In search of a ‘social minimum’: Austerity and destitution in the European Court of Human Rights

Dr Dimitrios Kagiaros

Teaching Fellow in Public Law and Human Rights,
University of Edinburgh

Abstract

The European Court of Human Rights has interpreted the Convention in specific circumstances, in a manner that extends the protection provided under civil and political rights into the socio-economic sphere. The Court in obiter statements, has also alluded to the possibility that “a wholly insufficient amount of pensions and other benefits” would “in principle” violate the Convention, namely Articles 2, 3 and 1 Protocol 1 ECHR. This statement also appears in various forms in recent admissibility decisions where applicants unsuccessfully challenged austerity measures adopted to give effect to conditionality agreements in states in the midst of a debt crisis. The paper seeks to examine whether with this statement, the Court is suggesting that states undergoing a debt crisis have a Convention-based duty to ensure that they protect everyone within their jurisdiction from destitution that could be the result of austerity policies. The paper will conclude that while a duty not to target specific individuals with harsh austerity measures while leaving others unaffected has been read into the ECHR, it is unlikely that with this statement the Court intends to create a ‘social minimum’ or a social welfare safety net that austerity cannot penetrate.

Introduction

In response to the sovereign debt crisis, affected states in Europe have implemented a series of stark austerity measures, impacting all aspects social welfare.1 For states in southern Europe, austerity policies were adopted to give effect to conditionality agreements that sought to make the reduction of welfare spending a prerequisite for access to financial support.2 With European countries now operating under a balanced budget rule,3 there is renewed interest surrounding the precise scope of states’ obligations to maintain a well-functioning social security and social welfare system.

The economic dimension of rights, especially of those rights whose realisation is highly resource-dependent, has generated debate on the appropriate role of human rights law

---


in times of economic crisis. Academic discussion has revolved around two interlinked issues. Firstly, how does a far-reaching debt crisis affect state obligations under human rights law, and secondly, how should the international human rights protection mechanisms respond to the crisis?

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

However, the wide margin of appreciation the Court grants the respondent state is accompanied by a warning that, in one form or another, has consistently appeared in the Court’s austerity case law. The Court cautions the respondent states that it would be willing to find a violation of the Convention where the pension or other benefits the applicant received from the state are found to be ‘wholly insufficient’. This, according to the Court, would occur in circumstances where the individual was wholly dependent on state support and the welfare received was inadequate for her subsistence. The Court has not sought to define the threshold beneath which social provisions would be deemed insufficient, nor has it found a violation of the Convention relying exclusively on the insufficiency (or complete lack of) a benefit. This has led commentators to suggest that such statements are nothing more than a ‘teasing promise’, a rhetoric device the Court deploys in obiter statements, but is unlikely to deliver on.

The fact that the Court returns to this concept, however, raises a series of interesting questions. Does this suggest that the Court would be willing to stand in the way of a complete eradication of social welfare in a state facing a debt crisis? Can this statement be relied upon to ensure that the implementation of austerity policies does not reach a point of condemning individuals to destitution? And, finally, is the Court suggesting that

---

7 The cases are developed in detail in the body of the paper.
8 As will be discussed below, the Court has alluded to the possibility that a completely insufficient amount of social benefits could violate Articles 2, 3 and A1P1 ECHR.
9 Budina v Russia (Application No. 45603/05, decision on admissibility 18 June 2009).
11 As will be demonstrated below, the Court when finding that an austerity measure violated the Convention, relied on other factors rather than ‘insufficiency’ to find a violation.
there is a minimum of social welfare, a ‘social minimum’\textsuperscript{13} that the ECHR requires, a Convention-based social benefit ‘safety net’, which austerity cannot penetrate?

The paper aims to examine this statement that the Court deploys and to determine its significance in the context of the economic crisis and austerity. It will argue that the insufficiency of a benefit has indeed on occasion been relied on as a normative justification for the Court to override the wide margin of appreciation and proceed to a more rigorous scrutiny of the impugned austerity measure. This insufficiency, however, serves merely as a starting point. In the few cases where an austerity measure was found to be disproportionate, the central element the Court relied on was not the overall amount of the benefit, but the fact that the applicant had been singled out to ‘carry the burden’ of austerity when compared to others within the respondent state. Thus, when the austerity measure ‘targets’ a specific group of individuals while leaving others largely unaffected, the likelihood of a successful challenge under the Convention is greater.

If, however, austerity measures are distributed more or less fairly, without targeting specific classes of individuals, does this reference to insufficiency of benefits leave open the possibility for a successful challenge to an austerity measure that renders an individual destitute? The paper will argue that in the context of a debt-ridden state this would be unlikely. The obligation to maintain a well-functioning welfare system to protect the rights under Articles 2, 3 and A1P1 is a positive one. Positive obligations, due to their nature as obligations of means, require the state to protect the rights-holder as far as they are able to do so. Thus, what the Court will assess where positive obligations are concerned, is whether the state, took reasonable measures, to the best of its ability, to protect rights-holders from a threat to the enjoyment of their rights. The state must remain diligent, but as the paper will demonstrate, it does not have a duty to succeed in this endeavour. This means that if the state can demonstrate that it employed the means at its disposal to the best of its subjective abilities, the fact that the rights-holder experienced a prejudice to their rights does not suffice to find a violation of the state’s obligations under the Convention.

Applying this to the context of the austerity, it will be argued that where an individual is rendered destitute due to austerity cuts and faces circumstances engaging the aforementioned rights, the Court would be expected to ascertain whether the respondent state employed the meagre means at its disposal in a manner that would protect the rights holder. Based on the court’s approach, the paper will conclude that such a thorough examination in a debt-ridden state is unlikely.

1. Austerity measures and social welfare under scrutiny in the European Court of Human Rights

A useful starting point to more precisely illustrate how the Court determines state obligations under the Convention in relation to social welfare, is the case of Stec and

The applicants sought to challenge the “differences in the entitlement for men and women to certain industrial injuries social security benefits”. With regards to state ‘social welfare’ obligations under the Convention, the Court in this case reached three important conclusions. Firstly, the Court held that the Convention does not create an obligation on Contracting Parties to establish a social security scheme or to provide a minimum amount of benefits. Secondly, the Court noted that if the state does establish such a scheme, the welfare provided (pensions and benefits, both contributory and non-contributory) would fall under A1P1, and are thus considered ‘possessions’ for the purposes of the Convention. Thirdly, any welfare policies the state adopts must be organised in a manner that is compatible with Article 14 ECHR.

The second point in the Court’s analysis in Stec is most relevant to the discussion here, as it suggests that the Convention’s guarantee for the peaceful enjoyment of possessions would require the Court to engage in a ‘fair balancing’ assessment to determine whether any interference with welfare benefits satisfied the conditions of proportionality. When such interference is the result of austerity policies in states facing an acute financial crisis, it is to be expected that the Court would grant the state a wide margin of appreciation. A look at the cases reaching the Court at the time of the European debt crisis confirms this account. The applicants in Koufaki and ADEDY v Greece for instance, complained about the cuts in their wages and pensions emanating from the laws implementing the first memorandum of understanding between Greece and its foreign creditors. The case was found inadmissible as manifestly ill-founded. In assessing the compatibility of the measures with the Convention, the Court began by explaining that ‘A1P1 cannot be interpreted as giving an individual a right to a pension of a particular amount’. The court reiterated that, under the circumstances, the margin of appreciation that would apply would be a wide one. The Court also dismissed the applicants’ arguments that there were less intrusive measures that Greece and its creditors could have adopted in response to the debt crisis, and emphasised that this did not alter the Court’s deferential approach.

In Da Conceicao Mateus and Santos Januario v. Portugal, another case that failed at the admissibility stage, the Court found the cuts in the applicants’ pensions to be “clearly in the public interest within the meaning of A1P1” and confirmed that “a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social policy”.

---

14 (App. Nos. 65731/01 and 65900/01, 12 April 2006).
15 Legal summary of the case available at [http://hudoc.echr.coe.int/eng#{"itemid":["002-3406"]}](http://hudoc.echr.coe.int/eng#{"itemid":["002-3406"]})
16 Stec at [53].
17 See also Koua Pourriez v. France (App. No. 40892/98, 30 September 2003).
18 Koufaki and Aedy v Greece (App. No. 57665/12 and 57657/12, 7 May 2013, decision on admissibility).
19 Ibid at [33].
20 Ibid at [31] emphasis added.
21 Ibid at [48]
22 (App. Nos. 62235/12 and 57725/12, 8 October 2013, decision on admissibility).
23 Ibid at [26].
24 Ibid at [22].
The Court reached similar conclusions in *Silva Carvalho Rico v Portugal*, noting that the austerity measures in this case "were adopted against the background of an actual and unexpected budgetary crisis". Notably, the Court also made reference to the judgment of the Portuguese Constitutional Court on the matter, which grounded its decisions on the "proviso of the possible", a doctrine according to which "a State cannot be forced to comply with its obligations in the framework of social rights if it does not possess the economic means to do so".

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

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

This reference to a possibility that wholly inadequate social benefits could breach Convention rights is not a novel position. The first case where the Court connected convention rights to destitution was *Larioshina v Russia*, where the applicant complained about the very limited sum she was given through her old-age pension and certain other social benefits that she was entitled to. The Court found the case inadmissible but very importantly noted “that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3”.

This position of the Court was further developed in the admissibility decision in *Budina v Russia*. The applicant argued under Article 2 ECHR, that the very small sum she was receiving was inadequate for her survival. Although her claim was ultimately unsuccessful, once again failing at the admissibility stage, the approach of the Court is enlightening:

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

This ‘promise’ that a wholly insufficient amount of welfare would violate the Convention also appears in the more recent austerity case law but not in a uniform way.

In *Koufaki* for instance, the Court noted that “that the applicants before it had not claimed specifically that their situation had worsened to the extent that they risked falling below
the subsistence threshold”.

This suggests that if the applicant had been more adversely impacted by the austerity measures, the Court’s position would have been different. No clarification was provided here as to whether the Court would rely A1P1 or Articles 2 and 3 ECHR. In the Da Conceicao Mateus admissibility decision, the Court stressed that “a total deprivation of entitlements resulting in the loss of means of subsistence would in principle amount to a violation of the right of property”. This represents a departure from Budina and Larioshina where the loss of adequate means of subsistence was tied to Articles 2 and 3. It does also suggest that there exists a Convention obligation to provide a minimum of welfare that would allow for the ‘subsistence’ of the individual. Finally, in Silva Carvalho Rico v Portugal, the Court noted that it would be willing to find a violation of the Convention where social rights claims are reduced “to purely symbolic sums”, but did not specify which Article would be violated.

2. Successful challenges to austerity

This warning of the Court can be interpreted as clarifying to states that they do not benefit from a ‘free pass’ when implementing austerity policies. While the threshold for an austerity measure to fail the Court’s proportionality test is set very high, the Court in a series of judgments has indicated the circumstances under which an austerity measure would violate the Convention. What weight did the Court place on the sufficiency of the benefit in these cases? As this part will demonstrate, while the overall amount of a social benefit is a starting point for the Court to engage in a more in-depth scrutiny of the impugned austerity measure, this is not the critical factor it will rely on to find a violation. Instead, the Court analyses austerity measures from the viewpoint of how the reduction the applicant faces compares with similar reductions or the overall amount of pensions others receive in the respondent state.

The case of Kjartan Asmundsson v Iceland serves to illustrate this point. The applicant received a disability pension after sustaining serious injuries in a work accident. As a response to the economic crisis in Iceland, the government removed the disability pension entitlements in their entirety from specific classes of recipients, including the applicant. The Court’s approach, in finding a violation of A1P1 is telling:

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

33 Koufaki n18 at [44].
34 Da Conceicao Mateus n22 at [24].
35 Silva Carvalho Rico n25 at [44].
36 (App. No. 60669/00, 12 October 2004).
commensurate reduction rather than the total deprivation of his entitlements”.

This approach is confirmed in a series of similar judgments. The decisive factor that grants the Court the legitimacy to override the wide margin of appreciation thus seems to stem not only from the reduction (or in this case the complete deprivation) of the applicant’s pension, but from the “discriminatory manner” in which the austerity measures were designed. The Court did not rely on Article 14 ECHR to reach this conclusion, but employed the term ‘discrimination’ to convey that the applicant was selected to bear the brunt of austerity, while most in a similar position were left unaffected. This constituted an ‘excessive and disproportionate burden’ on the applicant. Thus, the deprivation the applicant faced, and this is crucial to the paper’s argument, was but one factor the Court took into account. The Court explicitly claims that if the reduction of the applicant’s benefits was commensurate to that of others, the Court would not have found a violation.

This seems to suggest that the ‘insufficiency of a benefit’ is in essence a starting point for the Court to proceed to more rigorous scrutiny of the impugned measure than the traditional wide margin of appreciation would permit. In doing so, however, the Court is not setting an objective ‘social minimum’. By comparing the position of the applicant to that of others in the responding state, the Court is attempting to determine the subjective capabilities of each state. This, as will be developed in the section below, is an approach that is determined by the nature of positive obligations as obligations of means.

In light of this, it would be useful to examine a further possibility. If we were to suppose that a debt-ridden state would adopt austerity measures that, while fair in their distribution of the ‘cost’ of austerity, condemned individuals to destitution, could the Convention be relied upon to rectify this? Can the ‘wholly insufficient’ construct effectively thwart any attempts of the state to limit the scope of welfare to the point that it is non-existent?

3. Can destitution violate the Convention?

There have been instances in the Court’s case law where the Court has demanded the provision of welfare to applicants in exceptional circumstances. As this part will demonstrate, however, it would be difficult to accept these as setting a social minimum that would remain immune from austerity cuts in a debt-ridden state.

The first instance where the Court has found a violation of the ECHR stemming from the state’s failure to provide welfare assistance, is in cases where the state’s intervention is indispensable for the protection of human life, and essentially makes the difference

---

37 Ibid at [43-45] emphasis added.
38 See indicatively N.K.M. v Hungary (Application No.66529/11, 14 May 2013), Savickas and others v Lithuania (Application No. 66365/09, decision on admissibility 15 October 2013), Khoniakina v Georgia (Application No. 17767/08, 19 June 2012). See also Bukradze and others v Georgia (App. Nos. 1700/08, 22552/08 and 6705/09, 8 January 2013).
39 Asmundson n36 at [44]. The Court, after finding a violation of A1P1, did not proceed to examine the Article 14 claim separately.
40 Ibid.
between the ‘life and death’ of the applicant. Here, exceptionally, the Court has found against the respondent state, but maintained a very high bar which is not easily applicable to broader instances of destitution or to every person who is unable to sustain herself through state providence.\^41 Therefore, when basic social policy is intrinsically tied to the protection of human life itself, the core of Articles 2 and 3 is impinged, then there is an ‘objective’ responsibility of the state to act by providing welfare, usually in the form of healthcare.

Another instance where the Court has demanded the state to provide material assistance is when the individual is a member of a vulnerable group. A useful case to highlight the Court’s approach in these circumstances is MSS v Belgium and Greece.\^42 The applicant was an asylum seeker who complained inter alia, that upon his arrival in Greece, during the time his asylum request was being considered, he was left without shelter and material provisions in a state of destitution. The Court found that these conditions amounted to a violation of the applicant’s Article 3 ECHR rights. While the case can be welcomed as a milestone in the Court’s case law on socio-economic obligations under the Convention, its application beyond these very specific circumstances is questionable.

This is because the Court attached “considerable importance to the applicant’s status as an asylum-seeking and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection”.\^43 The Court set out criteria for determining whether a group can be viewed as vulnerable. Such groups must be a) fully dependent on state support and b) experience official indifference when in a situation of serious deprivation or want incompatible with human dignity.\^44

It is safe to deduce, that membership to a vulnerable group should be viewed as a circumstance that enhances and expands the scope of the state’s positive obligation to provide material assistance to the rights-holder.\^45 Recourse to the ‘vulnerability’ criterion, however, also demonstrates the limits of the Court’s willingness to require the state to proceed to social provisions. These do not need to be provided to everyone exposed to destitution, merely to those who the Court deems to belong to a ‘particularly vulnerable’ group. The applicant’s vulnerability was not determined on the basis that he was destitute, but on the basis that he was an asylum-seeker.

Could this protection be expanded to include vulnerable groups hurt by austerity measures in a debt-ridden state? Even if we are to grant ‘vulnerability’ an extended meaning, so to encompass all those who are reliant on the state for material support and face the state’s indifference, its use in the context of an economic crisis remains

---

\^41 D v United Kingdom (App. No. 30240/96, 2 May 1997); Paposhvili v Belgium (App. No. 41738/10, 13 December 2016); Asiyë Geç v Turkey Application No 24109/07, 27 January 2015).
\^42 (App. No. 30696/09, 21 January 2011).
\^43 Ibid at [251].
The concept of ‘vulnerable groups’ allows the Court to prioritise the needs of the applicants over other groups, due to the exceptional character of the circumstances they are experiencing. It essentially suggests that a priority in the allocation of resources should be given to such individuals by virtue of their membership to a vulnerable group. It thus presupposes that membership to a vulnerable group is an exceptional circumstance that requires and deserves special attention from the respondent state. This, to an extent, requires a well-functioning state where vulnerability is the exception rather than the rule. The criterion loses its significance when applied in situations where a large number of different groups could make a claim to be vulnerable, with regard to their social welfare. In the context of a state taking measures to recover from an unprecedented crisis while enormous demands on the welfare state due to the limited work force and a staggering increase in poverty, then the problems of applying the ‘vulnerability’ criterion become evident. If vulnerability is no longer the exception, but almost the norm then the criterion becomes insufficient in determining which categories of citizens deserve special attention over others. In an economy that is decimated, and a significant percentage of the population could claim to be vulnerable under the criteria the court established in MSS (full dependence on state support combined with state indifference) it could be argued that a new criterion to determine the most vulnerable amongst the vulnerable would need to be developed. This is even more so the case where the cost of austerity has been more or less evenly distributed between vulnerable groups.

This significantly limits the role of the ECtHR in the context of an austerity crisis. When faced with competing claims of vulnerability, emanating from various vulnerable groups (pensioners, the unemployed, the homeless, those in need of medical attention, those with disabilities that are in need of financial assistance to survive, refugees) in a state with particularly limited resources, it is difficult to envisage the Court making sensitive policy decisions that would prioritise one vulnerable group over the other. This type of reallocation of resources from vulnerable group A to vulnerable group B is arguably outside the remit of the international judge, at least when taking into account the manner in which the Court has understood its remit in the aforementioned austerity-related case law. This problem is exacerbated where the respondent state is party to a conditionality agreement which to a great extent stipulates how its resources will be allocated and how any access to bail out funds will be invested.47

Thus, the limited circumstances discussed above, where the Court found a violation of the Convention on the basis of a state failure to provide an adequate amount of social provisions cannot easily be expanded to broadly argue that the Convention establishes a social minimum which would set objective limits to austerity cuts in debt ridden states. There are, however, further doctrinal obstacles that limit the Court’s capacity to act as a bulwark against austerity-related destitution. As the following part will argue, the nature

of positive obligations suggests that references to insufficiency of benefit must examined in the light of the nature of positive obligations as obligations of means.

4. Assessing due diligence. What is the state expected to do in the context of a debt crisis in relation to its social welfare?

If we are to accept that the Convention creates duties on the state to protect individuals from destitution, as the Court suggested when referring to wholly insufficient benefits, then this duty to protect generates due diligence requirements on the part of the state. The state must therefore, employ all means at its disposal so as to ensure that the individual will not be exposed to conditions of destitution. The scope of this duty of due diligence however, is closely tied to the subjective capabilities of the state.

This is crucial to the argument the paper seeks to advance. When defining the scope of positive obligations, and in order to determine whether a violation has occurred, what needs to be assessed is not only whether the rights-holder was exposed to conditions that threatened the enjoyment of her rights, but additionally, whether the state employed the means at its disposal in a reasonable manner to protect the rights-holder. What this entails is that not every prejudice to the individual’s rights will constitute a violation of the state’s positive obligations under the Convention. This will be the case only when the state was in a position to prevent the violation and was negligent in doing so.

What this entails for the issue under examination, is that the fact that an individual is exposed to conditions that would threaten Convention rights, does not in itself suffice to find the state in violation of these rights as far as their positive dimension is concerned. Determining that the situation of deprivation the individual experiences triggers protection under A1P1 and Articles 2 and 3 ECHR, is only the first part of a two-stage test that the Court must conduct to determine whether a violation has occurred. In addition to the circumstances of deprivation, the Court must proceed to establish state fault, “a failure of the state that contributed to the prejudice the victim suffered”, namely that “there were certain supplementary measures which the State could have taken but failed to take, although this would not have imposed a disproportionate burden”.48

The report of the ILA Study Group on Due Diligence in International Law further illustrates this point. As the report explains:

Should a violation occur, the State will not be responsible in every case, but only if it has been deficient in some respect; in any case, the State will never be responsible for the violation itself, but rather for its failure to act, the separate delict.49

Therefore, in relation to positive obligations, the state is not asked to guarantee that the wrongful result will not occur, but to activate, as far as possible, those means at its disposal which are suitable to realise the goal of preventing and stopping any wrongful conduct that is not attributable to it. As far as the means are concerned, the state has the

49 ILA Study Group on Due Diligence in International Law, First Report Duncan French (Chair) and Tim Stephens (Rapporteur) published 7 March 2014 pg 16, www.ila-hq.org/download.cfm/docid/BAC4DFA1-4AB6-4687-A265FF9C0137A699
discretion to select the one that it prefers between equally fruitful means.\textsuperscript{50} If the state is found to have acted diligently, then regardless of whether the wrongful result occurred or not, it cannot be held responsible, due to the fact that it fulfilled its duties under the aforementioned principle. The state’s diligence is assessed based on the circumstances of the particular case. More specifically, it is based on what was necessary to do to avert the unwanted result and what it could do, on the means at its disposal, as well as other related parameters, such as whether based on the facts of each separate case, it was in a position to know and predict the imminent danger of a human rights violation. This makes it clear that the state “does not have an obligation to succeed”.\textsuperscript{51}

The degree of required diligence is not therefore the same for all states, nor is it objective. It depends upon the ad hoc conditions of every case and also upon the subjective capabilities of each state and what could reasonably be asked of it. What is under examination to assign responsibility is “capacity”\textsuperscript{52} to act. It suffices, therefore, for the state to “seek to achieve certain outcomes”.\textsuperscript{53}

Applying this to austerity, the claim that the applicant is facing circumstances of destitution which are not directly attributable the state,\textsuperscript{54} is not sufficient to find a violation of the Convention. The court must then proceed to assess whether the state was in a position to protect the rights-holder from destitution.

The Court’s case law has provided little indication that it would be willing to thoroughly engage in such an analysis. Instead, the Court has gone to great lengths to avoid interfering with sensitive issues of economic policy in debt-ridden states. Would an extreme scenario of a destitute applicant alter this approach? Unless there is a clear case of discrimination in line with the Asmundsson judgment, the Court seems lacking in interpretative tools that would provide it with the necessary justifications to find a violation. Assessing whether the state in the exercise of its duty of diligence could have or should have provided greater assistance to the applicant seems to remain outside the Court’s purview. As the paper has demonstrated above, the allocation of resources where the applicant is seeking a social benefit is the red line the Court does not cross, although it is a line it can potentially step on where an applicant is blatantly affected to a disproportionate degree by an austerity measure. In such cases, however, the Court expertly avoids engaging with the minutiae of resource allocation, by essentially requiring the state to distribute the cost of austerity in a manner that is not blatantly unfair towards specific classes of individuals. The Court did not suggest in these cases that the Convention demands a ‘social minimum’, it merely suggested that states in implementing austerity should not completely exclude certain individuals from accessing available benefits while leaving others unaffected. The case law also demonstrates that

\textsuperscript{50} "ILA Study Group on Due Diligence in International Law Second Report July 2016 Tim Stephens (Rapporteur) and Duncan French (Chair) 2016 pg. 7 http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.
\textsuperscript{51} 2014 Report n49 at 17.
\textsuperscript{52} Ibid at 18.
\textsuperscript{53} 2016 Report n50 at 46.
vulnerable groups should be prioritised as far as their social welfare is concerned. Thus, tools to provide a social minimum seem to be lacking in the Court.

Conclusion

The perceived failure of the Court to serve as a potent bulwark against austerity in debt ridden states by guaranteeing a social minimum is nothing more than a manifestation of its subsidiary nature as an institution protecting human rights in Europe and of the limits of international human rights protection, especially where positive obligations and the duty of due diligence are involved. While the Court has asserted its role in reviewing austerity measures where applicants are singled out by legislative measures to carry the burden of austerity in a discriminatory manner, where the distribution of the cost of austerity is fair, the Court will struggle to find the normative justification that will allow it to intervene and challenge a state’s austerity policy. Thus, the insufficiency of benefits statement the Court refer to in its case law, is unlikely to be the basis on which a pan-European social minimum can be generated.