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Stoyanova, Vladislava

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Positive Obligations as Coercive 'Rights' and Compulsory Vaccination under the European Convention on Human Rights

Vladislava Stoyanova*

Abstract

This article assesses what is analytically at stake when individuals claim that their rights under the European Convention on Human Rights have been interfered with and the respondent State invokes compliance with positive human rights obligations as the aim pursued with the interference. These situations could be framed as manifesting a tension between negative and positive obligations. This is a framing that was accepted in the compulsory vaccination case of *Vavřička and Others v the Czech Republic.* By using the reasoning and the framing endorsed in this judgment, the article demonstrates that there were no positive obligations at stake. By accepting that there was a tension between obligations, the Court in this case allowed general interests to operate under the façade of individual rights. While the State can and should protect general interests, such as public health, the coercive measures used in the pursuit of these interests are not commands that form the content of positive human right obligations.

1. Introduction

The rights enshrined in the European Convention on Human Rights (ECHR) have multiple corresponding obligations that can be relevant depending on the concrete circumstances of the case reviewed by the European Court of Human Rights (ECtHR or the Court). These obligations have been generally classified as positive and negative. Despite the limitations of this distinction, the Court refers to it and uses it to adjudicate cases. Positive obligations demand from the State to intervene by taking proactive measures to protect the important interests enshrined in the ECHR rights. Negative obligations demand that the State refrain from intruding upon, restricting, or otherwise interfering with these protected interests.[1]

The review of whether a State breached a negative obligation follows a particular structure that includes *inter alia* an assessment of whether the measure that interfered with the individual interest protected by the right, pursues legitimate aims. These aims reflect general interests that have been formulated in the text of the Convention as national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals.[2] If the interference measure does pursue one of these general aims, this is a manifestation of how an important individual interest can be in tension with general legitimate interests In addition to these general interests, as the text of Article 8 of the Convention suggests, 'the protection of the rights and freedoms of others' can be also a legitimate aim for infringing rights. In this situation, tension might arise between individual interests. If both of

* Associate Professor Public International Law, Faculty of Law, Lund University, Sweden. The author (partly) produced this article whilst holding the position of the Land Steiermark Fellow in Law and Innovation at the Centre for Jurisprudence, Faculty of Law, University of Graz, Austria.

[1] L Lavrysen, *Human Rights in a Positive State* (Intersentia 2016); A Mowbray, *The Development of Positive Obligations under the ECHR* (Hart Publishing 2004); V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).

[2] Article 8(2), ECHR. In the text below, the terms 'general interest', 'legitimate aim', 'general legitimate aim' are used interchangeably.

these individual interests ground rights enshrined in the ECHR,[3] the State might find itself in a situation of competing obligations, some of which might be negative while others positive.

The Grand Chamber in *Vavřička and Others v the Czech Republic* accepted the existence of such a competition.[4] As this article will argue, this position cannot be accepted and it, in fact, raises serious concerns. The positive obligations purportedly in tension with the negative obligations invoked by the applicants, were not linked to any individual interests that ground any ECHR rights. Accordingly, the case did not involve any actual positive obligations, nor genuine competition between ECHR obligations.

More precisely, in *Vavřička and Others v the Czech Republic* the applicants claimed a violation of the State's negative obligations under Article 8 of the ECHR (the right to private and family life) due to the compulsory vaccination of their children. Specifically, the first applicant was fined for failure to comply with an order to bring his two children at a medical facility for vaccination against poliomyelitis, hepatitis B and tetanus. The second applicant's admission to a nursery school was discontinued since the school's principal was informed by the applicant's pediatrician that she had not received the MMR (measles, mumps and rubella) vaccine. The third, fourth and fifth applicants were refused admission to nursery schools because they had failed to prove that they had been vaccinated. The sixth applicant was not vaccinated against tuberculosis, poliomyelitis, hepatitis B and MMR, as a result of which he was refused admission to a nursery school. The Grand Chamber held that the national vaccination duty and the consequences of non-compliance with it, constituted an interference with Article 8, since the applicants' interests protected by this provision were harmed. The Court then had to assess whether this interference was justifiable and thus not in violation of any negative obligations corresponding to Article 8.

The Grand Chamber found no violation since *inter alia* vaccinates were not administered forcibly, the sanctions for none compliance were not excessive, there was a 'general consensus' that vaccines were safe and effective, there were national procedures with safeguards for the applicants to raise their claims and ultimately the Czech authorities remained within their wide margin of appreciation in this area.[5] Most relevantly, to reach this conclusion, the Court accepted the Czech Republic's argument[6] that the State was under a positive obligation corresponding to Articles 2 (the right to life) and 8 (the right to private and family life) 'to put in place effective public-health policies for combating serious and contagious diseases and to

[3] The ECHR rights are grounded on individual interests. For this reason, the text that follows uses the terms 'ECHR rights', 'human right', 'ECHR protected interests' and 'ECHR-based individual interests' interchangeably. The term 'individual interests' however has a different meaning, since there might be individual interests *not* protected by ECHR rights. These can be framed as 'individual interests that do not base ECHR rights'. See further Section 3.D. The text below also refers to 'Article 8 right', when it needs to be specific that the relevant ECHR right is the one enshrined in Article 8 of the Convention.

[4] *Vavřička and Others v the Czech Republic* [GC] App no 47621/13, 8 April 2021.

[5] *Vavřička and Others v the Czech Republic*, para 273-310.

[6] There are cases where the State invokes positive obligations corresponding to ECHR rights to justify intrusive measures, but these invocations remain unaddressed in the Court's reasoning, which could imply their implicit rejection. See *Yordanova and Others v Bulgaria* App no 25449/06, 24 April 2012, para 94 and *Centrum för Rättvisa v Sweden* [GC] App no 35252-08, 25 May 2021, para 202 (compare with para 279). There are also cases where individual interests (not necessarily protected by ECHR rights) are invoked as the legitimate aims for infringements and the Court accepts them. See *Mile Novakovic v Croatia* App no 73544/14, 17 December 2020, para 64.

protect the life and physical integrity of those within their jurisdiction.'[7] By invoking positive obligations as competing with the applicants' individual ECHR-protected interests,[8] the State added further legitimacy and justificatory power to the aims that it invoked for interfering with the ECHR right.

This article will explain that by accepting the existence of competing positive obligations, the Court made a mistake. Exposing this mistake is crucial, as it allows for a critical examination of the arguments invoked by the State and by the Court to *justify* coercion, intrusion and the methods of coercion and intrusion used by the State. This article, in particular, highlights a key distinction in human rights law reasoning: is coercion justified as a means of pursuing general legitimate aims, or is it justified as a command arising from positive human rights obligations?In the first context, the justification is merely based on abstract general interests (public safety, public health etc.) that the State can and should pursue. What distinguishes the second context is that human rights law can serve to support individual claims for the State to intrude and interfere, so that positive human rights obligations are fulfilled. Given the widespread development of positive obligations, this second context is not that controversial,[9] when individuals invoke them. Things change, however, when it is *the State itself* that appeals to positive obligations. Most crucially for understanding the distinction - and the central argument advanced here - is that, as *Vavřička and Others* illustrates, it is not concrete individuals who assert that the State should intervene pursuant to positive obligations.[10] It is rather the State *itself* that justifies its intrusive actions in an abstract way, as not simply and only appealing to general interests, but as also claiming to be obliged under human rights law to intrude. In this way, further legitimacy and justification is added to interventions by the State.

To better understand this key distinction, I assess what is at stake when applicants claim infringement of their ECHR rights (i.e., through arguable breaches of negative obligations, as the applicants in *Vavřička and Others*) and the respondent State invokes protection of the rights of other individuals as the legitimate aim that justifies the infringement. Crucially, this protection is claimed to be necessary for fulfillment of positive human rights obligations. In these situations of possible clash between negative and positive obligations, the State formulates an argument that it was legitimate and necessary to interfere with the applicants' ECHR rights so that it fulfills its positive obligations that might correspond to the very same right or to different rights protected by the ECHR. In these instances, therefore the State adopts intrusive measures that clearly infringe interests protected by the Convention. There is no speculation regarding the harm suffered by specific individuals (since Article 8 is found to be relevant), and the interventions are presented as measures forming the content of competing positive obligations under human rights law. The intrusive interventions are thus presented as

[7] *Vavřička and Others v the Czech Republic* [GC] paras 197 and 282. See also para 212, where France in its submissions as a third party in the case, invoked 'State's positive obligations to protect the life and physical integrity of those within their jurisdiction' and argued that there were 'competing Convention rights'.

[8] It could be argued that when the Court invoked positive obligations in para 282, it simply acknowledged the existence of a 'pressing social need' understood as a legitimate *general* aim. Para 282 in *Vavřička* is, however, located in part (iii) of the judgment entitled '*Necessity in a democratic society*'. The necessity test is normally considered part of the proportionality review. In addition, para 282 is *not* in part (ii) entitled '*Legitimate aim*'. In any event, the GC's choice to invoke positive obligations as part of its justification needs to be taken seriously and critically examined.

[9] L Lavrysen, *Human Rights in a Positive State* (Intersentia 2016); A Mowbray, *The Development of Positive Obligations under the ECHR* (Hart Publishing 2004); V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).

[10] Such individual claims are normal when individual applicants invoke positive human rights obligations.

being commanded by 'rights' supposedly held by specific individuals under the ECHR.[11] Depending on their severity, the interventions might be qualified as coercion.[12] What is relevant here is that, in essence, the interventions are portrayed as serving not only the general legitimate aims as stipulated in Article 8(2) ECHR, but also as mandated by human rights tied to corresponding positive obligations. The important distinction between intrusion justified by general legitimate aims and intrusion mandated by positive human rights obligations is therefore eroded. This article argues that this erosion is flawed.

Vavřička and Others, a Grand Chamber judgment underscoring its significance, serves as an example in exposing the flaw; notably, the judgment has been repeatedly referenced by the Court in later judgments[13] and decisions.[14] More significantly, para 282 which introduced positive obligations as relevant and as competing with the negative obligations invoked by the

[11] The word 'rights' is in inverted commas to anticipate the argument developed below that in *Vavřička and Others* there were *no* individual ECHR *rights* as corresponding to any positive obligations.

[12] Intrusions and interferences can vary in degree, with physical coercion positioned at the most severe end of the spectrum. As the Grand Chamber noted in *Vavřička and Others*, vaccinations were not administered by force, and the sanctions for non-compliance were not considered excessive. This relatively low level of intrusion was a key factor in the Court's finding that there was no violation in the specific case. The focus of this article, however, is on the justifications for the intrusion itself.

[13] One can question whether the number of citations should be used as a metric for measuring the importance of a judgment. It can be however safely concluded that *Vavřička and Others* has been cited multiple times. A search in the HUDOC database that applied the temporal filter 8 April 2021 (the date when *Vavřička and Others* was delivered) - 23 September 2024, led to the discovery of the following judgments that contain references to *Vavřička and Others: Pasquinelli and Others v San Marino* App no 24622/22, 29 August 2024; *Thörn v Sweden* App no 24547/18, 1 September 2022; *CGAS v Switzerland* (Chamber) App no 21881/20, 15 March 2022; *Bielau v Austria* App no 20007/22, 27 August 2024; *Künsberg Sarre v Austria*, App no 19475/20, 17 January 2023; *Repeşcu v Republic of Moldova* App no 39272/15, 3 October 2023; *Khachatryan and Konovalova v Russia* App no 28895/14, 13 July 2021; *Polat v Austria* (marked as key case in HUDOC) App no 12886/16, 20 July 2021; *Nurcan Bayraktar v Turkey* App no 27094/20, 27 June 2023; *Y.Y. and Y.Y. v Russia* App no 43229/18, 8 March 2022 (see the partly dissenting opinion); *Mirzoyan v the Czech Republic* App no 15117/21, 16 May 2024; *G.T.B. v Spain* App no 3041/19, 16 November 2023; *CGAS v Switzerland* [GC] App no 21881/20, 27 November 2023; *Constantin-Lucian Spînu v Romani*a App no 29443/20, 11 October 2022; *Sahraoui et Autres v France* App no 35402/20, 11 July 2024; *M.A. and Others v France* (Chamber judgment) App no 63664/19, 25 July 2024; *A and Others v Iceland* App no 25133/20, 15 November 2022; *Executief van de Moslims van Belgium and Others v Belgium* (marked as a key case in HUDOC) App no 16760/22, 13 February 2024; *Connseil National de la Jeunesse de Moldova v Moldova* App no 15379/13, 25 June 2024; *D.B. and Others v Switzerland* App no 58817/15, 22 November 2022; *Byčenko v Lithuania* App no 10477/21, 14 February 2023; *A.H. and Others v Germany* (marked as a key case in HUDOC) App no App no 7246/20, 4 April 2023; *O.H. and Others v Germany* (marked as a key case in HUDOC) App no 53568/18, 4 April 2023; *Hurbain v Belgium* App no 57292/16, 22 June 2021; *Gauvin-Faurnis et Silliau v France* App no 21424/16, 7 September 2023; *L.B. v Hungary* [GC] Ap no 36345/16, 9 March 2023; *Macate v Lithuania* [GC] App no 61435/19, 23 January 2023; *Fedetova and Others v Russia* [GC] App no 40792/10, 17 January 2023; *Pindo Mulla v Spain* [GC] App no 15541/20, 17 September 2024; *Daniel Karsai v Hungary* (marked as a key case in HUDOC) App no 32312/23, 13 June 2024; *M.H. and Others v Croatia* App no 15670/18, 18 November 2021; *Grzeda v Poland* [GC] App no 43572/18, 15 March 2022; *Taganrog Lro and Others v Russia* App no 32401/10, 7 June 2022. These judgments can be generally divided into six groups as to how *Vavřička and Others* is used in their reasoning: (1) confirmation of the wide margin of appreciation granted to the State; (2) confirmation of the best interest of the child principle; (3) performance of balancing; (4) confirmation of the wide definitional scope of Article 8 ECHR; (5) support of the idea of 'social solidarity'; (6) reference to para 282 from *Vavřička and Others.* It is group (6) that is relevant for this article. Below I will make further distinctions within group (6).

[14] See *Baša v Serbia* App no 20874 (inadmissible 30 May 2023); *J.Č. Croatia* App no 11504/18 (inadmissible 13 December 2022); *Nemcsok v Hungary* App no 31757/23 (inadmissible 26 march 2024); *De Kok v Netherlands* App no 1443/16 (inadmissible 26 April 2022); *Moraru and Others v Moldova* App no 65209/13 (inadmissible 16 January 2024); *Mittendorfer v Austria* App no 32467/22 (inadmissible 4 July 2023); *Belghiti et Zniber v France* App no 16416/23 (inadmissible 2 November 2023); *Parfitt v the United Kingdom* App no 18533/21 (inadmissible 20 April 2021); *Belic and Others v Serbia* App no 3000/16 (inadmissible 23 January 2024); *Zambrano v France* App no 41994/21 (inadmissible 21 September 2021).

applicants, has been endorsed in subsequent judgments. These include *Pasquinelli and Others v San Marino,*[15] *Bielau v Austria,*[16] *Polat v Austria,*[17] *Sahraoui Et Autres v France*[18] and *Gauvin-Fournis et Silliau v France.*[19] This usage of positive obligations in the human rights law reasoning should be therefore better understood and scrutinized.[20] In addition, *Vavřička and Others* raises questions pertinent to future cases before the Court regarding coercive measures during emergencies and pandemics (e.g. Covid-19).[21] It also raises crucial questions about coercing individuals, including into medical interventions, the methods and levels of coercion and intervention used by States and, most importantly in light of this article, the arguments invoked to *justify* coercion and the methods of coercion.

A final clarification regarding the methodology is warranted. Since the aim is to examine the justifications in the human rights law review, the forthcoming analysis is analytical and conceptual. It does not pertain to the empirical reality and empirical questions.[22]

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[15] *Pasquinelli and Others v San Marino,* para 94. The applicants complained that the obligation imposed upon them, as health care and social health workers, to get vaccinated against Covid-19 in accordance with Section 8 of Law no. 107/2021 and the subsequent consequences, were contrary to Article 8 ECHR. At para 94, the Court held: 'As noted by the Constitutional Court, under Article 2 of the Convention member States have a positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction.' This paragraph shows not only the continuing invocation of positive obligations; but also, how such invocations are used by national constitutional courts. It then follows that the reasoning of the ECtHR affects how national constitution courts reason about the legitimate aims for limiting rights and the balancing between competing interests. Although in *Pasquinelli and Others v San Marino* the Court followed *Vavřička and Others* on this point, it also distinguished the cases. In the former, it found that there was no vaccination duty to begin with (see para 63).

[16] *Bielau v Austria* (see para 14 and 44) concerned disciplinary proceedings against the applicant, a practising doctor, for certain statements on his 'holistic medicine' website concerning the general ineffectiveness of vaccines. He complained under Article 10 ECHR that the disciplinary sanction imposed on him had violated his right to freedom of expression. See para 14 that shows how the national Supreme Administrative Court reasoned along the lines of *Vavřička.* See also para 44 where the Court referred to para 282 from *Vavřička.*

[17] *Polat v Austria* contains a specific reference to para 282 from *Vavřička* to confirm the proposition that there were positive obligations at stake that arguably needed to be balanced. See para 80 and 86 from *Polat v Austria*.

[18] *Sahraoui Et Autres v France* (para 56) contains a specific reference to para 282 from *Vavřička.*

[19] *Gauvin-Fournis et Silliau v France* (para 125) contains a specific reference to para 282 from *Vavřička* in support of the proposition that there were competing positive obligations at stake.

[20] This should also include the clarification that my search in the HUDOC database identified judgments, where the proposition that any positive obligations competed with the negative obligations invoked by the applicants, was rejected. See *M.A. and Others v France,* where the Court had to decide whether the criminalisation of the purchase of sex was compatible with Articles 2, 3 and 8 ECHR. There are references to *Vavřička* in the reasoning for the Court to support its approach to the margin of appreciation and the balancing between interests. Importantly, the Court did *not* use the proposition that there were positive obligations competing with the ECHR rights invoked by the applicants. The proposition expressed in para 282 of *Vavřička* was therefore not used. See also *Executief van de Moslims van België and Others v Belgium* where the applicants claimed that the ban on the ritual slaughter of animals without prior stunning in the Flemish and Walloon Regions, constituted a violation of Articles 9 and 14 of the Convention. The applicants argued that the ban was in breach of negative obligations corresponding to Article 9. This argument was rejected and the Court found no violation. The reasoning regarding the legitimate aim is interesting. At para 101, the Court held that there were legitimate general interests: 'the protection of animal welfare may be linked to the concept of "public morality", which constitutes a legitimate aim within the meaning of paragraph 2 of Article 9 of the Convention (my translation)'. Then the Court added immediately at para 102 with reference to *Vavřička*, the following: 'It is therefore not necessary to determine whether, as the Constitutional Court has held, the contested measure can also be regarded as aiming at the protection of the rights and freedoms of persons who attach importance to animal welfare in their outlook on life.' This implies that the Court refused to invoke individual interests (that could possibly base individual ECHR rights and thus positive obligations) as competing interests. It then follows that similarly to *M.T. and Others v France,* the Court in *Executief van de Moslims van België and Others v Belgium,* took an approach different from what para 282 from *Vavřička* suggests.

[21] See e.g. *Ruchi v Latvia* App no 37284/22 (communicated on 4 April 2024); *Figel v Slovakia* App no 12131/21 (communicated on 12 December 2022).

[22] See R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, where the distinction between normative, empirical and analytical tensions of interests is clarified.

To demonstrate what is at stake when positive obligations are accepted as a legitimate aim pursued with infringement measures, and the mistake done by the Court specifically in *Vavřička and Others*, the following path will be followed. Section 2 aims to achieve analytical clarity as to the separate concepts of first, ECHR rights, second, interests that base these rights and third, obligations that correspond to these rights. These three concepts are all mingled in the reasoning in *Vavřička and Others*. The Court also conflated individual and general interests. Section 2 therefore emphasizes that for human rights law to play any systemic and meaningful role, human rights have to be justified exclusively with reference to individual interests. Section 3 proposes how individual and general interests can be distinguished. It also highlights that if human rights law does not have the analytical tools to distinguish individual interests that justify human rights as correlated to obligations, from general interests, it collapses. This was precisely what happened in the reasoning in *Vavřička and Others.* In particular, the Court conflated positive human rights obligations with very abstract general interests. This was incorrect since the legitimate aims (like those formulated in Article 8(2) ECHR) are meant to generally protect the public at large. In contrast, positive obligations are meant to correspond to individual ECHR rights held by specific individuals so that their individual interests can be protected. Given these analytical mistakes made in *Vavřička and Others* that pose the risk of collapsing human rights law to the point of making it meaningless, Section 3 proposes tools for analytically distinguishing individual interests that justify human rights as correlated to obligations, from general interests.

Section 3 also underscores that a distinctive situation arises when ECHR protected interests appear to compete with other ECHR protected interests. This is a situation that could be characterized as one where the competing interests are on equal footing, since they are both protected by human rights law. Section 4 makes the key point that this equal footing of the *interests* should not and cannot be translated into equal footing of any possible corresponding *obligations*. The reasoning in *Vavřička and Others* seems to assume such an equal footing, which is incorrect. As much importantly, if no obligations can be specified in the form of commands or prohibitions, there are no competing ECHR rights (if the idea of correlativity is to be maintained) and there are no competing obligations at stake. It is rather general interests that are at stake, which the State can still aim to protect, but not as a matter of any *positive human rights law obligations*. Therefore, I conclude that in *Vavřička and Others* there were no competing, let alone conflicting positive obligations; there were only legitimate general interests. This is an important conclusion for countering a development whereby coercion and intrusion by the State are abstractly justified via the invocation of positive human rights obligations.[23]

2. Interests, rights and obligations: distinctions and connections

The tension between individual interests and collective societal interests permeates human rights law. This is reflected in the text of the ECHR provisions, where individual interests as protected by qualified rights can be interfered with in service of general interests (i.e.,

[23] Here it needs to be mentioned that a formidable corpus of case law and other normative outputs have been developed in justification of positive obligations and in favour of expansion of their scope and content. S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); H Shue, *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996); K Möller, *The Global Model of Constitutional Law* (OUP 2012). Yet, an account of positive obligations that fails to seriously consider their intrusiveness and power of coercion, is inadequate. For such an account, see V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023); L Lazarus, 'Preventive Obligations, Risk and Coercive Overreach' in L Lavrysen and N Mavronicola (eds) *Coercive Human Rights. Positive Duties to Mobilize the Criminal law under the ECHR* (Hart Publishing 2020) 249.

'legitimate aims').[24] Understanding this tension requires conceptual clarity on both sides – specifically, a clear grasp of the concept of human rights and that of general interests.[25]
As to the first side of this tension, the questions as to what it means to have a 'right' and what it means to have a 'human right' have been an object of extensive discussions.[26] What is relevant to highlight here is that a right is the logical connection between fundamental individual interests and obligations.[27] Despite the connection, it is crucial to underscore the distinction between the individual *interests* that base human *rights*, on the one hand, and any *obligations* that might correspond to the rights. These distinctions will be explained in Sections 2.A and 2.B below, since they are confused in the reasoning in *Vavřička and Others*. Section 3 will then proceed to examine the other side of the above-mentioned tension, namely the general interests.

2.A. Individual interests base and justify rights

Different interests could be invoked to justify a human right. Alexy explains that human rights can be justified with reference to exclusively individual interests, both collective and individual interests, and exclusively collective interests.[28] The type of justification invoked depends on the values that help us in the framing of these interests. An axiological approach is therefore relevant here. Ultimately, however, to preserve their analytical distinctiveness, human rights have to be based on and justified with reference to important individual interests. This justification can be also axiologically underpinned: in liberal societies, we value the individual since the individual is at the center.[29] This moral justification is important, and although related, it still needs to be distinguished from the analytical one that I will try to explain in the following paragraph.[30]

If human rights were to be justified with reference to collective interests, this will have serious repercussions for the tension between the collective and individual interests and for its resolution. In other words, how we address the tension is dependent on how human rights are justified. Alexy explains that

[24] *Vavřička and Others v the Czech Republic* [GC] para 272.
[25] R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163.
[26] See M Kramer, N Simmonds and H Steiner, *A Debate over Rights* (OUP 1998).
[27] S Besson, 'The Allocation of Anti-poverty Duties. Our Rights, but Whose Duties?' in Shefer (ed) *Poverty and the International Economic Legal System* (2013) 408, 415; Raz, 'On the Nature of Rights' XCIII Mind (1984) 194, 200. Rights are 'intermediary conclusions between statements of the right-holder's interest and another's duty.' J Raz, 'Legal Rights' in Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics (Oxford Clarendon Press 1994) 254, 259.
[28] The justification can be 'individualistic' and/or 'collectivists'. R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, 164 and 170. An example is provided with the right to property. It could be argued that this right is protected for the sake of 'the establishment and maintenance of an effective economy' and in this sense, this individual right also serves collective interests.
[29] B Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251, 260: 'In arguing that human rights are important for each and every individual, the emphasis should be on the separateness of individuals rather than their aggregate.'; R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, 170.
[30] In addition to the moral and the analytical justifications explained here, there are also institutional/procedural reasons as to why individual interests justify the ECHR rights. Specifically, individualization of the interests happens only on the side of the case brought before the ECtHR because of the specific procedure before the Court. This procedure implies that a claim can be brought against a State party to the ECHR; it cannot be brought against another individual, which would imply individualization of the interests of both affected parties (i.e. both individuals). In addition, the applicant must have a victim status for the claim to be adjudicated. Compliance with the victim status requirement demands in general that the individual applicant has to be 'directly affected by the alleged violation of the Convention.' For the flexibility and the modifications in the interpretations of the victim status requirement, see *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] App no 53600/20, 9 April 2024, para 463.

> an individual right which is exclusively a means to a collective good cannot, by definition, have any independent weight against that good. If the right ceases to be a means to a collective good or even becomes impediment to it, there is no longer a reason for the right. It no longer has even *prima facie* validity in relation to the collective good. This is not an instance of a conflict at the level of theory of principles: there can be no question of weighting and balancing. In this way, every restriction on and every evasion of the individual right is justified where it furthers the collective good.[31]

Similarly, when the collective good that justifies the right (if rights were justifiable with reference to collective goods) is different from the collective good that justifies the interference with the right, there is a conflict *solely* between collective goods. In these kinds of conflicts (i.e. conflicts between collective goods), '[i]ndividual rights do not play any systemic or significant role.'[32] It then follows that for human rights to play such a role, they have to be justified with reference to individual interests.

When it comes to the justification of the ECHR right to private life, the reasoning in *Vavřička and Others* cannot be criticized on this point. The Court was clear to the effect that the *individual* interests of the specific applicants were interfered with, which accordingly triggered Article 8 and its corresponding negative obligations. More specifically, the Court noted that 'the child applicants bore the direct consequences of non-compliance with the vaccination duty in that they were not admitted to preschool' and that Mr Vavřička was also personally affected by not complying with the duty to have his children vaccinated.[33] Collectivists justifications for this right were not invoked. Neither were any general interests invoked that might support a proposition that the right had not been interfered with and, therefore, Article 8 would not be even applicable.

2.B. Rights correlate to obligations

While the articulation of fundamental individual interests as rights is important, for the rights to be action-guiding, they need to be linked with obligations.[34] For human rights law to be meaningful, it needs to guide conduct by demanding certain measures,[35] which brings us to the question of obligations. The measures demanded as a matter of human rights law form the content of the obligations. In this sense, there must be a correlativity between rights and obligations.[36] The idea of correlativity is important since it draws attention to the specific bilateral relation between the right-holder (i.e. the specific individual) and the obligation-holder (i.e. the State).[37] This in turn is important since it shows that human rights law as a body of norms meant to guide state conduct (guidance attained via the triggering of obligations), cannot be conflated with some general aims and interests. This further feeds into the argument above that human rights have to be justified with reference to individual interests. If we make the conceptual move to obligations then, any obligations that are claimed to correspond to human rights, have to be also justified with reference to individual interests. In Section 3.C below, I will demonstrate that this justification is also reflected in the practice of the Court when the Court actually adjudicates breach of positive obligations in its case law. In contrast, the

[31] R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, 170.
[32] R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, 170.
[33] Paras 263-4.
[34] See Cristina Rettig and Giulio Fornaroli, 'Conflict of Rights and Action-Guidingness' (2023) Ratio Juris.
[35] P Eleftheriadis, *Legal Rights* (2008 OUP).
[36] I use the concept of correlativity in a very loose fashion here. For a useful explanation of this looseness, see D Lyons, 'The Correlativity of Rights and Duties' (1970) 4(1) *Noûs* 45.
[37] P Eleftheriadis, *Legal Rights* (2008 OUP) 155.

invocation of positive obligations in *Vavřička and Others* is completely detached from any individual interests.[38] This means that there were no relevant individual rights that might correspond to any positive obligations, which in turn means that there were no positive obligations at all upon the respondent State.

After establishing that human rights gain significance when linked to obligations and that these obligations must also be justified with reference to individual interests, attention can now turn to the content of these obligations. From the perspective of deontic logic, the content of the obligations can be in the form of commands and prohibitions.[39] The practice of human rights law, however, does not use the deontological operators of commands and prohibitions to frame the obligations upon the State. Yet, it is still possible to find an analogy in the ECtHR's practice. Prohibitions can be translated as negative obligations upon the State to refrain from certain conduct. Commands could be understood as positive obligations upon the State to do something.[40] What is crucial here is that once our focus turns to corresponding obligations, it is the measures that form the conduct of the State that matter. Deontology is useful here for categorizing these measures and better understanding them. More specifically, the deontological approach demands answers to the following questions: What is the State more concretely prohibited from doing or, in other words, which concrete measures is the State prohibited from undertaking? What is the State more concretely required to do, or in other words, which concrete measures is the State required to undertake?

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[38] *Vavřička and Others v the Czech Republic* [GC] para 282.

[39] R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, 165 with reference to A Ross, *Directives and Norms* (Routledge 1968) 117. Command, prohibition and permission are three basic deontic modalities. See also P Eleftheriadis, *Legal Rights* (2008 OUP) 88. I do not include a discussion on permissions, since I do not think that they are relevant when the actor whose conduct has to be regulated is the State. These deontological operators have been developed rather for the purpose of regulating conduct of individuals and thus regulating individual-individual (private/horizontal) relations. See G von Wright, *Norm and Action. A Logical Enquiry* (Routledge & Kegan Paul 1963); G von Wright 'Is there a Logic of Norms?' (1991) 4 Ratio Juris 265; G von Wright, 'Deontic Logic: A Personal View' (1999) 12 Ratio Juris 26.

[40] In *Vavřička and Others,* the Court was very clear that the State's negative obligations under Article 8 ECHR were at stake. Positive obligations were invoked in para 282 of the judgment as part of the review whether the negative obligations were breached since the measures of interference might not pass the test of necessary in a democratic society. Yet, it needs to be acknowledged that in some Article 8 cases, the Court might refuse to decide whether it would examine the case from the perspective of negative or positive obligations (e.g. *Von Hannover v Germany* App no 59320/00, 24 June 2002, para 57). In this sense, the distinction between negative and positive obligations (i.e. between prohibitions and commands) can be neglected. The distinction is not downplayed in judgments decided under Articles 2 and 3 ECHR, where the Court clarifies whether it will review the case from the perspective of negative or positive obligations (see V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023)). Yet, the neglect of the distinction in some Article 8 cases is a sufficient reason to ask how this neglect relates to the argument developed in this paper that positive human rights obligations should *not* be conflated with general legitimate aims in the reasoning. Two clarifications are due on this point. First, while the Court might choose to downplay the distinction between positive and negative obligations since it might be more efficient to directly proceed to proportionality review (see Vorland Wibye, 'Beyond Acts and Omissions—Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) 23 *Human Rights Review* 479), the downplay is still *analytically* incorrect (see M Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) *Heidelberg Journal of International Law* 691, 694). Second, the Court's failure to distinguish negative and positive obligations amplifies the concern raised in this paper. In other words, the failure augments the concern that positive obligations might be transformed into coercive 'rights'. In particular, if the content of the obligation upon the State is not clear (i.e. is it a prohibition to take disproportionate measure *or* is it a command to protect where the State has multiple compliance options none of which is necessary specifically commanded), then the conclusion in the judgment that there was a violation leads to a confusion as to what needs to be done for the purposes of execution (see Article 46 ECHR). This confusion in turn can support the argument that coercive measures (as chosen by the State) are demanded as a matter of positive obligations following from the conclusion of the judgment.

This is important since the ECtHR accepted in *Vavřička and Others* that there were positive obligations at stake as corresponding to individual ECHR rights: 'the Contracting States are under a positive obligation, by virtue of the relevant provisions of the Convention, notably Articles 2 and 8, to take appropriate measures to protect the life and health of those within their jurisdiction.'[41] If such obligations existed, they would need to have as their content some commands upon the State. For instance, the right to life of other children – an example being those who might possibly attend the same facilities as the applicants' children in *Vavřička and Others* - might correspond to the following deontological operator: commanding the State to take coercive measures against the applicants. In Section 4 below, I will further clarify how these measures can be framed in different ways with reference to the practice of the Court. The argument here is that positive obligations cannot be invoked in the abstract, as the Court did in *Vavřička and Others*. Instead, they must be grounded in specific measures that form their content and that guide the conduct of the State. When the Court in *Vavřička and Others* invoked 'appropriate measures to protect the life and health of those within their [States'] jurisdiction', these measures were a relevant consideration in the overall deliberation in the Court's reasoning. However, their relevance should be understood as limited to the role of serving general legitimate interests.

2.C. Interim conclusion

Important individual interests are the starting point in how human rights relate and trigger obligations. Important individual interests therefore also justify human rights obligations, including positive obligations, and their content (i.e. commands upon the State to take protective measures). The proposition that such positive obligations exist presupposes references to the protection of some individual interests. In the absence of such references, protective measures should be understood as serving general interests. This argument rests on the possibility of distinguishing between general and individual interests - a distinction that is the focus of the next section.

3. The distinction between general and individual interests

This analysis begins with the claim advanced in Section 3.A: that general interests - such as public safety and public health - must be distinguished from individual interests protected by the ECHR, and cannot be accorded the same abstract normative weight. As Section 3.B highlights, however, defining and delimiting general interests presents significant conceptual challenges. Nevertheless, human rights law requires analytical tools for drawing this distinction, as it rests on the premise that individual interests are both distinct and carry specific normative weight. Section 3.C sets out to propose such tools. Section 3.D. addresses the difficulty in drawing the distinction between individual interests and ECHR-protected individual interests. Despite the difficulty, Section 3.D. offers a solution that allows for my analysis to proceed under the assumption that important ECHR-protected individual interests ground rights that trigger obligations. Section 4 then moves to the examination of those obligations.

3.A. General interests are not on equal footing with individual interests protected by ECHR rights

As already mentioned, Article 8(2) ECHR contains an exhaustive list of aims that can justify limitations upon the right. Here a distinction is due between, on the one hand, those that are of *collective nature*, such as national security, public safety, economic well-being of the country,

[41] *Vavřička and Others* para 282.

prevention of disorder or crime, protection of health and morals, and on the other hand, those aims that reflect *individual* interests: 'protection of the rights and freedoms of others.' As to the second category, interests that protect human rights (i.e. fundamental rights as protected by the ECHR) and other individual interests that are *not* protected by the ECHR, should also be distinguished. It then follows that an infringement of the right to private and family life, can be justified as necessary for protecting general interests,[42] or individual interests ('rights and freedoms of others' as noted in the text of Article 8(2)), or ECHR-based individual interests (that can also fall within 'rights and freedoms of others' as used in the text of Article 8(2)). It is *only* in the last scenario, when the State could possibly invoke its positive human rights obligations: measures aimed to protecting interests that form the content of rights enshrined in ECHR. The Court's reasoning in *Vavřička and Others* could then potentially fall within this last scenario since interests (i.e., life and privacy) protected by ECHR rights (i.e., Articles 2 and 8) were invoked as underpinning the purported competing positive obligation of protecting life and health.[43]

In this scenario, the analytical operation of balancing of interests is distinctive since the interests that are arguably in tension must be placed on the same footing.[44] Below I will reject the proposition that specifically *balancing of interests*, even if those are placed on the same footing, is a useful analytical framework for understanding what is at stake. For now, what is relevant is the proposition that the balancing of ECHR-protected interests (i.e. private life as invoked by the applicants in *Vavřička*) and other ECHR-protected interests (i.e. private life or life as invoked by the State in support of the proposition that these interests base positive obligations) is distinguishable since both interests are protected by the rights in the Convention. Both interests are on the same footing and assigned abstractly the same level of importance in the

[42] For a critique against the entire argumentative framework that places general interests in balance with human rights, see B Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) Human Rights Quarterly 251; S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468. The arguments presented in this paper are distinct. These arguments are limited to a critique of the invocation of positive obligations as competing obligations or as legitimate general aims in paragraph 282 in *Vavřička and Others,* as also followed in subsequence judgments. Any critique of balancing as a tool for reasoning in human rights law, is not attempted here.

[43] Here it should be also noted that although not mentioned in the text of Article 8(2) ECHR, the Court has referred to the best interests of children. *See Vavřička* para 286-289. This is a very important *interpretative* tool used generally by the Court in its case law. In *Vavřička* specifically, the Court used this tool to support the empirical proposition that children are protected by receiving the full schedule of vaccinations, and the ensuing normative proposition that the domestic authorities 'may reasonable introduce a compulsory vaccination policy'. The Court did not refer to the interests of children in the parts of *Vavřička* where the Court framed the legitimate aim and the pressing social need. Yet, the interests of children can be included as part of 'the aims of protecting health and the protection of the rights of others' (see para 272 from *Vavřička*). It then follows that in addition to being an interpretative tool utilized via the 'best interests of the child' principle, interests of children can be part of the *general* legitimate aims that States can pursue with different methods. Interests of children can be also *individual* interests not protected by the ECHR rights or *individual* interests protected by ECHR rights (life, private or family life etc.). The inclusion of children therefore does not modify my conceptual analysis that it is *only* in the last scenario (i.e. children's individual interests as protected by ECHR rights), when the State could possibly invoke its positive human rights obligations. Once such obligations are relevant as competing obligations, they might be more demanding precisely because the object of their protection is *children*. Yet, this is a separate analytical question that pertains to the content and the scope of positive obligations.

[44] This relates to the idea that human rights have special normative force. M Klatt and M Meister, *The Constitutional Structure of Proportionality* (OUP 2012); L Tremblay, 'An Egalitarian Defense of Proportionality-based Balancing' (2014) 12 International Journal of Constitutional Law 866. If we accept that human rights have this special normative force over non-rights considerations, then we can assume that the proportionality analysis should be different, or at least distinctive. S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017) 16: 'taking the special normative force of human rights seriously requires the development of a distinct framework for the resolution of conflicts between them.'

Convention. As a consequence, balancing between interests protected by ECHR rights and other interests *likewise* protected by ECHR rights, is different from scenarios where ECHR protected interests are balanced against *other* interests (these other interests could be general and/or individual.[45]

This difference is possible to operationalize and thus make relevant in the human rights law reasoning, only if it is possible to distinguish between the above mentioned three interests (i.e. general interests, individual interests and ECHR-based individual interests that can also fall within 'rights and freedoms of others' as used in the text of Article 8(2)) that can justify measures of infringement. To distinguish, we must have some understanding as to how to delimit each one of them. The first challenge is how to define and delimit general legitimate interests. As opposed to defining individual interests,[46] the Court has not engaged with the problem of defining general interests, i.e. the general aims, indicated in Article 8(2).[47] In *Vavřička and Others,* as the Court usually does in its case law, it easily accepted that a general legitimate aim was at stake and the State actually pursued it.[48] In particular, the Court accepted that the vaccination duty 'corresponds to the aims of the protection of health and the protection of the rights of others, as recognized by Article 8'.[49] We therefore face the difficulty of defining general interests/aims. As the next section shows, there are additional delimitation difficulties.

3.B. Individual interests can be hidden behind general interests

An argument can be anticipated that situations where individual EHCR-based interests need to be balanced against each other are not that unique. The difficultly to distinguish between human rights that are based on individual interests, on the one hand, and general public interests, on the other, can support such an argument. The reason for this difficulty is that it might be the case that general interests actually also reflect individual interests protected by human rights. In other words, one might contend that the human rights of others are 'hidden behind' the abstract formulations of 'public safety' or 'health and morals.'[50] As *Vavřička and Others* suggests, this argument can be attractive for States to perform the conceptual move of framing

[45] Smet has framed these situations as 'traditional' human rights cases 'in which human rights are opposed by the public interests (or private interests that are not protected by way of human rights),' S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017) 5.

[46] When Article 8 is invoked by the applicant, the Court determines whether the harm complained of can be defined as an infringement of private or family life. D Harris, M O'Boyle, E Bates and C Buckley, *The Law of the European Convention on Human Rights* (OUP 2023) 510.

[47] For the difficulty in defining public interests and relating them conceptually with individual rights, see A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 Modern Law Review 671. See also See B Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251, 265, who has noted how the level of abstraction at which the general interests are formulated is a matter of choice and this choice affects the human rights review and reasoning.

[48] This relates to the acceptance in international law that States act in good faith. See B 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) 183. There are still examples, where the Court scrutinizes the legitimacy of the aims. See, e.g. *Macatė v Lithuania* [GC] App no 61435/19, 23 January 2023. This is, however, exceptional. It is also relevant to note that in this case it was simply empirically possible to scrutinize the claimed aim and its legitimacy.

[49] *Vavřička and Others v the Czech Republic* para 272.

[50] J Gerards, 'Fundamental Rights and Other Interests: Should it Really Make a Difference' in E Brems (eds), *Conflicts between Fundamental Rights* (Intersentia 2008) 655. See also J Tasioulas and E Vayena, 'Just Global Health: Integrating Human Rights and Common Goods' in Thom Brook (ed) *The Oxford Handbook of Global Justice* (OUP 2020) 155: 'some aspects of the common good are rights-based, in the sense that they include elements to which we have a right; and what these rights confer is a right to benefit from the common good in question.'

public interests as a collection of individual interests grounding rights that in turn arguably trigger competing positive obligations. In other words, it is attractive for States to justify restrictions for the sake of human rights of others, rather than for the sake of general interests. This makes the restrictions 'human rights-friendly'.[51]

In addition, the Court itself might also have reasons to be sensitive to the proposition that the human rights of others are hidden behind general interests. In this sense, it might be justified to reframe general aims as individual human rights. The reason might be an effort by the Court to counter what has been labelled as 'preferential framing': since the case is adjudicated from the perspective of the applicant whose right-protected interest has been interfered with and since rights have priority over non-rights interests, the Court's reasoning could be biased in favour of this person's perspective,[52] if the rights of other individuals are disregarded. If the same conduct of the State, were to be adjudicated from the perspective of these other persons, whose rights arguably trigger positive obligations, this bias could be problematic.

Smet has suggested that to avoid the risk of 'preferential framing', the Court's reasoning in the two situations (i.e. infringements of individual interests possibly in breach of negative obligations and protection of individual interests possibly to comply with positive obligations) has to ensure that they mirror each other, since 'the conflict remains identical.'[53] If this idea of mirroring is transposed to *Vavřička and Others*, this will imply an argument that the State fails to protect the right to life and/or private life of some by not coercing people to vaccinate their children. This argument implies the assumption that two obligations are at stake (positive and negative), and both correlate to ECHR rights that protect individual interests. If the idea of mirroring is followed, this should arguably lead to a balancing exercise that is not dependent on which obligation (the positive or the negative) is invoked in a specific case.[54] This argument also implies the assumption that the content of the positive obligation to protect life and health necessarily includes the concrete measure of coercing people to vaccinate their children. All these assumptions are, however, questionable. As I will continue to demonstrate, there were no competing positive obligations correlating to the ECHR right to life and private life at stake. Even if there were and even if the protected interests could be placed on the same footing as those of the applicants, as Section 4 will show, this equal footing should not and cannot be translated into equal footing of any possible corresponding obligations. Neither can it be translated into a command of taking concrete measures, such as fines and non-admission in nursery schools, as the content of a positive obligation.

As much more importantly, while it is possible that individual interests can be hidden behind general interests, we need a conceptual tool to distinguish the two. Otherwise, as noted in Section 2.1., human rights law collapses since we would be deprived of analytical tools to reason. Human rights law presupposes the distinctiveness of the individual and his/her interests and the assignment of a specific normative force to these interests. We therefore need some tools to make the distinction. With reference to Alexy's work and the ECtHR's practice, the following section presents these tools by clarifying the defining characteristics of general interests and what sets them apart.

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[51] J Bomhoff, 'The Rights and Freedoms of Others' in E Brems (ed) *Conflicts between Fundamental Rights* (Intersentia 2008) 638; S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017) 46.

[52] O de Schutter and F Tulkers, 'Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution' in E Brems (eds), *Conflict between Fundamental Rights* (Intersentia 2008) 188.

[53] S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017).

[54] This idea of equal footing and equal protection of the two rights implicated, has been supported in *Axel Springer AG v Germany* [GC] para 87.

3.C. Analytical tools for distinguishing between individual and general interests

3.C.(i) Defining general interests: aggregation, no specification and high speculation

Alexy has proposed that '[a] good is a collective good of a class of individuals if it is conceptually, actually or legally impossible to break up the good into parts and to assigned shares to individuals.'[55] This points to the characteristics of aggregation or non-separation that distinguish general interests. These characteristics can be also combined with absence of identifiability and specification of the individuals that are protected,[56] when general aims are pursued. Lastly, the high level of speculation as to how concrete individuals might be protected via the pursuit of general aims, such as public order or public health, is also indicative for recognizing general interests. In other words, in the absence of some determinacy as to who is protected and how, and from what specific harms (or risks of harms), it can be concluded that it is general interests that are at stake. The determinacy of the risk can also be related to its immediacy, the possibility and the ability to identify individuals at risk. If the risk is too remote (i.e. low immediacy) or there is low identifiability of the affected, it can be concluded that general interests are at stake.

These characteristic - aggregation, lack of specification or identifiability, and a high degree of speculation - are supported not only by Alexy's theoretical framework but also by the Court's case law. [57] But how can this be, given that, as noted in Section 3.A, the Court has not, unlike in its treatment of individual interests, articulated a definition of general interests or explored their defining features? My argument is that in cases where the Court ruled out the existence of individual interests, it can be assumed that general interests were at stake. It is therefore pertinent to examine the thresholds and standards that the Court uses to rule out the existence of individual interests.

In the next subsection, I will show that the above outlined characteristics are reflected in the Court's reasoning, consistently applied in the case law, as to when there are *no* individual interests that might trigger positive obligations. This observation is central to the critique of *Vavřička and Others* presented here, as it exposes the Court's reasoning regarding the lack of identifiable individual interests that could give rise to positive obligations. Accordingly, it reinforces the claim that the justification for the intrusive measures directed at the applicants should rely *solely* on general interests.

3.C.(ii) Defining individual interests: immediacy, identifiability and causation

The analysis of how the Court concludes that no individual interests are at stake - which in turn leads to the conclusion that only general interests are involved - requires an initial clarification. Specifically, the Court has developed two types of positive obligations: first, the obligation

[55] R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, 167.
[56] See also S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017) 51: 'the distribution of good is far removed from the protection of the concrete human rights of identified or identifiable individuals.' Smet has also observed that '[i]n the absence of concrete evidence that the human rights of identified – or identifiable – individuals are actually at stake, such situations do not entail genuine human rights conflicts.'
[57] These characteristics are also supported in domestic law. Tort law of negligence, for example, has been careful in making the distinction between general and individual interests and is equipped with analytical tools for this purpose. See T Hickman, 'Tort Law, Public Authorities, and the Human Rights Act 1998' in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (British Institute of International and Comparative Law 2002) 17.

upon the State to take protective operational measures and, second, the obligation to establish an effective regulatory framework.[58] I will therefore examine each of these separately, as the characteristics of aggregation, lack of specification or identifiability, and a high degree of speculation manifest differently in each context. I will also show how these characteristics directly relate to the standards of immediacy, identifiability, and causation employed by the Court for defining individual interests.

The positive obligation of taking protective operational measures

Starting with the first one, the case law has been consistent to the effect that the positive obligation of taking protective operational measures is triggered when 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals.'[59] Immediacy of the risk and identifiability are therefore key thresholds. If not met, there are no individual interests at stake that might trigger any positive obligations upon the State to protect thereby preventing harm. It can rather be suggested that some general interests are at stake; namely, the general aims of public safety or prevention of crime. Absence of immediacy and no identifiability directly corresponds to the characteristics mentioned in Section 3.C.(i).

Admittedly, there is lack of complete consistency from the Court on this point, since the standard of immediacy has been interpreted with some flexibility.[60] Notably, however, there is a resistance to the idea of requiring States, as a matter of their positive human rights law obligations, to take intrusive measures against individuals for the sake of protecting others when the risk of harm is not immediate.[61] In this respect, it is important that in *Vavřička and Others* no immediate risk to anybody was even mentioned in support of the argument that positive obligation were of any relevance. If there is no immediate risk, no positive obligation of taking protection operational measures can be triggered. If the same logic is transferred to *Vavřička and Others,* this will mean the following: no identifiable person was at immediate risk, no positive obligation was therefore triggered and accordingly, the reference to any positive obligations cannot be correct.

The positive obligation of adopting effective regulatory framework

In contrast to the positive obligation of taking protective operational measures,[62] the positive obligation of adopting effective regulatory framework is relevant even when harm (or the risk of harm) is not immediate. This latter obligation is also triggered when the person who might

[58] Here I disregard the third type of positive obligation developed by the Court, namely the procedural positive obligation of conducting effective investigation (see K Kamber, 'Substantive and Procedural Criminal Law Protection of Human Rights in the Law of the ECHR' (2020) 20(1) Human Rights Law Review 75). The reason is that when this obligation is invoked individual interests are clearly at stake and the Court does not have to consider their distinctiveness.

[59] See *Osman v the United Kingdom* [GC] App no 23452/94, 28 October 1998 para 116. V Stoyanova, Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete, 23 Human Rights Law Review 1 (2023).

[60] Ebert and Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights System: From the *Osman* Test to a Coherent Doctrine of Risk Prevention?' (2015) Human Rights Law Review 343; V Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the ECHR' (2020) 33 Leiden Journal of International Law 601.

[61] *Hiller v Austria*, App no 1967/14, 22 November 2016 para 50-57; Dissent of Judge Spano in *Talpis v Italy* no 41237/14, 2 March 2017 para 5.

[62] For the distinction between these two positive obligations in the practice of the Court, see for example *X and Others v Bulgaria* [GC] App no 22457/16, 2 February 2021, para 179-183; *Fernandes De Oliveira v Portugal* [GC] App no 78103/14, 31 January 2019, para 103.

suffer harm, arguably due to the State's failure to fulfill a positive obligation, is not identifiable in advance. For this reason, the positive obligation of adopting an effective regulatory framework aims at general protection, where the concrete applicant happens to be a representative victim of some structural deficiencies in the regulatory framework.[63]

If this positive obligation concerns general protection, what role do individual interests play? One might argue that the characteristics outlined above - which describe general interests - predominate in the Court's conceptualization of this obligation. As a result, the threshold for triggering this positive obligation does not appear to hinge on the presence of individual interests. Consequently, it might offer little analytical help in distinguishing between individual and general interests in human rights law. Nor might it clarify when the Court considers that no individual interests are at stake. The issue is not only that the threshold may be unhelpful; rather, the way this positive obligation is framed seems to obscure - or even erase - the very distinction between individual and general interests.

Although the Court has conceptualized this positive obligation as aiming at general protection where the concrete applicant happened to be a representative victim of structural regular deficiencies, such an erasure does not happen. Individual interests still base this positive obligation. The reason is that a causal link is still necessary between, on the one hand, any regulatory deficiencies and omissions (that arguably should have been avoided by the State to comply with its positive obligation), and, on the other, the specific harm suffered by the concrete applicant,[64] who invokes these obligations and whose case is adjudicated. Admittedly, no clear test of causation has been articulated by the Court.[65] Yet, the key point here is that the requirement of causation shapes the positive obligation as one underpinned by the logic of protecting *individual* interests. In other words, the requirement of causation implies some determinacy as to how the individual interests of the concrete applicant could have been protected by the regulatory framework, if it had not been shaped by regulatory deficiencies. In the absence of such determinacy, as per Alexy's theoretical framework, no individual interests are at stake.

If the same logic is transferred to *Vavřička and Others*, it becomes clear that the reasoning in the case demonstrates a neglect of any causal links between the hypothetical deficiency of not legislating to coerce vaccination and harm,[66] in favour of the argument that positive obligation were of any relevance. This neglect supports the understanding that rather than forming the content of any positive human rights obligations, the regulatory framework that coerced parents to vaccinate their children serves abstract general interests.

3.C.(iii) Wide scope of measures for serving general interests

[63] L Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights' in Brems and Haeck (eds), *Human Rights and Civil Rights in the 21st Century* (Springer 2014) 69.

[64] *Fernandes De Oliveira v Portugal* [GC] App no 78103/14, 31 January 2019, para 107, 116 and 122. This relates to the principle that this positive obligation does not imply an abstract review of the regulatory framework.

[65] V Stoyanova, Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR, 18 Human Rights Law Review 309.

[66] I frame this as a hypothetical because, in reality, the respondent State had adopted both an Act and a Ministerial Decree mandating vaccination (see paras 266–269 of the judgment). However, to properly assess the claim that positive obligations were engaged, it is necessary to construct a hypothetical scenario in which the State failed to legislate, and to examine whether such a failure could amount to a breach of the positive obligation to establish an effective regulatory framework.

Given the above-mentioned characteristics of aggregation, no specification and high speculation, general interests are formulated in very vague terms, which also implies a very wide scope of ways in which these interests can be served or disserved.[67] This means a wide scope of alternative measures for their realization. Since general interests are by definition more abstract, the measures (i.e., the conduct that consists of various alternatives that are the means for achieving the general interests) that can be undertaken for their fulfilment are also by definition more abstractly formulated. The more abstract the formulations of both (the aims and the means for the achievement of the aims), the less relevant any causality becomes. In its most extreme form, we lose the distinction between aims and means. This irrelevance of causality and the loss of the above-mentioned distinction is reflected in the practice of the Court. Usually, the Court in its practice easily accepts the underlying causality; it easily accepts that the measures of infringement that the applicant complains of as being in breach of negative obligations, contribute to the achievement of abstract aims (e.g. public health). The causal relationship between these measures and the general aims is not normally reviewed by the Court. This is precisely what the reasoning in *Vavřička and Others* reflects. The aim (i.e., the general interest) is the protection of public health, which is so abstract that many means could be easily accepted as contributory, given the wide scope of ways in which general interests can be served or disserved. Importantly, however, this does not imply that these means form the content of positive human rights obligations corresponding to individual rights. The means remain one of many for serving general interests.

Admittedly, certain measures serving general interests may also form part of the content of positive obligations arising under ECHR rights grounded in individual interests. However, the presence of individual interests remains essential for the trigger of positive obligations. This implies that there must be a causal link between, first, the harm to those interests and, second, the measures that the State is alleged to have failed to take in order to prevent that harm. In *Vavřička and Others*, the Court did not engage with either of these two elements when invoking positive human rights obligations. Nor did it consider the standards of immediacy of harm and identifiability individuals that might be harmed. The protective measure of mandatory vaccination thus remains a measure without specifically identified individuals to protect, and its protective effect remains largely speculative. According to Alexy's model, it therefore qualifies as a measure serving general interests.

3.C.(iv) No 'less damage' test for general interests

In light of the above-mentioned characteristics of aggregation, no specification, high speculation and the wide variety of ways for serving general interests, certain analytical tools applied to individual interests are simply not applicable to general interests. Specifically, when an individual interest protected by an ECHR right is interfered with, a relevant question is whether there were less restrictive means that the State could have used.[68] An important starting point is therefore that the State should use less intrusive (i.e., less injurious) means so that it can comply with its negative obligations corresponding to individual ECHR rights, while still trying to pursue the general interests.

[67] J Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 510: 'There are many ways in which a given interest can be served or disserved, and we should not expect to find that only one of those ways is singled out and made the subject matter of a duty.'

[68] Admittedly the test of less restrictive means is not consistently applied in the case law. See 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' 15 Human Rights Law Review (2015) 139.

In contrast, when a general interest is at stake, no test is applied for the purpose of restricting the permissible measures/means for pursuing general interests. To put it another way, no test is applied in the human rights law reasoning as to whether public interests could have been less damaged. More specifically, when a tension between an ECHR right and general interests is at stake, no question is, for example, asked whether the loss in public health (i.e. the general interest) can be no more than necessary in light of the goal of pursuing freedom from physical bodily interventions (i.e. the individual interest protected by the ECHR right). [69] By way of further explanation, no test is applied as to whether the reduction in public health or the economic well-being (i.e. general legitimate interests), was no more than necessary for pursuing, for example, the right to privacy. As Schauer explains, this difference is one of asymmetry that 'reveals that there is a presumption at work' in that when an ECHR protected individual right is interfered with, the State has a burden of justification. In comparison, there is no similar burden of justification to explain how and why, for example, public health is less protected. This asymmetry necessarily follows from the very idea of having individual rights as protected by the ECHR.[70] In straightforward terms, human rights law does not command the State to reduce damage to general public interests. Logically then, neither does human rights law impose any tests for deciding how much less damage should be made to general interests.

Not only is theoretically no test applied for the purpose of reducing any 'damages' to public interests, but it is not conceptually possible to apply such a test. The reason is that there is no identified individual. While the question whether a means is less injurious for public interests can be generally asked and practically possible to answer, whose individual interests are to be equally well protected? Equal to what? The whole analysis remains at the level of general interests and what might be more or less injurious for these general interests.[71]

In conclusion, human rights law rests on the premise that individual interests are both distinct and carry particular normative weight. Accordingly, analytical tools are needed to differentiate them from general interests. Section 3C presented these tools. It first drew on Alexy's work to propose the following defining characteristics of general interests: aggregation, lack of specification or identifiability, and a high degree of speculation. These characteristics can also be reconstructed in the ECtHR's case law. They appear particularly through the thresholds relating to the immediacy of harm, the identifiability of affected individuals and the requirement for causation. Where these thresholds are not met, there are no individual interests at stake. Section 3C added two more features that characterize general interests. First, there is a very

[69] F Schauer, 'Proportionality and the Question of Weight in Grant Huscroft et al (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasons* (CUP 2014) 173, 180. See also S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017) 42.

[70] Ibid. See also J Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in G Pavlakos (ed) Law, Rights and Discourse: The Legal Philosophy of Robert Alexy (Hart Publishing 2014) 167, 168, where it is explained how general interests cannot be optimisation requirements in the same way as individual interests that base human rights. The reason is that 'courts never consider whether legislatures have pursued the public interest to the greatest possible extent'. See also M Klatt, 'Balancing Rights and Interests: Reconstructing the Asymmetry Thesis' (2021) 41(3) Oxford Journal of Legal Studies, 321, 340, who discusses in detail the asymmetry as proposed by Schauer. Yet, he agrees that 'assigning higher abstract weight to rights lends rights a winning margin in the balancing. This winning margin may be equated, or indeed exceeded, by other variables of the competing principle.' This is important since if positive obligations are perceived as being relevant (as per para 282 from *Vavřička*), this creates the perception that there are competing ECHR rights that have to be assigned 'higher abstract weight'. This would mean at least the same abstract weight as the ECHR rights invoked by the applicants.

[71] Noting that in practice it is possible to ask what measures might be more or less injurious to general interests, is without prejudice to the normative starting point in human rights law that such questions are not required to be asked.

wide scope of ways in which these interests can be served or disserved. Second, human rights law does not require an assessment of whether the State could have caused less harm to public interests - or, by implication, protected them more effectively. Put simply, there is no breach of the ECHR because the State could have better safeguarded general interests. In contrast, human right law does demand an assessment of whether there were measures that the State could have adopted that were less damaging to individual interests.

3.D. The distinction between individual interests and ECHR-protected individual interests

With the characteristics of general interests established, attention can now be directed more closely toward individual interests. Such attention is warranted since there are also complications in making the distinction between individual interests and ECHR-protected individual interests, especially in the context of Article 8. It is useful to recall that, under the text of Article 8 of the Convention, an interference with the right to private life can be justified as necessary for the protection of general interests, the protection of individual interests (referred to as the 'rights and freedoms of others' in Article 8(2)), or the protection of ECHR-based individual interests (which may also fall within the scope of the 'rights and freedoms of others' under Article 8(2)). Only in the last scenario can the State potentially invoke its positive human rights obligations since it has to take measures aimed at protecting important interests that form the content of rights enshrined in ECHR – thus seeking to prevent harm reaching a certain level of severity. In other words, the measures are directed at protecting ECHR-based individual interests, which are accorded heightened normative importance precisely because they are protected under the Convention.[72] It then follows that the GC's statement in *Vavřička and Others* - that the Czech Republic had a positive obligation competing with the negative obligation not to disproportionate interfere with the applicants' ECHR rights - could *only* make sense if the asserted positive obligation was based on important individual interests *as protected* by ECHR, specifically under Article 8.

A complication however arises since the definitional scope of Article 8 has been interpreted widely.[73] As a consequence, it might be very difficult to distinguish the situation when the State seeks to *only* protect individual interests (i.e. less fundamental interests not necessarily protected by Article 8(1) ECHR). In light of the generous interpretative approach as to which individual interests are protected by Article 8, the distinction between individual interests and ECHR-protected individual interests seems to collapse.[74] This is problematic since it obstructs the ability to distinguish scenarios where positive obligations might be genuinely relevant and truly in tension with the negative obligations invoked by the applicants. The complication transpires because the individual interests underlying rights tied to positive obligations, are indeterminate, vague and potentially overly broad. It is only when these individual interests ground rights as enshrined in the ECHR (e.g. Article 8(1)), that a scenario of possible tension

[72] Section 3.A.

[73] See e.g. Dissenting opinion of Judge Wojtyczek in *Mile Novakovic v Croatia* App no 73544/14, 17 December 2020.

[74] The objective here is not to propose how the distinction should be drawn, nor where the severity threshold should be set, in determining whether a factual scenario concerns merely private life interests or private life interests protected by Article 8 of the Convention. Rather, I proceed on the assumption that such a distinction must exist, and that individual interests protected under the right to private life must meet a certain threshold of severity. It is worth noting that the ECtHR itself has struggled with both drawing this distinction and articulating the appropriate severity threshold under Article 8. See *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (OUP, 2023) 508.

between obligations transpires. However, if there is no analytical tool to distinguish ECHR-protected individual interests, it becomes impossible to isolate and properly identify instances of tensions between obligations.

If such instances cannot be isolated and such tools are not available, claims that there are tensions between negative and positive obligations, cannot be really scrutinized. The Court can thus continue to reason, as it did in *Vavřička and Others,* that the State was under a positive obligation corresponding to Article 8 (the right to private life) 'to put in place effective public-health policies for combating serious and contagious diseases' to protect the integrity – understood as private life - of those within their jurisdiction.[75] If private life interests – that are vague and can mean anything – are indistinguishable from private life interests *as protected by the Convention*, the former can also trigger positive obligations under the Convention. If accepted as triggered, as the Court did in *Vavřička and Others,* the next step of claiming that they compete with negative obligations can be easily made.

We are thus confronted with a situation in which the severity of harm is a questionable criterion enabling the distinction between, on the one hand, individual interests, and, on the other, ECHR-protected individual interests - the latter being the only ones capable of forming the basis for human rights obligations. Harm to interests and their relative importance do not therefore sufficiently guide the human rights reasoning. Rather, a discussion of the corresponding obligations and their proper specification is necessary to structure the review process. This discussion will be developed in Section 4.

A crucial clarification is, however, due at this point. For the sake of proceeding further to discuss obligations, let us assume that the interests protected by Article 8 compete with interests protected by another ECHR provision whose definitional limits are not that wide and ambiguous. Article 2 is such a candidate since it protects an individual interest (i.e. life) that is at least *prima facie* more important. [76] It can hardly be objectionable to accept that the interests protected by the ECHR right to life are more important than the interests protected by the ECHR right to private and family life. I then proceed under the assumption that the harm caused by the measure of interference is sufficiently severe to affect the interests protected by Article 8 and the interference is intended to protect *the more important* interest reflected in the right to life (Article 2). So, in contrast to with Sections 3.A – 3.C, I reverse the nature of the tension between the relevant interests. The effect of this reversal is that my starting point becomes the assumption that the interests that justify the measures of infringement - and which arguably form the content of any positive obligations - are at least *prima facie* more important. This higher level of importance of the interests on one side of the competition, however, tells us little about any corresponding obligations. Framing the discussion at the level of competition of interests is thus not very helpful. We need to discuss obligations, which is performed in the next Section 4.

3.E. Interim conclusion

For the sake of clarity prior to discussing obligations in Section 4, it is worth recalling that this section explained that human rights law rests on a fundamental distinction between individual and general interests, and on the proposition that individual interests are accorded greater

[75] *Vavřička and Others v the Czech Republic* [GC] paras 197 and 282.

[76] The definitional scope of Article 2 ECHR has been indeed extended to cover for example not only death, but also life-threatening injuries and risk of such injuries. *Nicolae Virgiliu Tănase v Romania* [GC] App no 41720/13, 25 June 2019.

abstract normative weight. It was also emphasized that this distinction is crucial because only individual interests that form the basis of ECHR rights can trigger obligations under the Convention. General interests - such as the prevention of crime or the protection of public health - should be safeguarded by States, but they do not themselves give rise to positive obligations under the ECHR. The invocation of positive obligations in *Vavřička and Others* appears to serve the protection of general interests, which renders the Court's innovation incorrect from the outset.

Nevertheless, Section 3 sought to show some understanding of the Court's error by acknowledging that distinguishing between individual and general interests is not always straightforward. However, analytical tools for making this distinction do exist. They can be identified not only in theoretical frameworks but also within the Court's own case law. If these tools are properly employed, it becomes possible to isolate individual interests that form the basis of ECHR rights, thereby enabling a proper conceptual link to corresponding obligations under the Convention, including positive obligations.

Finally, Section 3 also acknowledged that challenges persist even regarding the delimitation of individual interests. Without attempting to resolve them, Section 3.D. narrowed the subsequent discussion to scenarios where the asserted positive obligations - allegedly competing with negative obligations - are grounded in individual interests of unquestionable importance, such as the protection of life. After all, in *Vavřička and Others*, the Grand Chamber, in support of its claim that competing positive obligations existed, invoked not only Article 8 (whose definitional scope is broad and contested) but also Article 2, which protects the right to life.

4. Identification and resolution of tensions between obligations corresponding to ECHR rights

So far, I have demonstrated that while there are analytical tools that are helpful in the human rights law reasoning when the tension between general interests and individual ECHR rights has to be addressed, any suspected tension between individual interests protected by ECHR rights raises challenges. To understand these challenges and whether indeed there is actually any tension at all, any corresponding obligations, their specification and their possible incompatibility once specified, has to be included in the analysis.[77] This means that the obligations need to be specified to such a degree that it is possible to determine that the measures that form of content of one of the obligations, are not compatible with the measures that form the content of the other obligations. So, if there were to be an actual tension, or even conflict, the obligations on both sides need to be, first, identified and specified, and then, it needs to be determined that these specified obligations in some sense compete or are in conflict. In *Vavřička and Others* the specification of the obligations was performed only on one side of the alleged tension (i.e. the negative obligation not to disproportionately interfere with the ECHR right to private/family life), while those on the other side were framed in a very abstract fashion (i.e., the positive obligation to protect the right to life). As I will show, this abstract framing was inevitable given that there were no competing positive obligations corresponding to the ECHR right to life to start with.

[77] J Waldron, 'Rights in Conflict' (1989) 99 Ethics 503; S Besson 'Human Rights in Relation. A Critical Reading of the ECtHR's Approach to Conflicts of Rights' in S Smet and E Breams (eds) *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony?* (OUP 2017) 23, 28, where it is proposed that rather than considering 'conflicts of human rights as pertaining to rights *stricto sensu*', conflicts should be understood as 'conflicts between one or many of the specific duties correspond to those rights in a given context'.

To this end, Section 4.A. explains that Convention rights give rise to multiple obligations, which cannot be prioritized solely based on the relative importance of the interests underlying those rights. Instead, specification of the obligations is necessary to identify potential tensions between them and to guide the process of prioritization. In *Vavřička and Others* only the negative obligation not to disproportionate interfere with the applicants' interests as protected by Article 8 of the Convention, was specified. Any possible competing positive obligations were not. This, however, might not necessarily mean that such competing obligations did not exist. An outright rejection of their existence might be an example of 'preferential framing' since the case is framed from the applicants' perspective. Section 4.B. rejects the 'preferential framing' objection. Section 4.C. argues that even if positive obligations existed, their content cannot be specified as commanding the concrete intrusive measures against the concrete applicants in *Vavřička and Others.* The reason is that positive obligations can be fulfilled via multiple compliance measures. Section 4.D. defends this flexibility in compliance as a defining characteristic of positive obligations under the Convention.

4.A. Multiplicity of obligations without prioritization based on interest importance

At a very abstract level, one can say that the *interests* protected by the right to life are more important than those protected by the right to private life under the ECHR. However, each one of these rights has multiple corresponding obligations that can be framed at different levels of specification. Choices are also available as to how to formulate the specifications. It will be wrong to say that each specific obligation corresponding to Article 2 has priority over each specific obligation corresponding to Article 8. In other words, 'not all the duties generated by a given right have the same degree of importance.'[78]

However, the more abstractly the obligation is framed, like the abstract positive obligation to protect life invoked and accepted as relevant in *Vavřička and Others*,[79] the more important it seems to be (given that it is also presented as corresponding to the right to life) and the more difficult it is to concretely perceive the content and scope of this obligation. The measures that actually and more concretely might form the content of the purported obligation and determine its scope are irrelevant in this abstract framing. It is rather the *interests* protected by the ECHR right that matter, not any obligations. So, while it might be analytically and empirically correct that there is a tension between the *interests* protected by Articles 8 and 2, there are no obligations at stake that are in competition. Since there are no obligations that compete, there are no rights that compete.[80] There are only interests framed in very general and abstract terms that arguably compete with the negative obligation not to interfere with the individual right to private and family life. The interests protected by the right to private and family life have been clearly interfered with and there are specifically identifiable individuals who have been the object of this interference. This right therefore triggers negative obligations upon the State. On the other side of this competition is arguably the interest to protect life.[81] However, these are general interests. The characterization of the case as one of competition between obligations is therefore not correct. The State can and should still protect the general interests, but not as a matter of its human rights law *obligations*. This is important for not allowing the distinction between any general interests and individual interests that base human rights to collapse.

[78] Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 516.
[79] This is without prejudice to whether indeed empirically life is protected. My analysis is not based on empirics.
[80] This is based on the entanglement between rights and obligations.
[81] Assuming that empirically indeed vaccination of some save the lives of others. As I showed in Section 3.A above, analytically causality does not really matter anyway since the Court normally easily accepts that a legitimate aim is at stake and the State actually pursues it.

Maintaining this distinction is crucial for preserving the integrity of human rights law that is centered on the individual interests.

An objection can be, however, anticipated that the above analysis is an example of a 'preferential framing.'[82] In particular, since the case has been filed by the applicants who are the object of the interference, the reasoning is framed from their perspective, for which reason it could be biased. The right to life of persons who are not parties to the case should arguably also be protected and for this reason positive obligations of the State are *arguably* of relevance. To respond to this objection, a careful examination of how the Court has specified positive obligations in its practice is pertinent.[83]

4.B. Levels of specifications and their role in identifying tensions between obligations

The objective of this section is to examine how the Court has framed positive obligations and the different levels of specification that it has used and what purpose each one of these levels serves. For reasons already mentioned above, the specification of positive obligations corresponding to the right to life under Article 2 will be explained.

Two levels of concreteness in how the ECtHR has chosen to frame positive obligations can be identified in the case law.[84] These levels reflect a progressive specification in that the first one is very abstract. The Court aims to articulate some general and abstract standards, which is not very different from the articulation of abstract fundamental interests such as protection of life (see Section 4.B.(i)). There are no tensions between obligations as correlating to ECHR-rights at this level. Yet, to actually decide the case, the reasoning has to identify in more concrete terms the measures that the State should have arguably undertaken to fulfil its positive obligations.[85] This is when the Court's reasoning reflects the second more concrete level (see Section 4.B.(ii)). At this level, positive obligations could be indeed in tension with other obligations. Yet, the content of the potentially competing positive obligations cannot be reduced to the specific command to vaccinate the concrete children in *Vavřička and Others.*

[82] On 'preferential framing', see S Smet, 'When Human Rights Clash in 'The Age of Subsidiarity': What Role for the Margin of Appreciation' in Agha (ed), *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Hart 2017).

[83] It is also relevant to observe that despite the validity of this concern about 'preferential framing', human rights law is meant to be centered on the individual. It presupposes focus on the specific situation of a specific person and focus on the question whether this specific person has been disproportionately burdened. In addition, I am analyzing tensions between obligations in the context of adjudication, where there is a specific individual recognized as a victim. Tensions and conflicts between interests need to be also addressed in the context of law-making.

[84] V Stoyanova, Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete, 23 Human Rights Law Review 1 (2023).

[85] In its judgments, the Court actually distinguishes between a step of articulating general standards (the first level) and the step of applying the standards to the concrete facts (the second level). Level one is reflected in the section of the judgments entitled 'General principles'. Level two is reflected in the section of the judgment entitled 'Application of the above principles in the instant case' or 'Application to the present case.' See for example *Kurt v Austria* [GC] App no 62903/15, 15 June 2021, paras 157 – 210; *Lopes de Sousa Fernandes v Portugal* [GC] App no 56080/13, 19 December 2017, paras 164-7 and 197-205; *Fernandes de Oliveira v Portugal* [GC] App no 78103/14, 31 January 2019, at paras 104-132; *Kotilainen and Others v Finland* App no 62439/12, 17 September 2020, paras 65-90; *X and Others v Bulgaria* [GC] App no 22457/16, 2 February 2021, paras 176-193; *Nicolae Virgiliu Tănase v Romania* [GC] App no 41720/13, 25 June 2019, paras 157-172; *Talpis v Italy*, App no 41237, 2 March 2017, paras 95-107; *Hudorovič and Others v Slovenia* App nos 24816/14 and 25140/14, 10 March 2020, paras 139-159.

4.B.(i) Level one: articulation of general standards, rather than tension between obligations

When the Court adjudicates a case where the applicants invoke positive obligations under Article 2, the Court starts its analysis on the merits by noting that '[t]he first sentence of Article 2(1) enjoins the State not only to refrain from the international and unlawful taking of life, but also to take appropriate steps to safeguards the lives of those within its jurisdiction.'[86] The obligation of take appropriate steps to safeguard lives, is formulated at a very high level of abstraction. The framing is result-orientated since the emphasis is on the objective of safeguarding lives. This framing tells us nothing about the concrete measures, other than that they have to be appropriate. This is the first level.

In some situations, the Court has further specified this abstract positive obligation with reference to specific contexts. Such contextualizations can be found in cases involving, for example, domestic violence, children or medical negligence. Some of these contextualizations are suggestive of increased stringency by the Court in the assessment of breach;[87] others, are rather indicative of weaker stringency. An illustration of the latter emerges in the area of health care and medical negligence.[88] This supports the point made above that an ECHR right can trigger multiple obligations with varying stringency. Crucially, even if such contextualizations are done, the framing of the positive obligations remains very abstract. The objective of these articulations is the formulation of some general principles regarding the objective of safeguarding life in different contexts. These articulations can be related to the constitutional role of the Court[89] to formulate some general standards for state conduct.[90]

In *Vavřička and Others,* it is exactly this abstract formulation, articulated above as level one, that is used since to demonstrate the 'pressing social need', the Court noted

> In this respect it is relevant to reiterate that the Contracting States are under a positive obligation, by virtue of the relevant provisions of the Convention, notably Articles 2 and 8, to take appropriate measures to protect the life and health of those within its jurisdiction.[91]

However, while indeed the State has such abstract obligations, these do not correlate to individual ECHR rights. This means that analytically there cannot be a tension between rights as correlating to obligations. It is only possible that in *Vavřička and Others* there was a tension between the negative obligation not to disproportionate interference with Article 8 and some abstractly formulated interests.

An objection, however, can be anticipated. If the idea of correlativity is ignored, it might become possible to accept that the ECHR imposes general positive obligations of some objective nature, *not* owed to individuals and *not* corresponding to individual ECHR protected rights. Indeed, some theoretical accounts of human rights law reject correlativity.[92] If the

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[86] *Kurt v Austria* [GC] para 157.
[87] E.g. the reference to 'special diligence' in the domestic violence case of *Kurt v Austria* [GC].
[88] *Lopes de Sousa Fernandes v Portugal* [GC] App no 56080/13, 19 December 2017.
[89] Christoffersen, 'Individual and Constitutional Justice' in Christoffersen and Madsen (eds) *The European Court of Human Rights between Law and Politics* (OUP 2011) 181.
[90] *Paposhvili v Belgium* [GC] App no 41738/10, 13 December 2016, para 130.
[91] *Vavřička and Others v the Czech Respblic,* para 282 (references omitted).
[92] The interest-based theory rejects the idea of correlativity: 'the justificatory role of rights means that they cannot be regarded as strictly correlative to duties, and therefore statements about rights are not strictly equivalent to statements about duties.' J Waldron, *The Right to Private Property* (Clarendon 1990) 84. Raz has argued that the

rejection is endorsed, my arguments that are fundamentally shaped by the idea of correlativity, become fragile.[93] Such a rejection, however, has its own weaknesses. The theoretical accounts of these weaknesses need not detain us here.[94] What is important to underscore is that the ECHR does not impose general positive obligations that resemble what in German constitutional doctrine has been articulated as 'objective law' that does not give rise to an individual cause of action.[95] In this sense, the idea of correlativity is supported by the specific admissibility requirements, such as victim status,[96] for invoking violations of the ECHR.

4.B.(ii) Level two: articulation of alternatives, rather than commands

In its positive obligations case law, once the Court formulates the above-mentioned general standards, it proceeds to examine the question of breach in the concrete case. The relevant question faced by the Court here is whether the State has failed to take measures that it should have taken as a matter of any positive obligations. A response necessitates concretisation of the measures, including concretisation of alternative measures. The latter is necessary when the State has undertaken some protective measures, but these were arguably insufficient.[97] The starting point here is that States have discretion as to what protective measures to undertake, as a matter of their positive obligation.[98] Yet, concrete measures need to be identified and proposed as alternatives, otherwise the omission cannot be identified and framed in the reasoning. When such concrete measures are used in the reasoning, their articulation is part of the practical legal reasoning phase. They are not commands, to return to deontic logic mentioned in Section 2.B. There are at least two reasons that no commands are formulated in the Court's reasoning.

First, multiple alternative concrete measures are normally assessed, not the omission to take a single one that might be exclusively the basis for the conclusion in the judgment (i.e. the binary conclusion of violation or no violation).[99] Second and relatedly, the identified multiple concrete

correlativity axiom is not compatible with the 'dynamic aspect of rights:' '[…] most if not all formulations of the correlativity thesis disregard the dynamic aspects of rights. They all assume that a right can be exhaustively stated by stating those duties which it has already established.' See J Raz, 'Legal Rights' (1984) 4(1) *Oxford Journal of Legal Studies* 14-15; J Waldron, 'Introduction', in *Theories of Rights*, J Waldron (ed), (Oxford University Press 1984) 1, 10.

[93] The absence of concern with the obligation-holder and its conduct is not allowed under Hohfeld's model and its correlativity. Rights in this sense cannot have any meaningful role without always being entailed in particular juridical relations, where the obligation-holders and the content of the obligations are relatively clear. See P Eleftheriadis, *Legal Rights* (Oxford University Press 2008).

[94] See generally, *A Debate Over Rights*, M Kramer, NE Simmonds, and H Steiner (eds), (Oxford University Press 1998); P Eleftheriadis, *Legal Rights* (Oxford University Press 2008).

[95] For a brief overview, see Julian Rivers 'A Theory of Constitutional Rights and the British Constitution' in Robert Alexy, *A Theory of Constitutional Rights* (OUP 2010) xxiv.

[96] Admittedly, the Court has being expanding the meaning of victim status, which in turn helps in the adjustment of positive obligations in the direction of obligations of more general nature and as not necessarily corresponding to individual rights of specific persons. See *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] App no 53600/20, 9 April 2024, para 458-503.

[97] The concretisation of the measures can be directly linked to the standards of immediacy, identifiability and causation, explained in Section 3.C. as the defining characteristic of individual interests. For example, measures that form the content of positive obligation, need to be concretized so that it can be demonstrated how their omission caused harm to identifiably individuals.

[98] In choosing how to comply with their positive obligations, States enjoy a broad margin of appreciation. See *A, B and C v Ireland* [GC] App no 25579/05 para 249. See V Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) Nordic Journal of International Law.

[99] It is indeed possible that a single concrete measure that the State failed to take, might lead the Court to conclude that there was a breach of a positive obligation. These are rare scenarios, given that positive obligations are characterized by 'multiple, independently sufficient paths to compliance'. See J Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) Human

measures that are invoked in the practical legal reasoning do not correlate back to rights. There is thus no correlativity between rights and the concrete measures that are used in the reasoning stage as referents for assessing omissions.[100] It then follows that even the concretisation of the measures that form the content of any positive obligations leaves ambiguity, and in this sense cannot be understood through the frame of deontic logic where correlativity applies.[101]

How is this conclusion relevant to any tension between positive and negative obligations? Even assuming that there were relevant positive obligations, it can be questioned whether *their content necessarily includes a specific concrete measure* as necessarily correlated to the right to life. Even if positive obligations were relevant and even if breach of positive obligations were to be established, such obligations do not necessarily correlate to concrete measures as *commands*. To translate this to the *Vavřička and Others,* even if there *were* competing positive obligations at stake that arguably corresponded to the right to life of some concrete individuals (propositions that I already rejected), their content does not necessarily translate into the concrete measure of compulsory vaccination. One can even further reduce the level of specificity by noting that the concrete measure of compulsory vaccination of the *concrete* children of the applicants in *Vavřička and Others* cannot form the content of the positive obligation to safeguard life. It is hard to conceive that the Court would countenance a claim by, for example, parents of other children that argue that the State failed to comply with its positive obligations corresponding to *their* right to life, by not coercing some *concrete* children to vaccinate.[102] This is related to the nature of positive obligations where the focus of the analysis is on omissions. It is therefore relevant to also understand the distinction between acts and omissions better and how this distinction matters for the specification of obligations and any tensions. In particular, it is relevant to understand how it might be possible that omission-based obligations (i.e. positive obligations) come into tension with other obligations under the ECHR.

4.C. No commands and wide compliance options: difficulties in specifying omission-based obligations and identifying tensions

The structure of the analysis and the standards applied in the human rights review are different depending on whether it is an act or an omission by the State that is under scrutiny. Notably, in the context of Article 8, the Court might refuse to make the division. However, this does not

Rights Review; M Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) Heidelberg Journal of International Law 691.

[100] In some judgments the Court has been very explicit in this regard. For example, it has noted that although the measure of prosecuting an alleged perpetrator is relevant in the assessment of breach of positive obligations, there is no individual right to have somebody prosecuted (*Söderman v Sweden* [GC] App no 5786/08, 12 November 2013 para 83). Another relevant example emerges from *H.F. and Others v France* [GC] App no 24384/19, 14 September 2022, paras 259 and 282, where the Court was clear that there was no individual right to be repatriated.

[101] This causes problems when a judgment where the Court finds breach of positive obligations, needs to be executed, since the respondent State might not be sure how specifically to change its future conduct. See H Keller and C Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 26 Human Rights Law Review 829, 843.

[102] For similar flipping of the case in the context of an alleged tension between the negative obligations corresponding to Article 3 ECHR and any positive obligations to safeguard life, see N Mavronicola, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17(3) Human Rights Law Review 479, 484.

mean that analytically there is no distinction.[103] In addition, in the context of Article 2, the Court is clear as to whether the case involves a review of acts or omissions by the State.[104]

The distinction between acts and omissions can be reframed as a distinction between prohibitions (i.e. prohibitions of certain acts since they breach negative obligations) and commands (i.e. commands to perform certain acts since the omissions of these acts are in breach of positive obligations). Importantly, 'if there is a *command* to protect or support something, then not every act which represents or brings about protection or support is required.'[105] It might be possible to advance a range of actions to protect the interests that base individual human rights.[106] For this reason, an important staring point in the Court's analysis is that States have a choice as to how to comply with positive obligations,[107] and there is a 'wide range of possible measures' that they can undertake.[108] Importantly, not every possible measure that brings about compliance with the obligation is required, since there are 'multiple, independently sufficient paths to compliance.'[109]

At this juncture, it needs to be also acknowledged that States can also use different measures for limiting ECHR rights, some of them possibly in breach of negative obligations. This means that the availability of multiple options and alternatives is also necessarily present as an analytical step in the review of breach of negative obligations.[110] There is, however, still a difference. In particular, *all* measures that constitute disproportionate limitations are in breach of negative obligations.[111] Once a limitation measure passes the threshold of disproportionality, the only way to comply is to abstain from this measure.[112] One can rebut that States still have a wide range of possible measures at their disposal as to how to limit ECHR-protected rights. However, the normative starting point is that States have to choose the least restrictive measures

[103] J Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) Human Rights Review; See also Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) Heidelberg Journal of International Law 691, 694. Klatt explains how the Court's stance in some cases that the distinction does not matter, is incorrect.

[104] When state agents inflict harm, it might be artificial to consider positive and negative obligation independently: 'When lethal force is used with a "policing operation" by the authorities it is difficult to separate the State's negative obligations under the Convention from its positive obligations'. See *Finogenov and Others v Russia* App no 18299/03, 20 December 2011 para 208. Yet, in other circumstances where the right to life is found relevant, the distinction is made.

[105] R Alexy, *A Theory of Constitutional Rights* (2010) 308-9.

[106] R Alexy, 'On Constitutional Rights to Protection' 3 Legisprudence (2009) 1, 5.

[107] 'the choice of means for ensuring the positive obligations under Article 2 [the right to life] is in principle a matter that falls within the Contracting State's margin of appreciation. There are a number of avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still fulfill its positive duty by other means.' *Cevrioglu v Turkey* App No 69546/12, 4 October 2016, para 55; *Fadeyeva v Russia* App No 55723/00, 9 June 2005, para 96; *Budayeva and Others v Russia* App No 15339/02, 20 March 2008, paras 134-35; *Öneryildiz v Turkey* [GC] App No 48939/99, 30 November 2004, para 107; *Kolaydenko and Others v Russia* App No 17423/05, 28 February 2012, para 160; *Lambert and Others v. France* [GC] App No 46043/14, 5 June 2015, para 146.

[108] *Eremia v the Republic of Moldova* App No 3564/11, 28 May 2013, para 50; *Bevacqua and S. v Bulgaria* App No 71117/01, 12 June 2008, para 82.

[109] J Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) Human Rights Review.

[110] See for example See also M Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) Heidelberg Journal of International Law 691, who has explored the differences and the commonalities between negative and positive obligations in regard to the balancing of interests.

[111] Klatt 694.

[112] J Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) Human Rights Review.

when they take actions to limit human rights.[113] In this way, *their choice of measures is more circumscribed*.

In contrast, the Court has never formulated a test to the effect that States must undertake the best (or better) protective measures to ensure the ECHR rights. The starting point is rather that States can choose the measures and their failure to choose the best or the better measure for protecting a person (arguably in fulfilment of a positive obligation) does not necessarily lead to a breach. In comparison, when the Court adjudicates negative obligations, its starting point is *not* that States have different means of restricting rights and that even if one restrictive measure is disproportionate, the proportionality of other measures will still be examined. If one measure limiting the right is disproportionate, this measure is straightforwardly in breach of negative obligations.[114]

The wider choice of means/alternatives that characterises compliance with positive obligations, makes the finding of breach more difficult because of the need to consider wider alternatives and counterfactuals (i.e. what other means could be have been used to ensure the ECHR-protected right). The point is that the content of the positive obligation is much harder to specify to start with.[115] This supports the argument that while invoking positive obligations corresponding to the right to life might support the moral stance of the State,[116] the proposition that there is a necessary tension or anything close to a necessary conflict between these obligations and negative obligations is not acceptable. As already noted, there might rather be only tensions with general interests. In other words, the Court in *Vavřička and Others* incorrectly equated the general aim of public health with positive obligations.[117]

The wider compliance options that characterize positive obligations and the irrelevance of a test mirroring the less restrictive means test,[118] can be justified with reference to state discretion. At a more fundamental level, however, as the next section will show, what is hidden behind this justification is the preservation of individual freedoms and fending off state interferences.

4.D. Harm by interference versus harm by omissions: essential distinction for resolving tensions

Using the coercive power of the State to compel individuals and framing this as *commanded* by human rights law positive obligations is very problematic given the rationale of human rights law and its historical origins.[119] Above I argued that the suggestion that there is any tension between the obligation upon the State not to intervene (a prohibition that bases a negative obligation) and the obligation upon the state to interference (a command that could base a

[113] Notably, the Court does not consistently apply the least restrictive test means test as part of its proportionality review in negative obligations cases. See Brems and 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) Human Rights Law Review 139; Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466.
[114] Klatt, 695.
[115] V Stoyanova, Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete, 23 Human Rights Law Review 1 (2023).
[116] Smet effectively calls this 'public interests masquerading as human rights' S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017) 45.
[117] On the tension between 'public health' and human rights law, see R McWhirter and M Clark, 'Expertise, Public Health and the European Convention on Human Rights: *Vavřička v Czech Republic*' (2023) 86 Modern Law Review 1035.
[118] A possible mirror test could be framed as the best protective measure test or more protective measure test.
[119] See D McGrogan, *Critical Theory and Human Rights. From Compassion to Coercion* (Manchester University Press 2021).

positive obligation), is analytically not correct. However, if we ignore all of the above, which would imply ignoring certain foundations on which we have organized our liberal societies,[120] and if we were to accept that there is a tension since arguably the life of *concrete individuals is at clear and immediate risk*,[121] are there any other tools that can help us in addressing this tension? A possible tool might be the distinction between harming interests via interferences, on the one hand, versus not protecting interests via omissions, on the other. Moral philosophy has not only argued in favour of this distinction, but also warned that the first one is morally more objectionable.[122] In particular, *all things being equal*, the negative obligation not to intervene *in principle* trumps the positive obligation to intervene for the sake of protection.[123]

However, things are rarely equal since normally there are many variables and factors that intervene. One of these variables concerns evidence and empirical assumptions.[124] As noted by the dissenting judge, the Court in *Vavřička and Others* without any reservations reasoned based on the assumption in favor of the safety and efficiencies of all vaccines *in general*.[125] Regardless of the empirical correctness of this assumption,[126] the neglect in the Court's reasoning of the moral distinction between harming interests via interferences, on the one hand, versus not protecting interests via omissions, on the other, is disturbing.[127]

In closing, it is also worth noting that the analysis performed by moral philosophy is centered on the relationship between individuals. In comparison, human rights law is meant to regulate the relationship between the individual and the State. Given the special role of the State and its monopoly to legitimately use power, it might be added that the above moral distinction is even more important and the moral objectionability of the interferences is augmented. This feeds back into the above-mentioned rational of human rights law.

4.E. Interim conclusion

In *Vavřička and Others* the GC invoked Article 2 of the ECHR (the right to life) as a basis for positive obligations. These were presented as competing with the respondent State's negative

[120] This would mean ignoring the distinction between general and individual interests, ignoring that human rights law has to be justified with reference to individual interests since the individual is at placed at the centre, and ignoring the less restrictive means test. If all these were to be ignored, there will be no human rights law left.

[121] See Section 3.C. for the role of the 'immediate risk' standard for triggering positive obligations under the ECHR.

[122] S Smet, 'Conflict between Absolute Rights: A Reply to Steven Greer' 2013 (13) Human Rights Law Review 469, 490; Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing' (1989) 98 Philosophical Review 287; McMahan, 'Killing, Letting Die, and Withdrawal of Aid' (1993) Ethics 250; J Wibye 'Reviving the Distinction between Positive and Negative Human Rights' (2022) 35 Ratio Juris 363.

[123] See S Smet, 'Conflict between Absolute Rights: A Reply to Steven Greer' 2013 (13) Human Rights Law Review 469, 490. Smet also refers to empirical research that shows that when confronted with scenarios in which the harm is equal, people prefer not to intervene, rather that to intervene by taking an action to prevent harm in this way however (potentially or not) causing (intentionally or not) other harm.

[124] See R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163, where it is usefully explained that the tension between general interests and individual rights-protected interests has at least three aspects: normative, empirical, and analytical.

[125] In his dissenting opinion in *Vavřička and Others v the Czech Republic*, Judge Wojtyczek noted how some of the diseases were not even contagious.

[126] The way evidence works at the ECtHR is understudied. See Marie-Bénédicte Dembour, 'The Evidentiary System of the European Court of Human Rights in Critical Perspective' (2023) 4 ECHR Law Review 363.

[127] In fact, the reference to 'social solidarity' (*Vavřička and Others v the Czech Republic*, para 306) can be interpreted as a reversal of the distinction. The invocation of the aim of 'social solidarity' can be interpreted as downplaying of the heavier moral objectionability of harming by intervening. 'Social solidarity' appears to demand State-imposed sacrifice for the sake of protection. It is interesting to observe how the Court might continue to use 'social solidarity' argument in its human rights law review.

obligation not to disproportionately interfere with the applicants' private and family life The fundamental importance of the interests protected by the right to life is undisputed. This importance however does not mean that the positive obligations corresponding to this right necessarily should be prioritized in case of competition. The right triggers multiple obligations. These need to be specified so that tensions with other obligations can be identified and choices made. The Court's reasoning, however, neither undertook this specification nor suggested it as necessary. Equally important, the specification cannot lead to the command upon the State *as a matter of* human rights law positive obligations, to take the concrete intrusive measures against the concrete applicants in *Vavřička and Others.*

5. Conclusion

By using the reasoning and the conceptualization endorsed by the Grand Chamber in *Vavřička and Others,* this article demonstrated that the conflation of general interests (even if these are legitimate) and positive obligations as commands upon the State to interfere, is not correct. General interests and any obligations corresponding to ECHR rights should be analytically kept separate. Positive obligations correlate to individual fundamental rights that are based on individual interests. The latter should be distinguished from general interests that are characterized with non-separation and absence of identifiability of the individuals meant to be protected, in addition to high level of speculation as to how they might be protected. All of these imply that there is a very wide scope of ways in which general interests can be served or disserved. Crucially, human rights law does not demand reviewing whether general interests could have been better protected. In contrast, it does demand reviewing whether ECHR individual interests could be better protected via the application of the less restrictive means test.

Given the distinction between general interests and individual interests that base ECHR rights, there were no individual interests that could base ECHR rights with corresponding positive obligations at stake in *Vavřička and Others*. There was therefore no tension between negative and positive obligations. By accepting that there was such a tension, the Court allowed general interests to operate under the façade of individual human rights. The State can and should protect general interests, such as public health, but the coercive measure used in pursuit of these interests are not commands that from the content of human right *obligations*.

The article explained that to determine whether there is any actual tension between obligations, or even conflict, the obligations on both sides need to be specified. The negative obligation can be specified as a prohibition on disproportionate inference with private and family life. As to the positive obligation that could possibly compete, four key clarifications were offered. First, the purported correlation of this obligation to the right to life does not make it more important than any obligations (positive or negative) that correlate to the rights protected by Article 8.

Second, the assessment of breach of positive obligations in the process of the deliberative reasoning, necessarily requires an assessment of multiple alternative measures and counterfactuals as possible counterparts to alleged omissions. However, these individual measures taken in isolation are not the exclusive basis for the conclusion (breach or no breach of the positive obligations), which makes it difficult to correlate them back to individual rights. It then follows that even if there were relevant competing positive obligations that arguably corresponded to the right to life of some concrete individuals (propositions that I rejected), their content does not necessarily translate into the concrete coercive measure (i.e. compulsory vaccination).

Third, the absence of the above explained translation is related to the nature of positive obligations where the focus of the reasoning is on omissions. This leads to wider compliance options and the non-application of a test mirroring the less restrictive means test that is key in the assessment of any breach of negative obligations. Such a mirroring test could be possibly framed as whether the State has taken the best protective measures or the more protective measures. Such questions are, however, not asked when assessing compliance with positive obligations.

Fourth, the above-mentioned wider compliance options and the non-application of a mirroring test are warranted. The reason is that they help in resisting an interpretation of human rights law whereby the usage and the expansion of the coercive power of the State to compel individuals are framed as *commanded* by human rights law positive obligations. Such an interpretation might transform human rights into coercive 'rights'. A transformation that we should resist.