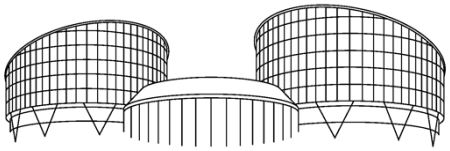

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

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

(Application no. 21881/20)

JUDGMENT

Article 11 • Freedom of peaceful assembly • General ban on public gatherings, for two and a half months at the beginning of the COVID-19 pandemic, to which criminal sanctions were attached and without judicial review of proportionality • Drastic measure affecting the applicant association's activity for a considerable period of time and requiring strong justification and particularly rigorous judicial review • No examination of the merits of appeals by the Supreme Federal Court during the general lockdown • No use of Article 15 by the State to take measures derogating from its obligations

STRASBOURG

15 March 2022

Referral to the Grand Chamber

05/09/2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georges Ravarani, *President,*
Georgios A. Serghides,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Milan Blaško, *Section Registrar*,

Having regard to:

the 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 governed by Swiss law, the Communaute genevoise d'action syndicale (CGAS, "the applicant association"), on 26 May 2020;

the decision to give notice to the Swiss Government ("the Government") of the complaint under Article 11 of the Convention;

the parties' observations;

Having deliberated in private on 18 January 2022,

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

INTRODUCTION

1. The application concerns the measures taken by the Swiss Government to counter the coronavirus disease ("COVID-19"). The applicant is an association whose declared aim to defend the interests of workers and of its member organisations, especially in the sphere of trade-union and democratic freedoms. Relying on Article 11 of the Convention, it alleges that it was deprived of the right to organise and to participate in public gatherings.

THE FACTS

2. The applicant association was established under Swiss law in 1962 and is based in Geneva. Its statutory aim is to defend the interests of workers and of its member organisations, particularly in the area of trade-union and democratic freedoms. It claims to organise and participate in dozens of gatherings each year in the Canton of Geneva. It was represented by Mr O. Peter, lawyer.

3. The Government were represented by their Deputy Agent, Mr A. Scheidegger, Federal Office of Justice.

4. The context of the present case is the coronavirus disease ("COVID-19") pandemic, the first cases of which were reported in Wuhan, China, on 31 December 2019.

5. On 25 February 2020 the new coronavirus was detected for the first time on Swiss territory, in the Canton of Ticino.

6. Faced with a sharp and rapid increase in the number of confirmed cases and hospitalisations, on 28 February 2020 the Federal Council (the government) decreed that the situation in hand was a "special situation" for the purposes of section 6 (1) (b) of the Epidemics Act (see paragraph 18 below) and, on the same date, adopted the Ordinance on measures to tackle the coronavirus, prohibiting public or private events involving more than 1,000 persons at one time.

7. On 11 March 2020 the World Health Organisation (WHO) described the situation as a pandemic.

8. On 13 March 2020 the Federal Council replaced the Ordinance of 28 February 2020 with Ordinance 2 on measures to tackle the coronavirus ("O.2 COVID-19", see paragraph 19 below), in which it ordered the closure of schools, universities and other training establishments and prohibited public or private gatherings of more than 100 persons. 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 on the basis of Article 7 (a).

9. On 16 March 2020 the Federal Council announced that there existed an "extraordinary situation" within the meaning of section 7 of the Epidemics Act (see paragraph 18 below) and amended the preamble to O.2 COVID-19. 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 specifically maintained the possibility for certain establishments, including food shops, banks, petrol stations and hotels, to remain open. In this version of the Ordinance (which entered into force on 17 March 2020), the reference to exceptional authorisation for the exercise of political rights had been removed (Article 7, see paragraph 20 below). Under the heading "Criminal Provisions", Article 10 (d) (1) provided that the fact of intentionally organised or conducted a gathering prohibited by Article 6 would be punishable by 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.

10. On 20 March 2020 the Federal Council strengthened these measures further, by prohibiting gatherings of more than five persons in public places. On 8 April 2020 the Federal Council extended the measures for one further week, that is, until 26 April 2020.

11. On 29 April 2020 the Federal Council announced a relaxation of the majority of emergency measures, with effect from 11 May 2020. The end of

lockdown took place earlier than the Federal Council had initially envisaged: shops, restaurants, markets, museums and libraries were authorised to reopen. Primary and secondary schools were authorised to resume in-class teaching.

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

13. The applicant association lodged an application with the Court on 26 May 2020. Relying on Article 11 of the Convention, it stated that it had been obliged, following the enactment of O.2 COVID-19, to cancel a gathering planned for 1 May 2020 and had withdrawn its request for authorisation. More generally, it claimed that it had been deprived of the possibility of organising or participating in public meetings. It submitted that in Switzerland the Federal Council's ordinances were measures which applied generally and that no appeal lay against them to a domestic court, explaining that it was for this reason that it had not applied to the national courts.

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

15. On 19 June 2020 the Federal Council declared a return to the "special situation" as of 22 June 2020.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

16. The relevant provisions of the Federal Constitution of 18 April 1999 ("the Constitution") read as follows:

Article 16: Freedom of expression and of information

"1. Freedom of expression and of information is guaranteed.

2. Every person has the right freely to form, express, and impart their opinions. ..."

3. Every person has the right freely to receive information, to gather it from generally accessible sources and to disseminate it."

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 23: Freedom of association

"1. Freedom of association is guaranteed.

2. Every person has the right to form, join or belong to an association and to participate in the activities of an association.

3. No one may be compelled to join or to belong to an association."

Article 29*a*: Guarantee of access to a court

"In a legal dispute, every person has the right to have their case determined by a judicial authority. The Confederation and the Cantons may by law preclude the determination by the courts of certain exceptional categories of case."

Article 35: Upholding of fundamental rights

"1. Fundamental rights must be upheld throughout the legal system.

2. Whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.

3. The authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons."

Article 36: Restriction of fundamental rights

"1. Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.

2. Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.

3. Any restrictions on fundamental rights must be proportionate.

4. The essence of fundamental rights is sacrosanct."

Article 185: External and internal security

"1. The Federal Council takes measures to safeguard external security, independence and neutrality of Switzerland.

2. It takes measures to safeguard internal security.

3. It may in direct application of this Article issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration.

4. In cases of emergency, it may mobilise the armed forces. Where it mobilises more than 4,000 members of the armed forces for active service or where the deployment of such troops is expected to last for more than three weeks, the Federal Assembly must be convened without delay."

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 in favour of 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 may 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."

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

Chapter 3:
The Federal Supreme Court as an ordinary court of appeal

...

Section 2: Criminal-law appeals
Article 78: Principle

"1. The Federal Supreme Court hears appeals against decisions in criminal matters.

2. The following may also be examined in criminal-law appeals:

a. decisions on civil claims, which must be determined at the same time as the criminal proceedings;

b. decision on the execution of sentences and measures."

...

Section 3: Public-law appeals
Article 82: Principle

"1. The Federal Supreme Court hears appeals:

a. against decisions taken in public-law proceedings;

..."

Chapiter 4: Appeals procedure

...

Section 2: Grounds of appeal
Article 95: Swiss law

"An appeal may be lodged for 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."

Article 103: Suspensive effect

"1. As a general rule, an appeal does not have suspensive effect.

2. An appeal shall have suspensive effect with regard to its findings where ... :

...

b. in criminal law, if [the appeal] is lodged against a decision which imposes a custodial sentence or a measure entailing a deprivation of freedom; the suspensive effect does not extend to the decision on the civil claims;

...

3. The investigating judge may, of his or her own motion or on an application by a party, decide differently with regard to any suspensive effect."

18. The relevant provisions of the Federal Act on the Fight against Human Communicable Diseases (Epidemics Act, LEp), 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.

2. The measures provided by it pursue the following aims:

a. to monitor communicable diseases and acquire fundamental knowledge about their spread and development;

b. to detect, evaluate and prevent the appearance and spread of communicable diseases;

c. to encourage individuals, certain groups of persons and certain institutions to contribute to preventing and combating communicable diseases;

d. to create the organisations, professional and financial frameworks required to detect, monitor, prevent and combat communicable diseases;

e. to guarantee access to facilities and methods of protection against communicable diseases;

f. to reduce the effects of communicable diseases on society and the persons concerned."

Section 6: Special situation

"1. A special situation exists where:

a. the habitual implementing bodies are unable to prevent and combat the emergence and spread of a communicable disease and 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 (OMS) has noted the existence of a health emergency of international scope, 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 take part in the fight against 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) coordinates the measures taken across the Confederation."

Section 7: Extraordinary situation

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

19. The relevant provisions of Ordinance 2 on the measures to tackle coronavirus (COVID-19, hereafter "O.2 COVID-19") of 13 March 2020 were worded as follows:

Article 6: Gatherings and establishments

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

2. Gatherings of less 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 gatherings 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."

20. As of 17 March 2020, the relevant provisions of O.2 COVID-19 read as follows:

Section 3: Measures in respect of the population, organisations and institutions

...

Article 6: Gatherings and establishments

"1. All public or private gatherings, 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."

Section 6: Criminal provision
Article 10d

"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 by a financial penalty, unless he or she has committed a more serious offence within the meaning of the Criminal Code".

21. On 21 March 2020 O.2 Covid-19 was supplemented by a new Article 7*c*, and its Article 10*d* was amended as follows:

Section 3: Measures concerning the population, organisations and institutions

...

Article 6: Gatherings and establishments

"1. All public and private demonstrations, including sports gatherings and associative activities, shall be forbidden.

2. Public establishments shall be closed, in particular:

..."

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.

..."

Section 6: Criminal provision
Article 10*d*

"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."

22. O.2 COVID-19 was subsequently amended again on several occasions at very short intervals.

23. The Law of the Republic and the Canton of Geneva on gatherings in public spaces (LMDPu-GE) of 26 June 2008 governs the organisation and holding of gatherings on public land 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 received 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 subject matter 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 competing private and public interests. 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 at a specified place, 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 demonstrate.

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

24. The Law of the Republic and the Canton of Geneva on Administrative Proceedings (LPA-GE) of 12 September 1985 provides as follows:

Section 4: Decisions

"Decisions within the meaning of Article 1 shall be deemed to be individual and concrete measures taken by the authority in individual cases based on federal, cantonal or communal public law intended:

(a) to create, amend or set aside rights or obligations;

(b) to establish the existence, absence or scope of rights, obligations or facts;

(c) to reject or declare inadmissible requests to create, amend, set aside or establish rights or obligations.

..."

Section 4A: Right to challenge an act

"Any person who has an interest which merits protection may require that the competent authority for acts based on federal, cantonal or municipal law and affecting rights or obligations:

(a) refrain from, cease to perform or revoke unlawful acts;

(b) eliminate the consequences of unlawful acts;

(c) establish that such acts are unlawful.

The authority shall give its ruling in the form of a decision.

Where it is not designated, the competent authority shall be the authority directly responsible for the State intervention in question."

Section 5: Administrative authorities

"The following shall be deemed to be administrative authorities within the meaning of Article 1:

(a) the cantonal government;

...

c) the *départements*;

..."

Section 6: Administrative courts

"For the purposes of the present law, the following shall be deemed to be administrative courts:

(a) the administrative court of first instance;

...

(c) the administrative division of the Court of Justice;

..."

Section 57: Subject of the appeal

"An appeal may be lodged against:

(a) final decisions;

(b decisions by which the authority recognises or declines its jurisdiction;

(c) interlocutory decisions, if they may cause irreparable damage or if the admission of an appeal may lead immediately to a final decision which makes it possible to avoid a lengthy and costly evidentiary procedure;

(d) constitutional laws, the laws and regulations of the cantonal government."

II. DOMESTIC PRACTICE

25. 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 higher-ranking legal norms (see, in particular, the Federal Supreme Court's judgment 2C_280/2020 of 15 April 2020 concerning O.2 COVID-19 and the ATF (judgment of the Supreme Federal Court) 139 II 384 [2012]). In contrast, the implementing acts based on such ordinances may be challenged through an ordinary appeal. In this context, the ordinance's conformity with higher-ranking law, 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]).

26. In the case 2D_32/2020 (Federal Supreme Court judgment of 24 March 2021), the company A. SA alleged that Article 11 (3) of the Federal Council's Ordinance on mitigating the economic consequences of the coronavirus (Ordinance on COVID-19 in the cultural sector), according to which "no appeal lies against [the] decisions taken in execution of the present ordinance", entailed a breach of the guarantee of access to a court as set out in Article 29a of the Constitution. In its judgment, the Federal Supreme Court reiterated its settled case-law to the effect that, like the other authorities, it was entitled to review the constitutionality of a federal ordinance through a preliminary ruling. It concluded that the impugned provision was contrary to Article 29a of the Constitution, in that it excluded any appeal against the decisions taken in execution of the above-mentioned ordinance and that, in consequence, it was unconstitutional and unenforceable.

27. In the Canton of Geneva, gatherings on public land require authorisation, as provided for by sections 3 to 5 of the LMDPu-GE (see

paragraph 23 above). The decision issued by the competent authority can be appealed against before the cantonal courts (see the relevant provisions of the LPA-GE, paragraph 24 above), then before the Federal Supreme Court (section 82 of the LTF, see paragraph 17 above). Following an appeal, the Administrative Division of the Canton of Geneva Court of Justice examined, in a preliminary ruling, the conformity of Article 6 of O.2 COVID-19 with the higher-ranking law (Court of Justice, Administrative Division, judgment of 18 August 2020). It found, on the merits, that the Ordinance constituted a sufficient legal basis and that the public interest in stemming the spread of the virus prevailed over the applicant party's interest in demonstrating in a public area. In a judgment of 12 August 2021 (1C_524/2020), the Federal Supreme Court declared an appeal inadmissible as being devoid of current purpose, in that the request for authorisation to demonstrate concerned a date that had already passed when the judgment being challenged was delivered, and that the prohibition on gatherings of five or more persons had been lifted on 30 May 2020. The Supreme Federal Court also held that the country was not in a situation which justified an exemption from the condition that there had to be a current interest. Given the rapid developments in the situation and in knowledge about the pandemic, there was nothing to suggest that a fresh request in respect of a similar gathering would be subject to identical or analogous rules as in the relevant case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

28. The applicant association complained that it had been deprived of the right to organise and participate in public meetings as a result of the measures enacted by the Government to tackle the coronavirus under O.2 COVID-19. It relied on Article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Admissibility

1. Victim status

(a) The parties' submissions

(i) The Government

29. The Government pointed out that on 13 March 2020 gatherings of more than 100 persons were banned until 30 April 2020 and that, on 16 March 2020 this restriction was replaced by a prohibition on public gatherings (to enter into force on 17 March 2020), initially valid until 19 April 2020, then extended on three occasions for limited periods. They also argued that O.2 COVID-19 had not been applied in a discriminatory manner to certain categories of the population, but that, on the contrary, it had covered all of the events listed in Article 6 without distinction. Furthermore, the competent cantonal authority could grant exemptions under Article 7. For that reason, they considered that it could not be claimed that this Ordinance, as such, absolutely prohibited any public demonstration or gathering.

30. The Government then noted that the applicant association had itself withdrawn its request for authorisation for a public gathering. It had not referred to any specific instance when it had been prohibited from organising a public demonstration or any request lodged by it for an exemption in application of Article 7 of O.2 COVID-19, rejection of which could have been appealed before the courts.

31. Lastly, the applicant association had not shown or even alleged the likelihood that it had been directly affected by the impugned measures, although, in the Government's view, this was a condition imposed by the Court's case-law. Its application thus amounted to an *actio popularis* which, for that reason, could not be examined by the Court.

(ii) The applicant association

32. The applicant association submitted that, in so far as the Government alleged that the ban on gatherings concerned everyone, and, in consequence, did not target certain categories of the population in a discriminatory manner, the Convention did not require that an applicant be affected more than anyone else, but simply that he or she be directly concerned by the decision. Thus, in so far as the prohibition had a general scope, it had also concerned the applicant association, which could therefore claim to be a victim of the ordinance. It considered that this conclusion seemed all the more justified in that a trade-union confederation, which very regularly organised demonstrations, marches, gatherings, strike pickets and other public events would be especially affected by the ban on any public or private gatherings, even of a political or trade-union nature.

33. In response to the Government's allegation that the applicant association had not shown that it was directly affected by the impugned

measures, since it had chosen to withdraw its request for authorisation for the demonstration on 1 May and had never received a formal refusal of authorisation to organise an event, the association submitted that, while it had indeed withdrawn its request, this had been done following an announcement by the Geneva police department had that no gatherings would be authorised, pursuant to the Ordinance in question. In its view, its decision to withdraw confirmed that it had intended to organise a gathering to mark May Day, as it did every year, but that had been prevented from doing so as a result of the prohibition laid down in the ordinance.

34. The applicant association alleged that the trade-union movement had been required to comply with the ban on organising marches, gatherings or strike pickets, failing which its members would have been liable to prison sentences. It added that, as a result, it had been impossible to organise any trade-union demonstration between 17 March and 30 May 2020. Even in the absence of a formal refusal to grant authorisation, it had therefore been obliged to alter its activity, under threat of serious penalties, including prison sentences and that, in consequence, its standing as a victim was also valid for the remainder of the period under consideration.

35. Accordingly, the applicant association concluded that it had been directly concerned by the general prohibition on demonstrations and that, accordingly, its standing as a victim should be acknowledged.

(b) The Court's assessment

36. The Court reiterates that the concept of "victim" within the meaning of Article 34 of the Convention must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III, and *Tourkiki Enosi Xanthis and Others v. Greece*, no. 26698/05, § 38, 27 March 2008). It primarily concerns the direct victims of the alleged violation, or the persons directly affected by the matters allegedly constituting the interference (see *Norris v. Ireland,* 26 October 1988, § 31, Series A no. 142; *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 43, Series A no. 246-A; *Otto-Preminger-Institut v. Austria*, 20 September 1994, §§ 39-41, Series A no. 295-A; *Tanrıkulu and Others v. Turkey* (dec.), no. 40150/98, 6 November 2001; and *SARL du Parc d'Activités de Blotzheim v. France*, no. 72377/01, § 20, 11 July 2006).

37. Moreover, the Court, very exceptionally, finds that certain persons who are likely to have been affected by the matters allegedly constituting the interference may be granted victim status. Thus, it has accepted the concept of a potential victim in the following cases: where the applicant was not able to establish that the legislation he complained of had actually been applied to him, on account of the secret nature of the measures it authorised (see *Klass and Others v. Germany*, 6 September 1978, § 34, Series A no. 28); where the applicant was required to modify his conduct or risk being prosecuted (see

Dudgeon v. the United Kingdom, 22 October 1981, §§ 40-41, Series A no. 45; *Norris,* cited above, § 29; and *Bowman v. the United Kingdom*, 19 February 1998, § 29, Reports 1998-I), or where the applicant belongs to a class of people who run the risk of being directly affected by the impugned legislation (see *Marckx v. Belgium*, 13 June 1979, § 27, Series A no. 31; *Johnston and Others v. Ireland*, 18 December 1986, § 42, Series A no. 112; and *Burden v. the United Kingdom* [GC], no. 13378/05, § 35, ECHR 2008).

38. In any event, whether or not the person concerned is a direct, indirect or potential victim, there must be a link between the applicant and the harm which they consider they have sustained on account of the alleged violation. The Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Norris*, cited above, § 31, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 28, ECHR 2009).

39. With regard to non-profit-making companies, the Court considers that they cannot themselves claim to be victims of measures which allegedly infringed their members' rights under the Convention (see *Association des amis de Saint-Raphaël et de Fréjus and Others v. France* (dec.), no. 45053/98, 29 February 2000, and *Čonka and the Human Rights League v. Belgium* (dec.), no. 51564/99, 13 March 2001).

40. In the present case, the Court notes that prior to the pandemic the applicant association had organised numerous demonstrations, particularly in support of trade-union and democratic freedoms, a fact that is not disputed by the Government. Following the introduction of the measures to tackle the coronavirus, it was prevented from doing so, on pain of prosecution with the possibility of custodial sentences. In particular, it claims to have been obliged to abandon plans to organise a demonstration scheduled for 1 May 2020 and to have withdrawn its request for authorisation.

41. Moreover, given that the applicant association was thus deprived of an important means of pursuing its statutory aims, there is a sufficient link between it and the harm that it claims to have sustained following the alleged violation of Article 11 of the Convention.

42. In view of the above considerations, the Court concludes that, since the applicant association was obliged to alter its behaviour and even, in order to avoid criminal penalties, to refrain from organising public meetings that would have contributed to achieving its statutory aim, it can claim to be a victim of a violation of the Convention.

2. Exhaustion of domestic remedies

(a) The parties' arguments

(i) The Government

43. The Government acknowledged that federal legislative acts were not submitted to judicial review *in abstracto*, that is, without an implementing act; nevertheless, they considered that those acts could be the subject of a preliminary ruling in the context of an appeal against an implementing legislative text.

44. The Government based its objection of non-compliance with Article 35 § 1 of the Convention on the possibility, allegedly available to the applicant association, to request authorisation at any moment for a public event in the exemptions provided for in Article 7 of O.2 COVID-19. According to the Government, the authorities would in that scenario have been obliged to examine any such request in the light of the applicable law, that is, the constitutional and international law.

45. The Government submitted that, more specifically, a refusal to grant an exemption could have been appealed against, initially before the Administrative Division of the Canton of Geneva Court of Justice (section 6 (1) of the LPA-GE), which, they argued, had in fact carried out such an assessment in a similar case (Administrative Division, judgment of 18 August 2020, mentioned in paragraph 27 above). They added that subsequently, had it failed at first instance, the applicant association could have lodged a public-law appeal with the Federal Supreme Court (section 82 (a) of the LTF, see paragraph 17 above) alleging, *inter alia*, a violation of federal law and international law, including the Convention (Article 189 (1) a and b of the Constitution; section 95 (a) and (b), of the LTF, at paragraphs 16 and 17 above). They stated that, equally, any criminal convictions could have been appealed against at final instance before the Federal Supreme Court on the same grounds (sections 78 (1) and 95 (a) and (b), of the LTF, in paragraph 17 above). They explained that in the context of such proceedings, the compatibility of O.2 COVID-19 with the higher-ranked law would have been the subject of a preliminary ruling.

46. Lastly, the Government pointed out that under Article 35 (2) of the Constitution all of the competent authorities were required "to uphold fundamental rights and to contribute to their implementation". The Government therefore considered that it was incumbent on them, in a case concerning the application of the law, to resolve a possible conflict between, on the one hand, the fundamental rights set out in the Constitution and the Convention guarantees, and, on the other, an ordinance of the Federal Council in the light of this obligation also. From their perspective, it followed that proceedings on granting an exemption within the meaning of Article 7 of O.2 COVID-19 could not be said to have had no prospect of success. In the Government's view, this possibility of judicial review differentiated the

present application from the situation in the case of *S.A.S. v. France* ([GC], no. 43835/11, § 61, ECHR 2014 (extracts)), in which the conformity of the law in question with fundamental rights had already been examined by the highest French courts, namely the Constitutional Council and the Court of Cassation.

47. In the light of these considerations, the Government considered that the national authorities, and in particular the Federal Supreme Court, ought not to be deprived of the possibility of being the first to examine the dispute, before its submission to an international court.

(ii) The applicant association

48. The applicant association disagreed with the Government's view that it could have attempted to obtain a refusal of authorisation in a specific situation before then lodging an appeal against that decision with the cantonal authorities, which would subsequently have been required to examine, in a preliminary ruling, the compatibility of O.2 COVID-19 with the higher-ranking law. In this connection, it argued that its application did not concern a refusal to authorise a specific event, but rather the introduction of a strict legal framework which, for two and a half months, had – in its submission – prohibited any political or trade-union event, on pain of a penalty of up to three years' imprisonment. It considered that such a measure could not be directly challenged by means of an individual decision.

49. The applicant association alleged that, contrary to what was suggested by the Government, while an appeal against a specific decision could lead a court to examine a given legal text's compatibility with the higher-ranking law, this was not guaranteed. It stated that, by applying the *jura novit curia* principle a Swiss court could base its judgment on the legal principles of its choice, without being obliged to examine the issues raised by the parties. It added that, to the extent that the Swiss courts had, in its view, no competence to rule on the compatibility of a legal norm with the higher-ranking norm, there was no possibility that they would examine, in a preliminary ruling, the national law's compatibility with the higher sources of law.

50. Lastly, it stated that the possible finding of a violation based on a refusal to authorise a specific event would by no means enable the damage caused by a general prohibition, valid for two and a half months, to be recognised and made good, although this was the subject of the present application.

51. In view of the particular circumstances of the present case, the applicant association submitted that the Court should find that it had had no possibility of securing an examination of the alleged violation of its rights, arising from a two-and-a-half-month general ban on gatherings and the related threats of penalties. In other words, since bringing a case before the Swiss courts was not an option, it was entitled to avail itself of the exceptional possibility of applying directly to the Court.

(b) The Court's assessment

(i) Applicable principles

52. The only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, in particular, the judgments in *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198, or *Dalia v. France*, 19 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I). In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal (see, for example, *Ringeisen v. Austria*, 16 July 1971, §§ 89 and 92, Series A no. 13).

53. Article 35 § 1 of the Convention provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time; that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government 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 *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports* 1996-IV).

54. The Court would emphasise that the application of this rule must make due allowance for the context. It has therefore recognised that Article 35 § 1 must be applied with a degree of flexibility and without excessive formalism (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200). 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 *Ringeisen*, cited above, §§ 89 and 92). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate as well as the personal circumstances of the applicants (see *Akdivar and Others,* cited above, § 69).

(ii) Application of the above principles

55. With regard to this specific case, the Government, based on the relevant domestic law and practice as set out above, considered that there had been nothing to prevent the applicant association from requesting

authorisation to organise a public event under the exemptions provided for in Article 7 of Ordinance 2 COVID-19, taken together with sections 3 to 5 of the LMDPu-GE (see paragraph 23 above). They argued that in such a scenario a refusal by the cantonal authorities could have been appealed against before the Canton of Geneva Court of Justice under the relevant provisions of the LPA-GE (paragraph 24 above), then before the Federal Supreme Court by means of a public-law appeal (section 82 of the LTF, see paragraph 17 above), for the purpose of obtaining a finding, through a preliminary ruling, that there had been, among other things, a violation of international law, including the Convention.

56. With regard, firstly, to the possibility of requesting an exemption, certain exemptions could be granted by the cantonal authorities under Article 7 (a) of O.2 COVID-19 in the version of 13 March 2020, especially for events related to the exercise of political or training rights. Nonetheless, once an "extraordinary situation" within the meaning of section 7 of the Epidemics Act had been declared by the Federal Council on 16 March 2020 (see paragraph 18 above), all public and private events were prohibited. In the version of the ordinance that was in force from 17 March 2020, the reference to exceptional authorisation for the exercise of political rights had been removed (see paragraph 20 above). In consequence, the Court notes that the possibility for an exemption for the exercise of political rights was provided for only in the version of 13 March 2020 of O.2 COVID-19, which was in force only until 16 March 2020, that is, for a very short period of time. Moreover, the Government did not provide a single example from the Canton of Geneva in which the relevant authorities had granted a request for an exemption and permitted the organisation of a public event during the relevant period. They had not therefore shown that this possibility was available in practice.

57. The Court will now address the possibility, as alleged by the Government, of challenging before the Swiss courts a potential refusal to grant authorisation for a peaceful assembly. In so far as the Government referred to case 2D_32/2020 (judgment of 24 March 2021, see paragraph 26 above, in which the Federal Supreme Court concluded that the impugned provision of the Covid Ordinance (Culture) was contrary to Article 29 (a) of the Constitution, in that it ruled out any appeal against the decisions taken in execution of that Ordinance and was accordingly unconstitutional and unenforceable), the Court points out that this judgment was delivered only on 24 March 2021, that is, approximately one year after the period under consideration in the present application, which concerns the weeks which followed the enactment of O.2 COVID-19 on 13 March 2020. In particular, the above-mentioned case concerned the right of access to a court in the context of services in the cultural sector – in other words, a right and a sector which are quite distinct from those in issue in the present case, which concerns the right to freedom of assembly within the meaning of Article 11

of the Convention. It follows that the above-mentioned judgment of the Federal Supreme Court is not relevant to the question of whether or not the applicant association, in the circumstance of this case, had at its disposal an effective remedy in order to complain of a violation of Article 11 of the Convention.

58. With more specific regard to freedom of assembly, the Federal Supreme Court, in a judgment of 12 August 2021 (1C_524/2020, in paragraph 27 above), declared inadmissible an appeal on the grounds that it was devoid of current interest, in that the request for authorisation to hold a gathering concerned a date that had already passed by the time that the judgment being appealed against was delivered and the restrictions previously in force had been lifted and would very probably not be reimposed in the same manner in future. Thus, the Federal Supreme Court did not rule on the merits of the appeal and did not carry out a preliminary examination of the constitutionality of the federal ordinance. The Court notes that, in the given case, even the first instance-court delivered its judgment after the date of the event for which authorisation had been requested. Such a delay is not, however, compatible with the principle in the Court's well-established case-law to the effect that an effective remedy requires that review of a refusal to grant authorisation must occur prior to the date of the intended meeting or gathering (see *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, § 345, 7 February 2017, and *Baczkowski and Others v. Poland*, no. 1543/06, §§ 81-83, 3 May 2007). This example shows that it is unlikely that the Swiss courts would, in the very specific context of the present case, have conducted a preliminary review of constitutionality with regard to the relevant ordinance of the Federal Council within a useful time although, in normal circumstances, the Swiss courts, and in particular the Federal Supreme Court, do carry out such an assessment.

59. In view of these considerations and of the overall public-health and political situation, the Court is not persuaded that the applicant association enjoyed at the relevant time an effective remedy, available in practice, by which to complain of a violation of the right to freedom of assembly within the meaning of Article 11 of the Convention. Indeed, it is clear from the relevant domestic practice, especially the Federal Supreme Court's judgment of 12 August 2021 (see paragraph 27 above) that, although federal ordinances could ordinarily be the subject of a preliminary ruling on constitutionality by the Federal Supreme Court, including in the absence of any current interest, that court, in the very particular circumstances of the general lockdown declared by the Federal Council as part of the efforts to tackle the coronavirus, did not examine freedom-of-assembly applications on the merits and did not assess the compatibility of O.2 COVID-19 with the Constitution.

60. Accordingly, the Court dismisses the Government's objection of non-exhaustion of domestic remedies.

3. Conclusion as to admissibility

61. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant association

62. The applicant association submitted that the general prohibition on demonstrations was based on a single Government ordinance and had not been approved by Parliament, which in itself raised a serious issue as to the quality of the legal basis, given the duration of the measures and the degree of the interference entailed by them. It also argued that the potential measures open to the Federal Council in application of section 6 (2) of the LEp were not defined by the law with sufficient precision.

63. The applicant association added that the Government had taken advantage of a power, which it described as unlimited, in order to enact measures which in substance amounted, in its view, to a derogation from a fundamental right guaranteed by the Convention, without observing any of the conditions imposed by Article 15. It considered that, given the intensity of the restriction on guaranteed rights, O.2 COVID-19 did not constitute a sufficient legal basis to justify the interference with the rights enshrined in Article 11.

64. The applicant association did not dispute that there had been legitimate aims for the alleged interference with the exercise of the right to freedom of peaceful assembly. As to the necessity of the impugned measures in a democratic society, it submitted that all events had been prohibited, that no exceptional exemption was applicable to gatherings related to the exercise of political rights and that, for that reason, no such gathering had been authorised during the period concerned.

65. In so far as the Government referred to a "short period" during which the restrictions were applicable, the applicant association noted that the period in question ran from 17 March to 30 May 2020. It submitted that, having regard to the severity of the measures, this duration was to be considered as particularly long.

66. The applicant association also argued that anyone merely attending an event during the period concerned had been liable to a custodial sentence of three years' imprisonment in application of Article 10 (d) of Ordinance O.2 Covid-19. It considered that, given the seriousness of the penalty, and the chilling effect that it implied, the interference had been extremely severe.

67. The applicant association also alleged that although the Government justified the restrictions by referring to the epidemiological situation, they had

in fact always refused to impose a general lockdown. According to the applicant association, the Government had always authorised access to workplaces, such as factories or offices, even when those premises were used by hundreds of people. The applicant association submitted that maintaining the latter types of activity had been possible, subject to the single condition that employers took organisational and technical measures to ensure compliance with the health and social-distancing recommendations. This meant that while it had been possible to bring together thirty persons in a shopping centre, building site or factory, bringing together those same persons – in compliance with health-protection measures – on a picket line or in a gathering had, in contrast, been subject to a three-year prison term.

68. The applicant association also considered it relevant to note that other member States of the Council of Europe, faced with a similar epidemiological situation, had not forbidden all political and trade-union gatherings, but, on the contrary, had merely restricted this right by making its exercise conditional on compliance with precautionary measures (social distancing, masks, disinfecting) in order to limit the health risks. It further indicated that certain States, aware of the incompatibility of a general prohibition on demonstrations with Article 11 of the Convention, had chosen to derogate formally from the Convention, by informing the Secretary General of the Council of Europe of that fact on the basis of Article 15 of the Convention.

69. In consequence, the applicant association concluded that a general prohibition had amounted to a manifestly excessive measure that had not been necessary in a democratic society. For that reason, it considered that there had been a violation of Article 11.

(b) The Government

70. The Government submitted that the prohibition on public gatherings had been provided for in Article 6 et seq. of Ordinance O.2 COVID-19. They also considered that those provisions had pursued two aims within the meaning of Article 11 § 2, namely the protection of health and protection of the rights and freedoms of others.

71. With regard to their necessity in a democratic society, the Government acknowledged that the prohibition of any public event amounted to a serious interference with the right to freedom of assembly and association. They observed that it was not therefore surprising that the Federal Council had not immediately had recourse to this radical measure, instead taking its decisions in the light of developments in the epidemiological situation, and had strengthened the relevant measures when the virus began to spread more quickly. In this connection, they added that it was only from 17 March 2020 that Article 6 of O.2 COVID-19 had prohibited all public gatherings.

72. The Government also specified that Article 7 of O.2 COVID-19 provided from the outset for the possibility of granting exemptions. Additionally, the validity of the ban had been limited in time and extensions

had only been adopted for short periods and in light of developments in the epidemiological situation. They added that the various prohibitions had been relaxed and lifted in stages, as the situation improved.

73. With regard to the option of imposing criminal penalties on all those who failed to comply with the prohibition set out in Article 6 of O.2 COVID-19, the Government considered that the severity of the threat to public health as a result of the coronavirus was such that, exceptionally, it was essential that the epidemiological measures were accompanied by penalties likely to discourage offending. In consequence, the Government concluded that they had not overstepped their margin of appreciation in exercising their power to sanction persons who participated in an event which did not meet the authorisation requirement.

74. In view of these considerations, the Government concluded that the complaint submitted under Article 11 of the Convention was manifestly ill-founded.

2. The Court's assessment

(a) Interference with the exercise of rights protected by Article 11 of the Convention

75. It is not disputed by the parties that the prohibition on public gatherings, one of a series of measures taken by the Government to tackle the coronavirus, amounted to an interference with the exercise of the applicant association's right to freedom of assembly as guaranteed by Article 11 § 1 of the Convention.

(b) Justification for the interference

76. An interference with the exercise of the right to freedom of peaceful assembly can only be justified if the requirements of paragraph 2 of Article 11 are met. It thus remains to be determined whether the interference was "prescribed by law", pursued one or more legitimate aims under that paragraph and was "necessary in a democratic society" to achieve them. The Court is therefore called upon to whether those conditions were satisfied in the present case.

(i) Legal basis and legitimate aim

77. In the present case, it is not disputed that the interference was based on Article 6 et seq. of Ordinance O.2 COVID-19. In so far as the applicant association relies on certain arguments concerning the quality of the legal basis, particularly the fact that the general prohibition on gatherings was based on a mere Government ordinance which had not been approved by Parliament, and its allegation that there was a lack of precision with regard to the measures provided for, the Court reiterates its case-law to the effect that the expressions 'prescribed by law' and 'in accordance with the law' in

Articles 8 to 11 of the Convention not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 108, ECHR 2015, with the other references cited therein).

78. The Court further reiterated that, for domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention and that, in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power (see, among other authorities, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; and *Lashmankin and Others*, cited above, § 411). Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (ibid.).

79. Nevertheless, in so far as it will conclude that the impugned restrictions were in any event excessive in the light of the criterion of being "necessary in a democratic society" (see paragraphs 84-89 below), the Court does not consider itself obliged to answer the question of whether the quality of the law in the present case was compatible with the requirements of Article 11 § 2 of the Convention.

80. With regard to the legitimate aims within the meaning of Article 11 § 2 of the Convention, the Government submitted that the impugned measures had pursued, in particulier, two aims within the meaning of Article 11 § 2, namely the protection of health and the protection of the rights and freedoms of others. The applicant party does not contest these aims and the Court is prepared to accept them.

(ii) Necessity in a democratic society

(α) The applicable principles

81. The principles which must guide the Court's assessment as to the necessity of the impugned measures in a democratic society were set out in the case of *Kudrevičius and Others,* cited above (references omitted):

> "142. The right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Contracting States enjoy a certain but not unlimited margin of appreciation ... It is, in any event, for the Court to give a final ruling on the restriction's compatibility with the Convention and this is to be done by assessing the circumstances of a particular case ...

143. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, having established that it pursued a "legitimate aim", whether it answered a "pressing social need" and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" ... In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts ...

144. The proportionality principle demands that a balance be struck between the requirements of the purposes listed in paragraph 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other ...

...

146. The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued ... Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification ... A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction ..., and notably to deprivation of liberty ... Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence ..."

82. The Court would add further that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 106, ECHR 2013 (extracts), or *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV).

83. Lastly, the Court also considers that the assessment of the proportionality of the measures must take account of their potentially chilling effect, and especially of the fact that the advance prohibition of an assembly was likely to dissuade potential participants from taking part (see, to this effect, *Christian Democratic People's Party v. Moldova*, no. 28793/02, § 77, ECHR 2006-II).

(β) Application of the above principles

84. With regard to the present case, it follows from the above principles that Switzerland enjoyed a certain margin of appreciation in determining restrictions to the rights and freedoms guaranteed under the Convention, but that this was, however, not unlimited. It is, in any event, for the Court, in the context of its review and in the light of the circumstances of a particular case, to give a final ruling on the restriction's compatibility with the Convention. In this connection, it acknowledges the very serious threat to public health

from COVID-19, and that information about the characteristics and dangerousness of the virus was very limited at the beginning of the pandemic; accordingly, States had to react swiftly during the period under consideration in the present case. Additionally, the Court is fully aware that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Mihalache v. Romania* [GC], no. 54012/10, § 92, 8 July 2019, and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X). It follows, with regard to the present case, that the Court takes note of the competing interests at stake in the very complex circumstances of the pandemic, especially with regard to the positive obligations on the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, notably under Articles 2 and 8 of the Convention (see *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 282, 8 April 2021).

85. The Court considers at the outset that the outright prohibition of a certain type of conduct is a drastic measure which requires strong reasons to justify it and calls for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake (see, for example, *Lacatus v. Switzerland,* no. 14065/15, § 101, 19 January 2021; *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 82, ECHR 2005-IX; and *Schlumpf v. Switzerland*, no. 29002/06, § 115, 8 January 2009). Under Article 6 (1) of O.2 COVID-19 (version of 13 March 2020), public or private events assembling 100 or more persons were forbidden (see paragraph 19 above). As noted when examining the exhaustion of domestic remedies (see paragraph 56 above), it had been possible for the cantonal authority, for a few days, to grant certain exceptional exemptions, in particular for gatherings to provide for the exercise of political or training rights, under Article 7(a) of the Ordinance. In contrast, once the Federal Council had declared an "extraordinary situation" within the meaning of section 7 of the Epidemics Act on 16 March 2020, all public and private gatherings were prohibited. In the version of the Ordinance in force from 17 March 2020, the reference to exceptional authorisation for the exercise of political rights had been removed (see paragraph 20 above). On 20 March 2020 the Federal Council strengthened these measures further by banning gatherings of more than five persons in public areas, with no possible exceptions. It was only from 30 May 2020 that events involving up to 30 persons were again permitted. Then, from 6 June 2020, private and public events of up to 300 persons were again authorised (see paragraph 14 above).

86. It follows that between 17 March and 30 May 2020 all the events by means of which the applicant association could have conducted its activities in accordance with its statutory aim were subject to an outright ban. In line with the case-law cited above, a blanket measure of this kind requires strong reasons to justify it and calls for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake. Even assuming that such a

reason existed – namely the need to tackle the global COVID-19 pandemic effectively – it transpires from the Court's examination of the exhaustion of domestic remedies (see paragraphs 57-59 above) that no such scrutiny was performed by the courts, including the Federal Supreme Court. Thus, the balancing exercise between the competing interests at stake, required by the Court for the purposes of assessing the proportionality of such a drastic measure, was not carried out (see *Kudrevičius and Others,* cited above, § 144, with further references). This is especially worrying in terms of the Convention in that the blanket ban remained in place for a significant length of time.

87. Furthermore, the Court notes that the applicant association has argued that access to workplaces such as factories and offices continued to be permitted, even when those premises were occupied by hundreds of people. In this connection, the Court considers that the Government have not answered the question as to why such activities continued to be possible, provided that employers took adequate organisational and technical measures to ensure compliance with the advice on hygiene and social distancing, whereas the organisation of an event in the public space – in other words, outdoors – was not allowed, even if the public-health protocols were adhered to. Here, the Court would note that for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned (see, to this effect, *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009; *Association Rhino and Others v. Switzerland*, no. 48848/07, § 65, 11 October 2011; and *Croatian Golf Federation v. Croatia*, no. 66994/14, § 98, 17 December 2020).

88. The Court further notes that the quality of the parliamentary and judicial review of the necessity of a general nationwide measure is also of particular importance in assessing its proportionality, including with regard to the operation of the relevant margin of appreciation (see *Animal Defenders International*, cited above, § 108, with further references). Admittedly, in view of the urgency of taking appropriate action to counter the unprecedented threat posed by COVID-19 in the early stages of the pandemic, it is not necessarily to be expected that very detailed discussions would be held at domestic level, especially involving Parliament, prior to the adoption of the urgent measures needed to tackle this global scourge. However, in such circumstances independent and effective judicial review of the measures taken by the executive is all the more vital.

89. As to the penalty for a breach of the ban on public gatherings under O.2 COVID-19, the Court reiterates that where the sanctions imposed are criminal in nature, they require particular justification, and a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (see *Kudrevičius and Others*, cited above, § 146). In the present case, on 17 March 2020 Article 10 (d) was inserted in O.2 COVID-19.

Under that provision, which was subsequently maintained, any person who deliberately violated the ban on gatherings within the meaning of Article 6 of the Ordinance was liable to a custodial sentence not exceeding three years or to a fine (except in the presence of a more serious offence within the meaning of the Criminal Code). The Court considers that these are very severe penalties, which were liable to have a chilling effect on potential participants or groups seeking to organise such events.

90. Lastly, the Court considers it important to point out that, in the face of the worldwide public-health crisis, Switzerland did not have recourse to Article 15 of the Convention, which allows a State Party to take certain measures derogating from its Convention obligations in time of war or other public emergency threatening the life of the nation. Accordingly, it was required to abide by the Convention under Article 1 and, with regard to the present case, to comply fully with the requirements of Article 11, within the margin of appreciation afforded to it.

91. The Court, while by no means disregarding the threat posed by COVID-19 to society and to public health, nevertheless concludes, in the light of the importance of freedom of peaceful assembly in a democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and appreciable duration of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of the rights protected by Article 11 was not proportionate to the aims pursued. Moreover, it notes that the domestic courts did not conduct an effective review of the measures at issue during the relevant period. The respondent State thus overstepped the margin of appreciation afforded to it in the present case. In consequence, the interference was not necessary in a democratic society within the meaning of Article 11 § 2 of the Convention.

92. There has accordingly been a violation of Article 11 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

94. The applicant association claimed 10,000 euros (EUR) in respect of the damage sustained as a result of the alleged violation of Article 11 of the

Convention. This amount would, it argued, compensate in very small part the difficulties encountered by it as a result of the measures, which it considered drastic, taken by the Government during the period concerned.

95. The Government considered that the applicant association had not specified the pecuniary damage caused to it by the impugned measures. As to any non-pecuniary damage, they argued that a finding of a violation of Article 11 would constitute sufficient just satisfaction.

96. The Court considers that, even supposing that the applicant association claimed pecuniary damage, this has not in any event been sufficiently substantiated and that no award is therefore to be made under this head. Further, the Court considers that the finding of a violation of Article 11 constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant association.

B. Costs and expenses

97. The applicant association also claimed EUR 3,000 in respect of the costs and expenses incurred in the proceedings before the Court.

98. The Government did not contest that claim.

99. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant association the sum of EUR 3,000 covering costs under all heads, plus any tax that may be chargeable.

C. Interest

100. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THOSE REASONS, THE COURT,

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by four votes to three, that there has been a violation of Article 11 of the Convention;

3. *Holds*, by four votes to three,
   (a) that the finding of a violation of Article 11 of the Convention constitutes in itself sufficient just satisfaction in respect of any

non-pecuniary damage which the applicant association may have sustained;

(b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the sum of EUR 3,000 (three thousand euros) in respect of costs and expenses, to be converted into Swiss francs (CHF) at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant association;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in French, and notified in writing on 15 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Georges Ravarani
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Krenc, joined by Judge Pavli;

(b) joint dissenting opinion of Judges Ravarani, Seibert-Fohr and Roosma.

G.R.
M.B.

CONCURRING OPINION OF JUDGE KRENC JOINED BY JUDGE PAVLI

(Translation)

1. I have subscribed to the conclusions of the judgment and the substance of the reasoning which underpins it. I should like to draw attention to certain points which I believe to be important and which have led me to conclude that there has been a violation of Article 11 of the Convention in this case.

I. The unprecedented scope of the measure

2. The present case concerns a ban with an unprecedented scope. Prohibiting as it did any public or private gathering for two and half months, the impugned measure was exceptional, both in its far-reaching nature and its duration. Admittedly, this ban occurred in an equally exceptional context, which the Court cannot disregard or downplay. Nor can the Court underestimate the difficulties encountered by the national authorities when required, as in the present case, to deal with a pandemic. Moreover, Switzerland was not the only State Party to have enacted strict restrictions at the relevant time.

II. The starting point: a holistic approach to the Convention

3. In this connection, the judgment rightly notes that "the Convention must be read as a whole" (see paragraph 84 of the present judgment). This is my starting point, since it is impossible to consider in isolation the potential issues raised by the measures enacted in the pandemic context, without running the risk of inconsistency.

4. Firstly, by virtue of Articles 2 and 8 of the Convention "the Contracting States are under a positive obligation ... to take appropriate measures to protect the life and health of those within their jurisdiction" (see *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 282, 8 April 2021). Protecting human life and health is not therefore one possible option available to the States; it is rather an obligation, imposed on them by the Convention. I believe it is important to reiterate this point.

5. Secondly, subject to a derogation notified under Article 15 of the Convention, those same States may, in honouring that obligation, introduce restrictions to the rights guaranteed by Articles 8 to 11 of the Convention only if these restrictions have an accessible and foreseeable legal framework and are proportionate.

6. The national authorities are thus torn between these obligations, which inevitably entail a degree of conflict, and call for an ongoing and sensitive balancing exercise. I fully acknowledge that the task of reconciling these

obligations is no easy one for the authorities (see, *mutatis mutandis*, with regard to counter-terrorism activities, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 252, 13 September 2016).

7. This task is all the more difficult in that such assessments can never be permanent, but must be constantly re-evaluated in the light of the situation and the data available at a given time.

III. The proportionality test

8. As I noted at the outset, and as the Government expressly acknowledged before the Court: the contested ban amount to a "serious interference" with the right to peaceful assembly, guaranteed by Article 11 of the Convention (see paragraph 71 of the present judgment). This was not a one-off refusal to authorise a specific demonstration. It was a blanket ban, imposed by a general rule, without exceptions and extending over an exceptionally long period. In reality, for several weeks (from 17 March 2020 to 30 May 2020), freedom of assembly was purely and simply set aside across the national territory. However justifiable this may have been from a public-health perspective, such a restriction, in order to be considered lawful under Article 11 § 2, must necessarily withstand judicial review of its proportionality.

9. Strictly assessed, the principle of proportionality calls for a two-fold test of appropriateness and necessity. Thus, a measure restricting liberty is proportionate only if it is capable of achieving the aim it pursues and if it does not go beyond what is necessary to achieve that aim (see *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009). The present judgment rightly highlights this second requirement, namely that of necessity (see paragraph 87), as emphasised by the Court on many occasions under Articles 8 to 11 of the Convention (see, with regard to Article 8 of the Convention: *Saint-Paul Luxembourg S.A. v. Luxembourg*, no. 26419/10, § 44, 18 April 2013; with regard to Article 9 of the Convention: *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, § 58, 12 June 2014, and *Lacatus v. Switzerland*, no. 14065/15, § 114, 19 January 2021; under Article 10 of the Convention: *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 61, 21 June 2012; and, with more specific regard to Article 11 of the Convention: *Association Rhino and Others v. Switzerland*, no. 48848/07, § 65, 11 October 2011, and *Croatian Golf Federation v. Croatia*, no. 66994/14, § 98, 17 December 2020).

10. Admittedly, in so far as it imposes an obligation to select the least restrictive alternative in order to achieve the intended aim, this necessity test may conflict with the margin of appreciation afforded to the States where that margin is wide, given that, in such circumstances, the authorities are granted greater latitude in their choice of the means to be employed for achieving that aim. This is illustrated by the *Vavřička* judgment (see *Vavřička and Others,*

cited above, § 306). In the present case, however, "the crucial importance of the right to peaceful assembly, which, like the right to freedom of expression, is one of the foundations of a democratic society" should not be lost from sight (see, among many other examples, *Dinçer v. Turkey*, no. 17843/11, § 20, 16 January 2018). The need for restrictions on that freedom must be "convincingly established" (see *Barraco v. France*, no. 31684/05, § 42, 5 March 2009, and *Galstyan v. Armenia*, no. 26986/03, § 114, 15 November 2007) – all the more so where the restriction is a general prohibition. Clearly, the margin of appreciation is substantially narrower in such a case than when it is the authorities' response to incidents of disorder or violence committed during public gatherings that is in issue (see, in particular, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 156, ECHR 2015, and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 251, ECHR 2011 (extracts)). Furthermore, the applicant association in the present case is a trade union whose activities were particularly affected by the impugned measure.

IV. The importance of the role of the domestic courts

11. Be that as it may, in accordance with the principle of subsidiarity (which permeates the Convention and since the entry into force of Protocol No. 15 is now enshrined in its Preamble), it is primarily for the national courts to review compliance with the requirements of the Convention. Since they are closest to the facts and realities, they are particularly well placed to identify the rights and interests at stake and to conduct the proportionality test required by the Convention. Their geographical proximity and legitimacy as an independent third party make them a key player in the protection of fundamental rights.

V. The absence of effective judicial review at domestic level in the present case

12. Following a detailed analysis, the present judgment nonetheless concludes that the judicial review of the contested ban likely to be conducted at national level could not be considered effective (see paragraphs 57 to 59 of the present judgment). I agree with this finding. Thus, I am unable to accept the Government's objection of non-exhaustion of domestic remedies in the present case. According to the Government, the applicant association ought to have applied for a permit to hold a gathering and then, if that request was rejected, to have lodged an appeal, thus triggering a preliminary ruling on whether the impugned ban was compatible with the Convention (see paragraphs 43 to 47). I cannot follow this approach, for several reasons.

13. Firstly, the applicant association cannot seriously be criticised for failing to request authorisation to hold an event, given that the prohibition had been laid down in a text that could not have been clearer. Furthermore, during

the period under consideration there had been no possibility of an exemption. This made it more than likely that any application for authorisation would have been doomed to failure. Indeed, the Government have not demonstrated the contrary before the Court.

14. Secondly, the "effective remedy" relied on by the Government is an indirect review, which could have been carried out only incidentally, and only following a refusal to grant authorisation. In my view, such a "remedy" is not commensurate with what is at stake in the present case. It is unsatisfactory, in that it imposes an excessive burden on the persons affected by the ban and is unsuited to the singular gravity of the prohibition.

15. Thirdly, the time factor is a key element in assessing a remedy's effectiveness. This is particularly so with regard to freedom of peaceful assembly, where bans on public gatherings are at issue[1]. In the present case, the impugned ban had effects that were immediately prejudicial to that freedom. However, as noted in the judgment following the Court's examination of the domestic practice during the relevant period, the Government have been unable to show that judicial review of compatibility with the Convention would have been possible "within a useful time" in this case (see paragraph 58 of the present judgment).

16. In my opinion, the more serious the interference and the more irreversible its consequences, the less the Court can show flexibility in assessing the effectiveness of a remedy within the meaning of Article 35 § 1 of the Convention.

17. Over and above the question of the application's admissibility, this finding that there was no "effective remedy, available in practice" (see paragraph 59 of the present judgment) is also, and more importantly, highly problematic in terms of substance, in the light of the requirements of Article 11 § 2 of the Convention. It is well established in the Court's case-law that outright bans call for "particularly thorough" scrutiny by the courts (see paragraphs 85 and 86). Thus, "the quality of the judicial review of the necessity of the measure is of particular importance" (see *Öğrü and Others v. Turkey*, nos. 60087/10 and 2 others, § 67, 19 December 2017). Since no effective remedy was available to challenge the impugned ban in good time, it was, in practice, immune from any review. This, in my view, is hard to reconcile with the requirements of the rule of law, which is at the heart of the

[1] See *Lashmankin and Others v. Russia*, nos. 57818/09 and 14 others, § 345, 7 February 2017: "In the area of complaints about restrictions on the freedom of assembly imposed before the date of an intended assembly – such as, for example, a refusal of prior authorisation where such authorisation is required – the Court has already observed that the notion of an effective remedy implies the possibility of obtaining a final decision concerning such restrictions before the time at which the assembly is intended to take place. A *post-hoc* remedy cannot provide adequate redress in respect of Article 11 of the Convention. It is therefore important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act …".

Convention and forms its "pole star" (see Robert Spano, "L'État de droit – L'étoile polaire de la Convention européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, 2021, pp. 481-509).

VI. Judicial review in times of crisis: a fundamental safeguard against *ultra vires* and abusive decisions

18. In times of (public-health or other) crisis, when successive rounds of far-reaching restrictions to freedoms may be enacted under the banner of urgency, access to independent and effective judicial review is a fundamental safeguard against the risk of excess and abuse, a possibility that can never be overlooked. The courts are not there to take the place of the competent authorities – they can make no such claim and do not have the necessary legitimacy for that purpose – but to verify the lawfulness and proportionality of those restrictions, guided by the prospect that citizens will be able, as soon as possible, to enjoy their freedoms fully once again.

19. I would add that this judicial review is particularly important with regard to restrictions imposed on the freedom of peaceful assembly, the specific nature of which cannot be underestimated. This freedom permits individuals to demonstrate collectively and publicly their opposition to other restrictions on rights and freedoms. Restricting the freedom of peaceful assembly is equivalent to restricting free democratic expression. In those circumstances, judicial review is essential.

VII. *Ex post facto* judicial review, prior parliamentary debate

20. At the same time, the importance of parliamentary review must also be emphasised. This is inherent in the concept of a democratic society. Indeed, "the Convention establishes a close nexus between an effective political democracy and the effective operation of Parliament. Accordingly, there can be no doubt that the effective functioning of Parliament is a value of key importance for a democratic society" (see *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 383, 22 December 2020). Moreover, in its case-law the Court has placed ever-greater emphasis on the quality of parliamentary debate, which is taken into consideration in assessing the proportionality of a general measure (see, *inter alia*, *Parrillo v. Italy* [GC], no. 46470/11, § 188, ECHR 2015; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 114, ECHR 2013 (extracts); and *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 79, ECHR 2005-IX).

21. In circumstances such as those prevailing in the present case, parliamentary review and judicial scrutiny are both essential counterweights to the executive's substantially increased role.

22. It is conceivable that, in exceptional cases, it would be difficult or even impossible to hold a parliamentary debate, in view of the urgency and

unpredictability of a particular situation. Nevertheless, every effort must be made to ensure that parliamentary scrutiny can be conducted as rapidly as possible. In consequence, and in the absence of an upstream parliamentary debate on a text entailing significant restrictions on fundamental freedoms, downstream judicial review "is all the more vital" (see paragraph 88 of the present judgment).

VIII. The key lessons

Reaffirming a pillar of the rule of law

23. The present judgment must be understood correctly. Nowhere does it state that the national authorities are estopped from restricting the rights safeguarded by the Convention in order to respond to a pandemic – far from it. In my view, the essential message to be taken from this judgment is that, in a democratic society governed by the rule of law, judicial review is absolutely necessary in respect of provisions which entail such far-reaching and long-lasting interference with the fundamental rights of the population as a whole. Such review is all the more necessary where those same provisions are, in the event of non-compliance, accompanied by criminal sanctions which, in the present case, are far from insignificant. In this connection, I note that a three-year prison sentence could be imposed (see paragraphs 20-21 of the judgment), a fact which, I must say, I find very disturbing[2].

A call for subsidiarity

24. In emphasising the need for accessible and effective judicial review at national level, there is no question of disregarding the Court's subsidiary role. On the contrary, this subsidiary role is reaffirmed, and its benefits are highlighted. Thus, it is increasingly clear from the Court's case-law that where the national courts conduct their review with due consideration for all of the competing rights and interests at stake under the Convention, as interpreted by the Court, there would have to be strong reasons for the Court to substitute its own assessment for that of the national courts (see, *inter alia*, under Article 11, *Öğrü and Others,* cited above, §§ 66-71; see also, in other fields, *M.M. v. Switzerland*, no. 59006/18, §§ 52-53, 8 December 2020; and *Petrie v. Italy*, no. 25322/12, § 44, 18 May 2017). This is a logical consequence of the Court's subsidiary role and of the margin of appreciation which must be granted to the national authorities.

Essential guidelines for a particularly critical and complex situation

[2] According to the Court, "a peaceful demonstration should not, in principle, be made subject to the threat of a penal sanction" (see *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011).

25. Faced with such an exceptional and uncertain situation as the COVID-19 crisis, the task of the national authorities, as guarantors of public health, was an extremely complex one, especially at the start of the pandemic, the extent and duration of which no one could have predicted. This complexity must be taken into account when assessing decisions with the benefit of hindsight. However, the present judgment sets out useful guidelines which contribute to preserving the rule of law, as I understand that concept, within the meaning of the Convention. The Court had a duty to reiterate them, otherwise it would have failed in its task.

JOINT DISSENTING OPINION OF JUDGES RAVARANI, SEIBERT-FOHR AND ROOSMA

(Translation)

1. To our regret, we are obliged, respectfully but firmly, to express our disagreement with the judgment delivered in the present case.

In our opinion, the judgment prejudges the motives of the Swiss courts, indulges in speculation and draws conclusions based on unproven assumptions. In so doing, it unnecessarily engages in an abstract assessment of the Swiss legislation on tackling the COVID-19 pandemic, while recommending that other less stringent but unspecified measures should have been adopted. Although it cites the Court's subsidiary role, this judgment makes it a court not of fourth, but of first, instance.

Unlike our colleagues, we consider that the applicant association failed to exhaust the available domestic remedies and that its application ought therefore to have been declared inadmissible (a). We will address the merits of the case, only briefly, incidentally and as a subsidiary aspect, particularly in the light of the finding, in our view erroneous, that the applicant association was not required to apply to the domestic courts (b).

(a) Exhaustion of domestic remedies

2. ***The facts and procedure.*** The facts at the origin of the dispute are – as always – extremely important. The applicant association regularly organises trade-union gatherings in the Canton of Geneva. In the period from 28 February to 19 June 2020, and in order to contain the adverse effects of the pandemic caused by COVID-19, the Swiss Federal Council adopted successive ordinances, initially restricting, then relaxing the right to organise public gatherings, on pain of criminal penalties; the most restrictive period was from 20 March to 26 April 2020, during which any gathering of more than five persons was forbidden (see paragraphs 6 to 15 of the present judgment).

Faced with this ban, the applicant association, which had initially requested a permit to organise a gathering as required by the legislation of the Canton of Geneva, withdrew its request. It thus waived the possibility of applying to a court in order to have an eventual refusal by the administrative authorities declared unlawful, preferring instead to apply directly to the Court and to allege that "the Swiss Federal Council's ordinances are acts of general application which cannot be appealed against before a domestic court" (see paragraph 13 of the judgment).

3. ***The submission that no domestic remedy was available.*** According to the applicant association, its case did not concern a refusal to authorise a specific event, but rather the introduction of a strict legal framework which, for two and a half months, had prevented it from organising any event. It

considered that "such a measure could not be directly challenged in the context of individual proceedings" (see paragraph 48 of the present judgment), adding that it was not possible for the Swiss courts "to rule on the compatibility of a legal norm with the higher-ranking norm" (see paragraph 49) and that the possible finding of a violation, based on a refusal to authorise a specific event, would "by no means enable the damage caused by a general ban, valid for two and a half months, to be recognised and made good" although this was the subject of its application (see paragraph 50). It concluded that it "had no means available of obtaining an examination of the alleged violation of its rights" (see paragraph 51).

In so doing, the applicant association either deliberately intended to by-pass the national courts (see paragraph 5 below) or was severely mistaken as to the content of domestic law. While it was perhaps unable to challenge the lawfulness (in the broad sense of a higher-ranking norm) of the impugned ordinance by way of direct review, it certainly had available another means of obtaining satisfaction, namely a plea of illegality.

4. ***The distinction between a direct appeal and a plea of illegality.*** Obtaining a finding that a legal provision is unlawful by means of proceedings brought directly to challenge that provision, or obtaining the same finding by way of a plea in the context of proceedings to have an individual administrative decision declared illegal are fundamentally different procedural routes which, for the individual, are nonetheless equally effective. With very few exceptions, in the (numerous) national systems which do not provide for a finding of illegality through direct proceedings, a plea of illegality is a sufficient means of safeguarding the rights and interests of individuals in the event of a violation of a higher-ranking norm.

There was nothing to prevent the applicant association from requesting authorisation to hold an event and, if that were refused, from challenging that refusal on the grounds that it was unlawful, in that it was based on a legislative text that was itself illegal because it violated a higher-ranking norm.

5. ***The Federal Council's ordinance could have been the subject of an indirect review of lawfulness.*** To claim, as the applicant association does, that "such a measure could not be directly challenged in the context of an individual decision" (see paragraph 48 of the present judgment) is a contradiction in itself, since in individual proceedings, understood as proceedings brought against an individual decision, the legal text underlying the decision can obviously not be challenged directly. To claim that the Swiss courts had "no competence to rule on the compatibility of a legal norm with the higher-ranking norm" (see paragraph 49 of the judgment) is also erroneous, since this is exactly what the Federal Supreme Court did in its judgment of 24 April 2021, referred to in the present judgment (see paragraph 7 below).

Unfortunately, this is the route that the present judgment has taken.

Thus, in paragraph 56, doubts are expressed as to the possibility of obtaining an exemption from the ban on public gatherings; the judgment points out that, in any event, an exemption was no longer possible after 17 March 2020. However, it is precisely the lawfulness of this rule that the applicant association could have challenged in the context of an individual appeal against a decision refusing authorisation for a demonstration. Further, it does not seem certain that no exemption was possible after 17 March 2020, since the domestic courts had no opportunity to clarify the scope of Article 7 (Derogations) of Ordinance O.2 COVID-19 (it appears from the provision in question that exemptions remained possible in principle, since training institutions, which could be granted an exemption in certain circumstances, were mentioned only by way of example rather than exhaustively).

In this context, it may even be doubtful whether the applicant association can still claim victim status in respect of the alleged violation. It is mistaken in claiming to have been directly affected by the impugned Federal Council ordinance, which provided for criminal penalties in the event of non-compliance. Had it requested authorisation to organise a gathering, as provided for by the law, it would have been able to appeal to the courts against that refusal, without risking a criminal penalty in the meantime. The facts of the present case are thus different from situations where the only way to challenge the illegality of a norm entails a prior criminal conviction (see, to similar effect, *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45), and the impugned Ordinance affected the applicant association, at the most, indirectly.

6. ***Requirements concerning the obligation to exhaust domestic remedies where there is uncertainty as to their availability***. The requirement to exhaust domestic remedies where there is uncertainty as to their availability or effectiveness is the subject of clear case-law on the Court's part. Applicants are under an obligation to exhaust only those remedies that are available and effective, both in theory and in practice at the relevant time, that is to say which are accessible and capable of providing the applicant with redress for his complaints and have reasonable prospects of success (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II, and *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)). The existence of the remedies in question must be sufficiently certain not only in theory but in practice. While it is true that the national case-law must be sufficiently consolidated in the domestic legal order, new situations may arise and, above all, mere doubts as to the effectiveness of a remedy are not a valid reason for an applicant's failure to use it (see *Epözdemir and Beştaş Epözdemir v. Turkey* (dec.), nos. 49425/10 and 51124/10, 22 October 2019; *Milosevic v. the Netherlands* (dec.), no. 77631/01, 19 March 2002; *Pellegriti v. Italy* (dec.), no. 77363/01, 26 May 2005; *MPP Golub v. Ukraine* (dec.), no. 6778/05, 18 October 2005; and *Vučković and Others v. Serbia*

(preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 74 and 84, 25 March 2014).

Moreover, the Court has regularly reiterated that this rule must be applied with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria,* 16 July 1971, § 89, Series A no. 13, and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 87, 9 September 2015). However, this cannot and does not mean that the Court is entitled to disregard the rules normally applicable in a given national system and to dispense applicant parties from the obligation to exhaust domestic remedies depending, so to speak, on whether their "face fits"; were it to do so, the requirement would be rendered devoid of meaning and purpose.

Ideally, of course, a domestic remedy would be definitively exhausted before a complaint is lodged against the impugned measure. However, in a system of prior authorisations for public gatherings, unless the requirement of such prior authorisation is declared contrary to the Convention, which is not the case (see, for example, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 147, ECHR 2015), it is simply unrealistic to impose such a condition. In such circumstances an effective remedy can only reasonably be required before a court of first instance, not before a court of appeal or even a supreme court ruling at final instance.

7. ***Reliance on irrelevant case-law examples. The Federal Supreme Court's judgment of 24 March 2021.*** The judgment then addresses the crucial question of whether the applicant association could have challenged before the Swiss courts a possible rejection of a request for authorisation to hold a peaceful assembly. To this end, the Court examines a judgment relied on by the Government to demonstrate the effectiveness of the domestic remedies, namely a Federal Supreme Court judgment of 24 March 2021. In holding that the judgment in question was irrelevant, the majority note that it was delivered a year after the period concerned by the present application before the Court and, above all, that the case in question concerned a different matter, namely the provision of cultural services (see paragraph 57 of the judgment).

Firstly, there was nothing to prevent the applicant association from taking the initiative and requesting authorisation, and subsequently challenging any refusal before the courts; and, secondly, in its the judgment of 24 March 2021, the Federal Supreme Court merely applied the general law, consisting in not accepting a norm that is considered unlawful as the legal basis for an individual decision. Its judgment may thus be regarded as an illustration of the effectiveness of challenging an individual decision refusing authorisation, based on an unlawful general provision.

8. ***The Federal Supreme Court's judgment of 12 August 2021.*** The present judgment subsequently refers to a judgment delivered by the Federal Supreme Court on 12 August 2021. Ruling on an application to have a refusal to grant authorisation for a gathering set aside, that court declared the appeal

inadmissible as being devoid of purpose, in that the request for authorisation concerned a date that had already passed when the contested decision was issued, and when the impugned restrictions had been lifted and were very unlikely to be re-imposed in the same way in future. The majority criticise the Federal Supreme Court for failing to rule on the merits of the appeal and to carry out a preliminary review of the constitutionality of the federal ordinance (see paragraph 58 of the present judgment).

This reasoning is surprising in several respects. At the outset, it should be noted that this inadmissibility judgment of the Federal Supreme Court was based on three different grounds, which provided ample justification for the decision taken. That court did not rely exclusively on the fact that the date set for the gathering had already passed by the time it was called upon to give judgment, but based its findings on two additional factors: firstly, the restrictions were no longer in force at the relevant time and, secondly, it considered that they would most probably not be re-imposed in the same way in future (a prediction which, moreover, was subsequently proved correct). It is pure conjecture to assume that the outcome would be (or would have been) the same if one of these additional factors was absent. Thus, the judgment in question cannot illustrate the ineffectiveness of the remedy which consists in challenging, before the administrative court, an individual decision to refuse authorisation. Only if such refusals to recognise standing were systematic and if the courts invariably refused, on the grounds that they were devoid of purpose, to rule on appeals against authorisation refusals, by declining to hear such disputes as a matter of priority or urgency, could it be concluded that this remedy is ineffective.

9. ***The existence of a case-law precedent regarding the Convention-compliance of the impugned restrictions.*** More serious yet, there exists, in the very area concerned by the present case, a judicial decision in which a court agreed to assess an appeal against a refusal to authorise a public gathering, and examined the compatibility of the impugned "COVID-19" Ordinance with the higher-ranking law: we refer to a judgment of 18 August 2020, in which the Administrative Division of the Court of Justice of the Canton of Geneva held that the ordinance in question did not breach a higher-ranking norm and dismissed the appellant party's appeal.

In refusing to attach any relevance to this last-cited judicial ruling, the present judgment notes that it was delivered after the date on which the gathering had been scheduled, and stresses that an appeal to the Administrative Division of the Court of Justice of the Canton of Geneva would therefore have proved ineffective, since the Court's case-law holds that the review of a refusal to grant authorisation must take place before the actual date of the planned event. While this principle is based on common sense, it is nevertheless incumbent on the organiser of an event to apply for a permit sufficiently early to allow the authorities to take a reasoned decision and, if they refuse, to enable the courts to examine a possible appeal without undue

pressure (with regard to the unrealistic requirement of a final judicial decision, see paragraph 6 *in fine* above). The information available to the Court does not indicate the time-limits in the dispute which gave rise to the above-mentioned judgment of the Administrative Division of the Court of Justice of the Canton of Geneva.

In any event, had the applicant association in the present case wished to organise its event on the emblematic date of 1 May 2020, it had sufficient time to apply to the authorities well in advance, thus enabling them, in turn, to decide in good time. Had its application been rejected for any reason, including as being devoid of purpose, it could then have complained to the Court about that refusal, and the Court could have ruled on whether the outcome of the dispute was compatible with the requirements of the Convention, taking into account the domestic courts' interpretation of the Swiss legal and statutory provisions. The Court's finding could then have served as a reference decision for other future cases in this area at national level. In such a scenario, the outcome might have been the same as that in the present judgment, but the Swiss judicial system would have been recognised rather than by-passed.

10. ***Conclusion.*** The outcome is disappointing: unnecessarily and without being able to examine whether and how the Swiss courts would have applied the requirements of Article 11 of the Convention to the restrictions imposed by the Federal Council's impugned COVID-19 ordinance, the judgment engages in an abstract review of a provision, a process which is inevitably flawed.

(b) The merits

The reasoning on the merits of the dispute suffers from the shortcomings in the section concerning the exhaustion of domestic remedies.

11. ***An erroneous premise: the absence of domestic remedies.*** The finding of a violation is based almost exclusively on the absence of judicial review of the ban, the reasons for it and the balancing of the conflicting interests at stake, as required by the Court in the context of examining the proportionality of the measure (see paragraph 86 of the present judgment).

However, as emphasised above, this premise is simply not correct (see above, (a)).

12. ***Abstract and incomplete review of the impugned measure.*** The judgment then proceeds, in the manner of a first-instance court, to carry out this balancing exercise itself in an entirely abstract way. Its assessment is limited to a single sentence: it concludes that "in the light of the importance of freedom of peaceful assembly in a democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and appreciable duration of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of

the rights protected by Article 11 was not proportionate to the aims pursued" (see paragraph 91 of the present judgment). There is not a word about the scale of the planned event, its route, the number of participants expected, nor about how the virus was spreading at the given time, hospital overcrowding, or the lack of vaccines and effective treatment in view of the health and political authorities' knowledge of COVID-19 at the relevant time; there is nothing concrete, merely a completely abstract balancing exercise, far removed from the requirements, consistently reiterated in the Court's case-law, with regard to effective and practical rights. The contrast with the responses provided to date by other Chambers of the Court on the same issue is striking (see *Ünsal and Timtik v. Turkey* (dec.), no. 36331/20, 8 June 2021; *Bah v. the Netherlands* (dec.), no. 35751/20, 22 June 2021; and *Zambrano v. France* (dec.), no. 41994/21, 21 September 2021). Bearing in mind the very worrying public-health situation and the uncertainty surrounding COVID-19's spread at the beginning of 2020, it is also debatable whether an overall duration of two and a half months can be described as "appreciable" with regard to the restriction in question (see paragraph 91 of the judgment).

13. ***Departure from the rule of a wide margin of appreciation in public-health matters.*** Admittedly, the judgment also addresses the issue of the margin of appreciation enjoyed by the Swiss authorities in this area, but from a perspective which, in our opinion, robs of its substance the conclusion in the recent *Vavřička and Others v. the Czech Republic* judgment ([GC], nos. 47621/13 and 5 others, 8 April 2021). The present judgment states that "Switzerland enjoyed a *certain* margin of appreciation in determining restrictions to the rights and freedoms guaranteed under the Convention" (see paragraph 84 of the present judgment). However, in the above-cited Grand Chamber judgment, the Court reiterated that matters of healthcare policy are in principle within the margin of appreciation of the States (see *Vavřička*, cited above, § 274), noted that "the respondent State's margin of appreciation will usually be *wide* if it is required to strike a balance between competing private and public interests or Convention rights" (ibid., § 275), and describes as wide the margin of appreciation in the area of child vaccination (ibid, § 280). The Grand Chamber weighed up this highly intrusive measure against the fundamental rights enshrined in Articles 8 (right to private life) and 9 (freedom of opinion) of the Convention and in Article 2 of Protocol No. 1 to the Convention (right to education) and concluded that, in imposing the impugned restrictions on the freedoms arising from those Convention provisions the Czech authorities had not exceeded the margin of appreciation afforded to them. We fail to see why a limitation in respect of the freedom of peaceful assembly guaranteed by Article 11 would not fall within the same margin of appreciation.[3]

[3] In response to possible accusations of a democratic deficit in the process of enacting the impugned measures, it may be observed, without in any way affecting the courts' obligation to safeguard the fundamental rights of those on whom they were imposed, that while there

It is also surprising that the judgment, referring to a number of Court judgments, emphasises that "for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned" (see paragraph 87 of the present judgment), although in the *Vavřička* judgment, the Grand Chamber deliberately refused to go down that route, a point that was criticised by Judge Wojtyczek in his dissenting opinion annexed to that judgment, in which he cites a series of Court judgments to the opposite effect (see, for example, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 110, ECHR 2013 (extracts); see also paragraph 14).

14. ***The conclusion reached by the judgment.*** The conclusion is equally surprising: "... the domestic courts did not conduct an effective review of the measures at issue during the relevant period. The respondent State thus overstepped the margin of appreciation afforded to it in the present case. In consequence, the interference was not necessary in a democratic society within the meaning of Article 11 § 2 of the Convention" (see paragraph 91 of the present judgment). It is true that the courts conducted no such review, but the reason for that is obvious: they were not put in a position to do so. In the final analysis, the majority accuse the authorities of omissions that are attributable to the applicant association.

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may have been no preliminary parliamentary debate owing to the obvious urgency of introducing health measures, the Swiss people, in two referenda of 13 June 2021 and 28 November 2021, rejected, by a majority of over 60% on each occasion, initiatives to oblige the federal authorities to lift the restrictive measures in question.