# The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights

# La protection des groupes vulnérables et des individus devant la Cour européenne des droits de l'homme

Yussef Al Tamimi


## Abstract

*Several legal authors have noted that, in recent years, vulnerability reasoning has played an increasingly prominent role in the case law of the European Court of Human Rights. In order to test this hypothesis, this article analysed all Court judgments that contain the terms "vulnerability", "vulnerable" or "vulnérabilité", adding up to 557 cases until January 2014. This comprehensive body of case law allows for a new analysis of the role of vulnerability in the Court's case law. A marked increase is found in the use of vulnerability reasoning by the Court; since 2007 (2%) the use has risen to 8% of the total number of judgments in 2013. A substantive analysis of the judgments reveals that the Court makes several distinctions between different types of vulnerability, while it also brings to light internal contradictions. For instance, the Court is ambiguous on whether certain groups, e.g. victims in criminal cases, are categorically vulnerable. In the final section, it is argued that the increase of the use of vulnerability reasoning by the Court coincides with its more active stance in the protection of disadvantaged groups. Vulnerability provides a strong instrument to place greater responsibilities on and reduce the margin of appreciation of states.*

## Résumé

*Plusieurs chercheurs juristes ont noté que, ces dernières années, le raisonnement basé sur la vulnérabilité joue un rôle de plus en plus important dans la jurisprudence de la Cour européenne des droits de l'homme. Pour tester cette hypothèse, cet article analyse tous les jugements qui contiennent les termes «vulnérabilité», «vulnérable» ou «vulnerable», totalisant 557 cas en janvier 2014. Ce large corpus permet une nouvelle analyse portant sur le rôle de la vulnérabilité dans la jurisprudence de la Cour. Une hausse de l'utilisation de raisonnement basé sur la vulnérabilité par la Cour est constatée : le terme a été utilisé dans 8% du nombre total de jugements en 2013, partant de 2% en 2007. Une solide analyse des jugements révèle que la Cour opère plusieurs distinctions entre différents types de vulnérabilité, et met en lumière certaines contradictions. La Cour est ambiguë dans la définition des catégories dites «vulnérables», comme par exemple les victimes de droit pénal. Dans la dernière partie, il est avancé que la hausse de l'usage de raisonnements basée sur la vulnérabilité coïncide avec une approche active de la Cour dans la défense des groupes défavorisés. Le terme de vulnérabilité permet de définir les responsabilités et de réduire la marge d'appréciation des États.*

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## Introduction

### The Autonomy Myth

"*All human beings are born free* (…)". This sentence forms the beginning of the Universal Declaration of Human Rights, which was adopted by the United Nations after the Second World War in 1948. It serves as a classic example of the liberal notion that human beings are born free and remain autonomous throughout their lives. Many other legal texts contain the same ideal, either in letter or spirit. A new movement in legal philosophy is now questioning this basic principle. According to this "vulnerability movement", inspired by the work of Martha Fineman, human beings are born physically and socially dependent on their environment, and remain dependent on their environment for the rest of their lives. The essential characteristic of human beings is therefore not autonomy, but rather vulnerability.

Several legal authors[1] have noted that, in recent years, vulnerability reasoning has also played an increasingly prominent role in the case law of the European Court of Human Rights (hereafter: the Court or ECtHR). Some have gone as far as calling the trend a revolution. However, studies on this topic are usually limited to cherry-picking stand-out cases like *M.S.S. v. Belgium and Greece*.[2] The aim of this article is to provide a comprehensive analysis of the Court's case law regarding vulnerability. First, the hypothesis will be tested if vulnerability has indeed played a bigger role in the Court's case law in previous years than before. All Court judgments that contain the terms "vulnerability", "vulnerable" or "*vulnérabilité*" are analysed, adding up to 557 cases until January 2014. Secondly, this comprehensive body of case law will be evaluated from different angles to see if there is a consistent approach to vulnerability in the case law of the Court: Which individuals or groups are considered vulnerable by the Court (section I)? Which characteristics does an individual or group need to have for the Court to recognise it as a vulnerable subject (section II)? Thirdly, the Court's understanding of the nature of the vulnerability concept will be analysed further on the basis of all cases in which the Court has used the notion.

The main contribution of this article lies in examining whether the interpretations of the Court's case law on vulnerability can be developed further if the analysis is based on all relevant case law rather than being limited to a small number of stand-out cases. Establishing a complete picture of the Court's understanding of vulnerability creates the opportunity to assess whether the increased use of the word "vulnerability" in the Court's case law has substantive implications for the human rights protection afforded by the Court. Is vulnerability simply a trending

[1] Amongst others: L. Peroni and A. Timmer, "Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law", *International Journal of Constitutional Law*, No. 11, 2013, p. 1056; I. Truscan, "Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights", *Retfærd: Nordic Journal of Law and Justice*, No. 3/142, 2013, p. 64.

[2] ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Appl. No. 30696/09).

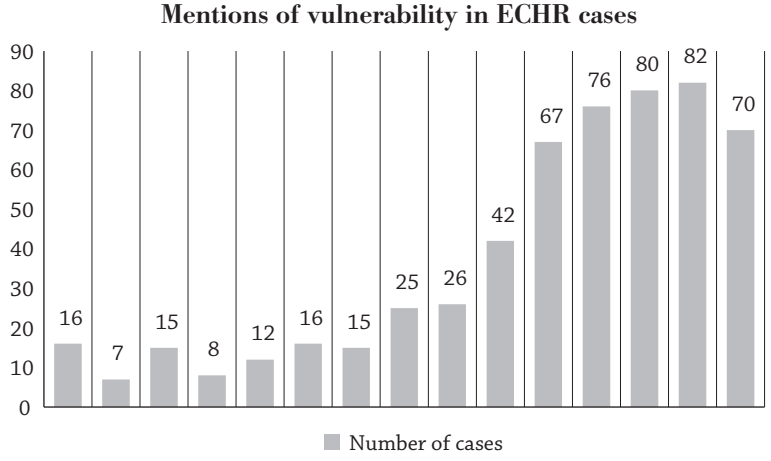
word? Or is the increased use of vulnerability a sign of a new notion of the function of human rights and an increased prioritisation of vulnerable groups and individuals by the Court? These questions will be addressed in the final section.

## I. Vulnerable Individuals and Groups

### A. Introduction

Up until January 2014, vulnerability has played a role in 557 cases of the Court.[3] Since its first use of the notion in 1981 in the case of *Dudgeon v. the United Kingdom*,[4] the number of mentions of vulnerability has strongly increased, as can be seen from Graph 1. The number of cases is also relatively higher when corrected by the total number of Court judgments. In 2013, the cases where vulnerability played a role in the Court's judgments made up nearly 8 % of the total number of judgments, against less than 2 % up until 2007.[5]

**Graph 1: Number of cases involving vulnerability (total: 557)**



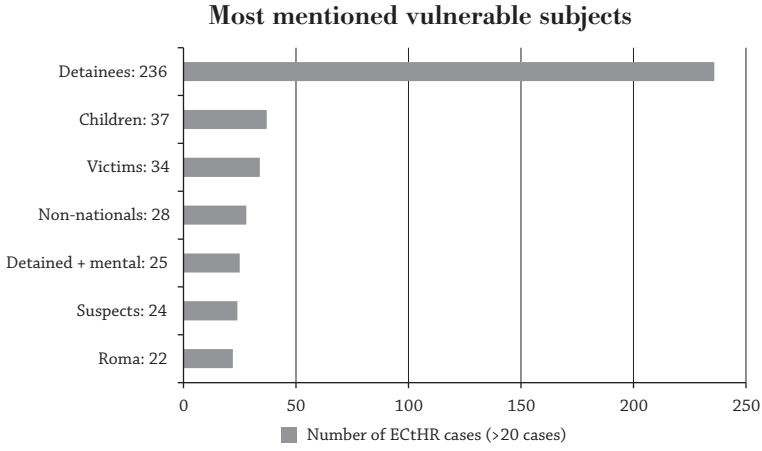

In its case law, the Court has neither given a definition of vulnerability, nor that of vulnerable individuals or groups. The Court identifies on a case-by-case basis whether the applicant or a related person to the case faces a condition of vulnera-

[3] The relevant judgments of the Court referred to in this article can be found in the ECtHR online database: hudoc.echr.coe.int. The search term that was used was: vulnerability OR vulnerable OR *vulnérabilité*. After removal of duplicates, these terms have been used by the Court in over 900 judgments until January 2014. I reduced this number to 557 cases where the use of the terms was deemed relevant, meaning that the term was either used by the Court to describe the facts of the case, was part of its assessment and judgment of the case, or was used explicitly when summing up the relevant (international) law documents. I take it that in these cases the use of the word was of some sort of interest to the Court and was applied because of its particular meaning.

[4] ECtHR, *Dudgeon v. the United Kingdom*, 22 October 1981 (Appl. No. 7525/76).

[5] Total number of judgments by the ECtHR in 2013: 916. In 2007: 1503. The total numbers of judgments are found at the official ECHR website.

bility. As a result, the persons that the Court has recognised as vulnerable subjects are very divers. The graph below shows the subjects that have been most prevalent among the ones recognised as vulnerable by the Court. These are detainees, non-nationals, victims, suspects, Roma people, children and mentally ill persons. In the following I will discuss a number of these groups in more detail.




## B. Persons in Detention

With mentions of vulnerability in 236 cases involving detained persons, detainees are by far the most mentioned vulnerable category in the Court's judgments. In *T.W. v. Malta*,[6] the Court first accepted that there are certain categories of detainees that are vulnerable: these were detainees who had been subject of ill-treatment, were mentally weak or those who did not speak the language of the judicial officer. Quickly, however, the Court came to the conclusion that all persons that are held in detention are in a vulnerable position. This was established in the Grand Chamber case of *Salman v. Turkey*:

> "In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them."[7]

Next to Article 2 of the Convention, Articles 3 and 5 are used by the Court as a legal basis to uphold that people who are deprived of their liberty by the state are in a vulnerable position.[8]

[6] ECtHR (GC), *T.W. v. Malta*, 29 April 1999 (Appl. No. 25644/94).
[7] ECtHR (GC), *Salman v. Turkey*, 27 June 2000 (Appl. No. 21986/93).
[8] ECtHR, *Iwanczuk v. Poland*, 15 November 2001 (Appl. No. 25196/94); ECtHR (GC), *T.W. v. Malta*, 29 April 1999 (Appl. No. 25644/94).

Certain circumstances can cause the level of vulnerability of the detained person to increase. This is the case when the authorities arouse "feelings of vulnerability" in the detainee by physical and mental torture,[9] isolation,[10] intimidation,[11] lengthy periods of interrogation[12] and when the detainee's correspondence with the Court is controlled.[13] The detainee's situation is also considered particularly vulnerable when he has no representative, either in the criminal procedure[14] or in the proceedings before the Court.[15] However, when the detained person does have a legal representative, his vulnerability does not excuse him from making procedural mistakes.[16] Finally, the length of the period of detention also influences the level of vulnerability, meaning that a person that is detained for a long period of time is considered particularly vulnerable, and *vice versa*.[17]

The case *D.F. v. Latvia* stands out because of the somewhat awkward description that the Court gives of the involved detainees.[18] The applicant had complained that, as a former police informant, he was at constant risk of violence from his co-prisoners. The Court makes a distinction between "vulnerable prisoners" and the "general prison population", and states that the government has an obligation to arrange a transfer policy for vulnerable prisoners in order to prevent inter-prisoner violence. This distinction seems at odds with the Court's usual consideration that all persons deprived of liberty are vulnerable. It would have been more consistent of the Court to speak of prisoners and particularly vulnerable prisoners.

### C. Children

After detainees, most mentions of vulnerability in ECtHR case law refer to children. Children are recognised as vulnerable and are therefore entitled to State protection. The ages of the children vary from barely ten months old[19] to "young persons".[20] A large part of the cases are about the role of authorities in child abuse situations, but the cases also concern children in a school setting,[21] adopted children[22] or children being heard by the police.[23]

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[9] ECtHR (GC), *Ilaşcu and Others v. Moldova and Russia*, 8 July 2004 (Appl. No. 48787/99).
[10] *Ibidem*.
[11] ECtHR, *Stepuleac v. Moldova*, 6 November 2007 (Appl. No. 8207/06).
[12] ECtHR (GC), *Bykov v. Russia*, 10 March 2009 (Appl. No. 4378/02).
[13] ECtHR, *Mechenkov v. Russia*, 7 February 2008 (Appl. No. 35421/05).
[14] ECtHR, *Levinta v. Moldova*, 16 December 2008 (Appl. No. 17332/03).
[15] ECtHR, *Ponushkov v. Russia*, 6 November 2008 (Appl. No. 30209/04); ECtHR, *Alekseyenko v. Russia*, 8 January 2009 (Appl. No. 74266/01); ECtHR, *Novinskiy v. Russia*, 10 February 2009 (Appl. No. 11982/02); ECtHR, *Chaykovskiy v. Ukraine*, 15 October 2009 (Appl. No. 2295/06).
[16] ECtHR, *İnan and Others v. Turkey*, 13 October 2009 (Appl. Nos. 19637/05, 43197/06, 39164/07).
[17] ECtHR, *Ochelkov v. Russia*, 11 April 2013 (Appl. No. 17828/05).
[18] ECtHR, *D.F. v. Latvia*, 29 October 2013 (Appl. No. 11160/07).
[19] ECtHR, *Nolan and K. v. Russia*, 12 February 2009 (Appl. No. 2512/04).
[20] ECtHR, *Société de Conception de Presse et d'Édition et Ponson v. France*, 5 March 2009 (Appl. No. 26935/05).
[21] ECtHR (GC), *Fernández Martínez v. Spain*, 15 May 2012 (Appl. No. 56030/07); ECtHR, *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, 10 April 2012 (Appl. No. 19986/06); ECtHR (GC), *Lautsi v. Italy*, 3 November 2009 (Appl. No. 30814/06); ECtHR, *Société de Conception de Presse et d'Édition et Ponson v. France*, 5 March 2009 (Appl. No. 26935/05).
[22] ECtHR, *Pontes v. Portugal*, 10 April 2012 (Appl. No. 19554/09); ECtHR, *Aune v. Norway*, 28 October 2010 (Appl. No. 52502/07).
[23] ECtHR (GC), *Blokhin v. Russia*, 14 November 2013 (Appl. No. 47152/06).

It deserves mentioning that, in these cases, the child is not always the applicant. In some cases the child is related to the applicant, and its vulnerability affects the Court's judgment on the applicant. For example, in *Nolan and K. v. Russia*,[24] the Court noted that the son of the applicant was ten months old, an age which the Court considered both vulnerable and formative for a child. The applicant was the only parent and legal guardian of his son. The applicant's and his son's interests therefore consisted in remaining, to the maximum extent possible, in physical proximity and contact. This was one of the main reasons why the Court, in the end, judged that the separation of the applicant and his son was unlawful.

### D. Victims

There are 33 cases involving victims where vulnerability plays a role in the Court's judgment. The Court has recognised victims of domestic violence,[25] sexual offences,[26] trafficking[27] and other offences as vulnerable subjects. In some cases the Court considers the victims to be vulnerable subjects, while in others the Court takes into consideration the "feelings of vulnerability" that the victims must have experienced.[28] Either way, in general, the Court's approach to victim vulnerability is very individual and the Court hardly makes categorical statements about victims. This is different for statements that are made about victims of torture and ill treatment; these are general statements about all victims of torture and ill treatment and not individual victims.[29]

The Court refers noticeably more to international treaties in victim cases than it does with other types of vulnerable subjects. It has, for instance, referred to the United Nations General Assembly Declaration on the Elimination of Violence against Women and to reports of the Commission on Human Rights of the UN Economic and Social Council.[30] In recent cases, the Court has used these treaties to categorically declare that victims of domestic violence as such are vulnerable and that State protection is needed for these victims:

> "The Court notes in this respect that the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection has been emphasised in a number of international instruments (...)."[31]

These recent cases point to a more categorical approach of the Court, like it does with victims of torture and ill treatment. Still, there have also been recent domestic

[24] ECtHR, *Nolan and K. v. Russia*, 12 February 2009 (Appl. No. 2512/04).
[25] E.g. ECtHR, *Eremia v. The Republic of Moldova*, 28 May 2013 (Appl. No. 3564/11).
[26] ECtHR, *Şandru v. Romania*, 15 October 2013 (Appl. No. 33882/05).
[27] ECtHR, *Breukhoven v. The Czech Republic*, 21 July 2011 (Appl. No. 44438/06).
[28] ECtHR, *Umayeva v. Russia*, 4 December 2008 (Appl. No. 1200/03); ECtHR, *Yöyler v. Turkey*, 24 July 2003 (Appl. No. 26973/95); ECtHR, *Rachwalski and Ferenc v. Poland*, 28 July 2009 (Appl. No. 47709/99).
[29] ECtHR, *Gisayev v. Russia*, 20 January 2011 (Appl. No. 14811/04); ECtHR (GC), *Aydin v. Turkey*, 25 September 1997 (Appl. No. 23178/94); ECtHR, *Bati and Others v. Turkey*, 3 June 2004 (Appl. Nos. 33097/96, 57834/00).
[30] ECtHR, *Eremia v. The Republic of Moldova*, 28 May 2013 (Appl. No. 3564/11).
[31] *Ibidem*; ECtHR, *Bevacqua and S. v. Bulgaria*, 12 June 2008 (Appl. No. 71127/01); ECtHR, *Hajduova v. Slovakia*, 30 November 2010 (Appl. No. 2660/03); ECtHR, *B. v. The Republic of Moldova*, 16 July 2013 (Appl. No. 61382/09).

violence cases where the Court again made a specific statement about the vulnerability of victims.[32] It seems that the Court is considering, but not completely ready, to make a statement about the vulnerability of victims in general.

### E. Non-Nationals

The most groundbreaking case of the non-nationals category, and perhaps of all vulnerability cases, is *M.S.S. v. Belgium and Greece*. In this case the Court has significantly broadened its notion of vulnerability. The applicant is an Afghan asylum seeker who fled Kabul, entered the European Union through Greece and travelled on to Belgium where he applied for asylum. By virtue of the Dublin II Regulation of the EU (Regulation 343/2003), the Belgian authorities transferred him to Greece, where he faced detention in very bad conditions. In its judgment, the Court uses vulnerability multiple times to describe the situation of the Afghan applicant. More importantly, however, the Court uses the word to make a general statement about an "inherent" attribute of asylum seekers:

> "(...) the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker."

The *M.S.S. v. Belgium and Greece* judgment contains other important aspects regarding vulnerability reasoning which will be discussed in the following sections. For now, it is relevant to note Judge Sajó's partly concurring and partly dissenting opinion in this case, in which he is particularly critical of the Court's use of vulnerability in the judgment. Sajó objects to the Court's categorisation of asylum seekers as inherently vulnerable. He argues that the concept of vulnerability needs to be understood in the specific meaning the Court has given it in its case law. He points to the case *Oršuš and Others v. Croatia*,[33] in which the Court judged that Roma are a vulnerable group because they have been historically subjected to prejudice. According to Sajó, asylum seekers are not a group that is historically subject to prejudice, resulting in its social exclusion. In fact, asylum seekers are not socially classified; asylum seekers are far from being homogeneous, if such a group exists at all. Asylum seekers can therefore not be considered a group of whom every member is inherently vulnerable.

Sajó's remarks get to the heart of a very serious issue with the vulnerability reasoning of the Court. Although his argument for sticking with the Court's former limited meaning of group vulnerability is not convincing (because why should all groups only be vulnerable in one way?), he raises a point that is a recurring question mark in cases involving vulnerability, namely where the line is between a general, group approach of vulnerability and an individual approach. The majority

[32] ECtHR, *Ristic v. Serbia*, 18 January 2011 (Appl. No. 32181/08). The Court says that states are obliged to protect victims, "particularly where they happen to be young and vulnerable", apparently excluding a portion of victims from being vulnerable. See also § 4.3 for this discussion.
[33] ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010 (Appl. No. 15766/03).

in *M.S.S. v. Belgium and Greece* unambiguously chose the former: asylum seekers are vulnerable as a group. However, this creates a problem. Approaching vulnerability as an inherent trait of all asylum seekers means that vulnerability needs to play a considerable role in all cases where members of this group are concerned. It seems, however, that this is not the case, since cases involving asylum seekers sometimes do not mention any consideration of the vulnerability of the asylum seeker as a part of the judgment.[34] The same holds true for other groups where the Court applies a general vulnerability approach by recognising all members of a group, e.g. Roma, children, victims and others, as vulnerable subjects, but then fails to apply vulnerability in other cases involving these subjects. The line between a group and an individual is not sufficiently well defined in the Court's case law.

### F. Suspects

The landmark case regarding the vulnerability of suspects is *Salduz v. Turkey*.[35] The Court's consideration that has been reiterated in many cases after the *Salduz* case is the following:

> "(...) an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence."

The Court notably leaves a possibility of an accused not being vulnerable by saying that he "often" finds himself in a particularly vulnerable position. The Court holds that this particular vulnerability "can only be properly compensated for by the assistance of a lawyer". In a case where the suspect was a lawyer himself, the Court held that the suspect was still vulnerable, but that his expertise should be taken into account.[36] Even with a lawyer present at a hearing, there is no guarantee that the principle of equality of arms has been respected if there has been an initial hearing where the suspect was deprived of legal representation, since this has already placed the suspect in a "vulnerable situation *vis-à-vis* the prosecution" during the proceedings.[37]

## II. The Determinants of Vulnerability

### A. Introduction

The current legal literature on vulnerability generally takes the view that the Court hardly ever explains the reasons that form the basis for vulnerability.[38]

[34] See e.g. ECtHR, *M.A. v. Cyprus*, 23 July 2013 (Appl. No. 41872/10).
[35] ECtHR (GC), *Salduz v. Turkey*, 27 November 2008 (Appl. No. 36391/02).
[36] ECtHR, *Paskal v. Ukraine*, 15 September 2011 (Appl. No. 24652/04).
[37] ECtHR, *Solovyevy v. Russia*, 24 April 2012 (Appl. No. 918/02).
[38] I. Truscan, *op. cit.*, p. 75; L. Peroni and A. Timmer, *op. cit.*, p. 1064.

Rather, the Court promptly assumes that a subject with a certain characteristic, for example a child, is vulnerable. My integral study of the Court's case law will allow us to test this assumption. Moreover, examining the determinants of vulnerability gives insight into the generalisability of the Court's considerations concerning vulnerability to other groups and individuals.

### B. Vulnerability as a Result of History

A determinant of vulnerability that is occurring increasingly in the Court's case law is the particular history of a group. The Court used this reasoning in 2007 in its judgment of *D.H. and Others v. the Czech Republic*.[39] In this case, the Court held that the Roma people are a vulnerable minority "as a result of their turbulent history and constant uprooting". In order to substantiate its meaning of the Roma's "turbulent history", the Court refers to a recommendation by the Parliamentary Assembly of the Council of Europe, in which the Parliamentary Assembly held that a special place among minorities is reserved for Gypsies, as they live scattered over Europe.[40] Another recommendation by the Parliamentary Assembly the Court refers to states that "Roma are subjected to discrimination, marginalisation and segregation."[41] Therefore, discrimination, marginalisation and segregation seem to be indicators of a historical background that renders a group vulnerable.

The historical reasoning has also been used for other vulnerable subjects than Roma. For instance, the Court has held in *Alajos Kiss v. Hungary*[42] that mentally ill persons are a particularly vulnerable group because they have a history of being a discriminated group in society. Importantly, the Court notes that the prejudice directed at vulnerable persons may be the result of legislative stereotyping. Likewise, the Court has held that persons with HIV are a particularly vulnerable group because they have suffered considerable discrimination in the past.[43]

An observation worth mentioning is that, for all groups mentioned above – Roma, mentally ill persons and persons with HIV –, the Court had already established in previous cases that these groups are vulnerable. The cases that are discussed in this paragraph are not the first cases in which these groups were recognised as vulnerable. For example, in the case of Roma, the Court had already held in *Chapman v. the United Kingdom*[44] that Roma are a vulnerable group. In the *Chapman* case, however, the Court did not mention the reason why Roma are considered vulnerable. Therefore, it seems that the Court is willing to first label a group as vulnerable, and only later clarifies the reasons why it considers it as

[39] ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007 (Appl. No. 57325/00).
[40] *Ibidem*, see § 56.
[41] *Ibidem*, see § 58.
[42] ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 (Appl. No. 38832/06).
[43] ECtHR, *Kiyutin v. Russia*, 10 March 2011 (Appl. No. 2700/10); ECtHR, *I.B. v. Greece*, 3 October 2013 (Appl. No. 552/10).
[44] ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 (Appl. No. 27238/95).

vulnerable. Moreover, even after the Court established the reasons that determine the group vulnerability in the abovementioned cases, still many cases regarding either Roma, mentally ill persons or persons with HIV do not state the reason why these groups are considered vulnerable. As a result, only a small number of cases contain the complete vulnerability reasoning of the Court, including the rationale behind the subject's vulnerability.

### C. Vulnerability in the Context of State Control

Another central determinant of vulnerability is state control. In several cases involving detainees – which, as has been shown in the previous section, constitute the bulk of the vulnerability cases – the Court has held that the dependence of detainees on the authorities is the reason for their vulnerability.[45] In one case, the Court held that detainees are vulnerable because they are limited in terms of access to medical assistance.[46] Other conditions during an imprisonment can exacerbate the vulnerable position of a detainee, for example if the detainee is held in custody with limited contacts with his family or the outside world,[47] when he has had no representative during the proceedings[48] or when a detainee has noticed another detainee being harmed or killed.[49] As was the case with the vulnerable groups mentioned in the first paragraph, the Court only explains why it considers detainees as vulnerable subjects in a select number of cases. In most cases, the Court addresses the vulnerability of detainees without mentioning the reasons that determine this vulnerability.

Suspects also find themselves in a vulnerable position due to their legal status. The effects of this vulnerability are amplified by the fact that the rules of a criminal procedure tend to become increasingly complex.[50] At times, the Court seems to derive the vulnerability of an individual's position from a certain act by the individual. For example, the Court held that a suspect was vulnerable on the basis of the fact that he had retracted a statement he had made earlier. The suspect made confessions without a lawyer being present and retracted them immediately when his lawyer was present. According to the Court, this demonstrates the vulnerability of the suspect's position and the need for appropriate legal assistance.[51]

[45] E.g. ECtHR, *Denis Vasilyev v. Russia*, 17 December 2009 (Appl. No. 32704/04).
[46] ECtHR, *Wenerski v. Poland*, 20 January 2009 (Appl. No. 44369/02).
[47] "The applicant's position might be particularly vulnerable when he is held in custody with limited contacts with his family or the outside world." See e.g. ECtHR, *Popov v. Russia*, 13 July 2006 (Appl. No. 26853/04).
[48] ECtHR, *Ponushkov v. Russia*, 6 November 2008 (Appl. No. 30209/04); ECtHR, *Alekseyenko v. Russia*, 8 January 2009 (Appl. No. 74266/01); ECtHR, *Novinskiy v. Russia*, 10 February 2009 (Appl. No. 11982/02); ECtHR, *Chaykovskiy v. Ukraine*, 15 October 2009 (Appl. No. 2295/06).
[49] ECtHR, *Gülbahar and Others v. Turkey*, 21 October 2008 (Appl. No. 5264/03).
[50] E.g. ECtHR (GC), *Salduz v. Turkey*, 27 November 2008 (Appl. No. 36391/02).
[51] ECtHR, *Yaremenko v. Ukraine*, 12 June 2008 (Appl. No. 32092/02).

### D. References to International Documents

The Court has used international legal documents in multiple cases to justify its recognition of a group or individual as a vulnerable subject. In a number of cases involving victims of domestic violence, the Court has referred to the UN Declaration on the Elimination of Violence against Women (1993) and to reports of the Commission on Human Rights of the UN Economic and Social Council.[52] The Court has used these treaties to maintain that victims of domestic violence are vulnerable and that State protection is needed for these victims.[53]

In the *M.S.S. v. Belgium and Greece* case,[54] international documents also play an important role in expressing the need for special protection of asylum seekers. The Court holds that the many international documents concerning the position of asylum seekers reveal the need for special protection of this particular group. In *Popov v. France*,[55] the Court referred to the EU Reception Directive (2003/9/EC), to highlight the vulnerability of minors in an illegal immigration setting. When listing the relevant international law, the Court mentions Article 17 of the Reception Directive, which holds that Member States shall take into account the specific situation of vulnerable persons such as minors. The Court subsequently uses the directive to emphasise the vulnerability of illegal immigrants of young age. The Court's reference to a categorisation of vulnerable subjects originating from an EU document might point to a harmonisation of the Court's understanding of vulnerability with the meaning of vulnerability in EU law. However, there are no further indications in the Court's case law that this is the case. The Reception Directive, or other EU legislation that contain a listing of vulnerable persons,[56] have not been mentioned in other cases involving vulnerability.

The Court also refers to international documents to establish the vulnerability of the position that a person could end up being in. In *Salah Sheekh v. the Netherlands*,[57] a case about the refused asylum claim of a Somali national belonging to the Ashraf minority, the Court referred to different reports by the United Nations High Commissioner for Refugees to establish that the Ashraf minority is one of the most vulnerable groups in Somalia. On this basis, the Court ruled that the expulsion of the applicant would expose him to a treatment in breach of Article 3 of the Convention.

A final case that stands out concerns an applicant's injuries sustained as a result of alleged police brutality.[58] In this case, the Court does not refer to international

[52] ECtHR, *Eremia v. The Republic of Moldova*, 28 May 2013 (Appl. No. 3564/11).
[53] ECtHR, *Bevacqua and S. v. Bulgaria*, 12 June 2008 (Appl. No. 71127/01); ECtHR, *Hajduova v. Slovakia*, 30 November 2010 (Appl. No. 2660/03); ECtHR, *B. v. The Republic of Moldova*, 16 July 2013 (Appl. No. 61382/09).
[54] ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Appl. No. 30696/09).
[55] ECtHR, *Popov v. France*, 19 January 2012 (Appl. Nos. 39472/07, 39474/07).
[56] For instance Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (*O.J.*, L 309, 24 November 2009, pp. 1-50), see Article 3, under 14.
[57] ECtHR, *Salah Sheekh v. the Netherlands*, 11 January 2007 (Appl. No. 1948/04).
[58] ECtHR, *Kaverzin v. Ukraine*, 15 May 2012 (Appl. No. 23893/03).

documents, but notably refers to its own case law as a reason for recognising the vulnerability of victims. By referring to its own cases as a basis for vulnerability, the Court might be at risk of deteriorating into circular reasoning if it does not form a strong and consistent understanding of vulnerability in its own case law.

### E. Closing Remarks

The cases in this section show that the Court has clarified the factors that determine the vulnerability of detainees, victims, asylum seekers, suspects, Roma, mentally ill persons and persons infected with HIV. Although these subjects are a minority regarding the range of persons that the Court has recognised as vulnerable in its case law, the figures in section I have shown that these groups are among the most mentioned subjects in the Court's vulnerability case law. Together, these subject account for nearly 70 % of the total number of cases mentioning vulnerability. Therefore, a close look at the Court's case law shows that the view that the Court hardly ever explains the reasons of vulnerability is incorrect. This view might be the result of the fact that only a small number of cases contain a comprehensive reasoning by the Court. As mentioned earlier, the Court often fails to state the determining factors of a subject's vulnerability, even after it has established in previous cases what these determinants are. As a result, it appears as if the Court does not explain the reasons that form the basis for vulnerability, while the Court has done so, but fails to mention these reasons in many of its cases.

Finally, one of the aims of examining the determinants of vulnerability in this section was to consider whether it is possible to generalise the Court's reasoning regarding vulnerability to other subjects. Certainly, the Court's strong considerations with regard to the historical discrimination and stigmatisation of groups in society open up the possibility for other groups to be considered as vulnerable by the Court. The Court provides various indicators on what it requires of groups to be considered as historically disadvantaged. Other groups that have experienced a similar history of stereotyping within society might fall within the scope of the Court's understanding of vulnerability. These groups would subsequently require special protection by the state.

## III. Understanding the Court's Vulnerability Concept

### A. Introduction

The case law of the Court discussed in the previous sections has shown that vulnerability is not a generic concept. The Court applies vulnerability in a variety of ways and adjusts its use to fit individual circumstances. This section aims to further explore the Court's understanding of vulnerability by analysing several

distinctions between different modes of vulnerability that occur in the case law. The first distinction is the division between vulnerable subjects and vulnerable situations or positions. In addition, the distinction between persons that "feel" vulnerable and persons that "are" vulnerable is considered. Finally, we examine cases where the Court chooses to recognise an individual as vulnerable and cases where a complete group is recognised vulnerable.

### B. Vulnerable Subjects *vs* Vulnerable Situations

In most cases concerning detention, the Court has held that "persons in custody are in a vulnerable position"[59] or that "a State is responsible for any person in detention, who is in a vulnerable situation while in its charge".[60] The terms "situation" and "position" appear interchangeably and are often both used in the same judgment. Detainees are hardly ever directly mentioned as vulnerable subjects ("detainees are vulnerable").[61] In the same way, the Court takes into account "the particularly vulnerable situation of victims of torture"[62] and "the vulnerable situation of women in south-east Turkey".[63] The Court has also spoken of the vulnerable "position" of torture victims,[64] suspects,[65] disabled persons[66] and Roma.[67] In many other cases, the Court has spoken of vulnerable situations and positions when applicants where under specific grave circumstances.[68]

In a number of cases, however, the Court does not rule that the applicant is in a vulnerable situation or position, but directly refers to the vulnerability of the applicant. This is especially the case when the applicant is a child. In these cases, the Court judges "in view of the particular vulnerability of children".[69] Similar wording is found in cases involving Kurds,[70] mentally[71] and terminally ill persons,[72] non-nationals[73] and victims.[74] In the case of groups that are considered as vulnerable, such as Roma, HIV-positive persons or mentally ill persons,

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[59] ECtHR (GC), *Salman v. Turkey*, 27 June 2000 (Appl. No. 21986/93).
[60] ECtHR, *Colak and Filizer v. Turkey*, 8 January 2004 (Appl. Nos. 32578/96, 32579/96).
[61] Among the 236 vulnerability cases involving detainees, there are only four exceptions to this rule. In ECtHR, *Belevitskiy v. Russia*, 1 March 2007 (Appl. No. 72967/01) the Court stated that "persons held in custody are (…) vulnerable to pressure". In ECtHR, *Knyazev v. Russia*, 8 November 2007 (Appl. No. 25948/05) and ECtHR, *Buzychkin v. Russia*, 14 October 2008 (Appl. No. 68337/01) the Court spoke of "the vulnerability of detainees". Finally, in ECtHR (GC), *Creangă v. Romania*, 15 June 2010 (Appl. No. 29226/03), the Court spoke of "the particular vulnerability of persons who find themselves under the exclusive control of State agents".
[62] See e.g. ECtHR, *Bati and Others v. Turkey*, 3 June 2004 (Appl. Nos. 33097/96, 57834/00).
[63] ECtHR, *Opuz v. Turkey*, 9 June 2009 (Appl. No. 33401/02).
[64] See e.g. ECtHR (GC), *Aydin v. Turkey*, 25 September 1997 (Appl. No. 23178/94).
[65] ECtHR, *Paskal v. Ukraine*, 15 September 2011 (Appl. No. 24652/04).
[66] See e.g. ECtHR, *B. v. Romania (No. 2)*, 19 February 2013 (Appl. No. 1285/03).
[67] ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 (Appl. No. 27238/95).
[68] For example, see ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006 (Appl. No. 13178/03); ECtHR, *A.A. and Others v. Sweden*, 28 June 2012 (Appl. No. 14499/09); ECtHR, *Lashin v. Russia*, 22 January 2013 (Appl. No. 33117/02).
[69] See e.g. ECtHR (GC), *Blokhin v. Russia*, 14 November 2013 (Appl. No. 47152/06); ECtHR, *Mihailova v. Bulgaria*, 12 January 2006 (Appl. No. 35978/02).
[70] E.g. ECtHR, *Kurt v. Turkey*, 25 May 1998 (Appl. No. 24276/94).
[71] E.g. ECtHR, *Slimani v. France*, 27 July 2004 (Appl. No. 57671/00).
[72] ECtHR, *Pretty v. the United Kingdom*, 29 April 2002 (Appl. No. 2346/02).
[73] E.g. ECtHR, *Sisojeva and Others v. Latvia*, 16 June 2005 (Appl. No. 60654/00).
[74] E.g. ECtHR, *Dudek v. Poland*, 4 May 2006 (Appl. No. 633/03); ECtHR, *Eremia v. the Republic of Moldova*, 28 May 2013 (Appl. No. 3564/11).

the Court has referred to these groups as "vulnerable minority" of "vulnerable group".[75]

On the face of it the Court's distinction between subjects who are vulnerable themselves and subjects who are in a vulnerable situation or position seems to be rather insignificant. This is supported by the fact that several applicants, such as Roma and victims, are – without apparent reasons – sometimes called "vulnerable" by the Court, and other times held to be "in a vulnerable situation or position". However, some cases regarding detainees might indicate some significance for the distinction. In a number of these detention cases, the Court found that, despite the detainees' vulnerability, their applications were not admitted to the Court. For example, in *Julin v. Estonia*,[76] the Court held:

> "Furthermore, while the applicant, like all detainees, was in a vulnerable position in the hands of the authorities, he does not appear to have been in a particularly helpless situation".

As has been shown in this paragraph, detained persons are often found to be in a vulnerable situation, and are not called vulnerable themselves. The case of *Julin v. Estonia* indicates that the Court might find that a vulnerable situation or position is not sufficiently helpless to warrant the admissibility of the case. A similar ruling about a group like children, who are directly considered as vulnerable persons by the Court, cannot be found. Therefore, the relevance of the distinction discussed in this paragraph might lie in that subjects who are in a vulnerable situation could be in a situation not helpless enough to justify admissibility, while subjects who are themselves considered as vulnerable do not show a similar layeredness of vulnerability with a minimum threshold of vulnerability below which the Court will not admit an applicant.

### C. Subjective Sense of Vulnerability *vs* Objective State of Vulnerability

The Court also distinguishes between persons that feel vulnerable and persons that are vulnerable. Usually, the Court notes that a person "is" vulnerable or that he "is" in a vulnerable situation or position. However, in a number of cases, the Court has held that a person "feels" vulnerable or has come to feel vulnerable due to the state's treatment. In two cases, the Court examined the legal system regarding transsexuals in the United Kingdom.[77] The applicants had undergone gender re-assignment surgery and lived in society as females, but, for legal purposes, they had remained males. The Court ruled that the law in the United Kingdom with regard to transsexuals may give the applicants feelings of vulner-

[75] See respectively, ECtHR, *Winterstein and Others v. France*, 17 October 2013 (Appl. No. 27013/07); ECtHR, *Kiyutin v. Russia*, 10 March 2011 (Appl. No. 2700/10); ECtHR, *Z.H. v. Hungary*, 8 November 2012 (Appl. No. 28973/11);
[76] ECtHR, *Julin v. Estonia*, 29 May 2012 (Appl. Nos. 16563/08, 18656/10, 40841/08).
[77] ECtHR (GC), *I. v. the United Kingdom*, 11 July 2002 (Appl. No. 25680/94); ECtHR (GC), *Christine Goodwin v. the United Kingdom*, 11 July 2002 (Appl. No. 28957/95).

ability, humiliation and anxiety. Therefore, the Court found that the legal system in the United Kingdom regarding transsexuals was in violation of Article 8 ECHR. Similarly, in two cases concerning victims of harassment by the police, the Court found that the applicants' rights under Article 3 ECHR were violated.[78] In both cases, circumstances had led to feelings of vulnerability in the applicants that the Court classified as humiliating and therefore degrading within the meaning of Article 3 ECHR.

Moreover, in a number of cases, the Court held – with regard to the admissibility – that the possibility that the "applicants could have felt vulnerable and apprehensive of State representatives" justified the fact that they had made mistakes in the domestic proceedings. The Court therefore admitted the cases despite these mistakes.[79] In *Panovits v. Cyprus*,[80] a case concerning a young suspect, the Court ruled that the state has the obligation, with due regard to the vulnerability of the young suspect, to take steps to reduce as far as possible feelings of intimidation and inhibition the suspect might experience during the criminal proceedings. What is striking about these latter cases is that the Court notes that the applicants "could have felt" vulnerable. This hypothetical mode of vulnerability is not found in cases where the Court establishes the objective state of "being vulnerable" in the applicant; in other words, there are no cases where the Court states that a person "could have been vulnerable". Therefore, the Court might apply the reasoning of a subjective sense of vulnerability whenever circumstances that generate a vulnerable state have occurred, but the vulnerability of the applicant has not (yet) been established.

### D. Individual or Group Vulnerability?

A prominent distinction in the Court's case law is the distinction between group and individual vulnerability. As discussed earlier, the Court has held in *M.S.S. v. Belgium and Greece* that asylum seekers are vulnerable as a group.[81] Similarly, the Court has held that Roma,[82] Kurds,[83] victims[84] and other groups are vulnerable. Members of these groups are automatically regarded as vulnerable persons by the Court. As discussed in section I, Judge Sajó strongly disagreed with the majority in his separate opinion in *M.S.S. v. Belgium and Greece*. In his opinion, asylum seekers are not a homogeneous group, and therefore not every asylum seekers could be considered as being inherently vulnerable. This distinction is also extensively discussed in the literature on vulnerability.[85] Martha Fineman,

[78] ECtHR, *Rachwalski and Ferenc v. Poland*, 28 July 2009 (Appl. No. 47709/99); ECtHR, *Hristovi v. Bulgaria*, 11 October 2011 (Appl. No. 42697/05).
[79] See ECtHR, *Akpinar and Altun v. Turkey*, 27 February 2007 (Appl. No. 56760/00); ECtHR, *Umayeva v. Russia*, 4 December 2008 (Appl. No. 1200/03); ECtHR, *Yöyler v. Turkey*, 24 July 2003 (Appl. No. 26973/95).
[80] ECtHR, *Panovits v. Cyprus*, 11 December 2008 (Appl. No. 4268/04).
[81] ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011 (Appl. No. 30696/09).
[82] E.g. ECtHR (GC), *Chapman v. the United Kingdom*, 18 January 2001 (Appl. No. 27238/95).
[83] E.g. ECtHR, *Kurt v. Turkey*, 25 May 1998 (Appl. No. 24276/94).
[84] E.g. ECtHR, *Gisayev v. Russia*, 20 January 2011 (Appl. No. 14811/04).
[85] See e.g. L. Peroni and A. Timmer, *op. cit.*, pp. 1060-1061; I. Truscan, *op. cit.*, pp. 82-83.

one of main advocates of the vulnerability movement in legal philosophy, would also be a strong opponent of the Court's group approach to vulnerability, but for a different reason. She does not oppose the classification of asylum seekers as vulnerable because they cannot be considered to be a group; rather, she fundamentally opposes the idea of regarding a specific group as vulnerable.[86] According to Fineman, vulnerability is a universal characteristic that is inherent in all human beings. She objects to applying the term vulnerability only to specific groups, because this maintains the idea that people normally are autonomous and independent. Therefore, Fineman differs from Judge Sajó in the sense that, unlike him, she does not leave open the possibility of recognising a group as vulnerable, however well-defined and homogeneous that group may be.

Peroni and Timmer provide a cunning solution to reconcile the Court's group approach with Fineman's universal vulnerability theory. According to Peroni and Timmer, there is no impediment to reconciling the two approaches on a conceptual level. They recall that, when asking a Strasbourg judge about the Court's group reasoning, he replied: "All applicants are vulnerable, but some are more vulnerable than others."[87] Peroni and Timmer argue that this statement shows that the Court's group-based approach and Fineman's universal approach can coexist. Moreover, they find that this holistic approach fits well with the paradoxical nature of vulnerability of being universal and particular at the same time.[88]

However, despite the judge's words, this does not seem to be the way the Court deals with this issue in practice. In the Court's case law discussed in this article, there are plenty of cases where the Court makes a clear distinction between vulnerable and not-vulnerable subjects. This is exemplified in cases where the Court explicitly ruled that the applicants do not require special consideration because they fall outside the protection of vulnerable subjects.[89] This points to an approach that rules out at least a significant number of people from being regarded as vulnerable.

## IV. The Impact of Vulnerability Reasoning

### A. Introduction

One question remains to be answered, the question whether the increased use of the word "vulnerability" in the Court's case law has had actual implications on the human rights protection afforded by the Court. Is vulnerability simply a trending word used to describe a condition that the Court had already integrated in its

[86] M. Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics", in M. Fineman and A. Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Farnham, Ashgate, 2013, p. 17.
[87] L. Peroni and A. Timmer, *op. cit.*, p. 1061.
[88] *Ibidem*, p. 1060.
[89] E.g. ECtHR, *Sharipov v. Russia*, 11 October 2011 (Appl. No. 18414/10); ECtHR, *Valiulienė v. Lithuania*, 26 March 2013 (Appl. No. 33234/07).

reasoning? Or is the increased use of vulnerability a sign of a new notion of the function of human rights and an increased prioritisation of vulnerable subjects by the Court? This section seeks to answer these question using a diachronic method of analysis of the Court's case law. For a selected number of vulnerable categories, the case law involving vulnerability reasoning is placed alongside cases on these subjects where the word vulnerability does not occur.[90] These categories are: detainees, victims, mentally disabled persons and persons with HIV. Reason for selecting these categories is that the Court has imparted the most clear-cut legal consequences on these categories: for detainees and victims, the Court has placed special positive obligations on the state's authorities; and for mentally disabled persons and persons with HIV, the state's margin of appreciation has been narrowed in discrimination cases. The clear consequences attached to the vulnerability of these categories by the Court allows for an apt comparison of this case law with cases on the same categories where vulnerability reasoning is not applied.

## B. Detainees: From Procedural to Substantive Protection

The protection of detained persons has always been a prominent part of the ECtHR's case law.[91] In the important case of *Golder v. the United Kingdom*,[92] the Court held that the interference with a detainee's correspondence with a lawyer by the state's authorities infringed his right of access to a court (Article 6 ECHR) and the right to correspondence (Article 8 ECHR). The Court's principled approach in the Golder case had a major impact on the development of prisoners' rights in Europe.[93] However, the decision was made in the context of a procedural right – the right to correspondence – that was specifically recognised by the Convention. In the first three decades after its inception, the role of the Court was at its strongest when it came to recognising procedural aspects of the rights of prisoners.[94]

These progressive procedural rulings are in contrast to the Court's more conservative position in cases where the substantive question was whether the detention violated Article 3 ECHR. The Court was careful not to use the term "torture" for anything except for deliberate inhuman treatment causing extreme suffering.[95]

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[90] The cases include judgments that were made before the word vulnerability first appeared in the case law involving the mentioned categories, as well as judgments made after the first appearance of the word. By adding this temporal aspect to the way these cases are presented, the development of the Court's attitude toward the rights of the mentioned categories and the way in which this development was influenced by the emergence of the term vulnerability will be made apparent. This diachronic method gives a clear view of the impact that vulnerability has on the Court's reasoning.

[91] D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy: Penology and human rights*, Oxford, Oxford University Press, 2009, p. 10.

[92] ECtHR, *Golder v. the United Kingdom*, 21 February 1975 (Appl. No. 4451/70).

[93] D. Van Zyl Smit and S. Snacken, *op. cit.*, p. 11.

[94] *Ibidem*. A similar emphasis on procedure rather than substance is noticeable in other early decisions, see e.g. ECtHR, *Campbell and Fell v. the United Kingdom*, 28 June 1984 (Appl. Nos. 7819/77, 7878/77).

[95] *Ibidem*; ECtHR, *Ireland v. United Kingdom*, 18 January 1978 (Appl. No. 5310/71).

Moreover, the Court seemed to have accepted that what it regarded as the inevitable deprivations of imprisonment were not inhuman or degrading forms of treatment. Thus, up until the late 1990's, the Court's protection of detainees was generally restricted to procedural measures. The reluctance of the Court to substantively address prison conditions led to suggestions that there should be an additional protocol to the ECHR to ensure legally binding protection of prisoners.[96]

However, the Court's stance changed rather drastically at the turn of the millennium. The Court became noticeably more prepared to make findings in respect of the full range of conduct prohibited in Article 3 ECHR.[97] In 1996, in the case of *Aksoy v. Turkey*, it found for the first time that the treatment of a detainee had been so harsh that it amounted to torture.[98] In 1997, in the case of *Aydin v. Turkey*, the rape of a detainee by an official had also been held to constitute torture.[99] In 1999, in the important case of *Selmouni v. France*,[100] the Court reiterated the practice emerging from the cases of *Aksoy* and *Aydin* and commented that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future". Other Articles were also accorded increased importance in the prison context. In *Messina v. Italy*,[101] the protection of family life (Article 8 ECHR) was used to find that a policy that made family visits virtually impossible violated the Convention. A complete ban on the right of sentenced prisoners to vote was also renounced on the basis that it infringed the right to participate in the democratic process established by Article 3 of Protocol 1 to the ECHR.[102]

Therefore, the Court became a more significant contributor to substantive European prison law than it had been before.[103] The development from (only) procedural to (also) substantive protection of detainee's human rights in the Court's case law at the turn of the millennium seems to be correlated to the emergence of the notion of vulnerability in the Court's detainee case law. In the two abovementioned cases from 1996 and 1997, *Aksoy v. Turkey* and *Aydin v. Turkey*, the Court regarded both applicants as vulnerable persons. Since the case of *Salman v. Turkey* in 2000, cases involving detainees usually contain a standard reference to the vulnerable situation of detained persons *qua* detained persons. The Court has broadened this protection to Article 3 ECHR in the *Iwanczuk v. Poland* case in 2001, where it emphasised that "authorities exercise full control over a person held in custody and their way of treating a detainee must, in view of his or her vulnerability, be subjected to strict scrutiny under the Convention".[104] In more

[96] D. Van Zyl Smit and S. Snacken, *op. cit.*, p. 13; see also Council of Europe, *Rights of persons deprived of their liberty* (Proceedings of the Seventh International Colloquy on the European Convention on Human Rights), Copenhagen-Oslo-Lund, 30 May-2 June 1990, p. 346. Such a protocol was never implemented.
[97] D. Van Zyl Smit and S. Snacken, *op. cit.*, p. 32.
[98] ECtHR, *Aksoy v. Turkey*, 18 December 1996 (Appl. No. 21987/93).
[99] ECtHR (GC), *Aydin v. Turkey*, 25 September 1997 (Appl. No. 23178/94).
[100] ECtHR (GC), *Selmouni v. France*, 28 July 1999 (Appl. No. 25803/94).
[101] ECtHR, *Messina v. Italy (No. 2)*, 28 September 2000 (Appl. No. 25498/94).
[102] ECtHR (GC), *Hirst v. the United Kingdom (No. 2)*, 30 March 2004 (Appl. No. 74025/01).
[103] D. Van Zyl Smit and S. Snacken, *op. cit.*, p. 33.
[104] ECtHR, *Iwanczuk v. Poland*, 15 November 2001 (Appl. No. 25196/94).

recent cases, the Court has held that the vulnerable position of prisoners dictates that the state's authorities are under a duty to protect their "physical well-being".[105] The specific special positive obligations that the Court has placed on the state relying on the vulnerability of detainees vary greatly and extend from measures with regard to the health of detainees[106] to the obligation to minimise the risk of attempts to escape or commit suicide.[107]

What does this tell us about vulnerability? The correlation between the emergence the notion of vulnerability in the Court's reasoning and the transformation by the Court from procedural to more substantive protection of detainee's human rights is a relevant and seemingly significant one. Not all cases that were pivotal for the Court's turn to a more substantive protection of detainees involved vulnerability reasoning (e.g. *Selmouni v. France*), but the appearance of vulnerability in the Court's case law clearly coincided with its turn to substance. The term vulnerability seems to be a word that enabled the Court to justify its change in attitude toward prisoners' rights around the millennium and allowed it to reason that detainees need to be protected more substantively.

### C. Special Protection of Victims

When state authorities are dealing with victims, the Court has placed special positive obligations on the state's authorities. The Court has held in the case of *Gisayev. v. Russia* that authorities need to take into account the particular vulnerability of victims of torture and ill treatment under Article 3 ECHR when dealing with complaints about torture.[108] Furthermore, with regard to victims in a criminal trial, the Court has ruled in the *Ristic v. Serbia* case that the state is required under Article 6 ECHR to afford adequate protection to victims, "particularly where they happen to be young and vulnerable".[109] The case concerned the excessive length of a criminal proceeding regarding the failure to pay child maintenance. The Court ruled that the length of the procedure had been intolerable and the judicial authorities had therefore failed to satisfy the reasonable time requirement under Article 6 ECHR.

The *Gisayev* case and the *Ristic* case are both very recent (both 2011), as are most of the cases where the Court has regarded victims as vulnerable subjects. Thirty of the 33 cases in which victims are regarded as vulnerable subjects originate from after 2006. This increased use of vulnerability in victim cases coincides with the increased attention for victims' rights across Europe. In recent years, the phenom-

[105] See e.g. ECtHR, *Barabanshchikov v. Russia*, 8 January 2009 (Appl. No. 36220/02).
[106] ECtHR, *Wenerski v. Poland*, 20 January 2009 (Appl. No. 44369/02); ECtHR, *Kozhokar v. Russia*, 16 December 2010 (Appl. No. 33099/08).
[107] ECtHR, *Keller v. Russia*, 17 October 2013 (Appl. No. 26824/04); ECtHR, *Renolde v. France*, 16 October 2008 (Appl. No. 5608/05).
[108] ECtHR, *Gisayev v. Russia*, 20 January 2011 (Appl. No. 14811/04).
[109] ECtHR, *Ristic v. Serbia*, 18 January 2011 (Appl. No. 32181/08).

enon of victims' rights has moved to the forefront of law- and policymaking on both domestic and international platforms and especially in academic circles.[110]

However, the protection of victims by the Court has been recognised for a longer time. The landmark case in the Court's jurisprudence on the development of victims' rights dates from 1985. In the case of *X and Y v. The Netherlands*,[111] the Court found a violation of the human rights of a 16-year-old rape victim, because her mental handicap was such that she was unable to make a personal complaint and her father was not authorised to file one on her behalf. In the following years, the Court expanded the rights of victims considerably. For instance, the Court has interpreted the Convention as placing a duty on states to carry out effective official investigations that can lead to prosecution.[112] Moreover, the Court held on several instances that victims are granted procedural rights under the Convention. The Court found a violation of the right to information where the state failed to inform victims and their next-of-kin of decisions not to prosecute.[113] The Court requires that victims are allowed access to documents in the investigation and also to be given the right to introduce evidence to the case.[114] The Court further found that the right to a remedy requires that states provide victims with the opportunity to claim compensation[115] and that the victim has the right that the proceedings are conducted within a reasonable amount of time.[116]

From this brief overview of cases we can infer that the protection of victims' rights has been developed by the Court before and independently from the increased use of vulnerability in the Court's case law from 2006 onwards. A similar observation applies to current case law. There have been recent victim cases where the Court did not mention the vulnerability of the applicant, despite placing expanded positive obligations on the state. The most striking example is the case of *Valiulienė v. Lithuania*.[117] In this case, the female applicant, a victim of domestic violence by her husband, pleaded that she had to be regarded as a vulnerable individual. The government denied the applicant's appeal to vulnerability by claiming that she was in a stronger position than other victims, referring especially to the contrasting position of women in Turkey in the case of in *Opuz v. Turkey*. The Court accepted the government's arguments and denied that the applicant was vulnerable, but nevertheless maintained that the fact that she was a victim of domestic violence meant the case fell "into the category of those having public

[110] J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Portland, Bloomsbury Publishing, 2008, p. 1; B. N. McGonigle, *Procedural Justice? Victim Participation in International Criminal Law*, Cambridge-Antwerp-Portland, Intersentia, 2011, p. 128.
[111] ECtHR, *X and Y v. The Netherlands*, 26 March 1985 (Appl. No. 8978/80).
[112] See e.g. ECtHR (GC), *Mccann and Others v. the United Kingdom*, 27 September 1995 (Appl. No. 18984/91); ECtHR, *Assenov. and Others v. Bulgaria*, 28 October 1998 (Appl. No. 24760/94).
[113] ECtHR, *Güleç v. Turkey*, 27 July 1998 (Appl. No. 21593/93); ECtHR (GC), *Oğur v. Turkey*, 20 May 1999 (Appl. No. 21594/93).
[114] ECtHR (GC), *Oğur v. Turkey*, 20 May 1999 (Appl. No. 21594/93).
[115] ECtHR, *Kaya v. Turkey*, 19 February 1998 (Appl. No. 22729/93).
[116] ECtHR, *Moreira de Azevedo v. Portugal*, 23 October 1990 (Appl. No. 11296/84); ECtHR (GC), *Calvelli and Ciglio v. Italy*, 17 January 2002 (Appl. No. 32967/96).
[117] ECtHR, *Valiulienė v. Lithuania*, 26 March 2013 (Appl. No. 33234/07). See also ECtHR, *A. v. Croatia*, 14 October 2010 (Appl. No. 55164/08).

importance". The Court ultimately found that the state had breached its positive obligations under Article 3 ECHR, because it failed to satisfy its positive obligations to investigate the complaint and prosecute the offender. Therefore, it seems that the Court is willing to impose special positive obligations despite denying a victim's vulnerability in a concrete situation.

Thus, it seems vulnerability has had a less significant impact on the Court's reasoning concerning victim's rights as compared with prisoners' rights. Although the increased use of vulnerability in victim cases after 2006 can be related to the increased legal and academic attention that victims' rights have received in recent years, the rights of victims have been steadily developed by the Court long before. Moreover, recent cases involving victims do not contain a reference to the vulnerability of the victim, while still providing special protection. Therefore, the relation between the development of victim's rights and the emergence of vulnerability reasoning in the Court's case law is relatively weak.

### D. Vulnerability in Discrimination Cases

Next to expanding the positive obligations placed on the state, another consequence the Court draws from being vulnerable is to narrow the state's margin of appreciation in discrimination cases. The Court seems to use vulnerability to explicitly address the stereotyping of groups whose protection against discrimination had previously not been guaranteed in the Court's case law. Two of these groups are mentally disabled persons and persons infected with HIV.

The Court has held in the landmark case of *Alajos Kiss v. Hungary*[118] that mentally ill persons are a particularly vulnerable group because they have a history of being a discriminated group in society. The applicant suffered from manic depression and was placed under partial guardianship, but Hungarian legislation made it impossible for any mentally disabled person under guardianship to vote. The Court held that the state has a narrow margin of appreciation when it comes to the fundamental right to vote of a vulnerable group, such as mentally disabled persons. Thus, the Court ruled that Article 3 of the First Protocol of the Convention, which enshrines the right to vote, was violated by the Hungarian state. This is the first case where the Court has explicitly employed an anti-stereotyping approach in a disability-context.[119]

The Court has adopted a very similar reasoning with regard to persons who are infected with HIV. In two cases concerning HIV-positive persons, the margin of

[118] ECtHR, *Alajos Kiss v. Hungary*, 20 May 2010 (Appl. No. 38832/06).
[119] In general, the Court's discrimination case law contains little jurisprudence directly addressing the rights of (mentally) disabled people; D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2014, p. 808. One of the few is the case of *Glor v. Switzerland* (ECtHR, 30 April 2009 (Appl. No. 13444/04)). Further discrimination cases were either found inapplicable (ECtHR, *Botta v. Italy*, 24 February 1998 (Appl. No. 21439/93), no violation of Article 8 with Article 14) or declared inadmissible (ECtHR, *Zehnalova and Zehnal v. the Czech Republic*, 14 May 2002 (Appl. No. 38621/97)).

appreciation afforded to the state under Article 14 ECHR was narrowed "substantially". The first case, *Kiyutin v. Russia*,[120] concerned the refusal of Kiyutin's application for a residence permit by the Russian authorities, because such permits were not issued to foreign nationals who are HIV-positive. The second case, *I.B. v. Greece*,[121] concerned the dismissal of an HIV-positive employee from his work in response to pressure from other employees calling for his removal. In both cases, the Court followed the line that it set out in *Alajos Kiss v. Hungary*. The Court found that people with HIV form a particularly vulnerable group due to the historical prejudice and discrimination directed at them. As a result, the Court applies a narrower margin of appreciation.[122] Indeed, these are the only cases where the Court found that HIV-positive persons were discriminated against.[123] Therefore, as with *Alajos Kiss v. Hungary*, the case of *Kiyutin v. Russia* is the landmark case with regard to the discrimination and stereotyping of persons with HIV.

With *Alajos Kiss v. Hungary* and *Kiyutin v. Russia*, the Court has taken significant steps to protect mentally disabled persons and HIV-positive persons from discrimination. Nevertheless, it is worth mentioning here the case of *Aksu v. Turkey*.[124] The case concerned publications that contained defamatory remarks on Roma people. As with mentally disabled persons and HIV-positive persons, the Court considers that Roma have become a specific type of disadvantaged and vulnerable minority due to their particular history. However, the Court decided not to examine the complaint under Article 14 ECHR, because "the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing *prima facie* evidence that the impugned publications had a discriminatory intent or effect." The Court does not elaborate why it requires "*prima facie*" evidence of the discriminatory intent or effect from the applicant, or, for that matter, why the Court itself does not view the publications as having any discriminatory intent or effect. The judgment strongly contrasts with the *Alajos Kiss* and *Kiyutin* cases, where the Court pro-actively took on the state's stereotyping tendencies.

Therefore, the landmark cases with regard to both mentally disabled persons and persons infected with HIV emphasised the vulnerability of the applicants due to their discrimination in the past. Thus, in these cases, vulnerability functioned as a justificatory instrument for the Court to protect groups whose protection against discrimination had previously not been guaranteed in the Court's jurisprudence. However, the case of *Aksu v. Turkey* shows that the Court's case law with regard to stereotyping is still developing.

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120 ECtHR, *Kiyutin v. Russia*, 10 March 2011 (Appl. No. 2700/10).
121 ECtHR, *I.B. v. Greece*, 3 October 2013 (Appl. No. 552/10).
122 ECtHR, *Kiyutin v. Russia*, 10 March 2011 (Appl. No. 2700/10).
123 There is one earlier case concerning an HIV-positive applicant in which the Court ruled that it found no evidence for discrimination and declared the complaint manifestly ill-founded; see ECtHR, *V.A.M. v. Serbia*, 13 March 2007 (Appl. No. 39177/05).
124 ECtHR (GC), *Aksu v. Turkey*, 15 March 2012 (Appl. Nos. 4149/04, 41029/04).

## Conclusion

In this article, I presented an analysis of the term vulnerability in the European Court of Human Rights' case law by systematically analysing all the Court's judgments containing the word vulnerability instead of – as usually happens – limiting the analysis to a small number of stand-out cases. This made it possible to demonstrate statistically that the number of mentions of vulnerability has strongly increased. In 2013, the cases where vulnerability played a role in the Court's judgments made up nearly 8 % of the total number of judgments, against less than 2 % up until 2007. Therefore, the claim made in the academic debate with regard to the increased use of vulnerability in the Court's case law is confirmed – absolutely as well as relatively – by the findings in this article.

The cases discussed in section II show that the Court has clarified the factors that determine the vulnerability of detainees, victims, asylum seekers, suspects, Roma, mentally ill persons and persons infected with HIV. The most prevailing determinants of vulnerability are: a history of prejudice, discrimination and stigmatisation, a situation of state control, or an international consensus on the vulnerability of a certain group. In contrast to the common view held in the literature based on a limited number of stand-out cases, a comprehensive analysis shows that the Court has clarified the determining factors of vulnerability of the subjects that are most often recognised as vulnerable in its case law.

Finally, this comprehensive analysis made it possible to conclude that, for some categories, there is a clear relation between the Court's change in attitude and the appearance of the word. Therefore, the Court may use the word vulnerability to legitimise taking a stronger and more pro-active position *vis-à-vis* state authorities. While not internalising Fineman's argument for the universal vulnerability of the human being, the Court does implement important parts of her theory by recognising the influence of the surroundings on the vulnerable person and addressing the key role of state authorities in determining these surroundings. With its increased attention for vulnerability, the Court is well-positioned to substantively address the vulnerability of people and to move states to take vulnerability into account in their law- and policymaking activities.

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