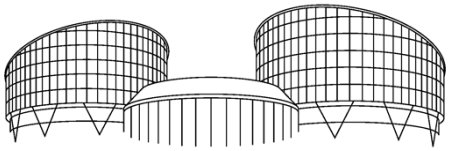

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF COMMUNAUTÉ GENEVOISE D'ACTION SYNDICALE (CGAS) v. SWITZERLAND

(Application no. 21881/20)

JUDGMENT

Art 35 § 1 • Exhaustion of domestic remedies • Art 34 • Victim • Anti-Covid-19 related measures banning public events in the respondent State for two and a half months at the beginning of the pandemic • Impugned ban not amounting to a "general measure" as the relevant federal ordinance authorised exceptions • Applicant association's unjustified decision not to continue authorisation request to hold a public event before receiving a formal decision and not to submit any other such request, deprived it of "direct victim" status and of opportunity to bring the matter before the domestic courts • Possibility of review of the compatibility of normative acts of the Federal Assembly and the Federal Council with provisions of superior legal force, by means of an application of a preliminary ruling, as part of an ordinary examination of a specific case by judicial bodies at all levels • Remedy directly available to litigants and made it possible, where appropriate, to have impugned provision declared unconstitutional • Requirement of judicial review in advance of the date of a planned event not decisive for determining effectiveness of a remedy allowing for review of a law's compatibility with the Convention • Absence of particular circumstance absolving applicant association at the material time from obligation to exhaust domestic remedies • Importance of Court's fundamentally subsidiary role • States' wide margin of appreciation in healthcare policy matters • Given unprecedented and highly sensitive context of the Covid-19 pandemic, important for national authorities to be given the opportunity to strike a balance between competing private and public interests at stake or between different rights protected by the Convention • Application inadmissible for non-exhaustion of domestic remedies

STRASBOURG

27 November 2023

This judgment is final but it may be subject to editorial revision.

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In the case of Communauté genevoise d'action syndicale (CGAS) v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Síofra O'Leary,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Krzysztof Wojtyczek,
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Pauliine Koskelo,
Tim Eicke,
Lətif Hüseynov,
María Elósegui,
Ioannis Ktistakis,
Andreas Zünd,
Diana Sârcu*, judges*,

and Abel Campos, *Deputy Registrar,*

Having deliberated in private on 12 April and 13 September 2023,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21881/20) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association constituted under Swiss law, the Communaute genevoise d'action syndicale (CGAS) ("the applicant association"), on 26 May 2020.

2. The applicant association was represented by Mr O. Peter and Mr C. Moreau, lawyers practising in Geneva, and by Mr G. Genton, a lawyer practising in Lausanne. The Swiss Government ("the Government") were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice.

3. The applicant association complained that it had been deprived of the right to organise public gatherings, and to take part in such gatherings, as a result of the measures adopted by the Government in the context of tackling the coronavirus during the period of application of Ordinance no. 2 on measures to combat the coronavirus ("Ordinance COVID-19 no. 2"), that is, from 17 March to 30 May 2020.

4. On 11 September 2020 the Government were given notice of the application.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 15 March 2022 a Chamber of that Section, composed of Georges Ravarani, President, Georgios A. Serghides, Darian Pavli, Anja Seibert-Fohr, Peeter Roosma, Andreas Zünd and Frédéric Krenc, judges, and Milan Blaško, Section Registrar, delivered a judgment in which it declared, by a majority, the application admissible and held, by four votes to three, that there had been a violation of Article 11 of the Convention. The concurring opinion of Judge Krenc, joined by Judge Pavli, and the joint dissenting opinion of Judges Ravarani, Seibert-Fohr and Roosma were appended to the judgment.

6. On 10 June 2022 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 5 September 2022 the panel of the Grand Chamber granted the request.

7. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant association and the Government each filed observations on the admissibility and the merits of the case (Rule 59 § 1). In addition, third-party comments were received from the French Government, the Assas Clinique de Droit International and Amnesty International, all of which had been given leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rules 71 § 1 and 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 April 2023.

There appeared before the Court:

(a) *for the respondent Government*
Mr A. CHABLAIS, *Agent*,
Mr A. SHEIDEGGER,
Ms I. REYSER,
Mr M. GERBER,
Mr P. MATHYS,
Ms L. LUCHETTA MYIT, *Advisers*;

(b) *for the applicant association*
Mr O. PETER,
Mr C. MOREAU, *Counsel*.

The Court heard addresses by Mr Chablais, Mr Peter, Mr Moreau and Ms Luchetta Myit.

INTRODUCTION

10. Under Article 11 of the Convention, the application concerns measures adopted by the Swiss Government to combat the coronavirus-2019 disease ("COVID-19"), which were in force from 17 March to 30 May 2020.

THE FACTS

I. THE GLOBAL CONTEXT

11. In December 2019 an epidemic of pneumonia cases, described at the relevant time as being viral in nature and of unknown cause, was detected in the city of Wuhan, China. On 9 January 2020 the Chinese health authorities and the World Health Organization ("WHO") officially announced that a new coronavirus had been identified.

12. The number of confirmed cases of persons infected by COVID-19 rose rapidly in China and across the world, and from 30 January 2020 WHO declared that the disease was a public-health emergency of international concern. On 11 March 2020 WHO declared COVID-19 a pandemic.

13. National and international public-health organisations recommended compliance with preventive measures including, in particular, wearing a mask, regularly washing one's hands or using a hydro-alcoholic solution, greeting others without shaking hands, maintaining a distance of at least 1.5 metres when speaking to other people and properly ventilating living areas.

14. On 12 March 2020 the European Centre for Disease Prevention and Control ("the ECDC"), an agency of the European Union aimed at strengthening Europe's defences against infectious diseases, alerted the EU and EEA countries to the risks associated with the spread of the virus and affirmed the need to take public-health measures in order to mitigate the impact of the pandemic. In particular, it recommended social distancing measures, including the immediate isolation of symptomatic persons, the suspension of mass gatherings and social distancing in the workplace (see paragraph 69 below).

15. During the spring of 2020, many countries declared a public-health state of emergency and introduced special protection measures, including lockdowns.

16. According to reports published by WHO, more than 3 million cases of coronavirus infection and almost 220,000 deaths were confirmed worldwide by 30 April 2020. European States alone represented almost half of the infections and two-thirds of the deaths at global level[1].

[1] See Situation report no. 101 (April 2020): https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports

17. On 31 December 2020 WHO validated the first anti-Covid-19 vaccine through the emergency use procedure[2].

18. On 5 May 2023, following a mass vaccination campaign (more than 13 billion vaccine doses administered worldwide), which had made it possible to contain the effects of the disease, WHO lifted the alert classifying COVID-19 as a public-health emergency of international concern. By that date, more than 766 million cases of COVID-19 infection and almost 7 million deaths had been recorded worldwide.

II. THE NATIONAL CONTEXT

19. On 25 February 2020 COVID-19 was detected for the first time on Swiss territory, in the Canton of Ticino.

20. According to data published by the Federal Office of Public Health ("the OFSP"), by the end of April 2020 about 29,000 cases had been confirmed in Switzerland and 1,427 COVID-19-related deaths had been registered. In the Canton of Geneva, 4,949 cases had been confirmed by laboratory tests and there had been 263 deaths[3].

21. In order to deal with the pandemic, on 28 February 2020 the Federal Council declared that the situation in hand was a "special situation" for the purposes of section 6 (1) (b) of the Epidemics Act; on the same date it adopted an Ordinance on measures to combat the coronavirus, prohibiting public or private events bringing together more than 1,000 persons at any one time.

22. On 13 March 2020 the Federal Council replaced the Ordinance of 28 February 2020 with Ordinance COVID-19 no. 2 on measures to combat the coronavirus ("Ordinance COVID-19 no. 2"), in which it announced the closure of schools, universities and other training establishments and prohibited public or private gatherings of more than 100 persons. Article 7 (a) of this Ordinance provided that certain exemptions, in particular for gatherings which pursued the exercise of political or training rights, could be accorded by the cantonal authority.

23. On 17 March 2020 the Federal Council announced that there existed an "extraordinary situation" within the meaning of section 7 of the Epidemics Act and amended the preamble to Ordinance COVID-19 no. 2. On that basis, it prohibited, in particular, all public and private gatherings and announced the closure of State establishments and commercial premises such as shops, markets, restaurants, museums and cinemas, but expressly specified that

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[2] https://www.who.int/news/item/31-12-2020-who-issues-its-first-emergency-use-validation-for-a-covid-19-vaccine-and-emphasizes-need-for-equitable-global-access

[3] See the "Weekly Epidemiological Update, Week of 27 April to 3 May 2020", published by the Department for Security, Employment and Health: https://www.ge.ch/document/covid-19-bilan-epidemiologique-detaille

certain establishments, including food shops, banks, petrol stations and hotels, could remain open (see § 42 below).

24. Under the heading "Criminal Provisions", Ordinance COVID-19 no. 2 provided that anyone who intentionally opposed the measures set out therein would be liable to a custodial sentence of up to three years or a fine, unless the person concerned had committed a more serious offence within the meaning of the Criminal Code.

25. On 21 March 2020 the Federal Council strengthened these measures further, by prohibiting gatherings of more than five persons in public areas. On 8 April 2020 it extended the measures for a further week, that is, until 26 April 2020 (see § 43 below).

26. On 29 April 2020 it announced that the majority of emergency measures were to be eased, with effect from 11 May 2020. Shops, restaurants, markets, museums and libraries were given permission to reopen. Primary and secondary schools were authorised to resume in-class teaching.

27. On 20 May 2020 the Federal Council announced that religious worship – whether private services or within a religious community – could resume from 28 May 2020, subject to compliance with the appropriate protection measures.

28. On 27 May 2020 it authorised a further stage in easing the relevant measures: from 30 May 2020, the ban on gatherings was relaxed (up to a maximum of 30 persons); from 6 June 2020, private and public events involving up to 300 persons were again authorised (for example, family celebrations, fairs, concerts, plays or film projections); political gatherings were also possible once again. Events involving more than 1,000 persons were prohibited until the end of August. On 20 June 2020 the prohibition on public events was lifted, although mask-wearing remained compulsory.

29. On 19 December 2020 the authority responsible for authorising and supervising therapeutic products in Switzerland (*Swissmedic*) authorised the first COVID-19 vaccine[4].

III. THE CIRCUMSTANCES OF THE CASE

30. The applicant is an association registered under Swiss law, which was set up in 1962 and has its headquarters in Geneva. It is an umbrella organisation for all of the trade unions in the canton of Geneva, and its statutory aim is to defend the interests of workers and of its member organisations, particularly in the field of trade-union and democratic freedoms.

[4] https://www.swissmedic.ch/swissmedic/fr/home/news/coronavirus-covid-19/covid-19-impfstoff_erstzulassung.html

A. The steps taken by the applicant association to organise an event on 1 May 2020

31. In a press release of 19 March 2020, the applicant association's organising committee announced that, in view of the public-health crisis and the restrictions in force, it had decided not to organise the traditional commemorative march scheduled for 1 May 2020.

32. On 14 April 2020 Ms L.F., the permanent secretary of the applicant association, submitted an authorisation request for a static gathering of 20 persons on the Mont-Blanc Bridge in Geneva, to be held at 12 noon on 1 May 2020.

33. On an unspecified date the Department for Security, Employment and Health ("the Department") contacted the association by telephone and informed it that the authorisation would be refused for the purposes of Ordinance COVID-19 no. 2.

34. By an email of 22 April 2020, Ms L.F. informed the Department that the association had decided to refrain from organising the gathering.

35. The applicant association decided to limit its actions to attaching a banner to the parapet of the Mont-Blanc Bridge, while urging citizens to demonstrate their solidarity by "making a noise" from windows and balconies.

B. The impact of Ordinance COVID-19 no. 2 on the organisation of public events in Switzerland

36. During the period of application of Ordinance COVID-19 no. 2, several requests were lodged under Article 7 of that Ordinance in ten cantons, including the Canton of Geneva, by various entities (associations, political parties, religious groups, etc.) seeking exemptions from the ban on public events. In six cantons (Aargau, Berne, Basle Rural, Grisons, Lucerne and Zurich), the competent administrative authorities granted some exemptions.

37. According to information submitted by the Government on 8 May 2023 in response to a request made at the close of the public hearing on 12 April 2023 (see paragraph 9 above), events such as municipal assemblies, information meetings, religious gatherings, training courses and events organised by sports bodies and professional associations were authorised in public places in several cantons throughout the period of application of Ordinance COVID-19 no. 2. Where the authorities refused to grant the requests, the organisers voluntarily called off the planned events. A formal refusal by the authorities to grant an exemption was appealed before the courts in only one instance, giving rise to the so-called "Climate Strike" case (see §§ 52-61 below).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Federal Constitution

38. The relevant provisions of the Federal Constitution read as follows:

Article 22: Freedom of assembly

"1. Freedom of assembly is guaranteed.

2. Every person has the right to organise meetings and to participate or not to participate in meetings."

Article 189: Jurisdiction of the Federal Supreme Court

"1. The Federal Supreme Court hears disputes concerning violations of:

a. federal law;

b. international law;

c. inter-cantonal law;

d. cantonal constitutional law;

e. the autonomy of the communes and other cantonal guarantees to public-law corporations;

f. federal and cantonal provisions on political rights.

2. It hears disputes between the Confederation and Cantons or between Cantons.
3. The jurisdiction of the Federal Supreme Court may be extended by law.
4. Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions shall be provided for by law."

Article 190: Applicable law

"The Federal Supreme Court and the other judicial authorities are required to apply the federal statutes and international law."

B. The relevant legislation

39. The relevant provisions of the Federal Supreme Court Act of 17 June 2005 ("the LTF") read as follows:

Section 3: Public-law appeals
Article 82: Principle

"1. The Federal Supreme Court hears appeals:

a. against decisions taken in public-law proceedings;

b. against cantonal normative acts;

c. which concern citizens' right to vote, and also elections and referenda."

Chapter 4: Appeals procedure

...

Section 2: Grounds of appeal
Article 95: Swiss Law

"An appeal may be lodged against a breach of:

a. federal law;

b. international law;

c. cantonal constitutional law;

d. cantonal provisions on the voting rights of citizens and on elections and referenda;

e. inter-cantonal law."

40. The relevant provisions of the Federal Act on the Fight against Human Communicable Diseases ("the Epidemics Act") of 28 September 2012 read as follows:

Section 1: Subject matter

"The present Act governs the protection of human beings against communicable diseases and provides for the necessary measures to that end."

Section 2: Aim

"1. The aim of the present Act is to prevent and combat the appearance and spread of communicable diseases.

..."

Section 6: Special situation

"1. A special situation exists where:

a. the habitual enforcement bodies are unable to prevent and combat the emergence and spread of a communicable disease and where one of the following risks is present:

(1) an increased risk of infection and spread,

(2) a specific risk for public health,

(3) a risk of serious repercussions for the economy or other vital sectors;

b. the World Health Organisation (WHO) has noted the existence of a public-health emergency of international concern, threatening the health of the population in Switzerland.

2. The Federal Council may, after having consulted the cantons:

a. order measures in respect of individuals;

b. order measures in respect of the population;

c. compel doctors and other health professionals to participate in combating communicable diseases;

d. declare that vaccinations are compulsory for the endangered population groups, particularly exposed individual and persons carrying out certain activities.

3. The Federal Department of the Interior (DFI) shall coordinate the measures taken across the Confederation."

Section 7: Extraordinary situation

"If an extraordinary situation so requires, the Federal Council may order the necessary measures in respect of all or part of the country."

41. The relevant provisions of Ordinance 2 on the measures to combat the coronavirus ("Ordinance COVID-19 no. 2"), which entered into force on 13 March 2020, were worded as follows:

Article 6: Public events and establishments

"1. Public or private events bringing together 100 persons or more at the same time are prohibited.

2. Events involving fewer than 100 persons may take place if the following prevention measures are complied with:

a. measures to exclude persons who are ill or who feel ill;

b. measures aimed at protecting particularly vulnerable persons;

c. measures to inform the people present about the general protection measures, such as hand-washing, the distances to be kept, the hygiene rules in the event of coughing or sneezing;

d. changes to the spatial conditions in order to ensure compliance with the hygiene measures.

..."

Article 7: Exceptions

"The competent cantonal authority may grant exceptional exemptions to the prohibitions set out in Articles 5 and 6 if:

a. this is justified by overriding public interests, such as events for the purpose of exercising political or training rights, and if

b. the training institution, the organisers or the operators submit a protection plan which includes the protection measures set out in Article 6, paragraph 2."

42. As of 17 March 2020, the relevant provisions of Ordinance COVID-19 no. 2 read as follows:

Article 6: Public events and establishments

"1. All public or private events, including sporting events and associative activities, are forbidden.

2. Public establishments shall be closed, in particular:

...

3. Article 2 shall not apply to the following establishments and gatherings:

..."

Article 7: Exemptions

"The competent cantonal authority may allow exceptions from the prohibitions set out in Articles 5 and 6, if:

a. it is justified by overriding requirement in the public interest, for example training establishments or in the event of supply-line difficulties, and if

b. the training establishment, the organiser or operator produces a protection plan, including the following prevention measures:

(1) measures aimed at excluding person who are ill or who feel ill,

(2) protection measures in respect of persons who are particularly at risk,

(3) measures to inform the persons in attendance about general protection measures, such as handwashing, social distancing or the hygiene rules to be complied with in case of a cough or cold,

(4) alteration to the premises to ensure compliance with the hygiene regulations."

Article 10

"Anyone who intentionally opposes the measures referred to in Article 6 (1), (2) and (4) shall be liable to a custodial sentence of up to three years or to a financial penalty, unless he or she has committed a more serious offence within the meaning of the Criminal Code."

43. On 21 March 2020 Ordinance COVID-19 no. 2 was supplemented by a new Article 7*c*, and its Article 10*d* was amended as follows:

Article 7c: Prohibition of gatherings in public areas

"1. Gatherings of more than five persons in public areas, especially on public squares, walkways and in parks, shall be forbidden.

2. In the event of a gathering of five or more persons, they must keep at a minimum distance of two metres from each other.

3. The police and other enforcement bodies authorised by the cantons shall ensure compliance with the above provisions in public areas."

Article 10d

"1. Anyone who intentionally opposes the measures referred to in Article 6 (1), (2) and (4) shall be liable to a custodial sentence of up to three years or a financial penalty, unless he or she has committed a more serious offence within the meaning of the Criminal Code.

2. Persons acting in breach of the prohibition on gatherings in public places, as set out in Article 7c, shall be liable to a fine.

3. Violations of the prohibition on gatherings in public places within the meaning of Article 7c may be punished by a fixed-penalty fine of 100 francs, in accordance with the procedure provided for in the Law of 18 March 2016 on fixed-penalty fines."

On 2 April 2020 Article 7(b), point 4 of Ordinance COVID-19 no. 2 was amended as follows:

"The competent cantonal authority may derogate from the prohibitions laid down in Articles 5 and 6 if:

...

b. the training establishment, organiser or operator submits a protection plan which includes the following prevention measures:

4. adaptation of the premises to ensure compliance with the OFSP's recommendations on hygiene and social distancing."

On 8, 16 and 29 April 2020 the Federal Council amended Ordinance COVID-19 no. 2, specifically by extending the term of validity of the limitations on public gatherings until 26 April, 8 May and 8 June 2020 respectively. On 8 May 2020 this term was brought forward to 7 June 2020.

44. The explanatory report by the Federal Department of the Interior (DFI) concerning Article 7 of Ordinance COVID-19 no. 2, in the version in force from 17 March 2020, is worded as follows:

"The principle of proportionality requires, for certain situations, a case-by-case assessment by the implementing authorities. Otherwise, there is a risk that the organisation of meetings, protected by fundamental rights (see Article 22 of the Constitution), would be completely prohibited, although the spread of the coronavirus could be ruled out or would be unlikely. Exceptions will therefore be provided for the general principle that prohibitions are to be introduced.

Accordingly, the competent cantonal authority may grant exceptional authorisation with regard to the prohibitions referred to in Articles 5 and 6 if this is justified by overriding public interests, for example for training institutions in fields where the availability of the professionals concerned is compulsory or, in a given case, necessary in order for the educational activity to take place.

Lastly, difficulties in the supply of basic goods and services may make it necessary to extend this exception to clearly defined institutions or suppliers.

In addition, training institutions, organisers or operators must submit a protection plan that includes the following preventive measures, showing how the likelihood of transmission can be minimised:

• Persons who are ill or feel ill must be requested not to attend the event or institution, or to leave it.

• Protection of vulnerable persons: this group includes individuals aged over 65 and persons suffering from one of the diseases listed in Article 10(b), § 2.

• Participants or attendees must be actively informed about general protective measures such as hand-washing, the distances to be maintained and the hygiene rules to be followed in the event of a cough or cold (such as by placing the OFSP's official leaflets in clearly visible locations).

• The spatial aspect: the smaller the event or institution, the lower the risk of infection and spread (low density). More space means less risk. Efforts should be made to secure larger venues, so that more space is available for those present. Appropriate instructions on the movement of groups of people can also reduce the risk of transmission. Another criterion to be taken into account, for example, is whether the event is held in open or closed premises. Lastly, the activities of the individuals present (number of close contacts, compliance with social-distancing rules during the actual activity) must also be taken into account."

45. The Law of the Republic and Canton of Geneva on events in public places (LMDPu-GE) of 26 June 2008 governs the organisation and holding of events in public places. The relevant provisions read as follows:

Section 3: Principle of authorisation

"The organisation of an event on public land shall be subject to authorisation, issued by the Department of Safety, Employment and Health (hereafter: the Department)."

Section 4: Authorisation procedure

"1. Applications for authorisation must be submitted to the Department by one or more adult natural persons, either individually or as the authorised representatives of a legal person, within a time-limit to be determined by regulation.

2. The cantonal government shall specify in the Regulations the content of the application for authorisation.

3. If the request does not comply with the requirements of the Regulation, the applicant shall be given a short period within which to comply. Failure to do so may result in the application being refused.

4. The Department may levy a fee per authorisation.

5. The beneficiary of the authorisation or a responsible person designated by the latter shall be required to remain at the disposal of the police throughout the event and to comply with their instructions.

..."

Section 5: Issuing, conditions for and refusal of an authorisation permit

"1. When it receives a request for authorisation, the Department shall assess all of the interests affected, and in particular the danger which the requested event could pose to public order. The Department shall base its assessment, in particular, on the information contained in the authorisation request, past experience and the correlation between the theme of the requested event and potential disorder.

2. When granting authorisation, the Department shall set out the arrangements, conditions and requirements in relation to the event, having regard to the authorisation request and the private and public interests at stake. In particular, it shall determine the location or route of the event and the date and scheduled start and end times.

3. To this end, the Department shall ensure, in particular, that the route does not create a disproportionate risk to persons or property and that the police and their resources are able to intervene along the entire itinerary. It may stipulate that the gathering shall be held in a specified location, without moving elsewhere.

4. Where such a measure appears necessary in order to limit the risks to public order, the Department shall require the applicant to provide a stewarding service. The size of the stewarding team shall be proportionate to the risk of disruption to public order. The Department shall verify the applicant's ability to meet this requirement prior to the event. The stewarding team is obliged to cooperate with the police and to comply with their instructions.

5. Where the imposition of conditions or requirements does not allow respect for public order to be guaranteed or prevent disproportionate interference with other interests, the Department shall refuse authorisation to hold public events.

6. The Department may amend or withdraw an authorisation if the circumstances change."

46. Article 2 of the implementing regulations for the LMDPu-GE provides that authorisation requests must be submitted to the Department of Security, Employment and Health no later than thirty days prior to the scheduled date of the event.

47. The Criminal Code provides as follows with regard to the liability of legal persons:

Article 102

"1. A crime or offence which is committed within an enterprise in the exercise of commercial activities which correspond to the aims of that enterprise shall be imputed to the enterprise if it cannot be imputed to any specific individual on account of the enterprise's inadequate internal structure. In such cases, the enterprise shall be liable to a fine not exceeding 5 million francs.

...

3. The court shall determine the fine, in particular, on the basis of the seriousness of the offence and of the inadequacy of the internal structure, the damage caused, and the economic capacity of the enterprise.

4. For the purposes of this heading, enterprises shall mean:

a. legal persons governed by private law;

b. public-law entities, with the exception of territorial corporations;

c. corporations;

d. sole traders."

C. Relevant practice

48. Under Article 189, al. 4 of the Constitution and section 82 (c) of the LTF, the ordinances of the Federal Council are not subject to a judicial appeal seeking an abstract review of their compatibility with provisions of superior legal force, as only the normative acts of cantons can be brought before the Federal Supreme Court (see, in particular, the Federal Supreme Court's judgment 2C_280/2020 of 15 April 2020 concerning Ordinance COVID-19 no. 2, and ATF (judgment of the Supreme Federal Court) 139 II 384 [2012]). The implementing acts based on such ordinances may be

challenged through an ordinary appeal. In this context, the ordinance's conformity with provisions of superior legal force, such as the Constitution or public international law, may also be challenged and examined by the courts in a preliminary ruling, in accordance with the Federal Supreme Court's consistent case-law (see, *inter alia*, ATF 104 Ib 412, ground 4c [1978]; 123 IV 29, ground 2 [1997]; 131 II 670, ground 3 [2005]; and 141 I 20, grounds 5 and 6 [2014]).

49. In their observations before the Grand Chamber, the Government submitted the following examples of judicial practice in the area of restrictions on freedom of assembly in the context of combating the COVID-19 pandemic.

1. Appeals seeking review of the compatibility of cantonal normative acts with provisions of superior legal force

50. The Federal Supreme Court has examined several appeals against cantonal ordinances imposing bans or restrictions on the freedom to hold public events in the context of combating the COVID-19 pandemic. In an initial judgment, it held that the introduction of a maximum number of 30 participants in public gatherings, adopted by the Canton of Schwyz on 30 October 2020, had been a proportionate restriction on the freedom to hold public events (ATF 147 I 450 of 8 July 2021, point 3). Similarly, it examined regulations issued by the Canton of Uri which entered into force on 1 April 2021 and limited the number of participants in political and civil-society events to 300 persons, and it emphasised the essential role of freedom of assembly in a democratic and liberal State that was governed by the rule of law (ATF 148 I 19 of 3 September 2021, points 5 and 6). Called on to examine an ordinance issued by the Canton of Berne on 4 November 2020, limiting the number of participants in political and civil-society gatherings to 15 persons, it held that this regulation deprived freedom of assembly of any meaning and was, for that reason, disproportionate and anti-constitutional (ATF 148 I 33 of 3 September 2021, point 7).

51. At the cantonal level, the Canton of Zurich Administrative Court (TA-ZH) ruled on an ordinance issued by the Canton of Zurich, which limited the number of participants at public gatherings to 15 persons during the period from 1 March to 30 April 2021. Like the Federal Supreme Court, it emphasised the importance of political and civil-society events for democracy and held that the restriction in question was disproportionate (TA-ZH judgment AN.1021.0003 of 29 April 2021, point 5).

2. Ordinary appeals against implementing acts based on federal ordinances

(a) The so-called "Climate Strike" case

(i) Judgment delivered by the Administrative Division of the Court of Justice of the Canton of Geneva on 18 August 2020

52. On 5 May 2020 the collective "Climate Strike" submitted to the Department for Security, Employment and Health an authorisation request for a public event involving twenty-eight people, scheduled for 15 May 2020. On 6 May 2020 it was informed by telephone that the authorisation request had been filed out of time and that, in any event, the gathering was prohibited under Ordinance COVID-19 no. 2. By a decision of 11 May 2020, noting that the event had not been cancelled, the Department refused to grant authorisation and prohibited the gathering.

53. On 14 May 2020 an appeal against the Department's decision was lodged with the Administrative Division of the Court of Justice of the Canton of Geneva ("the Administrative Division").

54. The Administrative Division delivered its judgment on 18 August 2020. It noted, firstly, that the date of the event had passed by the date when the appeal was lodged and that, furthermore, the ban on public events had been lifted on 30 May 2020. Nonetheless, it considered that the appellant party retained a current interest in its appeal since, as the COVID-19 pandemic had not yet been eliminated, the Federal Council could decide to prohibit public gatherings again. In any event, in order to guarantee access to a court against a decision refusing a request for authorisation to demonstrate, a right enshrined in Article 29 (a) of the Federal Constitution, it was considered appropriate in the given case to waive the requirement that the appeal had to have a current interest.

55. The Administrative Division then held that the prohibition on public events imposed by the Federal Council had not been incompatible with the obligations arising from the Convention and from the International Covenant on Civil and Political Rights, since both international and Swiss constitutional law authorised restrictions on the freedom of peaceful assembly in certain circumstances.

56. With regard to the legal basis of the prohibition, the Administrative Division considered that, in the context of an imminent danger to public health associated with the pandemic, the Federal Council's Ordinance COVID-19 no. 2, based on the Epidemics Act 2012, constituted a sufficient legal basis.

57. In assessing the proportionality of the prohibition, the Administrative Division noted that on the date that the request was submitted, the number of demonstrators authorised in public areas was limited to five persons. It added that organisers were required to submit a health plan and to guarantee compliance with protective measures to prevent the transmission of the virus.

The cantonal authority could have issued an exemption to the ban if there was an overriding public interest, as provided for in Article 7 of Ordinance COVID-19 no. 2, without however being allowed to identify alternative measures to those laid down in the ordinance.

58. The Administrative Division noted that the appellant party had not referred in its authorisation request to an overriding public interest that could have justified an exemption by the cantonal authority. It considered that the climate issue, referred to *a posteriori* by the Collective in its appeal, did not, in the emergency situation which existed at the time of the contested decision, take precedence over the higher interest of protecting public health. It also noted that the climate cause could have been defended through other means, such as social media, and that, in any event, the prohibition on public events had not been absolute, since exemptions were possible and gatherings of five persons could be authorised. In the Administrative Division's view, it had therefore been for the appellant party to comply with the Ordinance and to bring the arrangements for its event into line with the federal requirements, rather than for the authorities to propose alternative solutions.

(ii) The Federal Supreme Court's judgment of 12 August 2021

59. The appellant party brought the case before the Federal Supreme Court by way of a public-law appeal.

60. In a judgment of 12 August 2021 (1C_524/2020), the Federal Supreme Court declared the appeal inadmissible as being devoid of current interest. In this connection, it noted that the date of the demonstration had already passed, and that the prohibition on gatherings of five or more persons had been lifted on 30 May 2020. It added that although Article 29 (a) of the Constitution, referred to at first instance by the Administrative Division, guaranteed the right of access to a court, this did not necessarily include the Supreme Federal Court, as examination by a cantonal court could suffice to meet this requirement. It further noted that the appellant party had made no mention in its appeal of the existence of a current interest.

61. However, the Federal Supreme Court considered that the situation in the given case did not justify dispensing with the requirement that there had to be a current interest. Given the rapidly changing situation with regard to public health and to the COVID-19 regulations, and in view of the increased information becoming available about the pandemic, there was nothing to suggest that another request in respect of a similar event would be subject to identical or analogous rules as those applied in the given case.

(b) Case no. 2D_32/2020: the Federal Supreme Court's judgment of 24 March 2021

62. In case 2D_32/2020, the company A. SA alleged that Article 11 (3) of the Federal Council's Ordinance on mitigating the economic consequences of the coronavirus (an ordinance adopted on 20 March 2020 in respect of the

cultural sector), according to which "no appeal lies against [the] decisions taken in execution of the present Ordinance", entailed a breach of the right of access to a court as set out in Article 29a of the Constitution.

63. In a judgment of 24 March 2021, the Federal Supreme Court allowed the appeal, reiterating its settled case-law to the effect that, like the other judicial authorities, it was competent to review the constitutionality of a federal ordinance through a preliminary ruling, and could refuse to apply it if it considered that fundamental rights had not been respected. In the given case it concluded that the impugned provision had been contrary to Article 29a of the Constitution, in that it excluded any appeal against the decisions taken in execution of the above-mentioned Ordinance, which was, in consequence, unconstitutional and unenforceable (point 1.6.4).

II. INTERNATIONAL LAW MATERIALS

A. The United Nations

64. In September 2020 the United Nations Secretary-General published the second "Report on the United Nations Comprehensive Response to COVID-19", the relevant parts of which read as follows:

> "Over the course of 2020, the coronavirus disease, or COVID-19, has taken hundreds of thousands of lives, infected millions of people, upended the global economy and cast a dark shadow across our future. No country has been spared. No population group remains unscathed. Nobody is immune to its impacts. From the outset of the pandemic, the United Nations system mobilized early and comprehensively. It led on the global health response, provided life-saving humanitarian assistance to the most vulnerable, established instruments for rapid responses to the socio-economic impact and laid out a broad policy agenda for action on all fronts. It also provided logistics, common services and operational support to governments and other partners around the world on the front lines of the pandemic, as they mounted national responses to this new virus and unprecedented global challenge.
>
> ...
>
> The most urgent aim during the first six months of the pandemic, and until effective vaccines or treatments for COVID-19 become available, has been to suppress transmission of the virus. To that end, countries have implemented public health measures, including restrictions on movement, public gatherings, and economic activity. The most effective approaches to date have been comprehensive efforts that mobilize entire communities and all sectors to actively detect, test, isolate and care for every case, and to trace and quarantine every contact. This requires physical distancing measures, fact- and science-based public information, expanded testing, increasing capacity of health-care facilities, supporting health-care workers, and ensuring adequate supplies. The goal of such measures – in which every person has a role to play – is to reach a situation where disease transmission is under control; health systems are able to detect, test, isolate and treat every case and trace every contact; outbreak risks are minimized in vulnerable places, such as nursing homes and health facilities; schools, workplaces and other essential environments have established preventive measures; the risk of importing new cases can be managed; and communities are fully educated, engaged and empowered to live under a 'new normal'. Some countries can or have

already achieved these conditions with their own resources but developing countries continue to need considerable support."

65. On 9 December 2020 the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, together with the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa and President of the African Commission on Human and Peoples' Rights, and the OSCE's Office for Democratic Institutions and Human Rights, published a Joint Declaration on Protecting the right to freedom of peaceful assembly and association in times of Emergencies. The relevant parts of this Declaration read as follows:

> "f. Protecting health, security and public order are not incompatible with the exercise of the right to peaceful assembly. Crisis situations, including public health emergencies, must not be used as a pretext for rights infringements and the imposition of undue restrictions on public freedoms. In particular, blanket bans of assemblies are likely to constitute an unnecessary and disproportionate infringement of the right, even in emergency situations.
>
> g. Individuals must be free to participate in shaping decisions that will effect them and in policy formation during times of crisis as at other times; public participation is crucial to surmount any crisis, and civil society must be regarded as an essential partner of governments in this endeavor."

B. The Council of Europe

66. On 7 April 2020 the Secretary General of the Council of Europe published an information document entitled "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member States" (SG/Inf (2020)11). The relevant parts of this document read as follows:

> **"Introduction**
>
> The purpose of this paper is to provide governments with a toolkit for dealing with the present unprecedented and massive scale sanitary crisis in a way that respects the fundamental values of democracy, rule of law and human rights.
>
> It is recognised at the outset that governments are facing formidable challenges in seeking to protect their populations from the threat of COVID-19. It is also understood that the regular functioning of society cannot be maintained, particularly in the light of the main protective measure required to combat the virus, namely confinement. It is moreover accepted that the measures undertaken will inevitably encroach on rights and freedoms which are an integral and necessary part of a democratic society governed by the rule of law.
>
> The major social, political and legal challenge facing our member states will be their ability to respond to this crisis effectively, whilst ensuring that the measures they take do not undermine our genuine long-term interest in safeguarding Europe's founding values of democracy, rule of law and human rights. It is precisely here that the Council of Europe must carry out its core mandate by providing, through its statutory organs

and all its competent bodies and mechanisms, the forum for collectively ensuring that these measures remain proportional to the threat posed by the spread of the virus and be limited in time. The virus is destroying many lives and much else of what is very dear to us. We should not let it destroy our core values and free societies.

1. Derogation in time of emergency (Article 15 European Convention on Human Rights)

The extent of measures taken in response to the current COVID-19 threat and the way they are applied considerably vary from one state to another in different points of time. While some restrictive measures adopted by member states may be justified on the ground of the usual provisions of the European Convention on Human Rights (Convention) relating to the protection of health (see Article 5 paragraph 1e, paragraph 2 of Articles 8 to 11 of the Convention and Article 2 paragraph 3 of Protocol No 4 to the Convention), measures of exceptional nature may require derogations from the states' obligations under the Convention. It is for each state to assess whether the measures it adopts warrant such a derogation, depending on the nature and extent of restrictions applied to the rights and freedoms protected by the Convention. The possibility for states to do so is an important feature of the system, permitting the continued application of the Convention and its supervisory machinery even in the most critical times."

2. Respect for the rule of law and democratic principles in times of emergency

...

2.2. Limited duration of the regime of the state of emergency and of the emergency measures

...

During the state of emergency, governments may receive a general power to issue decrees having the force of the law. This is acceptable, provided that those general powers are of a limited duration. The main purpose of the state of emergency regime (or alike) is to contain the development of the crisis and return, as quickly as possible, to the normality.8 Prolongation of the state of emergency regime should be subject to the control of its necessity by parliament. An indefinite perpetuation of the general exceptional powers of the executive is impermissible.

3. Relevant human rights standards

...

3.3. Right to private life, freedom of conscience, freedom of expression, freedom of association

Effective enjoyment of all these rights and freedoms guaranteed by Articles 8, 9, 10 and 11 of the Convention is a benchmark of modern democratic societies. Restrictions on them are only permissible if they are established by law and proportionate to the legitimate aim pursued, including the protection of health. The significant restrictions to usual social activities, including access to public places of worship, public gatherings and wedding and funeral ceremonies, may inevitably lead to arguable complaints under the above provisions. It is for the authorities to ensure that any such restriction, whether or not it is based on a derogation, is clearly established by law, in compliance with relevant constitutional guarantees and proportionate to the aim it pursues.

While heightened restrictions to the above-mentioned rights may be fully justified in time of crisis, harsh criminal sanctions give rise to concern and must be subject to a strict scrutiny. Exceptional situations should not lead to overstatement of criminal means. A fair balance between the compulsion and prevention is the most appropriate, if not the only way, to comply with the Convention proportionality requirement."

67. In Resolution 2338 (2020) on "The impact of the Covid-19 pandemic on human rights and the rule of law", adopted on 13 October 2020, the Parliamentary Assembly of the Council of Europe ("PACE") stated as follows:

"1. Although primarily a public health crisis, the Covid-19 pandemic is also an unprecedented challenge for human rights and the rule of law – both of which remain applicable even in times of national emergency. The positive obligations under the European Convention on Human Rights (ETS No. 5, the Convention) require States to take measures to protect the life and health of their populations. This imperative does not, however, give States a free hand to trample on rights, suppress freedoms, dismantle democracy or violate the rule of law. Even during a state of emergency, the Convention continues to set limits, thereby ensuring respect for common European fundamental standards.

2. States have taken a wide range of often broadly similar measures to limit the spread of Covid-19. These generally include severe restrictions on freedom of movement and assembly and closures of educational establishments and premises used for commercial, recreational, sports, cultural and religious purposes. Such measures interfere with the enjoyment of Convention rights, sometimes with serious personal consequences for the individuals concerned, but – despite their scope and impact – they do not necessarily violate those rights. Many Convention rights allow for limitations in order to accommodate the need to balance individual against public interests, including the protection of public health and safety. Interference with these rights is permissible under the Convention so long as it is lawful, necessary, proportionate to the public interest being pursued and non-discriminatory. The Parliamentary Assembly welcomes the timely and constructive interventions by the Commissioner for Human Rights of the Council of Europe on various situations relating to this issue."

68. By Resolution 2471(2022), adopted on 25 November 2022, concerning "The impact of the Covid-19 restrictions on civil society space and activities", the Parliamentary Assembly called on Council of Europe member States to:

"comply with international legal standards that are pertinent to the functioning of civil society, and in particular with regard to the rights to freedom of assembly, association and expression; ..."

C. The European Union

69. On 12 March 2020 the ECDC published a document entitled "Rapid risk assessment: Novel coronavirus disease 2019 (COVID-19) pandemic: increased transmission in the EU/EEA and the UK – Sixth update", which recommended as follows:

"Necessary measures to mitigate the impact of the pandemic

Given the current epidemiology and risk assessment, and the expected developments in the next days to few weeks, the following public health measures to mitigate the impact of the pandemic are necessary in EU/EEA countries:

- Social distancing measures should be implemented early in order to mitigate the impact of the epidemic and to delay the epidemic peak. This can interrupt human-to-human transmission chains, prevent further spread, reduce the intensity of the epidemic and slow down the increase in cases, while allowing healthcare systems to prepare and cope with an increased influx of patients. Such measures should include:

- the immediate isolation of symptomatic persons suspected or confirmed to be infected with COVID-19;

- the suspension of mass gatherings, taking into consideration the size of the event, the density of participants and if the event is in a confined indoor environment;

- social distancing measures at workplaces (for example teleworking, suspension of meetings, cancellation of non-essential travel);"

With regard to measures related to mass gatherings, the ECDC advised as follows:

"Measures related to mass gatherings

Mass gatherings, such as sport events, concerts, religious events and conferences increase the number of close contacts between people for long periods, sometimes in confined spaces, and may be attended by individuals who have travelled from widespread areas with differing levels of community transmission of the virus. Therefore, mass gatherings may lead to the introduction of the virus into the community hosting the event and/or facilitate virus transmission and spread.

Measures to reduce the risk posed by mass gatherings include interpersonal distancing measures to avoid crowding and organisational measures, such as cancellation or postponement of an event. Data originating from seasonal and pandemic influenza models indicate that during the mitigation phase, cancellations of mass gatherings before the peak of epidemics or pandemics may reduce virus transmission. The cancellation of mass gatherings in areas with ongoing community transmission is, therefore, recommended. The decision to cancel will need to be coordinated by the organiser and public health and other national authorities. Alternative modes of broadcasting the events should be explored.

In case mass gathering events take place, high risk individuals should be advised not to participate. Other personal protective and environmental measures should be implemented."

70. European Parliament resolution of 13 November 2020 on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights (2020/2790(RSP), in so far as relevant, provides as follows:

"The European Parliament,

1. Recalls that, even in a state of public emergency, the fundamental principles of the rule of law, democracy and respect for fundamental rights must prevail, and that all emergency measures, derogations and limitations are subject to three general conditions, those of necessity, proportionality in the narrow sense and temporariness,

conditions which have been regularly applied and interpreted in the case law of the European Court of Human Rights (ECtHR), the Court of Justice of the EU (CJEU) and various constitutional (and other) courts of the Member States;

2. Believes that reactions to the crisis have, on the whole, shown the strength and resilience of national democratic systems; stresses that extraordinary measures should be matched by more intense communication between governments and parliaments; calls for a more intense dialogue with stakeholders including citizens, civil society and political opposition in order to build broad support for extraordinary measures and ensure that they are implemented as efficiently as possible, while avoiding repressive measures and ensuring unimpeded access to information for journalists;

3. Calls on the Member States to ensure that, when measures that could restrict the functioning of democratic institutions, the rule of law or fundamental rights are adopted, assessed or reviewed, those measures observe the recommendations of international bodies such as the UN and the Council of Europe, including the Venice Commission, and of the Commission's report on the rule of law situation in the EU; reiterates its call on the Member States not to abuse emergency powers to pass legislation unrelated to the COVID-19 health emergency objectives in order to surpass parliamentary oversight;

...

8. Calls on the Member States to restrict the freedom of assembly only where strictly necessary and justifiable in the light of the local epidemiological situation and where proportionate, and not to use the banning of demonstrations to adopt controversial measures, even if unrelated to COVID-19, that would merit a proper public and democratic debate."

III. COMPARATIVE-LAW MATERIALS

71. It appears from a comparative-law report prepared by the Court's Research Division, covering 36 member States of the Council of Europe, that measures restricting freedom of assembly in public places were adopted, with a view to combating the effects of the COVID-19 pandemic, in all 36 of these member States. 21 of these States (Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, the Czech Republic, certain German *Länder*, Hungary, Ireland, Lithuania, Luxembourg, Malta, the Republic of Moldova, Montenegro, Norway, Poland, Romania, San Marino, Slovakia, Slovenia, Spain and the United Kingdom (England, Wales and Scotland)) decided to introduce formal bans on gatherings in public areas, without providing for exceptions for demonstrations; in a further 12 of these member States (Albania, Croatia, Estonia, Finland, France, Georgia, Iceland, Liechtenstein, North Macedonia, Serbia, Sweden and Ukraine), such gatherings remained authorised throughout the COVID-19 pandemic, albeit subject to a maximum – sometimes very low – limit on the number of participants; in another two of the States surveyed (Greece and the Netherlands) gatherings were not formally restricted, but certain planned events were *de facto* prohibited.

72. In all 36 of the member States surveyed, the restrictive measures evolved over time; their necessity was reassessed regularly in the light of the

spread of the COVID-19 virus. Such reassessment was carried out at intervals of several weeks or months.

73. In 14 of these member States (Armenia, Azerbaijan, Belgium, Georgia, Ireland, Iceland, Lithuania, Montenegro, the Netherlands, North Macedonia, Norway, San Marino (for one month in 2020), Sweden and Ukraine), criminal liability with the possibility of imprisonment could be incurred for failure to comply with the measures in place. In the other countries, non-compliance with the measures imposed by the authorities incurred a fine.

74. In all 36 member States surveyed judicial review of the measures adopted was possible, either through an abstract review of the legislative or governmental act, or by challenging a decision refusing or banning the organisation of a particular demonstration or gathering. In 23 of these States the judicial remedies used resulted in a decision on the merits, whereas in seven other States no judicial remedies appear to have been used in practice. Judicial decisions were issued prior to the scheduled date of the planned event in eight of the States in question.

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

75. In its observations before the Grand Chamber on 2 December 2022, the applicant association submitted for the first time that the prohibitions introduced by Ordinance COVID-19 no. 2 had constituted a violation of its rights under Article 11 of the Convention not only from the perspective of the right to peaceful assembly, but also from that of the right to trade-union freedom.

76. In this connection, it alleged that the prohibition on any type of gathering, whether public or private, had seriously obstructed its trade-union activity, the aim of which was to defend the interests of its members through collective action. The entry into force of the impugned Ordinance had led to the cancellation of numerous collective bargaining sessions organised by the different trade unions, and had made it impossible to hold workers' assemblies, meetings of trade-union committees and public information meetings about the work of trade unions.

77. At the hearing, the Government submitted that this argument amounted to a new complaint that had not been raised before the Chamber and could not be considered as forming part of the case before the Grand Chamber.

78. According to the Court's case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment. The "case" referred to the Grand Chamber is the application as it has been declared admissible, as well as the

complaints that have not been declared inadmissible (see, for example, *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 98, 1 June 2021, and *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 83, 17 January 2023, with the case-law cited therein). A complaint consists of two elements: factual allegations and legal arguments (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018). These two elements are intertwined because the facts complained of ought to be seen in the light of the legal arguments adduced and *vice versa* (ibid., § 110).

79. In its initial application to the Court the applicant association specifically complained that the general prohibition on public events imposed by Ordinance COVID-19 no. 2 amounted to an interference with its right to freedom of peaceful assembly, guaranteed by Article 11 of the Convention, in so far as it had been prevented from organising and participating in public events. The parties' submissions before the Chamber concerned the repercussions of the impugned restrictions on the applicant association's ability to carry out that part of its activity which entailed the organisation of demonstrations and public gatherings. Moreover, the applicant association does not argue otherwise.

80. In its judgment, the Chamber examined the case on the basis of these submissions, having regard to the factual elements provided by the applicant association in support of its complaint. At no point did the Chamber examine whether the impugned provisions of domestic law had had an impact on the applicant association's right to trade-union freedom.

81. The Court reiterates that trade-union freedom is the freedom to protect the occupational interests of trade-union members by trade-union action and is a specific aspect of freedom of association (see *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96 and 2 others, § 42, ECHR 2002-V, and *Manole and "Romanian Farmers Direct" v. Romania*, no. 46551/06, § 57, 16 June 2015), that is, one of the various rights set out in Article 11 of the Convention. The elements relating to trade-union freedom that the applicant association has raised for the first time before the Grand Chamber thus constitute a new complaint relating to the distinct requirements of the provision relied upon. These elements are not therefore within the scope of the case before the Grand Chamber (see *Denis and Irvine*, cited above, § 110, and *L.B. v. Hungary* [GC], no. 36345/16, § 70, 9 March 2023).

82. In any event, allegations made after the expiry of the six-month time-limit can only be examined by the Court if they constitute legal submissions relating to, or particular aspects of, the initial complaints that were introduced within the time-limit (see *Kurnaz and Others v. Turkey* (dec.), no. 36672/97, 7 December 2004, and *Sâmbata Bihor Greco-Catholic Parish v. Romania* (dec.), no. 48107/99, 25 May 2004).

83. The Court has already found that the applicant association, through the arguments that it raised for the first time before the Grand Chamber, did not seek to clarify or elaborate upon the complaint initially raised from the perspective for freedom of peaceful assembly, but was seeking to raise a new complaint (see paragraph 81 above).

84. The Court reiterates that where an interference with the right relied on by an applicant emanates directly from legislation, the very maintenance in force of the impugned legislation may constitute a continuing interference with the right in question. In such a situation, in so far as the applicant association alleges that it had no remedy by which to seek redress at national level, the six-month time-limit starts to run once the situation complained of has come to an end (see *Parrillo v. Italy* [GC], no. 46470/11, §§ 109-114, ECHR 2015).

85. Accordingly, under Article 35 § 1 of the Convention as in force at the relevant time, the applicant association ought to have raised this new complaint, at the latest, within six months of 30 May 2020, the date on which Ordinance COVID-19 no. 2 ceased to apply.

86. It follows that the complaint raised by the applicant association with regard to trade-union freedom falls outside the scope of the case as submitted to the Grand Chamber and that, in any event, it is inadmissible for failure to comply with the six-month rule provided for by Article 35 of the Convention as in force at the relevant time (see, *mutatis mutandis*, *Kurt v. Austria* [GC], no. 62903/15, § 215, 15 June 2021).

87. Having regard to the above, the Grand Chamber will therefore limit its examination to the applicant association's complaint alleging a violation of its right to peaceful assembly, as brought before the Chamber and examined by it.

88. Within these limits, the Grand Chamber may also examine, where appropriate, issues relating to the admissibility of the complaints falling within the scope of the "case" as referred to the Grand Chamber, in the same manner as this is possible in normal Chamber proceedings. It may do so for example by virtue of Article 35 § 4 *in fine* of the Convention (which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings"), where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see, for example, *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 56, 25 March 2014; and *Radomilja and Others*, cited above, § 102, and the cases cited therein). Thus, the Grand Chamber may reconsider a decision to declare an application admissible, even at the merits stage and subject to Rule 55 of the Rules of Court, if it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Grosam v. the Czech Republic* [GC], no. 19750/13, § 64, 1 June 2023).

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The applicant association's alleged lack of victim status

1. The Government's submissions before the Grand Chamber

89. The Government asserted firstly that the applicant association, which, in their view, had deliberately ended the authorisation procedure launched by it, had not been prohibited from organising a public event. They added that it had not submitted a request for an exemption under Article 7 of Ordinance COVID-19 no. 2; had it done so, a possible refusal decision could have been appealed against before the courts. In this connection, the Government regretted that the Chamber had not taken account of the fact that the federal ordinance in question specifically provided, from the outset and throughout the entire period in issue in the present case, that the competent cantonal authority could grant exemptions from the ban on public events.

90. The Government further noted that in the present case there had been no risk of incurring a criminal sanction under Article 10(d) of Ordinance COVID-19 no. 2, since the applicant association, which is a private-law non-profit-making association rather than a commercial company, did not fulfil the criteria laid down in Article 102 of the Swiss Criminal Code in order for the liability of a legal entity to be engaged. They argued that the Chamber's finding that the applicant association had been obliged to change its conduct in order to avoid criminal sanctions did not therefore reflect the legal situation which existed in Switzerland.

91. The Government added that sanctions had been applied with the utmost restraint by the national courts. They explained that events which were held in public areas in breach of the ban on public events between 17 March and 6 June 2020 had given rise to only one conviction (with no penalty attached), one police warning and acquittals. At the hearing, they explained that sanctions were only applicable in cases of unauthorised public events.

92. The Government concluded that the applicant association had not shown that the impugned legislation had been applied to it in practice, that it had been obliged to change its conduct under pain of criminal prosecution, or that it belonged to a class of persons who risked being directly affected by the legislation in question. According to the Government, the application thus amounted to an *actio popularis*.

2. The applicant association's submissions before the Grand Chamber

93. The applicant association considered that it had been directly wronged by the impugned measure and that it was therefore a victim within the meaning of Article 34 of the Convention. It submitted that it had been obliged to change its conduct and had to desist from organising several assemblies of workers, strike pickets or any other form of social protest. It claimed that it

had decided not to go ahead with the march on 1 May in order to protect public health. With reference to the static event for which authorisation had been requested, it claimed to have taken notice of the refusal indicated orally by the authorities, without however formally withdrawing its request.

94. With regard to the chilling effect of the sanctions set out in Ordinance COVID-19 no. 2, the applicant association considered that the applicability of criminal sanctions to a non-profit association had not been clearly determined by the Swiss courts. In any event, the sanctions were, in its opinion, applicable to the association's representatives, which had quite simply dissuaded the latter individuals from organising meetings and public events.

95. The applicant association argued that the fact of lodging an appeal before the administrative courts would not have protected it from the risk of sanctions. It submitted that the member of the cantonal executive (*conseiller d'État*) responsible for security would undoubtedly have sent the police to disperse any gathering on the Mont-Blanc Bridge and to arrest the participants, even if, in the meantime, the association had lodged an appeal against a formal refusal by the authorities.

3. The third-party interveners

(a) The French Government

96. The French Government considered that the decision to be delivered by the Grand Chamber in the present case had to be consistent with the judgment in *Vavřička and Others v. the Czech Republic* ([GC], nos. 47621/13 and 5 others, 8 April 2021) and consolidate the principles set out therein, in a sphere concerning matters of public health which were common to all the States Parties to the Convention.

97. They argued that a wide margin of appreciation should be granted in view of the interest at stake in the present case, namely the protection of public health, and the urgent and unforeseeable nature of the pandemic crisis. They also pointed to the absence of a common approach on the part of European States as to the type of measures to be introduced to address the crisis. They argued that, in this context, each State could legitimately make different choices, depending on the capacity of its hospitals, its economic position or cultural factors and preferences.

98. The third-party Government also considered that the highly technical nature of the health-related questions posed by the COVID-19 pandemic did not allow for *a posteriori* assessment of the appropriateness or otherwise of a decision taken as a matter of great urgency, in an uncertain context characterised, in particular, by the incomplete and constantly changing scientific knowledge available to the authorities of the member States when they imposed the health restrictions in question.

99. With regard to the necessity and proportionality of the measure at issue, the French Government submitted that a blanket ban on public events had been justified, given the serious and uncertain context of the public-health crisis. The fact that, at the same time, a significant number of persons had been authorised to go to their workplaces did not, in their view, mean that less restrictive measures had been possible with regard to public gatherings, where supervision of compliance with preventive measures is more difficult.

(b) The Assas Clinique de droit international ("the CDIA")

100. The CDIA carried out a comparative-law study covering all of the Contracting Parties to the Convention. It submitted that an examination of the various measures adopted in the context of the COVID-19 health crisis indicated that a minority of ten States had had recourse to the "derogation" clause in Article 15 of the Convention. The other States had chosen merely to restrict a number of rights protected by the Convention, including the freedom of assembly and association protected by Article 11. In any event, the majority of States had considered it unnecessary to derogate from the right of assembly and association. In addition, the judicial authorities had for the most part carried out reviews of proportionality similar to that which the Court required from the member States in order to comply with their Convention obligations in the context of their ordinary review.

101. The CDIA concluded that there existed a European consensus on the fact that, in a democratic society, the protection of public health was dependent on respect for the rule of law and thus on continued, albeit limited, protection of the rights and freedoms enshrined in the Convention.

(c) Amnesty International

102. Amnesty International stressed the importance of the present case for the Court's case-law on restrictions on the right to freedom of peaceful assembly, especially in the context of public-health emergencies. It considered that the Court should proceed from the principle that blanket bans or restrictions on peaceful assemblies amounted to disproportionate measures. It added that, in this respect, the Court ought also to clarify the concept of a general measure, that is, of a measure which regulates a matter without allowing any possibility of exceptions. It also emphasised that the Court's supervision was of particular significance in the context of a public-health crisis in which procedural, legislative and judicial safeguards had been absent or reduced.

4. The Chamber judgment

103. The Chamber noted that, prior to the pandemic, the applicant association had organised numerous demonstrations, particularly in support of trade-union and democratic freedoms, and had been prevented from doing

so after the enactment of the anti-COVID measures. It also held that, in so far as the applicant association had been deprived of an important means of pursuing its statutory aims, there was a sufficient link between the association and the harm that it claimed to have sustained following the alleged violation of Article 11 of the Convention.

104. Citing the relevant case-law on the concept of "potential victim", the Chamber therefore dismissed the Government's preliminary objection, finding in particular that the applicant association had been obliged to modify its conduct in order to avoid liability for the criminal sanctions laid down in Article 10 of Ordinance COVID-19 no. 2.

5. The Court's assessment

(a) General principles deriving from the Court's case-law

105. The Court reiterates that in order to rely on Article 34 of the Convention, a person, non-governmental organisation or group of individuals must be able to claim to be a victim of a violation of the Convention; the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. The individual concerned must be able to show that he or she was "directly affected" by the measure complained of (see *Lambert and Others v. France* [GC], no. 46043/14, § 89, ECHR 2015 (extracts)).

106. Article 34 of the Convention does not allow complaints *in abstracto* alleging a violation of the Convention. The Convention does not provide for the institution of an *actio popularis*, meaning that applicants may not complain about a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention (see, among many other authorities, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014, and the references cited therein; *Garib v. the Netherlands* [GC], no. 43494/09, § 136, 6 November 2017; and *Zambrano v. France* (dec.), no. 41994/21, § 41, 21 September 2021).

107. However, the Court has accepted that individuals may argue, in certain circumstances, that a law violates their Convention rights even in the absence of an individual measure of implementation, and therefore claim to be "victims" within the meaning of Article 34. For example, where an applicant was unable to establish that the legislation he or she complained of had actually been applied to him or her, on account of the secret nature of the measures that it authorised (see *Klass and Others v. Germany*, 6 September 1978, § 30, Series A no. 28); where applicants were required either to modify their conduct or risk being prosecuted (see, in particular, *Dudgeon v. the United Kingdom,* 22 October 1981, § 41, Series A no. 45; *Norris v. Ireland*, 26 October 1988, § 32, Series A no. 142; *Michaud v. France*, no. 12323/11, §§ 51-52, ECHR 2012; and *S.A.S. v. France* [GC],

no. 43835/11, § 57, ECHR 2014 (extracts)); or if they belonged to a class of people likely to be directly affected by it (see, in particular, *Marckx v. Belgium*, 13 June 1979, Series A no. 31, § 27; *Burden v. the United Kingdom* [GC], no. 13378/05, § 34, ECHR 2008; *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, § 29, ECHR 2009; and *Tănase v. Moldova* ([GC], no. 7/08, § 108, ECHR 2010).

108. In any event, in order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Centre for Legal Resources on behalf of Valentin Câmpeanu,* cited above, § 101).

(b) Application of those principles to the present case

109. The Court notes, firstly, that the applicant association has not brought its case before the Court in the interests of its members or its representatives, but claims to have been directly affected, as an association, by the impact of Ordinance COVID-19 no. 2 (see, *a contrario*, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, § 95, 18 January 2018). The question which arises is therefore whether, in the absence of an individual measure taken against it on the basis of the impugned legislation, the applicant association can nonetheless claim to be a "victim" within the meaning of Article 34 of the Convention.

110. The Court reiterates that, according to its case-law, an applicant can claim that a law breaches his or her Convention rights even in the absence of an individual measure of implementation – leaving aside the specific context of secret surveillance measures – where the individuals concerned have been required either to modify their conduct or risk being prosecuted or punished, or where they have adequately demonstrated that they belong to a class of people who risk being directly affected by the legislation in question (see paragraph 107 above).

111. In its judgment, the Chamber concluded that the applicant association belonged to the first group, in that it had been obliged to refrain from organising public meetings in order to avoid the criminal penalties provided for in Ordinance COVID-19 no. 2 (see paragraph 42 of the Chamber judgment).

112. In this connection, the Grand Chamber notes that although criminal penalties were provided for in Article 10 of Ordinance COVID-19 no. 2 for non-compliance with the ban on gatherings, only individual members of the association, or its representatives, would have been liable, in such a scenario, to the imposition of sanctions on the basis of the impugned legislation. Under Article 102 of the Criminal Code, the criminal liability of a non-profit-making private association – such as the applicant association – could not be engaged (see paragraphs 47 and 90 above).

113. In those circumstances, the Grand Chamber considers that the present case cannot be compared to those in which the applicants were required to choose between complying with the impugned legislation or the risk of being directly and personally exposed to sanctions (see *Dudgeon* and *Norris*, cited above, concerning laws which punished homosexual acts between consenting adults; *Michaud,* cited above, concerning rules requiring lawyers to report suspicions, subject to the risk of disciplinary sanctions and even disbarment; and *S.A.S. v. France*, cited above, concerning the ban on the wearing of the full-face veil in public places).

114. It remains to be determined whether the applicant association was nonetheless directly affected by Ordinance COVID-19 no. 2. The Court does not underestimate the repercussions of the restrictions imposed by the Ordinance on the activities of the association, which has the statutory aim of defending the interests of working persons and of its member organisations. Like the Chamber, it notes in this connection that the applicant association had organised numerous events and public gatherings in the months preceding the entry into force of Ordinance COVID-19 no. 2 and that it had taken steps to organise a workers' demonstration on 1 May 2020.

115. However, in order to be able to allege that a law breaches his or her rights and freedoms as guaranteed by the Convention, an applicant must be able to show that he or she was "directly affected" by the legislation complained of, failing which the application falls into the category of an *actio popularis* (see *Dimitras and Others v. Greece* ((dec.), no. 59573/09, §§ 30-31, 4 July 2017, and *Shortall v. Ireland* ((dec.), no. 50272/18, § 53, 19 October 2021).

116. In this respect, the Grand Chamber considers it useful to examine the content of the impugned legislative measures. It notes that the previous cases in which the Court held that the applicants were permitted to complain about a law in the absence of individual implementing measures concerned texts which were applicable to predefined situations regardless of the individual facts of each case and, in consequence, likely to infringe those persons' rights under the Convention by their mere entry into force (see *Marckx,* cited above, concerning legislation which limited an "illegitimate" child's right to inherit property; *Burden*, cited above, concerning a law intended to restrict inheritance rights; *Sejdić and Finci*, cited above, concerning a law which limited the possibility of standing for election depending on ethnic origin; and *Tănase*, cited above, concerning a law limiting eligibility to stand for election in the case of dual nationals).

117. In the present case, the applicant association alleges before the Court that the ban on public events introduced by Ordinance COVID-19 no. 2 amounted to a general measure, given especially that, in its argument, any exemption had become impossible during the period under consideration. It submits that, in the version of the Ordinance in force from 17 March 2020, the possibility of requesting exemptions for "the exercise of political rights"

had been removed, which, in its view, rendered futile any attempt to organise gatherings in pursuit of its statutory aim.

118. The Court notes that Article 7(a) of Ordinance COVID-19 no. 2, which authorised exemptions from the ban on public events, had indeed been amended in the version of 17 March 2020 by the removal, *inter alia*, of the reference to "the exercise of political rights". Nonetheless, it is a fact that the granting of exemptions remained possible "if [justified by] an overriding public interest", and if the organiser submitted a protection plan that was considered adequate (see § 42 above).

119. Furthermore, the Government have indicated before the Grand Chamber that several exemptions were requested during the period of application of Ordinance COVID-19 no. 2 and that, in certain cases, such exemptions were granted by the administrative authorities, with the result that several gatherings were held in public places (see paragraphs 36-37 above).

120. Although the removal, on 17 March 2020, of the reference to "the exercise of political rights" from the list of examples of acceptable exemptions was admittedly not without importance, the Grand Chamber cannot however subscribe to the Chamber's conclusion that the impugned ban amounted to a "general measure" (see paragraphs 85 and 86 of the Chamber judgment), in the sense of a legislative measure which applies to predefined situations regardless of the specific facts of each individual case (see, *mutatis mutandis*, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 106, ECHR 2013 (extracts), and *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV).

121. As to the possibility that the applicant association could have requested and obtained an exemption enabling it to organise a specific gathering, the Grand Chamber considers that it is not its task to speculate in the abstract on whether the events that the applicant association wished to organise might have entailed an "overriding public interest", thus justifying the granting of an exemption. In this connection, it points out that the applicant association did not allege a breach of its right to freedom of assembly arising from the impossibility of organising a specific public event, but instead challenged the measure prohibiting such events, as introduced by Ordinance COVID-19 no. 2.

122. Lastly, the Court cannot overlook the fact that the applicant association deliberately chose not to continue with the authorisation procedure that it had begun for the purpose of holding an event on 1 May 2020, even before receiving a formal decision from the competent administrative authority that could have been challenged before the courts. In addition, it must be noted that it subsequently refrained from submitting any other authorisation request.

123. In the Court's opinion, such conduct, without adequate justification, has a bearing on the applicant association's victim status.

124. With regard to the fear of criminal sanctions, which is the argument put forward by the applicant association to justify its decision not to continue the authorisation procedure for the event of 1 May, the Court reiterates that in its capacity as a non-profit-making private association the applicant association was not subject to such sanctions (see paragraph 112 above). In any event, there is nothing to suggest that the mere fact of taking administrative steps to organise public events would have amounted to conduct that was likely to be sanctioned, including where such actions gave rise to a refusal by the competent authorities and, where appropriate, judicial proceedings. On the contrary, the evidence submitted by the parties indicates that only the fact of having organised or participated in unauthorised public events was punishable by a sanction under the impugned provisions (see §§ 91 and 95 above).

125. The Court considers that the effect of the applicant association's conduct was not only to deprive it of its status as a "direct" victim, within the meaning of Article 34 of the Convention, but also to deprive it of an opportunity to apply to the courts and to complain, at national level, of a violation of the Convention (see below). The issue of compliance with the rule of exhaustion of domestic remedies is closely linked to that of victim status, particularly with regard to a measure of general application such as a law (see, *mutatis mutandis, S.A.S. v. France*, cited above, §§ 57 and 61, and *Zambrano v. France* (dec.), cited above, § 47).

126. Accordingly, the Grand Chamber also considers it necessary to examine the second preliminary objection raised by the Government.

B. Exhaustion of domestic remedies

1. The Government's submissions to the Grand Chamber

127. The Government claimed that an effective domestic remedy had been available to the applicant association in order to allege a violation of Article 11 of the Convention, and that the applicant association had not exhausted it. They submitted that the applicant association ought initially to have made use of the possibility of requesting an exemption from the ban on public events within the meaning of Article 7 of Ordinance COVID-19 no. 2, then, in the event of a refusal, applied to the cantonal administrative court. The decision issued by that court could then in turn have been the subject of a public-law appeal before the Federal Supreme Court.

128. The Government argued that the Federal Supreme Court, as the highest judicial body and certain cantonal courts, had on several occasions been required to examine refusals to authorise public events, either through a preliminary ruling on federal law or through abstract review of cantonal provisions. The Government submitted that the time taken to process such procedures had never been excessive. In any event, in so far as the domestic law provided for an authorisation procedure, they argued that it was for the

organiser of an event to apply for authorisation in good time, in order to enable the authorities to give a reasoned decision and, in the event of a refusal, to enable the courts to examine a possible appeal without excessive pressure.

129. The Government also submitted that although standing to lodge an appeal presupposed a current interest in having the impugned decision set aside, the Federal Supreme Court, in line with its consistent case-law (ATF 146 II 335 ground 1.3; 142 I 135 ground 1.3.1) exceptionally waives this requirement where the dispute might recur in identical or similar circumstances, where the nature of the issue means that it cannot be decided before it loses its topicality, or where, because it involves a matter of principle, there are sufficiently important public-interest grounds for determining the disputed issue. They explained that, on the basis of this case-law, the Federal Supreme Court had thus examined numerous appeals against anti-COVID-19 measures, in spite of the absence of a current interest on the date on which the appeals were lodged (judgments 2C_228/2021 of 23 November 2021, ground 1.3; 2C_941/2020 of 8 July 2021, ground 1.3.2 (ground not published *in* ATF 147 I 450); 2C_8/2021 of 25 June 2021, ground 2.3.2; 2C 810/2021 of 31 March 2023).

130. With regard to the possibility of obtaining an exemption, the Government stated that both the wording of Article 7 of Ordinance COVID-19 no. 2 and the related explanatory reports indicated, unambiguously, that the list of public events for which the competent cantonal authorities could, on a case-by-case basis, grant an exemption from the ban had not been exhaustive, but had been provided solely by way of example. They argued that even if the type of event that the applicant association wished to organise had not been one of the examples expressly listed, the cantonal authorities had been under an obligation to examine, in this case, whether such an event could have been authorised as an exemption from the ban on public events laid down in Article 6 § 1 of Ordinance COVID-19 no. 2. In their view, the fact that the version applicable from 17 March 2020 no longer expressly referred to gatherings for the exercise of political rights had not had an impact either on the non-exhaustive nature of the list in Article 7 of Ordinance COVID-19 no. 2 or on the margin of appreciation of the competent cantonal authorities.

131. The Government submitted that certain of the requests for exemptions lodged in six cantons had been granted. They stated that no appeals had been lodged against the refusals to grant exemption requests, with the exception of the appeal by the "Climate Strike" collective.

2. The applicant association's submissions before the Grand Chamber

132. The applicant association invited the Grand Chamber to find that no effective remedy had been available to it in order to challenge the measures in question. It repeated that its application did not concern the refusal to allow it to organise a specific assembly, but what it considered to be a blanket ban

on public events for about two and a half months, imposed under Ordinance COVID-19 no. 2. In its view, a federal ordinance could not as such be subject to an abstract review of constitutionality. As to the possibility of securing a review of constitutionality through a request for a preliminary ruling, the applicant association pointed out that, although in the context of an appeal against a given decision the court could examine whether the relevant legal norm was compatible with the provisions of superior legal force, this was not guaranteed, contrary to the Government's implication. It stated that, in application of the *jura novit curia* principle, the Swiss courts could base their rulings on the legal principles of their choice, without being obliged to examine problems submitted by the parties.

133. In the alternative, the applicant association alleged that that it had been impossible to secure effective judicial review of the refusal to hold the planned demonstration on 1 May or any other specific event. It stated, firstly, that it had not been possible for it to request an exemption, since the ban in question concerned all political events. In this connection, it argued that all of the public statements issued by the Federal Council and the Geneva Cantonal Government had implied that public assemblies were prohibited in general.

134. The applicant association also submitted that, even supposing that a request for an exemption had been possible, a judicial appeal against an eventual refusal by the authorities would not have guaranteed a decision prior to the date of the planned event. In addition, an appeal to the Federal Supreme Court would undoubtedly have been declared inadmissible as being devoid of current interest; in support of this argument, it referred to the outcome of the proceedings in the so-called "Climate Strike" case.

135. Moreover, the applicant association considered that the particular circumstances of the present case, having regard especially to the serious nature of the interference with fundamental rights and the importance of judicial review in times of a public-health crisis, had been such as to release it from the obligation to exhaust the domestic remedies.

3. The Chamber judgment

136. The Chamber stated in its judgment that the applicant association had not been required to exhaust the legal remedies indicated by the Government, on the ground that they had not been effective and available in practice at the relevant time.

137. In particular, it noted that in the specific context of the general lockdown the national courts had failed to examine in good time the merits of appeals lodged with regard to freedom of assembly and to review the constitutionality of the impugned provisions. It concluded that the applicant association had not enjoyed at the relevant time an effective remedy, available in practice, by which to complain of a violation of Article 11 of the Convention. It also held that from 17 March 2020 onwards the applicant

association had no longer been able to request an exemption from the ban on organising a public event, on the basis of Ordinance COVID-19 no. 2.

4. The Court's assessment

(a) General principles pertaining to the exhaustion of domestic remedies

138. It follows from the Court's case-law that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is in the first place to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level (see, among many other authorities, *Vučković and Others*, cited above, §§ 69-77). Having regard to the subsidiary character of the supervision mechanism set up by the Convention, the Court has recognised on several occasions that the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned and that, through their direct and constant contact with the stakeholders in their country, the State authorities are in principle better placed than an international court to assess the local needs and context (see, for example, *Maurice v. France* [GC], no. 11810/03, § 117, ECHR 2005-IX, and *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 175, 15 November 2016, with further references).

139. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of these remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others*, cited above, § 71). To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004; *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II; *Vučković and Others*, cited above, § 74; and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 85, 9 July 2015).

140. The Court has frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism. It has further agreed that the rule on exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Gherghina*, cited above, § 87, and the case-law cited therein).

141. Thus, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar and Others v. Turkey*, 16 September

1996, § 67, Reports of Judgments and Decisions 1996-IV, and *Vučković and Others*, cited above, § 73). In this connection, the Court has considered, for example, that applicants were dispensed from the obligation to exhaust a remedy referred to by the Government where it was bound to fail and there were objective obstacles to its use (see *Sejdovic*, cited above, § 55); or where its use would have been unreasonable and would have constituted a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention (see *Vaney v. France*, no. 53946/00, § 53, 30 November 2004; *Gaglione and Others v. Italy*, nos. 45867/07 and 69 others, § 22, 21 December 2010; and *Fabris and Parziale v. Italy*, no. 41603/13, § 57, 19 March 2020).

142. That being said, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 70, 17 September 2009, and *Vučković and Others*, cited above, § 74).

143. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy advanced by them was an effective one, available in theory and in practice at the relevant time. Once this burden of proof has been satisfied it falls to the applicant to establish that the remedy was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010, and *Vučković and Others*, cited above, § 77).

144. In any event, in ruling on the issue of whether an applicant has met this admissibility criterion having regard to the specific circumstances of his or her case, the Court must first identify the act of the respondent State's authorities complained of by the applicant (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 226, ECHR 2014 (extracts)).

145. Where an applicant challenges a provision of a statute or regulation as being in itself contrary to the Convention, the Court has held that a remedy recommended under national law to review the compatibility of legislation with provisions of superior legal force is a domestic remedy that must be exhausted, provided that it is directly accessible to litigants (see *S.B. and Others v. Belgium* ((dec.), no. 63403/00, 6 April 2004; *a contrario*, *Tănase,* cited above, §§ 122 and 123; and *Parrillo*, cited above, §§ 101 and 104) and provided that the court applied to has jurisdiction, in theory and in practice, to abrogate a provision of a statute or of regulations that it considers contrary to a provision having superior legal force (see *Grišankova and Grišankovs v. Latvia* ((dec.), no. 36117/02, ECHR 2003-II (extracts), and *Burden*, cited above, § 40). Generally speaking, it is clear from the Court's case-law that whether a particular remedy, allowing for review of a law's compatibility

with provisions of superior legal force, is required under Article 35 § 1 of the Convention will depend largely on the particular features of the respondent State's legal system and the scope of jurisdiction of the court responsible for carrying out this review.

146. Lastly, with regard to the effectiveness of domestic remedies in the specific field of freedom of assembly, the Court requires that domestic law provides for adequate and effective legal safeguards against arbitrary and discriminatory exercise of the discretion left to the executive. This judicial review must make it possible to obtain an assessment of the proportionality and necessity of the impugned restriction within the meaning of Article 11 § 2 (see, *mutatis mutandis*, *Lashmankin and Others v. Russia* (nos. 57818/09 and 14 others, §§ 428 and 430, 7 February 2017). In addition, provided that the authorities are informed within the prescribed time-limits, organisers ought to be able to obtain a judicial decision before the date of the planned events (see *Bączkowski and Others v. Poland*, no. 1543/06, §§ 81-83, 3 May 2007; *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 99, 21 October 2010; and *Lashmankin*, cited above, § 345).

(b) Application of the above principles to the present case

147. The Court observes firstly that the situation complained of by the applicant association does not result from a specific measure restricting freedom of assembly taken against it by a public authority, but rather from the content of Ordinance COVID-19 no. 2 itself. The applicant association expressly claims that its application does not concern a refusal to organise a specific public event, but the general prohibition on public events arising from the version of the Ordinance in force from 17 March to 30 May 2020.

148. In those circumstances, the Court's task is to determine whether, in the light of the parties' submissions and all the circumstances of the case, the applicant association had available to it at the material time a domestic remedy that would have enabled it to obtain a review of whether that provision was compatible with the Convention. In this connection, regard must be had to the principles established in the Court's case-law in the specific sphere of applications for review of whether laws are compatible with the Convention (see paragraph 145 above).

149. The Government submitted that the applicant association ought to have requested authorisation to hold a public event; in the event of refusal, it would have had an opportunity to contest the authorities' formal decision before the cantonal and then the federal courts, on the ground that the domestic law was incompatible with the Convention and alleging a violation of Article 11 of the Convention.

150. It is clear from an examination of the Court's relevant case-law that, in establishing whether a remedy to obtain review of a law's compatibility with provisions of superior legal force is required by Article 35 § 1 of the

Convention, regard must be had to the particular features of the respondent State's legal system.

In the present case, it is not disputed that Swiss law does not allow for direct review of the constitutionality of a federal ordinance such as Ordinance COVID-19 no. 2. In accordance with Article 189 § 4 of the Constitution and section 82 (b) of the Federal Supreme Court Act, only cantonal normative acts may, as such, form the subject of a complaint to the Federal Supreme Court for the purpose of challenging their constitutionality (see paragraph 38 above).

151. Nonetheless, it is possible to obtain review of the compatibility of normative acts of the Federal Assembly and the Federal Council with provisions of superior legal force through a preliminary ruling, as part of the ordinary examination of a specific case by the judicial bodies at all levels. The Court notes that this possibility is clear from the Federal Supreme Court's consistent case-law, several examples of which were produced by the Government, including in the specific sphere of combating the COVID-19 pandemic (see paragraphs 48 and 52-63 above).

152. In the Court's view, all of the elements of relevant domestic law produced in the present case indicate that an application for a preliminary ruling on constitutionality, lodged in the context of an ordinary appeal against a decision implementing federal ordinances, is a remedy which is directly accessible to litigants and makes it possible, where appropriate, to have the impugned provision declared unconstitutional. Indeed, the applicant association does not dispute this, and has failed to submit any argument that would cast doubt on the effectiveness and availability in theory of this remedy. Rather, it seeks to dispute that such a remedy would have offered reasonable prospects of success in the particular circumstances of the present case.

153. In this connection, the applicant association argued, firstly, that having regard to the circumstances prevailing at the relevant time, it was unlikely that the ordinary court required to examine its case would have ruled in advance of the date of the planned event. In addition, once the case had been brought before the Federal Supreme Court, the latter would probably have refused to give a ruling on the ground that there was no current interest. According to the applicant association, the outcome of the so-called "Climate Strike" case proved the truth of its claims and the ineffectiveness in practice of the domestic remedies.

154. The Grand Chamber notes at the outset that the requirement that judicial review take place prior to the date set for the intended public event is a criterion that has been developed in the Court's case-law regarding remedies to secure judicial review of an individual measure restricting freedom of assembly as protected under Article 11. However, this criterion of "[within] a useful time", which was also referred to by the Chamber (see paragraphs 58-59 of the Chamber judgment) is not absolute, as the

consequences of failure to comply with it will depend on the particular circumstances of each case. It transpires from the Court's case-law that this criterion enters into play if the organisers comply with the time-limits laid down in the domestic law. Equally, the planned date of the event must be of crucial importance for the organiser (see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 109, ECHR 2001-IX; *Ivanov and Others v. Bulgaria*, no. 46336/99, § 74, 24 November 2005; *Bączkowski and Others*, cited above, § 81; and *Stowarzyszenie "Poznańska Masa Krytyczna" v. Poland* (dec.), no. 26818/11, 22 October 2013).

155. In so far as the situation complained of by the applicant association does not result from a specific measure restricting freedom of assembly, but from the very content of Ordinance COVID-19 no. 2, the Grand Chamber considers that this criterion is not in itself decisive for determining whether the remedy indicated by the Government made it possible, in the circumstances of the case, to obtain a review of whether the legislation in question was compatible with the Convention.

156. Secondly, with regard to the argument concerning the likelihood that an appeal against a first-instance decision would subsequently be examined on the merits by the Federal Supreme Court, the Court notes that the Government have produced several examples, including in the field of measures taken against COVID-19, showing that the Federal Supreme Court habitually waives the requirement of a current interest in order to have standing where the dispute is likely to recur in identical or similar circumstances, where the nature of the issue means that it cannot be determined before it is no longer topical, or if there are sufficiently important public-interest grounds for resolving the question in dispute (see paragraph 129 above).

157. It is true that in the so-called "Climate Strike" case, referred to by the applicant association in support of its allegations that this remedy would have been ineffective, the Federal Supreme Court, in examining the decision of the Administrative Division of the Court of Justice of the Canton of Geneva, did not assess the appeal on the merits, stating that the requirement of current interest to bring proceedings prevented it from dealing with the case. Nevertheless, the Federal Supreme Court justified its decision in the light of the specific circumstances of the case brought before it. In particular, it noted that the Administrative Division had waived the "current interest" requirement and had thus been able to examine the case at first instance, thereby satisfying the constitutionally-guaranteed requirement of access to a court. It also noted that the public-health situation had changed completely in the intervening period, a fact which had directly affected the question of the appeal's current interest on the date when the Federal Supreme Court was called upon to examine it. It further noted that the appellant party had failed to comment on the topicality of its standing to bring the case.

158. Equally, the Court notes that this Federal Supreme Court judgment of 12 August 2021 was delivered after the date on which the applicant association lodged its application with the Court. It reiterates that the effectiveness of a given remedy is normally assessed with reference to the date on which the application was lodged (see, *mutatis mutandis, Baumann v. France*, no. 33592/96, § 47, 22 May 2001; *Sürmeli v. Germany* [GC], no. 75529/01, § 110, ECHR 2006-VII; and *Norbert Sikorski v. Poland*, no. 17599/05, § 115, 22 October 2009).

159. In the Grand Chamber's view, the outcome of the so-called "Climate Strike" case cannot in itself be regarded as a particular circumstance which would have released the applicant association, at the relevant time, from the obligation to exhaust the domestic remedies prior to bringing its complaints before the Court. It reiterates that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Scoppola*, cited above, § 70, and *Vučković and others*, cited above, § 74). In addition, in a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and to allow the domestic courts to develop those rights by way of interpretation (see *Vučković and others*, cited above, § 84). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. The Court's power to review compliance with domestic law is thus limited, as it is primarily for the national authorities, notably the courts, to interpret and apply domestic law on a case-by-case basis (see, among other authorities and *mutatis mutandis, Burden,* cited above, § 42, and *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 110, ECHR 2015).

160. The Court draws attention to its fundamentally subsidiary role. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to evaluate local needs and conditions and to decide what is in the public interest (see, among many other authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V § 78; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012; and *Garib*, cited above, § 137). Furthermore, healthcare policy matters come within the margin of appreciation of the national authorities, who are best placed to assess priorities, use of resources and social needs. In this field, the Court has already had occasion to state that the margin of appreciation afforded to the States must be a wide one (see *Hristozov and Others v. Bulgaria*,

nos. 47039/11 and 358/12, §§ 119 and 124, ECHR 2012 (extracts), and *Vavřička and Others*, cited above, §§ 274 and 280).

161. It is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention. In particular, when the Court is called upon to address the complex and sensitive question of the balance to be struck between the various interests at stake for the purpose of verifying the necessity and proportionality of a given restrictive measure, it is essential that this balancing exercise has been carried out beforehand by the domestic courts (see *Zambrano v. France* (dec.), cited above, § 26, in the specific context of the COVID-19 pandemic).

162. In examining this case, the Grand Chamber cannot ignore the exceptional nature of the context which existed at the relevant time (see paragraphs 11-18 above). The emergence of the COVID-19 pandemic presented the States with the challenge of protecting public health while guaranteeing respect for every person's fundamental rights. The Court notes that all the member States of the Council of Europe decided to restrict certain fundamental rights, including freedom of assembly in public places (see paragraphs 66 and 74 above). During the first phase of the pandemic, a large number of international organisations and bodies underlined the need to take urgent measures with a view to mitigating the impact of the pandemic and compensating for the lack of a vaccine and medication (see paragraphs 64, 66 and 72 above). The Court also notes that these same bodies called on States to ensure that the rule of law, democracy and fundamental rights were maintained (see paragraphs 66-70 above).

163. The Court considers that in this unprecedented and highly sensitive context, it was all the more important that the national authorities were first given the opportunity to strike a balance between competing private and public interests or between different rights protected by the Convention, taking into consideration local needs and conditions and the public-health situation as it stood at the relevant time.

164. Having regard to the foregoing, the Court considers that the applicant association failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, namely, to prevent or put right eventual Convention violations through their own legal system (see, *inter alia*, *Gherghina*, cited above, § 115).

165. Even supposing that the applicant association can claim to have victim status (see § 126 above), the Government's preliminary objection of non-exhaustion of domestic remedies must therefore be upheld by the Court.

166. It follows that the application is inadmissible within the meaning of Article 35 § 1 of the Convention and must be dismissed in accordance with Article 35 § 4.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that the complaint under Article 11 of the Convention from the angle of trade-union freedom falls outside the scope of the case as submitted to the Grand Chamber and that, in any event, this complaint is inadmissible for failure to comply with the six-month time-limit;

2. *Allows*, by twelve votes to five, the Government's preliminary objection that the remainder of the application is inadmissible for non-exhaustion of domestic remedies.

Done in English and in French, and notified at a public hearing in the Human Rights Building, Strasbourg, on 27 November 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Síofra O'Leary
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktstakis and Zünd is annexed to this judgment.

S.O.L.
A.C.

JOINT DISSENTING OPINION OF JUDGES BOŠNJAK, WOJTYCZEK, MOUROU-VIKSTRÖM, KTISTAKIS AND ZÜND

(Translation)

1. The majority of the Grand Chamber have accepted the Government's preliminary objection of non-exhaustion of domestic remedies and have declared the application inadmissible. In so doing, they have completely invalidated the Chamber judgment of 15 March 2022, which had found a violation of Article 11 of the Convention on account of the measures taken by the Swiss Government between 17 March and 30 May 2020, in the context of tackling COVID-2019.

We are unable to share this approach.

2. We are fully aware that the respondent State, like the other member States of the Council of Europe, was faced with a public-health crisis of unprecedented scale. It goes without saying that such a situation required measures which were commensurate with the threat. However, the appearance of this crisis, or of any other crisis that might affect a High Contracting Party, cannot justify neglect of the fundamental principles on which a democratic society is based, in particular the enjoyment of individual freedoms.

Whatever the scale of the crisis and the fears to which it gives rise, the fundamental values of democratic societies must, more than ever, be preserved. From this perspective, more than in any other situation, the challenge facing the political and judicial authorities is to safeguard human rights and fundamental freedoms in a manner which remains practical and effective.

It is against this background that the procedural questions of victim status and exhaustion of the domestic remedies should be examined. These questions are closely linked to the very essence of the preservation of human rights and the rule of law.

3. With regard to victim status, it should be noted that, prior to the pandemic, the applicant association had on numerous occasions organised public events in support of trade-union and democratic freedoms. However, it was prevented from doing so following the introduction of the measures to combat COVID-19. It had planned and taken all the necessary steps with a view to organising a workers' demonstration on 1 May 2020, in line with its practice in previous years. The entry into force of Ordinance COVID-19, in the version applicable from 17 March, immediately prevented it from pursuing this activity. It should be noted that the Ordinance in force from 17 March admittedly provided for certain exemptions from the total ban on any public or private events, if this was justified by an overriding public

interest, but that - in contrast to the version of the Ordinance in force prior to 17 March 2020 - the exercise of political rights was abolished.

4. The applicant association, which had already decided not to organise the traditional commemorative march on 1 May, submitted an authorisation request for a static demonstration by 20 persons on the Mont-Blanc Bridge in Geneva, but it was informed by the Department for Security, Employment and Health that the gathering was prohibited within the meaning of Ordinance COVID-19 no. 2 (see paragraph 31 et seq. of the present judgment).

In addition, throughout the entire period of application of Ordinance COVID-19 no.2, no exemption for a political event was granted anywhere in Switzerland. The authorisations that were granted concerned other types of public events, such as municipal assemblies, information meetings, religious gatherings, training courses and events organised by sports bodies and professional associations (see paragraph 37 of the present judgment). It follows, in our opinion, that political demonstrations were automatically and systematically forbidden by Ordinance COVID-19 no. 2, although they are a fundamental vehicle of citizens' democratic expression.

5. In order to be considered a victim within the meaning of Article 34 of the Convention, an individual must be able to show that he or she was "directly affected" by the measure complained of, which generally implies that an individual measure has been taken against him or her.

The Court's case-law recognises, however, that, in the absence of an individual measure of implementation an applicant can claim that a law breaches his or her Convention rights and that he or she can be considered as a victim where, firstly, they have been required either to modify their conduct or risk being prosecuted, or, secondly, where they have adequately demonstrated that they belong to a class of people who are affected or risk being directly affected by the legislation in question (see paragraphs 107 and 110 of the present judgment).

6. In our view, the applicant association fits squarely into these two categories. Non-compliance with the ban on gatherings was punishable by a custodial sentence of up to three years or by a financial penalty (see paragraph 42 of the present judgment).

In the case of *S.A.S. v. France* ([GC] no. 43835/11, ECHR 2014) which concerned the wearing of the full-face veil in public, the maximum fine provided for by the legislation was 150 euros (§ 28). The Court in that case recognised the victim status of a woman who wished to wear the full-face veil occasionally and was thus confronted with a dilemma: either to comply with the ban, or to refuse to comply and face prosecution (ibid., § 57).

Admittedly, in the case before us the application association would not itself have been directly punished, since the criminal liability of a non-profit-making private association could not be engaged (see paragraphs 47, 90 and 112 of the present judgment). It remains the case, however, that – where certain conditions were met – criminal sanctions could have been imposed on

the representatives of the applicant association and persons participating in an event organised by it. We find it unreasonable and excessively formalistic to deny that the applicant association in the present case was confronted with the same dilemma as that facing the applicant in the above-cited S.A.S. case.

In addition, with regard to the possibility that the applicant association could have requested and obtained an exemption from the ban on organising a gathering, this strikes us as purely theoretical, given (i) that the Government have been unable to cite a single example, anywhere in Switzerland, where such an exemption was granted, and (ii) that the cantonal court had dismissed, in the context of another case ("Climate Strike") a request for authorisation on the basis of Ordinance COVID-19 no. 2; for its part, the Federal Supreme Court simply declared the appeal inadmissible.

For these reasons, it is our opinion that the preliminary objection raised by the Government as to the lack of victim status ought to have been dismissed.

7. With regard to the preliminary objection of non-exhaustion of domestic remedies, we subscribe to the findings of the Chamber (see the Chamber judgment, §§ 55-60; see also the summary in the present judgment, paragraph 136 et seq.).

Further, it is admittedly correct that the applicant association could have requested authorisation for a specific gathering, while simultaneously requesting an exemption from the ban on political events and asking for a preliminary ruling on whether Ordinance COVID-19 no. 2 was compatible with the Swiss Constitution and the Convention. This would have been possible in theory and *in abstracto*, but not in practice, and not in the pandemic context.

It appears that all of the exemptions to which the Government refer concern manifestations that were either apolitical in nature or were organised by the authorities themselves (see point 4 of the present opinion and paragraph 37 of the present judgment). The attempt in the so-called "Climate Strike" case to have the Federal Supreme Court review, through a preliminary ruling, whether the impugned text was compatible with the higher-ranking law proved unsuccessful. The Federal Supreme Court initially allowed the case to drag on for almost a year (see the Chamber judgment, §§ 27 and 58), before ultimately stating not only that there was no current interest in ruling on the case, but also that situations of this type (prohibitions on public events on account of the pandemic) would probably not reoccur in the future under identical or similar rules and that there was therefore no need to rule on the matter. In our opinion, this approach demonstrates that those remedies which were available in theory were not available in practice.

For their part, the majority object that this particular Federal Supreme Court judgment was delivered after the date on which the application was lodged with the Court and that it is therefore not to be taken into account in assessing the effectiveness of a remedy, something that is assessed with reference to the date on which the application is lodged (see paragraph 158

of the present judgment). However, the judgments cited by the majority state only that an objection of non-exhaustion must be based on the remedies that were available on the date that the application was lodged. They certainly do not make it impossible to show, through the decision of a domestic court delivered after the lodging of an application, that a remedy considered by the Government to be available was non-existent, or was not effective, at the time that the application was lodged.

We further note the Court's case-law, which specifies that when the timing of public events is crucial for the organisers and participants, as was the date of 1 May in the present case, the notion of an effective remedy implies the possibility of obtaining a ruling concerning the authorisation of the event before the time at which it is intended to take place (see *Bączkowski and Others v. Poland*, no. 1543/06, §§ 81-82, 3 May 2007). Equally, the OSCE/ODIHR/Venice Commission Guidelines on freedom of peaceful assembly (CDL-AD(2010)020) emphasise that a final ruling, or at least an injunction, should be given prior to the notified date of the assembly (point 4.6).

8. In sum, we consider that neither the preliminary objection of lack of victim status nor that of non-exhaustion of domestic remedies can be accepted.

9. On the merits, we agree with the Chamber's reasoning in its judgment of 15 March 2022, and with the analysis of Judges Krenc and Pavli in their concurring opinion.

In short, at the relevant time – that is, at the culmination of the pandemic, and at a time of great scientific uncertainty about the COVID-19 virus – Switzerland, like other member States, took radical measures to prevent the disease from spreading. In such situations, the role of the courts is crucial. It is their task to ensure that the regulations adopted by the Government do not go beyond what is necessary and that they comply with the principle of proportionality. In a democracy, the possibility of free discussion remains paramount. Hence the importance of freedom of expression and freedom of assembly in this context. It is admittedly true that the Court must respect the member States' margin of appreciation in weighing up the requirements of combatting a pandemic on the one hand, and fundamental freedoms on the other. However, no such margin of appreciation exists with regard to the availability of judicial remedies.

10. We regret that the Grand Chamber has not acknowledged that the principles which are at the heart of a democratic society are "vulnerable" in times of crisis, in terms both of procedure and of substance. It has thus passed up an opportunity to develop "crisis law" in the context of our Convention, once again leaving to the Contracting States a margin of improvisation which is fraught with danger and the risk of abuse, and which will find expression in a future global crisis.