Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?

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The European Court of Human Rights has, in specific circumstances, interpreted the Convention in a manner that extends the protection provided under civil and political rights into the socio-economic sphere. Additionally, in obiter statements, the Court has alluded to the possibility that 'a wholly insufficient amount of pensions and other benefits' would 'in principle' violate the Convention, namely Articles 2, 3 and 1 Protocol 1 ECHR. This statement also appears in recent admissibility decisions where applicants unsuccessfully challenged austerity measures adopted to give effect to conditionality agreements in states facing a debt crisis. The article examines whether with this statement the Court is suggesting that states must adhere to a minimum threshold of welfare protection, thereby protecting all individuals in their jurisdiction from the destitution that may arise from austerity policies. The article concludes that the Court's approach in cases where welfare reductions are under scrutiny points more towards a comparative or relative approach, an approach that compares the position of the applicant to others within the respondent state, rather than one that determines a welfare minimum in absolute and objective terms. Nonetheless, the article argues that this statement on insufficiency of benefits has the potential of contributing to a more substantively fair distribution of the cost of austerity in states facing a debt crisis.

Keywords: European Convention on Human Rights, welfare state, destitution, austerity.

1 INTRODUCTION

In response to the sovereign debt crisis,[1] affected states in Europe have implemented a series of stark austerity measures that have impacted all aspects of social welfare.[2] For states in southern Europe, austerity policies were adopted to give

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1 *See* indicatively *The Sovereign Debt Crisis, the EU and Welfare State Reform* (Caroline De La Porte & Elke Heins eds, Palgrave Macmillan 2016); *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises* (Martin Guzman, José Antonio Ocampo & Joseph E. Stiglitz eds, Columbia University Press 2016).

2 For an in-depth account of austerity measures across Europe *see Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Papers (Claire Kilpatrick & Bruno De Witte eds 2014–2015).

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effect to conditionality agreements that sought to make the reduction of welfare spending a prerequisite for access to financial support.[3] With European countries now operating under a balanced budget rule,[4] there is renewed interest surrounding the precise scope of states' obligations to maintain a well-functioning social security and social welfare system.

The economic dimension of rights, especially of those rights whose realization is highly resource-dependent, raises questions on the appropriate role of human rights law in times of economic crisis.[5] Academic discussion has revolved around two interlinked issues. Firstly, how does a far-reaching debt crisis affect state obligations under human rights law,[6] and secondly, how should international human rights protection mechanisms respond to the crisis?[7]

The approach of the European Court of Human Rights (henceforth, 'the Court' or ECtHR) to both these questions will be the focal point of this article. Applications to the ECtHR challenging austerity measures have been largely unsuccessful, with most failing at the admissibility stage. With its admissibility decisions and judgments, the Court affirmed that domestic authorities are better placed, given the exceptional circumstances of the debt crisis, to determine how their scarce resources will be allocated while attempting to build a path to economic recovery.[8] Thus, the presumption is that the state will enjoy the widest margin of appreciation possible in relation to legislative measures taken to respond to a budgetary crisis.

However, the wide margin of appreciation the Court grants the respondent state is accompanied by a warning that, in one form or another, has consistently appeared in

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3 *See* for instance Antonia Baraggia, *Conditionality Measures Within the Euro Area Crisis: A Challenge to the Democratic Principle?*, 4 Cambridge J. Int'l & Comp. L. 268–288 (2015); Pablo Martín Rodríguez, *A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis*, 12 Eur. Const. L. Rev. 265–293 (2016).

4 *See* Tony Prosser, *Constitutionalising Austerity in Europe*, Pub. L. 111–129 (2016).

5 *See* indicatively Margot E. Salomon, *Of Austerity, Human Rights and International Institutions*, 21 Eur. L.J. 521–545 (2015); Lorenza Mola, *The Margin of Appreciation Accorded to States in Times of Economic Crisis*, 5 Revista Jurídica de los Derechos Sociales 174–194 (2015); Ioanna Pervou, *Human Rights in Times of Crisis: The Greek Cases Before the ECtHR, or the Polaristation of a Democratic Society*, 5 Cambridge J. Int'l & Comp. L. 113–138 (2016).

6 Aoife Nolan, *Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis*, 4 Eur. Human Rts. L. Rev. 358–369 (2015); *Economic and Social Rights After the Global Financial Crisis* (Aoife Nolan ed., Cambridge University Press 2014); Lutz Oette, *Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?*, 15 Human Rts. L. Rev. 669–694 (2015); Janneke Gerards, *The ECtHR's Response to Fundamental Rights Issues Related to Financial and Economic Difficulties – The Problem of Compartmentalisation*, Neth. Q. Human Rts. 274–292 (2015); Stamatina Yannakourou, *Austerity Measures Reducing Wage and Labour Costs Before the Greek Courts: A Case Law Analysis*, 11 Irish Emp. L.J. 36–43 (2014).

7 Linos-Alexandre Sicilianos, *The European Court of Human Rights at a Time of Crisis in Europe*, 2 Eur. Human Rts. L. Rev. 121–135 (2016); Ben T. C. Warwick, *Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression*, 65 Int'l & Comp. L. Q. 249–265 (2016); Joe Wills & Ben T. C. Warwick, *Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse*, 23 Ind. J. Global Legal Stud. 629–664 (2016).

8 The cases are developed in detail in the body of the article.

the Court's austerity case law. The Court cautions the respondent states that it would be willing to find a violation of the Convention[9] where the pension or other benefits the applicant received from the state are found to be 'wholly insufficient',[10] or where a reduction of benefits would result in the applicant falling below the 'subsistence threshold'.[11] The Court has not defined the threshold beneath which social provisions would be deemed insufficient or threaten the applicant's subsistence,[12] nor has it found a violation of the Convention relying *exclusively* on the insufficiency (or complete lack of) a benefit.[13] This has led commentators to suggest that such statements are nothing more than a rhetorical device, a 'teasing promise'[14] which the Court deploys *obiter*,[15] but is unlikely to fulfil.

The fact that the Court returns to this concept, however, raises a series of questions that require further academic analysis to complement existing scholarship on the socio-economic jurisprudence of the ECtHR. What does this statement on insufficiency suggest about the Court's understanding of its role in supervising the implementation of the Convention in the midst of a debt crisis? Can such *obiter* statements be relied upon to ensure that austerity policies do not reach a point of condemning individuals to destitution? And, finally, is the Court through these statements incrementally generating an obligation on states to provide an objective minimum of social welfare, a 'social minimum'[16] that would serve as a Convention-based safety net which austerity could not penetrate?

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9 As will be discussed below, the Court has alluded to the possibility that a completely insufficient amount of social benefits could violate Arts 2, 3 and Art. 1 Protocol 1 ECHR.

10 As the article will demonstrate, the Court uses this terminology in Art. 3 cases. *See* indicatively *Budina v. Russia* Application No. 45603/05, decision on admissibility, 18 June 2009.

11 This phraseology is used in Art. 1 P1 cases.

12 Jo Kenny, *European Convention on Human Rights and Social Welfare*, 5 Eur. Human Rts. L. Rev. 495, 501 (2010).

13 As will be demonstrated below, the Court when finding that an austerity measure violated the Convention, relied on other factors in combination with 'insufficiency' to find a violation.

14 Colm O'Cinneide, *A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights*, 5 Eur. Human Rts. L. Rev. 583, 590 (2008).

15 As Feldman explains 'There is no real distinction drawn by the Court between ratio decidendi and obiter dictum in its previous pronouncements […] All statements are regarded as sources of enlightenment as to the meaning of the ECHR'. 'Precedent and the European Court of Human Rights', in Appendix C to Law Commission Consultation Paper No. 157, *Criminal Law: Bail and the Human Rights Act 1998: A Consultation Paper* 114–115 (1999), cited by Alastair Mowbray, *An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law*, 9 Human Rts. L. Rev. 179–201 (2009).

16 Waldron defines a social minimum as 'a level of material well-being beneath which no-one should be permitted to fall' in Jeremy Waldron, *John Rawls and the Social Minimum*, 1 J. Applied Phil. 21 (1986). *See also* Juri Viehoff, *Maximum Convergence on a Just Minimum: A Pluralist Justification for European Social Policy*, 15 Eur. J. Pol. Theory 164–187 (2017). On a 'minimum core approach', *see* Ingrid Leijten, *From* Stec *to* Valkov: *Possessions and Margins in the Social Security Case Law of the European Court of Human Rights*, 13 Human Rts L. Rev. 309–350 (2013) and Ingrid Leijten *The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection*, 16 Ger. L.J. 23–48 (2015).

By analysing the Court's austerity case-law, this article reaches the following conclusions. In Part 2, the article demonstrates that in cases where applicants challenged reductions to their welfare under Article 1 Protocol 1, the Court relied on the insufficiency of a benefit as a justification to override the wide margin of appreciation and to proceed to a more rigorous scrutiny of the impugned austerity measure. The fact that the reduction may threaten the applicant's subsistence, however, served merely as a starting point in the Court's analysis. In the few cases where an austerity measure was found to be disproportionate due to its insufficiency, the central element the Court relied on was not the overall amount of the benefit, but the fact that the applicant had been singled out to carry the burden of austerity when compared to others within the respondent state. Conversely, where the applicant could not demonstrate that their welfare reductions were excessive compared to others, no violation was found. In these cases, the Court does not specify the content of a minimum threshold of welfare protection or a maximum of permissible austerity cuts to welfare. Instead, the Court determines the outcome of the case by employing a comparative or relative approach.

However, if austerity measures are distributed without targeting specific classes of individuals within the respondent state, do references to insufficiency of benefits or subsistence thresholds leave open the possibility for a successful challenge to an austerity measure that renders an individual destitute? This relates to a broader issue that has generated significant academic discussion.[17] To what extent can the ECHR, which primarily protects civil and political rights, be utilized as a means to protect individuals from destitution? The Court has addressed such instances of destitution namely by reference to Articles 2 and 3 ECHR. As the article will explain in Part 3, the Court has on occasion found a state in violation of Article 3 for failing to provide material assistance to individuals, by relying on their vulnerable status.[18] This approach, however, also contains a comparative or relative element. What the Court is suggesting in such cases, is that the applicant is vulnerable in comparison to others within the respondent state. This is then used as the justification for the Court to expand the positive obligations of states under the Convention towards the applicants and to require them to take supplementary

[17] Indicatively Ellie Palmer, *Beyond Arbitrary Interference: The Right to a Home? Developing Socio-economic Duties in the European Court of Human Rights*, 61 N. Ir. Legal Q. 225–243 (2010); Françoise Tulkens, *The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis*, 2 Cyprus Human Rts. L. Rev. 122–140 (2013); Laurens Lavrysen, *Strengthening the Protection of Human Rights of Persons Living in Poverty Under the ECHR*, 33 Neth. Q. Human Rts. 293–325 (2015); Ida Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009).

[18] *See MSS v. Belgium and Greece* Application No 30696/09, Merits and Just Satisfaction, 21 Jan. 2011 and *VM and others v. Belgium* Application No 60125/11, Merits and Just Satisfaction, 7 July 2015.

socioeconomic measures. In light of this, the article will argue in Part 4, that while the statement on insufficiency of benefits, should not be understood as generating an objective minimum of Convention-protected socio-economic obligations, the Court's repeated reference to it is useful. This is due to the fact that this statement has the potential of contributing to a more substantively fair distribution of the cost of austerity in states facing a debt crisis.

In the final section, the article will assess what best explains the Court's preference for a comparative or relative approach, over an approach that identifies a concrete and absolute, pan-European social minimum. The article will conclude that this approach strikes a good balance in allowing the Court to provide some oversight to the implementation of austerity, while also ensuring that it does not expand state obligations under the Convention into the socio-economic sphere in a manner that states may consider illegitimate.

2 APPLICATIONS BROUGHT UNDER ARTICLE 1 PROTOCOL 1 AND THE 'SUBSISTENCE THRESHOLD'

Before proceeding with the analysis of the Court's approach to austerity claims brought under the right to property, a preliminary point must be addressed. This relates to the Court's capacity to adjudicate on socio-economic matters. The rights emanating from the welfare state are socio-economic in nature. The fact that the Convention is primarily aimed towards the protection of civil and political rights[19] has not limited the Court from embracing the concept that rights are indivisible, interrelated and interdependent.[20] The Court has accepted on many occasions that there is no watertight distinction between the two sets of rights,[21] and has maintained that 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation'.[22] In practice, however, the Court has demonstrated a great degree of restraint when examining cases that relate to the formulation of the

[19] The Convention protects some rights that are traditionally associated with the economic, social and cultural rights canon, such as the right to education under Art. 2 of Protocol 1 ECHR. *See also* Bernadette Rainey, Elizabeth Wicks & Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* Ch. 9 (Oxford University Press 2014).

[20] Reflecting the approach in the Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 at para. 5.

[21] *See* for instance *Airey v. Ireland* Application No 6289/73, Merits, 9 Oct. 1979 at para. 26, *N. v. United Kingdom* Application No 26565/05, Merits, 27 May 2008 and more recently *Asiye Genç v. Turkey* Application No 24109/07, Merits and Just Satisfaction, 27 Jan. 2015 and note the concurring opinion of judges Lemmens, Spano and Kjolbro.

[22] *Budina v. Russia supra* n. 10; Marc Bossuyt, *Should the Strasbourg Court Exercise More Self-restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations*, 28 Human Rts. L.J. 321 (2007).

respondent state's welfare policy, especially where such policies involve the allocation of scarce resources. The consistent approach of the Court has been to grant the respondent state a wide margin of appreciation, especially where applicants rely on the Convention to assert that the respondent state has a positive obligation to provide them with material assistance or a benefit.[23]

A useful starting point to illustrate more precisely how the Court purports to determine state obligations under the Convention in relation to social welfare and Article 1 Protocol 1 (henceforth Article 1 P1) is the case of *Stec and others v. United Kingdom*.[24] The applicants sought to challenge the 'differences in the entitlement for men and women to certain industrial injuries social security benefits'.[25] With regard to state 'social welfare' obligations under the Convention, the Court in this case reached three important conclusions. **Firstly**, the Court held that the Convention does not create an obligation on Contracting Parties to establish a social security scheme or to provide a minimum amount of benefits.[26] **Secondly**, the Court noted that if the state does establish such a scheme, the welfare provided (pensions and benefits, both contributory and non-contributory) would fall under Article1 P1, and are thus considered 'possessions' for the purposes of the Convention. **Thirdly**, any welfare policies the state adopts must be organized in a manner that is compatible with Article 14 ECHR.[27]

The second point in the Court's analysis in *Stec* is most relevant to the discussion here, as it suggests that the Convention's guarantee for the peaceful enjoyment of possessions[28] would require the Court to engage in a 'fair balancing' assessment to determine whether any interference with existing welfare benefits satisfied the conditions of proportionality. When such interference is the result of austerity policies in states facing an acute financial crisis, it is to be expected that the Court would grant the state a wide margin of appreciation.

The cases reaching the Court at the time of the debt crisis confirm this account. The applicants in *Koufaki and ADEDY v. Greece*[29] for instance, complained about the cuts in their wages and pensions emanating from the laws

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[23] It is not uncommon for a case that requires substantial reallocation of resources to be declared inadmissible as manifestly ill-founded. *See* for instance *Botta v. Italy* Application No 21439/93, Decision on the Admissibility, 24 Feb. 1998; *Zahnalova and Zehnal v. Czech Republic* Application No 38621/97, Decision on the Admissibility, 14 May 2002; *Sentges v. Netherlands* Application No 27677/02, Decision on the Admissibility 8 July 2003.

[24] Application Nos 65731/01 and 65900/01, Merits, 12 Apr. 2006. *See also Valkov and Others v. Bulgaria* Application No 2033/04, Merits and Just Satisfaction, 25 Oct. 2011.

[25] Legal summary of the case, http://hudoc.echr.coe.int/eng#{"itemid":["002-3406"]} (accessed Aug. 1 2018).

[26] *Stec*, *supra* n. 24, at para. 53.

[27] *See also Koua Poirrez v. France* Application No 40892/98, Merits and Just Satisfaction, 30 Sept. 2003.

[28] Protected under Art. 1 P1 ECHR.

[29] *Koufaki and Adedy v. Greece* Application Nos 57665/12 and 57657/12, Decision on the Admissibility 7 May 2013.

implementing the first agreement of financial support containing conditionality between Greece and its foreign creditors. The case was found inadmissible as manifestly ill-founded.[30] The Court reiterated that, under the circumstances, a wide margin of appreciation would apply.[31] The Court also dismissed the applicants' arguments that there were less intrusive measures that Greece and its creditors could have adopted in response to the debt crisis.[32]

In *Da Conceicao Mateus and Santos Januario v. Portugal,*[33] another case that failed at the admissibility stage, the Court found the cuts in the applicants' pensions to be 'clearly in the public interest within the meaning'[34] of Article 1 P1 and confirmed that 'a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social policy'.[35]

The Court reached similar conclusions in *Silva Carvalho Rico v. Portugal*,[36] noting that the austerity measures in this case 'were adopted against the background of an actual and unexpected budgetary crisis'.[37] Notably, the Court also made reference to the judgment of the Portuguese Constitutional Court on the matter, which grounded its decisions on the 'proviso of the possible',[38] a doctrine according to which 'a State cannot be forced to comply with its obligations in the framework of social rights if it does not possess the economic means to do so'.[39]

Finally, in the more recent case of *Mamatas and others v. Greece*,[40] the Court emphasized that it has 'built a jurisprudence on the margin of appreciation of States in the context of the economic crisis in Europe since 2008 and particularly in

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30 *Ibid.*, at para. 49.

31 'As the decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, the Court considers that the national authorities are in principle better placed than the international judge to choose the most appropriate means of achieving this and will respect their judgment unless it is manifestly without reasonable foundation […]This margin is even wider when the issues involve an assessment of the priorities as to the allocation of limited State resources'. *Ibid.*, at para. 31.

32 *Ibid.*, at para. 48. As the Court stressed:
'As regards alternative solutions, their possible existence does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way'.

33 Application Nos 62235/12 and 57725/12, Decision on Admissibility, 8 Oct. 2013.

34 *Ibid.*, at para. 26.

35 *Ibid.*, at para. 22.

36 Application Nos 13341/14, Decision on the Admissibility 1 Sept. 2015.

37 *Ibid.*, at para. 44.

38 *Ibid.*

39 *Ibid.*

40 Application Nos 63066/14, 64297/14 and 66106/14, Merits and Just Satisfaction, 21 July 2016. Contrary to the cases mentioned above, this case was found to be admissible and the Court proceeded to the examination of the merits.

relation to austerity measures through legislation'.[41] This reference to established case law on the margin of appreciation suggests that the Court will examine such cases under a rebuttable presumption of non-interference with legislative measures that seek to balance the budget through the adoption of austerity measures.

The common thread in these admissibility decisions and the *Mamatas* judgment, was the Court's emphasis on the exceptional circumstances of the debt crisis and the concomitant 'light touch' review it would conduct of the impugned austerity measures.

While making reference to the broad discretion of the state, however, the Court also issued a warning that purported to set the threshold beneath which welfare provisions could not fall without violating Article 1 P1.

In *Koufaki* for instance, and in the context of Article 1 P1, the Court noted that 'that the applicants before it had not claimed specifically that their situation had worsened to the extent that they risked falling *below the subsistence threshold'*.[42] This suggests that if the applicant had been more adversely impacted by the austerity measures, the Court's position would have been different. This was more explicitly stated in the *Da Conceicao Mateus* admissibility decision, where the Court stressed that 'a total deprivation of entitlements resulting *in the loss of means of subsistence* would in principle amount to a violation of the right of property'.[43]

This warning that cuts which threaten the applicant's subsistence could violate the Convention can be interpreted as clarifying to states that they do not benefit from unlimited discretion when implementing austerity policies. These *obiter* statements, however, raise an important question. If the Court is asserting that cuts that result in someone falling below the subsistence threshold violate Article 1 P1, how is this threshold to be defined? As this part will demonstrate, while the overall amount of a social benefit is a starting point for the Court to engage in a more in-depth scrutiny of the impugned austerity measure, this is not the critical factor it will rely on to find a violation. Instead, the Court analyses austerity measures from the viewpoint of how the reduction the applicant faces compares with similar reductions or the overall amount of pensions others receive in the respondent state. Thus, rather than specifying the content of an absolute, pan-European social minimum, or a maximum of acceptable welfare reductions, the Court instead adopts a comparative or relative approach.

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41 *Ibid*., at para. 88 and para. 120. *See also Frimu and others v. Romania* Application No 45312/11, Decision on the Admissibility, 13 Nov. 2012; *Panfile v. Romania* Application No 13902/11, Decision on the Admissibility, 20 Mar. 2012.

42 *Koufaki*, *supra* n. 29, at para. 44, emphasis added.

43 *Da Conceicao Mateus*, *supra* n. 33, at para. 24, emphasis added. The Court reached the same conclusion in *Silva Carvalho Rico*, *supra* n. 36, at para. 42.

The case of *Kjartan Asmundsson v. Iceland*[44] serves to illustrate this point. The applicant received a disability pension after sustaining serious injuries in a work accident. As a response to the economic crisis in Iceland, the government removed the disability pension entitlements in their entirety from specific classes of recipients, including the applicant. The Court's approach, in finding a violation of Article1 P1 is telling:

> The vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the adoption of the new rules, whereas only a small minority of disability pensioners had to bear the most drastic measure of all, namely the total loss of their pension entitlements. […] [T]he above differential treatment in itself suggests that the impugned measure was unjustified [and] must carry great weight in the assessment of the proportionality issue under Article 1 of Protocol No. 1. […] Against this background, the Court finds that, as an individual, the applicant was made to bear an excessive and disproportionate burden […]. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements.[45]

The decisive factor that grants the Court the legitimacy to override the wide margin of appreciation thus seems to stem not only from the reduction (or, in this case, the complete deprivation) of the applicant's pension, but from the 'differential treatment' in which the austerity measures were designed. The Court did not rely on Article 14 ECHR to reach this conclusion,[46] but employed the term 'discrimination' to convey that the applicant was selected to bear the brunt of austerity, while most in a similar position were left unaffected.[47] This justified the Court's finding of an 'excessive and disproportionate burden'[48] on the applicant. Thus, the deprivation the applicant faced, and this is crucial to the article's argument, was not the sole factor on which the Court relied. The Court did not find the state in violation due to its failure to continue providing the applicant with x amount of social welfare, but for failing to reduce benefits in response to the crisis in a commensurate manner.

Similar justifications were employed by the Court in *N.K.M v. Hungary*,[49] where the applicant complained under Article 1 P1, that that the 98% tax she was

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[44] Application Nos 60669/00, Merits and Just Satisfaction, 12 Oct. 2004. *See also Bäck v. Finland* Application No 37598/97, Merits, 20 July 2004 where the Court found that the virtual extinction of guarantor's claim as a result of court-approved debt adjustment in the context of recession in Finland did not violate Art. 1 P1.

[45] *Asmundson*, *supra* n. 44, at paras 43–45, emphasis added.

[46] *Ibid*., at para. 44. The Court, after finding a violation of Art. 1 P1, did not proceed to examine the Art. 14 claim separately.

[47] The allusion to the discriminatory nature of the measure, without recourse to Art. 14 will be addressed in the article's final section.

[48] *Asmundson*, *supra* n. 44, at paras 43–45.

[49] *N.K.M. v. Hungary* Application No. 66529/11, Merits and Just Satisfaction, 14 May 2013.

required to pay on the severance payment she received after being dismissed from the Hungarian civil service was excessive and not reasonably connected to the aim of 'protecting the public purse' in times of economic crisis.[50] In its finding of a violation, the Court was sympathetic to this claim, and once again drew its conclusions after comparing the applicant's position to that of other persons in similar situations. The Court thus emphasized that:

> [T]he measure targeted only a certain group of individuals, who were apparently singled out by the public administration in its capacity as employer. Assuming that the impugned measure served the interest of the State budget at a time of economic hardship, the Court notes that the majority of citizens were not obliged to contribute, to a comparable extent, to the public burden.[51]

This comparison between the position of the applicant and other classes of individuals has also been employed by the Court as a basis to *not* find a violation, where the applicant is in a similar position to other classes of individuals affected by austerity cuts.[52]

In *Savickas and others v. Lithuania*[53] for instance, where a senior judge complained to the Court for the significant reduction in her pension, the Court once again held that it was '*decisive* that the reduction of public sector salaries did not single out the judiciary. On the contrary, the reduction of judges' salaries formed part of a much wider programme of austerity measures affecting salaries in the entire public sector'.[54] The Court also stressed that 'it would be unfair for judges to be treated as an exception and to be exempted from austerity measures'.[55]

This was further affirmed in *Khoniakina v. Georgia*[56] which broadly shared the same facts with the *Savickas* case. Here, the Court noted that an amendment to legislation which resulted in reductions to the pensions of retired Supreme Court judges:

> [W]as not a single isolated statutory change but formed part of a much wider legislative reform of the pension system for retired civil servants. […] Consequently, it cannot be

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50 Ingrid Leijten, *N.K.M. v. Hungary: Heavy Tax Burden Makes Strasbourg Step In*, http://strasbourgobservers.com/2013/06/10/n-k-m-v-hungary-heavy-tax-burden-makes-strasbourg-step-in/ (accessed 2 Apr. 2017).

51 *N.K.M*, *supra* n. 49, at para. 72. The Court as in the *Asmundson* case (*supra* n. 50) did not examine the issue separately under Art. 14 ECHR.

52 Reference to this was also made in the admissibility decisions discussed above. In *Silva Carvalho Rico* (*supra* n. 36) the Court noted that 'the imposition of a reasonable and *commensurate* reduction' to benefits would not violate Art. 1 P1 at para. 42 emphasis added. The same statement appears verbatim in *Da Conceicao Mateus* (*supra* n. 33) at para. 24.

53 Application No. 66365/09, Decision on the Admissibility, 15 Oct. 2013.

54 *Ibid*., at para. 93.

55 *Ibid*.

56 Application No. 17767/08, Merits and Just Satisfaction, 19 June 2012. *See also Bakradze and others v. Georgia* Application Nos 1700/08, 22552/08 and 6705/09, Decision on the Admissibility, 8 Jan. 2013 at para. 20.

> said, […] that the general reform of retired civil servants' pension entitlements made the applicant bear an individual and excessive burden as one of the small number of retired judges of the Supreme Court.[57]

The comparison between the position of the applicant and others is even more central in the case of *Stefanetti and Others v. Italy*.[58] While the case does not relate to austerity measures, it is highly relevant in illustrating the Court's approach when calculating whether a reduction in pension violates Article 1 P1. The applicants who were Italian nationals, decided to retire in Italy after working many years in Switzerland. Upon their return to Italy their pension claims were readjusted to take into account the very low contributions they had paid while working in Switzerland. This meant that they would stand to lose an estimated 67% of their pension. In finding a violation of Article 1 P1, the Court set out important criteria for assessing whether such a measure would violate the Convention. The starting point for the Court was that the reductions had undoubtedly affected the applicants' way of life and 'hindered its enjoyment substantially'.[59] Secondly, the Court stressed that, 'the fair balance test cannot be based solely on the amount or percentage of the reduction suffered, in the abstract. In all of these cases, and other similar ones, the Court endeavours to assess all the relevant elements of the case against a specific background'.[60] Once again, the Court conducted a comparative exercise between the individuals and other pensioners in Italy. Relying on statistics presented by the European Committee of Social Rights, the Court examined the state of pensions in Italy and accordingly assessed the overall amount the applicants would have received, finding Italy to be in violation of Article 1 P1.[61]

In its broader pension case-law, the Court has also not found a violation of Article 1 P1 where reductions in social welfare 'were general measures intended to undo special privileges or to bring special pension regimes into the general one'.[62] Thus, reductions intending to bring groups enjoying better welfare treatment in line with others do not violate the Convention.

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57 *Ibid*., at para. 78.

58 Application Nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, Merits, 15 Apr. 2014.

59 *Ibid*., at para. 64.

60 *Ibid*., at para. 59.

61 Another important element the Court took into account in this case was the legitimate expectation of receiving higher pensions the applicants had when returning to Italy at para. 65. The frustration of legitimate expectations was also relied on to find a violation of Art. 1 P1 in *Béláné Nagy v. Hungary* Application No 53080/13, Merits and Just Satisfaction, 10 Feb. 2015. At the time of writing the case is pending before the Grand Chamber following a referral.

62 *Da Conceicao Mateus*, *supra* n. 33, at para. 24. *See also Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 63, 31 May 2011.

Therefore, it can be submitted that unless there is a manifestly unfair 'distribution' of austerity amongst various groups, where a specific group is called upon to bear the brunt of cuts and reductions in line with the *Asmundsson, N.K.M* and *Stefanetti* cases, the Court will maintain a deferential stance. It is interesting to note that the critical element for the court to find a violation in these cases was not the degree to which the social benefit was reduced or its overall amount,[63] but the 'specific background' of the case, namely the position of the applicant in comparison to others within the respondent state.

This seems to suggest that the amount of welfare is in essence a starting point for the Court to proceed to more rigorous scrutiny of the impugned measure than the traditional wide margin of appreciation would permit. In doing so, however, the Court is not setting an *objective*, or an absolute, European-wide social minimum. By comparing the position of the applicant to that of others in the responding state, the Court is attempting to determine the *subjective* capabilities of each state. Therefore, in these cases the Court adopts a comparative or relative approach rather than one based on an absolute understanding of a social minimum.

In light of this, it would be useful to examine a further possibility. The following section will seek to determine whether the Court's statement on insufficiency of benefits would be of any value in circumstances where the distribution of the cost of austerity is fair, but certain individuals are condemned to destitution. Going beyond a comparative or relative approach, is there any indication in the Court's case-law that the 'wholly insufficient' construct could effectively establish an objective social minimum of welfare protection? The Court has sought to address these issues by reference to Articles 2 and 3 ECHR. Its approach in these cases will be analysed in the section below.

3 APPLICATIONS BROUGHT UNDER ARTICLES 2 & 3 ECHR

The cases brought under Articles 2 and 3 ECHR have focused more on situations where the applicants were seeking certain minimum benefits rather than protesting their removal as in the Article 1 P1 cases discussed above.

The first case where the Court connected Convention rights to destitution was *Larioshina v. Russia*,[64] where the applicant complained about the very limited sum she was given through her old-age pension and certain other social benefits that she was entitled to. The Court found the case inadmissible but very

[63] Although reference is made to this in all the judgments.
[64] Application No 56869/00, Decision on the Admissibility, 23 Apr. 2002.

importantly noted 'that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3'.[65]

This position of the Court was further developed in the admissibility decision in *Budina v. Russia*.[66] The applicant received state benefits due to her disability. When she reached retirement age, these were replaced with an 'old-age' pension. The applicant argued under Article 2 ECHR, that the very small sum she was receiving was inadequate for her survival. Although her claim was ultimately unsuccessful, once again failing at the admissibility stage, the approach of the Court is enlightening:

> The Court cannot exclude that State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.[67]

It is notable that while the case was brought under Article 2 ECHR by the applicant, the Court made these statements in relation to Article 3. In its *Kutepov and Anikeyenko*[68] judgment, the Court elaborated further on the distinction between Articles 2 and 3 in relation to destitution. Article 2 could in principle be violated where the applicant 'faces any real and immediate risk either to his physical integrity or his life',[69] while Article 3 requires an indication 'that the amount of the second applicant's pension has caused such damage to his physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention'.[70]

There have been many arguments in legal scholarship that deprivation and poverty could be viewed as violating Convention rights, and by extension, allow the Court to set an objective minimum under which the state could not fall without triggering international human rights protection. Judge Tulkens, for instance, in discussing the role of the ECtHR during times of economic crisis, argues in her extra-judicial writings that '[i]t would be unthinkable not to consider that extreme poverty humiliates the individual in his own eyes and in the eyes of others and is such as to arouse feelings of fear, anguish and inferiority',[71] thus

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65 *Ibid*., at para. 3.

66 Application No 45603/05, 18 June 2009.

67 *Budina*, *supra* n. 10. Similar conclusions in relation to Arts 2 and 3 were reached in *Pancenko v. Latvia* Application No 40772/98, Decision on the Admissibility, 28 Oct. 1999.

68 *Kutepov and Anikeyenko v. Russia* Application No 68029/01, Merits, 25 Oct. 2005.

69 *Ibid*., at para. 62.

70 *Ibid*. The claims brought under Arts 2 and 3 in this case of the Convention were found to be manifestly ill-founded. The Court, however, did find a violation of Art. 1 P1.

71 Tulkens, *Seminar to Mark the Opening of the Judicial Year of the European Court of Human Rights* (Strasbourg 25 Jan. 2013), para. 19, http://echr.coe.int/Documents/Speech_20130125_Tulkens_ENG.pdf (accessed 1 Aug. 2018).

engaging Article 3. While accepting that 'almost as a matter of necessity, [there must be] a certain degree of restraint in applying [this] in practice',[72] Tulkens argues that '[i]s it really so ridiculous to think that if corporal punishment in schools is considered to be degrading, the same should apply to the situation of someone who "lives" in a slum?'[73]

The article argues that the Court has taken some steps towards the direction that judge Tulkens describes, but the approach it followed is not entirely divorced from a comparative/relative analysis of the impugned measure or the situation of the applicant. However, these cases offer some guidance as to the factors that must be present for the Court to find that the state can be held responsible for the conditions of destitution the applicant is facing.

The first instance where the Court has found a violation of the ECHR stemming from the state's failure to provide welfare assistance, are cases where the state's intervention is indispensable for the protection of human life, and essentially makes the difference between the 'life and death' of the applicant. Here, exceptionally, the Court has found against the respondent state, but maintained a very high bar which is not easily applicable to broader instances of destitution or to every person who is unable to sustain herself through state providence or experiencing welfare reductions.[74] Therefore, when basic social policy is intrinsically tied to the protection of human life itself, the core of Articles 2 and 3 is impinged, then there is an 'objective' responsibility of the state to act by providing welfare, usually in the form of healthcare.

A further instance where the Court has required the state to proceed with material provisions is where the applicant is deemed to belong to a vulnerable group. The seminal case highlighting the Court's approach in these circumstances is *M.S.S. v. Belgium and Greece*.[75] The applicant was an asylum seeker who complained inter alia, that upon his arrival to Greece, during the time his asylum request was being considered, he was left without shelter and material provisions in a state of destitution. The Court found that these conditions amounted to a violation of the applicant's Article 3 ECHR rights. While the case can be welcomed as a milestone in the Court's case law on socio-economic obligations under the Convention, its application beyond these very specific circumstances is questionable.

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72 *Ibid*., at para. 20.
73 *Ibid*.
74 Such examples are *D v. United Kingdom* Application No. 30240/96, Merits and Just Satisfaction, 2 May 1997; *Paposhvili v. Belgium* Application No. 41738/10, Merits and Just Satisfaction 13 Dec. 2016; *Asiye Genç v. Turkey* Application No 24109/07, Merits and Just Satisfaction, 27 Jan. 2015.
75 *Supra* n. 18.

This is principally due to the fact that when examining the state of destitution of the applicant the primary justification the Court relied on to find a violation of Article 3 ECHR, was obligations the respondent state had under its membership to the European Union (EU). As the Court stressed:

> Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living. The obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, *which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States*.[76]

The court's reliance on the Council Directive in finding a violation of Article 3 is telling. The Court managed to uphold the applicant's complaint but in essence did nothing more than point to the more generous EU legal order to justify bringing the provision of material assistance into the scope of the positive obligation under Article 3. This approach left the exact scope of Article 3 under the circumstances unclear. Would these standards apply only to those contracting parties to the ECHR that were bound by the EU council directive, or would they also apply to the non-EU members of the ECHR?

It would be wrong, however, to underestimate the importance of the case as a stepping stone towards a more robust use of Article 3 to tackle destitution. Very importantly, in its reasoning, the Court made use of a secondary justification for finding a violation of Article 3. The Court attached 'considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and *vulnerable population* group in need of special protection'.[77]

The Court set out criteria for determining whether a group can be viewed as vulnerable and in doing so referenced[78] the *Budina* admissibility decision[79] discussed above. According to the Court, such groups must be (1) fully dependent on state support and (2) experience official indifference when in a situation of serious deprivation or want incompatible with human dignity.[80]

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[76] *Ibid*., at paras 249 and 250, emphasis added.
[77] *Ibid*., at para. 251, emphasis added.
[78] *Ibid*., at para. 253.
[79] *Supra* n. 10.
[80] *MSS*, *supra* n. 18, at para. 263. *See also* Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 Int'l J. Const. L. 1056–1085 (2013).

Relying on this basis, the Court stressed that:

> In view of the obligations incumbent on the Greek authorities under the Reception Directive […], the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.[81]

Thus, the lack of material provisions was once again, merely the starting point in the Court's ultimate finding that the state was in breach of its Convention obligations. The applicant's situation of destitution was supplemented by two compounding factors, the obligation to provide assistance that arose from the EU Directive, and the applicant's membership to a vulnerable group. In subsequent case-law, the Court has found a violation relying on the applicants' destitution and vulnerability alone, without recourse to EU law.[82] Once again, however, the applicants' lack of access to basic provisions was supplemented by their membership to a specific group to find a violation.[83]

The emergence of a vulnerability criterion to enhance the state's positive obligations towards specific groups can serve prima facie as a useful tool in challenging a state's austerity policy. Its application, however, is limited. The applicant's vulnerability in *M.S.S.* was not determined on the basis that he was destitute, but on the basis that he was an asylum-seeker. Therefore, it would be difficult to accept that this judgment generates an objective social minimum that would apply to all instances of destitution caused by austerity measures. This aspect of 'group vulnerability' also explains why this tool to enhance positive obligations has been criticized. As commentators have pointed out, the term is exclusionary as it suggests that individuals who are not readily identifiable as members of a vulnerable group are viewed as 'self-sufficient, independent and autonomous'.[84]

Furthermore, an approach that deploys the applicant's vulnerability to justify socioeconomic protection under the Convention, also to an extent relies on a comparative and solidarity-based method of analysis. By designating certain groups

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81 *MSS*, *supra* n. 18, at para. 263.

82 *VM and others v. Belgium* Application, *supra* n. 18. After the Chamber judgment was released, the case was successfully referred to the Grand Chamber but was eventually struck out of the list for further consideration due to the fact that 'the applicant does not intend to pursue his application'. A Grand Chamber judgment could have further clarified the relationship between vulnerability and destitution.

83 'Having regard to the foregoing, the Court considers that the situation experienced by the applicants calls for the same conclusion as in the case of *M.S.S. v. Belgium and Greece*. In the Court's opinion, the Belgian authorities did not duly take account of the vulnerability of the applicants as asylum-seekers or of that of their children'. *Ibid.*, at para. 162.

84 Peroni & Timmer, *supra* n. 80, at 1060.

as vulnerable due to their experience, stigmatization or other characteristics,[85] the Court is suggesting that they are vulnerable in comparison to others, and therefore in need of added protection under the Convention that may include the provision of material assistance under Article 3 ECHR.[86] The Court's use of vulnerability, as Peroni and Timmer explain,[87] is thus one that is primarily driven by considerations of substantive equality. In the context of a debt-ridden state therefore, even if a reduction of social welfare across all affected parties would be considered fair from the viewpoint of a formal understanding of equality, substantive equality as evidenced through the Court's use of the vulnerability criterion requires the state to take a proactive stance and to ensure that any measures do not leave vulnerable groups without any material assistance. Therefore, this approach once again, rather than establishing an absolute, Convention-based social minimum available to all, ties insufficiency of benefits to the comparative disadvantage of the member of the vulnerable group to others.

4 UNLOCKING THE POTENTIAL OF THE 'INSUFFICIENCY OF BENEFITS' STATEMENT: A MEANS OF ACHIEVING SUBSTANTIVE EQUALITY IN THE DISTRIBUTION OF THE COST OF AUSTERITY?

The discussion in the previous sections may be viewed as painting a particularly disheartening picture of the Court's capacity to demand from states a social minimum of welfare protection that would be immune from austerity policies. It also seems to suggest that obiter statements on insufficiency of benefits or subsistence thresholds are misleading. If, as the article suggests, the Court relies on a comparative method to identify whether the state has any socio-economic obligations towards the applicant and does not set an objective social minimum, is there anything meaningful that this statement on insufficiency of benefits can contribute to the ongoing discussion on austerity and Convention rights? In response to this question, this section will argue that it would be incorrect to summarily discard such statements as mere rhetorical flourishes. This part will argue that where austerity has been evenly distributed, this statement can be useful in allowing the Court, in an appropriate case, to ensure a distribution of the 'cost' of austerity that

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85 *See* especially Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 Emory L.J. 251–275 (2010); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J.L. & Feminism 1–23 (2008).

86 Art. 8 has also been used in conjunction with the vulnerability criterion to enhance state obligations to ensure that the applicant does not become homeless. *See* Peroni & Timmer, *supra* n. 80.

87 Peroni & Timmer, *supra* n. 80, at 1076.

goes beyond considerations of formal equality, to include an analysis of the applicant's situation from the perspective of substantive equality.[88]

In the austerity cases discussed, apart from the weight that was given to the comparison between the applicant and others, the *impact* of the austerity measure to the concrete situation of the applicant features as well, but not as prominently. More specifically, in the admissibility decisions discussed in the article, the Court stressed that the impact of the welfare cuts the applicants experienced would arguably not affect their ability to sustain themselves.[89] This could be taken to suggest that the comparative approach the Court relies on (how does the welfare reduction compare to other welfare reductions?) can be supplemented by a concrete examination of the impact of austerity to the individual (does the austerity measure allow the individual to sustain themselves?). In the *Asmundsson* and *NKM* judgments, where the respective applicants experienced disproportionate welfare cuts, the manifestly excessive burden on the applicants sufficed to find violation. Therefore, the Court did not discuss in depth whether the impact of the austerity measure on the applicants could in itself render the state in breach of its Convention obligations. The cases that have reached the Court are primarily resolved on the basis of fairness and therefore, the Court has yet to fully engage with a case where the distribution of austerity was fair, but the applicant[90] was left destitute. Consequently, it is unclear whether there is scope to suggest that a reduction that is otherwise commensurate but leaves certain individuals destitute due to their personal circumstances would violate the Convention.

The article submits that the 'insufficiency of benefits' statement, can be useful in exactly such a scenario and that it can potentially contribute to further enhancing an interpretation of the Convention that is more aimed towards achieving substantive equality. It may allow Court in an appropriate case to focus more squarely on the impact of the austerity measure to the applicant, if the welfare reduction was 'reasonable and commensurate'. The Court could find that the same austerity measure may not affect everyone in the same way. Thus, a reduction in welfare that is not excessive or discriminatory in terms of formal equality, may have varying effects on different social welfare recipients. Thus, by featuring the statement on insufficiency of welfare in its case-law, the Court would be able in an appropriate case to challenge an austerity measure which does not create a disproportionate burden, but, exceptionally, leaves someone without the means of

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88 On the development of substantive equality in the ECtHR's jurisprudence *see* Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 Human Rts. L. Rev. 273, 282 (2016); Joan Small, *Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights*, 6 Int'l J. Discrimination & L. 45–68 (2003).

89 *Koufaki*, *supra* n. 29.

90 This would refer to an applicant who could not claim to be a member of a vulnerable group.

subsistence. To illustrate this point more clearly by relying on a more practical example, a fair and equitable reduction of 20% across all benefits may be experienced differently by a self-sufficient individual without family responsibilities in comparison to a single parent of three children who may be rendered destitute by the exact same austerity measure. Here, the insufficiency of benefits criterion can have a corrective role in ensuring that even in cases where the burden of austerity was not excessive, the equitable distribution of austerity required the state to adopt a more needs-based approach, rather than a strict formal equality approach. Thus, even if the burden is not excessive in formal terms, the Court could rely on the insufficiency of benefits to suggest that the state has further obligations towards the applicant. This may allow the Court to adopt a more holistic examination of the state's role in protecting the applicant. Did the state take into account the needs of the poorest when adopting austerity measures? Did it at least attempt to take adequate countermeasures to alleviate the pain of those who would be most directly affected? This potential of the insufficiency of benefits statement will yet again rely on a comparative approach, but one that allows for considerations of substantive equality to play a more forceful role.

This approach, however, still requires the existence of differentiating factors between the applicant and others. In a hypothetical (and particularly bleak) scenario where a debt-ridden state is unable to respond to its welfare obligations and in a commensurate manner reduces welfare to a point where it wholly affects the means of subsistence of the populace on a large scale, the applicant is unlikely to succeed in gaining protection under the Convention. It would be more likely in such circumstances for the Court to invoke the 'proviso of possible',[91] rather than to find the state in violation. As Feldman asserts, in relation to the Court's socio-economic jurisprudence, in such an unlikely situation where everyone is 'equally badly off',[92] than the state will have upheld its Convention obligations.

With these observations in mind, the following section will attempt to assess why the Court relies on a comparative rather than an absolute approach.

5 THE RATIONALE OF SELECTING A COMPARATIVE/ RELATIONAL APPROACH

In attempting to identify the nature of the Court's obiter statement on insufficiency of benefits, the article has identified an approach in the Court's austerity jurisprudence that allows it to subject an austerity measure to more intense

[91] *Supra* n. 38.

[92] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* 208 (Oxford University Press 2008).

scrutiny, in spite of the very wide margin of appreciation usually afforded to states in relation to social welfare claims in times of crisis. By following a comparative or relative approach when assessing the proportionality of an interference with Article 1 P1, the Court has found a violation where the applicants faced the 'excessive burden' of being deprived of their social benefits, while others were left unaffected. The Court in these cases assigned considerable weight to the fact that the 'cost' of austerity was not distributed fairly amongst the populace. Conversely, no violation was found where the applicant could not plausibly demonstrate that they were unfairly singled out to suffer the consequences of austerity. The Court has also relied on the vulnerability of applicants to find a failure of the state to provide them with necessary material provisions, as a violation of Article 3. The justification in this approach is similar, in that it identifies that the applicants are vulnerable in comparison to others. This account therefore, is also premised on a comparative or relative analysis. Furthermore, the article has suggested that the statement of insufficiency of benefits has the potential to be deployed by the Court as a means of working towards substantive equality in cases where the welfare reduction may seem commensurate, but in fact renders the individual destitute due to their personal circumstances.

All these responses of the Court point towards an understanding of a social minimum that is informed by notions of equality and solidarity rather than an absolute approach that requires contracting parties to guarantee a Convention-based minimum of social provisions. This section assesses the benefits of such a comparative or relative approach. It argues that by examining austerity measures through a comparative lens, the Court can claim 'a seat at the table' in the ongoing discussion of austerity in Europe, by ensuring that states do not respond to a debt crisis by arbitrarily sacrificing the welfare of a small group of individuals. At the same time, this approach ensures that the Court is not overstepping its boundaries by relying on an instrument protecting civil and political rights to generate extensive and objective socioeconomic obligations on contracting parties. Through a comparative approach, the Court's demands from the state remain subjective on the state and are tied to its specific capabilities. The state is still expected to protect individuals from destitution during the crisis, but only insofar as its means allow.[93] However, any response must take into account considerations of equal distribution of the weight of austerity.

This approach acknowledges the limits of international human rights supervision and recognizes that the obligations the Court can develop for states must not

[93] In the context of socio-economic rights 'a state is not required to take steps beyond what its available resources permit. The implication is that more would be expected from high-income states than low income states' Manisuli Ssenyonjo, *Economic Social and Cultural Rights in International Law* 96 (Hart 2016).

arbitrarily inflate the scope of the rights they have taken on to respect and protect by signing and ratifying the Convention. Although, as discussed above, the Court has endorsed the interdependence and indivisibility of rights,[94] its approach is characterized by caution. The Court clearly does not intend to create new and possibly onerous socio-economic duties on states, especially when they are attempting to recover from a crisis.

The comparative approach therefore, provides the Court with an avenue to challenge an austerity measure, without directly having to assess the broader policy choices of the state's response to austerity. To illustrate how the Court achieves this, it would be useful to examine how this comparison is carried out through a more technical analysis of the Court's inquiry into the compatibility of a welfare reduction with the Convention under Article 1 P1. The comparative exercise between the applicant and others is conducted in the proportionality (stricto sensu) stage of the Court's analysis, the stage where the Court assesses whether the interference with a right was as extensive as was necessary in relation to the aim the restriction was intended to achieve. In conducting this exercise under a comparative approach, the Court is not directly challenging the economic necessity of the austerity measure in isolation, namely it is not examining whether the reduction in social welfare was in itself necessary to achieve the aim of protecting public finances. This would have inevitably required the Court to engage in a sensitive discussion on the allocation of scarce resources in the midst of a debt crisis, an area that the Court has consistently held is outside its judicial domain. Instead, the Court examines the necessity of selecting the specific individual (or individuals) to bear the weight of austerity, while leaving others largely unaffected. This slight shift on how the Court carries out the necessity test allows it to retain some oversight over the state's response to austerity, but also sets the limits as to what the Court is willing to offer by means of Convention protection during the crisis. This analysis, through which the Court assesses whether the austerity measure creates an excessive burden, is therefore more akin to an implicit assessment of discriminatory treatment of the applicant, rather than a balancing exercise between the restriction to the applicant's rights and the broader financial and budgetary benefits that the restriction was designed to achieve. The Court, however, in the cases the article has examined that were brought against facing a debt crisis, does not rely on the Convention's non-discrimination provision to reach its conclusions. Similarly, in Article 3 cases, where no balancing exercise is carried out due to the absolute nature of the right, the Court focuses its efforts on determining the vulnerability of the applicant rather than objectively establishing a social minimum.

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[94] *Supra* n. 20 and n. 21.

This raises a related issue. If in fact the Court through its discussion of fairness in the distribution of the weight of austerity is seeking to ensure that the response to the crisis does not result in discriminatory treatment of specific groups, does it make a difference that the Court does not rely on Article 14 to achieve this, even though in most challenges to austerity the article has discussed, the applicants brought their claims under Article 14 in conjunction with other Convention articles?[95]

In the cases examined, where there was a successful challenge to austerity, the specific measures were so manifestly disproportionate that they could easily be addressed through the proportionality assessment contained in Article 1 P1 taken on its own.[96] This is in line with the Court's approach in the seminal *Belgian Linguistics*[97] judgment where the Court found that:

> where a separate breach has been found of the substantive article, it is not generally necessary … to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.[98]

By focusing on the substantive article to diagnose discriminatory treatment, the Court is also relieved from the duty of having to follow the more structured test that is dictated by Article 14 ECHR.[99] By avoiding examination of this issue through the lens of the discrimination provision, the Court is not required to assess, for instance, whether the alleged reason for the discrimination was one of the grounds listed in Article 14. The grounds of discrimination are not exhaustively mentioned in the Convention. Article 14 provides that apart from the grounds explicitly included in the Article, discrimination can be found in relation to any

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95 *See supra* n. 44 and n. 49.

96 In the *Asmundsson* judgment (*supra* n. 44), after finding a violation of Art. 1 P1 and when proceeding to examine the Art. 14 aspect of the claim, the Court noted that 'no separate issue arises under Article 14 of the Convention and that, accordingly, it is unnecessary to examine the matter under these provisions taken together' at para. 47. Similarly, in *NKM* (*supra* n. 49) the Court held that 'in the circumstances of the present case, the Court is of the view that the inequality of treatment of which the applicant claimed to be a victim has been sufficiently taken into account in the above assessment that has led to the finding of a violation of Art. 1 of Protocol No. 1 taken separately. Accordingly, it finds that – while this complaint is also admissible – there is no cause for a separate examination of the same facts from the standpoint of Art. 14 of the Convention' at para. 84.

97 Application Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Merits and Just Satisfaction, 23 July 1968.

98 D. J. Harris, Michael O'Boyle & Colin Warbrick, *Law of the European Convention on Human Rights* 784 (Oxford University Press 2014). The Court has on occasion examined Art. 14 separately after finding a violation of Art. 1 P1, *see* for instance *Chassagnou and others v. France* Application No 25088/94 28331/95, 28443/95, Merits and Just Satisfaction, 29 Apr. 1999.

99 The full test the Court applies in Art. 14 cases to determine is as follows: 'Does the complaint of discrimination fall within the scope of a protected right? Is the alleged reason for the discrimination one of the grounds listed in Article 14? Can the applicants compare themselves with another class of persons which is treated more favourably? Is the difference of treatment capable of objective and reasonable justification?' *See* Rainey, Wicks & Ovey, *supra* n. 19, at 567.

'other status'.[100] The Court has relied on this to expand on the grounds enumerated in Article 14.[101] Perhaps, in the selected austerity cases coming from states in the midst of a debt crisis, the Court is rightfully reluctant to inflate these grounds in a manner that may significantly hamper the state's ability to respond to the crisis. The 'excessive burden' threshold for a measure to fail the Article 1 P1 proportionality test is significantly higher than mere differential treatment to the enjoyment of a right without reasonable justification that is required by Article 14. Thus, the test of 'excessive burden' is one that is more difficult for the applicant to prove and gives the state significant room for manoeuvre in differentiating its approach to welfare cuts between various classes of individuals, as long as these welfare reductions do not excessively target one group, or leave certain persons destitute. The approach would of course be different in circumstances where the ground for differential treatment is a recognized ground in the Convention or the Court's case-law (for instance where austerity cuts were decided on the basis of gender), or would relate to a fundamental aspect of the case as the court has alluded to in *Belgian Linguistics*.[102]

In light of these observations, the article will offer some concluding thoughts.

6 CONCLUSION

The perceived failure of the Court to serve as a potent bulwark against austerity in debt-ridden states is nothing more than a manifestation of its subsidiary nature as an institution protecting human rights in Europe and of the limits of international human rights supervision, especially where positive obligations and the allocation of scarce resources are involved. While the Court has taken a more assertive stance where applicants are singled out by legislative measures to carry the burden of austerity in a discriminatory manner, if the distribution of the cost of austerity is fair, the Court will struggle to find the normative justification that will allow it to intervene and challenge a state's austerity policy. Thus, an insufficiency of benefits may only allow the court to examine whether the state has taken adequate steps, to the best of its subjective abilities and based on the circumstances of the case, to lighten the burden of those who will be most affected by ensuring that all

[100] Gerards has highlighted the difficulties and discrepancies in the Court's approach when expanding the grounds of discrimination. The Court's case-law is contradictory as to whether a 'new' ground can be something other than a ground that relates to 'personal choices or inherent personal traits'. *See* Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 Human Rts. L. Rev. 99, 108 (2013).

[101] On this *see* Oddný Mjöll Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, 14 Human Rts. L. Rev. 647, 663 (2014).

[102] *Supra* n. 97.

participate equally in austerity cuts. This, however, does not generate a pan-European, Convention-based 'social minimum' of welfare protection. It does, however, open up the possibility of requiring states to take into account matters of substantive equality when passing austerity measures.

This approach serves as a reminder of the differences between the mandates of the international and the domestic judge. Domestic judges on occasion have been more accepting to the idea of tying destitution to violations of the Convention.[103] The expectations, however, are different for the international judge whose mandate is to examine the compatibility of state action (or inaction) with the ECHR. As Jeff King argues, 'attempts to leverage a comprehensive protection of social rights out of an instrument that is chiefly aimed at protecting a class of civil and political rights is not only undesirable, but irresponsible and undemocratic'.[104] This normative objection to the Court's ability to establish a social minimum also seems to be empirical reality.

The statement on insufficiency of benefits, however, is crucial to the Court's austerity case-law. An opposite pronouncement by the Court, suggesting that it would *never* intervene to challenge austerity, should be dismissed as overly deferential. Thus, in allowing itself the capacity to intervene in specific circumstances, the Court could potentially be attempting to retain a 'seat at the table' in the ongoing discussion of austerity in Europe. More specifically, it could be viewed as sending a warning towards states, requiring them to ensure that, in the process of negotiating conditionality agreements, any measures affecting social welfare do not leave affected individuals destitute. Nonetheless, the justifications the Court will have at its disposal for overriding the margin of appreciation in such cases to find a violation of the Convention remain limited.

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[103] *See* for instance in the United Kingdom, *R. (Adam and Limbuela) v. Secretary of State for the Home Department* [2005] UKHL 56; and at common law *see* indicatively *The Queen On the Prosecution of the Overseers of Saint Dionis, Backchurch v. The Inhabitants of Saint Leonard, Shoreditch* (1865–66) L.R. 1 Q.B. 21; Katie Boyle, *Economic, Social and Cultural Rights in Northern Ireland: Legitimate and Viable Justiciability Mechanisms for a Conflicted Democracy*, in *Justiciability of Human Rights Law in Domestic Jurisdictions* 173–195 (Alice Diver & Jacinta Miller eds, Springer 2016).

[104] Jeff King, *Judging Social Rights* 200 (Cambridge 2012).