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A Note on Methodology

The present volume is based on a systematic analysis of the vulnerability jurisprudence related to Article 3 ECHR. The following explains the methodology used in obtaining, coding and analysing that case law.

This volume did not study all of the many thousands of cases examined by the Court under Article 3 to date, but only those where vulnerability explicitly played a role in the Court's decision-making. The case law to be considered was therefore filtered via the Court's own HUDOC database.¹ The data was collected by searching all document collections in both official languages, with the exception of communicated cases (where no examination of the merits has yet taken place, and it is thus not possible to derive any information about the Court's approach to vulnerability) and legal summaries (which reproduce other judgments and decisions and do not bind the Court). The search included Article 3 cases brought against any Member State, and covered judgments and decisions by all configurations of the Court on all levels of importance.

The results were narrowed to cases that included the words 'vulnerable', 'vulnerability', 'vulnérable' or 'vulnérabilité'. The Boolean wildcard symbol ('*') was used in order to include all four terms in one search, thereby avoiding overlaps, and the search term used was thus 'vuln*'. This search, which was conducted for the time span between the inception of the Court and 28 February 2019, yielded 1,147 results.

For the sake of creating a case law database that was as exhaustive as possible, a second search under the same conditions but using the terms 'precariousness', 'precarity', 'précarité' and 'précaire' was also conducted. The results overlapped almost entirely with the results found via the first search, and the Court usually reinterpreted applicants' allegations of *précarité* as a question of vulnerability² or used both terms together,³ meaning that only four additional relevant cases were identified in this way.⁴ This search was repeated using the term 'defenceless'; it led

¹ Which is available at <http://hudoc.echr.coe.int/eng#>.

² See *Stoyan Mitev v Bulgaria* App no 60922/00, Judgment of 7 January 2010, paras 53 and 55 as compared to para 73; *Tarakhel v Switzerland* App no 29217/12, Judgment (GC) of 4 November 2014, Reports 2014 (extracts), paras 65 and 84 (where the applicants refer to precariousness).

³ See *M.S.S. v Belgium and Greece* App no 30696/09, Judgment (GC) of 21 January 2011, Reports 2011, contrasting para 233 ('the vulnerability inherent in his situation') and para 320 ('a state of precariousness ... contrary to Article 3').

⁴ *Giusto, Bornacin and v Italy* App no 38972/06, Decision of 15 May 2007; *A.A. v Switzerland* App no 58802/12, Judgment of 7 January 2014, para 40; *Archip v Romania* App no 49608/08, Judgment of 27 September 2011, para 57; *B.A.C. v Greece* App no 11981/15, Judgment of 13 October 2016, paras 32, 37, 40, 43, 46, which is not directly relevant to the present analysis because the relevant references were made under Art 8 ECHR.

to the identification of one additional case.⁵ Similar searches were also conducted using the terms ‘helpless’, ‘sans défense’, ‘fragilité’, ‘susceptible’, ‘susceptibility’ and ‘susceptibilité’, but these did not lead to the identification of any additional cases relevant under Article 3.

The resulting judgments and decisions were filtered to retain only those where vulnerability had effectively been employed by the Court in its reasoning. Regarding the parts of these cases to be examined, a compromise had to be made between a ‘paragraph’ rule and a more comprehensive approach. On the one hand, in order to make it possible to take such a large number of cases into consideration, all of the judgments and decisions of the Court under Article 3 where vulnerability had entered into play could not be read in their entirety. It was therefore necessary to delineate which parts of the cases would be considered. On the one hand, reading all of the 1,150-odd judgments and decisions from start to finish would have been excessively labour-intensive and might have entailed conjecture regarding the attributes constituting vulnerability.⁶ On the other hand, cherry-picking only the paragraphs mentioning vulnerability would have risked missing relevant information, while failing to read the facts of the case would mean that the findings on the merits could be taken out of context. A workable compromise was therefore reached by first reviewing the facts of each case and then applying an expanded paragraph rule, ie only looking systematically at the section of the merits concerning Article 3, with whole judgments being considered where deemed opportune.

Applying this methodology led to the retention of 438 cases in which vulnerability played a part in the Court’s reasoning. Cases in which vulnerability was used only in its common definition, or used only in the context of other Convention rights or by third parties, were excluded. Where cases referred to the concept of vulnerability in both language versions, only the English version was counted. Where vulnerability was used by multiple configurations of the Court dealing with the same case – thus, for example, by the Commission and the Chamber, or by the Chamber and the Grand Chamber – only the final judgment or decision was counted; the findings of the other bodies were indexed as well, but separately so as to ensure that the same case was not counted twice for the purposes of the quantitative results. Where the concept of vulnerability was referred to only in a separate opinion attached to a judgment, but not in the judgment itself, the reference was included in the data for information purposes but not counted as a reference by the Court.

In order to build case law groups, the cases were coded according to – where possible – the aggregate trait or situation giving rise to the vulnerability in question. However, given that the intersection of various grounds of vulnerability

⁵ *Aliyeva v Russia* App no 1901/05, Judgment of 18 February 2010, para 87.

⁶ Contrast the approach taken by Audrey R Chapman and Benjamin Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic Social and Cultural Rights’ (2011) 33(3) *Human Rights Quarterly* 682–732, 703 and 705–07.

makes applicants more vulnerable than one of the individual grounds alone, it was not possible or useful to select just one of these aggregate groups for each case of intersectionality. This means that, where the Court considered that multiple traits gave rise to vulnerability, that case was coded once for each of the relevant categories. Any additional characteristics that did not play a role for the Court's finding of vulnerability – meaning that they were not explicitly or by obvious implication used as the basis for a finding of vulnerability – were not counted. However, this approach erases the intersection of the various sources of vulnerability at play. For this reason, cases of intersectional vulnerability were additionally coded as such.

Some references to very specific intersections of numerous factors could not always be added to broader categories and were more appropriately considered on their own. For example, the very specific reference to a vulnerable 'African woman working as a prostitute'⁷ was flagged as a special case, as was the reference, for example, to terminally ill patients seeking access to an experimental medicine.⁸

This volume operates on the basis of case law groups built by means of the database thus created. The large number of relevant cases was thereby organised into a typology that allows conclusions to be drawn about when, how and why the Court uses vulnerability. The decision to operate on the basis of an exhaustive case law analysis was not made only because such a comprehensive examination of vulnerability-related case law was missing in the academic literature (including, but not limited to, that concerning Article 3). It was also chosen in particular because this approach facilitates tracing the evolution of the various strands of case law and the diverging approaches to vulnerability taken. In other words, it uncovers certain elements that would have gone missing in an analysis based purely on leading cases, and considers that there is added value to documenting the massive extent to which the Court uses vulnerability reasoning.

* * *

The Council of Europe has aimed from the outset at protecting the rights of the weak, the vulnerable, the persecuted. Equality, tolerance and the acceptance of differences are its guiding principles.⁹

In 2011, the European Court of Human Rights (ECtHR) issued a landmark judgment in the case of *M.S.S. v Belgium and Greece*.¹⁰ That judgment, which created baseline welfare obligations for certain types of applicants, concerned the prohibition of torture and inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR). In this case, the Court

⁷ *B.S. v Spain* App no 47159/08, Judgment of 24 July 2012, para 62.

⁸ *Hristozov and Others v Bulgaria* App nos 47039/11 and 358/12, Judgment of 13 November 2012, Reports 2012 (extracts), para 122.

⁹ PACE, 'Report on Gypsies in Europe', Doc. 6733, 11 January 1993, para 7.

¹⁰ *M.S.S. v Belgium and Greece* App no 30696/09, Judgment (GC) of 21 January 2011, Reports 2011.

found that states must provide materially for people who are particularly dependent on the authorities. It did so by emphasising the special 'vulnerability' of the applicant as an asylum seeker.

Today, *M.S.S.* is part of a larger strain of case law that uses various iterations of vulnerability to tailor the Convention to context. For example, this concept has allowed the Court to create special protections for children, who fall in the 'class of highly vulnerable members of society' to whom the state must provide care and protection.¹¹ Children's vulnerability takes precedence over other interests, and for example means that the criteria for detaining a minor are more strict than those applicable to adult detainees. In other words, this case law recognises that identical treatment can have more intense or traumatic effects on one person than on another, depending on the circumstances. This recognition relates to the distinction between formal and substantive equality, and to the recognition that responding to context allows rights to be universal while also accommodating diversity.¹²

From a systemic perspective, the regional and international human rights framework responds to particular protection needs through 'special' human rights instruments specific to certain groups.¹³ Under a universal human rights instrument such as the ECHR, vulnerability has an equivalent function: it grants special protection or a tailored response to the needs of certain groups or individuals. Vulnerability has been used in this way not just by the ECtHR, as discussed in this volume, but also by other human rights bodies. These bodies all tend to use the concept as a vague and undefined one that allows for the ad hoc protection of certain individuals or groups, which raises questions about the meaning of vulnerability and the criteria for describing someone as vulnerable. It also entails a normative question regarding what these criteria and concepts should look like.

Answers to these questions are difficult to come by. Human rights bodies often refer to vulnerability situationally, and without an explanation of the concept's definition, scope, or effects. A theoretical account of vulnerability is replaced simply with the delimitation of a list of groups and individuals considered to fall under the term in a given context, through either a 'categories approach'¹⁴ (for example, the category of children) or a 'factor-based approach'¹⁵ (for example, the factor of being in detention). In other words, instead of clarifying what

¹¹ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03, Judgment of 12 October 2006, Reports 2006-XI, para 55.

¹² See Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2004), 254–56.

¹³ An example is the CRC.

¹⁴ Chrystalla Katsapaou, 'Response to Vulnerability in Asylum: Project Report' (UNHCR, 2013), www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/response/response-to-vulnerability-in-asylum-project-report.html, 33.

¹⁵ David Weissbrodt and Mary Rumsey, *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar, 2011); Dia Anagnostou, 'The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities' in Dia Anagnostou and Evangelia Psychogiopoulou (eds), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context* (Martinus Nijhoff, 2010), 1–26, 2.

vulnerability means and why it matters for human rights protection, human rights bodies prefer to simply state that a given individual or group is vulnerable.

For the past three decades, the ECtHR has used vulnerability reasoning in various ways to extend the scope of Convention rights. It has done so for a variety of reasons, including applicants' dependency, a risk of harm or exposure to violence, and historic oppression and marginalisation. Over time, the Court's vulnerability reasoning has acquired significance in the context of various Convention rights, including the right to life,¹⁶ the prohibition of torture and inhuman and degrading treatment,¹⁷ the prohibition of slavery and forced labour,¹⁸ the right to liberty and security,¹⁹ the right to a fair trial,²⁰ the right to respect for private and family life,²¹ and the prohibition of discrimination.²²

Today, references to vulnerability are most plentiful under Article 3 ECHR. In this context, the Court has developed a burgeoning case law, which spans hundreds of judgments and decisions and concerns applicants who have been considered vulnerable for a broad array of reasons. The present volume predominantly concentrates on this provision. It does so not only because vulnerability reasoning is prevalent and impactful under Article 3, but also to explore the relationship between the provision's absolute nature and its arguably relative application. Today, given the volume of vulnerability-related case law, and the various and significant effects that the concept has on Convention standards, understanding vulnerability is key to understanding the Court's approach to Article 3 ECHR and to the progressive development of its case law overall.

The Court's intentional ambiguity about the meaning of vulnerability is perplexing, especially given that vulnerability is a term in common use and not per se a legal concept. As a result, understanding the concept of vulnerability requires a closer look at *regarding whom, how, and why* the Court resorts to vulnerability reasoning.

The question of *who is vulnerable* is explored in chapter three of this volume, which maps the Court's case law under Article 3 and creates a typology of vulnerability on this basis. The bulk of references to vulnerability under Article 3 relate to dependency. This can stem from a particular need for care and support – as applies for example to children and to persons with certain disabilities –, or can be due to imprisonment, institutionalisation, or other grounds rendering a person particularly dependent on the state. However, not all references to vulnerability

¹⁶ Art 2 ECHR; see *Salman v Turkey* App no 21986/93, Judgment (GC) of 27 June 2000, Reports 2000-VII, para 99.

¹⁷ Art 3 ECHR; as discussed in this volume.

¹⁸ Art 4 ECHR; see *Siliadin v France* App no 73316/01, Judgment of 26 July 2005, Reports 2005-VII, paras 126 and 143.

¹⁹ Art 5 ECHR; see *O.M. v Hungary* App no 9912/15, Judgment of 5 July 2016, para 53.

²⁰ Art 6 ECHR; see *Blokhin v Russia* App no 47152/06, Judgment (GC) of 23 March 2016, Reports 2016, paras 195, 198–99.

²¹ Art 8 ECHR; see *I.B. v Greece* App no 552/10, Judgment of 3 October 2013, Reports 2013, paras 79–81; *Söderman v Sweden* App no 5786/08, Judgment (GC) of 12 November 2013, Reports 2013, para 81.

²² Art 14 ECHR; see *D.H. and Others v Czech Republic* App no 57325/00, Judgment (GC) of 13 November 2007, Reports 2007-IV, paras 181–82.

relate to dependency. Applicants may for example be vulnerable because they have experienced victimisation, including through sexual and domestic violence. They might also be vulnerable because of a context of migration, or because they belong to a marginalised group, for example certain religious and ethnic minorities or LGBTQI people. People living with a psychosocial disability or HIV/AIDS can also fall into this latter category. Situations of pregnancy and precarious reproductive health can also create vulnerabilities, as can certain political views and activities. Lastly, chapter three discusses the Court's approach to the intersection of two or more grounds of vulnerability, for example when an applicant is both a child and a member of an ethnic minority, or both a detainee and living with mental illness.

In chapter four, the volume explores *how* the Court uses vulnerability. In other words, it determines the effects of the concept. For example, the Court has relied on vulnerability to flesh out states' positive obligations to protect the wellbeing of individuals under their control²³ and to lower the threshold of severity that must be reached in order for the Court to find a violation of Article 3.²⁴ Beyond this, vulnerability affects many aspects of an application's life in Strasbourg – from the urgency with which it is treated, to the criteria for its admissibility, to the Court's decision on the substance of the case and even the awards made. Vulnerability can, in other words, have far-reaching effects, and it is part of the continuing strengthening or expansion of the protection afforded by Article 3, which – as part of the ECHR, a living instrument to be interpreted in light of present-day conditions – enshrines an 'increasingly high standard' that evolves with time.²⁵

Lourdes Peroni and Alexandra Timmer, two of the first scholars to study the Court's vulnerability jurisprudence, have argued that vulnerability 'acts as a magnifying glass', allowing the Court to pinpoint ill-treatment and its impact on a particular applicant.²⁶ At the same time, even without vulnerability reasoning, the Court's assessment of whether there has been a violation of Article 3 is already context-sensitive. In other words, the minimum level of severity that must be reached in order for ill-treatment to violate Article 3 is a relative one, and dependent on all the circumstances of a case.²⁷ As a result, this volume asks *why* the Court nevertheless uses the concept of vulnerability. It argues that the reasons for the Court's turn to vulnerability might be found, for one, in its attempts to limit the scope of its judgments, especially where politically delicate distributive questions are at stake, while retaining the flexibility to find violations where

²³ *X. v Germany* App no 8819/79, Decision of 19 March 1981, DR 24, p 158; *Denis Vasilyev v Russia* App no 32704/04, Judgment of 17 December 2009, para 115.

²⁴ *Tarakhel v Switzerland* App no 29217/12, Judgment (GC) of 4 November 2014, Reports 2014 (extracts), paras 118–19.

²⁵ *Selmouni v France* App no 25803/94, Judgment (GC) of 28 July 1999, Reports 1999-V, para 101.

²⁶ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056–85, 1091.

²⁷ *Ireland v United Kingdom* App no 5310/71, Judgment of 18 January 1978, Series A no 25, para 162.

deemed necessary. Vulnerability may therefore allow for a covert balancing exercise to take place in the context of Article 3 despite the provision's absolute nature. Vulnerability narratives may also function as a consensus-building instrument in divisive cases, or they may evoke judicial empathy. At the same time, vulnerability allows for the identification of structural inequalities and disadvantages and promotes a substantively equal approach to protecting human dignity.

In this regard, the Court's approach to vulnerability relates to a well-established philosophical debate. From this perspective, vulnerability can destabilise the prevailing liberal order's concept of the legal subject as autonomous, rational and invulnerable. In these theoretical accounts, vulnerability is a mechanism for context-sensitivity and a driver for equality, justice and respect for human dignity because it represents a shared human experience linked to our embodiment in a vulnerable human form. In other words, vulnerability here is understood as a universal human experience or condition. Placing the Court's approach to vulnerability into this wider theoretical context not only sheds light on some of the pitfalls of its jurisprudence, but also potentially provides ideas for addressing them.

The present volume uses this philosophical-theoretical framework to analyse the Court's approach. This identifies a binary opposition of vulnerable applicants against those who are non-vulnerable as being deeply problematic. As an alternative, it discusses a spectrum that moves between extreme vulnerability and great resilience – ie access to resources that protect individuals against the effects of their vulnerability. Based on this approach, the volume recommends a roadmap for the Court's future case law that addresses the risks of its current selectivity.