Judicial Limitation of Claims vs Effective Protection of Rights under the ECHR

O.G. and others v Greece (App. Nos. 71555/12 and 48256/13)

European Court of Human Rights (Chamber): Judgment of 23 January 2024

Introduction

When bringing a claim to the European Court of Human Rights (ECtHR or the Court) applicants may expect that the Court will consider all aspects of the complaint to determine its admissibility and merits before concluding whether the respondent state has complied with its obligations under the European Convention on Human Rights (ECHR or the Convention). In practice, however, it is commonplace for the Court not to examine all issues pertaining to a specific application and to limit the scope of the applicant's complaint. This might occur where a single state action or omission engages multiple Convention rights.[1] In such instances, if the Court finds a violation for one Article, it may consider it unnecessary to examine the claim the applicant raises about the same state (in)action under other Articles.[2] Additionally, where multiple state actions or omissions are at issue, the Court may decide to examine some of the claims and, if it finds a violation, determine that it is not necessary to consider the remaining claims when they raise no separate issues.[3] The justifications the Court provides for these practices vary.[4] However, if the Court chooses to limit a claim, questions arise firstly, as to the considerations that will determine which right will be given priority when more than one Convention articles apply to the same state behaviour; and secondly, how the Court determines which aspects of an applicant's claim are worthy of examination when multiple state actions are at issue.

The ECtHR's recent judgment in *O.G. and others v Greece*[5] serves as a useful case study to reveal potential issues in the Court's approach to limiting the scope of a complaint. While the outcome of the case favoured the applicants in that the Court found multiple Convention violations and awarded them considerable damages,[6] the judgment raises questions as to how the Court justified its decision to focus only on certain aspects of a particularly complex series of events that gave rise to multiple allegations of Convention failures. This case study allows us to consider broader issues pertaining to the judicial limitation of an applicant's complaint and to determine when such

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[1] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania [GC]* (App. No.47848/08), judgment of 17 July 2014 at [154]. Greene refers to this as "allegation picking" see A. Greene, "Allegation Picking and the European Court of Human Rights as a Strategic Actor" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4861812.

[2] *Centre for Legal Resources on behalf of Valentin Câmpeanu* (App. No.47848/08), judgment of 17 July 2014 at [154].

[3] *Mehmet Hatip Dicle v Turkey* (App. No.9858/04), judgment of 15 October 2013 at [41].

[4] The different contexts where this appears will be presented and assessed below.

[5] *O.G. and others v Greece* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024.

[6] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [165].

practices are an acceptable exercise of judicial economy[7] and when they may undermine the effective protection of rights. This note concludes that while judicial limitation is an appropriate means for the Court to resolve disputes expeditiously, any limitation must be carried out by reference to principled and coherent justifications.

After presenting the facts and the outcome of *O.G. and others* in more detail in section 2, section 3 of this note outlines the concept of judicial limitation in international adjudication. Section 4 delves into how the Court in this judgment justified its choice to examine one of the claims relating to a forcible medical intervention through the prism of Article 8 rather than Article 3 and argues that the approach that was adopted was problematic. Section 5 contests the Court's justifications for discarding the applicants' remaining complaints and argues that these claims raised separate issues that required careful consideration. This will lead to the conclusion that the Court ought to demonstrate a greater degree of consistency and clarity when deciding to limit its examination of a specific claim.

2. What the Court decided in *O.G. and others v Greece* (and what it did not decide)

The claim in *O.G. and others* was brought by 11 applicants[8] who had been arrested during a police operation in the centre of Athens on suspicion of engaging in prostitution without the necessary permit. They were detained for several days in a police precinct in cells that were meant for short-term detention.[9] Following their arrest, they were forcibly subjected to blood tests to determine their HIV status. Those who were found to be living with HIV were prosecuted for, amongst other offences, attempting to cause serious bodily injury.[10] Subsequently, their names, photographs, and HIV status were published on the official police website. This information was disseminated widely by the Greek press. The Greek authorities contended that this measure was necessary to warn potential clients who may have had unprotected sex with the applicants to seek medical support. Additionally, if any clients were found to have contracted HIV, their identification would provide further evidence to assist the criminal case against the applicants.[11] The publication of this data led to the media targeting the applicants and their families and subjecting them to

[7] This concept will be explored in more detail in section 3 of this note.
[8] There were eight applicants in application 71555/12 and three applicants in 48256/13. The Court decided to join the applications given the similarity of the subject matter, see *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [68].
[9] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [40].
[10] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [8].
[11] The criminalisation of HIV transmission and the placement of the responsibility for transmission entirely on the shoulders of the applicants raises issues that are outside the scope of the judgment and this note. On this, see B. Haire and J. Kaldor, "HIV Transmission Law in the Age of Treatment-as-Prevention" (2015) 41 *Journal of Medical Ethics* 982 and C. Giles, "Digital disclosure: HIV status, mobile dating application design and legal responsibility" (2021) 30 *Information and Communications Technology Law* 35, 50.

unprecedented public shaming.[12] These events received global attention, with UNAIDS, the joint United Nations programme on HIV/AIDS, condemning the Greek authorities' approach.[13]

In bringing their claims to the Court, the applicants raised separate issues for each of the aforementioned events. Namely, claims were brought under arts 3 and 8 ECHR in relation to the forcible medical procedure, under art.8 for the publication of the applicants' sensitive medical and other data, under art.5 challenging legality of their detention, under art.3 for the conditions of this detention, and under art.13 in relation to all claims.

After addressing some preliminary issues relating to the admissibility of the claims,[14] the Court began its analysis by focusing on the medical testing to which the applicants were subjected. The applicants alleged that these tests were carried out without their consent. Additionally, some applicants who were struggling with addiction complained that they were experiencing withdrawal symptoms at the time and, consequently, could not have given valid consent to the procedure. The applicants argued that, for these reasons, the forcible testing amounted to violations of arts 3 and 8 ECHR.

At the outset, the Court noted that:

> The Court, master of the legal characterisation of the facts of the case, considers first of all that in the current state of its case law and having regard to the nature of the applicants' complaints, the questions raised by the present case must be examined solely from the perspective of Article 8 of the Convention.[15]

Thus, in relation to the forcible medical testing, the art.3 claim was discarded. The Court ultimately found a violation of art.8 on the basis that the interference was not prescribed by law as there was no clear and foreseeable legal basis that would have allowed authorities to carry out blood tests on the applicants without their consent.[16] Due to this finding, the Court did not proceed with an assessment of the legitimate aim behind the measure or its necessity.[17]

The Court then examined the art.8 claim relating to the publication of the applicants' names, photographs, and HIV status. The Court found that this measure was prescribed by law and served the legitimate aim of protecting the rights of others, namely the rights of any clients who might have had unprotected sex with the applicants.[18] In determining the necessity of the measure, the

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[12] For an account of the applicants' experience see the documentary 'Ruins - Chronicle of an HIV witch-hunt' (2013) directed by Zoe Mavroudi, *https://www.youtube.com/watch?v=LlbL4sQ3_Fo*.
[13] UNAIDS Press Release, "UNAIDS calls on Greece to protect sex workers and their clients through comprehensive and voluntary HIV programmes" (Unaids.org, 10 May 2012), *https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/may/20120510psgreece*.
[14] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [97]-[106].
[15] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [89]. All quotes are translated from the original French by the author.
[16] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [115]-[122].
[17] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [121].
[18] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [149].

Court noted that data relating to HIV status are particularly sensitive and therefore stringent justifications were required for publication.[19] Consequently, a narrow margin of appreciation applied, and the reasons adduced to justify the publication of the applicants' data would be subject to a stricter level of scrutiny. The Court noted that the applicants were not informed about the impending publication of their data and were not given the opportunity to contest this publication.[20] Additionally, the authorities did not consider the impact that this measure would have on the particular circumstances of the applicants.[21] Ultimately, the Court concluded that authorities could have achieved the same result (protecting the health of the applicants' clients) by releasing a general statement informing the public that sex workers arrested in Athens were found to be HIV-positive.[22] Therefore, the publication of the applicants' data was not necessary to achieve the intended aim. For this reason, the publication of the applicants' sensitive medical data amounted to an art.8 violation.

Following this finding, the Court concluded that

> having regard to the facts of the case, the arguments of the parties and the conclusions formulated under Article 8 ECHR, the Court considers that it has examined the main legal questions raised by the present applications and that there is no need to rule separately on the other complaints.[23]

Therefore, all the remaining claims relating to the legality and conditions of the applicants' detention at the police precinct, as well as their art.13 claim were not addressed.

3. Judicial economy and the "*stricto* and *lato* sensu" judicial limitation of applicants' complaints

The applicants' decision to raise multiple claims arising from their treatment during and after their arrest reflects the fact that those bringing cases before the ECtHR may opt for a maximalist approach, by raising as many Convention issues as possible to challenge the behaviour of the respondent state. Conversely, the Court may want to deal with cases expeditiously by finding the most straightforward and clear resolution to the dispute. The practice of judges deciding only on specific aspects of a claim is not exclusive to the ECtHR.[24] This type of judicial limitation of the scope of a claim can be viewed as a form of judicial economy,[25] which in international adjudication is more broadly understood to require the judge "to obtain the best result in the management of a controversy with the most rational and efficient use possible of his or her

[19] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [152].
[20] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [151]-[152].
[21] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [155].
[22] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [156].
[23] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [161].
[24] F.P. Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23 *Leiden Journal of International Law* 909, 913-917.
[25] F.P. Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23 *Leiden Journal of International Law* 909, 913.

powers".[26] Palombino distinguishes between the strict and *lato sensu* understanding of judicial limitation. In its strict sense, judicial limitation:

> postulates a certain order between the issues to be decided – that is, the presence of an issue which, as a matter of logic, should be analysed before the others; if the decision as to the former issue is able to settle the dispute by itself (absorbing issue), it either precludes or implies a solution to the latter (absorbed issue).[27]

This is distinguished from the *lato sensu* understanding:

> where the judge does not wish to enter into a particular question raised in the proceeding and to this end decides the issue which is not logically anterior to the others but in any case, enables the dispute to be settled and the resolution of that question to be precluded or implied.[28]

This latter form of judicial limitation can also be characterised as "judicial avoidance",[29] namely a means for the international judge to resolve the dispute while not getting drawn into a particularly sensitive or controversial area that, for instance, may result in pushback from states.

Whether a specific instance of judicial limitation should be classed as *lato* or *stricto* sensu may, in some cases, be subjective. Normative considerations play an important role in determining which aspect of a claim might be anterior to others or to identify what the most important aspects of a claim are. These may also differ between what the *applicants* consider to be the most egregious violations and what *the Court* considers important to address. With these considerations in mind, the subsequent sections demonstrate how the Court's justifications for limiting the scope of the applicants' claim in the case at issue raises important questions that are worthy of closer inspection.

4. Issues arising from the same state action / omission: The forcible blood testing *in O.G. and others* and the choice of applicable rights

The first facet of the case worth exploring is the Court's justification for only examining the forcible blood testing through the prism of art.8. After presenting some of the justifications that the Court has deployed in its broader case law to justify the examination of one right over another where a single state action or omission is involved, this section focuses on the "master of characterisation" argument that was used in the present case to discard the art.3 claim. The use of this approach is peculiar, as it implies that art.3 was inapplicable to the case. After explaining why there was in fact at least an arguable case to be made that the applicants' treatment breached art.3,

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[26] F.P. Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23 *Leiden Journal of International Law* 909, 913.
[27] F.P. Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23 *Leiden Journal of International Law* 909, 913.
[28] F.P. Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23 *Leiden Journal of International Law* 909, 913.
[29] F.P. Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23 *Leiden Journal of International Law* 909, 913.

this section concludes that the master of characterisation argument was an inappropriate means to dismiss the art.3 argument in this case.

The Court's decision to examine a specific state (in)action under one Article when more than one applies is not, in itself, objectionable. There might be good reasons for the Court to opt for the most straightforward path to the resolution of a dispute and to avoid getting caught up in circuitous reasoning. As judges have noted in separate opinions, "in principle, the Court should not find dual or multiple violations in cases where single material acts are involved".[30] This approach, however, requires the Court to justify why a certain right is to be preferred over another. The justifications that the Court provides in its case law in this respect vary. In some cases, the preference for one Article over another is due to technical reasons. For instance, if one of the rights engaged is considered *lex specialis* in the specific context of the case, the Court will give it precedence over the right it regards as *lex generalis*.[31] In other cases, the finding of a violation for one Article might render the examination of the other moot. For instance, where the killing of a person by state agents is found to violate art.2, the Court will not consider it necessary to examine whether this use of force also amounted to a violation of art.3.[32] The Court may also not assess a claim under another right that is applicable if the applicants did not specifically make representations before the Court as to that right.[33]

In other instances, the choice of which right(s) the Court will examine may be more controversial. For instance, the Court's approach to discrimination claims brought under art.14 in conjunction with another Article has been criticised as inconsistent and contradictory.[34] The Court has oftentimes not carried out an art.14 assessment after finding a violation of the main Article, even when, arguably, "the issue of discrimination was a fundamental aspect of the case".[35] Additionally, issues as to the applicable rights may arise when the Court is asked to expand the scope of

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[30] *Jalloh v Germany [GC]* (App. No.54810/00), judgment of 11 July 2006, dissenting opinion of Judges Wildhaber and Caflisch at [15].

[31] For instance, the Court has noted the "symbiotic link" between arts 10 and 11 in relation to demonstrations but considers art.11 to be the *lex specialis* in this context. See *Kudrevičius and Others v Lithuania [GC]* (App. No.37553/05), judgment of 15 October 2015 at [85] and D. Mead, 'The right to peaceful protest under the European Convention on Human Rights - a content study of Strasbourg case law' [2007] *European Human Rights Law Review* 345, 345. Similarly, art.6 is considered *lex specialis* in relation to art.13. See *Baka v Hungary [GC]* (App. No.20261/12), judgment of 23 June 2016 at [181].

[32] *Nikolova and Velichkova v Bulgaria* (App. No. 7888/03), judgment of 20 December 2007 at [78]; *Shchiborshch and Kuzmina v Russia* (App. No. 5269/08), judgment of 16 January 2014 at [264].

[33] In *Kudrevičius and Others* (App. No. 37553/05), judgment of 15 October 2015 at [193], for instance, after finding a violation of art.11 the Court noted that "in their observations before the Grand Chamber, the applicants did not specifically address the complaint that they had raised before the Chamber under Article 7 of the Convention. That being so, the Court considers that it is not necessary to carry out a separate examination of whether there has been a violation of Article 7 of the Convention."

[34] See indicatively P. Johnson, "Sexual orientation discrimination and Article 14 of the European Convention on Human Rights: the problematic approach of the European Court of Human Rights" [2023] *European Human Rights Law Review* 548, 563.

[35] D. Harris and others, *Law of the European Convention on Human Rights* (5th edn, Oxford University Press, 2023), p. 775.

protections offered under the ECHR through evolutive interpretation. In *Lăcătuş v. Switzerland*,[36] for instance, the applicant raised an issue that the Court had not previously addressed, namely whether a blanket ban on begging under penalty of criminal law was compatible with arts 8 and 10. In its judgment, the Court, for the first time, determined that under certain circumstances the protection of private life under art.8 could encompass a right for a destitute person to approach others to seek financial assistance.[37] The Court ultimately found a violation of art.8 and did not consider it necessary to examine the art.10 complaint,[38] even though the claim was brought under the latter provision in domestic proceedings[39] and freedom of speech is the right that other judicial fora, for instance the US Supreme Court, have found to be relevant to the context of soliciting funds in a public space.[40] In this instance, the choice as to which right the Court will develop appears random and arbitrary.

The justification on which the Court relied to discard the art.3 claim in relation to the blood testing in *O.G. and others* is altogether different. The Court did not refuse to examine art.3 on the basis that this was not necessary after finding a violation of art.8. Instead, the Court relied on the fact that it is the "master of the characterisation" to be given in law to the facts of a case to conclude that art.8 was the appropriate right to examine under the circumstances.[41] This approach is linked to the *jura novit curia* principle which determines that the Court

> is not bound by the legal grounds adduced by the applicant […] and has the power to decide on the characterisation to be given in law to the facts of a complaint by

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[36] *Lăcătuş v Switzerland* (App. No.14065/15), judgment of 19 January 2021 at [53].
[37] *Lăcătuş* (App. No. 14065/15), judgment of 19 January 2021 at [55]-[60].
[38] *Lăcătuş* (App. No. 14065/15), judgment of 19 January 2021 at [120]. Nevertheless, in a concurring opinion, Judge Keller set out a convincing account as to why Article 10 was also applicable to the case. The Court also did not examine the discrimination aspect of the claim brought under Article 14 in conjunction with Article 8. [123]. On this judgment, see S. Ganty, "The Double-Edged ECtHR Lăcătuș Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei" (2022) 3 *European Convention on Human Rights Law Review* 393-420 and Dimitrios Kagiaros, "Is begging speech? Assessing Judge Keller's concurring opinion in *Lăcătuş v Switzerland*' (*Strasbourg Observers*, 12 February 2021), *https://strasbourgobservers.com/2021/02/12/is-begging-speech-assessing-judge-kellers-concurring-opinion-in-lacatus-v-switzerland/#:~:text=She%20ultimately%20concludes%20that%20begging,the%20purposes%20of%20the%20Convention*.
[39] *Lăcătuş* (App. No. 14065/15), judgment of 19 January 2021 at [8], although, ultimately, domestic courts determined that freedom of expression was not engaged.
[40] *Schaumburg v Citizens for a Better Environment*, 444 U.S. 620 (1980) recognising that solicitation for money is closely intertwined with speech.
[41] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [89]; *Söderman v Sweden [GC]* (App. No. 5786/08), judgment of 12 November 2013 at [57]. See also, D. Spielmann, "The European Court of Human Rights: Master of the Law but not of the Facts?" Speech to the British Institute of International and Comparative Law (6 November 2014), *http://9bri.com/wp-content/uploads/2014/11/Spielmann_Jeudi_6_novembre_2014.pdf.*

> examining it under Articles or provisions of the Convention that *are different from those relied upon by the applicant*.[42]

As this quote suggests, the *jura novit curia* principle has been deployed primarily as a rationale for the Court to examine a claim under Articles on which the applicant *had not* relied in their application.[43] Therefore, as a tool, its main function has been viewed as one of "requalification of applications".[44] Even when the master of characterisation approach is used to justify the preference for a specific right over an another that the applicant put forward, this has been accompanied by a thorough explanation. In *S.M. v. Croatia*[45] for instance, the complainant challenged Croatia's failure to fulfil its positive obligations under arts 3, 6 and 8[46] after authorities were made aware that the applicant had been forced into prostitution. In the Chamber judgment in this case, the Court relied on the master of characterisation approach to decide the case under art. 4 and ultimately found a violation of this right.[47] When the case reached the Grand Chamber, the applicant's claims were reformulated to include a complaint under art. 4 along with arts 3 and 8.[48] The Court invoked the 'master of characterisation' approach once again to justify its reliance exclusively on art. 4 to resolve the case, but this reference to the principle was accompanied by an acknowledgment that the remaining articles were also relevant to the case.[49] The Grand Chamber ultimately justified its choice on the basis that the claim raised issues linked to human trafficking, and therefore, it was more appropriate for this claim to be examined under art. 4.[50]

Conversely, in *O.G. and others*, where the applicants brought their claims under both arts 8 and 3,[51] no further elaboration was provided to explain the choice of art 8. Therefore, the inference that can be drawn from the Court's decision to invoke the "master of characterisation" argument and its emphasis that the forced medical intervention "*must* be examined *solely*"[52] under art.8, is that art.3 was inapplicable to the facts of the case.

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[42] *Nicolae Virgiliu Tănase v Romania [GC]* (App. No. 41720/13), judgment of 25 June 2019 at [83] (emphasis added). Similarly, Article 32 ECHR provides that the Court's jurisdiction extends "to all matters concerning the interpretation and application of the Convention".

[43] *Nicolae Virgiliu Tănase* (App. No. 41720/13), judgment of 25 June 2019 at [86] where the Court used this principle to examine the case under arts 2 and 8 which had not been raised by the applicant. See also *Milićević v Montenegro* (App. No. 27821/16), judgment of 6 November 2018 at [36]-[39]; *Erményi v Hungary* (App. No. 22254/14), judgment of 22 November 2016 at [18]-[19]; *Molla Sali v Greece [GC]* (App. No. 20452/14) judgment of 19 December 2018 at [84]-[86].

[44] *Brisc v Romania* (App. No.26238/10), judgment of 11 December 2018, dissenting opinion of Judges Kūris and Yudkivska at [36].

[45] *S.M. v Croatia* (App. No. 60561/14), judgment of 19 July 2018.

[46] On this see K. Hughes, 'Human Trafficking, *SM v Croatia* and the Conceptual Evolution of Article 4 ECHR' (2022) 85 Modern Law Review 1044, 1050 and the discussion in fn 31 in particular.

[47] *S.M. v Croatia* (App. No. 60561/14), judgment of 19 July 2018 at [36].

[48] *S.M. v Croatia* [GC] (App. No. 60561/14), judgment of 25 June 2020 at [240].

[49] *S.M. v Croatia* [GC] (App. No. 60561/14), judgment of 25 June 2020 at [241].

[50] *S.M. v Croatia* [GC] (App. No. 60561/14), judgment of 25 June 2020 at [242] –[243].

[51] *O.G. and others* (App. Nos 71555/12 and 48256/13), judgment of 23 January 2024 at [89].

[52] *O.G. and others* (App. Nos 71555/12 and 48256/13), judgment of 23 January 2024 at [89] (emphasis added).

If this inference is correct, the Court's approach required further justification as it does not seem to align with its previous case law. In the Grand Chamber judgment in *Jalloh v Germany*, for instance, the Court adopted the opposite approach to a forcible medical intervention, by finding a violation of art.3 and then noting that no separate issues arose in relation to the art.8 claim.[53] While, as will be developed below, there are significant differences between *Jalloh* and *O.G and others*, this judgment suggests that the art.3 claim was, at least, arguable in the latter case, rather than inapplicable as the Court's approach implies.

In *Jalloh*, the applicant had swallowed a small plastic bag as he was being arrested by the police on suspicion of drug trafficking. The authorities had forcibly administered emetics to the applicant to retrieve the bag, which they suspected contained drugs. The Court noted that art.3 does not as such preclude forcible medical interventions to obtain evidence of participation in a criminal offence, but "the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3".[54] The particularly violent nature of the intervention played a significant role in the finding of an art.3 violation in *Jalloh*.[55] The emetics were administered in the applicant's stomach through a tube placed through his nose while he was pinned down by four police officers. These conditions were considered sufficient to arouse in the applicant "feelings of fear, anguish and inferiority that were capable of humiliating and debasing him"[56] and led the Court to conclude that this treatment was inhuman and degrading due to the combined physical pain and mental anguish it caused the applicant.[57] The finding of an art. 3 breach led the Court to conclude that it was not necessary to examine the Article 8 dimension of the case.[58] It is important to note here qualitative difference between the finding of an art. 3 and an art. 8 violation. The absolute character of art. 3 and the fact that it "enshrines one of the most fundamental values of democratic societies […] [and] is a value of civilisation closely bound up with respect for human dignity"[59] may justify why it was given precedence in *Jalloh*. The Court's decision not to examine the art. 8 dimension in this case is a more defensible exercise in judicial economy, on the basis that a graver violation, that of art. 3, had already been established, and as a result, the art 8 claim was absorbed by this finding.

Due to the *ab initio* rejection of the art.3 claim in *O.G. and others*, there is no detailed discussion as to the means of coercion, physical or otherwise, that authorities used to conduct the forcible blood tests on the applicants. If no excessive force was used, this could justify the Court's consideration that art.8 was the more appropriate right on which to base its findings. However,

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[53] *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [86].
[54] *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [72].
[55] It is notable that in a dissenting opinion in *Jalloh [GC]* (App. No.54810/00), judgment of 11 July 2006, Judges Wildhaber and Caflisch disagreed with the finding of an art.3 violation, but did find a violation of art.8 based on the facts of this case.
[56] *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [82].
[57] *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [82].
[58] *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [86].
[59] *Bouyid v. Belgium [GC]* (App. No. 23380/09), judgment of 28 September 2015 at [81].

even if the police did not resort to physical force to ensure that the applicants complied to the blood tests, there are issues that make an art.3 violation plausible. More specifically, the drug dependency reported by some of the applicants and the fact that they were experiencing withdrawal symptoms during and following their arrest, as well as their HIV status are factors that, according to the Court's case law, increase the applicants' vulnerability.[60] Vulnerability is a criterion that plays an important role in determining whether certain treatment reaches the minimum level of severity required for an art.3 violation and has the effect of lowering this threshold.[61] Moreover, while individuals in police custody are generally considered vulnerable,[62] the Court has been particularly sensitive to situations where applicants have more than one characteristic pointing to vulnerability.[63] In such a context, where the vulnerable applicant is subjected to a forcible medical procedure in detainment while experiencing withdrawal symptoms and, as the applicants alleged, is *unable* to consent (rather than *refusing* to consent), legitimate questions arise as to whether the forcible medical testing would amount to degrading treatment under art.3. If we assume that in *O.G. and others* no actual bodily injury or intense physical or mental suffering was caused by the blood tests, the standard to be applied to determine the minimum level of severity is whether the treatment "humiliates or debases an individual showing a lack of respect for or diminishing his or her human dignity".[64] The case at hand provides a blunt example of a person's body being used as a means to an end, where the applicants' condition of extreme vulnerability is instrumentalised by authorities to avoid any resistance while carrying out blood tests to retrieve evidence that achieves the aims of law enforcement. However, lack of consent is not, in itself, sufficient to meet the required minimum level of severity. As Mavronicola emphasises, "coercion does not always entail inhuman or degrading treatment."[65] For instance, it would be difficult to argue convincingly that a forcible medical intervention to save the applicants' lives if they were exhibiting symptoms of a drug overdose at the police station would have violated art.3. Therefore, the *purpose* and *necessity* of the forcible testing are important criteria in determining whether the treatment attained the required minimum level of severity.[66] As to the purpose, it is notable that these tests were not

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[60] *Wenner v Germany* (App. No. 62303/13), judgment of 1 September 2016 in relation to drug use and *Kiyutin v Russia* (App. No. 2700/10), judgment of 10 March 2011 designating people living with HIV as a vulnerable group. For a more thorough discussion on the role vulnerability analysis could have played in this case, see D. Kagiaros, "*O.G. and others v. Greece*: a belated vindication for (some) sex workers living with HIV" (*Strasbourg Observers*, 27 February 2024), *https://strasbourgobservers.com/2024/02/27/o-g-and-others-v-greece-a-belated-vindication-for-some-sex-workers-living-with-hiv/*.

[61] C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Hart Publishing, 2021), pp.137-138.

[62] For a detailed discussion see N. Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing, 2021), p.92 citing *Bouyid v. Belgium [GC]* (App. No. 23380/09), judgment of 28 September 2015 at [107].

[63] C. Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Hart Publishing, 2021), p.117.

[64] *Bouyid* (App. No. 23380/09), judgment of 28 September 2015 at [87].

[65] N. Mavronicola, "*Güler and Öngel v Turkey*: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force" (2013) 76 *Modern Law Review* 370, 381.

[66] N. Mavronicola, "*Güler and Öngel v Turkey*: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force" (2013) 76 *Modern Law Review* 370 (for a discussion as to why a discussion of necessity in this context does not undermine the absolute character of art.3 ECHR).

conducted for therapeutic reasons, but to further the aims of law enforcement and, purportedly, to protect the rights of others.[67] The necessity of conducting the tests while the applicants were experiencing withdrawal symptoms is also questionable. In *Jalloh*, the authorities argued that the emetics had to be administered as a matter of urgency as there was concern that the bag would burst if it was not removed and place the applicant's life at risk, an argument that ultimately failed to sway the Court.[68] No similar urgent reasons are present here, as the tests could have been carried out soon after the applicants had recovered without significantly affecting the rights of the applicants' clients. Determining the HIV status of the applicants at the specific time through a forced medical intervention was, therefore, not justifiable.

Additionally, although it is unclear to what extent physical force was used to subdue the applicants to carry out the tests or the degree to which the applicants resisted, the Court has held that "in respect of a person who is deprived of his liberty, […] any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3".[69]Consequently, the exclusion of the art.3 claim in *O.G. and others* required further justification. If the Court considered the art.3 argument to be weak, it would have been preferable for the Court to use other tools at its disposal to reject it. For instance, the Court could have found this part of the claim inadmissible as manifestly ill-founded and explained its reasons,[70] or it could have found no violation of art. 3.. If the Court wished to rely on the 'master of characterisation' formulation, it could have adopted a similar approach to its Grand Chamber judgment in *S.M. and others* to explain in more detail its preference for art. 8.[71] It is important for the Court to distinguish between a claim that is arguable but weak and a claim that is not tenable on the basis that the impugned state behaviour would not qualify for examination under art.3. Indeed, the use of the "master of characterisation" justification to discard the art.3 claim raises concerns as to how the Court views the treatment of people in detention, particularly ones whose situation renders them particularly vulnerable in their interaction with authorities. For this reason, the rejection of the art.3 argument should not be viewed as a defensible exercise of judicial limitation by the Court and further elaboration was required to justify the examination of the claim solely under art.8.

5. The remaining issues and the determination of the 'main legal questions' of the case

While the Court's unwillingness to look at the art.3 dimension of the forcible medical testing may not have had much practical significance given the applicants were vindicated through the finding of an art.8 violation, the Court's decision not to examine the remaining claims raises more complex issues. Apart from the broader art.13 claim, the applicants challenged the conditions and legality

[67] This was a factor that played a role in the finding of an art.3 violation in *Jalloh*, see *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [82].
[68] *Jalloh* (App. No.54810/00), judgment of 11 July 2006 at [63] and [82].
[69] *Bouyid v. Belgium [GC]* (App. No. 23380/09), judgment of 28 September 2015 at [88].
[70] Under art.35(3)(a) ECHR.
[71] See supra fn 50.

of their detention under arts 3 and 5. In respect to these claims, the Court concluded that "having regard to the facts of the case, the arguments of the parties and the conclusions formulated under Article 8 ECHR",[72] the "main legal questions" had been addressed and consequently, there was no need to examine the remaining complaints. To support this finding, the Court cited the Grand Chamber judgment in *Valentin Câmpeanu* where it had reached similar conclusions.[73] In the operative part of the judgment, it is mentioned that this decision was taken by six votes to one, however, no separate opinion is provided setting out the grounds for disagreement amongst the judges.

A first objection to this approach is that the present case should be distinguished from the judgment in *Valentin Câmpeanu*. In that case, the multiple Convention claims related to a series of state failures to provide the necessary medical support to an extremely vulnerable young man that ultimately led to his death. After finding a violation of arts 2 and 13, the Court considered that it was unnecessary to examine the remaining Convention issues arising from these failures under arts 3, 5, 8 and 14.[74] Here, there could be some justification for the Court's decision to focus on the result of these consistent failures, namely the death of the applicant, and to use art.2 as the vehicle to condemn the state's passivity to support him.[75] In *O.G. and others*, it is less clear why the issues relating to the applicants' conditions of detainment are absorbed by the art.8 violations found in relation to their forcible medical testing and the publication of their data. These claims arise from wholly distinct material situations with different consequences for the applicants, and, as such, raise different legal concerns.

Secondly, similarly to the forcible medical intervention, the applicants' complaint under art.3 about their conditions of detention is particularly strong. The applicants noted that they were held for several days in the premises of the General Directorate of the Attica Police in cells that were only suitable for short-term detention. They were held in a cramped space, without ventilation or access to natural light, with food that was of extremely poor quality, and without an interior courtyard in which they could walk or exercise. They also alleged that they were not provided with medical care or psychological support despite their HIV diagnosis and overall health condition.[76] The Court has previously found that poor conditions such as the ones described by the applicants amount to art.3 violations.[77] In determining whether conditions of detention breach art.3, the Court considers their cumulative effect on the applicant.[78] More specifically, among other factors, the Court considers the duration of the applicant's detainment as well as "access to outdoor exercise,

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[72] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [161].
[73] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [161].
[74] *Centre for legal resources on behalf of Valentin Câmpeanu* (App. No.47848/08), judgment of 17 July 2014 at [156].
[75] Although some dissenters in this case argued that there should have been an examination of art.3 (see joint partly dissenting opinion of Judges Spielmann, Bianku and Nussberger), while others argued that the Court should have addressed the art.14 dimension of the case (see joint dissenting opinion of Judges Ziemele and Bianku).
[76] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [41].
[77] Most recently, in *Leroy and others v France* (App. Nos. 32439/19, 37876/19 and 46898/19), judgment of 18 April 2024.
[78] *Clasens v Belgium* (App. No. 26564/16), judgment of 28 May 2019 at [33].

natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygiene requirements".[79] Additionally, the specific circumstances of the applicants, namely their drug dependency and overall poor health, plausibly point to treatment that contravenes art.3. Although the government in its submissions to the Court contested these claims,[80] the applicants' complaint was not wholly without merit.

Finally, the Court's contention that it had already addressed the "main legal claims" in this case required further justification. Underlying this rationale are certain normative considerations. The determination of what is a main and what is a secondary or ancillary issue might differ depending on the perspective that is adopted. In *Valentin Câmpeanu*, the argument that the right to life supersedes the other issues raised in the claim can be viewed as credible, even if it is not without its faults.[81] In the present case, the value judgment as to which was the main issue is not altogether clear. Out of the core issues (the medical testing, the publication of medical data, and the legality and conditions of detention), the Court seems to suggest that the first two are more important to address than the latter. It is unclear if this assessment is made based on what was the more serious violation from the perspective of the applicants or, instead, if the choice is determined from the perspective of the legal issues that were most important for the Court to clarify. Even in the case of the latter, the issues raised were relatively straightforward and the Court resolved them by reference to long-standing Convention principles as discussed in section 2.

Ultimately, whether the Court's failure to examine the remaining issues is a defensible exercise in judicial limitation will depend to a great extent on one's view of the proper function of the ECtHR. Under one view, the judgment resolved the issue in the applicants' favour by condemning unequivocally the actions of the Greek authorities and awarding the applicants significant sums in non-pecuniary damages.[82] In this sense, the Court fulfilled its function by resolving the dispute and denouncing (some of) the actions of the respondent state. Viewed from the perspective that the Court, apart from resolving the conflict between the parties, also has a "meta-function",[83] namely to develop a body of Convention standards that shape the future behaviour of contracting parties to the ECHR, this judgment is less of a success story. This is because the non-examination of these issues might be interpreted by the respondent state as a tacit acceptance that the conditions of detention were appropriate. Such an interpretation would be particularly problematic since the respondent state has a patchy Convention record for the conditions of detention under which

[79] *Clasens* (App. No. 26564/16), judgment of 28 May 2019 at [33].
[80] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [42]-[43].
[81] See *supra* fn. 75 for the partly dissenting opinions.
[82] *O.G. and others* (App. Nos. 71555/12 and 48256/13), judgment of 23 January 2024 at [165].
[83] Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge University Press, 2022), p.99.

vulnerable people are held.[84] This should serve as a strong incentive for the Court to restate the relevant principles.

Conclusion

The judgment in *O.G. and others* serves as a condemnation of the Greek authorities' mistreatment of vulnerable individuals in detention. However, this victory for the applicants is tempered by the Court's reluctance to examine further facets of this case. While the choice to focus on certain issues over others does not automatically raise concerns, the reasons adduced to justify the Court's choice in the present case require closer inspection. The invocation of the "master of characterisation" argument to dismiss the applicants' art.3 claim in relation to the forcible medical intervention sets a concerning precedent. The fact that this issue was ultimately resolved based on a "technicality", namely a finding that the procedure was not prescribed by law, did not give the Court the opportunity to examine the substantive reasons for why such a procedure may breach the Convention under either arts 8 or 3. Hopefully, the Court's approach to art.3 does not signify a weakening in protections under this Article for detained individuals subjected to non-consensual medical procedures for the purpose of obtaining evidence. Nor is the Court's decision to dismiss the remaining claims, particularly the art.3 claim relating to the conditions of the applicants' detention, fully justified given the distinct issues that this treatment raised in relation to the other claims. More broadly, further study is required to determine the factors that inform the Court's approach to the judicial limitation of a claim to ensure that such actions are principled and do not detract from the effective protection of rights.

Dimitrios Kagiaros

[84] See indicatively *Kargakis v Greece* (App. No. 27025/13), judgment of 14 January 2021, and for more judgments C. Stilianidou, "European Court of Human Rights condemns Greece over the detention conditions in Greek prisons" (govwatch.gr, 31 December 2020), *https://govwatch.gr/en/katadikes-tis-elladas-apo-to-edda-to-etos-2020-gia-tis-synthikes-kratisis-stis-fylakes/*.