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4

The Growth and Impact of Vulnerability Reasoning

Chapter Summary

The preceding chapter has explored the reasons why the Court may identify an applicant or group as vulnerable. The following will expand on this, and discuss not only the distribution and pervasiveness of references to vulnerability in the Article 3 case law, but also the various types of effects that vulnerability reasoning can trigger. It will show that the concept of vulnerability can affect the life of an application in Strasbourg from start to finish, from its categorisation under the Court's priority policy, to the admissibility requirements and issues of proof, to shaping states' material and procedural obligations and affecting awards made in terms of just satisfaction and consequential orders.

Keywords: effects of vulnerability; interim protection; admissibility; burden of proof; remedies; positive obligations; quantitative analysis.

I. A Quantitative Analysis of Vulnerability under Article 3

This volume is based on a systematic analysis of the vulnerability case law under Article 3 until early 2019. This allows for a quantitative evaluation of the Court's vulnerability case law to complement the qualitative analysis in the preceding chapter.

To begin with, it is possible to note that, for a number of years, the use of vulnerability in the Court's case law increased dramatically. In the early 1980s to the early 1990s, the concept was not used under Article 3 ECHR, and throughout the 1990s, references were exceedingly scarce. This stands in stark contrast to the pervasive use of vulnerability in the new millennium. However, the number of references is currently declining. Figure 4.1 shows the number of times the Court has relied on vulnerability reasoning in the decade from 2009.

The figure clearly shows that the number of references to vulnerability made by the Court in its Article 3 case law peaked in 2016, when 76 such references were made, and has steadily declined since. To understand why this is the case,

Figure 4.1 Number of References to Vulnerability by the Court under Article 3 (2009–beginning of 2019)

it is helpful to put the Court's vulnerability reasoning into the perspective of its case law on Article 3 as a whole. By doing so, it emerges that, while vulnerability reasoning was, at least for a time, increasingly pervasive under Article 3, the general increase in the number of violation judgments regarding the provision kept pace with this development until 2016. In other words, vulnerability may not necessarily or not only have become more prevalent over time, but its use seems to some extent to have increased in proportion with the ever more productive output of the Court. Figure 4.2 tracks this development as concerns the violation judgments issued by the Court under Article 3, providing both an overview of this synchronised increase and of the relative prevalence of the concept.

Figure 4.2 also shows that the abovementioned *decrease* in the number of references to vulnerability is also evident when looking only at violation judgments. This invites speculation that vulnerability reasoning is used not in cases where established case law allows for a straightforward violation finding, but in more activist judgments. It should be noted, too, that the relevance of the concept is not – or at least not necessarily – decreasing along with the quantity of references made in this regard. As shown in the preceding chapter and as noted above, the concept has served to amend the approach to Article 3 in a number of regards. That case law remains, and the Court continues to rely on it and build upon it. This allows for two observations.

First, the work done by vulnerability reasoning is here to stay. While the Court's decision not to refer to vulnerability explicitly in some cases makes the

Figure 4.2 Violation of Article 3 Judgments Using Vulnerability, and Overall, as of 1 January 2019, by Year

relevant case law harder to find systematically, the Court is implicitly continuing many of the same approaches as those facilitated by vulnerability. Thus, in recent cases it has for example reflected on an applicant's disability, the particular needs and hardships associated with it, and the ways in which this requires a State response and tailors the standards under Article 3, all without explicitly referring to vulnerability.¹

Again, it is not clear what the reasons for the decrease in references to vulnerability are: there has been no statement of principle by the Court in this regard, and relevant cases continue to come before it. Based on the above, it seems that, during the last 10 years, the Court has used vulnerability to achieve agreement among judges about expanding the scope of Article 3. Now having done so, and having both established a more inclusive case law in various respects and entered a period

¹See for example *Tsarpelas v Greece* App no 74884/13, Judgment of 26 April 2018, where no reference to vulnerability was made, although the case was later cited by the Court as one concerning vulnerability (in *SH.D. and Others v Greece, Austria, Croatia, Hungary, Northern Macedonia, Serbia and Slovenia* App no 14165/16, Judgment of 13 June 2019, para 48).

of deference or even ‘walking back’,² it may no longer be as necessary to deploy vulnerability reasoning in as many cases, as the Court can now rely on existing vulnerability case law to justify making similar findings.

Lastly, it is interesting to note that the data indicates that references to vulnerability are present in the Article 3 jurisprudence of all five Sections of the Court and – though, given the smaller number of its judgments and decisions, to a lesser extent – of the Grand Chamber. Though the composition of the Sections changes over time, and that of the Grand Chamber changes on a case-by-case basis, this does provide some indication of the pervasiveness of the concept. Of course, judicial formations change over time, and they are fluid in the sense that the Grand Chamber judges also sit in the Chamber and in the Committees, but this provides a sense that vulnerability reasoning is not merely the pet issue of a select few judges, but a pervasive concept.

Lastly, it is possible to disaggregate the types of violations of Article 3 that the Court finds by relying on vulnerability. As outlined previously, these various types of violations – torture, inhuman treatment and punishment, and degrading treatment and punishment – are in a hierarchical relationship, with torture being the most severe type of violation of Article 3. The Court has used vulnerability reasoning to find a violation of Article 3 by an explicitly recognised act of torture in 37 cases to date; the remaining 496 violations of Article 3 found under reference to vulnerability involved inhuman or degrading treatment or punishment (426 total cases) and/or purely procedural (39 cases) or conditional (31 cases) violations of Article 3, though the Court sometimes fails to specify which type of violation of Article 3 it is dealing with.³

In short, it appears that vulnerability reasoning under Article 3 is firmly entrenched in the Court’s jurisprudence across a variety of grounds, across time, across all sections of the Court and across the various aspects of Article 3. However, this does not mean that vulnerability permeates or defines all of the Court’s jurisprudence under the provision. The Court’s reliance on vulnerability remains, outside of the specific contexts in which it is best-developed, the exception rather than the rule. This will be discussed in more detail in the following section.

II. The Effects of Vulnerability under Article 3 ECHR

Vulnerability reasoning permeates the Court’s case law and applies to a range of situations and traits. But what does vulnerability actually *do*? The present section discusses the various types of impacts and effects that vulnerability reasoning can have on the Court’s approach to a case.

² Laurence Helfer and Erik Voeten, ‘Walking Back Human Rights in Europe?’, 31(3) *European Journal of International Law* (2020) 797–827.

³ *Serçe v Romania* App no 35049/08, Judgment of 30 June 2015, paras 48–49; *Andrișcă v Romania* App no 65804/09, Judgment of 3 February 2015, para 74.

A. The Court's Priority Policy

One of the first things that happens when a case arrives in Strasbourg is that it is assigned a category under the Court's priority policy. That policy explicitly mentions the concept of vulnerability, stating that the highest-priority category is reserved for 'urgent cases concerning vulnerable applicants'.⁴ These cases are thereby expedited and receive the highest priority treatment, even higher than other Article 3 cases, which generally fall into the third category (out of seven). Cases falling under the top three priority categories are destined to be examined by the Chamber or Grand Chamber, meaning that they are more likely to be considered in detail by the Court. However, it is not clear how the Court determines whether an applicant is vulnerable for the purposes of the priority policy, without having examined the case on the merits. This is presumably a simplified assessment, and one based on recognitions of vulnerability in previous case law.

B. Admissibility *ratione personae*

Tightening the admissibility criteria for applications before the Court is a commonly proposed way to reduce the Court's workload, albeit one that is undeniably harmful to applicants. In this context, vulnerability reasoning under Article 3 ECHR can be used to loosen the requirements on the *ratione personae* admissibility of applications. There are two main areas of relevance here: the possibility of bringing a case on behalf of a victim, and the loss of victim status by the victim him- or herself because of the availability of domestic redress and compensation.

i. Cases Brought on Behalf of Victims

When it comes to cases brought on behalf of victims, an illustrative example here is the *Ilhan v Turkey* case. The applicant in *Ilhan* was permitted to bring a case on behalf of his vulnerable brother, who had been subjected to ill-treatment and had suffered a brain injury. The Court held that it must apply the rules on the admissibility of applications with some flexibility and without undue formalism, and that those rules, along with the ECHR as a whole, have to be interpreted so as to make Convention rights practical and effective.⁵ Finding that the applicant's brother was vulnerable, the Court held that the applicant had validly introduced the application in Strasbourg on his behalf.⁶

⁴ ECtHR, 'The Court's Priority Policy', www.echr.coe.int/documents/priority_policy_eng.pdf, as amended on 22 May 2017.

⁵ *Ilhan v Turkey* App no 22277/93, Judgment (GC) of 27 June 2000, Reports 2000-VII, para 51.

⁶ *Ibid.*, para 55.

There have been other similar cases before the Court.⁷ Of these, the most notable is *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, which concerned post-mortem proceedings brought by an NGO on behalf of a particularly vulnerable individual. The Court permitted the applicant NGO to represent the deceased applicant, because the opposite conclusion would mean risking that ‘the respondent State might escape accountability under the Convention’.⁸ In his separate opinion, Judge Pinto de Albuquerque summarised the intention underlying the judgment by maintaining that ‘[d]ifferent situations must be treated differently. Thus, the right of access to court for extremely vulnerable persons warrants positive discrimination in favour of these persons’.⁹

While the Court emphasised the exceptional nature of the *Valentin Câmpeanu* case, at the time, the idea of positive discrimination underlying the judgment seemed to indicate a new willingness of the Court to introduce a more flexible application of the admissibility criteria concerning vulnerable individuals and groups. As the judges of the First Section put it in one 2015 decision, it seemed that the Court was ready to display ‘reasonable flexibility in ensuring that formal criteria related to admissibility and representation do not result in unjustified exclusion of the most vulnerable victims from the protection guaranteed by the Convention’.¹⁰

However, the finding made in *Valentin Câmpeanu* is in constant tension with the Court’s need to reduce its case load and the impetus to emphasise formal rules to this end. As a result, the rule created in that judgment may have been rather severely undermined by two later developments: first, the amendment of the Rules of Court to require a strike-out where an applicant has not provided a signature authorising proceedings on his behalf by a legal representative,¹¹ and secondly, certain decisions rendered by the Court, namely *N. and M. v Russia*, *G.J. v Spain* and *Bulgarian Helsinki Committee v Bulgaria*, which were communicated before those rules took effect.¹²

In *N. and M.*, which was brought by the applicants’ lawyer after her clients had allegedly been subjected to enforced disappearance from Russia to Uzbekistan in violation of interim measures indicated by the Court, the Strasbourg judges

⁷ See *Y.F. v Turkey* App no 24209/94, Judgment of 22 July 2003, Reports 2003-IX, brought on behalf of the applicant’s vulnerable wife (paras 31–36), and *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v Romania* App no 2959/11, Judgment of 24 March 2015, paras 39–46 (brought by a human rights NGO).

⁸ *CLR on behalf of Valentin Câmpeanu v Romania* App no 47848/08, Judgment (GC) of 17 July 2014, Reports 2014, para 112.

⁹ *Ibid*, Concurring Opinion of Judge Pinto de Albuquerque, para 9.

¹⁰ *Tagayeva and Others v Russia* App nos 26562/07 ..., Decision of 9 June 2015, para 473, which primarily concerns Art 2 ECHR but makes a general restatement of principle.

¹¹ r 47.1.c. of the Rules of the European Court of Human Rights of 14 November 2016, www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

¹² *N. and M. v Russia* App nos 39496/14 and 39727/14, Decision of 26 April 2016, paras 60–63; *G.J. v Spain* App no 59172/12, Decision of 21 June 2016, paras 45–53; *Bulgarian Helsinki Committee v Bulgaria* App nos 35653/12 and 66172/12, Decision of 28 June 2016, paras 50–61.

declared the application inadmissible. In doing so, they held that the applicants' interests could just as well have been protected if their relatives had brought applications on their behalf in Uzbekistan. This decision created a major tear in the protection of vulnerable individuals, given that the facts of the case indicated a flagrant case of enforced disappearance and that the applicants' family members were resident in a non-Member State of the Council of Europe where they, too, feared persecution.¹³ This judgment in effect privatises the burden of protecting the most fundamental human rights, namely the right to life and the right to be free from torture and IDT, by forcing the family members of vulnerable individuals to choose between bringing an application in Strasbourg and their own safety.

Another nail in the coffin of the promise held by *Valentin Câmpeanu* came with the decision in *G.J. v Spain*.¹⁴ That case was brought by an NGO on behalf of a pregnant woman who alleged that she had been the victim of trafficking, had been forced into prostitution and that, if she were returned to Nigeria, she would run the risk of being recaptured by her traffickers. Despite these claims, the applicant was returned to Nigeria by the Spanish authorities, in an exceedingly problematic way¹⁵ and before she had issued a written authority to the NGO in question, Women's Links Worldwide. Obtaining such an authorisation later allegedly became impossible because, as feared, the victim was recaptured by her traffickers.¹⁶ Regardless, the domestic instances and the Court both ultimately found that Women's Links Worldwide did not have legal standing to bring a complaint on behalf of the applicant.¹⁷ The Court reasoned that the case was distinguishable from *Valentin Câmpeanu* on a number of grounds: first, in that case, the Romanian authorities had not objected to the representation of Mr Câmpeanu by the NGO, secondly, Mr Câmpeanu would manifestly have been unable to initiate proceedings domestically on his own, and thirdly, he had not been provided with legal counsel.¹⁸

The third nail in the coffin of the *Valentin Câmpeanu* judgment came with the decision in *Bulgarian Helsinki Committee v Bulgaria*.¹⁹ There, the Court considered an application brought by an NGO on behalf of two mentally disabled adolescent girls who died in a care home. The NGO became aware of the fate of the two girls after they had already died, and initiated a series of proceedings on their behalf. In this case, the Court considered that the *Valentin Câmpeanu* jurisprudence is

¹³ *N. and M.* (n 12), paras 20–26, 30 and throughout.

¹⁴ *G.J.* (n 12).

¹⁵ From the perspective of the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No 197, Warsaw, 16 May 2005, in force since 1 February 2008, ratified by Spain on 2 April 2009, especially Art 10 (identification of the victims), Art 13 (recovery and reflection period) and Art 16 para 2 (repatriation and return of victims).

¹⁶ *G.J.* (n 12), paras 34, 36, 41.

¹⁷ *Ibid.*, para 53.

¹⁸ *Ibid.*, para 52.

¹⁹ *Bulgarian Helsinki Committee* (n 12), paras 50–61.

only applicable if a cumulative and rather long list of criteria is met. These criteria, it argued, are (1) the vulnerability of the direct victim, which must have made it impossible for him or her to bring a complaint while alive; (2) the significance of the allegations at stake; (3) the absence of heirs or legal representatives who may bring an application to the Court; (4) the existence of contact between the applicant association and the victim while the latter was alive; (5) intervention by the applicant association in the post-mortem domestic proceedings; as well as (6) the recognition of the applicant association's legal standing by the domestic authorities. In its decision, the Court noted that the applicant association had intervened on behalf of the girls only years after their deaths and had thus never had contact with them, and that the domestic authorities did not acknowledge their legal standing.²⁰ It therefore declared the case inadmissible.

In *Bulgarian Helsinki Committee*, the Court noted that its decision was 'limited to the circumstances of the case before it, and that its conclusions therefore should not be interpreted as a misrecognition of the contribution by civil society in the proceedings concerned to the protection of persons who are extremely vulnerable'. It went on to commend the 'active and vigilant role of the applicant association, which alerted the competent institutions and cooperated with them during the proceedings and investigations that were conducted'. It also 'noted with satisfaction that the Bulgarian authorities seriously took into consideration the reports of the applicant association, even absent a formal status thereof in the domestic proceedings'.²¹

By making this statement, as an ostensible obiter dictum, the Court seems to be seeking to pre-empt possible backlash against its decision and the application of its long and prohibitive list of criteria. Indeed, the role of NGOs in ensuring protection of individual rights should not be underestimated. The hopelessness of the situation of applicants such as Mr Câmpăanu is a testament to this. Even if that was not the Court's intention, the result reached in all three of these decisions – two of which were brought by reputable NGOs, and the third of which was brought by a known human rights advocate – has the potential to undermine human rights defenders' important contribution to the protection of the rights of the vulnerable. The criteria now imposed effectively mean that the Court will almost never examine these types of cases, despite the fact that the examples discussed here all concern credible allegations of severe human rights violations. This is all the more shocking because, at least in two of the cases, the decisive procedural hurdle to a substantive examination is simply the presence or absence of a signature on the application form to the Court.

The formalism displayed by the Court in this context is certainly surprising in the wake of *Valentin Câmpăanu*, which is a Grand Chamber judgment, whereas a Chamber formation decided the later three cases. The latter three decisions cannot

²⁰ Ibid, paras 56–58.

²¹ Ibid, para 60, translation by the author.

be referred to the Grand Chamber, given that inadmissibility decisions are final. Nonetheless, it is not inconceivable that a future Grand Chamber judgment will revise the trend begun with these unfortunate decisions. For now, however, it seems that the Court is only willing to apply *Câmpeanu* to the narrowest sliver of applicants, namely those who have no living relatives and no legal capacity, and regarding whose representation by a third party before the Court the domestic authorities have no objection. This effectively renders *Câmpeanu* inapplicable to all but a fringe number of cases, and continues to leave those applicants who are vulnerable, but ‘not vulnerable enough’, unprotected.

ii. Loss of Victim Status

When it comes to the loss of victim status under Article 34 ECHR, which may take place if an applicant has received adequate redress and compensation on the domestic plane, vulnerability can also play a role. For example, concerning one applicant who had received compensation for a violation of Article 3 domestically, the Court took his vulnerability into account in order to find that he had nonetheless retained victim status.²² In other cases, too, the Court has mentioned vulnerability when it came to the question of victim status.

For example, to overcome a possible loss of victim status, the Court has recalled the inability of certain vulnerable applicants to complain to the domestic authorities and seek redress. In one such case, it referred to the inability of an applicant who was detained and suffered from schizophrenia to coherently complain of his ill-treatment.²³ More generally, it has referred to the vulnerability of detainees to find that ‘the fact that an applicant has been awarded a sum of money in compensation in the domestic proceedings is not decisive’.²⁴ To determine whether domestic redress has led to a loss of victim status, the Court held, it instead had to examine all the circumstances and determine whether the amount of compensation awarded was sufficient to compensate for the Convention violation at stake.²⁵

On this basis, the Court has recognised victim status in several cases. Even where the respondent state has acknowledged the underlying breach of the Convention and compensated the applicants, the Court has found – relying again on vulnerability – that this is not decisive.²⁶ Similarly, regarding the failure of the domestic authorities to provide timely protection to a mentally ill minor who had been subjected to prostitution and rape, the Court found that – as the state had not compensated her for the period during which she was vulnerable and awaiting protection measures – she had not lost her victim status.²⁷

²² *Abdulkadyrov and Dakhtayev v Russia* App no 35061/04, Judgment of 10 July 2018, para 24.

²³ *Gömi v Turkey* App no 38704/11, Judgment of 19 February 2019, para 61.

²⁴ *Oleksa v Poland* App no 47580/13, Judgment of 12 July 2018, not reported, para 24.

²⁵ *Ibid.*, paras 24–27.

²⁶ *Budnik v Poland* App no 61928/13, Judgment of 7 September 2017, para 21.

²⁷ *V.C. v Italy* App no 54227/14, Judgment of 1 February 2018, para 61.

C. Granting of Interim Protection

The Court has granted interim protection under rule 39 of the Rules of Court²⁸ in certain Article 3 cases specifically in light of applicants' vulnerability. For example, in the 2012 *Yordanova* judgment, the Court provided rule 39 protection in order to stall the applicants' eviction until arrangements could be made to ensure housing for the vulnerable among them.²⁹ Similarly, in *Hosseini Kheel v Netherlands*, the Court granted interim protection because of the 'plentiful information on the vulnerable situation of single women in Afghanistan'.³⁰

While it is difficult to determine with any certainty whether the Court is more likely to grant interim protection to vulnerable applicants, it should be noted that the relevant Practice Direction states that the Court will make such an order where 'it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied'.³¹ This idea of proving 'real risk' seems, at least by analogy, similar to the requirement of proof of real risk of exposure to ill-treatment in expulsion cases, where vulnerability does facilitate matters of proof for applicants. Given that little is known about the grounds for the interim protection orders made by the Court, it is not clear whether and to what extent it has regard for the vulnerability of applicants here. However, what is clear is that, as the Court's former President, Jean-Paul Costa, stated in 2011, 'the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable'.³²

D. Requirement to Use and Exhaust Domestic Remedies (Applicant's Duty of Diligence)

The Court's case law has indicated that an identification as vulnerable may exempt applicants from the obligation to diligently use and exhaust available domestic remedies before taking their case to Strasbourg.

For example, when it comes to the obligation to exhaust all available domestic remedies, the Court has exempted applicants from using specific remedies in

²⁸ r 39 (interim measures) of the Rules of the ECtHR of 1 January 2020, www.echr.coe.int/documents/rules_court_eng.pdf.

²⁹ *Yordanova and Others v Bulgaria* App no 25446/06, Judgment of 24 April 2012, para 49.

³⁰ ECtHR Press Unit, *Factsheet: Interim Measures*, September 2016, www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf, 4, referring to *Hosseini Kheel v Netherlands* App no 34583/08, Decision of 16 December 2008.

³¹ Practice direction on requests for interim measures issued by the President of the Court in accordance with r 32 of the Rules of Court on 5 March 2003 and amended on 16 October 2009 and on 7 July 2011, www.echr.coe.int/Documents/Rules_Court_ENG.pdf, 52–53.

³² Speech by Mr Jean-Paul Costa on the occasion of the opening of the judicial year, 28 January 2011, reproduced in the Annual Report of the ECtHR for 2011, www.echr.coe.int/Documents/Annual_report_2011_ENG.pdf, 35–46, 40.

light of their mental illness.³³ As concerns the duty of due diligence in promptly applying to the domestic authorities, its response depends on the circumstances of the case. The Court has held that a delay in lodging a complaint domestically is not decisive where the authorities 'ought to have been aware that an individual could have been subjected to ill-treatment'.³⁴ That conclusion, originally reached in *Mocanu*, accepts that a delay in using domestic remedies does not preclude the admissibility of an application 'where the applicant was in a particularly vulnerable situation, having regard to the complexity of the case and the nature of the alleged human rights violations at stake, and where it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues'.³⁵

Since *Mocanu*, the Court has repeated its finding that, as concerns applicants' duty of diligence to promptly contact the domestic authorities, not every delay will negatively impact the admissibility of applications brought by 'particularly vulnerable' applicants.³⁶ This finding is linked to the Court's consistent case law concerning states' obligation to investigate possible ill-treatment even absent an express complaint.³⁷ In any event, the authorities must act immediately after an official complaint is lodged, and must take into account the particular vulnerability of victims and their reduced readiness or willingness to make a complaint at all.³⁸

When it comes to time limits for the use of domestic remedies, the Court has held that, in the case of continuous rights violations vis-à-vis vulnerable applicants, rigid time limits may place an 'unreasonable procedural burden' on these individuals.³⁹ Regarding prisoners detained under inadequate conditions, this type of approach ignores their vulnerability and the fact that their main concern is their daily struggle to meet their own basic needs and to maintain their health, dignity, and safety.⁴⁰

While such findings remain the exception, these cases do show that the Court is potentially willing to waive the exhaustion of domestic remedies requirement and the duty of diligence for vulnerable applicants under certain circumstances.⁴¹

E. The Six-Month Rule

Vulnerability also comes into play concerning the application of the six-month rule – ie the rule in Article 35 § 1 ECHR that applications must be filed in Strasbourg

³³ *M.S. v Croatia (No. 2)* App no 75450/12, Judgment of 19 February 2015, para 123.

³⁴ *Mocanu and Others v Romania* App nos 10865/09 ..., Judgment (GC) of 17 September 2014, Reports 2014 (extracts), para 265.

³⁵ *Ibid.*

³⁶ *Melnichuk and Others v Romania* App nos 35279/10 and 34782/10, Judgment of 5 May 2015, para 81.

³⁷ *Krsmanović v Serbia* App no 19796/14, Judgment of 19 December 2017, para 64, citing *Velev v Bulgaria* App no 43531/08, Judgment of 16 April 2013, paras 59–60.

³⁸ *Ibid.*, para 73.

³⁹ *Nikitin and Others v Estonia* App nos 23226/16 ..., Judgment of 29 January 2019, para 141.

⁴⁰ *Ibid.*

⁴¹ *Dorneau v Romania* App no 55089/13, Judgment of 28 November 2017, para 99.

no later than six months after a final domestic decision, which will be reduced to four months by Protocol No 15 to the ECHR. The previous section concerned the diligence required of applicants in initiating domestic proceedings, and the fact that vulnerability has been seen as mitigating the consequences of a failure to do so. As concerns applicants' 'second duty of diligence', namely to speedily apply to the Court, vulnerability has helped applicants to overcome the consequences of bringing an application out of time.⁴²

In cases where the domestic proceedings continue fruitlessly for years or even decades, the Court requires applicants to bring their applications to Strasbourg within six months of the moment in which they became aware, or should have become aware, that there would be no final decision in their case. The application of this rule, which raises more challenging issues than the simple calculation from the time of a final domestic decision as envisioned in Article 35 § 1 ECHR,⁴³ can respond to the vulnerability and feeling of powerlessness of an applicant.

For example, in *Mocanu*, the Court considered not only the applicant's failure to bring domestic proceedings in good time, but also his delay in applying to the Court. The Court held that such a delay does not preclude the admissibility of an application in exceptional cases where applicants are in a situation of particularly vulnerability. It concluded that the vulnerability and feeling of powerlessness of the applicant plausibly explained his failure to begin proceedings for over 10 years, given that 'it was not unreasonable for him to wait for developments that could have resolved crucial factual or legal issues'.⁴⁴ It held, therefore, that 'the applicant's vulnerability and his feeling of powerlessness ... amount[ed] to a plausible and acceptable explanation for his inactivity'.⁴⁵

F. The Burden of Proof

In the Court's jurisprudence, vulnerability can also affect the application of the *affirmanti incumbit probatio* principle in an applicant's favour.⁴⁶ Vulnerability thus affects the distribution of the burden of proof, and the Court considers the nature of the allegations made and the circumstances of a given case – including the vulnerability of the applicant – in order to determine whether that onus is on the applicant or on the state.⁴⁷

In this context, the Court has for example held that, regarding persons in the state's exclusive authority, it is for the authorities to refute allegations of ill-treatment.⁴⁸ This includes proving that, when persons with a disability are

⁴² Ibid, paras 82, 85–90.

⁴³ *Melnichuk and Others* (n 36), para 82.

⁴⁴ *Mocanu and Others* (n 34), para 275.

⁴⁵ Ibid.

⁴⁶ *Ersin Erkuş and Others v Turkey* App no 40952/07, Judgment of 31 May 2016, para 60.

⁴⁷ *Zamferesko v Ukraine* App no 30075/06, Judgment of 15 November 2012, para 47.

⁴⁸ Ibid, para 47.

placed in detention, measures are taken to ensure that their needs are met.⁴⁹ The further a person is removed from outside control – for example when they are detained unlawfully, without a record of their detention being drawn up –, the more favourably the Court views the affected individual's version of the facts.⁵⁰

The same goes for the submission of documentary evidence. In one 2016 case, the Court found that the Russian government's failure to submit legible and complete medical records regarding an ill applicant who was vulnerable in light of his detention meant that it could 'draw inferences as to the well-foundedness [*sic*] of the applicant's allegations and the Government's conduct'.⁵¹ It went on to find a violation of Article 3 because of the inadequate medical care provided.

In addition, when states make preliminary objections alleging that applicants failed to exhaust available domestic remedies, the Court has required the state to prove that these remedies were effective if the applicants were vulnerable, for example because they were placed in a mental health facility.⁵²

This approach to the burden of proof may benefit vulnerable applicants, but it works to the disadvantage of those who are *not* considered vulnerable. In this regard, the Court has found that non-vulnerable applicants cannot be absolved from the duty to substantiate an alleged Convention violation.⁵³ The issue of non-vulnerability is discussed more in depth in later chapters.

G. Positive Obligations

Vulnerability reasoning has also been instrumental for the continuing development of the positive obligations derived from Article 3 in combination with Article 1 ECHR.⁵⁴ These positive obligations mean that states must 'take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals'.⁵⁵

Regarding vulnerable individuals, states have three separate positive obligations, namely to (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

⁴⁹ *Z.H. v Hungary* App no 28973/11, Judgment of 8 November 2012, paras 29 and 31.

⁵⁰ *L.G. v Belgium* App no 38759/14, Judgment of 18 September 2018, para 99.

⁵¹ *Makshakov v Russia* App no 52526/07, Judgment of 24 May 2016, paras 24, 96–97 and 101.

⁵² *M. v Ukraine* App no 2452/04, Judgment of 19 April 2012, para 83.

⁵³ *S.N. and T.D. v Latvia* App no 5794/13, Decision of 6 December 2016, para 68.

⁵⁴ 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.

⁵⁵ *M.P. and Others v Bulgaria* App no 22457/08, Judgment of 15 November 2011, para 108; Lavrysen Laurens, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' 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) 162–82, 79–80, 109–10.

are raised and, under certain circumstances, (c) establish and effectively apply a system punishing the ill-treatment and providing sufficient safeguards to victims.⁵⁶

In this context, vulnerability provides a minimum content to states' positive obligations. One example of this is *O'Keeffe v Ireland*, where the Court refined the positive obligation to 'provide effective protection of vulnerable persons'.⁵⁷ In this case, regarding a child victim of sexual assault, it held that the positive obligation to protect should not 'impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources', meaning that not every risk of ill-treatment triggers the protective obligation.⁵⁸ However, it held, states should 'at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge'.⁵⁹

Positive obligations under Article 3 also require states to ensure protection from ill-treatment by private parties, which includes effective protection of identified individuals from criminal acts by third parties, 'as well as reasonable steps to prevent ill-treatment of which the authorities knew or ought to have known'. This was the finding made in *Rumor v Italy*, a case that concerned a victim of domestic violence, and where the Court held that '[c]hildren and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity'.⁶⁰

Article 3 also entails a positive obligation to investigate alleged violations of the provision. In *Ribitsch v Austria*, one of the very first cases in which the Court had regard to individual vulnerability in the context of Article 3, it also laid the groundwork for this investigative obligation. The Court has since held that, where there are sufficiently clear indications that ill-treatment has taken place, the authorities must investigate even where no official complaint has been made. This was justified by 'the particularly vulnerable situation of victims and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint'.⁶¹ Article 3 also requires 'vigorous investigation' of alleged offences against members of vulnerable groups.⁶²

The Court has laid down special requirements for what that investigation should look like. For example, in a case concerning the alleged sexual assault of a minor, the Court held that the domestic authorities had violated their positive obligations

⁵⁶ *Bălșan v Romania* App no 49645/09, Judgment of 23 May 2017, para 57.

⁵⁷ *P. v United Kingdom* App no 1529/10, Decision of 12 November 2013, para 68.

⁵⁸ *O'Keeffe v Ireland* App no 35810/09, Judgment (GC) of 28 January 2014, Reports 2014 (extracts), para 144.

⁵⁹ *Ibid*, emphasis added.

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

⁶¹ *Stanimirovic v Serbia* App no 26088/06, Judgment of 18 October 2011, para 39. Compare also the similar findings in *Buzilo v Republic of Moldova* App no 52643/07, Judgment of 21 February 2012, para 29, and *Mocanu and Others* (n 34), para 275.

⁶² *Balázs v Hungary* App no 15529/12, Judgment of 20 October 2015, para 53.

under Articles 3 and 8 ECHR by 'having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the sexual assault of children'.⁶³ Similarly, in a case concerning the rape of a mentally disabled fifteen-year-old, the Court paid special attention to the vulnerability of the applicant when it held that the domestic authorities should have shown 'increased diligence in analysing the applicant's statements' as well as paying 'particular attention' to 'the validity of the applicant's consent to the sexual acts in the light of her intellectual capacity'.⁶⁴ It did so in light of its finding that 'failure to properly investigate or provide appropriate judicial response to complaints of sexual abuse against children or other vulnerable persons such as persons with intellectual disabilities creates a background of impunity'.⁶⁵

In that latter case, the Court found that the domestic authorities had failed to comply with their positive obligations in multiple ways. For one, they had not taken any of the applicant's personal circumstances, including 'her age and her mental and physical development or the circumstances in which the incident took place', into account.⁶⁶ Furthermore, the Court also found that the respondent State had failed in its 'positive obligations to apply effectively a criminal-law system punishing all forms of rape and sexual abuse'.⁶⁷ In other words, Article 3 requires states to deploy the criminal law vis-à-vis certain violations of the provision. As noted above in the section concerning the sexual abuse of minors, the deterrence limb of Article 3 requires the authorities to prevent sexual abuse of minors where they have at least imputed knowledge of a corresponding risk of abuse; this includes a 'coercive obligation' to deploy the criminal law.⁶⁸

Known vulnerability may contribute to imputing knowledge of a risk of ill-treatment to the state, which then triggers the state's positive obligations to protect certain groups or individuals.⁶⁹ In certain situations, the Court has therefore held that the state must have been aware of certain risks, for example of 'the level of sexual crime by adults against minors', and should have taken adequate measures in response.⁷⁰

In some cases, states have positive obligations to provide care and material support to vulnerable applicants. In *Mubilanzila Mayeka and Kaniki Mitunga*, concerning an unaccompanied minor migrant, the Court held that the domestic

⁶³ *M. and C. v Romania* App no 29032/04, Judgment of 27 September 2011, para 119.

⁶⁴ *I.C. v Romania* App no 36934/08, Judgment of 24 May 2016, para 56.

⁶⁵ *Ibid*, para 55.

⁶⁶ *Ibid*, para 56.

⁶⁷ *Ibid*, para 60.

⁶⁸ Natasa Mavronicola, 'Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR', 80 *Modern Law Review* (2017), 1026–51; Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?', in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP, 2012), 135–55.

⁶⁹ *O'Keeffe* (n 58), paras 144–46, 162, 168.

⁷⁰ *Ibid*, para 162.

authorities had violated the five-year-old applicant's rights under Article 3 when they subjected her to migration detention and expulsion. It did so by finding that the applicant, as an unaccompanied minor, 'indisputably 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'.⁷¹ Similarly, in *Shiozhvili and Others v Russia*, the Court found that the Russian authorities, who left a pregnant woman and her four minor children stranded in an unfamiliar city during winter, had violated their positive obligations under Article 3. Because the authorities had failed to provide any form of support to the applicants after forcing them into a vulnerable situation, they had violated their duty to provide material support.⁷²

In short, vulnerability and positive obligations, taken together, mean that Article 3 requires states to become responsive – in other words, to demonstrate 'active State involvement'⁷³ – in order to prevent and address breaches of vulnerable individuals' rights. In doing so, states must, *inter alia*, take the specifics of an applicant's vulnerability – such as child-specific psychology or the impaired ability of a mentally disabled person to give valid consent to a sexual act – into consideration. They must take measures that are specifically tailored to protecting the Article 3 rights of the most vulnerable members of society before, while, and after they are exposed to ill-treatment. In some cases, Article 3 may also require the state to deploy the criminal law in order to effectively protect vulnerable individuals.

H. Reassessment of a Domestic Finding

In some cases, the Court uses vulnerability reasoning not only to assess the quality of the domestic investigation, but also to re-examine the domestic authorities' evaluation of the facts of a case.

One example of this is *Balázs v Hungary*, which was brought by a Roma applicant who had suffered an allegedly racially motivated beating. Despite various indications to the contrary, including the alleged use of racist slurs by the perpetrator, the domestic prosecutor found that criminal responsibility for a violent hate crime could not be established 'beyond any doubt', and therefore discontinued the proceedings.⁷⁴ When it examined this case, the Court's starting point was that alleged offences against vulnerable individuals require 'vigorous investigation'.⁷⁵

⁷¹ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03, Judgment of 12 October 2006, Reports 2006-XI, para 55.

⁷² *Ibid*, para 86.

⁷³ *M. and M. v Croatia* App no 10161/13, Judgment of 3 September 2015, Reports 2015 (extracts), paras 135–36.

⁷⁴ *Balázs* (n 62), paras 10, 11, 74.

⁷⁵ *Ibid*, para 53.

The failure of the domestic authorities to see any relevance in the perpetrator's racist social media posts and their insistence on a purely racist motivation to find that a hate crime had been committed, the Court held, had led to a 'manifestly unreasonable assessment of the circumstances of the case' and a violation of Article 14 in conjunction with Article 3 ECHR.⁷⁶

The Court also uses vulnerability to allow itself to re-examine domestic assessments in expulsion cases.⁷⁷ There, the Court has occasionally re-evaluated whether an applicant faces a real risk of harm upon expulsion by conducting its own assessment in light of the vulnerability of the applicant or the group to which he or she belongs. Although vulnerability does not always yield a favourable result for the applicants concerned in the Court's expulsion case law,⁷⁸ it has regularly led the Court to depart from the findings of the domestic authorities.⁷⁹

I. Minimum Level of Severity

Vulnerability under Article 3 can affect the minimum level of severity that ill-treatment must attain in order to fall within the scope of the provision. In other words, vulnerability reasoning broadens the scope of Article 3.⁸⁰ As discussed above, the minimum level of severity required under this provision has long been considered relative by the Court, so this context-responsiveness is not new in itself. The Court has consistently considered that the assessment of this minimum 'depends on all the circumstances of the case', which includes applicants' vulnerability.⁸¹

The Court frequently finds that the nature, duration, and severity of a given instance of ill-treatment have violated Article 3 given the facts of a case as a whole, the circumstances, and the vulnerability of the applicant.⁸² This applies

⁷⁶ Ibid, paras 75–76.

⁷⁷ Compare *Samina v Sweden*, where the Court held regarding the applicant's expulsion from Sweden that it did not need to re-examine the assessment made by the domestic authorities because the applicant had not proved that she was vulnerable (*Samina v Sweden* App no 55463/09, Judgment of 20 October 2011, para 64).

⁷⁸ See, for example, *Sow v Belgium* App no 27081/13, Judgment of 19 January 2016, para 56, where the applicant was not considered particularly vulnerable to female genital mutilation; *G.J. (n 12)*; *A.M.E. v Netherlands* App no 51428/10, Decision of 13 January 2015, para 32.

⁷⁹ *U.N. v Russia* App no 14348/15, Judgment of 26 July 2016, paras 39–40; *Khamrakulov v Russia* App no 68894/13, Judgment of 16 April 2015, para 66; *Hirsi Jamaa and Others v Italy* App no 27765/09, Judgment (GC) of 23 February 2012, Reports 2012, paras 125 and 155.

⁸⁰ *Gjini* App no 1128/16, Judgment of 15 January 2019, para 82.

⁸¹ *Tarakhel v Switzerland* App no 29217/12, Judgment (GC) of 4 November 2014, Reports 2014 (extracts), paras 118–119; *Khlaifia and Others v Italy* App no 16483/12, Judgment (GC) of 15 December 2016, Reports 2016 (extracts), para 160.

⁸² See, for example, *Grzywaczewski v Poland* App no 18364/06, Judgment of 31 May 2012, para 102; *Wenerski (No 2)* App no 38719/09, Judgment of 24 July 2012, paras 56 and 59; *I.G. and Others v Slovakia* App no 15966/04, Judgment of 13 November 2012, para 123. See also *Zarzycki v Poland* App no 15351/03, Judgment of 12 March 2013, where the Court held that *even though* the applicant was vulnerable, the threshold of severity had not been met (para 125).

to individuals belonging to a recognised 'vulnerable group' – individuals with disabilities,⁸³ asylum-seekers⁸⁴ and Roma,⁸⁵ to be specific – but also to individuals recognised simply as 'vulnerable'.⁸⁶

For example, the Court has taken the special vulnerability of detainees who are in poor health into account, finding that poor detention conditions exacerbate the feelings of distress of these vulnerable persons.⁸⁷ When it comes to states' positive obligations, a failure to take into account the specific needs and extreme vulnerability of applicants can raise treatment up past the threshold of severity.⁸⁸ In *R.R. v Poland*, for example, the Court found that the domestic authorities' failure to provide timely information to the applicant about the health of her foetus meant that she was exposed to 'weeks of painful uncertainty' and 'acute anguish'; given that she was in a 'situation of great vulnerability', this meant that the threshold under Article 3 had been met.⁸⁹

The *R.R. v Poland* judgment also touches upon another interesting aspect of the Court's vulnerability jurisprudence, namely the fact – as discussed above – that a sense of vulnerability can in and of itself be humiliating and meet the threshold of severity required under Article 3.⁹⁰ In other words, the severity of a feeling of humiliation can suffice to meet the threshold of severity required under Article 3.

J. The Intent and Purpose Requirements of Torture

The Court takes vulnerability into account when determining whether a given treatment constitutes torture, as opposed to inhuman or degrading treatment. This is particularly true in cases concerning detainees (especially those in unrecorded detention) who are ill-treated by the authorities in order to extract information.⁹¹ While the intent and purpose requirements are usually also discussed in these cases – although the Court has admitted that it is not always straightforward to link ill-treatment to the aim of extracting a confession⁹² – vulnerability argumentation serves to underscore the utter denial of rights and dignity that occurs in these situations.⁹³

⁸³ *Z.H.* (n 49), paras 29–31.

⁸⁴ *Tarakhel* (n 81), paras 118–19; *M.S.S. v Belgium and Greece* App no 30696/09, Judgment (GC) of 21 January 2011, Reports 2011, paras 232–33, 251, 263.

⁸⁵ *I.G. and Others* (n 82), para 123.

⁸⁶ *Menesheva v Russia* App no 59261/00, Judgment of 9 March 2006, Reports 2006-III, para 61; *Wenerski (No 2)* (n 82), paras 56 and 59.

⁸⁷ *Wenerski (No 2)* (n 82), para 56.

⁸⁸ *Tarakhel* (n 81), para 119.

⁸⁹ *R.R. v Poland* App no 27617/04, Judgment of 26 May 2011, Reports 2011 (extracts), paras 159, 161.

⁹⁰ *Rachwalski and Ferenc v Poland* App no 47709/99, Judgment of 28 July 2009, para 61.

⁹¹ *Razzakov v Russia* App no 57519/09, Judgment of 2 February 2015, para 54; *Lykova v Russia* App no 68736/11, Judgment of 22 December 2015.

⁹² *Kaverzin v Ukraine* App no 23893/03, Judgment of 15 May 2012, para 174.

⁹³ *Razzakov* (n 91), para 54.

In some cases, even in detention, ill-treatment cannot be linked to the purpose of extracting a confession. In one case against Greece, the Court considered the rape of a male detainee by a guard. There was no discussion of a proscribed purpose here, and instead the Court focused on whether the treatment was intentional and the fact that it was 'a particularly serious and reprehensible form of ill-treatment given the ease with which the perpetrator could abuse the vulnerability and fragility of the victim.'⁹⁴ Focusing on the particular cruelty of the act and the intentionality of the guard's behaviour, the Court found that it had constituted torture.⁹⁵

Similarly, the applicants in *Cirino and Renne v Italy*, who complained about the conditions of their detention and the gratuitous and repeated acts of violence they suffered in prison, were both described as vulnerable and found to have been tortured. This finding was based on the deliberate, premeditated, and organised nature of their ill-treatment, the routine nature of ill-treating 'problematic' detainees at the facility in question, and the fact that the treatment served to punish and discipline them.⁹⁶ The purposive element was applied very loosely here, and it should be noted that much ill-treatment of this severity, if not administered at random, could be described as a form of punishment, discipline, or intimidation, which the Court has also recognised as proscribed purposes.⁹⁷

There are other cases in which the elements of purpose and intent take a back seat in the Court's understanding of what constitutes torture. For example, in *Cestaro v Italy*, violence perpetrated by police against a vulnerable elderly man sitting with his arms up and his back against a wall led the Court to make a finding of torture.⁹⁸ Here, the Court did note that there are two elements to defining torture: severity and purpose.⁹⁹ It went on to discuss various reasons why the treatment suffered constituted torture, but did so while focusing largely on the gratuitous, unmerited, and excessive nature of the violence inflicted, and not on its purpose.

In this regard, it is remarkable that there have been no cases to date in which the ill-treatment inflicted by private parties was characterised as torture by the Court. In other words, the Court seems to continue to see torture as something that only state actors can perpetrate, which is a somewhat questionable approach, especially given the level to which state acquiescence or toleration can facilitate or even encourage private ill-treatment.¹⁰⁰ In addition, specifically in a vulnerability context, it is relevant to recall that the UNCAT lists discrimination as a

⁹⁴ *Zontul v Greece* App no 12294/07, Judgment of 17 January 2012, para 88, translated from the original French by the author.

⁹⁵ *Ibid.*, para 92.

⁹⁶ *Cirino and Renne v Italy* App no 2539/13 and 4705/13, Judgment of 26 October 2017, paras 78–87.

⁹⁷ *Gäfigen v Germany* App no 22978/05, Judgment (GC) of 1 June 2010, Reports 2010, paras 89–90.

⁹⁸ *Cestaro v Italy* App no 6884/11, Judgment of 7 April 2015, paras 176, 178, 190.

⁹⁹ *Ibid.*, para 171.

¹⁰⁰ *Volodina v Russia* App no 41261/17, Judgment of 9 July 2019, regarding the authorities' toleration of domestic violence.

proscribed purpose that can qualify treatment as torture. For example, when it comes to gender-based or homophobic violence, it could be argued that failing to recognise ill-treatment based on these vulnerability-related motives as torture if they are severe enough to justify doing so means ‘turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.’¹⁰¹

K. Hindrance by the State (Article 34 ECHR)

Under Article 34 ECHR, which concerns the right to individual application, the Contracting States to the Convention ‘undertake not to hinder in any way the effective exercise of this right’. States are thereby precluded from hindering applicants’ effective communication with the Court. This requirement, too, is responsive to an applicant’s vulnerability.¹⁰² For example, in a 2015 case against Russia, the Court found that, in determining whether states have complied with Article 34, ‘regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities’. In that case, the Court held that the applicants – who were imprisoned, barely spoke Russian, had no family or social support, and were not provided with a translator – were ‘particularly at risk to unacceptable practice [*sic*]’.¹⁰³

Article 34 also enshrines positive obligations regarding applicants in a situation of vulnerability and dependence. Regarding these individuals – including detainees – the authorities have an obligation ‘to furnish all necessary facilities to make possible a proper and effective examination of applications’.¹⁰⁴ This includes providing applicants with stationery, stamps, and the files needed to make an application to the Court.¹⁰⁵ In one 2016 case, for example, the Court held that Article 34 ‘may impose on the State authorities an obligation to provide copies of documents to applicants who find themselves in situations of particular vulnerability and dependence and are unable to obtain the documents needed for their files without State support’.¹⁰⁶ This obligation has been narrowed again in other cases, with the Court arguing that states are not automatically required to provide copies of any requested document.¹⁰⁷

L. Just Satisfaction (Article 41 ECHR)

The vulnerability of applicants is also relevant in the context of just satisfaction claims under Article 41 ECHR. As concerns the need for applicants to submit a

¹⁰¹ *M.C. and A.C. v Romania* App no 12060/12, Judgment of 12 April 2016, para 113.

¹⁰² *Knyazev v Russia* App no 25948/05, Judgment of 8 November 2007, paras 116–19.

¹⁰³ *L.M. and Others v Russia* App nos 40081/14 ..., Judgment of 15 October 2015, para 160.

¹⁰⁴ *Yusunova and Yusunov v Azerbaijan* App no 59620/14, Judgment of 2 June 2016, para 109.

¹⁰⁵ *Szemkovics v Romania* App no 27117/08, Decision of 17 December 2013, paras 27–31, esp 30.

¹⁰⁶ *Savchenko v Ukraine* App no 1574/06, Judgment of 22 September 2016, para 214.

¹⁰⁷ *Tymchenko v Ukraine* App no 47351/06, Judgment of 13 October 2016, para 104.

corresponding claim for damages, in one 2015 judgment, an applicant – who had suffered a violation of Article 3 on account of his conditions of detention – failed to make a claim for just satisfaction. The Court noted that the individual concerned ‘must have suffered considerably’ under the detention regime in question, as he was missing a hand and had committed acts of self-harm.¹⁰⁸ Under Article 41 ECHR, the Court ruled that he would have been entitled to EUR 23,250 in just satisfaction had he made a corresponding claim. The Court held that given that the case concerned ‘a serious breach of Article 3 of the Convention suffered by a disabled and particularly vulnerable applicant, it would be unduly harsh fully to reject his claim in respect of non-pecuniary damage’, therefore awarding him half of the amount to which he would have been entitled, so EUR 11,625.¹⁰⁹ This is a curious result, given that the Court seems to have been uncomfortable both with not providing just satisfaction at all, and with making a full award, and seems to have relied on vulnerability to create a compromise, perhaps as a way of reaching an equitable medium between different judges’ opposing opinions.

In addition to the above, vulnerability may also play a role when it comes to determining the *amount* of just satisfaction awarded by the Court, or its decision to award any amount at all.¹¹⁰ Here, too, the case law is spotty and there is not much clarity about when, why, or how vulnerability will play a role.

In 2017, the Grand Chamber had an opportunity to address this issue in *Nagmetov v Russia*. It found that it can occasionally and exceptionally make awards even where applicants have not made a ‘specific claim’ for just satisfaction.¹¹¹ This was an Article 2 case, and the majority did not address the issue of vulnerability, but the three dissenters did refer to the concept, which indicates that it may have been discussed by the majority as well.¹¹² Arguably, covert vulnerability analysis could be part of *Nagmetov*’s regard for the overall context of a Convention violation, or part of establishing the particular gravity and impact of a violation. Future case law will have to show what the role of vulnerability is in this regard.

M. Consequential Orders (Article 46 ECHR)

Consequential orders are made by the Court in selected violation judgments to indicate the measures that states must take to end a rights-violating situation and fulfil their obligations under Article 46 ECHR.¹¹³ Nesa Zimmermann has argued that vulnerability may make the Court more likely to order individual or general

¹⁰⁸ *Neshkov and Others v Bulgaria* App nos 36925/10 ..., Judgment of 27 January 2015, paras 69 and 302.

¹⁰⁹ *Ibid.*, para 302.

¹¹⁰ *Ilgiz Khalikov v Russia* App no 48724/15, Judgment of 15 January 2019, para 107.

¹¹¹ *Nagmetov v Russia* App no 35589/08, Judgment (GC) of 30 March 2017, paras 69 and 71.

¹¹² *Ibid.*, Joint Dissenting Opinion of Judges Raimondi, O’Leary, and Ranzoni, para 42.

¹¹³ *Stanev v Bulgaria* App no 36760/06, Judgment (GC) of 17 January 2012, Reports 2012, para 255, citing *Broniowski v Poland* App no 31443/96, Judgment (GC) of 22 June 2004, Reports 2004-V, para 194.

measures.¹¹⁴ She supports her argument by referring to *Yordanova and Others v Bulgaria*.¹¹⁵ Although the Court has been vague in this regard, some other judgments support her conclusion.

When it comes to general measures encouraged by or linked to vulnerability, there are a number of examples from the Article 3 case law. For example, in *Savridin Dzhurayev v Russia*, the Court held that ‘in view of their particularly vulnerable situation, applicants in respect of whom the Court has indicated interim measures must be granted effective protection by the State not only in law, but also in practice’. It then went on to order a general measure requiring the domestic authorities to implement an ‘appropriate mechanism, tasked with both preventative and protective functions’ to tackle kidnapping and irregular removal from Russia.¹¹⁶

Another example of this came about in *Śławomir Musiał v Poland*, where, considering serious and structural problems with conditions in Polish prisons, the Court required the respondent state to rapidly take ‘necessary legislative and administrative measures ... in order to secure appropriate conditions of detention of detained persons, in particular, adequate conditions and medical treatment for prisoners, who, like the applicant, need special care owing to their state of health’.¹¹⁷ In yet another case, the Court had regard to the vulnerability of criminal suspects in requiring urgent specific reforms to the national legal system.¹¹⁸

Vulnerability may also lead to an order of specific measures. For example, in *Neshkov and Others v Bulgaria*, concerning a particularly vulnerable applicant facing harsh detention conditions, the Court ordered that, to ‘redress the effects of the breach of his rights under Article 3 of the Convention, the authorities must, if he so wishes, urgently transfer him to another correctional facility’.¹¹⁹

There does thus seem to be some willingness on the part of the Court to indicate general and individual vulnerability-related measures. When it comes particularly to general measures, these may provide an avenue for addressing broader systems of disadvantage and marginalisation. It is difficult to make general conclusions in this context, however, given that the Court’s reasons for ordering general measures under Article 46 ECHR are varied and complex, and depend on the nature and circumstances of the case, the urgency of providing redress and the question of whether legislative changes are necessary to address the issue, for instance.¹²⁰

¹¹⁴ Nesa Zimmermann, ‘Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights’ (2015) 25(4) *Swiss Review of International and European Law* (*Schweizerische Zeitschrift für internationales und europäisches Recht*) 539–62, 562.

¹¹⁵ *Ibid.*, 561, referring to *Yordanova and Others* (n 29), para 166.

¹¹⁶ *Savridin Dzhurayev v Russia* App no 71386/10, Judgment of 25 April 2013, Reports 2013 (extracts), para 262.

¹¹⁷ *Śławomir Musiał v Poland* App no 28300/06, Judgment of 20 January 2009, para 107.

¹¹⁸ *Kaverzin* (n 92), paras 174 and 182.

¹¹⁹ *Neshkov and Others* (n 108), para 292.

¹²⁰ See Helen Keller and Cedric Marti, ‘Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ (2015) 26(4) *European Journal of International Law* 829–50, 843.