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A Typology of the Court's Approach to Vulnerability under Article 3 ECHR

Chapter Summary

This chapter systematically examines the Court's Article 3 case law for references to vulnerability. Based on case law groups, it creates a typology of types of vulnerability recognised by the Court. The first category is dependency-based vulnerability, which concerns minors, the elderly, and those with psychosocial and cognitive disabilities. A related category, which accounts for the bulk of the Court's references to vulnerability under Article 3, concerns vulnerability due to state control. In addition, applicants may be considered vulnerable due to experiences of victimisation or a feeling of vulnerability, because of a context of migration, discrimination or marginalisation, or due to pregnancy or situations of precarious reproductive health, unpopular views, or the intersection of various sources of vulnerability. The chapter discusses the case law in relation to each of these categories in turn, provides a qualitative and quantitative overview of references, and discusses some underexplored sources of vulnerability that the Court could potentially consider in the future. It also provides the groundwork for an analysis of the effects and pitfalls of vulnerability reasoning under Article 3, as fleshed out in the chapters that follow.

Keywords: Vulnerability reasoning, vulnerable groups, marginalisation, othering, victimisation, dependency, detention, minors, psychosocial disability, migration.

I. Overview: A Typology and Distribution of References

In order to map the reasons why a given group or individual may be considered vulnerable by the Court, it is useful to create a typology of sources of vulnerability. There have been some proposals, made elsewhere, on how to go about creating such a typology. Proposals include dividing sources of vulnerability into 'etic' and 'emic' vulnerability, differentiating between vulnerable groups and vulnerable individuals, and creating a more detailed typology that lists all recognised sources of vulnerability separately.

The first proposed typology divides sources of vulnerability into 'etic' and 'emic' vulnerability. An 'etic' approach defines vulnerability as the existence of a risk that justifies intervention, while an 'emic' approach links it to a person's psycho-social cultural context, and sees vulnerability as an individual lived experience.¹ The Court's Article 3 jurisprudence recognises sources of vulnerability than can fall under one or the other of these types of vulnerability. It takes an 'etic' approach, for example, to the vulnerability of migrants in the State to which they are to be returned,² and it takes an 'emic' approach when it bases its finding of a violation of the provision on, for example, the subjective sense of violation experienced by applicants.³ A division of vulnerability into these two categories shows the flexibility of the concept, underscores the resulting difficulties of definition, and highlights the importance of listening to and understanding the experiences of the individuals concerned.⁴ The division into etic and emic sources of vulnerability does not, however, create a useful typology of vulnerability on its own.

To enrich this, a distinction can be made between vulnerable groups, on the one hand, and vulnerable individuals, on the other. This is also a distinction made by the ECtHR. As discussed below, under the prohibition of discrimination in Article 14 ECHR, the Court has defined vulnerable groups as 'historically subject to prejudice with lasting consequences', which results in social exclusion and can entail legislative stereotyping that precludes an individualised assessment of a person's capacities and needs.⁵ The Court has considered that restrictions of the rights of vulnerable groups with a protracted history of discrimination, for example people with a cognitive disability, entail a narrow margin of appreciation on the part of the state, and must be justified by 'very weighty reasons'.⁶

Vulnerable groups identified by the Court to date include the Roma community, people living with HIV, asylum-seekers and people with cognitive disabilities.⁷ This list likely does not represent a *numerus clausus*. For example,

¹ Michael C Dunn, Isabel CH Clare and Anthony J Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Public Policy' (2008) 28(2) *Legal Studies* 234–53, 245–46; Jonathan Herring, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (vol 14, OUP, 2012) 243–63 245–46.

² Such a risk must be proven and individualised in order for expulsion to conditionally violate Article 3 (see *I.I.N. v Netherlands* App no 2035/04, Decision of 9 December 2004; *N.M.B. v Sweden* App no 68335/10, Judgment of 27 June 2013, paras 32–33).

³ On the sense of vulnerability as a violation of Art 3, see for example *Rachwalski and Ferenc v Poland*, no 47709/99, Judgment of 28 July 2009, para 61; *Ilaşcu and Others v Republic of Moldova and Russia* App no 48787/99, Judgment (GC) of 8 July 2004, Reports 2004-VII, para 446.

⁴ Herring (n 1), 246–49.

⁵ *Kiyutin v Russia* App no 2700/10, Judgment of 10 March 2011, Reports 2011, para 63; *Alajos Kiss v Hungary* App no 38832/06, Judgment of 20 May 2010, para 42, with references; 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.

⁶ *Alajos Kiss* (n 5), para 42, with references.

⁷ *D.H. and Others v Czech Republic* App no 57325/00, Judgment (GC) of 13 November 2007, Reports 2007-IV, para 182; *Kiyutin* (n 5), para 64; *M.S.S. v Belgium and Greece* App no 30696/09, Judgment (GC) of 21 January 2011, Reports 2011, para 251; *Alajos Kiss* (n 5), para 42. For a more comprehensive analysis, see Peroni and Timmer (n 5).

in *Kiyutin v Russia*, the Court held that groups can also be vulnerable on account of their sex, sexual orientation, race or ethnicity, mental faculties or disability.⁸ The Court's understanding of group vulnerability also seems to be sensitive to, in addition to historical discrimination, the conditions facing the members of a given group as individuals today. Thus, in *I.B. v Greece*, the Court held that 'HIV-positive persons have to face up to a whole host of problems, not only medical, but also professional, social, personal and psychological ones, and above all to sometimes deeply rooted prejudices even among the most highly educated people.'⁹ There, the Court went on to address the existence of prejudices which stigmatise or marginalise those living with the virus, and found that people living with HIV constitute 'a vulnerable group with a history of prejudice and stigmatization'.¹⁰

Individual vulnerability has been less clearly described and delimited by the Court than group vulnerability, and the former concept has also been used to encompass a wider range of applicants than the latter. In general terms, individual vulnerability can stem from an aspect of an individual's status or identity, or from powerlessness, dependence, and exposure to an increased risk of human rights violations. Alexandra Timmer, in her ground-breaking 2013 article,¹¹ created a more detailed typology that identified seven grounds that have thus far brought about the qualification of individuals as vulnerable, one of which is the above-mentioned ground of membership in a vulnerable group. These grounds are:

- the inherent vulnerability of children and persons with cognitive disabilities;
- vulnerability due to state control;
- vulnerability related to gender, as applies to victims of domestic violence and women in precarious situations of reproductive health;
- vulnerability due to a legal power imbalance, as experienced by persons accused of a crime and those who lack legal capacity;
- vulnerability due to the espousal of unpopular views, which can arise in demonstrators and journalists;
- vulnerability in the context of migration, as applies to the detention and expulsion of asylum-seekers; and
- vulnerability due to group membership, as applies to Roma, persons living with HIV/AIDS, and – to some extent – asylum-seekers.

Timmer also included the category of compounded vulnerability, which encompasses intersections of the above traits such as, for example, in the case of a detained

⁸ *Kiyutin* (n 5), para 63, with further references.

⁹ *I.B. v Greece* App no 552/10, Judgment of 3 October 2013, Reports 2013, para 80.

¹⁰ *Ibid*, para 81, citing *Kiyutin* (n 5), para 64.

¹¹ Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 147–70, 151–54, and the case law cited therein.

child who is also a migrant.¹² This responds to the fact that the Court's concept of vulnerability can accommodate the intersection of traits and statuses that make an individual vulnerable.

The concept of intersectionality was famously coined by critical race scholar Kimberlé Crenshaw to describe the discrimination experienced by African-American women, who suffer discrimination because of their race or their gender along with discrimination that is unique to the intersection of those two traits.¹³ This idea seems to have resonated with the Court, at least to some extent. For example, in *B.S. v Spain*, the Court held that the applicant was vulnerable by virtue of not just one but a series of traits, namely her African origin, her gender, and the fact that she was a sex worker.¹⁴ It thereby displayed at least a fledgling awareness of intersectionality, although it has refused to explicitly apply this concept, or even to engage with it, in many of its key non-discrimination cases.¹⁵

The Court's case law continues to show that it is easier to delineate vulnerability by examining the grounds that cause it than by attempting to create a *numerus clausus* of individuals who can be considered vulnerable, given that the individuals who can fall into this category are many: from military conscripts,¹⁶ to detainees in a drunken state,¹⁷ to victims of violations of Article 3¹⁸ and terminally ill patients seeking access to an experimental medicine,¹⁹ among many others. In other words, identifying the principles behind and reasons for vulnerability reasoning provides a better understanding of what the concept means than enumerating vulnerable groups and individuals. This however makes it particularly relevant to note that the Court has thus far failed to articulate those principles.

A noteworthy element of Timmer's framework for present purposes is that it does not make a rigid conceptual distinction between individual and group vulnerability. This is important here because while some scholars – including Timmer – do seem to consider that there is some conceptual distinction to be made,²⁰ it is not clear that this distinction is particularly useful for the purposes of Article 3 ECHR.

That is not to say that there is no distinction to be made. Vulnerable groups are, according to the Court's case law, rendered vulnerable by their history of

¹² Ibid.

¹³ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *University of Chicago Legal Forum* 139–67, 149.

¹⁴ *B.S. v Spain* App no 47159/08, Judgment of 24 July 2012, para 62.

¹⁵ *Garib v the Netherlands* App no 43494/09, Judgment (GC) of 6 November 2017, Reports 2017, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para 34. See also *S.A.S. v France* App no 43835/11, Judgment (GC) of 1 July 2014, Reports 2014, where the Court did not engage with the concept despite its invocation by multiple third-party interveners.

¹⁶ *Placi v Italy* App no 48754/11, Judgment of 21 January 2014, paras 49, 58, 59.

¹⁷ *Kummer v Czech Republic* App no 32133/11, Judgment of 25 July 2013, para 69.

¹⁸ *Buzilo v Republic of Moldova* App no 52643/07, Judgment of 21 February 2012, para 29.

¹⁹ *Hristozov and Others v Bulgaria* App nos 47039/11 and 358/12, Judgment of 13 November 2012, Reports 2012 (extracts), paras 112, 122.

²⁰ Contrast Timmer (n 11) and Peroni and Timmer (n 5).

discrimination, and vulnerable individuals are, as evident from the case law, rendered vulnerable by some other trait, condition or situation – for example, their dependency or the fact that they are under the sole authority of state authorities. There is thus a definitional difference between these two concepts, which may stem from the fact that the concept of vulnerable groups evolved largely under the auspices of Article 14 ECHR. Ultimately, though, there seem to be limited differences between the effects of membership in a vulnerable group and individual vulnerability, at least under Article 3. While membership in a vulnerable group has relevance in expulsion cases as concerns the burden of proving that an individual faces a risk of ill-treatment if returned,²¹ group and individual vulnerability seem to overlap in all other regards.

This point is underscored by the fact that the Court itself does not always heed this distinction between group and individual vulnerability. For example, in *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, the Court examined an application brought on behalf of a young man of Roma ethnicity who suffered from a profound intellectual disability and who had been diagnosed with HIV as a child. Despite the intersection of multiple group-related grounds of vulnerability in this case (namely minor age, Roma ethnicity, intellectual disability and HIV/AIDS), the Grand Chamber did not consider Mr Câmpeanu to be a member of a vulnerable group – nor, *nota bene*, refer to the concept of intersectionality – instead referring to his ‘heightened state of vulnerability’, his ‘state of extreme vulnerability’ and the fact that he was a ‘highly vulnerable person’, respectively.²² The Court’s case law itself thus seems to indicate that there is no strict distinction to be made between group and individual vulnerability. This goes hand in hand with the fact that the Court can only consider cases concerning individual members of a vulnerable group, and not concerning a vulnerable group as a whole. While group membership may have certain evidentiary advantages or be otherwise relevant under Article 14 ECHR,²³ under other articles of the Convention it is generally the qualification as vulnerable that is decisive, independently of whether that vulnerability is individual or group-based.

It must be noted that the Court is, however, not particularly consistent in applying vulnerability reasoning. In cases concerning, for example, the alleged ill-treatment of detainees, it by turns emphasises the importance of their vulnerability,²⁴ merely pays lip service to the idea²⁵ or fails to mention it at

²¹ *Gayratbek Saliyev v Russia* App no 39093/13, Judgment of 17 April 2014, para 62.

²² *Centre for Legal Resources (CLR) on behalf of Valentin Câmpeanu v Romania* App no 47848/08, Judgment (GC) of 17 July 2014, Reports 2014, paras 143, 108 and 104.

²³ Under Art 14, membership in a vulnerable group narrows the state margin of appreciation and requires strict scrutiny (*I.B.* (n 9), paras 79, 81).

²⁴ *Aydin v Turkey* App no 23178/94, Judgment (GC) of 25 September 1997, Reports 1997-VI, paras 83–84.

²⁵ *Lipencov v Republic of Moldova* App no 27763/05, Judgment of 25 January 2011, para 32; *Gladović v Croatia* App no 28847/08, Judgment of 10 May 2011, para 37; *Oshurko v Ukraine* App no 33108/05, Judgment of 8 September 2011, para 69.

all.²⁶ Another source of uncertainty stems from the way in which the Court conceptualises vulnerability. For example, in one case, it found that an applicant military officer who had been sexually harassed at work was not vulnerable because the Court did not consider 'that the applicant's situation was akin to that of a child'.²⁷ This seems to imply that only extreme dependency engenders vulnerability. Yet, in other cases, the Court engages with the lived experiences of an individual applicant, and considers it decisive whether they *felt* vulnerable.²⁸ In yet other cases, vulnerability is considered the product of other feelings, including those of arbitrariness, inferiority and anxiety.²⁹ Though the determination that someone is vulnerable seems to be the outcome of an evaluative process, this process is usually not described in Strasbourg's judgments, making it difficult to determine how the Court reaches its conclusions about an applicant's vulnerability.

To shed some more light on this, and based on the methodology described in the annex,³⁰ the present chapter provides an in-depth and systematic overview of the Court's case law on vulnerability under Article 3 ECHR between the Court's first use of the concept and 28 February 2019. In doing so, this chapter will amend Alexandra Timmer's typology of the Court's uses of vulnerability,³¹ tailoring that framework to the case law under Article 3. This is because the specificities of the Article 3 case law, combined with a systematic examination of hundreds of cases, mandate a series of departures from her original categories. For one, the distinction between vulnerable groups and individuals will not figure as prominently here, for the reasons just discussed. Furthermore, 'inherent vulnerability' will be reconceived as dependency-based vulnerability. This has a three-fold explanation: first, the amended term is considered more descriptive; secondly, it takes the often transitory nature of dependency-as-vulnerability more accurately into account; and thirdly, it may better serve to provoke a discussion about the ways in which the vulnerability of children and mentally disabled persons is constructed based on ideas about their dependency without regard for emancipatory or participatory interests. Psychosocial disability will be grouped into this category to reflect the Court's framing of it, although there are overlaps between this category and the category of discrimination-based vulnerability as discussed below. Despite its overlaps with dependency-based vulnerability, vulnerability due to state control will remain a separate category, as will vulnerability due to a legal power imbalance and vulnerability in the context of migration.

²⁶ For example *Nogin v Russia* App no 58530/08, Judgment of 15 January 2015 (where the judgment failed to mention the concept at all) and *Merezhnikov v Russia* App no 30456/06, Judgment of 12 November 2015 (where it was referred to by the parties (para 25) but not by the Court).

²⁷ *Reilly v Ireland* App no 51083/09, Decision of 23 September 2014, para 58.

²⁸ *Ülke v Turkey* App no 39437/98, Judgment of 24 January 2006, para 62.

²⁹ *M.S.S.* (n 7), para 233.

³⁰ See the 'Note on Methodology' at the end of this volume.

³¹ Timmer (n 11), 151–54, and the case law cited therein.

Furthermore, gender-based vulnerability will be re-conceptualised for the purposes of the present volume. Although sex is one of the prohibited grounds for different treatment contained in the prohibition of discrimination in Article 14 ECHR, the Court does not consider women to be a vulnerable group as such. In other words, identifying as female does not automatically render applicants vulnerable in the case law studied. Instead, certain applicants may be considered vulnerable due to a particular situation in which they find themselves. This may be due to an experience of victimisation in the form of gender-based violence, as discussed below in section IV. It may also be due to various contexts that particularly affect women. An example is the existence of a local context hostile to women, as will be examined below in the section on vulnerability and migration (section V) and as was established for example in the *Opuz* case.³² A further ground for vulnerability relates particularly to those who are pregnant, and their needs and the needs of their unborn children during pregnancy (section IV). Gender-based vulnerability as it relates to transgender or gender non-binary individuals will fall under the category on LGBTQI+ people (section VI).

When it comes to vulnerability due to victimisation, the present volume groups together cases concerning male and female victims of sexual violence, as well as those who experience a sense of vulnerability that causes suffering reaching the threshold of Article 3 due to victimisation. This moves the discussion away from the suggestion that all women are considered vulnerable in the Court's jurisprudence, for that is not the case. While, under Article 14, the Court does discuss domestic and gender-based violence as a problem of gender discrimination,³³ this is not reflected in its approach to Article 3. In this regard, it instead takes an inclusive approach to the types of violence concerned – be it physical or sexual, or constituting abuse in an economic, emotional or verbal sense – and to the possible victims, given that domestic violence ‘affects different family members, although women make up an overwhelming majority of victims’.³⁴ This approach allows it to capture various types of violence, not just that against women, but also that against other victims, including against men and children, who may be directly or indirectly affected.³⁵

A few additional amendments apply. What Timmer calls the espousal of unpopular views is relevant also under Article 3, but largely with respect to the risk of ill-treatment in expulsion cases. This source of vulnerability will therefore be considered together with migration-related cases. The section on vulnerability

³² *Opuz v Turkey* App no 33401/02, Judgment of 9 June 2009, Reports 2009, para 160.

³³ *Volodina v Russia* App no 41261/17, Judgment of 9 July 2019.

³⁴ *Ibid*, para 71.

³⁵ *Opuz* (n 32), para 132.

due to discrimination and marginalisation will cover members of the LGBTQI community, religious and ethnic minorities, including Roma, and those living with HIV/AIDS. A penultimate section will have regard to intersecting sources of vulnerability and include comments on the intersection of poverty and vulnerability. The last section will explore some further applications of vulnerability to groups and individuals not yet (clearly) recognised as vulnerable.

This ultimately leads to the following typology of vulnerability under Article 3:

- dependency-based vulnerability, which concerns minors, the elderly, and those with psychosocial and cognitive disabilities (i.e. mental illness and intellectual disability);
- vulnerability due to state control, including that of detainees, military conscripts, and persons in state institutions;
- vulnerability due to victimisation, including by domestic and sexual abuse, other violations of Article 3, or because of a feeling of vulnerability;
- vulnerability in the migration context;
- vulnerability due to discrimination and marginalisation, which covers ethnic and religious minorities, LGBTQI people, and those living with HIV/AIDS;
- vulnerability due to pregnancy or situations of precarious reproductive health;
- vulnerability due to the espousal of unpopular views; and
- intersecting vulnerabilities.

Before exploring this amended typology in detail, Figure 3.1 provides a quantitative overview of the distribution of references to vulnerability under the various branches of the typology as of 28 February 2019. A more detailed quantitative exploration will follow below.

Figure 3.1 indicates that the various grounds for vulnerability are prevalent in the Court's case law to very different degrees. For example, the Court's case law concerning the vulnerability of detainees is perhaps the most differentiated of all sources of vulnerability, and the prevalence of references to the concept in its jurisprudence to date explains this to a certain extent. This overview also serves to highlight that some sources of vulnerability have only been discussed in rare cases, meaning that future case law will need to clarify or expand the Court's position.

With these figures in mind, the analysis will now turn to the typology of grounds for vulnerability, and explore these grounds in detail.

Figure 3.1 References to Vulnerability under Article 3 ECHR as of 28 February 2019

II. Dependency-based Vulnerability

A. Minors

The Court often refers to children as a paradigmatic example of who is vulnerable. This is true even in cases that do not actually concern minor applicants.³⁶ Children were also the first individuals considered vulnerable by the Court, with an early reference to their vulnerability being made under Article 3 in 1981.³⁷ Despite this initial reference, however, the Court's case law on the vulnerability of children did not take off until the late 1990s. The following will first summarise the early jurisprudence as concerns the vulnerability of children in general, and then differentiate specific constellations in which minors' vulnerability is often cited by the Court today, namely the contexts of sexual abuse, exclusive state authority, and childhood migration.

i. The Court's Early Case Law

The Court's current case law on the vulnerability of minors under Article 3 began in 1997, with *Aydin v Turkey*. That case concerned a 17-year-old girl who had been detained for three days by the authorities, during which time she was blindfolded, raped, paraded naked, and spun around in a tyre while sprayed with high-pressure water. In deciding the case, the Court referred to her overall sense of vulnerability and considered that she had been subjected to 'particularly terrifying and humiliating experiences ... having regard to her sex and youth and the circumstances under which she was held.'³⁸

A year later, in 1998, the Court went on to create its (now standard) language on the vulnerability of minors, when it held that '[c]hildren and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against ... serious breaches of personal integrity'.³⁹ This positive obligation to protect vulnerable individuals under Article 3 drew on past case law on the vulnerability and need for protection of children under Article 8 ECHR, specifically a case on the sexual abuse of a cognitively disabled girl in an institutional setting.⁴⁰ Contrasting this Article 8 case with the later case law on the vulnerability of children is a clear example of the Court's evolutive and expanding approach to Article 3. The type of treatment that violated Article 8 in the prior case, which was decided in 1985, would nowadays very likely be seen as reaching the threshold of Article 3, which requires more intense suffering. These cases thus

³⁶ *Opuz* (n 32), para 160; *M.B. v Romania* App no 43982/06, Judgment of 3 November 2011, para 52; *Dorđević* (n 45), para 138.

³⁷ *X. v Germany* (n 15), 165.

³⁸ *Aydin* (n 24), paras 83–84.

³⁹ *A. v United Kingdom* App no 25599/94, Judgment of 23 September 1998, Reports 1998-VI, para 22.

⁴⁰ *Ibid*, citing *X. and Y. v Netherlands* App no 8978/80, Judgment of 26 March 1985, Series A91, paras 21–27; *Stubbings and Others* (n 62), paras 62–64; CRC, Arts 19 and 37.

clearly illustrate the way in which a given treatment can pass from the scope of Article 8 to the scope of Article 3 with the passage of time.

In 1999, the Court again referred to its jurisprudence under Article 8 ECHR when it held that there is an obligation on states to provide effective deterrence against sexual abuse of children and other vulnerable individuals.⁴¹ By 2001, the reference to Article 8 had fallen away, and the Court held that Articles 1 and 3 ECHR together obligate states

to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals ... These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.⁴²

This finding was reiterated various times in the course of the following year.⁴³

In the years that followed, the Court often applied this formula, and increasingly noted the vulnerability of young people up to the age of 19 or 20.⁴⁴ It used vulnerability reasoning to require states to pay special attention to protecting children, given that their ability or willingness to complain of ill-treatment is often reduced⁴⁵ and that they are more susceptible to trauma.⁴⁶ States have positive obligations to give adequate weight to minors' vulnerability, protect them, and take adequate measures to ensure that they are not exposed to ill-treatment.⁴⁷ In short, this means taking special measures in the form of 'extra protection' of vulnerable minors.⁴⁸ The Court also takes the vulnerability of minors into account by finding that a given form of treatment may have a more severe impact on minors than on adults for the purposes of the threshold of severity under Article 3.⁴⁹

From these beginnings, the Court's jurisprudence has continued to emphasise 'effective deterrence' of ill-treatment regarding minors and young people.⁵⁰

⁴¹ *Stuart v United Kingdom* App no 41903/98, Decision of 6 July 1999, para 1, citing *Stubbings and Others* (n 62), para 64 and *Aydin* (n 24), para 86 (*sic*).

⁴² *Z. and Others v United Kingdom* App no 29392/95, Judgment (GC) of 10 May 2001, Reports 2001-V, para 73.

⁴³ *G.G. v Italy* App no 34574/97, Decision of 10 October 2002; *D.P. and J.C. v United Kingdom* App no 38719/97, Judgment of 10 October 2002, para 109; *E. and Others v United Kingdom* App no 33218/96, Judgment of 26 November 2002, para 88.

⁴⁴ *Menesheva v Russia* App no 59261/00, Judgment of 9 March 2006, Reports 2006-III, para 61; *Knox v Italy* App no 76577/13, Judgment of 24 January 2019, para 41.

⁴⁵ *B. v Romania* App no 42390/07, Judgment of 10 January 2012, para 50.

⁴⁶ *Slavov and Others v Bulgaria* App no 58500/10, Judgment of 10 November 2015, para 82.

⁴⁷ *Yazgöl Yilmaz v Turkey* App no 36369/06, Judgment of 1 February 2011, para 42; *Rahimi v Greece* App no 8687/08, Judgment of 5 April 2011, para 87.

⁴⁸ *Ateşoğlu v Turkey* App no 53645/10, Judgment of 20 January 2015, para 27.

⁴⁹ *Bati and Others v Turkey* App no 33097/96 and 57834/00, Judgment of 3 June 2004, Reports 2004-IV (extracts), para 122.

⁵⁰ *Sultan Öner and Others v Turkey* App no 73792/01, Judgment of 17 October 2006, paras 133 and 134; *Muskhadzhiyeva and Others v Belgium* App no 41442/07, Judgment of 19 January 2010, para 55; *Đurđević v Croatia* App no 52442/09, Judgment of 19 July 2011, Reports 2011 (extracts), paras 102 and 109; *M. and Others v Italy and Bulgaria* App no 40020/03, Judgment of 31 July 2012, para 105; *O'Keeffe v Ireland* App no 35810/09, Judgment (GC) of 28 January 2014, Reports 2014 (extracts), paras 144–46.

This includes an obligation to ensure effective protection against ill-treatment inflicted by private parties and the procedural obligation to provide an effective investigation and prosecution of ill-treatment.⁵¹

ii. Sexual Abuse of Minors

Certain constellations of ill-treatment affecting children have received particular attention from the Court. This is particularly true of cases involving the sexual abuse of minors. The relevant case law relates to both sexual abuse in the institutional and the private setting, and requires a context-sensitive and proactive approach by the authorities.

In 2003, for example, the Court found an Article 3 violation by the Bulgarian authorities, who had 'attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors'.⁵² In 2011, the Court made the same finding regarding the Romanian authorities and the sexual assault of children.⁵³ In the *P. and S. v Poland* judgment of 2012, concerning a 14-year-old girl who had become pregnant as the result of rape, the Court found that the respondent state had not only failed to protect the applicant from rape, which had placed her in a situation of 'great vulnerability'; it had also compounded the situation by, via its officials, humiliating the applicant and frustrating her attempts to obtain an abortion. All in all, the state had failed to have proper regard to the applicant's vulnerability, her young age, and her own feelings and views.⁵⁴

This guidance has become more concrete over time. In 2016, again considering the special psychological factors involved in the rape of minors, the Court took its previous case law a step further, into a fully child-sensitive assessment.⁵⁵ In that judgment, *M.G.C. v Romania*, it engaged in detail with the domestic response to the multiple rape of an 11-year-old girl. The perpetrators had received relatively light sentences, and the domestic instances had ignored the fact that the victim had not yet reached the domestic age of consent; instead, they considered that her lack of consent had not been proven, and that she may even have provoked the acts in question. The Court re-examined this domestic evaluation of the facts, displaying little understanding for the authorities' approach to the issue of consent. It noted that the domestic authorities had failed to consider the difference in age and physical strength between the applicant and the fifty-two-year-old principal perpetrator. The Court also noted that, in evaluating the applicant's demeanour, which was interpreted as a sign of consent, the domestic courts had failed to 'demonstrate a child-sensitive approach', and that they had 'held against the applicant facts that

⁵¹ *Đurđević* (n 50), para 102; *M.P. and Others v Bulgaria* App no 22457/08, Judgment of 15 November 2011, para 108.

⁵² *M.C. v Poland* App no 23692/09, Judgment of 3 March 2015, para 183.

⁵³ *M. and C. v Romania* App no 29032/04, Judgment of 27 September 2011, para 119. Similarly also in *C.A.S. and C.S. v Romania* App no 26692/05, Judgment of 20 March 2012, para 81.

⁵⁴ *P. and S. v Poland* App no 57375/08, Judgment of 30 October 2012, para 161–66.

⁵⁵ *M.G.C. v Romania* App no 61495/11, Judgment of 15 March 2016, para 73.

were, in reality, consistent with a child's possible reaction to a stressful event, such as not telling her parents.⁵⁶ The Court thus not only addressed the domestic courts' failure to engage with the applicant's age and psychology and provided concrete guidance, including by challenging the failure to order a specialist psychological evaluation, but effectively also addressed the fact that she was revictimised by the general conduct and outcome of the proceedings.⁵⁷

The approach taken by the domestic authorities regarding the alleged rape of a minor, this time in a family setting, was criticised also in *G.U. v Turkey* in 2016.⁵⁸ After the victim was forced to give evidence in open court – a request to the contrary having been ignored – the alleged perpetrator, her stepfather, was acquitted due to a lack of proof and to medical evidence that he was impotent. In examining the case, the Court noted that neither the investigating authorities nor the domestic judges had taken the particular vulnerability of the victim, as a minor, into consideration. In doing so, they had also ignored the 'special psychological factors involved in the rape of minors committed in a family setting, which could have explained the victim's reluctance to report her rape and to describe the acts in question'.⁵⁹ The Court went on to recall that the authorities must display particular attention for vulnerable individuals, including children, and provide them with special protection given that their ability to complain about rights violations may be reduced.⁶⁰ In cases concerning the rape of minors, the Court held, the best interests of the child must predominate; respect for human dignity and psychological integrity require special attention when the victim of sexual violence is a child.⁶¹ The Court also pointed out that the domestic authorities ignored evidence of trauma in the applicant, and instead focused on speculating about whether, given her 'corpulence', it would have been possible for her stepfather to rape her by force.⁶² As a result, the Court found, the state had not complied with its positive obligations vis-à-vis the applicant under Articles 3 and 8 of the Convention.

Vulnerability may be particularly acute where minor age and intellectual disability or mental illness overlap. When it comes to sexual violence at the intersection of childhood age and intellectual disability, the Court considers that their disability puts minor applicants 'in a heightened state of vulnerability'.⁶³ The Court has been particularly exacting regarding states' obligations in this context, requiring the penalisation and effective prosecution of all non-consensual sexual acts, also absent physical resistance by the victim.⁶⁴ The Court furthermore requires consideration of victims' individual circumstances and the circumstances of the

⁵⁶ Ibid, para 70.

⁵⁷ Ibid, paras 70–75.

⁵⁸ *G.U. v Turkey* App no 16143/10, Judgment of 18 October 2016, paras 7–8.

⁵⁹ Ibid, para 72, translation by the author.

⁶⁰ Ibid.

⁶¹ Ibid, para 73.

⁶² Ibid, paras 75–76.

⁶³ *I.C. v Romania* App no 36934/08, Judgment of 24 May 2016, para 56.

⁶⁴ Ibid, para 52.

case in order to avoid misinterpretations of any failure to come forward and to allow for adequate and diligent analysis of the validity of consent.⁶⁵ Similarly, Court requires particular diligence from the state when it comes to sexual abuse at the intersection of mental illness and minor age. Where it can impute knowledge of a victim's mental illness to the authorities, the Court requires them to take the victim's particular moral and physical vulnerability into account, and take action to protect them.⁶⁶

Below, in the discussion on minors in institutional settings, this analysis will discuss the *O'Keeffe v Ireland* case. That case is also relevant here, because it provides an example of the particularly stringent obligations on the state when it comes to sexual abuse of minors who are in its custody, albeit temporarily, ie for the purposes of schooling.⁶⁷ In *O'Keeffe*, the Court held, having regard to the fundamental nature of Article 3 and children's particular vulnerability, that the government had an 'inherent obligation' to protect these children, especially in primary schools, by taking special measures and adopting safeguards.⁶⁸ Because the applicant in *O'Keeffe* was vulnerable and in an institutional setting, the Court found that the state 'must be considered to have been aware of the sexual abuse of children by adults' – in other words, it imputed knowledge of a risk of ill-treatment to the state.⁶⁹

To put it simply, this case law has crystallised into the finding that children are vulnerable to sexual abuse, and that for this reason they and other vulnerable persons are entitled to effective state protection.⁷⁰ This entails a range of overlapping state obligations: to provide for effective deterrence, to effectively protect, and to take reasonable steps to prevent ill-treatment.⁷¹ The case law shows that the deterrence limb, or preventive obligation, means that the authorities must prevent sexual abuse of minors where they know or ought to know about relevant risks; this includes a requirement to deploy the criminal law, or what has elsewhere been called a 'coercive obligation'.⁷² Known vulnerability (for example that of minors in the institutional setting) might contribute to imputing knowledge of a risk of ill-treatment, triggering the protective obligation.⁷³ And to effectively deter sexual abuse of minors, states must take measures aiming to ensure respect for victims' human dignity and protect the child's best interests; this means adequately investigating alleged sexual abuse, attaching sufficient weight to minors' vulnerability and their specific psychology,⁷⁴ and having regard for the

⁶⁵ Ibid, para 56.

⁶⁶ *V.C. v Italy* App no 54227/14, Judgment of 1 February 2018, paras 83/84, 99, 102, 110–11.

⁶⁷ *O'Keeffe* (n 50), para 145.

⁶⁸ Ibid, para 146.

⁶⁹ Ibid.

⁷⁰ *Talpis v Italy* App no 41237/14, Judgment of 2 March 2017, para 115.

⁷¹ Corina Heri, 'Shaping Coercive Obligations through Vulnerability: The Example of the ECtHR', in Natasa Mavronicola and Laurens Lavrysen (eds), *Towards a Coercive Human Rights Law? Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart, 2020).

⁷² Laurens Lavrysen and Natasa Mavronicola, *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart, 2020), *passim*.

⁷³ *O'Keeffe* (n 50), paras 144–46, 168.

⁷⁴ *M.G.C.* (n 55), para 73.

fact that vulnerable minor victims' 'capacity or willingness to pursue a complaint' may be limited.⁷⁵

iii. Physical Abuse of Minors

When minors are physically abused in non-sexual ways, the Court has taken a similar approach as described in the previous section. Its stance today is that the physical disciplining of children, though once widely accepted, has grown less acceptable in European societies to the point of becoming a violation of the victims' physical integrity. Two key cases in this progressive lowering of the threshold of severity, which represents a paradigmatic example of the evolutive interpretation of Article 3, were the 1998 judgment in *A. v United Kingdom*, concerning the caning of a boy by his stepfather,⁷⁶ and the previous 1978 case of *Tyrer v United Kingdom*, concerning public birching.⁷⁷

Corporal punishment in the institutional setting will be discussed below.⁷⁸ When it comes to the corporal punishment of children in private contexts, in 2017, the Court held that Article 3 requires states to take measures to prevent such ill-treatment. It did so by holding that '[a]ssuring basic dignity to the child means that there can be no compromise in condemning violence against children, whether accepted as "tradition" or disguised as "discipline"'.⁷⁹ The Court held that children's uniqueness – which derives from 'their potential and vulnerability, their dependence on adults' – means that they must receive better, as opposed to less stringent, protection from violence, including from corporal punishment at home, which it described as 'being invariably degrading'.⁸⁰ Here, the Court displays no qualms about requiring the state to interfere in the sphere of relations between individuals, and instead makes clear demands on the kind of treatment to which children can be subjected in the home.

iv. Children under Exclusive State Authority

The Court has a long and consistent strain of case law considering children particularly vulnerable when they find themselves in the exclusive control of the authorities. This means that states must adhere to particular requirements when detaining minors or conducting police interviews or arrests involving them.⁸¹ These requirements are additional to those concerning detention in general, which – as outlined below – make demands on safety from violence by other detainees and by staff, the provision of adequate medical care, and adequate conditions for those with special medical or physical needs.

⁷⁵ *I.C.* (n 63), para 51.

⁷⁶ *A. v United Kingdom* (n 39), paras 22–24.

⁷⁷ *Tyrer v United Kingdom* App no 5856/72, Judgment of 25 April 1978, Series A26, para 33.

⁷⁸ *V.K. v Russia* App no 68059/13, Judgment of 7 March 2017, paras 172 and 183.

⁷⁹ *D.M.D. v Romania* App no 23022/13, Judgment of 3 October 2017, para 50.

⁸⁰ *Ibid.*

⁸¹ *Alkes v Turkey* App no 3044/04, Judgment of 16 February 2010, para 43; *Bati and Others* (n 49), especially para 122.

The Court's case law here is by now well-established. For example, in a series of 2016 judgments against France, the Court drew far-reaching consequences from the idea that children, in light of their vulnerability, need special protection when in the exclusive control of the authorities. There, the Court found that the immigration-related detention of very young children, even together with their parents, could prove traumatic to the point of violating Article 3.⁸² These cases show that the Court is engaging in an increasingly detailed examination of whether the way states treat children in their care is compatible with those minors' rights under Article 3. In this regard, the Court consistently finds that children have specific needs given their age and dependence. In the French cases, the authorities had violated the ECHR by detaining small children; for example, in one of the cases, they interned a four-year-old boy for 18 days, albeit together with his parents.⁸³ The Court gave a detailed explanation of why detention had a negative impact on the children. It considered factors such as the presence of loud noise emissions from a nearby airport, which particularly affected the children given their need for outdoor recreation. It also noted that the fact that young children cannot be left unattended when their parents are interviewed means that they are repeatedly exposed to the presence of armed and uniformed police. The Court also noted the harmful effect of frequent loud-speaker announcements made at detention facilities.⁸⁴ Judgments like this can have potentially far-reaching effects because they imply that, under certain circumstances, the Convention could require that at least one parent be given their liberty so as to be with their child.

Before turning to the Article 3 obligations regarding minors in exclusive state control, it must be noted that the vulnerability of minors is equally relevant in other institutional contexts, such as for example the state schools. The Court has for example held that the positive obligation to protect vulnerable individuals from ill-treatment has particular importance 'in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and wellbeing of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities.'⁸⁵ In another case, ill-treatment in a nursery school was attributed to the state because it was inflicted in a state-supervised public nursery school during school hours.⁸⁶ The same findings have been made in the context of an orphanage.⁸⁷

⁸² *A.B. and Others v France* App no 11593/12, Judgment of 12 July 2016, paras 110–15; *A.M. and Others v France* App no 24587/12, Judgment of 12 July 2016, paras 47–53; *R.K. and Others v France* App no 68264/14, Judgment of 12 July 2016, paras 67–72; *R.C. and V.C. v France* App no 76491/14, Judgment of 12 July 2016, paras 35–40; *R.M. and Others v France* App no 33201/11, Judgment of 12 July 2016, paras 71–76.

⁸³ *A.B. and Others* (n 82), paras 110–11.

⁸⁴ *Ibid*, para 113.

⁸⁵ *O'Keeffe* (n 50), para 145.

⁸⁶ *V.K.* (n 78), paras 172 and 183.

⁸⁷ *X and Others v Bulgaria* App no 22457/16, Judgment (GC) of 2 February 2021.

But how precisely does vulnerability shape the rights of minors? For one, if the authorities inflict ill-treatment on a minor, particularly one who is under their exclusive authority, the Court has used vulnerability to pull that treatment under the scope of Article 3.⁸⁸ For example, in *Bouyid v Belgium*, a case concerning two brothers – one of whom was a minor – who were slapped by police officers during questioning, the Court found that the relevant officers had flouted their duty to protect these vulnerable individuals and to respect their human dignity.⁸⁹ The Court used this opportunity to hold that '[p]olice behaviour towards minors may be incompatible with [Article 3] simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors.'⁹⁰ In other words, the vulnerability of minors when confronted with the authorities means that it may be incompatible with Article 3 to apply the same methods as one would to an adult. However, of course, this does not mean that any police investigative or criminal action against minors is per se incompatible with Article 3.

Two relevant cases in this regard were decided in 1999. They concerned criminal proceedings against two boys who were accused of murdering a toddler in the United Kingdom. There, the Court examined the compatibility with Article 3 of criminal proceedings conducted against the two perpetrators, who were aged 10 at the time of the crime and 11 during trial.⁹¹ The representatives of the two boys, who had reached the domestic age of criminal responsibility and were tried in an adult court in a public trial, argued that the state had to 'ensure that the procedures adopted for the trial and sentencing of such young children were modified to reflect their age and vulnerability.'⁹² The Court itself did not use vulnerability language, but went on to examine in substance whether this obligation had been complied with. In doing so, it noted that the authorities had not had any intention to cause the applicants suffering.⁹³ Furthermore, it found that any type of setting – be it formal or informal, public or private – would have caused the boys, who were suffering from post-traumatic stress disorder, great suffering, and that the circumstances did not go beyond what was strictly necessary in order for the authorities to deal with the crime committed.⁹⁴

Today, such a case might be decided differently. States are obligated to provide extra protection to children in judicial proceedings, and treatment that may be permissible for adults can violate Article 3 when imposed on children.⁹⁵

⁸⁸ *Iurcu v the Republic of Moldova* App no 33759/10, Judgment of 9 April 2013, para 38.

⁸⁹ *Bouyid v Belgium* App no 23380/09, Judgment (GC) of 28 September 2015, Reports 2015, paras 103, 107–11.

⁹⁰ *Ibid*, para 110.

⁹¹ *V. v United Kingdom* App no 24888/94, Judgment [GC] of 16 December 1999, Reports 1999-IX, para 65; *T. v United Kingdom* App no 24724/94, Judgment (GC) of 16 December 1999, para 63.

⁹² *Ibid*, paras 63–64 and 62–63, respectively.

⁹³ *Ibid*, paras 78 and 76, respectively.

⁹⁴ *Ibid*, paras 79 and 77, respectively.

⁹⁵ *Ateşoğlu* (n 48), para 27; *Zherdev v Ukraine* App no 34015/07, Judgment of 27 April 2017, para 86.

This obligation is particularly acute vis-à-vis children with special needs. For example, in a 2016 judgment concerning a minor who had been diagnosed with ADHD, the Court held that his Article 3 rights had been violated not only because he had lacked necessary medical treatment, but also because he had confessed under duress.⁹⁶ Criminal proceedings regarding juveniles, the Court held, should be oriented around the principle of respect for the best interests of the child and should guarantee, accordingly, that 'a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings'. This right of a minor defendant to participate effectively in his or her criminal trial requires the authorities to 'deal with him with due regard to his vulnerability and capacities' at every stage of criminal investigation, but especially during questioning.⁹⁷ The authorities must take steps to reduce children's feelings of inhibition and intimidation as much as possible, and to ensure that they have 'a broad understanding of the nature of the investigation, of what is at stake, and of their defence rights'.⁹⁸

These obligations are not limited to minors with special needs, however. Concerning a 16-year-old applicant, the Court held in 2017 that leaving him handcuffed and naked but for his underwear for hours, 'in a state of uncertainty and vulnerability', raised an issue under Article 3.⁹⁹ Placing the same applicant in a cell with adult detainees, it went on to note, 'must have contributed to creating in him feelings of fear, anguish, helplessness and inferiority, diminishing his dignity'.¹⁰⁰ In other words, the Court displays a great willingness to make inferences about the effects of a given treatment here. Increased awareness of the psychological vulnerability of children – including their inability to withstand the pressures associated with a criminal investigation – also means that, according to the Court, a minor's vulnerability can affect the assessment of evidence. In particular, considerations about their vulnerability can affect the evidentiary weight of police records signed by minors.¹⁰¹

It is not quite clear where the age ceiling for youth-related vulnerability in criminal proceedings lies. For example, in 2019, an applicant who was 20 years old when she was interrogated by Italian police regarding the death of her roommate submitted that she had been vulnerable because she was young, did not speak Italian well, and was in an extreme state of shock and confusion.¹⁰² She argued that her incriminating statements were a result of the psychological pressure under which she was placed while in this state. Here, the Court found that the applicant

⁹⁶ *Blokhin v Russia* App no 47152/06, Judgment (GC) of 23 March 2016, Reports 2016, para 148.

⁹⁷ *Ibid*, para 195.

⁹⁸ *Ibid*.

⁹⁹ *Zherdev* (n 95), para 93.

¹⁰⁰ *Ibid*.

¹⁰¹ *Volkan Özdemir v Turkey* App no 29105/03, Judgment of 20 October 2009, para 38.

¹⁰² *Knox* (n 44).

was in an untenable psychological situation, and that her complaints about how she had been treated were not taken seriously. It went on to find a violation of Article 3 in its procedural limb. The emphasis on the applicant's youth evokes some of the case law discussed above, and indicates that this type of vulnerability is determined not by a fixed age limit, but by a contextual assessment. This, of course, raises questions of fairness, and it is not entirely clear how this situation is to be distinguished from the vulnerability in which people who are being interrogated by police generally find themselves.¹⁰³

The vulnerability of children in detention also places the authorities under special investigative obligations. This may mean doing away with formal rules, for example when it comes to the lodging of complaints about sexual and physical abuse in detention by minor detainees.¹⁰⁴ In the same vein, delays in reporting ill-treatment in detention to the authorities should not be considered decisive for the legitimacy or admissibility of these claims, given the vulnerability of the minor detainees in question.¹⁰⁵

Lastly, it should be noted that the obligation to provide special protection to children in the context of criminal proceedings goes beyond measures targeting them directly, and also requires the authorities to take minors' psychological vulnerability into consideration when they are indirectly affected by measures against their parents.¹⁰⁶ In 2016, the Court held that the manner in which an individual had been arrested in front of his children, aged four and eight, was incompatible with Article 3. In particular, the Court noted that while it could not prohibit the authorities from arresting suspects in front of their partners or children, there needed to be some consideration of the children and of possible alternative measures.¹⁰⁷ Removing arrested parents from their home without providing care and an explanation to their children can likewise violate Article 3.¹⁰⁸

v. Minors in the Migration Context

The special vulnerability of minor migrants also has a considerable influence on the Court's reasoning under Article 3. In this regard, the Court has repeatedly held that minor asylum-seekers are 'a category of vulnerable persons particularly requiring the authorities' attention' and that children have special needs due to their age and their dependence, both in and outside the context of migration detention.¹⁰⁹ However, vulnerability is not reserved to those minors who have attained the formal status of asylum-seekers.

¹⁰³ *Utvenko and Borisov v Russia* App no 45767/09 and 40452/10, Judgment of 5 February 2019, para 189 (regarding Art 6).

¹⁰⁴ *A.Ş. v Turkey* App no 58271/10, Judgment of 13 September 2016, paras 72–73.

¹⁰⁵ *Nalbandyan v Armenia* App no 9935/06 and 23339/06, Judgment of 31 March 2015, para 106.

¹⁰⁶ *Govedarski v Bulgaria* App no 34957/12, Judgment of 16 February 2016, para 62.

¹⁰⁷ *Ibid.*, para 62.

¹⁰⁸ *Ioan Pop and Others v Romania* App no 52924/09, Judgment of 6 December 2016, paras 61 and 63.

¹⁰⁹ *Popov v France* App no 39472/07 and 39474/07, Judgment of 19 January 2012, para 91; *Tarakhel v Switzerland* App no 29217/12, Judgment (GC) of 4 November 2014, Reports 2014 (extracts), para 99.

In the key 2006 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* judgment, the Court made clear that the vulnerability, dependence, and entitlement to protection of migrant children does not depend on whether they have attained asylum-seeker or refugee status.¹¹⁰ In this judgment, the Court considered the case of an unaccompanied Congolese girl who, aged five, had entered Belgium illegally and who had then been detained and removed. In this context, the Court not only held that the young girl was extremely vulnerable due to her age, the fact that she had entered the country illegally and the fact that she was unaccompanied – a case of intersectionality further discussed below – but also that '[i]n view of the absolute nature of the protection afforded by Article 3 of the Convention, [the applicant's vulnerability] is the decisive factor and it takes precedence over considerations relating to [her] status as an illegal immigrant.'¹¹¹ Accordingly, she 'came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection.'¹¹²

The *Mubilanzila Mayeka and Kaniki Mitunga* judgment represented the clearest formulation of the Court's approach to the vulnerability of minors under Article 3 until that time. However, it is remarkable that the Court held that the young girl's vulnerability took precedence over her status as an illegal immigrant. This would make it seem that there is an element of balancing at play here, one that juxtaposes the interests of the child with the state's prerogative to expel non-citizens at its own discretion even under Article 3 ECHR.¹¹³

The same could be said of other examples of the Court's case law on the treatment of migrant children. In 2011, for example, in examining whether Article 3 had been violated in the case of three children who, together with their mother, had been detained in a closed transit centre for illegal aliens in Belgium, the Court held that the best interests of the child as per Article 3 CRC should take precedence in the context of expulsion. On that basis, the Court considered the three children vulnerable both by virtue of their age and due to their traumatising personal history, and found a violation of Article 3.¹¹⁴ The reference to the CRC in that case was drawn from other case law brought under Article 8 ECHR, where the Court found that the state had exceeded its margin of appreciation and failed to adequately balance the interests at stake.¹¹⁵ While the precedence of the child's best interests is a fixed feature of the Court's jurisprudence under Article 8, transplanting this standard into Article 3 must have due regard for the fact that states have no margin of appreciation under the latter.

¹¹⁰ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03, Judgment of 12 October 2006, Reports 2006-XI, para 55.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP, 2015), 3–5, 8 and 97; *Tatar v Switzerland* App no 65692/12, Judgment of 14 April 2015, para 39.

¹¹⁴ *Kanagaratnam v Belgium* App no 15297/09, Judgment of 13 December 2011, para 67.

¹¹⁵ *Nunez v Norway* App no 55597/09, Judgment of 28 June 2011, paras 9–12.

A different approach, truer to the absolute nature of Article 3, is the one taken in *Tarakhel v Switzerland*. There, the Court – although reiterating that a child’s extreme vulnerability is decisive and takes precedence over their status as an illegal immigrant¹¹⁶ – focused on concretising children’s right to special protection and the threshold of severity under Article 3. It did so to rebut the presumption of compliance with the Convention by receiving states under the EU’s Dublin Regulation.¹¹⁷ It held that the ‘requirement of “special protection” of asylum-seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability.’¹¹⁸ On this basis, it found that the reception conditions for children who seek asylum must be age-appropriate so as not to expose them to stress, anxiety, and trauma. Otherwise, Article 3’s threshold of severity would be met. In other words, here, vulnerability was not used to balance different types of interests, but to provide a more complete understanding of the harms at stake. It is also notable that, expanding the finding made in *Mubilanzila Mayeka and Kaniki Mitunga*, even accompanied children were described as ‘extremely vulnerable’ here.¹¹⁹

In addition, the Court has set a clear standard as concerns the permissibility of detaining minors in the migration context. As discussed above, in a series of 2016 judgments against France, the Court found that the immigration-related detention of very young children, even together with their parents, could prove traumatic to the point of violating Article 3.¹²⁰ Given the impact of the detention conditions on the children, and the fact that they were confined together with their parents, which meant that they were exposed to the latter’s suffering, the Court found a violation of Article 3 in these cases.¹²¹ It held that the authorities must reserve immigration detention of children to a measure of last resort, and endeavour to keep it as short as possible. Beyond a brief period, detention of these very small children – and thus presumably also of their parents – is not permissible.¹²² In addition, states have strict medical obligations towards vulnerable and very small children in their custody.¹²³

These cases against France concerned children aged up to six years old. It is clear that the detention of children of this age is exceedingly difficult to reconcile with Article 3. However, the Court is more tolerant of detention measures ordered against teenagers in the migration context. A leading case in this regard is *Abdullahi Elmi and Aweys Abubakar v Malta*, concerning two unaccompanied teenagers who were detained for around eight months in a facility for adults

¹¹⁶ *Tarakhel* (n 109), para 99.

¹¹⁷ Council Regulation (EC) No 343/2003 of 18 February 2003, [2003] OJ L50/1–10, Now replaced by Regulation (EU) No 604/2013 of 26 June 2013, [2013] OJ L180/31–59.

¹¹⁸ *Tarakhel* (n 109), para 119.

¹¹⁹ *Ibid.*

¹²⁰ *A.B. and Others* (n 82), paras 110–15, esp 110, and the other four related cases cited in n 82.

¹²¹ *Ibid.*

¹²² *Ibid.*, para 114.

¹²³ *Korneykova and Korneykov v Ukraine* App no 56660/12, Judgment of 24 March 2016, para 152.

while awaiting the outcome of a procedure to confirm their age. This case raised questions about who falls in the category of vulnerable minors. Here, the Court held that although the applicants were not small children, 'they still fell within the international definition of minors, in respect of which detention should be a last resort and which should be limited to the shortest time possible'.¹²⁴ Thus, the Court held, the detention conditions should have been adapted to their ages, which were later confirmed as being 16 and 17, respectively.¹²⁵ In particular, under Article 3, the Court highlighted that the applicants were provided with no counselling, educational assistance or other support from qualified personnel, nor with any entertainment facilities suitable to their age. In addition, the detention facility was characterised by appalling sanitary conditions and 'a tense and violent atmosphere', and the applicants reported being beaten and robbed by other detainees.¹²⁶ This, the Court held, was a violation of Article 3, even if the applicants' age had not yet been established at the outset.

This case shows two things in particular. First, although the requirements for the treatment of adolescents are not as strict as those concerning children, teens are still vulnerable and require special protection under Article 3. This allows for a portrayal of childhood vulnerability as a spectrum, which comes to an abrupt halt at the age of about 18 to 20. Secondly, in case of doubt about their age and therefore their vulnerability, the Article 3 rights of minors require states to err on the side of treating them as minors.

However, not all of the judges involved in deciding this case agreed. Judge Sajó, in a concurring opinion, argued not only against considering asylum-seekers as a vulnerable group, but also against the vulnerability of the applicants as minors on the basis that he did not 'consider that case-law based on the problems of small children is applicable to adolescents'.¹²⁷ In other words, Judge Sajó disagreed – not for the first time¹²⁸ – with the Court's approach to vulnerability, arguing that he would have 'preferred specifics' about why and how the applicants were vulnerable. Indeed, and although that may not be what Judge Sajó intended, greater engagement with why the applicants were vulnerable would have been preferable in this case, although its outcome and general approach are to be welcomed. Various complaints made by the applicants that were linked to their needs as vulnerable minors were lost in the judgment, for example their extremely limited ability to contact their families in Somalia.¹²⁹ Arguably, engaging with why and how the applicants were vulnerable – as unaccompanied minors lacking any kind of adult

¹²⁴ *Abdullahi Elmi and Aweys Abubakar v Malta* App nos 25794/13 and 28151/13, Judgment of 22 November 2016, paras 111 and 113.

¹²⁵ *Ibid*, paras 111 and 113.

¹²⁶ *Ibid*, paras 23, 110 and 111.

¹²⁷ *Ibid*, Concurring Opinion of Judge Sajó.

¹²⁸ *M.S.S.* (n 7), Partly Concurring and Partly Dissenting Opinion of Judge Sajó, and *Abdi Mahamud v Malta* App no 56796/13, Judgment of 3 May 2016, Partly Dissenting Opinion of Judge Sajó.

¹²⁹ *Abdullahi Elmi and Aweys Abubakar* (n 124), para 24.

support – may have meant engaging with the need to provide them with a meaningful opportunity to stay in touch with their families.

vi. Problems with Portraying Children as Vulnerable

Childhood age is the most consistently recognised source of vulnerability in the Court's case law. The Court's protection of children is comparatively well-developed, and it entails positive obligations on the part of states to take children's special needs into account and to advocate for their best interests. This child-friendly approach is certainly to be welcomed, and it has led to applicant-friendly results in many cases. For example, in *Tarakhel*, the Court focused on the vulnerability of the applicant family's children in order to overcome the requirement of a systemic deficiency in the Italian reception conditions, a requirement that had gone unmet in the preceding *Mohammed Hussein* case.¹³⁰ In *Blokhin*, the vulnerability of the minor involved was used to derive an obligation of the authorities to engage with his capacities, needs, and feelings.¹³¹ The Court has furthermore recognised the vulnerability of children in many different contexts, and – in analogy to the best interests of the child principle under Article 8 – it gives precedence to the vulnerability of the child over other considerations.¹³²

However, certain issues with the Court's approach remain. Indeed, while the Court often refers to children as a seemingly self-explanatory example of vulnerability, and uses respect for their vulnerability to lay the groundwork for protecting the rights of other vulnerable individuals and groups, the concept of a child's vulnerability is not as nuanced as that of the child's best interests. In other words, the Court's jurisprudence does not emphasise a transcendence of vulnerability in order to ensure respect for the capacities of children. To clarify: while the CRC emphasises procedural requirements such as hearing children and permitting them to participate in proceedings that concern them,¹³³ the Court's approach largely focuses on substantive outcomes, or on the requirement that states take children's vulnerability into consideration. Thus, the CRC guarantees a child 'not only rights derived from her or his vulnerability (protection) or dependency on adults (provision). The Convention recognises the child as a subject of rights.'¹³⁴ By contrast, in the Court's jurisprudence, the agency of children is not elevated in this manner. Instead, the Court's approach focuses largely on 'children's fragility and vulnerability and their dependence on adults for the [*sic*]

¹³⁰ Contrast *Tarakhel* (n 109), paras 119–22, and *Mohammed Hussein and Others v Netherlands and Italy* App no 27725/10, Decision of 2 April 2013, para 78.

¹³¹ *Blokhin* (n 96), para 195.

¹³² On the child's best interests, see, instead of many, *Mennesson v France* App no 65192/11, Judgment of 26 June 2014, Reports 2014 (extracts), paras 81 and 84; Helen Keller and Corina Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights' (2015) 84(2) *Nordic Journal of International Law* 270–96; *Tarakhel* (n 109), paras 119–22.

¹³³ Committee on the Rights of the Child, 'General Comment No 12 (2009): The Right of the Child to be Heard', UN Doc CRC/C/GC/12, 1 July 2009.

¹³⁴ *Ibid*, 6, para 18.

growth and development', which it has recognised as calling 'for greater investment in the prevention of violence and protection of children on the part of families, society and the state'.¹³⁵

In some sense, the Court's understanding of Article 3 as providing protection, and not empowerment, to children is a direct outcome of its interpretation of that provision in general. However, this may not be the most child-friendly – or the most individual-friendly, or agency-friendly – manner to proceed. In 2012, Jonathan Herring examined claims that legal emphasis of the vulnerability of children results in a paternalistic system that denies their agency, exaggerates risks and downplays their abilities.¹³⁶ Herring employed a situational definition of vulnerability as exposure to a risk of harm, and found that this concept has been formative for the moral rhetoric of childhood.¹³⁷

Herring's work cites the research of Anneke Meyer, who in turn considers that the ideas of vulnerability and innocence form the moral rhetoric of childhood in that they serve to explain and legitimise a wide variety of measures or ideas about children while doing away with the need to provide a justification: in her words, 'children are the reason'.¹³⁸ In so doing, Meyer has expressed a problem that lies at the very core of the Court's vulnerability jurisprudence. The Court often seems to permit vulnerability to suffice as the reason for a range of results under Article 3. A wide variety of reasons can be given to support the Court's reliance on vulnerability – for example, the idea that a society that fails to protect its weakest members destroys its own moral foundations, and thus itself, or the claim that we are all vulnerable and that a tailored response to the vulnerability inherent in each and every one of us is the foundational premise of human rights law – but the problem remains that the Court has not expressly acknowledged any one of them.

Herring criticises the approach to vulnerability employed regarding children today, arguing that it is selective regarding the risks it emphasises and homogenising – in other words, essentialising – as it negates the spectrum of childhood experiences and the diversity of children.¹³⁹ Herring also identifies a third risk by pointing out that vulnerability discourse may actually endanger children by emphasising their innocence and helplessness, which may attract abuse.¹⁴⁰ Emphasising innocence may also hamper the full human rights protection of those children and young adults who cannot be deemed innocent or helpless. Herring concludes by stating that while not wishing to overemphasise the resilience and capabilities

¹³⁵ Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2009)10 on integrated national strategies for the protection of children from violence, adopted on 18 November 2009, preamble, 7th recital.

¹³⁶ Herring (n 1), 244.

¹³⁷ Ibid, 245–46, citing Anneke Meyer, 'The Moral Rhetoric of Childhood' (2007) 14(1) *Childhood* 85–104, 85.

¹³⁸ Meyer (n 137), 85.

¹³⁹ Herring (n 1), 249.

¹⁴⁰ Ibid, 250.

of children, he aims to show that the law 'exaggerates the vulnerability of children and exaggerates the capacity of adults'.¹⁴¹

To transfer these criticisms one-for-one onto the Court's child-related vulnerability reasoning as it stands today is perhaps overly harsh. Especially in recent cases, the Court has displayed an individual-sensitive and circumstance-responsive approach to childhood vulnerability. However, there is a salience to these concerns, and these authors' fears for the agency and independence of those labelled vulnerable are applicable to all of the applicants discussed in this volume, not just children. In particular, it is problematic to create a strict distinction between vulnerable children and invulnerable adults. Individual maturity covers a large spectrum, and it is largely artificial to assume that attaining the age of majority guarantees any particular level of development or independence. However, under the same argument it is also problematic to lump small children and adolescents together, and here the Court's judgments on the detention of children show an acute awareness of the differences between these two groups without negating the vulnerability of either. In recognising that young children are particularly impressionable and may suffer trauma as a result of experiences that would be considered bearable for adolescents,¹⁴² it has thus paved the way for more individualised, context-sensitive vulnerability assessments in individual cases.

B. The Elderly

While vulnerability due to young age is a frequently cited component of the Court's case law under Article 3, as discussed in the previous section, the age-related vulnerability of the elderly has by contrast been paid less attention. In fact, there have only been a handful of relevant cases to date.

In two such cases, the Court recognised the vulnerability of elderly detainees. The first applicant was aged 63 at the time of his arrest¹⁴³ and the second was aged 77;¹⁴⁴ both had medical problems. The combination of advanced age and poor state of health rendered the applicants vulnerable, the Court held in both cases, and detention may have exacerbated their feelings of distress. In both cases, however, it took into consideration the authorities' responses to the applicants' vulnerability, including the medical assistance received, and found no violation of Article 3.¹⁴⁵

By contrast, the Court did find a violation in *Cestaro v Italy*, where it considered the applicant, a 62-year-old demonstrator at a G8 summit who was severely injured by police, 'physically vulnerable' due to his age.¹⁴⁶ *Cestaro* showed that

¹⁴¹ Ibid, 250.

¹⁴² *A.B. and Others* (n 82), paras 110–15, esp 110, and the remaining case law in (n 82).

¹⁴³ *Stoyan Mitev v Bulgaria* App no 60922/00, Judgment of 7 January 2010, para 73.

¹⁴⁴ *Giorgini v Italy* App no 20034/11, Decision of 1 September 2015, paras 52 and 57.

¹⁴⁵ Ibid, para 57; *Stoyan Mitev* (n 143), para 73.

¹⁴⁶ *Cestaro v Italy* App no 6884/11, Judgment of 7 April 2015, para 180.

the physical fragility of elderly people – though the applicant, at age 62, likely represents the lower limit of what might be considered an elderly person – must be taken into consideration by the domestic authorities in determining the level of force appropriate to use regarding that person.

In *Mudric v Republic of Moldova*, the Court examined a case concerning domestic violence, finding that the victim was particularly vulnerable to attacks by her ex-husband because she was 'a single woman aged 72'.¹⁴⁷ It is curious here that this vulnerability seems to be relative not just to the applicant's aggressor, who was mentally ill and characterised as dangerous, but also relative to the authorities and to methods for seeking protection. This seems to indicate an awareness by the Court of the fact that age, like all grounds for discrimination, is socially constructed, and that the elderly are not or not just vulnerable per se, but also because of stereotypes about them and because they lack access to sources of protection.

Lastly, in *Irina Smirnova v Ukraine*, the Court considered the case of a retired single woman who had been repeatedly assaulted by the co-owners of her flat.¹⁴⁸ The Ukrainian government did not contest that the applicant, as a 'retired single woman', was a vulnerable person, and that it accordingly had a positive obligation to protect her.¹⁴⁹ Even though the applicant was only in her early sixties when the ill-treatment began, here it appears to be the power difference between the applicant, as a single older woman, and the 'younger and stronger' men who harassed her that was decisive for finding an Article 3 violation.¹⁵⁰

Elderly applicants have also sought assistance from the Court to gain or improve access to socio-economic benefits, specifically old-age pensions. So far, the Court has not found any violations of Article 3 by the failure of the state to provide an old-age pension that is sufficiently high to ensure a life in dignity, although several such applications have come before it.¹⁵¹ The Court has dismissed these applications as manifestly ill-founded, without using vulnerability reasoning in its decisions. However, it has held that complaints concerning pensions or other social benefits that are 'wholly insufficient' may raise an issue under Article 3.¹⁵² The Court went on to hold that it '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'.¹⁵³ This indicates that, in future cases, the Court may consider the vulnerability of elderly individuals

¹⁴⁷ *Mudric v the Republic of Moldova* App no 74839/10, Judgment of 16 July 2013, para 51.

¹⁴⁸ *Irina Smirnova v Ukraine* App no 1870/05, Judgment of 13 October 2016, paras 9–18.

¹⁴⁹ *Ibid*, para 69.

¹⁵⁰ *Ibid*, para 72.

¹⁵¹ *Budina v Russia* App no 45603/05, Decision of 18 June 2009; *Larioshina v Russia* App no 56869/00, Decision of 23 April 2002.

¹⁵² *Larioshina* (n 151), para 3.

¹⁵³ *Budina* (n 151).

in a socio-economic context. If it does so, it may reverse the current requirement of proof of concrete suffering, which will be nigh impossible for many applicants to provide.¹⁵⁴

In many ways, vulnerability due to advanced age is a continuation of the vulnerability of children. All humans experience dependency at the beginning of life, and many experience it near the end. However, the Court has not yet gone into much detail regarding the vulnerability of the elderly, and many questions regarding the obligations of states surrounding dignity, aging and death are unanswered at present. For example, the section in this chapter concerning persons interned in state institutions will not go into the situation of nursing home residents because there has been no case law in this regard. However, there are many similarities between these situations and those of individuals confined, for example, to psychiatric hospitals. In this area, it is necessary to await future developments in the Court's jurisprudence; however, it is difficult to imagine that persons in nursing homes would not be considered vulnerable and in need of special consideration if the question arose.

C. Intellectual and Psychosocial Disabilities

As concerns the vulnerability of intellectually or cognitively disabled persons and persons living with mental illness, also known as psychosocial disabilities, the Court has built up an extensive case law in both regards. There is however some overlap between the two groups. In particular, both factors can be stigmatising, and both fall under the definition of disability under the Convention on the Rights of Persons with Disabilities.¹⁵⁵

In this regard, the Committee on the Rights of Persons with Disabilities defines disability as including 'those who have long-term physical, including psychosocial, intellectual or sensory impairments, and should include past, present, future and presumed disabilities, as well as persons associated with persons with disabilities'.¹⁵⁶ This definition is kept inclusive because those affected by disability-related discrimination should not be 'burdened by proving that they are "disabled enough" in order to benefit from the protection of the law'.¹⁵⁷

The Court does not apply clear definitions of either intellectual disability or mental illness, and often relies on medical evidence submitted by the parties to find that a person falls under either group. In this regard, it does not seem to apply any requirement that applicants must reach a specific level or degree of disability

¹⁵⁴ *Ibid.*

¹⁵⁵ Committee on the Rights of Persons with Disabilities, 'General Comment No 6 (2018) on Equality and Non-discrimination', Doc CRPD/C/GC/6, 26 April 2018, para 73(b).

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

in order to be considered vulnerable.¹⁵⁸ The following will discuss both of these groups in turn.

i. Intellectual or Cognitive Disabilities

Along with children, the Court frequently mentions mentally disabled individuals as a prime example of vulnerability.¹⁵⁹ The Court requires states to pay intellectually disabled persons particular attention, provide a suitable environment if they are taken into state custody, and afford victims of attacks on their physical or mental integrity special protection in light of their reduced ability or willingness to seek redress themselves.¹⁶⁰ This latter finding has particularly been developed in the context of sexual violence against persons with intellectual disabilities, where the Court has held that the failure to properly investigate or provide an appropriate judicial response to such allegations risks creating a background of impunity and breaching the state's positive obligations.¹⁶¹

Perhaps the leading judgment when it comes to vulnerability and intellectual disability is *Đorđević v Croatia*. Mr Đorđević, who had been divested of legal capacity due to his mental and physical disability, had been exposed to ill-treatment by a group of school-aged children.¹⁶² Here the Court reiterated the state's obligation to take measures to protect people in its jurisdiction from ill-treatment, also if administered by private individuals, and held that these measures 'should provide effective protection, in particular, of children and other vulnerable persons'.¹⁶³ The Court went on to hold that, as the authorities had not taken 'all reasonable measures to prevent abuse against the first applicant, notwithstanding the fact that the continuing risk of such abuse was real and foreseeable', there had been a violation of Article 3.¹⁶⁴

When it comes to criminal proceedings against individuals with cognitive disabilities, the state's obligation to effectively protect children and other vulnerable persons is also part of its procedural obligations under Article 3.¹⁶⁵ Deficiencies in how proceedings are conducted become 'are all the more serious' if the person concerned is a vulnerable, cognitively disabled person.¹⁶⁶

When a person with cognitive disabilities is detained, the authorities must 'demonstrate special care in guaranteeing such conditions as correspond to the person's individual needs resulting from his disability'.¹⁶⁷ One example here

¹⁵⁸ *E.B. v Romania* App no 49089/10, Judgment of 19 March 2019, paras 59–60.

¹⁵⁹ *M.B.* (n 36), para 52.

¹⁶⁰ *Ibid*; *B. v Romania* (n 45), para 50.

¹⁶¹ *E.B.* (n 158), paras 59–60; *I.C.* (n 63), para 55.

¹⁶² *Đorđević v Croatia* App no 41526/10, Judgment of 24 July 2012, Reports 2012, para 6.

¹⁶³ *Ibid*, para 138.

¹⁶⁴ *Ibid*, paras 149 and 150.

¹⁶⁵ *W. v Slovenia* App no 24125/06, Judgment of 23 January 2014, para 70.

¹⁶⁶ *Ibid*, para 70.

¹⁶⁷ *Z.H. v Hungary* App no 28973/11, Judgment of 8 November 2012, paras 7, 10 and 29.

is *Țicu v Romania*, where the Court held vis-à-vis a detainee who suffered from a severe delay in his mental and physical development that, in order to determine whether the medical treatment he received in detention was compatible with Article 3, it was necessary to take into consideration his vulnerability and his incapacity to complain about the treatment received. The Court used three criteria to determine whether the treatment had been adequate: the applicant's state of health, the adequate character of the medical treatment he had received in detention and the feasibility of continued detention given the applicant's state of health.¹⁶⁸ Other, later cases have echoed this finding.¹⁶⁹ Intellectual disability and detention will be discussed in more detail below, in the section on vulnerability in detention, so for the purposes of this section it suffices to note that special vulnerability-based state obligations exist in this regard.

As discussed above, the Court appears to place persons with cognitive disabilities in a position analogous to that of children, mentioning both in the same breath and failing to make meaningful distinctions between them. This analogy is, in some ways, useful: like young age, intellectual disability may render those affected dependent on others – be it the state or others who provide them with support in exercising their legal capacity and going about their lives – to some extent, and may therefore attract abuse. The Court's case law captures various constellations in which persons living with intellectual disabilities have found it difficult to respond to or even protest against violations of their rights. In addition, persons with severe cognitive disabilities may experience a legal power imbalance because they do not enjoy legal capacity, although this can raise its own issues under the Convention.¹⁷⁰

However, the Court is striking a balance here between protecting people with intellectual disabilities and empowering them, and as it does so it should be wary of the triple risk of paternalising and stigmatising the individuals concerned and of essentialising their needs and experiences. Focusing on the limitations of these individuals as a group negates the fact that the extent and iteration of cognitive disability varies between individuals, and that failing to consider the agency and abilities of affected individuals may result in discriminatory outcomes.¹⁷¹ In particular, comparing intellectually disabled people to children negates all the ways in which they are unlike children – not least their potential ability to exercise at least some aspects of their legal capacity, but also for example their possible desire to engage in sexual relationships or start families. In addition, any approach to the vulnerability of disabled people should be aware of the danger of 'othering',

¹⁶⁸ *Țicu v Romania* App no 24575/10, Judgment of 1 October 2013, para 59.

¹⁶⁹ *Drăgan v Romania* App no 65158/09, Judgment of 2 February 2016, para 91.

¹⁷⁰ *Shtukaturv v Russia* App no 44009/05, Judgment of 27 March 2008, para 90.

¹⁷¹ See, for an example from the Art 8 context, *Kocherov and Sergeyeva v Russia* App no 16899/13, Judgment of 29 March 2016.

and seek to counter this risk by advancing inclusion and by incorporating an awareness of the social model of disability.¹⁷²

ii. Mental Illness (Psychosocial Disability)

In addition to intellectual disability, the Court has recognised mental illness (also termed psychosocial disability) as a source of vulnerability. The relevant cases concern a range of different contexts, from detention and institutionalisation to military conscription and the expulsion of migrants.

When it comes to mental illness and detention, since *Kudła v Poland*, the Court has consistently acknowledged that detained persons suffering from a psychological condition or mental illness are more vulnerable than the average detainee.¹⁷³ Even where measures taken regarding mentally ill detainees serve to protect the safety of other detainees, this must not aggravate the mental state of the individual concerned.¹⁷⁴ Regarding individuals who are confined to psychiatric hospitals, the Court has held that the vulnerable position of these individuals, who experience feelings of inferiority and powerlessness, calls for 'increased vigilance' in reviewing whether the requirements of the ECHR have been met.¹⁷⁵ Measures taken concerning these individuals must be medically necessary.¹⁷⁶ The Court has also formulated special obligations for states regarding mentally ill military conscripts, finding for example that Italy had violated Article 3 by failing to provide a framework to detect and react to the vulnerability of conscripts with psychosocial disabilities in a timely manner.¹⁷⁷ In addition, as discussed below concerning vulnerability and migration, psychosocial disability is also a factor that influences the Court's determination of whether the expulsion or return of an applicant is compatible with Article 3, although it does not do so consistently.¹⁷⁸

The vulnerability of mentally ill persons also has an effect under Article 3 when persons with a psychosocial disability are the victims of violence. For example, if a psychosocially disabled person makes allegations of rape, the authorities must pay particular attention, and pursue all available possibilities for establishing the facts.¹⁷⁹ In addition, when faced with victims whose psychological condition is vulnerable, for example due to trauma, the uncertainty brought

¹⁷² As discussed in Domańska Monika, 'People with Disabilities as a Vulnerable Group: The Concept of Protection of the Rights of Vulnerable Groups', 4(23) *Białostockie Studia Prawnicze* (2018) 25–34.

¹⁷³ *Kudła v Poland* App no 30210/96, Judgment (GC) of 26 October 2000, Reports 2000-XI, para 99. *Renolde v France* App no 5608/05, Judgment of 16 October 2008, Reports 2008 (extracts), para 120. *Ślawomir Musiał v Poland* App no 28300/06, Judgment of 20 January 2009, para 87.

¹⁷⁴ *G. v France* App no 27244/09, Judgment of 23 February 2012, para 44.

¹⁷⁵ *M.S. v Croatia* (No. 2) App no 75450/12, Judgment of 19 February 2015, para 98.

¹⁷⁶ *Ibid*, para 98.

¹⁷⁷ *Placi* (n 16), para 59.

¹⁷⁸ *Sufi and Elmi v the United Kingdom* App no 8319/07 and 11449/07, Judgment of 28 June 2011, paras 303 and 312.

¹⁷⁹ *M.B.* (n 36), para 57.

about by excessively long-lasting proceedings and the need to relive the events during repeated interrogations may particularly affect these victims in a manner incompatible with Article 3.¹⁸⁰

One informative case here is *Bureš v Czech Republic*. The 22-year-old applicant, who suffered from a psychosocial disability, accidentally overdosed on prescribed medication and was picked up by police while partially naked in public. Police assumed that he was a drug addict, and he was transferred to a sobering-up centre, where he was restrained in a manner that caused nerve damage to his hands and later impacted his ability to exercise his profession as a musician. He was then involuntarily hospitalised for over two months. In considering the applicant's complaint under Article 3, the Court considered that he was 'a young man of a fragile build, suffering from a mental illness' who found himself in a particularly vulnerable position in the sobering-up centre while accidentally intoxicated.¹⁸¹ The Court found a violation of Article 3 in the fact that the authorities – who, it held, knew or should have known about the applicant's mental illness – strapped him to a bed in a centre meant for treating persons under the influence of drugs without properly checking the necessity of such treatment.¹⁸² This case not only highlights the fact that the necessity of a given treatment can make the difference between a violation of Article 3 and permissible treatment, but also that measures applied to mentally ill persons and their particular vulnerability must be considered and assessed in the individual case.

In other words, when making an arrest or otherwise depriving anyone of their liberty, the authorities must be sensitive to the possibility that the person concerned may suffer from a psychosocial disability, and respond accordingly. In one 2017 case, concerning a man with a serious psychiatric disorder who died while being arrested, the Court held that he was vulnerable because of his mental illness and that he 'clearly did not understand what the police officers were doing'.¹⁸³ Police lost control of the situation and, despite the applicant's double vulnerability as a detainee and a mentally ill person, he 'was literally trampled underfoot by the police'.¹⁸⁴

The stigmatisation of persons with psychosocial disabilities affects perceptions of those affected. The Court's case law resolutely breaks from this stigma with its vulnerability reasoning, which assists it in evaluating cases from the perspectives of applicants. In particular, the Court has developed an awareness of the impaired ability of some mentally ill persons to complain about ill-treatment, and has also begun to deploy a nuanced understanding of the variety of psychosocial disabilities and the range of effects they may have, as well as requiring sensitivity to the

¹⁸⁰ *S.Z. v Bulgaria* App no 29263/12, Judgment of 3 March 2015, especially para 52.

¹⁸¹ *Bureš v Czech Republic* App no 37679/08, Judgment of 18 October 2012, para 88.

¹⁸² *Ibid*, paras 94 and 105.

¹⁸³ *Boukrourou and Others v France* App no 30059/15, Judgment of 16 November 2017, para 85.

¹⁸⁴ *Ibid*, para 86.

existence and exigencies of these conditions from State authorities.¹⁸⁵ In doing so, the Court is contributing to replacing damaging archetypes or ideas of mentally ill persons – those fuelling fear and discrimination – with new ones that funnel an understanding of their particular needs and humanity, as well as feelings of injustice, into heightened protection. At the same time, the Court must be careful not to reinforce ideas about the powerlessness or otherness of the persons concerned. Like for the intellectually disabled persons discussed in the preceding section, the Court must strike a balance between protecting and empowering persons with psychosocial disabilities.

III. Vulnerability Due to State Control

The most commonly found source of vulnerability in the Court's Article 3 case law is that of persons under state control. This includes persons in detention, but also those who are institutionalised or otherwise under the sole authority of the state. When people are deprived of their liberty, they are vulnerable because they depend on the authorities both to guarantee their safety and to provide them with access to essential resources like food, hygienic conditions, and health care. As a result, the state has particular obligations under Article 3 to protect and provide for individuals in its custody. While all persons deprived of their liberty are vulnerable, some are particularly vulnerable, for example because they suffer from a psychosocial disability or are minors. In addition, the state often controls the flow of information and access to proof here, and so the Court applies a presumption of state responsibility when harm comes to those deprived of their liberty. The following sections will discuss some different situations in which the Court has concretised this.

A. Detainees

When it comes to detainees, which for present purposes includes persons under arrest, in pre-trial detention, or serving a prison sentence, the concept of vulnerability applies in two ways. First, they are vulnerable because they are under exclusive state authority. Secondly, some prisoners are more vulnerable than others due to specific factors, such as for example a disability or illness. The following will consider these two sources of vulnerability individually.

i. The Vulnerability of Detainees in General

Today, the vulnerability of detainees is the most commonly recognised form of vulnerability in the Court's Article 3 case law. The Court is guided here by the

¹⁸⁵ *Riviere v France* App no 33834/03, Judgment of 11 July 2006, para 63; *Dybeku v Albania* App no 41153/06, Judgment of 18 December 2007, para 41.

idea that all prisoners have the right to be detained under conditions compatible with human dignity, meaning that the manner and method in which measures are executed may not 'subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'.¹⁸⁶ Incarceration, the Court has held, does not lead to a loss of Convention rights, but – to the contrary – may lead to a need for increased human rights protection because prisoners are in a vulnerable situation and entirely under the authority of the state.¹⁸⁷ On this basis, the Court has established that the health and wellbeing of prisoners must, though taking into account the practical demands of imprisonment, be considered; in assessing whether the treatment or punishment inflicted in a given case is compatible with Article 3, the vulnerability of the detainee in question must be taken into account.¹⁸⁸

The beginnings of this strain of case law can be traced back to the 1990 case of *Tomasi v France*. There, one Commission member argued that even slight injuries may meet the threshold of severity of Article 3 when 'the victim is deprived of his liberty, vulnerable and in a state of inferiority'.¹⁸⁹ The Commission itself, in that case, relied on a 'presumption of severity' in cases of ill-treatment in detention.¹⁹⁰ In 1992, in its judgment in the same case, the Court built on these arguments to create the basis of what would later become the modern-day reversal of the burden of proof that is now commonly applied to injuries suffered in detention. This presumption means that, because of the vulnerability of detainees, when a person enters the custody of the authorities in good health and leaves with injuries, the State carries the burden of proof for explaining those injuries.¹⁹¹

Since then, the Court has frequently used vulnerability to reverse the burden of proof where allegations of ill-treatment in detention were concerned, and accepted that all detainees are vulnerable by virtue of being under exclusive state authority.¹⁹² This applies to alleged violence, but also to, for example, failure to provide adequate food or medical care to detainees.¹⁹³ Article 3 requires the state itself to provide for these basic needs, and so it cannot avoid its obligation by, for example, allowing detainees to purchase their own food.¹⁹⁴

However, the Strasbourg jurisprudence regarding the vulnerability of detainees has multiple strands. Three of these are discernible in the *Aydin v Turkey*

¹⁸⁶ *Rezmiveş and Others v Romania* App no 61467/12 ..., Judgment of 25 April 2017, para 72.

¹⁸⁷ *Ibid*, para 72.

¹⁸⁸ *Renolde* (n 173), para 120.

¹⁸⁹ *Tomasi v France* App no 12850/87, Report (Commission) of 11 December 1990, Dissenting Opinion of JC Soyer, para 30, translation from the original French by the author.

¹⁹⁰ *Tomasi* (n 189), paras 91 and 102.

¹⁹¹ *Tomasi v France* App no 12850/87, Judgment of 27 August 1992, Series A241-A, para 110. This was later adapted to its current form in *Selmouni v France* App no 25803/94, Judgment (GC) of 28 July 1999, Reports 1999-V, para 87. See also *Sitnikov v Russia* App no 14769/09, Judgment of 2 May 2017, para 35.

¹⁹² *Ribitsch v Austria* App no 18896/91, Judgment of 4 December 1995, Series A336, para 36; *Shlychov v Russia* App no 40852/05, Judgment of 9 February 2016, para 57.

¹⁹³ *Beketov v Ukraine* App no 44436/09, Judgment of 19 February, para 141; *Mammadov and Others v Azerbaijan* App no 35432/07, Judgment of 21 February 2019, para 120.

¹⁹⁴ *Mammadov and Others* (n 193), 142.

case discussed above, which concerned a 17-year-old girl who was exposed to severe ill-treatment in detention, including rape. In this case, the Court considered that rape by a state official 'must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.'¹⁹⁵ This draws on a first strand of vulnerability reasoning in the detention context, concerning the control that the authorities have over detainees, which creates a special obligation to ensure their wellbeing.¹⁹⁶

The second strand of case law relates to the fact that the Court noted the applicant's age and sex in *Aydin*.¹⁹⁷ Although the Court did not explicitly label this as a source of vulnerability at the time, this type of finding later evolved into the case law that recognises that certain detainees are more vulnerable than others because, for example, of their youth, disability, or some other factor. This is discussed in more detail in the next section.

Thirdly, the Court held that the applicant had suffered terrifying, disorienting, humiliating, painful, anguishing and bewildering experiences, which must have led her to experience an 'overall sense of vulnerability'.¹⁹⁸ The idea of vulnerability as an emotion evoked in response to victimisation will be touched upon again below. That idea has frequently been cited by the Court. In doing so, it examines whether detainees have been made to feel vulnerable, fearful or anxious.¹⁹⁹ Such feelings can lead the Court to find that an act of torture has taken place.²⁰⁰

In addition to these three strands, in later cases the Court has also inferred an individual's feeling of vulnerability from the circumstances of a case: in a 2016 judgment, it concluded from the fact that the applicant's son threw himself from a window during ill-treatment in police custody that his suffering had been particularly acute and had thus constituted torture.²⁰¹ In another case, the Court found that the very fact of an applicant's illegal detention while he was covertly removed from Italy by United States intelligence operatives meant that he must have been in a permanent state of anxiety and uncertainty about his future, and that he therefore found himself in a 'situation of total vulnerability'.²⁰²

In parallel, the idea that humiliation of someone who is under the control of the authorities can constitute ill-treatment has also gained traction. In *Bouyid v Belgium*, concerning two brothers who were slapped by police officers during questioning, the Court found that the officers concerned had flouted their duty

¹⁹⁵ *Aydin* (n 24), para 83.

¹⁹⁶ *Özen and Others v Turkey* App no 29272/08, Judgment of 23 February 2016, para 75.

¹⁹⁷ *Aydin* (n 24), para 84.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Dikme v Turkey* App no 20869/92, Judgment of 11 July 2000, Reports 2000-VIII, para 91; *Doğanay v Turkey* App no 50125/99, Judgment of 21 February 2006, para 32.

²⁰⁰ *Dikme* (n 199), para 91; *Hajrulah v the Former Yugoslav Republic of Macedonia* App no 37537/07, Judgment of 29 October 2015, para 100.

²⁰¹ *Lykova v Russia* App no 68736/11, Judgment of 22 December 2015, para 126.

²⁰² *Nasr and Ghali v Italy* App no 44883/09, Judgment of 23 February 2016, para 286, translation by the author.

to protect these vulnerable individuals and had failed to respect their human dignity.²⁰³ The Court held that even a single unpremeditated slap without serious or lasting effects can be humiliating to the victim.²⁰⁴ In the context of detention, this is particularly acute because this type of behaviour ‘highlights the superiority and inferiority which by definition characterise the relationship between [law-enforcement officers] and [detainees]’.²⁰⁵ The Court also emphasised that, because victims know that such treatment is in breach of officers’ moral, professional, and legal obligations, this may additionally ‘arouse in them a feeling of arbitrary treatment, injustice and powerlessness’.²⁰⁶

The finding in *Bouyid* concerning the lack of respect for the applicants’ dignity and their feelings of humiliation could have potentially far-reaching consequences given that many aspects of detention – and perhaps detention itself – may humiliate detainees. This is particularly true because, in *Bouyid*, the Court found it sufficient for detainees to be humiliated in their own eyes, and not necessarily those of others.²⁰⁷ Admittedly, this case is not about the humiliations that necessarily accompany detention, but instead about the entirely unrelated infliction of police violence on persons under the complete control of the authorities. In this regard, the Court rightly noted the impermissibility of violence in the context of the resulting power imbalance, and did not allow arguments about the potentially provocative behaviour of the applicants to affect this.²⁰⁸

In other words, when persons are in state custody, the power imbalance that occurs affects whether a given treatment falls under Article 3. Still, not every humiliation will meet the Article 3 threshold. For example, in *Szafranski v Poland*, the Court examined a complaint about conditions of detention, including the authorities’ failure to provide a proper separation between a toilet and the rest of a shared cell. The Court held that, although states are obligated to ensure the compatibility of detention with the human dignity of detainees, who are vulnerable given their detention, the cumulative effect of the conditions of detention in this case did not reach the requisite level of distress and hardship necessary for a violation of Article 3.²⁰⁹ However, the Court did find a violation of the lower-threshold Article 8, noting that the European Committee for the Prevention of Torture (CPT) requires a proper separation of toilets and that the domestic authorities had violated their positive obligation to ensure a minimum level of privacy.²¹⁰

²⁰³ *Bouyid* (n 89), paras 107–11.

²⁰⁴ *Ibid.*, paras 105–06.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, para 106.

²⁰⁷ *Ibid.*, para 87.

²⁰⁸ *Ibid.*, para 108.

²⁰⁹ *Szafranski v Poland* App no 17249/12, Judgment of 15 December 2015, paras 22 and 27–28.

²¹⁰ *Ibid.*, para 40.

ii. Particularly Vulnerable Detainees

Early on in its vulnerability case law concerning detainees, the Court also began to take into consideration the special vulnerability of particular applicants. In other words, while all detainees are vulnerable by virtue of being under the sole control of the state, the Court has also identified detainees who, by virtue of some other trait, are more vulnerable than the average detainee. For example, it has found that a Chinese detainee awaiting deportation in the United Kingdom was particularly vulnerable due to his 'position as a foreigner in the prison'.²¹¹ More commonly, detainees of young or advanced age have been qualified as particularly vulnerable, with the Court tailoring the level of suffering that detained individuals may be expected to bear to the special psychology of children²¹² and likewise finding that advanced age and the medical issues that accompany it can make an individual particularly vulnerable.²¹³ The vulnerability of minor detainees has been covered above in section II.A.iv.

The following will focus on four main sources of particular vulnerability in detention: mental health problems (ie psychosocial disabilities) and intellectual disabilities, physical disabilities or illnesses, the risk of abuse by other detainees and the risk of abuse by the prison authorities. A short section noting some peculiarities of the Court's approach to strip-searches will follow.

a. Psychosocial or Cognitive Disabilities and Detention

As discussed above, the Court has held that states have special obligations regarding persons who suffer from intellectual disabilities and mental illness. In addition, these sources of vulnerability require special attention in the detention context, where they are not necessarily distinguished from each other. These cases can concern detention in the law-enforcement context, but also include confinement in psychiatric hospitals, which typically places individuals in a 'position of inferiority and powerlessness' much like detention.²¹⁴

When it comes to the issue of whether Article 3 allows for the detention of someone with a psychosocial or cognitive disability at all, the Court considers three criteria. These include the individual's medical condition, the adequacy of the medical care and assistance provided in detention, and the advisability of maintaining them in detention in view of their state of health.²¹⁵ In applying these three criteria, the Court has required increased vigilance from the authorities in reviewing the permissibility of detention given '[t]he feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder'.²¹⁶

²¹¹ *Zhu v United Kingdom* App no 36790/97, Decision of 12 September 2000.

²¹² *Bati and Others* (n 49), para 122; *Yazgöl Yılmaz* (n 47), para 42.

²¹³ *Stoyan Mitev* (n 143), para 73; *Giorgini* (n 144), paras 52 and 57 (concerning the detention of a 77-year-old woman).

²¹⁴ *M.S. (No 2)* (n 175), para 98.

²¹⁵ *Aswat v United Kingdom* App no 17299/12, Judgment of 16 April 2013, para 50.

²¹⁶ *Ibid.*

When deciding to detain a person with psychosocial or cognitive disabilities, states must take into account that these detainees are particularly vulnerable because they may experience particular feelings of distress, fear, and anguish in detention.²¹⁷ The authorities must ‘demonstrate special care in guaranteeing such conditions as correspond to the person’s individual needs resulting from his disability.’²¹⁸ The vulnerability of mentally unstable applicants means that the authorities must use ‘special precautions against unnecessarily affecting their psychological state’ when carrying out any actions in their respect, for example a search of their cell.²¹⁹ Furthermore, the Court has regard for the fact that individuals suffering from a cognitive disability or illness may be less able to formulate a coherent complaint against their ill-treatment.²²⁰

In some cases, the Court has found that the failure to provide a specific service tailored to the needs of an applicant may violate Article 3. In 2019, in *Rooman v Belgium*, it examined an application from a severely mentally ill applicant who was subjected to compulsory confinement in the French-speaking part of Belgium, but who exclusively spoke German. It found that the failure to provide the applicant with access to a German-speaking psychologist had violated the state’s obligation of means under Article 3 because, in this case, it meant that necessary treatment was not adequately available.²²¹ Similarly, in a case concerning a detainee serving a life sentence and suffering from schizophrenia and paranoid delusions, the Court held, given his vulnerability, that the failure to place him in an facility providing suitable psychiatric services had exposed the applicant to a risk to his health and must have caused him stress and anxiety.²²² In other words, the failure to transfer this seriously mentally ill prisoner to a suitable facility had violated Article 3.

In addition, as noted in a preceding section, when it comes to criminal proceedings against individuals with cognitive disabilities, the state’s procedural obligations under Article 3 are particularly strict.²²³

As concerns the imposition of unwanted medical treatment on patients with psychosocial disabilities, the Court considers the established principles of medicine to be decisive. Accordingly, it has held that ‘it is for the medical authorities to decide, on the basis of the recognized rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible.’²²⁴ At the same time, the Court requires

²¹⁷ See, for some of the earlier examples of this case law, *Kudla* (n 173), para 99; *Keenan v United Kingdom* App no 27229/95, Judgment of 3 April 2001, Reports 2001-III, paras 110–11; *Pantea v Romania* App no 33343/96, Judgment of 3 June 2003, Reports 2003-VI (extracts), para 192; *Slimani v France* App no 57671/00, Judgment of 27 July 2004, Reports 2004-IX (extracts), para 28.

²¹⁸ *Z.H.* (n 167), paras 7, 10 and 29.

²¹⁹ *Ciorap v Republic of Moldova* (No 5) App no 7232/07, Judgment of 15 March 2016, para 48.

²²⁰ *Drăgan* (n 169), para 91; *Stepanian v Romania* App no 60103/11, Judgment of 14 June 2016, paras 64 and 73.

²²¹ *Rooman v Belgium* App no 18052/11, Judgment (GC) of 31 January 2019, paras 153–59.

²²² *Gömi v Turkey* App no 38704/11, Judgment of 19 February 2019, para 87.

²²³ *W. v Slovenia* (n 165), para 70.

²²⁴ *M.S. (No 2)* (n 175), para 98.

safeguards for such measures: Article 3 permits non-consensual measures against 'patients with psychological or intellectual disabilities' only when these measures are a means of last resort, and only to prevent imminent harm to the person concerned or to others.²²⁵

The special obligations that result from the vulnerability of detainees also apply if the detainee concerned is considered to be particularly dangerous.²²⁶ In the 2015 *Bamouhammad v Belgium* judgment, for example, the Court held that the respondent state had violated Article 3 because the applicant, who was suffering from prison psychosis, had been continually transferred between prisons, which had exacerbated his condition. Even though the authorities had treated the applicant, who was considered dangerous, differently from ordinary detainees, they had failed to take his vulnerability sufficiently into account and to envisage his situation from a humanitarian perspective.²²⁷ In particular, the Court found that the modalities of the applicant's detention, namely his repeated transfers between prisons, delays in providing medical treatment, and the refusal to consider a different form of executing his sentence, could have provoked distress exceeding the threshold of Article 3.²²⁸

b. Physical Disabilities or Illnesses and Detention

Regarding the detention of persons with a physical disability or illness, obligations similar to those described in the preceding section apply. In order to determine whether the conditions of detention and the medical treatment provided are compatible with Article 3, the Court considers applicants' vulnerability and (in)capacity to complain about their treatment. It has found that these situations require 'special care in guaranteeing conditions that correspond to their special needs'.²²⁹ States must also prove that applicants alleging the contrary have received comprehensive and adequate medical care.²³⁰ They are also under an obligation to provide disabled prisoners with 'organised assistance' capable of ensuring respect for their human dignity.²³¹

The Strasbourg judges use the same three criteria as described in the preceding section to determine whether an ill or disabled detainee's treatment meets the threshold required for a violation of Article 3. These are the applicant's state of health or medical condition, the adequate character of the medical treatment

²²⁵ Ibid, para 104.

²²⁶ *Bamouhammad v Belgium* App no 47687/13, Judgment of 17 November 2015, paras 125–32.

²²⁷ Ibid, paras 123, 148.

²²⁸ Ibid, para 155.

²²⁹ *Mircea Dumitrescu v Romania* App no 14609/10, Judgment of 30 July 2013, para 59.

²³⁰ *Savinov v Ukraine* App no 5212/13, Judgment of 22 October 2015, para 50; *Barsukov v Russia* App no 51252/09, Judgment of 6 June 2017, para 32.

²³¹ *Semikhvostov v Russia* App no 2689/12, Judgment of 6 February 2014, para 84.

received in detention, and the feasibility of continued detention given the applicant's health.²³²

The Court has unequivocally held that dependency on cellmates for medical treatment and assistance creates feelings of vulnerability and humiliation in prisoners forced to avail themselves of such help. This places them in a position of inferiority vis-à-vis other prisoners, and states cannot absolve themselves of their obligations towards ill or disabled prisoners by shifting responsibility for their care to their cellmates.²³³ In 2015, the Court summarised its previous findings on this matter, holding that the assistance provided by co-detainees, even voluntarily, does not mean that the special needs of a dependent applicant have been satisfied, and so neither have the state's obligations.²³⁴

The obligation to take the vulnerability of detainees into account begins at the time of their arrest. For example, in 2013, the Court considered the case of a man who died from the combination of the stress of being arrested and a pre-existing cardiovascular affliction. While recognising the possibility of state responsibility, however, the Court also held that, in order to find the state responsible for the individual's death, the authorities must have reasonably been able to be aware of his vulnerability.²³⁵ It has continued this line of reasoning in later cases.²³⁶

To date, the Court has taken into consideration the vulnerability of detainees suffering from a range of conditions, disabilities, and illnesses. To name but a few examples, regarding a detainee who suffered from unstable type-II diabetes, chronic pancreatic inflammation and stomach ulcers, the Court found that the authorities had to balance the risks posed by incarceration with particular diligence, including by regularly reviewing the compatibility of his health with detention.²³⁷ In *Taïs v France*, the Court rejected the government's submission that the applicants' son, who was found dead in his cell, had been in good health when detained, noting that the fragile and HIV-positive young man had been incarcerated while drunk and in 'a worrying physical and moral state'.²³⁸ In *Grzywaczewski v Poland*, the Court held that the cumulative effects of detention in an overcrowded space under inadequate living conditions had violated Article 3. The applicant in that case, who suffered from diabetes, prostate cancer, and mild cardiac disorders, was characterised as 'in a vulnerable position vis-à-vis other prisoners', which in this specific context seems to mean not that he risked violence, but that he suffered

²³² *Ticu* (n 168), para 59; *Babar Ahmad and Others v United Kingdom* App nos 24027/07 ..., Judgment of 10 April 2012, para 215.

²³³ *Kaprykowski v Poland* App no 23052/05, Judgment of 3 February 2009, para 74; *Grimailovs v Latvia* App no 6087/03, Judgment of 25 June 2013, paras 151 and 153; *Semikhvostov* (n 231), para 84.

²³⁴ *Helhal v France* App no 10401/12, Judgment of 19 February 2015, para 62, translated from the original French by the author.

²³⁵ *Yüksel v Turkey* App no 49756/09, Decision of 1 October 2013, para 71.

²³⁶ *Vinogradov v Russia* App no 27122/10, Judgment of 7 March 2017, para 42.

²³⁷ *Andrzej Wierzbicki v Poland* App no 48/03, Judgment of 19 January 2010, para 58.

²³⁸ *Taïs v France* App no 39922/03, Judgment of 1 June 2006, para 89, translation by the author.

more acutely under the circumstances of detention.²³⁹ In another case, *Wenner v Austria*, the Court found that the state had violated Article 3 by refusing to provide the applicant, a life-long heroin addict, with drug substitution therapy in detention.²⁴⁰

In the same vein, the Court has held that disability makes prisoners 'more vulnerable to the hardships of detention'.²⁴¹ The Court bases these judgments on the physical and mental effect of a lack of adequate treatment and care. Inadequate medical treatment causes detainees to suffer distress exceeding the inevitable level of suffering inherent in detention.²⁴² In 2017, regarding a terminally ill detainee who was suffering the effects of heavy medication in difficult prison conditions, the Court held that, in this context, any lack of diligence by the authorities exacerbated his vulnerability, making it impossible for him to retain his dignity.²⁴³

This jurisprudence is not without its inconsistencies, however. In 2012, the Court found regarding the detention of an individual with amputated forearms that, though he was vulnerable, the absence of any 'incident or positive intention to humiliate or degrade the applicant' meant that Article 3 had not been violated.²⁴⁴ This finding is a curious one, given that the element of intent is not a requirement for finding that Article 3, in its inhuman and degrading treatment or punishment limbs, has been violated. The Court corrected itself in 2015, finding that the fact that a wheelchair-bound detainee had to depend on his cellmates in order to access the showers meant that Article 3 had been violated despite the absence 'of elements that lead one to think that the authorities were acting with the intent to humiliate or degrade the applicant'.²⁴⁵

However, that was not the end of this inconsistency. The question of intent was picked up again in *Ostrowski v Poland*, concerning a detainee with a hearing impairment who sought to obtain a second hearing aid from the prison authorities.²⁴⁶ Here, the Court considered the question of intent as part of determining whether adequate medical treatment had been provided. The Court held that there was no evidence that the applicant had been humiliated or ill-treated by other detainees, and no evidence of an 'incident or positive intention to humiliate or degrade the applicant on the part of the State authorities', so that even though the applicant was more vulnerable to the hardships of detention given his special needs, the circumstances of the case had not violated Article 3.²⁴⁷

²³⁹ *Grzywaczewski v Poland* App no 18364/06, Judgment of 31 May 2012, paras 5 and 102.

²⁴⁰ *Wenner v Austria* App no 62303/13, Judgment of 1 September 2016, paras 38 and 58.

²⁴¹ *Zarzycki v Poland* App no 15351/03, Judgment of 12 March 2013, para 125.

²⁴² *Raffray Taddei v France* App no 36435/07, Judgment of 21 December 2010, para 63.

²⁴³ *Dorneau v Romania* App no 55089/13, Judgment of 28 November 2017, para 99.

²⁴⁴ *Zarzycki* (n 241), para 125.

²⁴⁵ *Helhal* (n 234), para 63, translation by the author.

²⁴⁶ *Ostrowski v Poland* App no 26945/07, Decision of 1 September 2015, para 76.

²⁴⁷ *Ibid*, paras 75–77.

Ostrowski conflicts with other cases where the Court has found that humiliation in one's own eyes can violate Article 3.²⁴⁸ In this context, humiliation primarily comes into play concerning dependency on cellmates, and the Court rather consistently finds a violation of Article 3 where disabled inmates' welfare is left up to other detainees. For example, in 2016, regarding a blind applicant, the Court held that Article 3 was violated 'where prison staff felt that they had been relieved of their duty to provide security and care to more vulnerable detainees by making their cellmates responsible for providing them with daily assistance or, if necessary, with first aid'.²⁴⁹ In other words, the human dignity of vulnerable detainees means that they must be provided with organised assistance.²⁵⁰

The Court's case law in this context continues to evolve. In a 2016 decision, concerning a detainee with partially reduced hearing, the Court departed from the intent requirement of *Ostrowski*, albeit to a similar result.²⁵¹ Here the Court found that the applicant had insufficiently substantiated her claims of exclusion and ridicule by other inmates. Therefore, it held that it could not find that 'the delay in providing her with a hearing aid at the public's expense could be perceived as humiliating or debasing treatment', even though '[a] prisoner with special needs is more vulnerable to the hardships of detention in view of his or her health problems, and the applicant must have felt excluded due to her hearing difficulties'.²⁵²

In short, failure to provide assistance to an ill or physically disabled detainee is incompatible with Article 3 if one of three alternative conditions is fulfilled: either the detainee in question becomes dependent on the assistance of other prisoners, or the detainee, despite functioning normally, but can prove that the authorities had the intent to humiliate them, or the detainee can prove that they were ridiculed by other detainees on account of their disability. A fourth alternative condition, that the detainee was humiliated in their own eyes, does not yet seem to have trickled down to these particular types of cases.

Not only the failure to take a particular inmate's illness into account, but also the corraling together of ill inmates and the resulting exposure to further diseases has been found by the Court to constitute a violation of Article 3. In 2016, regarding an inmate who suffered from hepatitis, tuberculosis, and HIV, the Court held that the fact that he shared an overcrowded ward in close quarters with many 'sick and occasionally infected inmates' had constituted degrading treatment.²⁵³ In early 2021, the Court made a similar finding based on this case law – although without making any explicit reference to vulnerability – concerning the Covid-19 pandemic.²⁵⁴

²⁴⁸ *Bouyid* (n 89), para 105; *Svinarenko and Slyadnev v Russia* App nos 32541/08 and 43441/08, Judgment (GC) of 17 July 2014, Reports 2014 (extracts), para 115.

²⁴⁹ *Butrin v Russia* App no 16179/14, Judgment of 22 March 2016, para 63.

²⁵⁰ *Ibid.*

²⁵¹ *Stefaniak v Poland* App no 56941/11, Decision of 19 April 2016, para 38.

²⁵² *Ibid.*, para 40.

²⁵³ *Vidish v Russia* App no 53120/08, Judgment of 15 March 2016, para 29.

²⁵⁴ *Feilazoo v Malta* App no 6865/19, Judgment of 11 March 2021, para 92.

Disabled inmates' vulnerability not only influences the Court's determination of whether their detention causes them to suffer in a manner incompatible with Article 3. Vulnerability reasoning has also been used to find that the domestic authorities were under an obligation to transfer a disabled applicant to another correctional facility.²⁵⁵ Furthermore, it reverses the burden of proof in certain cases: for example, where an applicant alleges that the authorities have not provided prescribed medications, the fact that the detainee concerned is vulnerable and in the control of the authorities means that the state must prove that the medications were administered.²⁵⁶

How far can the Court go in ordering the state to take specific medical measures? One case in which the Court made a very specific order to the state – and did so, remarkably, at the stage of interim protection – was *G. v Russia*, which concerned a detainee who had been diagnosed with rectal cancer, among other conditions.²⁵⁷ Suffering from a prolapsed colon and in a great degree of pain, the applicant obtained a consultation with two external specialist doctors who recommended immediate surgery, warning that failure to operate could result in complications or death. A prison doctor found, however, that surgery was not immediately necessary, and prescribed absorbent underwear, which the prison authorities did not provide. The applicant spent the following year unable to control his defecation and being transferred in and out of the prison hospital, showing signs of inflammation, aggravation of a heart condition, and the potential spreading of his cancer. The Court, faced with this situation, ordered interim protection under rule 39 of the Rules of Court and indicated to the government that the applicant should be allowed to have colorectal surgery and two diagnostic procedures on his liver.²⁵⁸ The government complied with the order almost immediately. In its judgment, the Court described the domestic authorities' approach to the matter as 'unacceptable', and found two violations of Article 3, one due to the lack of medical treatment and the other due to the conditions of detention, which did not afford the applicant any privacy.

This finding is, given the Court's previous case law as summarised above, unsurprising. What is surprising about the case, however, is that the Court – which does not itself have any medical expertise – ordered specific medical procedures and diagnostic tests. In cases such as this one, where the Court's judgment ultimately came almost nine years after the corresponding application had been made before it, such a specific order of medical procedures may be the only way to minimise applicants' suffering and to guarantee that detainees can access the treatment due to them under Article 3 ECHR before their condition has irreparably worsened – in other words, to guarantee effective protection of individual rights.

²⁵⁵ *Neshkov and Others v Bulgaria* App nos 36925/10 ..., Judgment of 27 January 2015, para 292.

²⁵⁶ *Kolesnikovich v Russia* App no 44694/13, Judgment of 22 March 2016, para 74.

²⁵⁷ *G. v Russia* App no 42526/07, Judgment of 21 June 2016, paras 4 and 8.

²⁵⁸ *Ibid*, paras 4, 53; see also r 39 (interim measures) of the Rules of the ECtHR of 1 January 2020.

However, it must be noted that, though rule 39 protection helped the applicant in *G. v Russia* to obtain speedy access to medical care, this approach is effective only if states comply with the Court's interim protection orders. This has not always been the case. In one case, the Court ordered rule 39 protection for an applicant with cervical cancer who was being denied necessary radiation treatment in a Russian prison. Here, the authorities apparently failed to comply with the interim measures order, and the applicant died in detention before the case was decided.²⁵⁹ There are more such examples, even if looking only at Russia during a one-year period. One case concerned an applicant who died of prostate cancer in detention despite a rule 39 order to transfer him to a specialist hospital.²⁶⁰ Another case concerned an applicant suffering from a number of conditions, including HIV/AIDS, tuberculosis and hepatitis C, who died after the authorities failed to comply with the Court's interim protection order to conduct an independent medical examination.²⁶¹ The same thing occurred in another case, concerning a detainee suffering from metastatic kidney cancer; the prison authorities did not consider the possibility of radiation therapy and did not comply with the rule 39 order to conduct an independent medical examination, and he died before the case ever reached the judgment phase.²⁶²

In this context, in addition to vulnerability language, the Court has also referred to the 'precariousness' of a detainee's health or the resulting 'defencelessness'. It has used 'precariousness' language, for example, concerning a Romanian man who, after an altercation with the mayor of his town, was handcuffed to a tree outside the village police station. The Court took into account that the applicant, who had been left handcuffed outdoors on a cold and wet day, suffered from a 'precarious state of health'; accordingly, it found that he had suffered inhuman and degrading treatment.²⁶³ The idea of 'defencelessness' was used in a case against Russia, where armed men had dragged a physically disabled man out of his home in the middle of a cold night in only an undergarment.²⁶⁴ While these terms – precariousness and defencelessness – are rarely used by the Court, it appears that they are used as synonyms of vulnerability in this context.

c. Risk of Abuse by Other Detainees

A further cause of vulnerability in detention stems from traits or behaviours that make detainees more prone to abuse by other inmates. This includes individuals who have cooperated with the authorities as informants,²⁶⁵ who are less

²⁵⁹ *Semenova v Russia* App no 11788/16, Judgment of 3 October 2017, para 4.

²⁶⁰ *Kondrulin v Russia* App no 12987/15, Judgment of 20 September 2016, paras 21 and 23–24.

²⁶¹ *Maylenskiy v Russia* App no 12646/15, Judgment of 4 October 2016, paras 15, 19 and 22.

²⁶² *Klimov v Russia* App no 54436/14, Judgment of 4 October 2016, paras 22–31.

²⁶³ *Archip v Romania* App no 49608/08, Judgment of 27 September 2011, paras 57–59.

²⁶⁴ *Aliyeva v Russia* App no 1901/05, Judgment of 18 February 2010, para 87.

²⁶⁵ *J.L. v Latvia* App no 23893/06, Judgment of 17 April 2012, para 87; *D.F. v Latvia* App no 11160/07, Judgment of 29 October 2013, para 92.

able than average to control their emotions,²⁶⁶ who identify as members of the LGBTQI community,²⁶⁷ or who are related to prison guards or who have previously worked as police officers and private security guards,²⁶⁸ along with those who have committed crimes of a sexual nature against children.²⁶⁹ The Court has also established vulnerability based on specific contexts, for example of Serbs who had been convicted of war crimes against Bosniacs and who were kept in a largely Bosniac prison.²⁷⁰ In addition, states have an obligation to protect detainees from fellow inmates with an increased propensity to violence, for example psychopathic cellmates.²⁷¹

The Court has held in this regard that states are under an obligation to 'take all steps reasonably expected to prevent real and immediate risks to prisoners' physical integrity, of which the authorities had or ought to have had knowledge'.²⁷² This means keeping at-risk individuals in separate cells.²⁷³ However, it is not sufficient to comply with this obligation by moving vulnerable prisoners from cell to cell nearly constantly, and 'any transfers of vulnerable prisoners should form part of a carefully designed strategy for dealing with inter-prisoner violence'.²⁷⁴

Notably, it is not decisive whether at-risk prisoners have brought about the risk of abuse by their own actions. This is consistent with the Court's case law under Article 3 writ large, given that the protection afforded by an absolute prohibition cannot be 'lost' by victims.²⁷⁵ For example, in the case of a young detainee with no experience of the criminal justice system who suffered 'systematic abuse' by other prisoners, the Court held that his distress in detention may have caused his provocative behaviour. The authorities should have known that this would render the applicant more vulnerable to abuse, and should have reacted at least to his visible injuries.²⁷⁶

However, conflicts with other inmates must reach a certain seriousness and likelihood in order to render a detainee vulnerable. In one case against Latvia, the Court held that an applicant, who alleged that he had cooperated with law enforcement and was therefore at risk of abuse by other inmates, could not be

²⁶⁶ *Preminyin v Russia* App no 44973/04, Judgment of 10 February 2011, paras 73 and 86.

²⁶⁷ *Korpachyova-Hofbauer v Bulgaria* App no 56668/12, Decision of 1 September 2015, para 35, citing *Stasi v France* App no 25001/07, Judgment of 20 October 2011, para 91.

²⁶⁸ *Korpachyova-Hofbauer* (n 267), para 35, citing *Aleksejeva v Latvia* App no 21780/07, Judgment of 3 July 2012, para 34; *Totolici v Romania* App no 26576/10, Judgment of 14 January 2014, paras 6, 48–49; *Starovoitovs v Latvia* App no 27343/05, Decision of 27 November 2012, paras 35–38; *Belyayev v Russia* App no 43852/12, Judgment of 15 January 2019, para 38.

²⁶⁹ *Korpachyova-Hofbauer* (n 267), para 35, citing *M.C.* (n 52), para 90.

²⁷⁰ *Rodić and Others v Bosnia and Herzegovina* App no 22893/05, Judgment of 27 May 2008, paras 69–70.

²⁷¹ *Korpachyova-Hofbauer* (n 267), para 35.

²⁷² *D.F.* (n 265), para 84.

²⁷³ *Belyayev* (n 268), para 38.

²⁷⁴ *Ibid.*, paras 86–87 and 92.

²⁷⁵ Compare, for example, *V. v United Kingdom* (n 91), para 69.

²⁷⁶ *Preminyin* (n 266), paras 73, 81 and 86.

considered vulnerable given that he had also – contradictorily – submitted that he had *not* cooperated with the authorities.²⁷⁷ The Court thus stopped short of rendering vulnerability contingent on a detainee's reputation or alleged reputation within an institution.

In the same case, the Court also held that the applicant's mental health issues did not create a sufficient potential for conflict with other inmates, given that his mental health had been stable for a decade.²⁷⁸ In other words, the Court held, mental illness per se does not place inmates at risk of violence from others. This stands in contrast to the Court's broad-brush approach to vulnerability and mental illness in other cases, and its finding that persons who suffer from mental illness are less likely and able to complain of ill-treatment.

This indicates a perception that detainees must be cowed and defenceless before being considered vulnerable to violence in detention. This perception emerges even more clearly elsewhere, for example in the separate opinion of Judge Kūris in the *Kardišauskas* case. He emphasised the applicant's record of poor behaviour in prison and argued that 'the applicant could hardly be considered a genuinely vulnerable type of prisoner'.²⁷⁹ This approach is exceedingly problematic. Making vulnerability conditional on the 'innocence' or likeability of an applicant is not only extremely subjective, but it also ignores a fundamental tenet of human rights law, namely that human dignity and the human rights protection to which it entitles its bearers are universal and characteristic of all human individuals. In addition, the protection of Article 3 cannot be waived or lost. An objective risk of abuse in prison should – and, in the Court's case law, usually does – entitle an individual to the protection associated with this vulnerability, independently of the person's likability, innocence, or responsibility for creating the risk of abuse.

One other case – albeit decided under another provision of the Convention, the right to liberty and security under Article 5 ECHR – bears mentioning in the context of protecting detainees from violence. In 2016, the Court examined an application against Hungary concerning the detention of an asylum-seeker who claimed to have fled his home state, Iran, because he faced prosecution and potentially severe penalties there due to his 'homosexuality'.²⁸⁰ In Hungary, the applicant was placed in detention among other asylum-seekers. The Court held that, in detaining asylum-seekers who claim to belong to a vulnerable group in their home state, the authorities 'should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place'.²⁸¹ In other words, states must avoid revictimising or further exposing these individuals to ill-treatment. In the case concerned, the authorities had

²⁷⁷ *Kostjučenkovs v Latvia* App no 19826/04, Decision of 8 March 2011, para 49.

²⁷⁸ *Ibid.*

²⁷⁹ *Kardišauskas v Lithuania* App no 62304/12, Judgment of 7 July 2015, Concurring Opinion of Judge Kūris, para 3.

²⁸⁰ *O.M. v Hungary* App no 9912/15, Judgment of 5 July 2016, para 8.

²⁸¹ *Ibid.*, para 53.

failed in this duty by not considering whether LGBTQI people like the applicant 'were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons'.²⁸² This reasoning complements the developments under Article 3 regarding the detention of those who are vulnerable to abuse or ill-treatment from co-detainees, and as indicated previously in this chapter the idea of preventing revictimisation is one that seems to be developing – albeit perhaps less explicitly – also under the Court's Article 3 case law.²⁸³

d. Risk of Abuse by Persons in Positions of Authority

The risk of abuse in detention does not only stem, of course, from other inmates, but can come from prison employees and other persons in positions of authority.

When it comes to how vulnerable to abuse detainees feel, the Court has found that feelings of vulnerability can be particularly acute for those detained alone.²⁸⁴ Isolation in detention can exacerbate physical and mental pain or suffering,²⁸⁵ and detainees' mental state can deteriorate if they are exposed to long stretches of isolation, which can cause chronic stress and emotional and social isolation that, in turn, render the individual concerned particularly vulnerable.²⁸⁶ Due to this vulnerability, additional pressure on them – for example, refusing to allow one detainee under such circumstances to change his urine-soaked clothes – may violate Article 3.²⁸⁷ However, the mere fact of isolation does not always suffice to consider an applicant vulnerable: the Court has also rejected the argument of vulnerability made by an applicant who showed no signs of 'typical symptoms'.²⁸⁸

In addition to this psychological element, i.e. concerning the feeling of vulnerability, the Court considers that the risk of abuse and ill-treatment in detention is particularly acute where applicants are detained alone, illegally and in secret.²⁸⁹ In *Dikme v Turkey*, the Court held that the applicant – who had been detained for 16 days without access to a lawyer, doctor, relatives or friends, or a court – 'was left entirely vulnerable ... to the reprehensible conduct of his custodians and the police officers responsible for questioning him, and, even more seriously, to acts of physical torture'.²⁹⁰ The Court went on to find that the applicant had been beaten,

²⁸² Ibid.

²⁸³ *M.G.C.* (n 55), paras 70–75.

²⁸⁴ *Stepuleac v Republic of Moldova* App no 8207/06, Judgment of 6 November 2007, para 65.

²⁸⁵ *Dikme* (n 199), para 91.

²⁸⁶ *Öcalan v Turkey (No 2)* App no 24069/03, 197/04, 6201/06 and 10464/07, Judgment of 18 March 2014, para 122; *Cirino and Renne v Italy* App no 2539/13 and 4705/13, Judgment of 26 October 2017, para 80.

²⁸⁷ *Burlya and Others v Ukraine* App no 3289/10, Judgment of 6 November 2018, para 83.

²⁸⁸ *Hansen v Norway* App no 48852/17, Judgment of 29 May 2018, para 151.

²⁸⁹ *Otamendi Eiguren v Spain* App no 47303/08, Judgment of 16 October 2012, para 41; *Dikme* (n 199), paras 82 and 91; *Lyapin v Russia* App no 46956/09, Judgment of 24 July 2014, para 119.

²⁹⁰ *Dikme* (n 199), para 82.

and that the physical and mental pain and suffering that he had experienced was 'likely to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will'.²⁹¹

Given the Court's understanding of vulnerability in detention as dependence-based, it is unsurprising that it considers isolated, secret, or incommunicado detention, which entails the removal of all safeguards against ill-treatment, to make individuals more vulnerable.²⁹² Persons accused of a crime are exposed to a legal power imbalance,²⁹³ and cutting them off from the resources and sources of resilience that the world outside the prison has to offer intensifies that imbalance. The less able prisoners are to communicate with the outside world and to complain about their treatment, the more vulnerable they are to abuse by persons in a position of authority.²⁹⁴ This especially concerns limitations on access to lawyers, doctors, and family members who may draw attention to the detained person's plight, but it depends on the circumstances of each case, and for example may also require access to an interpreter.²⁹⁵

The detention period in question must not be particularly long in order for this case law to apply. In 2016, regarding an applicant who was held in incommunicado detention for six hours, the Court found that 'such detention, applied in violation of all laws and in the absence of all procedural guarantees, cannot but increase the vulnerability of the applicant and constitute a factor that favours ill-treatment'.²⁹⁶

The type of crime in question may also make a difference. Certain types of crimes may make detainees more vulnerable to violence by law-enforcement officers. In one case, for example, an applicant was considered particularly vulnerable in this regard because he was being interrogated in connection with the murder of a police driver. Here, the Court insinuated that the applicant's account of the violence that he had suffered was particularly believable because the officers in question may have been enraged by the murder of one of their own.²⁹⁷ There is little analogous case law about identities that make detainees more vulnerable, but one example could be where a detainee identifies or is perceived as 'a homosexual', and is therefore subjected to violence.²⁹⁸

e. Strip-Searching and 'Helplessness'

A curiosity of the Court's approach to the particular vulnerability of certain detainees concerns strip-searches. In this regard, the Court has established – in

²⁹¹ Ibid, para 91.

²⁹² *Leonid Petrov v Russia* App no 52783/08, Judgment of 11 October 2016, paras 54 and 65; *L.G. v Belgium* App no 38759/14, Judgment of 18 September 2018, para 99.

²⁹³ *Kovalchuk v Ukraine* App no 21958/05, Judgment of 4 November 2010, paras 60–61.

²⁹⁴ *Beortegui Martinez v Spain* App no 36286/14, Judgment of 31 May 2016, para 46.

²⁹⁵ *Razzakov v Russia* App no 57519/09, Judgment of 2 February 2015, para 54.

²⁹⁶ *Oleynik v Russia* App no 23559/07, Judgment of 21 June 2016, para 58, translation by the author.

²⁹⁷ *Sergey Ryabov v Russia* App no 2674/07, Judgment of 17 July 2018, not reported, para 41.

²⁹⁸ *Zontul v Greece* App no 12294/07, Judgment of 17 January 2012, para 88.

case law not related to vulnerability – that systematic full-body strip-searching violates Article 3 unless justified on specific security-related grounds.²⁹⁹ The same goes for inappropriately conducted, insulting, or unhygienic searches, including searches conducted by a person of the opposite sex.³⁰⁰

Mentioning this jurisprudence is relevant here because of a further condition that is occasionally imposed. That strand of judgments concerns strip-searches that comply with the requirements outlined above. In order for the suffering evoked by such a search to surpass the threshold of Article 3, applicants must not only be in a vulnerable position – as they will always be while in detention – but they must also be ‘in a particularly helpless situation.’³⁰¹

The helplessness requirement stems from a judgment concerning the strip-searching of a handcuffed and allegedly blindfolded detainee. There, the Court found that the applicant’s helplessness rendered the strip-search in question degrading.³⁰² The Court has taken that finding and turned it into an additional requirement on strip searches. Whether helplessness and particular vulnerability are synonymous has, however, not been made clear, although it would certainly seem that the two concepts are related. Either way, the fact that a detainee is physically restrained is an additional factor to be considered here, arguably as a source of particular vulnerability, and the Court has ‘condemned the practice of gratuitously imposing potentially debasing measures’ on these vulnerable applicants.³⁰³

Two cases from 2018 further underscore the close connection between helplessness and vulnerability. In *Abu Zubaydah v Lithuania* and *Al Nashiri v Romania*, the Court dealt with applications from persons detained by the CIA.³⁰⁴ At the time, it was the CIA’s stated policy that ‘captured terrorists’ could be exposed to ‘a wide range of legally sanctioned techniques ... designed to psychologically “dislocate” the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist.’³⁰⁵ The measures applied included, as a matter of standard procedure, the blindfolding and hooding of detainees, the removal of their hair upon arrival in detention, leg shackling, incommunicado and solitary confinement, and exposure to continuous loud noise and light. These cases indicate that vulnerability and helplessness, which Article 3 protects against and which the CIA had sought to maximise, are the core business of detainees’ Article 3 rights.

²⁹⁹ *Van der Ven v Netherlands* App no 50901/99, Judgment of 4 February 2003, Reports 2003-II, paras 58–63; *Lorsé and Others v Netherlands* App no 52750/99, Judgment of 4 February 2003, paras 70–74.

³⁰⁰ *Valašinas v Lithuania* App no 44558/98, Judgment of 24 July 2001, Reports 2001-VIII, paras 114–18; *Iwańczuk v Poland* App no 25196/94, Judgment of 15 November 2001, paras 58–59.

³⁰¹ *Jaeger v Estonia* App no 1574/13, Judgment of 31 July 2014, para 42, or *Julin v Estonia* App nos 16563/08 ..., Judgment of 29 May 2012, para 189.

³⁰² *Wieser v Austria* App no 2293/03, Judgment of 22 February 2007, para 40.

³⁰³ *Ibid*; *Orłowski v Poland* App no 18877/12, Judgment of 6 November 2018, para 83.

³⁰⁴ *Abu Zubaydah v Lithuania* App no 46454/11, Judgment of 31 May 2018, para 653; *Al Nashiri v Romania* App no 33234/12, Judgment of 31 May 2018, para 670.

³⁰⁵ *Ibid*, paras 40 and 42, respectively.

f. Comments

The context of detention is perhaps the first that comes to mind when one thinks of torture. The conventional image of ill-treatment as something that is applied in detention in order to extract information or a confession from the victim certainly illustrates the ease with which the authorities can impact the physical and psychological integrity of an individual who is cut off from the outside world by prison walls. However, beyond the intentional infliction of suffering through torture, detainees are also exposed to other threats to their physical and psychological integrity. They depend on the state to not only protect them from ill-treatment aimed at extracting information, but also to ensure that they are adequately housed, fed, clean, and cared for. Because the state assumes responsibility for the persons detained in its prisons and institutions, it thus bears obligations to ensure adequate conditions of detention for those individuals.

To date, the Court has found in numerous instances that states have failed their obligations to vulnerable detainees under Article 3. However, the Court's jurisprudence has not always been this way: the Court was once much more reluctant to evaluate domestic policy decisions regarding incarceration, and hesitated to make findings that would impose cost burdens on states.³⁰⁶ Today, a more proactive Court relies on vulnerability and external standards and findings, such as those of the CPT, to engage more closely with cases.³⁰⁷

The detention context highlights the different tiers of protection created by the Court's vulnerability reasoning. While the special relationship of dependence between detainees and the state creates a degree of vulnerability in all persons deprived of their liberty, certain detainees receive special protection because they are even more vulnerable given the intersection of detention and other factors, such as mental health issues or physical disability. The Court has been proactive in creating positive state obligations to ensure adequate detention conditions and in finding that Article 3 has been violated in the context of detention. From ensuring adequate hygiene and medical care to providing protection to individuals who are at risk of violence in detention, the Court requires states to ensure that the human dignity of detainees is preserved and that they do not undergo suffering or humiliation amounting to ill-treatment. While the flood of applications from certain countries shows that detention conditions in many states remain below the standard required by the ECtHR,³⁰⁸ the Court's vulnerability reasoning has

³⁰⁶ Steve Foster, 'The Effective Supervision of European Prison Conditions' in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart, 2015) 381–400, 384–85; *Reed v United Kingdom* App no 7630/76, Decision of 6 December 1979, DR 19, 113, para 35, where prison conditions were considered 'unsatisfactory' but nonetheless failed to meet the threshold of severity.

³⁰⁷ *Abu Zubaydah* (n 304), paras 350–54; Foster (n 306), 387–88.

³⁰⁸ Some examples being detention conditions in Bulgarian (*Neshkov and Others* (n 255)) and Russian prisons (*Zayev v Russia* App no 36552/05, Judgment of 16 April 2015; *Razzakov* (n 295)).

prepared the foundations for a context-sensitive engagement with the Article 3 rights of detainees. In doing so, it underscores the fact that human dignity and the right to be free from ill-treatment, suffering and humiliation cannot be limited along with the right to liberty of detainees, but remain very much applicable in the detention context.

B. Military Conscripts

Like detainees, conscripted military personnel find themselves vulnerable because they are under the control of the authorities, and the state likewise has an Article 3 obligation to protect their physical wellbeing.³⁰⁹ This requires states to take reasonable steps to protect conscripts from ill-treatment of which the authorities had or ought to have had knowledge.³¹⁰

While all conscripts are, given this case law, considered to be in a vulnerable position analogous to that of detainees, some conscripts may be particularly vulnerable. For example, conscripts who suffer from psychosocial disabilities may experience particular stress and anxiety if subjected to military life, and their suffering may therefore go 'beyond that of any regular conscript in normal military service'.³¹¹ If conscripts display this kind of vulnerability, states are required to ensure that they can perform their military service in a manner compatible with Article 3, which includes detecting and reacting to their vulnerability in a timely manner.³¹²

This is one more example of the types of situations in which vulnerability reasoning can shift the Court's perspective and bring it closer to the context underlying an application. Persons who are drafted into military service are, often at a very young age, thrust suddenly into military life. Instead of subscribing to the archetype of the strong and unfazed soldier, and deferring to states' competence for organising their armed forces, the Court has – quite rightly – recognised that conscripts find themselves in a challenging situation, particularly if they suffer from psychological problems. Here, the vulnerability heuristic serves to facilitate a shift in perspective and promotes genuine understanding for the situation and power structure in which these individuals find themselves.

C. Persons in State Institutions

Like detainees and military conscripts, persons who are deprived of their liberty in other contexts are also vulnerable, given that they are equally under the state's exclusive control. The Court has recognised this similarity, finding that vulnerability

³⁰⁹ *Denis Vasilyev v Russia* App no 32704/04, Judgment of 17 December 2009, para 115; *Preminyin* (n 266), para 73; *Placi* (n 16), para 49.

³¹⁰ *Placi* (n 16), para 49.

³¹¹ *Ibid*, para 58.

³¹² *Ibid*, para 59.

arises not only when individuals are under exclusive state control in a penitentiary or military conscription context, but in any situation where individuals find themselves in the state's sole authority.

For example, in its 2012 *Stanev v Bulgaria* judgment, the Court considered the case of an individual suffering from schizophrenia who had been placed in a social care home for people with mental disorders under crowded, unhygienic, demeaning, and generally poor conditions. In examining the case, the Court held that Article 3 applies to 'anyone in the care of the authorities' and 'to all forms of deprivation of liberty'.³¹³ In another judgment, in 2015, the Court built on this, citing the 'position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals' as requiring more stringent review of whether a given treatment or punishment is compatible with Article 3.³¹⁴

The Court's case law shows that vulnerability in the institutional setting arises regardless of the duration of time during which an individual is in the state's custody, and is present from the very beginning of an applicant's deprivation of liberty, even if it only lasts one hour.³¹⁵ As this jurisprudence relates vulnerability to state control, it can be expected that this case law would also apply to those who have voluntarily entered an institution and but cannot freely leave it, or those who have been placed there by a legal guardian.

IV. Vulnerability Due to Victimisation

The chapter so far has covered various ways in which the situations or characteristics of applicants preceding an alleged Convention violation can render them vulnerable. In addition to this, the Court has also found that a Convention violation may, in and of itself, render someone vulnerable.³¹⁶ This reasoning – the recognition of victimisation as a source of vulnerability – may seem circular at first. However, when considering the types of cases concerned and the destructive psychological effect that ill-treatment has on its victims,³¹⁷ the Court's approach is, in fact, rather straightforward.

Victims' rights have, in the last decades, increasingly gained international recognition, with a focus on access to legal proceedings and on providing reparation.³¹⁸ In the Council of Europe, the Committee of Ministers has for example

³¹³ *Stanev v Bulgaria* App no 36760/06, Judgment (GC) of 17 January 2012, Reports 2012, para 206.

³¹⁴ *M.S. (No 2)* (n 175), para 98.

³¹⁵ *Ilievski v former Yugoslav Republic of Macedonia* App no 20136/11, Judgment of 7 May 2015, paras 60–61.

³¹⁶ *N. and M. v Russia* App nos 39496/14 and 39727/14, Decision of 26 April 2016, para 60.

³¹⁷ Margi Laird McCue, *Domestic Violence: A Reference Handbook*, 2nd edn (ABC-CLIO 2008), 79; Katie M Edwards et al, 'Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change' (2011) 65(11) *Sex Roles* 761–73, esp 765–66.

³¹⁸ UN GA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

enjoined states to ensure that '[crime] victims who are particularly vulnerable, either through their personal characteristics or through the circumstances of the crime, can benefit from special measures best suited to their situation.'³¹⁹

At the same time, certain types of crimes have received particular attention in the sense of states' obligations to combat them. When it comes to gender-based violence, for example, the Council of Europe has created the Istanbul Convention, which places states under an obligation to fully address gender-based violence in all its forms, including by taking measures to prevent such violence, to protect victims, and to prosecute perpetrators, for example through the criminalisation of various types of violence.³²⁰

The creation of positive obligations, particularly investigative ones, under Article 3 ECHR transforms these developments into a tangible improvement for victims' access to justice in Strasbourg.³²¹ The following will explore how the Court utilises vulnerability to respond to three particular contexts of victimisation: domestic and sexual violence, victims of a violation of Article 3, and applicants who experience what is called a 'sense of vulnerability'. At the same time, it should be noted at the outset that the reception of human rights-based duties to deploy the criminal law has been critical in the scholarly literature.³²²

A. Victims of Domestic and Sexual Violence

The present section groups together cases concerning all victims of sexual violence, as well as those who, due to victimisation, experience a sense of vulnerability reaching the threshold of Article 3. This conglomeration of cases is based on the fact that, while the Court does discuss domestic and gender-based violence as a problem of gender discrimination under Article 14 ECHR,³²³ this is not reflected in its approach to Article 3. Victims of sexual violence can have any gender, and when it comes to domestic violence as a form of ill-treatment, the Court takes an inclusive approach to the types of violence concerned and to the gender of possible victims.³²⁴ This approach allows it to capture various types of violence against

Humanitarian Law, UNGA Res 60/147 of 16 December 2005, paras 2(a), 3(d), 10, 11(a)–(c), 13, 15–23; Council of Europe, European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983, ETS 116, in force since 1 February 1988, 26 states parties.

³¹⁹ Council of Europe Committee of Ministers, Recommendation Rec(2006)8 of the Committee of Ministers to Member States on Assistance to Crime Victims, 14 June 2006, para 3.4.

³²⁰ Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, CETS No 210, entered into force 1 August 2014, 34 states parties.

³²¹ For more on the recognition of victims' rights on the international plane, see Cherif M Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) *Human Rights Law Review* 203–79.

³²² Laurens Lavrysen and Natasa Mavronicola, *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart, 2020), and the discussions therein; Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 41(4) *Human Rights Quarterly*, 729–61.

³²³ *Volodina* (n 33).

³²⁴ *Ibid*, para 71.

victims of any gender, including child victims.³²⁵ This does not mean, that the Court does not engage with the gendered nature of many forms of especially domestic violence, but that this largely falls under Article 14. In that context, the Court has recently displayed a turn to a gender-sensitive approach of its interpretation of the ECHR.³²⁶

i. Rape and Sexual Violence

Sexual violence against minors is a well-explored source of vulnerability in the Court's case law, as discussed previously in this chapter. When it comes to adult victims of sexual violence, its case law is more scarce, and its acknowledgement of victims' vulnerability is less forthcoming.

Regarding sexual violence perpetrated by state actors, the Court has clearly acknowledged that the context of detention gives rise to vulnerability. In 1997, it held that the treatment suffered by the applicant in *Aydin v Turkey* – a 17-year-old who had suffered rape in detention – would have created in her in an 'overall sense of vulnerability', and that she had therefore suffered torture.³²⁷ Since then, the Court has recognised the dependency and powerlessness of victims who suffer sexual violence in detention as regards obtaining justice, and held that they are in a vulnerable position when it comes to questions of proof.³²⁸ Today, the rape of detainees by state officials has been recognised as 'an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim'.³²⁹

However, vulnerability to and arising from sexual violence is not limited to situations of detention, as the Court has also recognised. Faced with 'defendable' claims of such acts, whether perpetrated by state actors or private parties, states are therefore under an obligation to conduct an investigation capable of identifying the perpetrators and holding them accountable even when the victim is not under their exclusive control. This applies particularly to vulnerable individuals, including children and intellectually disabled persons, who should benefit from additional protection in light of their inability or lack of willingness to report abuse.³³⁰ In the absence of an appropriate response, the Court has held, the authorities risk producing 'a background of impunity' that may violate Article 3.³³¹

³²⁵ *Opuz* (n 32), para 132.

³²⁶ *Volodina* (n 33).

³²⁷ *Aydin* (n 24), para 84.

³²⁸ *Zeynep Avci v Turkey* App no 37021/97, Judgment of 6 February 2003, para 65.

³²⁹ *Maslova and Nalbandov v Russia* App no 839/02, Judgment of 24 January 2008, para 107; *Zontul* (n 298), para 88.

³³⁰ *M.B.* (n 36), para 52.

³³¹ *I.C.* (n 63), para 55.

However, when it comes to sexual violence perpetrated against adult victims by private actors and absent an intersection with another ground for vulnerability (be it detention, minor age, intellectual disability, or some other ground), there is less clarity in the case law about victims' vulnerability. In the period under study, there was in fact only one relevant judgment. In that case, the Court addressed the way in which proceedings must be structured in order to provide redress to the victim, engaging with the victim's vulnerability and the effects of the authorities' response. The Court applied a standard of diligence to the authorities' approach to the case, and found that they had fallen short of Convention requirements, given the length of the domestic proceedings (which featured a preliminary investigation that lasted eight years), the victim's related uncertainty that the aggressors would be punished, and the fact that the victim was required to relive the events in question numerous times while being repeatedly questioned.³³²

It is however difficult to generalise based solely on this case. Beyond this case, ie in other non-intersecting sexual assault cases, the Court has not considered adult victims vulnerable. This implies that the victims are sufficiently able to come forward about their ordeals and to undergo the resulting proceedings. How does this compare to the Court's approach to vulnerability in other situations? It can be argued, of course, that victims of sexual violence are not homogenous: they will have varying experiences of ill-treatment and different reactions to that experience. Likewise, it can be argued that the Court can find Convention violations without considering an applicant vulnerable.³³³ However, the other sources of vulnerability do not require homogeneity among victims either, and being considered vulnerable works in applicants' favour in various ways, as discussed below. In addition, the Court's current approach raises problems given the very nature of sexual violence, as – in the Court's own words – it 'leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence'.³³⁴ Especially because sexual violence is an exercise of power over the victim, it could instead be argued that every victim of such violence is vulnerable, and that the state must react to the underlying imbalance of power.

ii. Domestic Abuse

One of the Court's first leading judgments regarding domestic abuse was *Opuz v Turkey*.³³⁵ There, the Court found that Article 1 ECHR, in combination with Article 3, places states under an obligation to ensure that individuals in their jurisdiction are not ill-treated, including by private individuals. On this basis, it

³³² S.Z. (n 180), para 52.

³³³ Heri (n 71).

³³⁴ *Aydın* (n 24), para 83.

³³⁵ *Opuz* (n 32).

went on to hold that vulnerable individuals are particularly – thus, especially but non-exclusively – entitled to state protection through effective deterrence of such acts.³³⁶ The Court considered that the applicant was vulnerable *inter alia* due to the protracted violence she had suffered, the threat and her fear of further violence, as well as the ‘vulnerable situation of women in south-east Turkey’.³³⁷

Subsequently, in considering the vulnerability of victims of domestic violence, the Court has referred to recognitions of this vulnerability in relevant international instruments.³³⁸ The Court has considered victims of domestic violence to be vulnerable if they cannot physically defend themselves against a stronger aggressor³³⁹ or if they are particularly young or of advanced age.³⁴⁰ Physical injuries and a fear of further violence also indicate vulnerability and entitle victims to state protection.³⁴¹ However, such aggravating factors may not be necessary in order for the Court to recognise the vulnerability of victims of domestic abuse. For example, in 2014, the Court had regard for ‘how vulnerable victims of domestic abuse usually are’ in justifying the need for a *proprio motu* investigation.³⁴²

Given the particular vulnerability of victims of domestic violence, the Court has recognised the need for active state involvement in their protection, which entails overlapping positive obligations. This means that the domestic authorities must (a) take reasonable measures to prevent ill-treatment of which they knew or ought to have known (which entails a real and immediate risk of ill-treatment of an identified individual), (b) comply with a (procedural) obligation to conduct an effective official investigation where arguable claims of ill-treatment are raised and (c) establish and effectively apply a system punishing all domestic violence and provide sufficient safeguards to victims.³⁴³

A judgment from 2016 illustrates the many ways in which victims of domestic abuse are vulnerable. In that case, *M.G. v Turkey*, the Court held that it is necessary for the domestic authorities to take into account the precarious situation and particular moral, physical and/or material vulnerability of the victims of such abuse.³⁴⁴ In addition, the Court referred to victims’ feelings of vulnerability where no protection from abuse is provided.³⁴⁵ It noted that the applicant was forced to live in hiding, fearing that – absent speedy proceedings to ensure protection for herself and her children – she would be exposed to further violence. Even though no further acts of violence took place, the Court held that ‘it could not ignore the

³³⁶ *Ibid*, para 159.

³³⁷ *Ibid*, para 160.

³³⁸ *E.M. v Romania* App no 43994/05, Judgment of 30 October 2012, para 58.

³³⁹ *Eremia v Republic of Moldova* App no 3564/11, Judgment of 28 May 2013, para 61, concerning an aggressor who was ‘a police officer trained to overcome any resistance.’

³⁴⁰ *C.A.S. and C.S.* (n 53), para 81; *Mudric* (n 147), para 51.

³⁴¹ *Rumor v Italy* App no 72964/10, Judgment of 25 May 2014, paras 58 and 60.

³⁴² *T.M. and C.M. v Republic of Moldova* App no 26608/11, Judgment of 28 January 2014, para 46.

³⁴³ *Bălşan v Romania* App no 49645/09, Judgment of 23 May 2017, para 57.

³⁴⁴ *M.G. v Turkey* App no 646/10, Judgment of 22 March 2016, para 95.

³⁴⁵ *Ibid*, para 105.

feeling of fear in which she lived – living in hiding for two and a half years – nor the impact of the violence that she suffered on her personal, social and family life, which persist even today.³⁴⁶

In 2017, the Court took a similar approach when considering the case of a victim of domestic abuse whose child was murdered by her abuser. It held that the victim had not received effective state protection, and that the domestic authorities had failed to take into consideration the situation of ‘precariousness and particular, moral, physical, and material vulnerability’ facing the applicant, and offer appropriate support.³⁴⁷ In cases concerning violence against women, the Court held, it is incumbent on the national authorities to take into account the situation of precariousness and particular, moral, physical and material vulnerability of the victims and to do so in the shortest time possible.³⁴⁸

A last case in this context, *Irina Smirnova v Ukraine*, concerns the ill-treatment of a female retiree by her flat’s co-owners.³⁴⁹ This case has already been mentioned above in the context of the vulnerability of the elderly, but the abuse aspect merits revisiting here. In this case, the Court noted the importance of taking measures to protect vulnerable people, and argued for a holistic assessment of situations of potential abuse and sensitivity to the psychological effects on the victim, stating that ‘[w]here an individual makes a credible assertion of having been subjected to repeated acts of domestic violence or other types of harassment, however trivial the isolated incidents might be, it falls on the domestic authorities to assess the situation in its entirety, including the risk that similar incidents would continue.’³⁵⁰ It went on to provide concrete guidance for what this assessment should look like, arguing that it should ‘take due account of the psychological effect that the risk of repeated harassment, intimidation and violence may have on the victim’s everyday life’ and react to the systematic nature of abuse.³⁵¹ Thus, the Court argued that the state response, which ultimately took 12 years to impose prison sentences on the applicant’s harassers, had been insufficient given the lack of a ‘swift intervention’ by the authorities and the misrecognition of the systematic and on-going nature of her ill-treatment.³⁵²

iii. A Victim-Oriented Approach

The vulnerability of victims of domestic and sexual violence works in two ways in the Court’s jurisprudence. First, it addresses the likelihood that someone will

³⁴⁶ Ibid, para 104, translation by the author.

³⁴⁷ *Talpis* (n 70), para 115.

³⁴⁸ Ibid, para 130.

³⁴⁹ *Irina Smirnova* (n 148), paras 9–18.

³⁵⁰ Ibid, para 71.

³⁵¹ Ibid.

³⁵² Ibid, para 77.

become a victim. Secondly, vulnerability also addresses the likelihood that someone will be able to complain about and prove their alleged victimisation. Together, at their best, these two branches of the Court's vulnerability reasoning show that the Strasbourg judges seek a contextual and reality-based understanding of how domestic and sexual violence work – namely, that these sorts of transgressions are dramatically underreported by victims and, even where they are reported, difficulties of proof as well as the shame and fear of stigmatisation experienced by the victim can mean that help is not available and the perpetrators are not brought to justice.³⁵³

Sexual and domestic violence are expressions of power and control over the victim,³⁵⁴ and inflict particularly intense forms of trauma from a psychological standpoint.³⁵⁵ Failing to recognise the suffering of the victims of sexual and domestic violence or engaging in a stigmatising response – such as, for example, the perpetuation of so-called 'rape myths' – represents a secondary victimisation or 'revictimisation' of the victims by the legal system.³⁵⁶ The Court's vulnerability jurisprudence allows it to respond to the particular psychology of victims and has the potential to, by shifting attention to the perspective of the victim, prevent revictimisation in future cases.

Before moving on, it should be noted that the Court has remained silent on the vulnerability of victims of human trafficking under Article 3. This runs counter to the work of other international instances,³⁵⁷ and to the fact that the situation of these individuals is, in a number of ways, comparable to that of victims of abuse or of violations of Article 3. Human trafficking, too, is a particularly traumatic experience, and one that involves elements of power, control, domination, and the lack of options for escape, as well as, often, sexual violence. Where these cases are brought under Article 3, vulnerability reasoning has not played a role in the Court's jurisprudence to date, even though the Court has not lacked opportunities to address this matter.³⁵⁸ By comparison, when cases are instead brought under the prohibition of slavery and forced labour in Article 4 ECHR, reference to vulnerability has been made in recent case law.³⁵⁹ This could trickle down into the Article 3 jurisprudence in the future.

³⁵³ McCue (n 317), 79. See also, on rape myths, Edwards et al (n 317).

³⁵⁴ McCue (n 317), 80, 88.

³⁵⁵ Ask Elklit and Dorte M Christiansen, 'ASD and PTSD in Rape Victims' (2010) 25(8) *Journal of Interpersonal Violence* 1470–88.

³⁵⁶ Joanne Hattendorf and Toni R Tollerud, 'Domestic Violence: Counseling Strategies that Minimize the Impact of Secondary Victimization' (1997) 33(1) *Perspectives in Psychiatric Care* 14–23; Edwards et al (n 317).

³⁵⁷ See, for example, CEDAW Committee, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Myanmar, UN Doc CEDAW/C/MMR/CO/4–5, 25 July 2016, para 44f.

³⁵⁸ *M. and Others* (n 50), para 105. See also *G.J. v Spain* App no 59172/12, Decision of 21 June 2016, para 52, where the Court's main concern was to distinguish the *Valentin Câmpeanu* case (n 22).

³⁵⁹ *V.C.L. and A.N. v the United Kingdom* App nos 77587/12 and 74603/12, Judgment of 16 February 2021, paras 149 and 159.

B. Victims of a Violation of Article 3

In a small but noteworthy number of cases beyond the contexts discussed above (ie, unrelated to domestic or sexual violence), the Court has also considered the vulnerability of victims of a violation of Article 3.³⁶⁰ States likewise bear an obligation to these vulnerable individuals to conduct an in-depth and effective investigation under Article 3 and under the right to an effective remedy in Article 13 ECHR.³⁶¹

The fact that victims of ill-treatment are less willing to report their experiences means that states must investigate potential ill-treatment as soon as there is a sufficient indication – thus, a ‘credible assertion’ – that it has taken place.³⁶² In this regard, the Court has held even if applicants fail to comply with their duty of diligence to make a timely application to the Court, this is not decisive if either a) the state is aware that ill-treatment may have occurred or b) the applicant is particularly vulnerable. The latter depends on ‘the complexity of the case and the nature of the alleged human rights violations at stake, and [whether] it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues.’³⁶³

The Court’s reasoning as concerns the vulnerability of victims of ill-treatment appears, to a certain extent, to contradict the Court’s selective model of vulnerability as described above. If any victim of an Article 3 violation is vulnerable, then vulnerability under Article 3 describes every applicant alleging a violation of his or her rights under that provision. Because anyone can be a victim of such a violation, this potentially applies to every human individual. However, while there are undoubtedly many advantages to a recognition of universal human vulnerability, such a recognition does not seem to be the Court’s intention. Instead, while this particular strand of jurisprudence opens up the concept of vulnerability in order to provide a broader, more inclusive umbrella of protection, it does so by attaching it to a particular effect. The relevant jurisprudence ties into the Court’s approach to victims of domestic and sexual violence, and seeks to counteract the underreporting and intimidation that characterises instances of ill-treatment that do not fall under those two categories but evoke similar effects. This helps the Court to mount an adequate response to the particular psychology of certain

³⁶⁰ *Gisayev v Russia* App no 14811/04, Judgment of 20 January 2011, para 116; *Members of the Gldani Congregation of Jehovah’s Witnesses and Others v Georgia* App no 71156/01, Judgment of 3 May 2007; *Buzilo* (n 18), para 29; *Ilhan v Turkey* App no 22277/93, Judgment (GC) of 27 June 2000, Reports 2000-VII, paras 61 and 92.

³⁶¹ *Stanimirovic v Serbia* App no 26088/06, Judgment of 18 October 2011, para 39.

³⁶² *Ibid*, para 39; *Ilhan* (n 360), paras 61 and 92; *Otašević v Serbia* App no 32198/07, Judgment of 5 February 2013, para 30.

³⁶³ *Mocanu and Others v Romania* App nos 10865/09 ..., Judgment (GC) of 17 September 2014, Reports 2014 (extracts), para 265; *Ismogulov v Russia* App no 60890/08, Decision of 27 March 2018, para 31.

victims and thereby to isolate cases in which applicants are less able to obtain justice.³⁶⁴

The Court's approach to the vulnerability of victims of an Article 3 violation seems to have a predominantly procedural utility. This reflects a broader discussion on the need to facilitate access to justice for victims of ill-treatment. Extensive work is being done on this, for example, by national and international organisations on counselling and assisting victims of torture in particular.³⁶⁵ This work is motivated by the recognition that because torture – and to a lesser extent also inhuman and degrading treatment – breaks the will of victims and dehumanises them, it can disintegrate the individual personality, destroy social, intimate, and family ties, and destabilise entire communities.³⁶⁶ Torture in particular reduces individuals to positions of extreme distress and helplessness and can have lasting cognitive, emotional and behavioural consequences.³⁶⁷ In this regard, the Istanbul Protocol, which provides a manual on how to investigate and document ill-treatment, recommends that experts should

attempt to relate to mental suffering in the context of the individual's beliefs and cultural norms ... Ideally, this attitude will communicate to the victim that his or her complaints and suffering are being recognized as real and expectable under the circumstances. In this sense, a sensitive empathic attitude may offer the victim some relief from the experience of alienation.³⁶⁸

Certainly, this will depend on the circumstances of the ill-treatment in question and on its severity. Where the Court's vulnerability reasoning means recognition of the suffering of victims of ill-treatment, it may be doing as the Istanbul Protocol recommends by allowing individuals to experience procedural justice even where the outcome of their application may not be favourable.³⁶⁹ Procedural justice describes the recognition that participation in the proceedings, perceived neutrality of the adjudicators, a feeling of being treated with respect by the system and trust in the decision-making authority can increase individuals' satisfaction with human rights adjudication and the perceived standing of the Court.³⁷⁰ Experiencing proceedings as just may also be a step on the road to recovery from the feeling of powerlessness associated with acts of torture or other ill-treatment.³⁷¹

³⁶⁴ OHCHR, 'Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (revised edn, 2004) HR/P/PT/8/Rev.1, www.ohchr.org/Documents/Publications/training8Rev1en.pdf, esp 46–47.

³⁶⁵ See, for example, the organisations and bodies that participated in drafting the Istanbul Protocol (OHCHR (n 364), iii).

³⁶⁶ *Ibid.*, 45.

³⁶⁷ *Ibid.*, with further references, and 46–47.

³⁶⁸ *Ibid.*, 46.

³⁶⁹ Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) *Human Rights Quarterly* 176–200.

³⁷⁰ *Ibid.*, 180–82.

³⁷¹ *Ibid.*, 182, citing Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44(1/2) *Court Review: The Journal of the American Judges Association* 26–31, 26.

C. Feelings of Vulnerability

In addition to the procedural requirements on states given the vulnerability of victims of ill-treatment, the very similarly worded 'sense or feeling of vulnerability', as experienced by individual applicants in a variety of contexts, has also been recognised as a source of vulnerability by the Court. In and of itself, this can affect applicants' procedural rights as well as the substantive findings made under Article 3 under certain circumstances.³⁷²

The first relevant case in this regard was again *Aydin v Turkey*, decided in 1997, where the Court held that the applicant's treatment added to her 'overall sense of vulnerability' in detention, and found that she had been tortured.³⁷³ Today, if applicants are subjected to treatment likely to arouse feelings of vulnerability, the Court takes this into consideration along with feelings of fear and anxiety as an indicator that the individual has been humiliated and debased and that Article 3 has therefore been violated.³⁷⁴

In fact, according to the Court's current case law, it seems that if a given treatment inspires extreme feelings of vulnerability in individuals, this is not only significant but even potentially sufficient for finding a violation of Article 3.³⁷⁵ In one case, the Court found that the various penalties and punishments inflicted on a conscientious objector to military service had been disproportionate and that they 'aimed more at repressing the applicant's intellectual personality, inspiring in him feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will'.³⁷⁶ In another case, the Court similarly held that the youth of the applicant and the fact that he had been denied access to counsel in detention would have 'inspired in him a feeling of vulnerability, of powerlessness and of fear when faced with State agents'; this would have caused him to feel 'fear, anguish and inferiority capable of humiliating him and eventually breaking down his physical or moral resistance'.³⁷⁷

Similarly, in *El-Masri*, concerning an applicant who was mistaken for an al-Qaeda operative and detained in a Macedonian hotel until he was flown to Afghanistan by a CIA 'extraordinary renditions' team, the Court held that there was

no doubt that the applicant's solitary incarceration in the hotel intimidated him on account of his apprehension as to what would happen to him next and must have caused him emotional and psychological distress. The applicant's prolonged confinement in the

³⁷² For example requiring states to investigate alleged ill-treatment diligently (*Stepuleac* (n 284), para 65; compare *Keser and Kömürçü v Turkey* App no 5981/03, Judgment of 23 June 2009, para 72) or influencing the Court's findings on the admissibility of an application (*Mocanu and Others* (n 363), para 275).

³⁷³ *Aydin* (n 24), especially para 84.

³⁷⁴ *Dikme* (n 199), para 91; *Ilaşcu and Others* (n 3), para 446; *Bilen v Turkey* App no 34482/97, Judgment of 21 February 2006, para 35.

³⁷⁵ *Sultan Öner and Others* (n 50), para 134; *Fahriye Çalışkan v Turkey* App no 40516/98, Judgment of 2 October 2007, paras 43–44; *Stepuleac* (n 284), para 65.

³⁷⁶ *Ülke* (n 28), para 62.

³⁷⁷ *Doğanay* (n 199), para 32, translation by the author.

hotel left him entirely vulnerable. He undeniably lived in a permanent state of anxiety owing to his uncertainty about his fate.³⁷⁸

The Court generally does not require applicants to prove their feelings of vulnerability, which is understandable given that such proof may not be possible. Instead, the Court infers a sense of vulnerability – or its absence³⁷⁹ – from the situation.³⁸⁰

In this context, the Court builds upon the idea that mental suffering can, in and of itself, constitute torture or ill-treatment. It thereby seems to equate vulnerability with a feeling of defencelessness against abuse, with powerlessness vis-à-vis the torment inflicted by state actors, and with humiliation at the injustice suffered. Vulnerability in this sense is slippery: it provides a highly subjective standard, one that is difficult to prove or disprove in the individual case. At the same time, this idea of a sense of vulnerability as understood by the Court may be seen as part of the very core of a violation of Article 3, as it is difficult to argue that victims of such a violation would not feel powerless, debased in their dignity and humiliated and, therefore, vulnerable.

The sense-of-vulnerability jurisprudence is indeterminate, but it can be understood as aiming to capture particular extremes in terms of fear and anguish. In fact, when read together with the jurisprudence discussed above on victims of domestic and sexual violence, the Court's understanding of the 'sense of vulnerability' becomes rather clear. From this perspective, the Strasbourg judges use it to counteract or neutralise the effects of victimisation, namely the lower rates of reporting, the problems of proof, and the psychological trauma that accompany the more severe, direct, interpersonal, and intentional forms of ill-treatment.

This case law also serves to simply recognise psychological suffering. In this regard, even if it may sometimes seem difficult to determine the added value of the sense-of-vulnerability jurisprudence beyond the fact that it explicitly names the feelings experienced by all victims of ill-treatment, the idea is significant. This type of vulnerability reasoning invites judges to reimagine the facts from the perspective of the victim and to acknowledge the suffering that he or she has undergone. Any effects for the outcome of the case aside, this is already a substantial step towards doing procedural justice.³⁸¹

V. Vulnerability in the Context of Migration

If one aspect of the Court's vulnerability jurisprudence has received scholarly scrutiny in recent years, it is the case law concerning migration. Since the Court

³⁷⁸ *El-Masri v former Yugoslav Republic of Macedonia* App no 39630/09, Judgment (GC) of 13 December 2012, Reports 2012, para 202.

³⁷⁹ *Todorov* App no 51562/99, Decision of 29 September 2005.

³⁸⁰ *Levinta* App no 17332/03, Judgment of 16 December 2008, para 73. See also *Rachwalski and Ferenc* (n 3), para 61.

³⁸¹ Brems and Lavrysen (n 369).

sealed the recognition of asylum-seekers as a vulnerable group in *M.S.S.*,³⁸² scholars including Moritz Baumgärtel, Sylvie Da Lomba, and Veronika Flegar, along with others, have discussed this topic.³⁸³ It is in the migration context that many of the greatest strides in the Court's vulnerability case law under Article 3 have been made, but also where vulnerability and its consequences can be particularly controversial.

A. Vulnerability in the Host State

In 2011, the Grand Chamber issued perhaps its most important judgment on the vulnerability of asylum-seekers to date. That judgment was *M.S.S. v Belgium and Greece*, and it stemmed from an asylum-seeker's complaint about his return from Belgium to Greece under the EU's Dublin Regulation as well as about his living conditions in Greece.³⁸⁴ In that judgment, the Court made the appealingly generalisable finding that 'the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.³⁸⁵ Concerning the overcrowding and unhygienic conditions experienced by the applicant during his detention at a Greek holding centre, the Court found that 'taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker'.³⁸⁶

The Court went on to note the 'considerable importance' it attached to the status of the applicant as an asylum-seeker, a group that it considered 'particularly underprivileged and vulnerable' and thus in need of special protection.³⁸⁷ It also examined the applicant's living conditions in Greece upon release, namely

³⁸² *M.S.S.* (n 7).

³⁸³ Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' 38(1) *Netherlands Quarterly of Human Rights* (2020) 12–29; Sylvie Da Lomba, 'Vulnerability, International Human Rights Adjudication and Migration Governance' 10 *Inter-American and European Human Rights Journal* (2019) 3–37; Ben Hudson, 'Migrant Vulnerability and the European Court of Human Rights (ECtHR): Exposing the Limits of the Concept of Vulnerability in the Mediterranean Migration Context', 4 *Maritime Safety and Security Law Journal* (2018) 26–46; Lieneke Slingenberg, 'The Right Not to be Dominated: The Case Law of the European Court of Human Rights on Migrants' Destitution' 19(2) *Human Rights Law Review* (2019) 291–314; Veronika Flegar, 'Vulnerability and the Principle of Non-refoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?' 8(2) *Contemporary Readings in Law and Social Justice* (2016) 148–69.

³⁸⁴ Council Regulation (EC) No 343/2003 of 18 February 2003, cited in full above at n 117.

³⁸⁵ *M.S.S.* (n 7), para 232.

³⁸⁶ *Ibid*, para 233.

³⁸⁷ *Ibid*, para 251.

the state of extreme poverty and homelessness that he experienced, given that he was not issued a work permit.³⁸⁸ Specifically regarding the ‘particular state of insecurity and vulnerability in which asylum-seekers are known to live in Greece’, the Court found that the authorities could not simply remain passive and wait for the applicant to turn to the police for assistance.³⁸⁹ It considered that the Greek authorities had failed to display due regard for the applicant’s vulnerability as an asylum-seeker and that, due to this inaction, they were responsible for his living conditions, namely his homelessness and lack of access to sanitary facilities, resources, or any basic means of subsistence.³⁹⁰

As a Grand Chamber judgment, *M.S.S.* thus established a baseline for the welfare obligations that the state owes to destitute persons who depend on it entirely. Crucially for the purposes of Article 3, the Court also countered some of the relativist arguments found elsewhere in its case law. It held that, while states were at the time experiencing ‘considerable difficulties in coping with the increasing influx of migrants and asylum-seekers’, and while the ‘burden and pressure’ placed on states by these circumstances were accentuated by the effects of the financial crisis, these considerations could not absolve states of their responsibilities under Article 3, given its absolute nature.³⁹¹

After *M.S.S.*, the Court has continually reaffirmed states’ positive obligations to protect vulnerable migrants, including by providing for them materially.³⁹² Because migrants may be detained in the host state, their vulnerability as migrants and as detainees intersects. The relevant jurisprudence echoes that on detention in general, though the standards required regarding detained asylum-seekers may in fact be higher.³⁹³ This includes an implicit requirement to have regard for and respond to the intersection of various sources of vulnerability,³⁹⁴ including by providing adequate medical care and conditions for minors and those who are pregnant.³⁹⁵

For example, as discussed above, the Court held in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, which concerned an unaccompanied five-year-old who entered Belgium illegally before being detained and expelled, that

[i]n view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that [the applicant’s vulnerability] is the decisive factor and it takes precedence over considerations relating to [her] status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members

³⁸⁸ *Ibid.*, paras 172 and 254.

³⁸⁹ *Ibid.*, paras 254, 258 and 259.

³⁹⁰ *Ibid.*, para 263.

³⁹¹ *Ibid.*, para 223.

³⁹² *Rahimi* (n 47), para 87; *Amadou v Greece* App no 37991/11, Judgment of 4 February 2016, paras 59–62.

³⁹³ *Aden Ahmed v Malta* App no 55352/12, Judgment of 23 July 2013, para 98; *Abdi Mahamud* (n 128), especially the Partly Dissenting Opinion of Judge Sajó.

³⁹⁴ *Mahamed Jama v Malta* App no 10290/13, Judgment of 26 November 2015, paras 100–01.

³⁹⁵ *Aden Ahmed* (n 393), para 97.

of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3.³⁹⁶

This judgment, by referring to the absolute nature of Article 3, pre-empts balancing of the applicants' interests against those of the state on the basis of her extreme vulnerability, which stemmed from the fact that she was an unaccompanied child migrant. The wording of this passage is, however, unfortunate given that, by emphasising the applicant's vulnerability in this way, the Court implies that states do not owe a similar duty to provide care and protection to adult migrants, or that Article 3 does not take precedence over states' interests with regard to those who do not fall in the category of 'highly vulnerable individuals'. The Court later clarified this jurisprudence by finding that it was not so much relevant whether the migrant children were accompanied or not, but that they were young and dependent.³⁹⁷

The idea that children in immigration detention are due special protection in light of their vulnerability was further explored by the Court in a number of 2016 judgments against France, as mentioned above in the section on children, where the Court found that the immigration-related detention of very young children together with their parents could prove traumatic to the point of violating Article 3.³⁹⁸ Here the Court held that, beyond a brief period and as a measure of last resort, immigration detention of young children is impermissible.³⁹⁹

Regarding adult migrants, the Court is less willing to create sweeping change by means of vulnerability reasoning. One short-lived hope for improvement here came in 2015, with a now voided judgment of the Second Section which considered the effects of the dangerous journey by sea faced by many irregular migrants and asylum-seekers when entering Europe. The Second Section found that the applicants in *Khlaifia and Others v Italy*, who were on board vessels that were intercepted by the Italian coast guard, were in a situation of vulnerability given their traumatic experience on the Mediterranean. That and their detention in appalling conditions upon arrival in Italy, it found, violated their human dignity and therefore constituted degrading treatment.⁴⁰⁰ However, that judgment was referred to the Grand Chamber, which departed from the Chamber judgment with respect to both the vulnerability argumentation and the finding of a violation of Article 3.⁴⁰¹

As concerned the vulnerability of the applicants in *Khlaifia*, the Grand Chamber narrowed the Chamber's broad approach, which seemed to globally apply to all migrants who made use of the Mediterranean route, and instead found that despite their dangerous and exhausting crossing 'the applicants, who were not

³⁹⁶ *Mubilanzila Mayeka and Kaniki Mitunga* (n 110), para 55; *Muskhadzhiyeva and Others* (n 50), paras 55–56.

³⁹⁷ *Kanagaratnam* (n 114), para 67; *Popov* (n 109), para 91.

³⁹⁸ *A.B. and Others* (n 82), paras 110–15, esp 110, and the remaining case law in (n 82).

³⁹⁹ *Ibid*, para 114.

⁴⁰⁰ *Khlaifia and Others v Italy* App no 16483/12, Judgment of 1 September 2015, para 135.

⁴⁰¹ *Ibid*.

asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin.' It also noted that 'they belonged neither to the category of elderly persons nor to that of minors' and that 'they were aged between 23 and 28 and did not claim to be suffering from any particular medical condition.' The Grand Chamber went on to unanimously find that there had been no violation of Article 3 in the case, thereby precluding recognition of the all-inclusive vulnerability of migrants who have travelled via the Mediterranean route.⁴⁰² The Court's approach to vulnerability here does not entirely convince, because it does not display any of the sensitivity to real lived experience that it otherwise seems to be the concept's purpose to provide. Instead, the Court seems to be working with rigid categories, pigeonholing applicants into two categories: vulnerable and non-vulnerable.

At other times, the Court has used vulnerability reasoning to distinguish applicants from others in the same situation, finding – sometimes not very convincingly – that detention conditions imposed on illegal migrants violate the Article 3 rights of one individual who can be described as vulnerable, and reaching the opposite conclusion regarding another individual whom it does not consider vulnerable. A prime example of this is the 2016 *Abdi Mahamud v Malta* judgment. In another, similar case decided just a few months prior, *Moxamed Ismaaciil and Abdirahman Warsame v Malta*, the Court had found that the cumulative effect of the conditions of detention facing two female Somali asylum-seekers who arrived in Malta in 2012 did not violate Article 3 because the applicants were not more vulnerable than other detained migrants.⁴⁰³ The facts of *Moxamed Ismaaciil and Abdirahman Warsame* and the claims made by the applicants were almost identical to *Abdi Mahamud*, which was decided only a few months later, but its outcome was very different.⁴⁰⁴ Both cases were decided by the same formation of judges, and the same counsel represented all three applicants.

Despite their many similarities, these cases were decided very differently as concerns Article 3. The difference between them hinged on the concept of vulnerability. In both cases, the applicants alleged a variety of somatic and psychosomatic afflictions.⁴⁰⁵ In the latter case, the applicant was classified as 'vulnerable' under a domestic system for finding alternative accommodation for certain migrants, at the request of her doctor, and was released from detention on this basis.⁴⁰⁶ In other words, in the earlier case, the Court found no vulnerability and thus no violation of Article 3; in the latter one, it did both, with little explanation.⁴⁰⁷

⁴⁰² Ibid, para 194.

⁴⁰³ *Moxamed Ismaaciil and Abdirahman Warsame v Malta* App nos 52160/13 and 52165/13, Judgment of 12 January 2016, para 94.

⁴⁰⁴ *Abdi Mahamud* (n 128), paras 20–23, and *Moxamed Ismaaciil and Abdirahman Warsame* (n 403), paras 54–65.

⁴⁰⁵ Ibid, paras 16–19 and para 56, respectively.

⁴⁰⁶ *Abdi Mahamud* (n 128), paras 11–15, 18, 88.

⁴⁰⁷ Ibid.

Judge Sajó, by now a long-time critic of the Court's approach to vulnerability,⁴⁰⁸ wrote a powerful partly dissenting opinion in the *Abdi Mahamud* case. He argued that the applicant did not display any medical symptoms that would have made her 'particularly sensitive'.⁴⁰⁹ He also pointed out that the majority deferred to the domestic categorisation of the applicant as vulnerable without paying any attention to the divergence between the domestic meaning and the meaning of vulnerability in Strasbourg. This gives the impression that the Court is willing to use any available vulnerability arguments to bring about applicant-friendly outcomes if it can do so without issuing judgments with wide-ranging consequences. To Judge Sajó, the real question in this case was not the applicant's vulnerability, but the length of detention that the Court is willing to tolerate for the prevention of unlawful entry for any migrant.

This argument should be seen in the light of a third case, *Aden Ahmed v Malta*, which was different on the facts from *Moxamed Ismaaciil and Abdirahman Warsame* and *Abdi Mahamud* mostly because the applicant – also a young Somali woman who was in immigration detention in the same Maltese facility in 2011–12, and who was also allegedly emotionally fragile – suffered a miscarriage in detention. The applicant in this third case was not considered vulnerable for domestic purposes, but the Court nonetheless found that she was vulnerable given the fact that 'she was an irregular immigrant and because of her specific past and her personal emotional circumstances'.⁴¹⁰ In that case, therefore, the Court did not specify why or how one's personal circumstances make one more vulnerable in detention. Nonetheless, the Court not only found a violation of Article 3, but it also made a distinction between immigration detention and criminal justice. The former, it held, affects 'aliens who, often fearing for their lives, have fled from their own country'.⁴¹¹ This factor was relevant for the Court in finding that the cumulative conditions of detention had diminished the applicant's dignity and violated her rights under Article 3. These three cases thus show three different approaches to vulnerability, applied without clear criteria under comparable conditions and leading to dramatic differences in outcomes.

To conclude this section, it is possible to offer a certain insight into the temporal and personal scope of the vulnerability of migrants. The special vulnerability of asylum-seekers, the Court has held, ends if and when their applications for asylum are favourably decided and they are granted permission to remain in the host country. At this point, they are no longer considered vulnerable and are to be, instead, treated on a par with the general population.⁴¹² As concerns the personal scope of this type of vulnerability, cases such as *Aden Ahmed v Malta* show that

⁴⁰⁸ *M.S.S.* (n 7), Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

⁴⁰⁹ *Abdi Mahamud* (n 128), Partly Dissenting Opinion of Judge Sajó.

⁴¹⁰ *Aden Ahmed* (n 393), para 97.

⁴¹¹ *Ibid*, para 98.

⁴¹² *Mohammed Hassan and Others v Netherlands and Italy* App nos 40524/10 ..., Decision of 27 August 2013, para 179.

irregular migrants may also be considered vulnerable, though the Court's jurisprudence in this regard has lacked consistency to date.⁴¹³

In a 2016 decision, the Court further clarified this by holding that, while individuals whose applications for asylum have been rejected lose some of the socio-economic entitlements due to them because of their vulnerability, they may nonetheless remain vulnerable and attract special positive obligations on the part of the state. It did so when considering the case of a failed Ethiopian asylum-seeker, who claimed that the deprivation of housing and care after his asylum application was rejected violated Article 3.⁴¹⁴ There, the Court held that the applicant's loss of his right to legal residence in the Netherlands 'did not automatically affect his vulnerability as a migrant', although noting too that his situation was different from that in *M.S.S.*⁴¹⁵ Thus, the Court held, while he also found himself in a situation of uncertainty, this was 'inherently different from *M.S.S.* in that it was not linked to the Netherlands authorities' assessment of his asylum request'.⁴¹⁶ In other words, the Court considered – given all the circumstances, in particular a grace period during which the applicant could remain in the country and benefit from state-sponsored housing and care – that the domestic authorities had not shown 'ignorance or inaction towards the applicant's situation'.⁴¹⁷

B. Vulnerability, the Risk of Ill-treatment and Removal or Expulsion

The above concerns vulnerability in a host state. But what of vulnerability due to a situation or conditions in a migrant's home state? Usually, individual applicants are required to show that there is a sufficiently individualised risk of ill-treatment in order for a return to be incompatible with Article 3 and trigger non-refoulement obligations. Vulnerability, however, may amend this requirement.⁴¹⁸

There is a distinction to be made here between returns a) under the European Union's Dublin system and b) those outside that system. With regard to returns under the Dublin system, ie within the EU, the Court has been reluctant to find that conditions in the receiving state are bad enough to constitute a systemic failure to provide for the needs of asylum-seekers and thus give rise to a conditional violation of Article 3.⁴¹⁹ For example, regarding Greece, the Court's pre-2011 position was that it could be presumed that, as a receiving Dublin state, Greece would comply with its Convention obligations and that conditions incompatible

⁴¹³ *Aden Ahmed* (n 393), para 97.

⁴¹⁴ *Hunde v Netherlands* App no 17931/16, Decision of 5 July 2016, paras 55–56, referring to *M.S.S.* (n 7).

⁴¹⁵ *Ibid.*, para 55, referring to *M.S.S.* (n 7).

⁴¹⁶ *Ibid.*, para 56.

⁴¹⁷ *Ibid.*, para 56.

⁴¹⁸ *Samina v Sweden* App no 55463/09, Judgment of 20 October 2011, para 64.

⁴¹⁹ *Mohammed Hussein and Others* (n 130), para 78.

with the Convention should be taken up with the Greek authorities.⁴²⁰ The *M.S.S.* judgment was ground-breaking in that it departed from this case law and found that the Belgian authorities had violated their obligations to protect the applicant from ill-treatment in Greece.⁴²¹

Regarding returns to Italy, the Court has repeatedly found that, if the Italian authorities are aware of an applicant's vulnerability, then there is not a sufficient risk of ill-treatment in Italy to violate Article 3.⁴²² In this regard, the vulnerability of children also comes into play, and may help to overcome the Court's hesitation and problems of proof. For example, in the above-mentioned *Tarakhel* judgment, in 2014, the Court found that it was not compatible with Article 3 to return a family with children to Italy absent individual guarantees from the Italian authorities that they would be kept together and received in a manner adapted to the children's ages.⁴²³ This reasoning in *Tarakhel* gave the Court a way to move away from previous jurisprudence wherein the absence of a systemic problem with reception conditions meant that returns to Italy were considered compatible with Article 3.⁴²⁴ The Court now routinely takes the vulnerability of families with minor children into account as concerns returns to Italy, though this does not always guarantee applicants success.⁴²⁵

When it comes to extra-Dublin returns, the Court has been somewhat less reluctant to find that members of certain ethnic, religious, political, or other minority groups may face a real risk of ill-treatment if transferred to non-Dublin or non-Council of Europe Member States.⁴²⁶ In *Salah Sheekh v Netherlands*, the Court found that the applicant belonged to a vulnerable group in his native Somalia and would likely be marginalised, isolated, ill-treated, and harassed if returned, so that returning him would violate Article 3.⁴²⁷ From this starting point, the Court has taken the vulnerability of potential returnees into account when considering whether there is a risk of ill-treatment sufficient to allow it to find a conditional violation of Article 3.⁴²⁸

⁴²⁰ *K.R.S. v the United Kingdom* App no 32733/08, Decision of 2 December 2008; Gina Clayton, 'Asylum-seekers in Europe: M.S.S. v Belgium and Greece' (2011) 11(4) *Human Rights Law Review* 758–73, 761–62.

⁴²¹ *M.S.S.* (n 7), paras 344–60.

⁴²² *Daytbegova and Magomedova v Austria* App no 6198/12, Decision of 4 June 2013, paras 68–69; *Abubeker v Austria and Italy* App no 73874/11, Decision of 18 June 2013, paras 70–71.

⁴²³ *Tarakhel* (n 109), para 122.

⁴²⁴ Contrast *ibid*, paras 115, 118–22 and *Mohammed Hussein and Others* (n 130), paras 78–79.

⁴²⁵ *J.A. and Others v the Netherlands* App no 21459/14, Decision of 3 November 2015, para 28; *N.A. and Others v Denmark* App no 15636/16, Decision of 28 June 2016, para 26.

⁴²⁶ Compare *Eshonkulov v Russia* App no 68900/13, Judgment of 15 January 2015, para 34; *F. v United Kingdom* App no 17341/03, Decision of 22 June 2004; *Dzhaksybergenov v Ukraine* App no 12343/10, Judgment of 10 February 2011, para 37; *Hirsi Jamaa and Others v Italy* App no 27765/09, Judgment (GC) of 23 February 2012, Reports 2012, paras 125 and 155; *Savridin Dzhurayev v Russia* App no 71386/10, Judgment of 25 April 2013, Reports 2013 (extracts), paras 179 and 181; *N.A.N.S. v Sweden* App no 68411/10, Judgment of 27 June 2013, paras 32–33; *Khamrakulov v Russia* App no 68894/13, Judgment of 16 April 2015, para 66.

⁴²⁷ *Salah Sheekh v Netherlands* App no 1948/04, Judgment of 11 January 2007, paras 140 and 146.

⁴²⁸ *Hirsi Jamaa and Others* (n 426), para 155.

One concrete example of this concerns the vulnerable ethnic Uzbeks who risk return from Russia to Kyrgyzstan, where they stand to be prosecuted for their involvement in inter-ethnic riots, and potentially tortured.⁴²⁹ That group, the Court has held, is 'systematically exposed to a practice of ill-treatment'.⁴³⁰ The systematic nature of the ill-treatment in this context, the Court has held, means that applicants must only prove that they belong to the group in question, and not prove any more individualised threat, in order for the Court to consider that they are at a real risk of ill-treatment if returned.⁴³¹

Similar findings apply to Uzbeks facing extradition to Uzbekistan, where they have been charged with crimes related to their religious or political convictions.⁴³² Likewise, too, the human rights situation in Turkmenistan, which the Court has described as 'alarming' given rampant discrimination against people who were not of Turkmen origin, means that expulsions there might violate Article 3.⁴³³

The vulnerability of members of certain religious groups is also relevant in this context. For example, in a 2013 judgment against Russia, the Court found a violation of the state's obligations under Article 3 in a case concerning the return of an applicant to Tajikistan, where he was being persecuted on account of his Muslim faith.⁴³⁴ The Court has likewise held that individuals whose extradition is sought by the Tajik authorities because of religiously or politically motivated criminal charges constitute a vulnerable group, facing a real risk of ill-treatment if removed.⁴³⁵ In various cases against Sweden, the Court has also examined whether it is permissible to return members of the Iraqi Christian minority, who are vulnerable in certain parts of the country 'either directly because of their faith' or because of societal perceptions about them as a group.⁴³⁶ There, however, the Court reached the conclusion that the possibility of internal relocation within Iraq made it possible to return these individuals.

Another example of a vulnerable group for expulsion purposes are LGBTQI migrants who allege that, if returned to their country of origin, they would face a risk of ill-treatment on account of their sexual orientation. In this regard, the Court's vulnerability jurisprudence has proved slow to protect LGBTQI

⁴²⁹ *Kadirzhanov and Mamashev v Russia* App nos 42351/13 and 47823/13, Judgment of 17 July 2014, paras 91–92; *Khamrakulov* (n 426); *Mamadaliyev v Russia* App no 5614/13, Judgment of 24 July 2014, para 62; *Tadzhibayev v Russia* App no 17724/14, Judgment of 1 December 2015, para 43; *R. v Russia* App no 11916/15, Judgment of 26 January 2016, para 56.

⁴³⁰ *Khamrakulov* (n 426), para 66.

⁴³¹ *Kadirzhanov and Mamashev* (n 429), para 92.

⁴³² *Eshonkulov* (n 426), para 34.

⁴³³ *Allanazarova v Russia* App no 46721/15, Judgment of 14 February 2017, para 73.

⁴³⁴ *Savridin Dzhurayev* (n 426), paras 15 and 181.

⁴³⁵ *B. U. and Others v Russia* App no 59609/17, 74677/17, and 76379/17, Judgment of 22 January 2019, para 17.

⁴³⁶ *N.A.N.S.* (n 426), para 32; *M.K.N. v Sweden* App no 72413/10, Judgment of 27 June 2013, paras 32 and 33; *N.M.B.* (n 2), paras 35–36, 46; *A.G.A.M. v Sweden* App no 71680/10, Judgment of 27 June 2013, para 37; *M.Y.H. and Others v Sweden* App no 50859/10, Judgment of 27 June 2013, paras 60–61; *W.H. v Sweden* App no 49341/10, Judgment of 27 March 2014, paras 63, 65 and 67.

applicants.⁴³⁷ For example, in two cases concerning expulsion to Iran, the Court has held that though 'the general situation in Iran does not foster the protection of human rights and that homosexuals may be vulnerable to abuse', the applicants had failed to prove that there were substantial grounds to believe that they would experience ill-treatment.⁴³⁸ By contrast, in a later case under Article 5(1), which has already been touched upon above, the Court showed more advanced engagement with and a meaningful response to the vulnerability of a similar applicant. There, it considered that detaining a 'homosexual' Iranian asylum-seeker together with other asylum-seekers who would presumably treat him in a homophobic manner did not take his vulnerability sufficiently into account.⁴³⁹ And then, in 2020, it found a conditional violation of Article 3 regarding the return of a 'homosexual person' to the Gambia, albeit without reference to the concept of vulnerability.⁴⁴⁰

Thirdly, the risk of being subjected to female genital mutilation potentially renders applicants vulnerable for the purposes of Article 3. The Court has recently acknowledged this, albeit in a weak and roundabout way, by finding that an applicant was not to be considered vulnerable because she had not proven that she faced a risk of exposure to (in this case, repeated) female genital mutilation.⁴⁴¹ This makes it possible to assume that proving such a risk would entail a finding of vulnerability.

Regarding the risk of poor medical care for ill returnees to non-Dublin states, the Court has long used an extremely restrictive approach. Beginning with its judgment in *N. v United Kingdom*, the Court – although not altogether consistently – limited ill migrants' protection from being returned to a state in which they would receive poor medical care, providing such protection under Article 3 only in extreme cases.⁴⁴² An applicant's health-related vulnerability, thus, did not always suffice in order for the Court to find that expulsion to a non-Dublin state would constitute a violation of Article 3. This approach was not always well-received. For example, Judge Power-Forde, appending a powerful Dissenting Opinion to the Chamber judgment in *S.J. v Belgium*, pointed out an inconsistency in the Court's case law: if poor reception conditions suffice to render the return of suspected terrorists incompatible with Article 3, she argued, the same should have been true for the applicant in *S.J.*, an HIV-positive, 22-year-old mother of three.⁴⁴³

⁴³⁷ Raoul Wieland and Edward J Alessi, 'Do the Challenges of LGBTQ Asylum Applicants Under Dublin Register with the European Court of Human Rights?' *Social and Legal Studies* (2020) 1–21.

⁴³⁸ *F. v United Kingdom* (n 426), para 1; *I.I.N.* (n 2).

⁴³⁹ *O.M.* (n 280), para 53.

⁴⁴⁰ *B. and C. v Switzerland* App nos 889/19 and 43987/16, Judgment of 17 November 2020.

⁴⁴¹ *Sow v Belgium* App no 27081/13, Judgment of 19 January 2016, paras 56, 68.

⁴⁴² *N. v United Kingdom* App no 26565/05, Judgment (GC) of 27 May 2008, Reports 2008. This judgment came in the wake of *D. v United Kingdom* App no 30240/96, Judgment of 2 May 1997, Reports 1997-III, paras 53 and 54. See also *Sufi and Elmi* (n 178), para 303. Compare also *M.T. v Sweden* App no 1412/12, Judgment of 26 February 2015, and the Dissenting Opinion by Judge de Gaetano.

⁴⁴³ *S.J. v Belgium* App no 70055/10, Judgment of 27 February 2014, Dissenting Opinion of Judge Power-Forde. This case was referred to the Grand Chamber but struck out of the list after a friendly settlement (*S.J. v Belgium* App no 70055/10, Judgment (GC) of 19 March 2015).

Judge Power-Forde's concerns are important and justified ones that speak to the heart of the lack of care with which migrants are treated in many modern societies,⁴⁴⁴ and touch upon a delicate area of the Court's jurisprudence, namely the question of whether socio-economic factors in a receiving non-Member State can prevent an applicant's return to that state. That is something that, in the past, the Court has been inclined to allow only if an additional test of exceptionality is met.⁴⁴⁵

This very high threshold requires the existence of 'compelling' humanitarian reasons, and has been applied where applicants challenge their expulsion on medical or health grounds. In this regard, the Court has noted that a balancing between individual and community interests is inherent to the Convention, and that it therefore can only block an expulsion in very exceptional circumstances, so as to spare states the financial burdens of providing medical care to non-nationals.⁴⁴⁶ There is thus a not-so-covert balancing exercise at play in such cases,⁴⁴⁷ and one that is difficult to square with the absolute nature of Article 3, which technically does not permit any such balancing.⁴⁴⁸

In this regard, however, a real shift of the balance in applicants' favour – and in the favour of consistent vulnerability reasoning – came about with the 2016 Grand Chamber judgment in *Paposhvili v Belgium*.⁴⁴⁹ This judgment largely reshaped the Court's case law on the expulsion of seriously ill applicants, perhaps in no small part due to a third-party intervention by the Ghent University Human Rights Centre, which urged the Court to reconsider its approach given the inappropriateness of balancing budgetary considerations against individual suffering under Article 3.⁴⁵⁰ *Paposhvili* concerned a seriously ill Georgian man who faced expulsion to Georgia, and who alleged that he would face a risk of ill-treatment contrary to Article 3 if expelled. In Belgium, he was being treated for multiple serious illnesses, including leukaemia, with cutting-edge and very expensive drugs; these were not, he alleged, available to him in Georgia. The applicant died before the Grand Chamber considered the case, but the Court decided to continue the examination because of the 'special circumstances relating to respect for human

⁴⁴⁴ To paraphrase Hannah Arendt, *The Origins of Totalitarianism*, 2nd edn (Harvest / Harcourt Inc, 1973) 297, discussed further below.

⁴⁴⁵ *F.N. v United Kingdom* App no 3202/09, Decision of 17 September 2013, para 31.

⁴⁴⁶ *N. v United Kingdom* (n 442), paras 42–44. See, in this regard, Kathryn Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 27(2) *International Journal of Refugee Law* 264–96, 269.

⁴⁴⁷ *Jalloh v Germany* App no 54810/00, Judgment [GC] of 11 July 2006, Reports 2006-IX, para 119; Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22(3) *Leiden Journal of International Law* 583–621.

⁴⁴⁸ Stijn Smet, 'The "Absolute" Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?' in Eva Brems and Janneke H Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 273–93, 274, 289.

⁴⁴⁹ *Paposhvili v Belgium* App no 41738/10, Judgment (GC) of 13 December 2016, Reports 2016.

⁴⁵⁰ Ghent University Human Rights Centre, 'Paposhvili v Belgium: Third Party Intervention', 17 July 2015, www.hrc.ugent.be/wp-content/uploads/2015/09/Paposhvili.pdf.

rights' involved.⁴⁵¹ The Court ultimately came to the conclusion that, had the Belgian authorities expelled Mr Paposhvili without assessing the risk to his health, they would have violated Article 3 ECHR.⁴⁵²

This finding was momentous, and it came about because, while acknowledging the state prerogative regarding aliens on their territory, the Court came to the conclusion that its application of Article 3 since *N. v United Kingdom*, ie, interpreting the provision as only blocking the expulsion of persons near death, had deprived seriously but non-critically ill applicants 'of the benefit of that provision' – ie, of their Article 3 rights.⁴⁵³ The Court thereby changed its case law to mean that persons who risk 'a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy' fall under the 'very exceptional cases' requirement and meet the threshold of Article 3.⁴⁵⁴ Where applicants allege a risk of health-related treatment falling under Article 3, the Court held, States must 'examine the applicants' fears and ... assess the risks they would face if removed to the receiving country', and submit their allegations to 'close scrutiny'.⁴⁵⁵ This means that states must compare an applicant's state of health pre-removal to the projected evolution thereof after expulsion.⁴⁵⁶

Paposhvili was a leap forward from *N. v United Kingdom*. The importance of this case is that the cost of treating Mr Paposhvili was not allowed to outweigh – or, in fact, to be placed in the balance with – his potential suffering. It should be noted, however, that the Court did not go so far as to use vulnerability language, despite the fact that the applicant, respondent government, and the two third-party interveners all referred to the concept. Time will tell how the Court will deal with similar cases, but it seems that there is still a certain degree of reluctance to set an overly broad precedent in this type of case.

Regarding the expulsion of mentally ill applicants, Article 3 provides stronger protection than other provisions of the Convention, specifically Article 8. For example, under the latter provision, the Court often rather generously presumes that the receiving states will provide adequate treatment or simply examines whether the individual concerned will be stable for the duration of the transfer.⁴⁵⁷ By contrast, the return of a mentally ill individual without assurances that he or she will receive adequate treatment in the receiving country in other cases may constitute a conditional violation of Article 3.⁴⁵⁸ Mental illness can

⁴⁵¹ *Paposhvili* (n 449), para 133, referring to Art 37(1) ECHR.

⁴⁵² *Ibid*, operative part of the judgment, para 1.

⁴⁵³ *Ibid*, para 181.

⁴⁵⁴ *Ibid*, paras 182–83.

⁴⁵⁵ *Ibid*, paras 184 and 187.

⁴⁵⁶ *Ibid*, paras 188 and 205.

⁴⁵⁷ See, in this context, the case of *Khan v Germany*, which – albeit brought under Art 8 and without reference to vulnerability – illustrates this phenomenon very well (referring to the Chamber judgment, *Khan v Germany* App no 38030/12, Judgment of 23 April 2015, para 53, as the Grand Chamber case was struck out (*Khan v Germany* App no 38030/12, Judgment (GC) of 21 September 2016 (Struck out of the List), paras 37–42)).

⁴⁵⁸ In the context of Art 3, see *Tatar* (n 113), where Judge Lemmens, in his Partly Dissenting Opinion, argued for the recognition of the applicant's vulnerability and the need to obtain assurances.

sometimes even be the sole deciding factor for whether an applicant should (not) be returned.⁴⁵⁹ The case law on this matter is, however, heterogeneous. In some cases, the Court applies the exceptionality test, and requires ‘compelling humanitarian grounds against removal’.⁴⁶⁰ For example, in *F.N. v United Kingdom*, the Court considered that the applicant – who had allegedly been raped in her home state, Uganda, immediately before her departure there, and who had since been suffering from depression and therefore required regular access to anti-depressant medication – had not sufficiently demonstrated such compelling humanitarian grounds against removal. The fact that the applicant had become homeless upon return to her home state and had therefore suffered renewed rape leading to the birth of a child, as well as having irregular access to her medication for financial reasons, did not change this outcome.⁴⁶¹

C. Comments

The Court has developed a voluminous case law on vulnerability and migration, and the *M.S.S.* judgment cemented the recognition of asylum-seekers as a vulnerable group. However, in this context, vulnerability and its consequences can be particularly controversial.

For example, in his attached Partly Concurring and Partly Dissenting Opinion in *M.S.S.*, Judge Sajó raised a number of criticisms about vulnerability reasoning that merit further consideration here. In short, he argued against understanding asylum-seekers as a vulnerable group, and contended that ‘although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group’, because the Court’s approach to vulnerable groups only applies to groups of which all members, ‘due to their adverse social categorization, deserve special protection’.⁴⁶² Citing the Court’s case law under Article 14, the Judge admitted that restrictions of the rights of particularly vulnerable groups entail a narrow margin of appreciation and require very weighty reasons.⁴⁶³ This approach, he conceded, is merited given the lasting consequences of the prejudice to which these groups were historically subjected.⁴⁶⁴ However, Judge Sajó reasoned that asylum-seekers could not be classified as a vulnerable group, contending that, on the one hand, they have not historically suffered prejudice with lasting consequences rendering them socially excluded – a problematic argument to make in contexts of rampant anti-migrant sentiment – and, on the other, that they cannot be considered a homogeneous group. The majority’s approach,

⁴⁵⁹ *Sufi and Elmi* (n 178), paras 303 and 312.

⁴⁶⁰ *F.N.* (n 445), para 31.

⁴⁶¹ *Ibid.*

⁴⁶² *M.S.S.* (n 7), Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

he argued, meant that Article 3 and 'the constitutional position of a welfare state are getting even closer' as there 'seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the "vulnerable"'.⁴⁶⁵

Several of these arguments require breaking down. The socio-economic obligations that Judge Sajó feared here seem to have gained traction in the Court's jurisprudence, albeit to a very modest extent. While the judge's definition of group vulnerability corresponds to the Court's Article 14 jurisprudence, he fails to recognise that the vulnerability of individuals has begun to play an equally, if not more, important role in the Court's jurisprudence. In addition, his requirement of homogeneity among the members of vulnerable groups is a seriously problematic one that would nullify individual identities and circumstances in any group. In any event, vulnerability has not led to the imposition of wide-ranging socio-economic obligations on states. The reason for this is partly that the Court is not being as principled as Judge Sajó, in his separate Opinion, expected it to be.

Judge Sajó was responding to the power of Article 3, namely the fact that it enshrines unconditional obligations given its absolute and non-derogable nature. However, the Court continues to struggle to reconcile state interests with the absolute nature of Article 3. That struggle is particularly evident in its jurisprudence on migrants and asylum-seekers. Recognising the vulnerability of these individuals means engaging with their dependency and the real consequences of return; this, in turn, potentially has some politically sensitive consequences, including high financial costs, if the Court wishes to take the absolute nature of Article 3 seriously. On the other hand, minimising harms or failing to engage with the right to dignity of migrants and asylum-seekers undermines the core values of Article 3, namely their equal entitlement to the Convention's protection and their human dignity.

In *Abdi Mahamud v Malta*, Judge Sajó wrote another relevant Separate Opinion concerning vulnerability.⁴⁶⁶ There, the judge criticised the vagueness of the Court's approach to individual vulnerability. This case was an example of a recurring trend in Strasbourg: where the Court struggles to make findings that would have large-scale socio-economic and political consequences, it uses vulnerability to provide relief only to certain badly-off applicants. In this vein, as outlined above, it has even gone so far as to defer to the domestic determination of who is vulnerable. The problems with this are multiple: not only does the Court provide different levels of protection for applicants in objectively similar circumstances, but it also invites a variable and disjointed understanding of vulnerability. In addition, it creates an incentive for states to attempt to avoid violation judgments by using a very restrictive domestic definition of vulnerability.

⁴⁶⁵ Ibid.

⁴⁶⁶ *Abdi Mahamud* (n 128), Partly Dissenting Opinion of Judge Sajó.

The variability of the Court's approach is evident when comparing *Abdi Mahamud* to the *Moxamed Ismaaciil and Abdirahman Warsame*⁴⁶⁷ and *Aden Ahmed* cases.⁴⁶⁸ These three very similar cases, as discussed above as well, display different outcomes linked to the three different approaches to vulnerability used, with the applicants being considered (i) invulnerable by the domestic and Strasbourg authorities or (ii) vulnerable by Strasbourg *because* of a domestic assessment or (iii) vulnerable *despite* that assessment. What these three cases have in common is that all three indicate a willingness to use vulnerability to distinguish cases. *Aden Ahmed* distinguished immigration detention from imprisonment and the applicant's fragile mental and physical state from that of her co-detainees. *Moxamed Ismaaciil and Abdirahman Warsame* distinguished the applicants in that case, not considered vulnerable, from vulnerable applicants such as the one in *Aden Ahmed*. *Abdi Mahamud* used vulnerability reasoning to find a violation in circumstances almost identical to those in *Moxamed Ismaaciil and Abdirahman Warsame*, distinguishing the applicant in the former case from the latter on the basis of a domestic assessment of vulnerability.

This mixture of approaches not only creates confusion about what vulnerability means and who will be considered vulnerable in any given case, and thus affects the predictability and credibility of the Strasbourg case law. It also does nothing to address the fact that immigration detention lasting – as was the case in these judgments – for up to 18 months can have a dramatic impact on any affected person, not just those who are considered vulnerable on the domestic or Strasbourg plane. On the other hand, using vulnerability as the yardstick by which cases are distinguished is certainly an improvement over the 'compelling humanitarian grounds' test, which proves almost impossible for applicants to meet.

One further comment is necessary in this regard, namely concerning the *Hunde v the Netherlands* case. There, the Court distinguished the vulnerability of a failed asylum-seeker from that of asylum-seekers whose applications were still pending; specifically, it found that states do not owe the same obligations regarding housing and care to failed asylum-seekers as they do to applicants such as the one in the *M.S.S.* case.⁴⁶⁹ While the outcome of this case was consistent with the Court's general approach to expulsions, cases such as this one present a conceptual problem. Thus, if asylum-seekers are vulnerable because of everything they have been through during their migration and the traumatic experiences that they are likely to have endured, as the Court held in *M.S.S.*,⁴⁷⁰ as well as their dependence on the state, then it is not clear why a failed asylum-seeker should not be considered equally vulnerable, as the failure of one's asylum application is unlikely to reverse one's migration-related trauma or one's dependence on a host state. Of course, failed asylum-seekers have, by definition, been shown to lack the risks of

⁴⁶⁷ *Moxamed Ismaaciil and Abdirahman Warsame* (n 403).

⁴⁶⁸ *Aden Ahmed* (n 393).

⁴⁶⁹ *Hunde* (n 414), para 55, referring to *M.S.S.* (n 7).

⁴⁷⁰ *M.S.S.* (n 7), para 232.

persecution or ill-treatment that those whose applications are pending may have claimed. However, the vulnerability framework provided by the Court to date does not create a convincing basis for distinguishing these two categories from each other, except for – as the Court itself argues – via the need to balance individual and general interests, an argument which has little or no place under the absolute prohibition enshrined in Article 3.⁴⁷¹

VI. Vulnerability Due to Discrimination and Marginalisation

In the past, the Court has taken the vulnerability of members of religious, ethnic, political, and other minorities into consideration when evaluating whether these individuals face a risk of ill-treatment abroad. However, the Court's understanding of the vulnerability of these minorities, along with other groups who face discrimination, such as LGBTQI persons and those living with HIV/AIDS, also applies beyond the migration context.

The Court's case law regarding vulnerable minorities under Article 3 revolves around the recognition of specific groups who have – historically or recently – been exposed to discrimination as a group. This part of the Court's vulnerability jurisprudence under Article 3 most strongly evokes its approach to vulnerability under Article 14. In other words, this is a way to render certain situations suspect because they concern a member of a particular minority. In these cases, the Court recognises that the general situation of these groups – the usual conditions of their interaction with members of the majority or with the authorities – is particularly difficult and rife with discriminatory attitudes.

A. Vulnerable Ethnic Minorities

The first and foremost group recognised by the Court in this context – and the only one that has been recognised as a 'vulnerable group' in the Court's sense of the term – are Roma people and Travellers. Since 2001, the Court has repeatedly referred to the vulnerability of Roma and Travellers under Article 3.⁴⁷² These cases generally involve targeted discriminatory treatment inflicted by either state or private actors.

For one, the Court held that the Roma are in a particularly vulnerable situation in their interactions with police.⁴⁷³ Other state actors may also perpetrate discriminatory violence against Roma: in *I.G. and Others v Slovakia*, the Court held that

⁴⁷¹ *Hunde* (n 414), para 54.

⁴⁷² *Smith v United Kingdom* App no 34334/96, Decision of 3 May 2001.

⁴⁷³ *Sashov and Others v Bulgaria* App no 14383/03, Judgment of 7 January 2010, para 55.

the non-consensual sterilisation of young Roma women constituted a violation of Article 3, and in doing so took into consideration the vulnerability of the population group to which they belonged and also the importance of female fertility in that group's culture.⁴⁷⁴ Elsewhere, it found that, because of 'their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority', meaning that they require special protection and that the state must vigorously investigate offences against them, also where committed by private actors.⁴⁷⁵ In 2018, the Court found that the Russian authorities, who failed to protect Roma applicants from a 'pogrom' and simply advised them to leave before their homes were ransacked by a mob, had subjected them to degrading treatment, given their vulnerability.⁴⁷⁶

The second ethnic group repeatedly considered vulnerable by the Court in its Article 3 jurisprudence concerns situations in non-member states. This situation has been discussed above, and for example concerns ethnic Uzbeks who risk being returned to Kyrgyzstan, where they stand to be prosecuted for their involvement in inter-ethnic riots and potentially subjected to torture or ill-treatment.⁴⁷⁷

B. Vulnerable Religious Minorities

Religious minorities may also be vulnerable for the purposes of Article 3. These cases largely concern the state obligation to protect against violence by private parties. For example, in a judgment against Serbia concerning the violence inflicted on a leading member of the Hare Krishna community by private individuals, the Court held that after various incidents 'it should have been obvious to the police that the applicant, who was a member of a vulnerable religious minority ... was being systematically targeted and that future attacks were very likely to follow'.⁴⁷⁸ As the police failed to take sufficient preventive measures, the Court found a violation of Article 3. Similarly, in *Begheluri and Others v Georgia*, the Court examined the response of the authorities to the religiously-motivated violence and aggression inflicted on a group of Jehovah's Witnesses by private parties and by police. The Court found that, given the applicants' helplessness, the vulnerability of their situation, and the indifference they experienced when seeking the assistance of the authorities, they had likewise suffered a violation of Article 3.⁴⁷⁹

⁴⁷⁴ *I.G. and Others v Slovakia* App no 15966/04, Judgment of 13 November 2012, paras 125, and also – in the context of Art 14–160.

⁴⁷⁵ *Balázs v Hungary* App no 15529/12, Judgment of 20 October 2015, para 53.

⁴⁷⁶ *A.N. and Others v Russia* App nos 61689/16, 20421/17, 23188/17 ..., Judgment of 23 October 2018; para 134.

⁴⁷⁷ *Kadirzhanov and Mamashhev* (n 429), paras 91–92; *Mamadaliyev* (n 429), para 62; *Khamrakulov* (n 426), paras 65–66.

⁴⁷⁸ *Milanović v Serbia* App no 44614/07, Judgment of 14 December 2010, para 89.

⁴⁷⁹ *Begheluri and Others v Georgia* App no 28490/02, Judgment of 7 October 2014, para 113.

As noted above, the vulnerability of religious groups is also relevant in the migration context: it may be incompatible with Article 3 to return individuals to a state where they will face persecution on account of their religion.⁴⁸⁰ This relates to violence not only by the state, but also by private parties.⁴⁸¹

C. Vulnerable LGBTQI+ People

As concerns the vulnerability of members of the LGBTQI+ community, the Court to date has mostly considered this in the context of migration, as discussed above.

Beyond this, there have also been two Article 3 cases that relate to vulnerability in detention and – real or presumed – LGBTQI identity. However, in both cases, the Court focused on the applicants' vulnerability as detainees, and not on their LGBTQI identity. In one case, the Court considered whether the state had complied with Article 3 in subjecting a 'homosexual' inmate to solitary confinement after he alleged that he had been sexually abused.⁴⁸² In that case, the Court found no violation of Article 3, stating that the provision should not impose excessive burdens on the authorities.⁴⁸³ In another case, the Court heard an Article 3 complaint concerning the rape of an inmate by state officials who (mistakenly) presumed that he was 'a homosexual'. There, too, the vulnerability analysis concerned not the applicant's presumed sexual orientation, but his detention.⁴⁸⁴

The dearth of case law in this regard does not mean that LGBTQI identity does not, in a number of Member States, expose individuals to an acute risk of abuse and violence, both by state and non-state actors.⁴⁸⁵ Recently, the Court had an opportunity to consider this type of vulnerability in depth under Article 3 taken together with Article 14 ECHR. The case was *Identoba and Others v Georgia*, and it concerned violence against persons participating in a march organised by members of the LGBTQI community. In its judgment, the Court held that states have an obligation, albeit not an absolute one, to 'take all reasonable steps to unmask possible discriminatory motives' for ill-treatment.⁴⁸⁶ This, the Court acknowledged, is a 'difficult task' and one that does not require a particular result, but simply requires states' 'best endeavours'.⁴⁸⁷ However, it also held, '[t]reating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are

⁴⁸⁰ *Savrididdin Dzhurayev* (n 426), paras 15 and 181.

⁴⁸¹ *N.A.N.S.* (n 426), paras 32 and 33; *M.K.N.* (n 436), paras 32 and 33.

⁴⁸² *Stasi* (n 267), para 91.

⁴⁸³ *Ibid.*, paras 78, 91.

⁴⁸⁴ *Zontul* (n 298), paras 16, 79, 88.

⁴⁸⁵ *Identoba and Others v Georgia* App no 73235/12, Judgment of 12 May 2015, paras 68, 72; PACE, Resolution 1728(2010) of the Parliamentary Assembly on Discrimination on the Basis of Sexual Orientation and Gender Identity, 29 April 2010, esp paras 3–8.

⁴⁸⁶ *Identoba and Others* (n 485), para 67.

⁴⁸⁷ *Ibid.*

particularly destructive of fundamental rights'.⁴⁸⁸ Given the 'precarious position' of LGBTQI individuals in Georgia and the prevalence of negative opinions against them, the Court held that 'the discriminatory overtones of [the violent incident in question] and the level of vulnerability of the applicants, who publicly positioned themselves with the target group of the sexual prejudice, are particularly apparent'.⁴⁸⁹ Given the fact that the march's organisers had requested protection in advance and also given 'the history of public hostility towards the LGBT community in Georgia', the Court held that the authorities knew or ought to have known about the risks, and were obligated to provide heightened protection.⁴⁹⁰ The Court underlined the necessity of meaningful inquiry into the discriminatory motives behind the attack on the march in light of the hostile climate in Georgia and the homophobic hate speech uttered by the assailants. It held that, otherwise, 'prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes'.⁴⁹¹ In addition to this investigative obligation, it held, the authorities were under 'a compelling positive obligation to protect the demonstrators'.⁴⁹²

The reasoning in *Identoba* repeatedly invoked the concept of vulnerability, and shows engagement with the realities of homophobic violence and the need for the authorities to respond to these types of societal attitudes where they put discriminated-against people at risk. However, situations in the various Member States vary greatly. In a 2016 case against Romania, the Court indicated that it may not be entirely ready to classify all LGBTQI individuals as vulnerable. In that judgment, which involved violence by private actors against members of the LGBTQI community after a march, the Court acknowledged that 'the LGBTI community in the respondent State finds itself in a precarious situation, being subject to negative attitudes towards its members'.⁴⁹³ As a result, it found that the homophobic violence suffered by the applicants 'was directed at their identity and must necessarily have aroused in them feelings of fear, anguish and insecurity'.⁴⁹⁴ However, vulnerability language did not enter into the Court's reasoning under Article 3, meaning that it did not describe the Romanian LGBTQI community as vulnerable.

Nevertheless, the recent recognition of the vulnerability of the LGBTQI community in at least one Member State with a culture of entrenched homophobia illustrates the potential to use the vulnerability of certain groups to create positive state obligations to protect them. *Identoba* provides much-needed recognition of the risks associated with a particular sexual orientation or gender identity in

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid, para 68.

⁴⁹⁰ Ibid, para 72.

⁴⁹¹ Ibid, para 77.

⁴⁹² Ibid, para 80.

⁴⁹³ *M.C. and A.C. v Romania* App no 12060/12, Judgment of 12 April 2016, para 118.

⁴⁹⁴ Ibid, para 119.

certain countries. This approach may continue to develop in different directions, including potentially into a recognition that discriminatory treatment as such may constitute an affront to human dignity that meets the standard of degrading treatment.⁴⁹⁵ This could also mean that discriminatory intent suffices to raise ill-treatment to the level of torture, or that the Court will have to engage with violence against LGBTQI people also in countries without violent and dominating discourses of homophobia and transphobia. However, today, engagement with the vulnerability of LGBTQI people still appears to be in its nascent stages.

D. HIV/AIDS

Except for in the context of detention, as discussed above, and in the very specific circumstances of terminally ill cancer patients seeking access to an experimental medicine,⁴⁹⁶ physical illness has not been generally recognised by the Court as a ground for vulnerability under Article 3.⁴⁹⁷ There is one potential exception to this rule, however, and that is the case of people living with HIV/AIDS. The Court has established that these individuals constitute a vulnerable group for the purposes of Article 14 ECHR.⁴⁹⁸ When it comes to Article 3, like most other physical illnesses, the Court has mostly dealt with the vulnerability brought about by HIV/AIDS in the detention context, but the fact that this group faces stigma and discrimination in ways comparable to the groups discussed above means that this case law could have broader implications.

Most of the relevant cases here do concern the obligation to provide adequate medical care to detainees. Thus, when detaining persons living with HIV/AIDS, states must have regard to their fragile state of health, and must monitor their illness and provide medical care.⁴⁹⁹ The fragile state of health of seropositive people is an 'aggravating factor' regarding ill-treatment inflicted on these individuals, and intensifies the obligation of the State to justify that treatment.⁵⁰⁰

In an expulsion context, returning an HIV-positive migrant to a country where he or she will not receive adequate health care can amount to a death sentence.⁵⁰¹ However, the Court was, for a long time, generally unwilling to accept arguments that an applicant's medical condition and the alleged inability to obtain adequate

⁴⁹⁵ *Karaahmed v Bulgaria* App no 30587/13, Judgment of 24 February 2015, para 73, citing *Begheluri and Others* (n 479), para 100.

⁴⁹⁶ *Hristozov and Others* (n 19), para 122.

⁴⁹⁷ Compare *Karaahmed* (n 495), para 76, where the Court held that the applicant's poor eyesight did not make him vulnerable.

⁴⁹⁸ *Kiyutin* (n 5), paras 64 and 68.

⁴⁹⁹ *Kozhokar v Russia* App no 33099/08, Judgment of 16 December 2010, para 111; *Khudobin v Russia* App no 59696/00, Judgment of 26 October 2006, Reports 2006-XII (extracts), paras 89 and 96.

⁵⁰⁰ *Tais* (n 238), paras 8 and 89.

⁵⁰¹ PACE, Resolution 1997 (2014), 'Migrants and Refugees and the Fight against AIDS' adopted by the Standing Committee on 23 May 2014, para 7.

care upon removal justified finding a Convention violation.⁵⁰² In *N. v United Kingdom*, discussed above, the Court found that there would be no violation of Article 3 if an HIV-positive applicant were to be returned to Uganda. The Court was only willing to protect against the most extreme cases of ill migrants being returned to face a breakdown of their medical treatment.⁵⁰³ Later cases equally refused to appreciate how an applicant's health would evolve after expulsion or whether they would have practical access to required medication.⁵⁰⁴ Fortunately, recent case law on expelling very ill non-nationals indicates that this jurisprudence may have changed in applicants' favour.⁵⁰⁵ Nevertheless, it remains to be seen how the vulnerability of applicants who depend on permission to remain in a host country to continue to access adequate medical care for their HIV/AIDS-related medical issues will be recognised in the Court's future case law.

Beyond this, however, there is not much case law on the vulnerability of persons living with HIV/AIDS and Article 3. This stands in contrast to the Court's progressive jurisprudence under Article 14, whereby persons living with HIV/AIDS have been recognised as a vulnerable group.⁵⁰⁶ Through this case law, the Court has pushed back against discrimination against these persons by requiring particularly weighty reasons to justify discriminatory treatment.⁵⁰⁷ Discrimination on the basis of seropositivity intersects with stigma against LGBTQI individuals, those living in poverty, intravenous drug users, and foreign nationals.⁵⁰⁸ The Court's Article 14 case law provides, or can provide, a corrective to this. By finding that 'people living with HIV are a vulnerable group with a history of prejudice and stigmatisation', the Court has refused to accept exclusionary rules based on the generalisation that these individuals behave unsafely,⁵⁰⁹ which it described as lacking a factual basis and failing 'to take into account the individual'.⁵¹⁰

⁵⁰² This jurisprudence revolves around the judgment in *N. v United Kingdom* (n 442) and has been subject to intense criticism (François Julien-Laferrrière, 'L'éloignement des étrangers malades: Faut-il préférer les réalités budgétaires aux préoccupations humanitaires?' (2009) 77 *Revue trimestrielle des droits de l'homme* 261–77, 263; Sylvie Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21(4) *European Journal of Health Law* 339–64). For an exception to the rule, see *D. v United Kingdom* (n 442).

⁵⁰³ *N. v United Kingdom* (n 442).

⁵⁰⁴ *S.J.* (n 443), para 125, referred to the Grand Chamber but struck out of the list after a friendly settlement.

⁵⁰⁵ *Paposhvili* (n 449).

⁵⁰⁶ *I.B.* (n 9), para 81; *Novruk and Others v Russia* App nos 31039/11 ..., Judgment of 15 March 2016, para 100.

⁵⁰⁷ *Kiyutin* (n 5), paras 63–64.

⁵⁰⁸ Richard Parker and Peter Aggleton, 'HIV and AIDS-Related Stigma and Discrimination: A Conceptual Framework and Implications for Action' (2003) 57 *Social Science & Medicine* 13–24, 15; *Kiyutin* (n 5), especially at paras 66–74.

⁵⁰⁹ *Kiyutin* (n 5), paras 64, 68, 71.

⁵¹⁰ *Ibid.*, para 68. On this case, see also 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, 1067.

VII. Vulnerability, Pregnancy and Precarious Reproductive Health

While sex is one of the prohibited grounds for different treatment contained in the prohibition of discrimination in Article 14 ECHR, the Court does not consider women vulnerable as such. Instead, its case law shows that female(-identifying) applicants may be considered vulnerable due to a particular situation in which they find themselves. This may be due to an experience of victimisation, for example in the form of gender-based violence, or due to various contexts that particularly affect women. One such ground for vulnerability relates particularly to those who are pregnant and their needs and the needs of their unborn children during pregnancy.

This requires some clarification before turning to the case law. Given that not all women are able to become pregnant, and cisgender women are not the only ones who experience pregnancy, or the vulnerability associated with it, the Court's approach is a sensible one. From this perspective, it is good news that the Court separates vulnerability due to pregnancy (which it recognises under certain circumstances) from the idea of vulnerability based on gender (which it does not recognise as a source of vulnerability absent other factors). However, at the same time, stereotypes and discrimination related to gender may be linked to the ways in which pregnancy-related healthcare is denied: these will be discussed further on in this section. In addition, it should be noted that the Court does not display any terminological awareness of the fact that non-female-identifying people can become pregnant, and references to 'women' below draw from that case law without seeking to imply definitions of womanhood. In general, it can be noted that the vulnerability of those who are pregnant, particularly those in precarious situations of reproductive health, represents a special case of vulnerability that can be linked to dependency and State control.

The Court's case law on vulnerability in pregnancy began with the 2004 *Bati and Others v Turkey* judgment, discussed above, wherein the Court considered an adult applicant to be vulnerable because she was pregnant at the time of her ill-treatment in police custody. While the judgment does not indicate whether the applicant was considered vulnerable in her own right or whether the vulnerability in question was that of her unborn child,⁵¹¹ it did represent the beginning of the Court's recognition of the vulnerability of women who are pregnant or giving birth under Article 3.⁵¹²

The vulnerability that arises during pregnancy creates special positive obligations on the part of the state. For example, in 2016, the Court found that the

⁵¹¹ Although the Court's recognition of the rights of the unborn child as such has been hesitant, see *Vo v France* App no 53924/00, Judgment (GC) of 8 July 2004, Reports 2004-VIII.

⁵¹² *Bati and Others* (n 49), para 122. Compare, for a later example, *Nechiporuk and Yonkalo v Ukraine* App no 42310/04, Judgment of 21 April 2011, para 156.

Russian authorities, in expelling a pregnant woman and her four minor children from Russian territory but then leaving them stranded in an unfamiliar city during winter, had violated their positive obligations under Article 3. The applicant and her children were described, in the judgment, as being in a 'very vulnerable position'.⁵¹³ In other words, here it was not the pregnancy itself, but the situation into which the pregnant applicant was thrust by the state that rendered her and her children vulnerable.

In the context of medical treatment, the vulnerability that arises during pregnancy seems to relate to uncertainty about the health of the foetus and the health of pregnant applicants themselves. In *R.R. v Poland*, for example, the applicant – who suspected a genetic malformation in her unborn child – was refused access to genetic testing by doctors opposed to abortion. When she finally obtained genetic testing – after the expiration of the legal time limit for access to an abortion – her suspicions were confirmed. In considering whether there had been a violation of Article 3, the Court found that the applicant was 'in a situation of great vulnerability', for '[l]ike any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation'. The doctors' 'procrastination' had exposed her to 'weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment'.⁵¹⁴

The *R.R.* case indicates that, to a certain extent, the vulnerability of women as concerns their reproductive health is a function of state interference in their independent decision-making regarding these matters. This is reflected in other cases, as well. For example, where rape results in pregnancy – as it did in *P. and S. v Poland* – states must not frustrate and humiliate victims seeking to undergo an abortion. In this context, the Court has enjoined states to have regard to the vulnerability, age, views and feelings of the victim.⁵¹⁵ Regarding the non-consensual sterilisation of young Roma women during childbirth, the Court has used similar arguments to classify this as degrading treatment.⁵¹⁶

In the context of detention, which entails a significant loss of autonomy regarding decision-making on prenatal care, the Court has held that the state must provide a minimum level of support to pregnant detainees. For example, in the 2013 case of a detained irregular migrant who had a miscarriage in detention, the Court held that she was doubly vulnerable due to, on the one hand, her general background as a migrant and her circumstances and, on the other, her fragile health. Given the fact that she was pregnant, the Court held that the state was required to take

⁵¹³ *Shioshvili and Others v Russia* App no 19356/07, Judgment of 20 December 2016, paras 83 and 86.

⁵¹⁴ *R.R. v Poland* App no 27617/04, Judgment of 26 May 2011, Reports 2011 (extracts), para 159.

⁵¹⁵ *P. and S.* (n 54), paras 162–66.

⁵¹⁶ *I.G. and Others* (n 474), para 123.

special measures, which should have included providing 'adequate surroundings' and 'an appropriate and varied diet'.⁵¹⁷

This vulnerability, like all vulnerability, is contextual. The vulnerability that arises during pregnancy, the case law now indicates, is not simply a derivative of the vulnerability of an unborn child or an expression of a pregnant person's own physical fragility, but also considers their position of powerlessness and dependence vis-à-vis state institutions. This includes the position of those who are pregnant regarding healthcare providers, on whom they may depend for information about the health of their foetus and access to certain care and services. The Court's vulnerability reasoning in this context serves to recognise the essential nature of access to appropriate care during pregnancy, and to give this interest primacy over state interests. Vulnerability reasoning also allows the Court to emphasise the importance of protecting a person's own decision-making about reproduction free of state interference.

In this context, however, there is still work to be done. For example, the UN Human Rights Committee has outpaced the ECtHR as concerns the recognition that denial of access to abortion services, at least as concerns potentially problematic pregnancies, constitutes a violation of the prohibition of torture and inhuman and degrading treatment.⁵¹⁸ The Court generally considers these cases under Article 8 ECHR⁵¹⁹ or declares them inadmissible.⁵²⁰

As noted at the outset of this section, this case law has, so far, been about the rights of cisgender women. However, the intersection of pregnancy with transgender or non-binary identity would likely generate particularly acute vulnerabilities. This case law could also have potential implications for cisgender men. For example, involuntary and medically unnecessary sterilisation of people of any gender could potentially be found to be a violation of Article 3. In a similar regard, under Article 8 (but with reference to Article 3), the Court has made great strides in recent years concerning the requirement of sterilisation for legal recognition of trans people's gender identity.⁵²¹ Last but not least, and to complete the picture, there is no reason why the Court could not find, in future cases, find that the Article 3 rights of non-pregnant parents-to-be may also be violated given prolonged uncertainty regarding the health of their foetus. In this regard, vulnerability reasoning can assist the user – here, the Court – in taking the suffering of any affected applicants more fully into account.

⁵¹⁷ *Aden Ahmed* (n 393), para 97.

⁵¹⁸ HRC, *Amanda Jane Mellet v Ireland*, Communication No 2324/2013, UN Doc. CCPR/C/116/D/2324/2013, Views of 31 March 2016, para 7.8. Vulnerability language also came into play in this case, see para 7.4.

⁵¹⁹ *A., B. and C. v Ireland* App no 25579/05, Judgment (GC) of 16 December 2010, Reports 2010, starting at para 212.

⁵²⁰ *D. v Ireland* App no 26499/02, Decision of 27 June 2006, paras 86–104, concerning the exhaustion of domestic remedies.

⁵²¹ *A.P., Garçon and Nicot v France* App nos 79885/12 ..., Judgment of 6 April 2017, Reports 2017.

VIII. Vulnerability Due to the Espousal of Unpopular Views

In the typology outlined at the beginning of this chapter, Alexandra Timmer recognised the vulnerability of demonstrators, dissidents, and journalists to ill-treatment by state actors due to the espousal of unpopular views as a significant source of vulnerability under the Convention writ large.⁵²² This type of vulnerability stems from the Court's freedom of expression jurisprudence, and as a result it has remained somewhat marginal under Article 3.

In the context of Article 3, relevant cases here often concern expulsion, for example the return of political dissidents from Russia to their countries of origin. As mentioned above, for example, the Court has recognised ethnic Uzbeks suspected of participating in inter-racial riots in Kyrgyzstan as vulnerable in the context of returns.⁵²³ The same goes for the political opposition in Kazakhstan⁵²⁴ and 'individuals whose extradition was sought by either Uzbek or Tajik authorities on charges of religiously or politically motivated crimes'.⁵²⁵ In addition, the Court has considered the 'precariousness' of the situation of dissidents and perceived dissidents in Sudan, finding it incompatible with the Convention to return registered political opponents of the regime to the country.⁵²⁶

In other words, where an extradition request shows that an applicant stands accused of religiously and politically motivated crimes, the Court considers this sufficient to demonstrate that the applicant is a member of the vulnerable group in question.⁵²⁷ This case law does not, however, block the return of any person accused of a crime in these destination countries: those whose extradition is sought for offences that are 'neither politically nor religiously motivated' are not members of the vulnerable group in question.⁵²⁸

Outside of the expulsion context, in 2015, the Court explored a particular facet of demonstrators' vulnerability to police violence. In *Cestaro v Italy*, the Fourth Section found that the beating of a 62-year-old demonstrator by security forces had constituted torture. The blows inflicted by the authorities caused multiple fractures, from which the applicant never fully recovered. The Court held that the victim – who was sitting against a wall with his hands up when beaten – was in a situation of vulnerability due to his age, and also noted that police cannot

⁵²² Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 147–70, 157–58, and the case law cited therein.

⁵²³ *Khamrakulov* (n 426), para 66; *U.N. v Russia* App no 14348/15, Judgment of 26 July 2016, paras 39–40.

⁵²⁴ *Dzhaksybergenov* (n 426), para 37.

⁵²⁵ *Golubyatnikov and Zhuchkov v Russia* App no 49869/06 and 44822/06, Judgment of 9 October 2018, para 17.

⁵²⁶ *A.A. v Switzerland* App no 58802/12, Judgment of 7 January 2014, para 40.

⁵²⁷ *T.M. and Others v Russia* App nos 31189/15 ..., Judgment of 7 November 2017, para 20.

⁵²⁸ *B.T. v Russia* App no 40755/16, Decision of 5 December 2017, para 28.

be indifferent to the physical vulnerability of demonstrators due to their age or gender, nor to signs of capitulation.⁵²⁹ To some extent, this case also evokes the risks of violence by private parties or receiving states faced by those demonstrating for LGBTQI rights.⁵³⁰ However, the case law here is too sparse to make any findings about what vulnerability means to the Court in these circumstances.

IX. Intersecting Vulnerabilities

The above has discussed instances in which individuals simultaneously exhibit multiple traits that render them vulnerable – they may, for example, be detained, suffer from a mental illness, and be of Roma ethnicity. Cumulatively, the interaction between these traits marginalises individuals, places them in complex situations of vulnerability and influences their social reality and experiences.⁵³¹ Termed intersectionality in the non-discrimination context, and based on a concept originated by Kimberlé Crenshaw in the field of critical race theory,⁵³² this interplay of various grounds for vulnerability places the affected individuals in positions of particularly acute defencelessness to ill-treatment. In other words, the sum of various vulnerabilities is greater than its parts.

The Court has recognised that particular issues arise when various grounds for vulnerability intersect, although not in as many words. In the *B.S. v Spain* case, for example, the Court found a violation of Article 14 in conjunction with Article 3 in its procedural aspect given the fact that the domestic courts' decisions 'failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute'.⁵³³ This finding came after two third-party interveners invited the Court to engage with the intersectionality of the grounds for the applicant's vulnerability. The first intervener, the European Social Research Unit at the University of Barcelona, pointed out that 'taking account of only one of the grounds [for discrimination] was approximate and failed to reflect the reality of the situation'.⁵³⁴ The second intervener, the AIRE Centre, 'invited the Court to recognize the phenomenon of intersectional discrimination, which required a multiple-grounds approach that did not examine each factor separately'.⁵³⁵ The Court's judgment supports the conclusion that, while not explicitly acknowledging the intersection of the applicant's ethnicity, foreign origin, gender and engagement in the sex trade or exploring this concept, and seemingly unwilling to use the term 'intersectionality', the Court took the third party interventions into

⁵²⁹ *Cestaro* (n 146), para 180.

⁵³⁰ *Identoba and Others* (n 485), paras 68–70; *Karaahmed* (n 495), paras 11–25.

⁵³¹ Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(1241) *Stanford Law Review* 1241–99, 1244–45.

⁵³² *Ibid*; Crenshaw (n 13).

⁵³³ *B.S.* (n 14), para 62.

⁵³⁴ *Ibid*, para 56.

⁵³⁵ *Ibid*, para 57.

account, and is at least willing to display some awareness about the harms suffered at the intersection of various grounds for vulnerability.⁵³⁶

Though the facts of *B.S.* provide one of the most explicit examples of intersectionality under Article 3, it does not stand alone. The Court has considered a number of applications brought by individuals who fall into multiple vulnerability-related categories. For example, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* concerned an applicant who was a minor, an illegal immigrant, and unaccompanied by her family.⁵³⁷ The applicants in *I.G. and Others v Slovakia* were of Roma ethnicity, minors, and pregnant.⁵³⁸ The applicant on whose behalf the *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* case was brought was young, deprived of his liberty, of Roma ethnicity, suffered from a profound intellectual disability, and had been diagnosed with HIV as a child.⁵³⁹ In other words, intersectional cases can and frequently do come before the Court. In addition, the intersection of grounds for vulnerability is extremely common in the Court's case law concerning vulnerability in detention. For example, as discussed above, the Court has frequently held that persons who are both detained and suffer from mental health issues are particularly vulnerable, as they may experience particular feelings of distress, fear and anguish while deprived of their liberty.⁵⁴⁰

While the Court's case law thus shows some recognition of the accrued and unique vulnerabilities that arise with the accumulation of relevant traits, the Court does not explicitly explore the sum of vulnerabilities concerned, their specific effects, and the ways in which the individuals concerned are especially marginalised or resilient. In other words, it fails to engage with the concept of intersectionality. Instead, the Court tends to list the various grounds for vulnerability one after another and then, without further discussion, conclude that, given the applicant's resulting – albeit sometimes termed particular or extreme⁵⁴¹ – vulnerability, Article 3 has been violated.⁵⁴² Where the Court's recognition of intersectionality in these cases is implied or missing, it remains unclear whether all of the factors that give rise to vulnerability were taken into consideration, and to what effect, or whether there has been real appreciation for the applicant's position inside structures of oppression, discrimination, and vulnerability.

The way in which the Court goes about responding to cases where grounds for vulnerability intersect depends on the circumstances. In the context of detention, the Court has set up special protections that apply in such cases, lowering the threshold of suffering and anguish that must be reached in order to find a violation of Article 3 and explicitly acknowledging the heightened terror and

⁵³⁶ *Ibid.*, para 62.

⁵³⁷ *Mubilanzila Mayeka and Kaniki Mitunga* (n 110), para 55.

⁵³⁸ *I.G. and Others* (n 474), paras 6, 123, 143.

⁵³⁹ *CLR on behalf of Valentin Câmpeanu* (n 22), paras 104, 108 and 143.

⁵⁴⁰ For example in *Kudla* (n 173), para 99.

⁵⁴¹ *CLR on behalf of Valentin Câmpeanu* (n 22), para 108.

⁵⁴² For example, *P. and S.* (n 54), paras 161, 162 and 166.

humiliation experienced by vulnerable victims.⁵⁴³ In the context of expulsion and removal cases, the intersection between poor conditions in the receiving State and another ground for vulnerability, for example childhood age, can make the difference for finding a conditional violation of Article 3.⁵⁴⁴ In the past, the Court has also attended to the 'cumulative risks of reprisals' faced by applicants for various reasons in the receiving State.⁵⁴⁵ Where young age and sexual victimisation intersect, too, the Court has recognised the special vulnerability of those who find themselves at this intersection and required States to attach sufficient weight to the 'special psychological factors' at play.⁵⁴⁶

However, the Court's implicit acknowledgment of intersectional vulnerability has its limits. For example, in *A.S. v Switzerland*, the Court considered the possibility of returning an individual who was an asylum-seeker, a victim of torture, and suffered from mental health issues to Italy. The Court's judgment tested the limits of *Tarakhel*, with the Court finding that though it was possible that 'a significant number of asylum-seekers might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions', as the applicant was not critically ill and both the speed with which his condition would deteriorate upon removal and his access to medical treatment in Italy involved 'a certain degree of speculation', removal would not violate Article 3.⁵⁴⁷

The thought behind the restrictiveness of the Court's vulnerability and intersectionality jurisprudence in the context of asylum and expulsion may be similar to the one behind its failure to recognise the exclusions that arise from the intersection of poverty and other grounds for vulnerability. The disenfranchising power of poverty has not been recognised in the Court's Article 3 vulnerability case law, perhaps because of fears that such recognition would give rise to a wide-ranging obligation to provide financial support to the indigent – in other words, that it would open the floodgates of socio-economic support obligations. Situations of extreme material poverty have been regarded as a violation of Article 3 under certain circumstances, namely when they affect particularly vulnerable individuals who are dependent on the state.⁵⁴⁸ However, poverty in itself – thus particularly, but not only, where it intersects with a disadvantaged ethnicity, mental illness, or another of the traits discussed above – may effectively prevent individuals from claiming their rights.

In this regard, a group of Strasbourg judges, writing for a seminar, once remarked that while the Convention does not protect a 'right not to be poor', situations of extreme poverty may breach the Convention and limit those affected

⁵⁴³ *Kudla* (n 173), para 99; *Aydin* (n 24), paras 83–84.

⁵⁴⁴ *Tarakhel* (n 109), paras 118–22.

⁵⁴⁵ *Samina* (n 418), para 64.

⁵⁴⁶ *M.C.* (n 52), para 183.

⁵⁴⁷ *A.S. v Switzerland* App no 39350/13, Judgment of 30 June 2015, para 36.

⁵⁴⁸ *M.S.S.* (n 7), paras 172 and 254.

in their ability to avail themselves of their rights.⁵⁴⁹ The judges pointed out that, according to the Court's 1978 *Airey* judgment, complaints about entirely insufficient pension sums and other social benefits could in principle raise issues under Article 3.⁵⁵⁰

In this same vein, the Court has found that a lack of resources cannot justify the failure to secure Convention rights and freedoms, including under Article 3.⁵⁵¹ Poverty affects a wide range of human rights, and it often affects those who are already vulnerable for another reason. The floodgate argument – the fear that the Court would create a financially untenable welfare state by recognising conditions of extreme material poverty in those who depend on the state for survival as a Convention violation – does not change the fact that conditions of extreme material poverty can entail a level of suffering and deprivation that should be recognised as meeting the threshold of Article 3.

One laudable development in this context was the 2021 judgment in *Lacatus v Switzerland*, where the Court recognised the existence of a human right to beg as part of Article 8 ECHR, referring at various times to the applicant's vulnerability as an illiterate and destitute young Roma woman.⁵⁵² However, while the Court invoked the concept of human dignity here, it neither considered Article 3, nor seemed willing to go beyond a recognition of the fact that prohibiting someone from ensuring their own survival through begging was impermissible, as opposed to making a finding about the effects of poverty on human dignity more generally, or about the specific vulnerability that comes from poverty or the intersection of various sources of vulnerability.

X. Underexplored Sources of Vulnerability

The grounds for vulnerability that the Court has recognised to date are likely not final. Its approach to the concept has undergone gradual evolution, and the Court has progressively identified vulnerable groups and individuals as its case law has developed. The present chapter has shed some light on why certain groups and individuals are recognised as vulnerable. This is often based on the discrimination or inequality faced by a group and the individuals who belong to it, or on a situation of dependency, including the inability of individuals to claim their rights. As will be argued below, this comes down to a denial of basic human dignity and the

⁵⁴⁹ Julia Laffranque, Guido Raimondi, Ledi Bianku, Angelika Nußberger and Linos-Alexander Sicilianos, 'Implementing the European Convention on Human Rights in Times of Economic Crisis', *Seminar Background Paper* (25 January 2013), www.echr.coe.int/Documents/Seminar_background_paper_2013_ENG.pdf, 1.

⁵⁵⁰ *Ibid.*, 2, citing *Airey v Ireland* App no 6289/73, Judgment of 9 October 1979, Series A32, para 26.

⁵⁵¹ Laffranque et al (n 549), 4, citing *Poltoratskiy v Ukraine* App no 38812/97, Judgment of 29 April 2003, Reports 2003-V, para 148 and *Orchowski v Poland* App no 17885/04, Judgment of 22 October 2009, para 153.

⁵⁵² *Lacatus v Switzerland* App no 14065/15, Judgment of 19 January 2021.

capabilities that human individuals need in order to live a life that ensures their dignity. On this basis, it is possible to suggest some further groups and individuals who face inequality, discrimination or dependency, and who could therefore arguably also fall under the Court's approach to vulnerability.

Recognition of some of these further sources of vulnerability appears to be gaining traction in the Court's Article 3 case law. For example, it seems that the Court has made some headway towards more solid recognition of the vulnerability of the LGBTQI community or of the elderly. Regarding other factors, however, the Court displays reluctance.

Especially in the migration context, a number of harms are thereby ignored or 'privatised' by the Court – an argument that will be explored below. This is true, for example, of the risk of exposure to female genital mutilation or the risks based on gender inequality in a receiving State. Outside of the migration context, too, there are further possible examples: two that come to mind are the fate of those suffering from drug addiction⁵⁵³ and homeless persons who are not asylum-seekers. Perhaps the most flagrant example of all, however, is that of vulnerability due to extreme poverty, which was touched upon above and will be explored further in chapter five.

⁵⁵³ See, *mutatis mutandis*, *Miah v United Kingdom* App no 53080/07, Decision of 27 April 2010, para 14.