort based on ordinary law is an effective remedy for raising grievances arising from a tuberculosis bacillus infection contracted in prison.'

[69] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] App no 21881/20, 27 November 2023, paras 118–120.

[70] *Epözdemir and Beştaş Epözdemir v Turkey* App nos 49425/10 and 51124/10, (decision 22 October 2019); *Milosevic v the Netherlands* App no 77631 (decision 19 March 2002); *Pellegriti v Italy* App no 77363/01 (decision 26 May 2005); *MPP Golub v Ukraine* App no 6778/05, (decision 18 October 2005); *Vučković and Others v Serbia* (preliminary objection) [GC], App no 17153/1, 25 March 2014, paras 74 and 84.

[71] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] para 159.

As to the public health context, in *CGAS v Switzerland* the Grand Chamber underscored that this context raises the 'complex and sensitive question of the balance to be struck between the various interests at stake for the purpose of verifying the necessity and proportionality of a given restrictive measure'.[72] It added that[73]

> health care policy matters come within the margin of appreciation of the national authorities, who are best placed to assess priorities, use of resources and social needs. In this field, the Court has already had occasion to state that the margin of appreciation afforded to the States must be a *wide* one.

This makes it 'essential that any balancing has been done beforehand by the domestic courts.'[74]

As to the Covid-19 crisis, the GC in *CGAS v Switzerland* held that it was 'unprecedented and highly sensitive' and of 'exceptional nature.' Therefore, 'it was *all the more important* that the national authorities were first given the opportunity to strike a balance between competing private and public interests or between different rights protected by the Convention.'[75]

These two considerations (i.e., the public health context and the context of a crisis) therefore justified a more rigid and formalistic approach to the requirement for the exhaustion of domestic remedies. When applied to the specific applicant in *CGAS v Switzerland*, this rigidity and formalism meant that the applicant was expected to use a remedy when nobody ever was granted an exemption from the ban on public assembly and a request for an exemption had already been dismissed in another case.

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[72] *ibid* para 161.
[73] *ibid* para 160 with references to *Hristozov and Others v Bulgaria* App no 47039/11 and 358/12, paras 119 and 124, and *Vavricka* paras 274 and 280.
[74] *Zambrano v France* (dec) para 26; *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] para 161.
[75] *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] para 163.

Similar formalisms characterised the reasoning in the inadmissibility decision in *Mittendorfer v Austria,* a case where the applicant tried to challenge the vaccination mandates.[76] The implication from declaring the application inadmissible was that the applicant was expected (as any other future applicant who might try to challenge the Austrian Vaccination Act) to seek domestic remedies despite the existence of a judgment by the Federal Constitutional Court from 23 June 2022 that the Vaccination Act was constitutional and did not violate human rights.[77] The approach in *Thevenon v France* was very similar.[78] This case concerned the question of whether the imposition of a compulsory vaccination on account of the applicant's occupation as a professional firefighter breached his rights under Articles 8 and 14. He was suspended from his job since he refused to take the Covid-19 vaccine. The case was dismissed by the ECtHR as inadmissible since the applicant was expected to have resort to the following domestic remedy: the initiation of a procedure to challenge the suspension order issued by his employer before the French administrative courts. Such an expectation was raised despite the decision of the advisory section of the Conseil d'Etat (the highest administrative court) where the latter had already found that – from a general standpoint – Law No. 2021-1040 was compatible with the French Constitution and the Convention. Yet, the ECtHR demanded that that the applicant should have filed an individual petition to obtain a specific decision on his case.[79]

There are other pending cases, where the restrictive measures have generally been declared constitutional by the domestic courts, and the Court would have to decide whether the particular applicant would still have to seek domestic proceedings to *concretely* challenge the

[76] *Mittendorfer v Austria* App no 32467/22 (inadmissible 4 July 2023).
[77] *ibid* para 33.
[78] *Thevenon v France* App no 46061/21 (decision of 13 September 2022); *Zambrano v France* App no 41994/21 (decision of 7 October 2021).
[79] See also the pending *Pasquinelli and Others v San Marino* App no 24622/22 communicated on 12 December 2022, where by means of judgment no 11 of 2 November 2021, the national Constitutional Court confirmed the legitimacy of the law requiring health care workers to get vaccinated and its compatibility with the San Marino Constitution, the Convention, and other instruments. The Court asked no questions regarding the requirement for exhaustion of domestic remedies.

measures in his or her *specific* case.[80] Given the current approach by the Court in *CGAS v Switzerland,* the applicants face an uphill battle.

4. Avoiding the 'fair'

Despite the relatively formalist approach taken so far to the admissibility requirements (i.e., victim status and exhaustion of domestic remedies), which has allowed the Court to avoid the difficult task of balancing, there have been applications declared admissible leading to judgments on the merits, where the Court had to engage with the fairness of the balance already struck at the national level.

Spînu v Romania is one of the few judgments that can give some insights as to the Court's approach on the merits where the proportionality of the restrictive measures was reviewed.[81] It concerned the Romanian authorities' refusal to allow the applicant, a detained member of the Seventh-day Adventist Church, to go to a church in Bucharest to celebrate the Sabbath. Prior to the Covid-19 crisis, he had been allowed by the prison authorities to go to church. After establishing the legality of the restrictive measure and that it pursued a legitimate aim (the protection of public health), the Court reviewed its proportionality. Most importantly, the margin of appreciation afforded to the State was declared to be wide. In particular, the Court considered that[82]

> the evolution of the health situation and its unpredictability must have posed a certain number of problems for the prison authorities in organizing or monitoring the activities

[80] *Toromag S.R.O. v Slovakia*, App no 41217/20 communicated on 5 December 2020. The case concerns the closure from March to June 2020 of fitness centres, under measures taken by the Public Health Authority of Slovakia as part of the prevention of the spread of Covid-19. The applicants, owners of those centres, complain of the pecuniary damage allegedly suffered, the loss of future income and the loss of clientele. See also *Scheffer v Slovakia* App no 16627/21, communicated 24 January 2023; *Panta Rhei, S.R.O v Slovakia* App no 38283/21, communicated 15 May 2023; *Denim Retain S.R.O. v Slovakia* App no 21846/21, communicated 10 July 2023.
[81] *Spînu v Romania* App no 29443/20 (11 October 2022) para 63.
[82] *ibid* para 68.

> of a religious nature of the detainees. Therefore, it is of the opinion that a *wide margin of appreciation* must be granted to them […]

This implied more deference and no detailed scrutiny of the restrictive measures. An interesting feature here that deserves to be highlighted is the invocation of 'social solidarity' as an additional justification for the wide margin. Admittedly, it appeared for the first time in *Vavřička and Others v Czech Republic*,[83] where 'social solidarity' was used to rationalise a wide margin and thus the compatibility of an intrusive measure with human rights law. 'Social solidarity' in the specific context of the prison environment meant that the applicant had to accept limitations for the sake of common interests. As the Court clarified,[84]

> the risk of contamination outside the prison and introduction of the virus into the closed environment of this establishment must certainly have had significant weight in the decision of the prison authorities, at a time when prevention measures were focused on the prevention of contact and on isolation or quarantine, among others.

While this reasoning in the specific context of the prison environment (i.e. a closed environment where the state authorities have enhanced obligations toward the prisoners), might be easier to accept, it remains to be better understood how the Court will continue to use 'social solidarity' as an argument in justification of restrictive/intrusive measures.

5. Avoiding the 'fair balance'?

Despite the wide margin of appreciation that would suggest that the Court would rather steer away from directly balancing individual and general interests, in *Spînu v Romania* certain

[83] *Vavřička and Others v Czech Republic* [GC] App no 47621/13, 8 April 2021, para 279.
[84] *Spînu v Romania* App no 29443/20 (11 October 2022) para 68.

factors were invoked in the reasoning that are indicative of how 'a fair balance' might be struck.[85] Three such factors can be distinguished: (i) the severity of the interference; (ii) efforts to counterbalance the interference; and (iii) the temporality of the interference. These will be explained below since it is likely that their relevance will be lasting. Of equal importance is the problematic way these factors are utilized in the Court's reasoning since, as I will explain, they ultimately undermine the 'fair balance' test as a tool for human rights law reasoning.

5.1 Severity of the interference

As to the severity, the Court noted that the restrictive measures targeted only 'one component of the exercise of his [the applicant's] right to freedom of religion'. This component 'was limited to the applicant's participation in the religious worship of his Church outside the prison.'[86] To explain the low severity of the interference, the Court added that 'religious service was suspended for certain periods at the end of 2020 and the beginning of 2021'.[87] This meant that even if the applicant was allowed to go to service outside of the prison, this would not make much of a difference.

A note of warning, however, needs to be expressed here. The argument is problematic since the consequences of one restriction (i.e., suspension of the operation of churches) were used as a justification for the proportionality of another restriction (not allowing the applicant to go to church outside of prison). This is a dangerous path of reasoning because, as already mentioned in the Introduction, the restrictive measures in response to the Covid-19 crisis affected all spheres of our lives and were pervasive. Therefore, cross-referencing for assessing the proportionality of the restrictions is problematic.

[85] This is reflective of how the Court's reasoning tends to mix substantive arguments and institutional considerations related to the role of subsidiarity. See J Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2017) 29(3) Netherlands Quarterly of Human Rights 324.
[86] *Spînu v Romania* App no 29443/20 (11 October 2022) para 66.
[87] *ibid* para 67.

5.2 Counterbalancing measures

The second factor mentioned in *Spînu v Romania* concerns the State's efforts to counterbalance the interference. The Court admitted that even if alternative measures, such as online activities, could not 'fully replace direct participation in religious service', such alternatives were important since they showed that 'the national authorities have made reasonable efforts to counterbalance the restrictions decided during the pandemic.'[88]

Generally, it needs to be first emphasised that the consideration of alternatives is key for any proper proportionality review. This relates to the relevance of the less restrictive means test as part of the proportionality assessment. This test involves an assessment whether alternative less restrictive/intrusive measures could have achieved the legitimate general aim (here, public health) as pursued by the State. The test means that when States restrict rights, they should search for restrictive measures that are more protective of individual interests as enshrined in the right.[89] *Spînu v Romania*, however, reveals a reversal of the test: the question made relevant in the reasoning was whether the applicant could use alternatives that were more restrictive of his interests (i.e. freedom of religion) and more protective of the general interest (public health).

Admittedly, the less restrictive means test is not consistently applied in the Court's case law.[90] In some of the communicated cases where applicants argued breach of negative obligations because of the restrictive measures during the Covid-19 crisis, the Court asked whether the national authorities had envisaged or considered any less severe measures to

[88] *ibid* para 69.
[89] Brems and Lavrysen, '"Don't' Use a Sledgehammer to Crack a Nut"'.
[90] *ibid*. The GC refused to ask questions about the availability of less restrictive/intrusive means in *Vavřička and Others v Czech Republic* [GC] App no 47621/13, 8 April 2021, a refusal criticized by Judge Wojtyczek in his dissenting opinion.

achieve the aim pursued;[91] in other communicated cases, such questions are not asked.[92] The application of this test is also directly linked with the scope of the margin of appreciation: the wider the margin, the less likely the Court is to search for alternative, less intrusive measures. As established by the Grand Chamber in *Vavřička and Others v the Czech Republic,*[93] in the area of healthcare policies the margin is wide. *Spînu v Romania*, however, indicates not simply a wide margin and thus no scrutiny of alternatives that are more protective of the right, but a reversal of the test.

5.3 The role of temporality

The third factor mentioned in *Spînu v Romania* concerns the temporality of the interference, and in particular the limited duration of the restrictions and their one-off nature. The Court noted that 'the applicant's complaint relates to a one-off situation' and not to a 'continuing situation'.[94] In the Court's reasoning, the temporary nature of the limitation was linked to 'the unpredictable and unprecedented nature of the health crisis.'[95]

Indeed, a temporary restriction can imply lesser harm to the important interests protected by human rights, which is a pertinent consideration in any proportionality assessment. However, a note of warning is also due. In particular, one-off measures characterised by an unprecedented level of intrusiveness, even if temporary, can in the long term change the

[91] *Pešić v Serbia* App no 48973/20 (communicated 5 January 2023); *Bado v Slovakia* App no 23445/21 (communicated 23445/21) about restrictions of freedom of movement; *Central Unitaria de Traballadores/AS v Spain* App no 49363/20 communicated 13 October 2021 where the Court did ask 'Would less stringent measures have achieved the same or a comparable result?' See also *E.B. v Serbia* App no 50086/20 (communicated 5 November 2021) and *A.A. v Serbia* App no 50898/20 (communicated 5 November 2021).
[92] In *Szivarvany Misszio Alapitvany v Hungary* App no 32272/21 communicated 27 Nov 2023 (freedom of peaceful assembly – blanket ban on public assemblies), the Court did *not* pose a question about less restrictive means. Similarly, in *Sandor Jambor v Hungary* App no 50723/21, communicated 27 November 2023, where the applicant complained about the general prohibition on peaceful assemblies, no question was posed about whether there were any less restrictive means.
[93] *Vavřička and Others v the Czech Republic* [GC] App no 47621/13, 8 April 2021, para 274.
[94] *Spînu v Romania,* para 70.
[95] *ibid*. See also *Fenech v Malta*, para 130: 'This process is still ongoing, and it is in that light that the Court must not lose sight of the challenges being posed by the constant evolution of the Covid-19 pandemic.'

society's *baseline perceptions* as to what a State can acceptably do. In addition, such one-off measures might be mere *improvisations*. The qualification of the one-off measures as mere improvisations can be revealed when the measures are looked at in their totally, which allows the exposure of inconsistencies. Laudably, the Chamber in *CGAS v Switzerland* explicitly uncovered the inconsistency. In particular, there was a prohibition on public assemblies and demonstrations outdoors, whereas the physical presence of employees in offices and factories was not restricted in any way. The exposure of inconsistencies is possible when comparisons start being made between the activities that were banned and those that were not. The inclusion of such comparisons is possible only if the Court were to choose to more closely examine the measures, in this way also providing a guidance to national courts and national decision makers. At this stage of the Court's practice such guidance in absent.

5. Conclusion

The objective of this chapter was to understand the ECtHR's approach to the measures taken by States during the Covid-19 crisis. The approach can be assessed as one of avoidance. Although the admissibility requirements (victim status and exhaustion of domestic remedies) are linked with the essence of the preservation of human rights,[96] these requirements are applied strictly, leading to the rejection of applications as inadmissible. More generally, these rejections (and more the requirement for the applicant to be individually and specifically affected in order to claim victim status) demonstrate the limits of human rights law to respond to structural and systemic measures. More problematically, the Court has so far refrained from developing emergency/crisis *acquis* to better guide national decision-makers in reviewing Covid-19

[96] Joint Dissenting Opinion in *Communauté Genevoise D'action Syndicale (CGAS) v Switzerland* [GC] App no 21881/20, 27 November 2023, para 2.

measures. It has avoided developing standards that can be perceived as deterrents.[97] By walking the path of avoidance, the Court risks making itself irrelevant. It has allowed States to improvise and such improvisations seem to be accepted given their temporary nature. The Court's reasoning itself also reveals aspects of very questionable improvisations. In particular, the reversal of the less intrusive means test and the cross-referencing between different restrictive measures for assessing their proportionality, were identified and described in this chapter.

[97] As Tzevelekos and Dzehtsiarou have argued, 'the "shadow" of the Court should always be in the mind of national decision-makers and judges.' Vassilis P Tzevelekos and Kanstantsin Dzehtsiarou, 'Normal as Usual? Human Rights in Times of COVID-19' (2020) 1 European Human Rights Law Review 141, 144.