The protection of vulnerable groups and individuals by the European Court of Human Rights

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“Some vulnerabilities are natural, inevitable, and immutable. Others are created, shaped, or sustained by current social arrangements. While we should always strive to protect the vulnerable, we should also strive to reduce the latter sort of vulnerabilities insofar as they render the vulnerable liable to exploitation.”

Robert E. Goodin, Protecting the Vulnerable
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INTRODUCTION

THE AUTONOMY MYTH

Consider the following depiction of mankind:

“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 in spirit. A new movement in legal philosophy is now questioning this basic principle. According to this ‘vulnerability movement’, which is sparked by the work of Martha Fineman, the human being is born physically and socially dependent on its environment, and remains dependent on its environment for the rest of its life. The essential characteristic of human beings is therefore not autonomy, but rather vulnerability. Legal texts should therefore move their view of human beings as autonomous persons toward a more vulnerable consideration of human beings.

Several legal authors 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. The aim of this thesis is to provide a comprehensive analysis of the Court’s case law regarding vulnerability, and test the hypothesis if vulnerability has indeed played a bigger role in the Court’s case law in previous years than before. Subsequently, the thesis questions whether this case law points to a new perception by the Court of the function of vulnerability in human rights protection.

CENTRAL PROBLEM AND RESEARCH QUESTION

The Universal Declaration of Human Rights is not alone in its depiction of the human being as a free-born individual. Constitutions and treaties around the globe that were adopted after the 18th century were based on the same liberal political thought that was the driving force behind the U.S. Declaration of Independence in 1776 and the French Revolution in 1789. This thought conceptualizes human beings as autonomous rights holders, who are protected in their autonomy from encroachment on their rights by other individuals or the state. This idea is subsequently implemented in many policy areas in modern western countries.

In her book The Autonomy Myth, Martha Fineman sets out to debunk the liberal political theory by questioning the very reality of the purported autonomy of human beings. According to Fineman, every society has its own “foundational myths” which are associated with its origin and its national character. The foundational myth that underlies the modern western world is the idea of the ‘social contract’: the notion that states exist because individuals, who are free by nature, joined together and consented to create an entity – the state – to act on their behalf. The preamble of the Constitution of the United States is a classic expression (‘We the People’) of the social contract idea:

1 See below.
“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

According to Fineman, foundational myths have a strong influence on the development of the identity of a nation. These myths operate in a complex cultural context and are embedded into the framework of a general ideology, and change the way we understand ourselves and our environment, including the political realm. This is where autonomy makes a first entrance in Fineman’s analysis. Fineman describes the word ‘autonomy’ as part of the language of the foundational myth:

“By evoking the language of foundational myths – words such as ‘autonomy’, ‘independence’, ‘justice’ and ‘liberty’ – political players may shield a very radical agenda from societal scrutiny.”

Thus, the myth of the social contract has caused autonomy to play a central role in our identity and in modern public policy. Autonomous individuals interact with the state and its institutions, as well as with each other, through processes of negotiation, bargaining, and consent. Society is conceived as a collection of self-interested individuals who manage their independently acquired and overlapping resources. The way we come to perceive a liberal relationship between the state and the individual is a manifestation of the autonomy ideal. Rather than being dependent on or asserting entitlement to the provision of socioeconomic goods by the state, the liberal subject demands only the autonomy that will enable him to provide for himself and his family. His demand for liberty is refined as the freedom to make choices, the right to contract. Laws, constitutions and treaties reinforce this idea by letting individual rights define the relationship between government and citizens. Individual liberty interests are protected; autonomy entails being left alone to satisfy our own wants and needs without undue restraint.

According to the vulnerability movement, the image of the human being encapsulated in the liberal subject is reductive and fails to reflect the complicated nature of the human condition. The vulnerability approach replaces the liberal subject with the ‘vulnerable subject’. The vulnerable subject is the embodiment of the realization that vulnerability is a universal and constant aspect of the human condition. Dependency and vulnerability are not deviant, but natural and inevitable. Every human being is born physically and socially dependent on his environment, and remains dependent on his environment for the rest of his life. The essential characteristic of human beings is therefore not autonomy, but rather vulnerability. Without involving vulnerability in our notions on law, a primary component of man is neglected. Fineman therefore calls for a reconstruction of the locus of law and policy from autonomy to vulnerability. In Fineman’s view, the autonomy myth has produced institutional arrangements that fail to take account of the dependency inherent in the human condition. The ideology of autonomy treats vulnerability as a private matter with which the state has no legitimate concern. The demand for liberty effectively operates as a restraint on the state, which is deterred from interference with individual liberty, even for the purpose of ensuring greater social equality. The effects are big social inequalities between people. With her vulnerability thesis, Fineman wants to offer an alternative to the rigid and formal equal protection under the law: her vulnerability thesis does not focus on the

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4 The Autonomy Myth, p. 16. In making this point Fineman heavily relies on two other interesting ‘constructionist’ books: Myth and Reality by Mircea Eliade and Political Myth by Henry Tudor.
5 Ibid.
7 The Autonomy Myth, p. 17.
8 Equality, Autonomy, and the Vulnerable Subject in Law and Politics, p. 17.
9 Ibid., p. 36-37.
discrimination against certain groups in society, but focuses on social institutions that favor limited segments of the population by distributing privilege and disadvantage in systems that transcend identity categories.\textsuperscript{10} Therefore, a discourse reform in law and politics is needed to realize social equality between citizens and to point the state’s policy and obligations in the right direction.

In accord with Fineman’s ideas, several authors\textsuperscript{11} have noted that, in recent years, vulnerability reasoning has played an increasingly prominent role in the case law of the ECtHR. Some have gone as far as calling the trend a revolution.\textsuperscript{12} However, studies that are performed on this topic usually only address standout cases like \textit{M.S.S. v. Belgium and Greece}.\textsuperscript{13} The research in this thesis will examine all cases where vulnerability has played a role in the judgment of the Court. In this way, the thesis will provide a comprehensive look at the Court’s case law regarding vulnerability, and will verify whether the statements made on the increased use of vulnerability reasoning are correct. With this data in hand, we can explore whether the increased use of vulnerability by the Court points to a new notion on the role that vulnerability can play in human rights law protection. Therefore, the central question in this thesis is:

\textit{Does the case law of the European Court of Human Rights confirm the view that the Court has applied vulnerability reasoning more often in the past few years, how does the Court give substance to vulnerability in its case law, and does this have substantive implications for the human rights protection afforded by the Court?}

In order to give a complete view of the Court’s understanding of vulnerability, all cases which contain the term ‘vulnerability’, ‘vulnerable’ or ‘vulnérabilité’ will be analyzed. The judgments will be evaluated from different angles, in order 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? Which characteristics does an individual or group need to have in order for the Court to recognize it as a vulnerable subject? What are the consequences for the Court’s judgment when a group or individual is recognized as vulnerable? The Court’s understanding of the nature of the vulnerability concept will also be analyzed: does the Court characterize vulnerability as the cause or the consequence of a human rights violation? Does the Court distinguish between different forms of vulnerability? Through these analyses I try to get a clearer picture of how the Court applies vulnerability in its case law.

Having a clear idea of the Court’s understanding of vulnerability creates the opportunity to answer the question 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 word that the Court uses to describe a circumstance that the Court had already integrated in its reasoning? Or is the increased use of vulnerability a sign of a new notion of the function of human rights and an increased prioritization of vulnerable groups and individuals by the Court? That will be the final subquestion of this thesis.

\textsuperscript{10} Equality, Autonomy, and the Vulnerable Subject in Law and Politics, pp. 15-16.


\textsuperscript{13} ECtHR [GC] 21 January 2011, no. 30696/09 (M.S.S. v. Belgium and Greece).
METHOD

As said above, the research in this thesis encompasses all the Court’s judgments where the terms ‘vulnerability’, ‘vulnerable’ or ‘vulnérabilité’ play a role. These terms have been mentioned by the Court in around 900 judgments until 2013. I have reduced this number to 557 cases where these terms actually play a role in the judgment. With ‘play a role’, I mean that the word was 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 instances the use of the word was of some sort of interest to the Court and was applied because of its particular meaning. When analyzing the Court’s understanding of vulnerability in Chapters Two, Three, Four and Five, the cases where the Court refers to vulnerability in the assessment sections become especially relevant, since these sections include the substantive considerations that express what vulnerability adds to the Court’s judgment.

Not only cases where the applicant or another person is recognized as vulnerable are included. In some cases the Court considers whether a person is vulnerable, and then explicitly decides that he or she is not. These cases are of course included in the research, because they give valuable insight into the criteria that the Court uses when identifying a vulnerable subject. Cases with minor references to the terms, for example in third-party interventions or in the applicant’s or government’s statement of the facts, were left out of the research if they were the only references in the case, because I cannot assume that the term plays a role in the Court’s judgment if it is not (also) mentioned in its own statement of the facts or in its assessment of the case. The same goes for cases where the vulnerability-words are only mentioned in either concurring or dissenting opinions; these cases are left out of the research. Decisions are also not part of this research.

While reading the Court’s cases, I categorized the relevant cases into tables according to date, the vulnerability category, determinants of vulnerability, effects of vulnerability and the relevant Articles of the European Convention on Human Rights (hereafter: the Convention or ECHR). A few things should be said about these categorizations. Some categories are pretty straightforward: the year, the determinants of vulnerability (why is someone considered to be vulnerable?) and the relevant ECHR Articles. When more than one violation is under consideration in one case, I take the relevant ECHR Article to be the Article under which the Court brings up the term vulnerability (or vulnerable or vulnérabilité). With the vulnerability category, I mean to categorize the groups or individuals that are considered as vulnerable and put them together with the same type of subjects as much as possible. Examples of these vulnerability categories are children, detainees and victims of crimes. I am aware that this is a tricky system of sorting, since there are many ECtHR cases where the vulnerable subject does not only belong to one type, but his circumstances lead to a classification in more than one category, for example when a detained person also has a mental illness. I have tried to account for this as much as possible by making categories that encompass multiple types of vulnerability (e.g. detained + mental disorder). Nonetheless, there are also many individuals or groups that fit quite readily into a specific category.

It should be noted that the categories ‘vulnerability category’ and ‘determinants of vulnerability’ are different. When placing certain individual or group in a vulnerability category, I ask the question: who is the group or individual that is being considered vulnerable in this case? When addressing the determinants of vulnerability, I ask: why is the group or individual considered vulnerable in this case? For example, the Roma people have been recognized as a vulnerable group by the Court in several cases. These cases I place under the vulnerability category ‘Roma’. In the case Oršuš and others v. Croatia the Court clarified why it considers the Roma people as a vulnerable group: “as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority”\(^\text{14}\). The history of the group, then, is the reason why this specific group is considered vulnerable. The first question will be addressed in Chapter One, while the determinants of vulnerability are the subject of Chapter Two. Sometimes, however, the line is hard to draw where a type starts and where the reasons for the vulnerability end. In certain cases this is clear, but, for instance, in the case of children, the category to which the vulnerable subject belongs, namely children, is also the reason that it is considered vulnerable – the child is vulnerable, because it is a child. In any case, this might be the reason why

\(^\text{14}\) ECtHR [GC] 16 March 2010, No. 15766/03 (Oršuš and others v. Croatia).
authors on the subject of vulnerability have stated that the Court hardly ever mentions the reasons why it considers a certain group or individual as vulnerable.\textsuperscript{15} Presumably, the Court assumes that the type of group or individual in itself sufficiently justifies its labeling as vulnerable. More on this will be discussed in Chapter Two.

Finally, the answer to the final subquestion (whether the increased use of vulnerability has substantive implications for the human rights protection afforded by the Court) will be sought in Chapter Five in the following way. For a selected number of vulnerable categories, I will place the case law involving vulnerability reasoning alongside cases on these subjects where the word vulnerability does not appear. These categories are: detainees, victims, mentally disabled persons and persons with HIV. I have chosen these four categories, because the Court has attached the most clear-cut legal implications to these categories, as I will demonstrate in Chapter Three: for detainees and victims, the Court has placed special positive obligations on the state’s authorities (especially under Articles 2 and 3 ECHR); 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 a proper comparison of this case law to cases on these same categories where the word vulnerability does not appear. If the same consequences do not occur in the latter cases, this will be an indication that the vulnerability of the subjects plays a significant role in determining the degree of human rights law protection these subjects warrant. The cases that will be discussed in this chapter 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 word vulnerability will be made apparent. This diachronic method will give us a clear impression of the extent to which the term vulnerability has an impact on the reasoning of the Court.

THE SOURCES USED IN THIS THESIS

This thesis is based on sources of two main types, which together make it possible to analyze the Court’s understanding of vulnerability. The first is simply the case database of the ECtHR (Hudoc), which was used to search for the cases that concerned vulnerability. As said, the terms ‘vulnerability’, ‘vulnerable’ or ‘vulnérabilité’ were searched for up until 1 January 2014, only judgments and no decisions, and otherwise no advanced searches were used.

The second type of sources used is the literature that is written on the subject of vulnerability, which was helpful to understand and categorize the concept of vulnerability. The literature can be divided into legal literature and other literature. The legal literature consists of several articles and books that especially discuss the philosophical impact of vulnerability on law and human rights. The scarce articles that are written on the ECtHR and vulnerability all point to the increased attention of the Court for vulnerability, and make useful categorizations of the Court’s case law regarding vulnerability. A comprehensive display of the Court’s case law, as in this thesis, is still lacking.

THE THEORETICAL AND CONCEPTUAL FRAMEWORK

Before moving on, it is perhaps useful to say something about the theoretical and conceptual framework of this research.

First of all, I want to emphasize that this is a legal thesis. Despite the philosophical and political foundations of Fineman’s vulnerability project, the aim of this thesis is to provide a thorough insight into how an authoritative legal court, in this case the ECtHR, applies vulnerability in its jurisprudence. The implementation of vulnerability into public discourse has serious political implications. As said above, Fineman aims to change policymaking and address social inequality by changing the view of human beings as autonomous persons to a more vulnerable consideration of humans. This is quite a radical change and its political discussion lies outside the scope of this thesis. The thesis will therefore not add to the theoretical discussion on the function of vulnerability in social and public policy, but will primarily give a (statistical) outlook on the use of the concept by the ECtHR. In the final chapter I will also discuss whether the increased use of vulnerability points to a new notion of the function of vulnerability in human rights law.

In order to get a clear view of whether vulnerability as a concept is playing an important role in the case law of the ECtHR, synonyms of vulnerability, such as ‘fragility’, are left out of this research. Although these synonyms convey the same idea as vulnerability, the literature regarding this subject is specifically pointing at the increased use of vulnerability in the Court’s case law. To put this claim under examination, the research in this thesis concentrates solely on the use of vulnerability.

Besides synonyms, the literature on vulnerability contains a number of different types of distinctions made in the concept of vulnerability. In this thesis, I will come across several of these distinctions. These distinctions are helpful tools to further analyze the Court’s understanding of vulnerability. One such tool that I will discuss in Chapter Four is the distinction between vulnerability that is the cause of a human rights violation and vulnerability that is the consequence of such a violation, i.e. did the person concerned become vulnerable because of the violation or is there a violation because the person was in a vulnerable position? How does the Court understand vulnerability, as a cause or as an effect? When analyzing the Court’s understanding of vulnerability in Chapter Four, I will get deeper into these distinctions.

Another discussion point is whether the Court’s approach to the concept of the vulnerability—assigning vulnerability to groups of persons – is a correct approach. Fineman is a strong opponent of this understanding of vulnerability. According to Fineman, marking groups as vulnerable facilitates state paternalism and obscures the institutional errors and inequalities that are actually at the basis of human rights violations.¹⁶ Fineman advocates a universal approach to vulnerability, where all human beings are considered vulnerable. The Court’s vision and Fineman’s critique will be more deeply discussed in Chapter Four.

**Outline of the Thesis**

The remainder of the thesis consists of five chapters. The first chapter will be quite a statistical affair. This is to show the number of cases involving vulnerability, and to zoom in on the individuals and groups that the Court has recognized as vulnerable in its case law. Chapter Two deals with the question which characteristics an individual or group needs to have in order for the Court to recognize it as a vulnerable subject. The answer to this question will give us better insight into the underlying reasons of the Court to recognize a certain group or individual as vulnerable subjects, and the extent to which we can generalize the Court’s judgments to other groups and individuals. The consequences for the Court’s judgment when a subject is considered as vulnerable are discussed in Chapter Three. Here, I will also deal with the different ECHR Articles that the Court applies the vulnerability reasoning to. The fourth chapter contains a further analysis of what the Court understands under vulnerability. Finally, in Chapter Five I aim to answer the question whether the increased use of the word ‘vulnerability’ in the Court’s case law points to a new notion of the role of vulnerability in human rights law protection. All is recapitulated in the conclusion.

CHAPTER ONE: VULNERABLE INDIVIDUALS AND GROUPS

1.1 INTRODUCTION
The groups and individuals that the Court has recognized as vulnerable subjects in its case law are very diverse. Amongst others, detainees, victims, children and non-nationals are qualified as vulnerable by the Court. This chapter will zoom in on the individuals and groups that the Court has recognized as vulnerable in its case law. The chapter will begin by showing the number of cases where vulnerability is applied by the Court, and will then proceed to discuss the individuals and groups that the Court has recognized as vulnerable.

1.2 HOW MANY MENTIONS OF VULNERABILITY?
As mentioned earlier, the legal literature regarding vulnerability has recently brought to notice the increasing use of vulnerability reasoning in ECtHR case law. Peroni and Timmer have pointed out the shortage of attention for this particular development in the Court’s case law:

“Though each and every move of the European Court of Human Rights is intensely followed these days, one recent development in the front lines of its reasoning has so far escaped scholarly attention: the emergence of the concept of vulnerable groups.”

Vulnerability has played a role in 557 cases of the Court up until, and including, 2013. Since its first use of the notion in 1981 in the case of Dudgeon v. the United Kingdom, the number of mentions of vulnerability has strongly increased, as can be seen from the chart on the next page. A first glance at these numbers immediately shows a strong increase in frequency of the mentions of vulnerability:

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18 ECtHR 22 October 1981, no. 7525/76 (Dudgeon v. the United Kingdom).
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:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of judgments at the ECtHR</th>
<th>Number of cases involving vulnerability</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959-1999</td>
<td>1014</td>
<td>16</td>
<td>1.6 %</td>
</tr>
<tr>
<td>2000</td>
<td>695</td>
<td>7</td>
<td>1.0 %</td>
</tr>
<tr>
<td>2001</td>
<td>888</td>
<td>15</td>
<td>1.7 %</td>
</tr>
<tr>
<td>2002</td>
<td>844</td>
<td>8</td>
<td>0.9 %</td>
</tr>
<tr>
<td>2003</td>
<td>703</td>
<td>12</td>
<td>1.7 %</td>
</tr>
<tr>
<td>2004</td>
<td>718</td>
<td>16</td>
<td>2.2 %</td>
</tr>
<tr>
<td>2005</td>
<td>1105</td>
<td>15</td>
<td>1.4 %</td>
</tr>
<tr>
<td>2006</td>
<td>1560</td>
<td>25</td>
<td>1.6 %</td>
</tr>
<tr>
<td>2007</td>
<td>1503</td>
<td>26</td>
<td>1.7 %</td>
</tr>
<tr>
<td>2008</td>
<td>1543</td>
<td>42</td>
<td>2.7 %</td>
</tr>
<tr>
<td>2009</td>
<td>1625</td>
<td>67</td>
<td>4.1 %</td>
</tr>
<tr>
<td>2010</td>
<td>1499</td>
<td>76</td>
<td>5.1 %</td>
</tr>
<tr>
<td>2011</td>
<td>1157</td>
<td>80</td>
<td>6.9 %</td>
</tr>
<tr>
<td>2012</td>
<td>1093</td>
<td>82</td>
<td>7.5 %</td>
</tr>
<tr>
<td>2013</td>
<td>916</td>
<td>70</td>
<td>7.6 %</td>
</tr>
</tbody>
</table>

19 The total numbers of ECtHR judgments are found at: <http://www.echr.coe.int/Documents/Overview_19592013_ENG.pdf>, retrieved 28 December 2014.
What might explain this rise in cases mentioning vulnerability? The increased academic interest in the concept of vulnerability across multiple disciplines might explain the rise. In popular psychology, vulnerability has taken a huge leap of interest in the 2000’s. Of course, Martha Fineman and her followers have shown that vulnerability can also be relevant in a legal context, which might have added to the awareness of the concept. But there are no indications that the increase of the use of vulnerability is related to Fineman’s ideas. The rise in mentions might simply be the result of certain considerations becoming standard in the Court’s judgments. These questions become relevant in the final chapter when we examine whether the increased use of vulnerability reasoning points to a new notion of the role of vulnerability by the court.

1.3 Most mentioned vulnerable subjects: >20 cases

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 vulnerability. As a result, the persons that the Court has recognized as vulnerable subjects are very divers. The graph below shows the subjects that have been most prevalent among the ones recognized as vulnerable by the Court. These are detainees, non-nationals, victims, suspects, Roma people, children and mentally ill persons. These groups all have more than twenty mentions as vulnerable subjects in the Court’s case law. In this paragraph I will zoom in on these large groups and individuals. Note that, although the Court makes a distinction in the way it deals with asylum seekers and other non-nationals, I have here counted asylum seekers as a subcategory of non-nationals in order to have, for the sake of clarity, a total sum of all non-national cases taken together.

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1.3.1 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. The Court first accepted in *T.W. v. Malta*[^21] 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.”[^22]

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.[^23] A large portion of the mentions of vulnerability in cases concerning detainees is accounted for by the standard consideration by the Court that persons in custody are in a vulnerable position and the authorities are under a duty to protect them.

The identity of the detained person can have an influence on the level of vulnerability that is assigned to a certain individual. In the *Öcalan v. Turkey*[^24] case, the Court held that the political background of the applicant made him less vulnerable, because of the political ramifications that would be the consequence of anything happening to him. There are also ways in which the level of vulnerability of the detained person can be increased. This is the case when the authorities arouse ‘feelings of vulnerability’ in the detainee by physical and mental torture[^25], isolation[^26], intimidation[^27], lengthy periods of interrogation[^28] and when the detainee’s correspondence with the Court is suppressed[^29]. The detainee’s situation is also considered particularly vulnerable when he has no representative, either in the criminal procedure[^30] or in the proceedings before the Court.[^31] However, when the detained person does have a legal representative, his vulnerability does not excuse him from making procedural mistakes.[^32] 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.[^33]

The case *D.F. v. Latvia* stands out because of the somewhat awkward description that the Court gives of the involved detainees.[^34] The case concerns inter-prisoner violence. The applicant had complained that, as a former police informant, he was at constant risk of violence from his co-prisoners. His requests for a transfer

[^21]: ECtHR 29 April 1999, no. 25644/94 (*T.W. v. Malta*).
[^22]: ECtHR [GC] 27 June 2000, no. 21986/93 (*Salman v. Turkey*).
[^23]: The foundational case in regard to the vulnerability of detainees on the basis of Article 3 of the Convention is *Iwanczuk v. Poland* (ECtHR 15 November 2001, no. 25196/94). Vulnerability on the basis of Article 5 was first established in the decision of the Commission *Kurt v. Turkey* (5 December 1996, no. 24276/94), but was first used by the Court in the abovementioned *T.W. v. Malta* case.
[^24]: ECtHR 12 March 2003, no. 46221/99 (*Öcalan v. Turkey*).
[^25]: ECtHR 8 July 2004, no. 48787/99 (*Ilaşcu and others v. Moldova and Russia*).
[^26]: Ibid.
[^27]: ECtHR 6 November 2007, no. 8207/06 (*Stepuleac v. Moldova*).
[^28]: ECtHR 10 March 2009, no. 4378/02 (*Bykov v. Russia*).
[^29]: ECtHR 7 February 2008, no. 35421/05 (*Mechenko v. Russia*).
[^30]: ECtHR 16 December 2008, no. 17332/03 (*Levinta v. Moldova*).
[^31]: ECtHR 6 November 2008, no. 30209/04 (*Ponushkov v. Russia*); ECtHR 8 January 2009, no. 74266/01 (*Alekseyenko v. Russia*); ECtHR 10 February 2009, no. 11982/02 (*Novinskiy v. Russia*); ECtHR 15 October 2009, no. 2295/06 (*Chaykovskiy v. Ukraine*).
[^32]: ECtHR 13 October 2009, nos. 19637/05, 43197/06, 39164/07 (*İnan and others v. Turkey*).
[^33]: ECtHR 11 April 2013, no. 17828/05 (*Ochelkov v. Russia*).
[^34]: ECtHR 29 October 2013, no. 11160/07 (*D.F. v. Latvia*).
were rejected multiple times, and it took the Latvian authorities more than one year to transfer him to a specialized prison. The Court held that the applicant had been exposed to the fear of imminent risk of ill-treatment for over a year, despite the authorities being aware that such a risk existed. Here 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.

The vulnerability of a detained person applies for as long as the detention continues. Once the detention is over, it follows from the Court’s case law that the vulnerability no longer applies. In Ayan v. Turkey, the applicant was arrested in the course of a police operation against a banned organization. Relying on Article 3 of the Convention, he complained that he had been ill-treated while in police custody and that no effective investigation had been carried out into the matter by the Turkish authorities. The Court however found no evidence to presume that the applicant had been ill-treated while in custody. As a proof of the ill-treatment, the applicant had brought forward a doctor’s opinion that he had obtained more than eight years after he was released. The Court admits that the applicant could not obtain evidence on his alleged injuries while he was in detention due to his vulnerable position, but stated that after being released from detention, there were no indications that he had remained in a vulnerable position. The Court therefore deemed the applicant capable of obtaining evidence immediately after his release from detention, for example by going to a doctor. The protection that the applicant had enjoyed as a detainee because of his vulnerable status was gone when he was released. In another case, the Court judged on the non-affiliation of an ex-prisoner to the pension system for work he performed while imprisoned. Seven dissenting judges held that ex-prisoners are vulnerable subjects, as they have less access to social services, but the majority of the Grand Chamber disagreed. Timmer criticizes this approach by the Court. According to her, the Court conceptualizes vulnerability so narrowly that state control is the only criterion. This exclusive focus on physical state control does not allow for an adequate response to the vulnerability of ex-prisoners. The Ayan v. Turkey seems to confirm this view, although the Court does not rule out an ex-prisoner’s vulnerability in that case, but just did not see any indication that the ex-prisoner had remained in a vulnerable position after his release. There seems to be room for an ex-prisoner to be vulnerable, but being an ex-prisoner as such is not enough.

To be sure, the 236 cases discussed here are not the only vulnerability cases concerning detainees. There are plenty of other cases where detainees are the subjects, but in these cases the detained persons also have a different characteristic, e.g. they have a mental illness or they are still young. These cases are discussed in separate paragraphs below.

1.3.2 CHILDREN

The second most mentions of vulnerability in ECHR case law refer to children. These cases are rather straightforward and do not contain the same nuances and gradations as the cases involving detainees. Children are recognized as vulnerable and are therefore entitled to State protection. The ages of the children vary from barely ten months old to ‘young persons’. A main part of the cases are about the role of authorities in child abuse cases, but the cases also concern children in a school setting, adopted children or children being heard by the police.

35 ECHR 12 October 2010, no. 24397/03 (Ayan v. Turkey).
36 ECHR [GC] 7 July 2011, no. 37452/02 (Stummer v. Austria).
38 ECHR 12 February 2009, no. 2512/04 (Nolan and K. v. Russia).
39 ECHR 5 March 2009, no. 26935/05 (Societe de Conception de Presse et D’edition et Ponson v. France).
40 ECHR 15 May 2012, no. 56030/07 (Fernández Martinez v. Spain); ECHR 10 April 2012, no. 19986/06 (Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey); ECHR 3 November 2009, no. 30814/06 (Lautsi v. Italy); ECHR 5 March 2009, no. 26935/05 (Societe de Conception de Presse et D’edition et Ponson v. France).
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\(^43\), 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.

1.3.3 Victims

There are 33 cases involving victims where vulnerability plays a role in the Court’s judgment. The Court has recognized victims of domestic violence\(^44\), sexual offences\(^45\), trafficking\(^46\) 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.\(^47\) 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:

“In this connection the Court notes (...) the need to take into account the particular vulnerability of victims of torture and ill treatment.”\(^48\)

The Court refers noticeably more to international treaties in victim cases than it does with other types of vulnerable subjects. It has, for example, 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.\(^49\) 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 (...)”\(^50\)

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 violence cases where the Court again made a specific

\(^{41}\) ECtHR 10 April 2012, no. 19554/09 (Pontes v. Portugal); ECtHR 28 October 2010, no. 52502/07 (Aune v. Norway).

\(^{42}\) ECtHR 14 November 2013, no. 47152/06 (Blokhin v. Russia).

\(^{43}\) ECtHR 12 February 2009, no. 2512/04 (Nolan and K. v. Russia).

\(^{44}\) E.g. ECtHR 28 May 2013, no. 3564/11 (Eremia v. The Republic of Moldova).

\(^{45}\) ECtHR 15 October 2013, no. 33882/05 (Sandru v. Romania).

\(^{46}\) ECtHR 21 July 2011, no. 44438/06 (Breukhoven v. The Czech Republic).

\(^{47}\) ECtHR 4 December 2008, no. 1200/03 (Umayeva v. Russia); ECtHR 24 July 2003, no. 26973/95 (Yöyler v. Turkey); ECtHR 28 July 2009, no. 47709/99 (Rachwalski and Ferenc v. Poland).

\(^{48}\) ECtHR 20 January 2011, no. 14811/04 (Gisayev v. Russia); ECtHR 25 September 1997, no. 23178/94 (Aydin v. Turkey); ECtHR 3 June 2004, nos. 33097/96, 57834/00 (Bati and others v. Turkey).

\(^{49}\) ECtHR 28 May 2013, no. 3564/11 (Eremia v. The Republic of Moldova).

\(^{50}\) Ibid.; ECtHR 12 June 2008, no. 71127/01 (Bevacqua and S. v. Bulgaria); ECtHR 30 November 2010, no. 2660/03 (Hajduova v. Slovakia); ECtHR 16 July 2013, no. 61382/09 (B. v. The Republic of Moldova).
statement about the vulnerability of victims.\textsuperscript{51} It seems that the Court is considering, but not completely ready, to make a statement about the vulnerability of victims in general.

\subsection*{1.3.4 Non-nationals}

The most groundbreaking case of the non-nationals category, and perhaps of all vulnerability cases, is \textit{M.S.S. v. Belgium and Greece}.\textsuperscript{52} In this case the Court has significantly broadened its notion of vulnerability. The applicant is an Afghan asylum seeker who fled Kabul in 2008, 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), Greece was the responsible Member State for the examination of his asylum application. The asylum seeker’s applied for a stay of execution in Belgium due to the deficiencies in the asylum procedure in Greece. His application was rejected, and the Belgian authorities transferred him to Greece in June 2009. There he faced detention in very bad conditions. After the applicant’s release, he lived in the street, and only occasionally received aid from local residents and the church. Steps were reportedly taken to find him accommodation, but according to his submissions to the Court no housing was ever offered to him.

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:

\textit{“(…) the applicant’s distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.”}

When analyzing the applicant’s living conditions in Greece, the Court emphasizes the weight it attaches to him being part of a vulnerable group. To justify this, the Court uses other international and European conventions that supposedly show the consent of the Member States regarding this issue:

\textit{“The Court attaches considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, mutatis mutandis, Oršuš and Others v. Croatia [GC], no. 15766/03, § 147, ECHR 2010-…). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.”}

Finally, the Court holds Greece responsible for the applicant’s abhorrent living conditions, because “the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum seeker”.

The \textit{M.S.S. v. Belgium and Greece} judgment contains other important aspects regarding vulnerability reasoning which will be discussed in the subsequent chapters. For now, it is interesting 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 categorization of asylum seekers as inherently vulnerable. Sajó states in his separate opinion 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, among others, the case \textit{Oršuš and Others v.}…

\textsuperscript{51} ECHR 18 January 2011, no. 32181/08 (Ristic v. Serbia). 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 paragraph 5.3 for this discussion.

\textsuperscript{52} ECHR [GC] 21 January 2011, no. 30896/09 (M.S.S. v. Belgium and Greece). (‘note: this case concerns a non-national who was a detainee as well, so should actually be categorized in a separate category ‘non-national + detainee’. But since the considerations of the Court seem to concern asylum seekers in general, and the judgment subsequently played a big role for other non-nationals in general, I categorized it under ‘non-nationals’).
Croatia, to which the Court refers in the abovementioned passage. In that case\(^{53}\) – which will also be discussed further below – the Court judged that Roma are a vulnerable group because they have been historically subjected to prejudice, resulting in their social exclusion. 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, so they are not even treated as a group in society. Asylum seekers can therefore not be considered a group, of whom every member is inherently vulnerable. Asylum-seekers are far from being homogeneous, Sajó says, if such a group exists at all.

Sajó’s remarks hit the nail on the head. Although his reasoning for sticking with the Court’s former limited meaning of group vulnerability is not convincing (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 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.\(^{54}\) The same holds true for other groups where the Court applies a general vulnerability approach by recognizing 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.

Other cases involving non-nationals are mainly of two kinds: cases about the position of non-nationals in society and cases about non-nationals who are (being) deported to their home country. The former cases pertain to, for example, a distinction made between nationals and non-nationals in domestic expropriation law, favoring non-nationals, which is not in violation of Article 1 of the First Protocol of the Convention according to the Court, given that “non-nationals are more vulnerable to domestic legislation”\(^{55}\).

In the deportation cases, vulnerability is playing an increasingly important role in determining whether the population group to which the asylum seeker belongs is in sufficient peril in his home country to justify not being deported. In Samina v. Sweden\(^{56}\) the Court dedicates a separate paragraph to determining whether the situation of the applicant in her home country (Pakistan) would be so vulnerable, that the implementation of the deportation order to return her to Pakistan would be in violation of Article 3 of the Convention. In several cases the Court found that the applicant did not belong to a vulnerable group in his or her home country, and therefore judged that the deportation would not be in violation of Article 3 of the Convention.\(^{57}\)

1.3.5 Detained + Mental Disorder

Next to the ‘normal’ detainees, the Court has involved vulnerability reasoning in quite a number of cases involving mentally ill detainees. The Court considers detainees with a mental disorder either as ‘particularly vulnerable detainees’\(^{58}\), or as ‘more vulnerable than the average detainee’\(^{59}\), or as detainees ‘in a particularly vulnerable situation’\(^{60}\). The Court’s reasoning regarding mentally ill detainees, then, does not seem to differ

\(^{53}\) ECHR [GC] 16 March 2010, no. 15766/03 (Oršuš and Others v. Croatia).

\(^{54}\) See e.g. ECHR 23 July 2013, no. 41872/10 (M.A. v. Cyprus).

\(^{55}\) ECHR 21 February 1986, no. 8793/79 (James and others v. the United Kingdom); ECHR 8 July 1986, no. 9006/80 (Lithgow and others v. the United Kingdom).

\(^{56}\) ECHR 20 October 2011, no. 55463/09 (Samina v. Sweden).

\(^{57}\) Ibid.; ECHR 10 February 2011, no. 12343/10 (Dzhaksyberg-Enov (Aka Jaxybergenov) v. Ukraine); ECHR 3 March 2011, no. 66317/09 (Elmuratov v. Russia); ECHR 11 October 2011, no. 18414/10 (Sharipov v. Russia); ECHR 5 June 2012, no. 55822/10 (Shakurov v. Russia).

\(^{58}\) Among others ECHR 17 July 2012, no. 2913/06 (Munjaz v. the United Kingdom); ECHR 24 November 2009, no. 23968/05 (Halilovic v. Bosnia and Herzegovina).

\(^{59}\) ECHR 10 January 2013, no. 43418/09 (Claes v. Belgium); ECHR 18 December 2007, no. 41153/06 (Dybeku v. Albania); ECHR 20 January 2009, no. 28300/06 (Sławomir Musiał v. Poland).

\(^{60}\) ECHR 22 January 2013, no. 33117/02 (Lashin v. Russia).
from the way the Court considered detainees with a special circumstance as ‘particularly vulnerable detainees’ (see above).

1.3.6 SUSPECTS
The landmark case regarding the vulnerability of suspects is Salduz v. Turkey. The Court’s consideration that has been reiterated in many cases after the Salduz-case is the following:

“(…) the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (...). At the same time, 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:

“In this respect the Court takes note that the applicant was a policeman and a lawyer himself. While this fact may not mean that he was not vulnerable or in need of an advocate’s support in his procedural capacity as a suspect, the level of the applicant’s expertise cannot be discounted in assessing whether his consent to participate in the particular questioning was well-informed.”

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.

1.3.7 ROMA
The final subjects that have been recognized as vulnerable in more than twenty cases are the Roma. The first time the Roma group was recognized as vulnerable by the Court was in the case of Chapman v. the United Kingdom. The case concerned applicants from five British gypsy families who had bought land on which to station their caravans, without obtaining prior planning permission. After they had bought the land, they were refused permission to place a caravan on the piece of land, and were also given no permission to build a bungalow. It was acknowledged in the planning proceedings that there was no official site for gypsies in the area. The applicants complained that measures taken against them to enforce planning measures violated articles 8 and 14 of the Convention, and argued that these measures also interfered with their peaceful enjoyment of their land, contrary to article 1 of the First Protocol of the convention.

In the Court’s judgment of the case there seems to be a certain overlap between the concepts of vulnerable groups and minorities. The Court first states that there is an “emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security”. Then the Court judges that the Roma ‘as a minority’ are in a vulnerable position and require special consideration by the state:

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61 ECtHR 27 November 2008, no. 36391/02 (Salduz v. Turkey).
62 ECtHR 15 September 2011, no. 24652/04 (Paskal v. Ukraine). See also: ECtHR 11 April 2013, no. 20372/11 (Vyerentsov v. Ukraine).
63 ECtHR 24 April 2012, no. 918/02 (Solovyev v. Russia).
64 ECtHR [GC] 18 January 2001, no. 27238/95 (Chapman v. the United Kingdom).
“(…) although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented. As intimated in Buckley, the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases (…). To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.”

The Court refers to the case of Buckley v. the United Kingdom65, which seems somewhat misplaced. The facts of the Buckley-case were quite similar to the Chapman-case, but there was no consideration of the vulnerability of the Roma population and the Court was actually strongly criticized by the dissenting judges for not sufficiently taking into account the vulnerability of Gypsies as a minority. Judge Repik stated in his separate opinion:

“There was never any mention of the applicant’s right to respect for her home or of the importance of that right to her given her financial and family situation. Nor was any account taken of the possible consequences for the applicant and her children were she to be evicted from her land. In these circumstances the Court, in order to fulfil its supervisory role, ought itself to have considered whether the interference was proportionate to the right in issue and to its importance to the applicant, all the more so as where a fundamental right of a member of a minority is concerned, especially a minority as vulnerable as the Gypsies, the Court has an obligation to subject any such interference to particularly close scrutiny. In my opinion, the Court has not fully performed its duty as it has not taken into account all the relevant matters adduced by the Commission and was too hasty in invoking the margin of appreciation left to the State.”

In the same vein, Judge Lohmus remarks that the Court overlooked the special consideration that needs to be given to a minority group such as the Roma:

“It has been stated before the Court that the applicant as a Gypsy has the same rights and duties as all the other members of the community. I think that this is an oversimplification of the question of minority rights. It may not be enough to prevent discrimination so that members of minority groups receive equal treatment under the law. In order to establish equality in fact, different treatment may be necessary to preserve their special cultural heritage.”

Other cases involving the Roma people have reproduced the Court’s considerations in Chapman v. the United Kingdom. Vulnerability reasoning is used in various cases involving Roma, from measures to sterilize women66 to the education of Roma children.67 The Court has also used different international documents to strengthen its basis for the special human rights protection for Roma people, such as reports from the United Nations Committee on Economic, Social and Cultural Rights and the International Covenant on Economic, Social and Cultural Rights.

1.4 MIDDLE GROUP: 5-20 MENTIONS

In this paragraph, I will discuss the subjects that the Court has recognized as vulnerable in 5 to 20 cases.

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65 ECtHR 25 September 1996, no. 20348/92 (Buckley v. the United Kingdom).
66 ECtHR 13 November 2012, no. 15966/04 (I.G. and others v. Slovakia).
67 See among others ECtHR 13 November 2007, no. 57325/00 (D.H. and Others v. the Czech Republic).
1.4.1 MENTALLY ILL PERSONS
The Court has ruled that ‘persons of unsound mind’ within the meaning of Article 5, paragraph 1, under e, of the Convention are vulnerable persons. In recent cases the Court has judged that individuals suffering from a mental illness constitute a “particularly vulnerable group” due to the discrimination they suffered in society. The cases generally concern the placement of the mentally ill person in a mental health facility, and involve individuals who are residing in state-held facilities as well as private psychiatric institutions.

1.4.2 KURDS
The Court has considered Kurds as vulnerable subject on several occasions. At first, the Court judged in a number of cases that individual Kurds were vulnerable. In later cases, the Court ruled that villagers from south-east Turkey, who are Kurds, are vulnerable in general. This is the first time that vulnerability has been restricted to a geographical location.

1.4.3 NOT-VULNERABLES
There is also a category of not-vulnerables, by which persons are meant who were explicitly not regarded as vulnerable subjects by the Court. This is possible since this research includes all cases where vulnerability plays a role in the judgment, not only cases where someone was actually found vulnerable. In these specific cases,

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68 ECtHR 11 October 2011, no. 30951/10 (Gorobet v. Moldova).
69 ECtHR 20 May 2010, no. 38832/06 (Alajos Kiss v. Hungary); ECtHR 2 May 2013, no. 11737/06 (Zagidulina v. Russia).
70 ECtHR 19 April 2012, no. 2452/04 (M. v. Ukraine).
71 ECtHR 16 June 2005, no. 61603/00 (Starck v. Germany); ECtHR 20 March 2007, no. 5410/03 (Tysiąc v. Poland).
72 ECtHR 16 September 1996, no. 21893/93 (Akdivar and others v. Turkey); ECtHR 28 November 1997, no. 23186/94 (Menteş and others v. Turkey); ECtHR 18 December 1996, no. 21987/93 (Aksoy v. Turkey); ECtHR 4 December 2003, no. 39272/98 (M.C. v. Bulgaria).
73 Among others ECtHR 25 May 1998, no. 24276/94 (Kurt v. Turkey).
the Court explicitly considered the issue of vulnerability, but came to the conclusion that the persons concerned are not vulnerable. This makes these cases particularly interesting, because they reveal what criteria the Court uses to consider groups or individuals as vulnerable. Since this chapter is about which groups and individuals the Court has considered as vulnerable subjects in its case law, and not why it has considered them as such, this paragraph will only describe which groups and individuals the Court has excluded from being vulnerable.

In *Urbárska Obec Trencianske Biskupice v. Slovakia*\(^74\), the Court held that there had been a violation of Article 1 of the First Protocol of the Convention as regards, among others, the transfer land of an association of landowners to members of a gardening association. The Court ruled that no fair balance was made between the interests of the landowners and the members of the gardening association, since there was “no indication that, in general, persons using land in allotment gardens belong to a socially weak or particularly vulnerable part of the population”. As a result, Article 1 of the First Protocol of the Convention was violated.

In *Valiulienė v. Lithuania*\(^75\) the Court ruled that women, like the applicant in this case, do not by default fall into the category of vulnerable persons. The Court held that her being a woman was not enough of a reason to recognize her as vulnerable.

In two other cases\(^76\) the Court adopts an interesting approach. The two detained applicants complain that if they were to be extradited they would face the risk of being subjected to ill-treatment by the Belarus authorities. The Court first establishes that the political opposition “is widely recognised as a particularly vulnerable group in Belarus”, and then rules that the applicants are not a part of this group and are therefore not vulnerable. So the Court here first determines what the scope of vulnerability under these circumstances is, and then rules that the individuals do not fall under that scope.

Finally, in another case\(^77\), the Court held that nine terminally-ill cancer patients were not in a vulnerable situation, because they had all received adequate medical treatment. For reasons not stated, Judge De Gaetano and Judge Vučinić disagree in their separate opinion and still consider the patients as vulnerable individuals.

1.4.4 DETAINED + HEALTH

The Court has also considered detainees who have health problems as vulnerable. As was the case with mentally ill detainees, the health issues of detainees are circumstances that make them ‘particularly vulnerable’\(^78\) and ‘more vulnerable than the average detainee’\(^79\). The Court is not clear as to the extent that a detained person’s illness needs to have developed, but all cases include some sort of illness for which the vulnerable person needed special medical attention.

1.4.5 PERSONS WITH HEALTH ISSUES

Persons with health issues (who were not detained) have also been considered as vulnerable on some occasions. In the important case of *Pretty v. the United Kingdom*\(^80\), judging on the lawfulness of UK’s prohibition on assisted suicide, the vulnerability of terminally ill persons played an important role in the Court’s judgment. The Court held that ‘many’ terminally ill persons will be vulnerable, and that the vulnerability of this class provided the rationale for the prohibition on assisted suicide. It is up to the member states to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Therefore, there was no violation of the Convention.

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\(^{74}\) ECHR 27 November 2007, no. 74258/01 (*Urbarska Obec Trencianske Biskupice v. Slovakia*).

\(^{75}\) ECHR 26 March 2013, no. 33234/07 (*Valiulienė v. Lithuania*).

\(^{76}\) ECHR 18 February 2010, no. 51243/08 (*Puzan v. Ukraine*); ECHR 20 May 2010, no. 3990/06 (*Kamyshev v. Ukraine*).

\(^{77}\) ECHR 13 November 2012, nos. 47039/11, 358/12 (*Hristozov and others v. Bulgaria*).

\(^{78}\) ECHR 2 September 2010, no. 71420/01 (*Bekirski v. Bulgaria*).

\(^{79}\) ECHR 5 February 2013, no. 76317/11 (*Bubnov v. Russia*).

\(^{80}\) ECHR 29 April 2002, no. 2346/02 (*Pretty v. the United Kingdom*).
A special group of ill persons is formed by HIV-positive persons.\textsuperscript{81} The history of prejudice and social exclusion of HIV-positive persons has moved the Court to take an especially strong position regarding the vulnerability of this group. The Court has recognized all persons with HIV as a vulnerable group which governments have to give special consideration to:

“The Court therefore considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.” \textsuperscript{82}

Another notable case regarding persons with health issues is \textit{Fadeyeva v. Russia}.\textsuperscript{83} In this case, the applicant complained that the industrial pollution of the steel-plant, near which she lives, had endangered her health and well-being. Both parties agreed that the applicant’s place of residence was affected by the industrial pollution of steel-plant. However, the degree of disturbance and the effects of pollution on the applicant were disputed. The Court ruled that even if no harm was done to the applicant’s health, the fact that the pollution had made the applicant more vulnerable to illnesses was enough to bring the complaint within the scope of Article 8 of the Convention:

“Even assuming that the pollution did not cause any quantifiable harm to her health, it inevitably made the applicant more vulnerable to various illnesses. Moreover, there can be no doubt that it adversely affected her quality of life at home. Therefore, the Court accepts that the actual detriment to the applicant’s health and well-being reached a level sufficient to bring it within the scope of Article 8 of the Convention.”

According to this reasoning, the applicant herself was not vulnerable, but was made more vulnerable by the violation of the pollution regulations. This is a different way of reasoning by the Court than usual, where the Court first considers the individual or group as vulnerable, and then decides whether or not the measures taken by the authorities are fitting to the vulnerable situation of the subject. In this case, the vulnerability of the applicant has actually been caused by the (lack of) measures by the authorities, making the applicant more vulnerable to illnesses.

1.4.6 Vulnerable persons in general
This category includes cases where the Court has used vulnerability in its judgment in a very general sense to describe persons who need some sort of extra consideration by the state. The vulnerability is not intended at a specific group or individual. An example is \textit{Haas v. Switzerland},\textsuperscript{84} a case about Switzerland’s prohibition of assisted suicide:

“(…) it is appropriate to refer, in the context of examining a possible violation of Article 8, to Article 2 of the Convention, which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives (…). For the Court, this latter Article obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved.”

\textsuperscript{81} As with the cases concerning asylum seekers and other non-nationals, I have here counted HIV-positive persons as a subcategory of persons with health issues in order to have a total sum of all illness cases taken together.
\textsuperscript{82} ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia); ECtHR 3 October 2013, no. 552/10 (I.B. v. Greece).
\textsuperscript{83} ECtHR 9 June 2005, no. 55723/00 (Fadeyeva v. Russia).
\textsuperscript{84} ECtHR 20 January 2011, no. 31322/07 (Haas v. Switzerland).
Although the case is similar to the abovementioned *Pretty v. the United Kingdom* case, the Court here does not only intend mentally ill persons, but poses a general duty under Article 2 of the Convention for all vulnerable people.

1.4.6 State (Agency)

This group of cases consists of agencies of the state which the Court has recognized as vulnerable. These are especially some older cases, including a case in which the Court states that the judiciary of Northern Ireland was vulnerable to terrorist attacks at that specific time, which justified that the government surpassed judicial control over detaining terrorist suspects under the prevailing circumstances. \(^85\) In another one of the earlier vulnerability cases, the Court had to decide on the lawfulness of the retrospective removal of a right to reclaim overpaid tax. There were several technical defects in the tax law, which the Parliament announced it would remove. The applicants had issued their claim immediately prior to the official announcement that Parliament would approve retrospective legislation to remedy the technical defects. The Court held that the applicants’ claim was an attempt to benefit from the vulnerability of the authorities resulting from technical defects in the law. Accordingly, no violation of the Convention was in order. \(^86\)

In two more recent cases, the Court has ruled that a number of police officers were subject to vulnerable feelings when they were outnumbered and assaulted by a group of persons. \(^87\) This justified specific acts of self-defense by the police. The Court has also ruled that the absence of any procedural safeguards in Russian law rendered the members of the bench vulnerable to outside pressure. \(^88\)

1.4.7 Persons Entitled to Social Security

There are five cases in which the Court has named persons that are entitled to social security as vulnerable people. The cases all concern Article 1 of the First Protocol of the Convention. The Court uses the following general consideration in its judgment:

“[…] the Court must have regard to the particular context in which the issue arises in the present case, namely that of a social security scheme. Such schemes are an expression of a society’s solidarity with its vulnerable members.” \(^89\)

The consideration is part of the Court’s assessment whether the interference that is imposed in the case constitutes an excessive individual burden on the applicant. The applicants in all cases are persons who are entitled to social security (one of the cases concerns applicants that are entitled to public pensions\(^90\)). Interestingly, however, the Court does not in any of the cases call the specific applicants themselves vulnerable. The vulnerability is implied from the general consideration quoted above. What is interesting here is that the Court, with other categories of vulnerable subjects, has often shied away from making general remarks about the vulnerability of the whole group of persons. In this instance, on the other hand, the Court sticks to its general consideration and seems reluctant to specify the vulnerability of persons who are entitled to social security.

In *Valkov and others v. Bulgaria*\(^91\) the Court made it clear that the emphasis on society’s solidarity with its vulnerable members distinguishes social security schemes from private insurance schemes.

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\(^85\) ECtHR 26 May 1993, nos. 14553/89, 14554/89 (*Brannigan and McBride v. the United Kingdom*).

\(^86\) ECtHR 23 October 1997, nos. 21319/93, 21449/93, 21675/93 (*National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom*).

\(^87\) ECtHR 24 May 2007, no. 17060/03 (*Zelilof v. Greece*); ECtHR 14 January 2010, no. 2945/07 (*Galotskin v. Greece*).

\(^88\) ECtHR 9 October 2008, no. 62936/00 (*Moiseyev v. Russia*).

\(^89\) Among others, see ECtHR 8 December 2009, no. 18176/05 (*Wieczorek v. Poland*).

\(^90\) ECtHR 25 October 2011, nos. 2033/04, 171/05, 19125/04 (*Valkov and others v. Bulgaria*).

\(^91\) Ibid.
1.4.8 Pregnant women

Pregnant women have been considered as vulnerable on several occasions. The cases all concern the individual situation of the women and the circumstances vary a lot. One case concerned the particularly vulnerable position of the applicant because she was fired from her job while she was on maternity leave 92, while another concerned the vulnerable situation of a woman who was considering abortion. 93 The case of Nechiporuk and Yonkalo v. Ukraine 94 is interesting because it shows the expanding function of vulnerability. In this case, the applicant is a man who has a pregnant wife who was “particularly vulnerable given her advanced stage of pregnancy” and who, as the applicant knew, was in police custody. The Court finds that this “must have exacerbated considerably his mental suffering”. Despite the applicant not being a vulnerable subject, the vulnerability of his pregnant wife also affects the Court’s ruling on him.

1.4.9 Religious groups

This final category includes cases where the Court used vulnerability in cases involving religious groups. In one case, the Court found that the applicant was a member of a vulnerable religious minority. The case concerned the Serbian authorities’ failure to prevent repeated attacks on a member of the Hindu Hare Krishna community and to investigate those incidents, which were likely motivated by religious hatred, effectively. 95 In four other cases, the Court did not recognize a religious group as vulnerable, but vulnerability nonetheless played an important role in the cases. The Court found that safeguarding Article 9 of the Convention is elementary for a proper functioning of Article 11 of the Convention, because without guaranteeing the freedom of organization, the applicant’s freedom of religion would be vulnerable:

“Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual’s freedom of religion would become vulnerable.” 96

The Court therefore found that the complaints of the applicants should be examined under Article 9 of the Convention.

1.5 Small group: <5 cases

A lot of vulnerable subjects have only sparingly been mentioned by the Court. A number of these include subjects who belong to multiple categories, for example detainees who are disabled. The table below shows the subjects that have been recognized by the Court in less than five cases. Below I will discuss a number of the cases that are important for the Court’s understanding of vulnerability.

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<th>Four cases = 59</th>
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<td>- Child + victim</td>
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<th>Three cases</th>
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<td>- Homosexuals</td>
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<td>- The weaker party in civil proceedings</td>
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<td>- Expropriated persons</td>
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<td>- Detained + young person (juvenile)</td>
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<td>- Non-national + child</td>
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<th>Two cases</th>
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<td>- Tenants</td>
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92 ECtHR 30 July 2009, no. 4487/04 (Svetlana Orlova v. Russia).
93 ECtHR 30 October 2012, no. 57375/08 (P. and S. v. Poland).
94 ECtHR 21 April 2011, no. 42310/04 (Nechiporuk and Yonkalo v. Ukraine).
95 ECtHR 14 December 2010, no. 44614/07 (Milanovic v. Serbia).
96 Among others ECtHR 26 October 2000, no. 30985/96 (Hasan and Chaush v. Bulgaria).
There are several cases where children with various circumstances are recognized as vulnerable by the Court. Children who have been the victim of child abuse are considered particularly vulnerable.\(^97\) The same holds true for children who have a mental disorder\(^98\) or are the sons and daughters of illegal immigrants, especially if they are unaccompanied by their families.\(^99\) Young persons who are detained or accused of a crime are also considered vulnerable by the Court, although they are not always regarded as ‘particularly’ vulnerable like children.\(^100\)

The Court has not recognized homosexuals as vulnerable persons in its case law. However, in three cases, the Court has found that “particularly weighty reasons” need to be advanced before the Court to justify a measure against a homosexual, because such a measure “operates in this intimate and vulnerable sphere of an individual’s private life”.\(^101\) Transsexual persons have also not been deemed as vulnerable by the Court. In two cases regarding the legal status of transsexuals in the United Kingdom, the Court did, however, find that the legal system placed transsexuals in an anomalous position in which they could experience feelings of vulnerability, humiliation and anxiety.\(^102\) The applicants had undergone gender re-assignment surgery and lived in society as females, but, for legal purposes, they had remained males. This had effects on their life where sex was of legal relevance, such as in the area of pensions and retirement age. The legal system in the United Kingdom was therefore in violation of Article 8 of the Convention.

There is a group of cases where the Court has used vulnerability to impose duties on the state to guarantee the right to a fair trial. For example, the Court has held that, under certain circumstances, Article 6 of

\(^{97}\) ECtHR 20 March 2012, no. 26692/05 (C.A.S. and C.S. v. Romania).
\(^{98}\) ECtHR 9 October 2007, no. 9375/02 (Saoud v. France).
\(^{99}\) ECtHR 12 October 2006, no. 13178/03 (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium); ECtHR 13 December 2011, no. 15297/09 (Kanagaratnam and others v. Belgium); ECtHR 19 January 2012, nos. 39472/07, 39474/07 (Popov v. France).
\(^{100}\) ECtHR 30 May 2013, no. 35985/09 (Martin v. Estonia); ECtHR 11 December 2008, no. 4268/04 (Panovits v. Cyprus).
\(^{101}\) ECtHR 2 March 2010, no. 13102/02 (Kozak v. Poland); ECtHR 12 June 2012, no. 9106/06 (Genderdoc-M v. Moldova); ECtHR 9 October 2012, no. 24626/09 (X v. Turkey).
\(^{102}\) ECtHR 11 July 2002, no. 25680/94 (I. v. the United Kingdom); ECtHR 11 July 2002, no. 28957/95 (Christine Goodwin v. the United Kingdom).
the Convention requires the domestic courts to assist the most vulnerable party in the proceedings.\textsuperscript{103} Similarly, persons with no legal capacity\textsuperscript{104} or persons who have been caught up in a procedure that has taken a very long time (the Court uses the term ‘legal limbo’)\textsuperscript{105} are considered vulnerable and require special consideration.

In the case \textit{Hutten-Czapska v. Poland}\textsuperscript{106}, the Court has ruled that tenants are ‘often’ vulnerable individuals. Nevertheless, it found that the government had struck a fair balance between the interests of the land owner and the tenants. The Court does not further elaborate when tenants are recognized as vulnerable or not. In another interesting case regarding tenants, the government contended that the case of \textit{Connors v. the United Kingdom}\textsuperscript{107} (which is similar to the \textit{Chapman v. the United Kingdom} case discussed above), is not applicable, because it concerns the vulnerable Roma people, unlike the case at hand. The Court rejects this argument by the government and rules that the Connors-case is applicable:

“The Court is unable to accept the Government’s argument that the reasoning in Connors was to be confined only to cases involving the eviction of Roma or cases where the applicant sought to challenge the law itself rather than its application in his particular case. The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.”\textsuperscript{108}

This judgment is highly significant, because it seems that the Court might take reasoning which it previously applied to vulnerable groups or individuals, and use it for other subjects who are essentially not vulnerable themselves. Vulnerability reasoning can lay the basis for more extensive protection. This might be a first sign of the working of vulnerability being extended to other persons.

Specific witnesses have also been recognized as vulnerable in two cases, which entitled them to protection.\textsuperscript{109} In two cases regarding journalists in Ukraine, the Court held that the journalists who had covered politically sensitive topics were vulnerable which was evidenced by the death of eighteen journalists in Ukraine since 1991.\textsuperscript{110} The category ‘principles and ideas’ is a somewhat odd category compared to the other categories. It contains two cases where the Court held in one that the principle of legal certainty “came to be extremely vulnerable” in the proceedings\textsuperscript{111}, and in the other that the Court observes that “thought and opinions on public matters are of a vulnerable nature”\textsuperscript{112}. Apart from these two cases, no other abstractions have been subject to vulnerability reasoning in the Court’s case law.

Finally, there are several cases concerning women in different circumstances: a mother whose child was taken into care\textsuperscript{113}, a woman working as a prostitute\textsuperscript{114} and a 19 years old female who was confronted with

\textsuperscript{103} ECtHR 11 December 2008, no. 21539/02 (Trapeznikova v. Russia); ECtHR 15 January 2009, no. 42454/02 (Menchinskaya v. Russia); ECtHR 1 April 2010, no. 5447/03 (Korolev v. Russia (No. 2)).

\textsuperscript{104} ECtHR 16 July 2009, no. 20082/02 (Zehentner v. Austria).

\textsuperscript{105} ECtHR 26 June 2012, no. 26828/06 (Kurić and others v. Slovenia).

\textsuperscript{106} ECtHR 19 June 2006, no. 35014/97 (Hutten-Czapska v. Poland).

\textsuperscript{107} ECtHR 27 May 2004, no. 66746/01 (Connors v. the United Kingdom).

\textsuperscript{108} ECtHR 13 May 2008, no. 19009/04 (McCann v. the United Kingdom).

\textsuperscript{109} ECtHR 19 July 2007, no. 40074/98 (Feyzi Yildirim v. Turkey); ECtHR 13 November 2012, no. 7678/09 (Van Colle v. the United Kingdom).

\textsuperscript{110} ECtHR 8 November 2005, no. 34056/02 (Gongadze v. Ukraine); ECtHR 15 July 2010, no. 16695/04 (Gazeta Ukraina-Tsentr v. Ukraine).

\textsuperscript{111} ECtHR 19 February 2009, no. 24465/04 (Khristov v. Ukraine).

\textsuperscript{112} ECtHR 25 October 2011, no. 27520/07 (Altuğ Taner Akçam v. Turkey).

\textsuperscript{113} ECtHR 18 June 2013, no. 28775/12 (R.M.S. v. Spain).

\textsuperscript{114} ECtHR 24 July 2012, no. 47159/08 (B.S. v. Spain).
several male policemen\textsuperscript{115} were all considered vulnerable by the Court. In one case, the Austrian government attempted to justify the prohibition of ova donation by stating that the prohibition was meant to prevent the exploitation of women in vulnerable situations. The Court finds that this argument does ‘not apply’, but does not elaborate its position.\textsuperscript{116}

\section*{1.6 Concluding Remarks}

In conclusion, the figures in the first paragraph of this chapter are very straightforward: there has been a great increase in the number of cases where vulnerability played a role in the judgment of the Court. A further look into the cases involving vulnerable subjects shows exactly what one would expect from a newly developing concept: a great variety in the application of the concept with no central definition that guides the Court’s use. The result is that there are several discrepancies in the Court’s case law regarding vulnerability that require further analysis. First, there are cases where persons and individuals are deemed vulnerable and cases where the situation or the position of the subject is deemed vulnerable. Then there are cases where the Court chooses to recognize an individual as vulnerable and cases where a complete group is recognized as vulnerable; although there seem to be indications that the Court is increasingly adopting the group approach for several categories. Thirdly, cases where not the applicant but a person related to the applicant is deemed vulnerable need to be examined further, to see if and how this influences the Court’s judgment. There is also a difference between cases where the Court holds that a subject is vulnerable and other cases where the Court holds that a subject feels vulnerable. Finally, in some cases the Court has judged that subjects are ‘particularly vulnerable’ in contrast to the usual vulnerability. These differences will be analyzed further in the fourth chapter of this thesis. First, we will look into the determinants and implications of vulnerability in the Court’s case law.

\textsuperscript{115} ECtHR 9 March 2006, no. 59261/00 (Menesheva v. Russia).

\textsuperscript{116} ECtHR 1 April 2010, no. 57813/00 (S.H. and others v. Austria).
CHAPTER TWO: THE DETERMINANTS OF VULNERABILITY

2.1 INTRODUCTION
This chapter deals with the question whether there is a consistent reasoning in the Court’s case law with regard to the reasons why it considers a subject as vulnerable. The previous chapter examined the characteristics of the subjects that the Court has deemed vulnerable; in this chapter, the aim is to show what moves the Court to decide that these characteristics make the subject in question vulnerable. These findings will provide us with insights about the underlying motives of the Court for recognizing groups or individuals as vulnerable subjects. Examining the determinants of vulnerability also gives an idea of the extent to which we can generalize the Court’s considerations concerning vulnerability to other groups and individuals.

The current legal literature on vulnerability generally takes the view that the Court hardly ever explains the reasons that form the basis for vulnerability. 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 either have to confirm or negate this hypothesis. In this chapter, I will discuss the cases in which the Court has clarified its reasons for recognizing a certain subject as vulnerable. The chapter is divided into four paragraphs: vulnerability as a result of history, as a result of state control, references to international documents and other determinants. I will conclude with several closing remarks.

2.2 VULNERABILITY AS A RESULT OF HISTORY

2.2.1 PREJUDICE, DISCRIMINATION AND STIGMATIZATION
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. In this case, the Court held that the Roma people are a vulnerable minority ‘as a result of their turbulent history and constant uprooting’:

“The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly’s Recommendation No. 1203 (1993) on Gypsies in Europe, cited in paragraph 56 above, and point 4 of its Recommendation no. 1557 (2002) on the legal situation of Roma in Europe, cited in paragraph 58 above). As the Court has noted in previous cases, they therefore require special protection (...).”

D.H. and Others v. the Czech Republic is the first case where the Court has regarded the history of the Roma people as the reason for their vulnerability. 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:

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118 ECtHR 13 November 2007, no. 57325/00 (D.H. and Others v. the Czech Republic).
“A special place among the minorities is reserved for Gypsies. Living scattered all over Europe, not having a country to call their own, they are a true European minority (...).”

Another recommendation by the Parliamentary Assembly that the Court refers to states:

“Today Roma are still subjected to discrimination, marginalisation and segregation. Discrimination is widespread in every field of public and personal life, including access to public places, education, employment, health services and housing, as well as crossing borders and access to asylum procedures. Marginalisation and the economic and social segregation of Roma are turning into ethnic discrimination, which usually affects the weakest social groups.

(…) Roma form a special minority group, in so far as they have a double minority status. They are an ethnic community and most of them belong to the socially disadvantaged groups of society.”

Therefore, discrimination, marginalization and segregation seem to be indicators of a historical background that renders a group vulnerable. The historical reasoning has been applied by the Court in Roma cases after the D.H. and Others v. the Czech Republic case, most notably in Oršuš and others v. Croatia119 and Horváth and Kiss v. Hungary.120

The historical reasoning has also been used for other vulnerable subjects than Roma. For instance, the Court has held in Alajos Kiss v. Hungary121 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:

“In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (...). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (...).”

Likewise, the Court has held that persons with HIV are a particularly vulnerable group because they have suffered considerable discrimination in the past.122

The cases mentioned in this paragraph show that the Court has applied historical reasoning to different types of vulnerable groups. Additionally, the Court has specified what it means with a history that causes vulnerability, by considering that a history filled with prejudice, discrimination and stigmatization is the reason for a group to be vulnerable.

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 recognized as vulnerable. For example, in the case of Roma, the Court had already held in Chapman v. the United Kingdom125

119 Ibid., see par. 56.
120 Ibid., par. 58.
121 ECtHR [GC] 16 March 2010, no. 15766/03 (Oršuš and others v. Croatia).
122 ECtHR 29 January 2013, no. 11146/11 (Horváth and Kiss v. Hungary)
124 ECtHR 10 March 2011, no. 2700/10 (Kiýtün v. Russia); ECtHR 3 October 2013, no. 552/10 (I.B. v. Greece).
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 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.

2.2.2 CRITIQUE OF THE COURT’S APPROACH

The historical approach of the Court has been criticized by two judges in separate opinions. In D.H. and Others v. the Czech Republic, Judge Borrego Borrego criticized the Court in a dissenting opinion for occupying itself with assessing social developments and contexts instead of examining the individual application. Borrego Borrego says:

“After noting the concerns of various organisations about the realities of the Roma’s situation, the Chamber stated: “The Court points out, however, that its role is different from that of the aforementioned bodies and that, like the Czech Constitutional Court, it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications ...” (...).

Yet the Grand Chamber does the exact opposite. In contradiction with the role which all judicial bodies assume, the entire judgment is devoted to assessing the overall social context – from the first page (“historical background”) to the last paragraph, including a review of the “Council of Europe sources” (fourteen pages), “Community law and practice” (five pages), United Nations materials (seven pages) and “other sources” (three pages, which, curiously, with the exception of the reference to the European Monitoring Centre, are taken exclusively from the Anglo-American system, that is, the House of Lords and the United States Supreme Court). Thus, to cite but one example, the Court states at the start of paragraph 182: “The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority”.”

Borrego Borrego wonders whether it is the Court’s task to assess the larger historical and social context of the Roma people. He argues that it is not appropriate for the Court to make general statements about all members of a vulnerable group, but should instead examine the individual applications that it is presented with.

As discussed in Chapter One, Judge Sajó is critical of the Court’s approach in the M.S.S. v. Belgium and Greece case. Sajó objects to the Court’s categorization of asylum seekers as inherently vulnerable. Sajó states in his separate opinion that asylum seekers, unlike the Roma, are not a group that has been historically subject to prejudice, resulting in its social exclusion. In fact, asylum seekers are not socially classified, so they are not even treated as a homogeneous group in society. According to Sajó, asylum seekers can therefore not be considered a group, of whom every member is inherently vulnerable.

Sajó’s criticism is different from the criticism given by Borrego Borrego. Whereas Borrego Borrego argues that it is not at all the Court’s task to make general statements about all members of a vulnerable group, Sajó takes a less critical stance toward the Court by only arguing that asylum seekers cannot be appropriately called a vulnerable ‘group’. Asylum seekers apparently do not have enough homogeneity in Sajó’s view to enable the Court to make a general statement about the vulnerability of them all. Therefore, with Sajó’s view, it would still be possible for the Court to recognize an entire group as vulnerable, as long as the group is sufficiently homogeneous. This is evidenced by the fact that Sajó calls mentally disabled persons an

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126 ECtHR 13 November 2007, no. 57325/00 (D.H. and Others v. the Czech Republic), Dissenting Opinion of Judge Borrego Borrego.
“undeniably vulnerable group” in his separate opinion. What group homogeneity means or when a sufficient degree of homogeneity of a group is reached remains unclear in Sajó’s opinion.

2.3 VULNERABILITY IN THE CONTEXT OF STATE CONTROL

Another determinant that plays an important role in the Court’s case law regarding vulnerability is state control. In several cases involving detainees – which, as has been shown in the previous chapter, 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. In one case, the Court held that detainees are vulnerable because they are limited in terms of access to medical assistance. 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, when he has had no representative during the proceedings or when a detainee has noticed another detainee being harmed or killed. 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. 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.

2.4 REFERENCES TO INTERNATIONAL DOCUMENTS

In the D.H. and Others v. the Czech Republic case, we saw that the Court relied on documents by the Council of Europe to substantiate its vulnerability reasoning. In the same way, the Court has used international legal documents in other cases to justify its recognition of a group or individual as a vulnerable subject.

In multiple 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. The Court has used these treaties to maintain that victims of domestic violence are vulnerable and that State protection is needed for these victims:

128 Ibid.
129 E.g. ECtHR 17 December 2009, no. 32704/04 (Denis Vasilyev v. Russia).
130 ECtHR 20 January 2009, no. 44369/02 (Wenerski v. Poland).
131 “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 13 July 2006, no. 26853/04 (Popov v. Russia).
132 ECtHR 6 November 2008, no. 30209/04 (Ponushkov v. Russia); ECtHR 8 January 2009, no. 74266/01 (Alekseyenko v. Russia); ECtHR 10 February 2009, no. 11982/02 (Novinskiy v. Russia); ECtHR 15 October 2009, no. 2295/06 (Chaykovskiy v. Ukraine).
133 ECtHR 21 October 2008, no. 5264/03 (Gülbahar and others v. Turkey).
134 E.g. ECtHR 27 November 2008, no. 36391/02 (Salduz v. Turkey).
135 ECtHR 12 June 2008, no. 32092/02 (Yaremenko v. Ukraine).
136 ECtHR 28 May 2013, no. 3564/11 (Eremia v. The Republic of Moldova).
“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 (…)”.\(^{137}\)

In the \textit{M.S.S. v. Belgium and Greece} case,\(^{138}\) 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:

“The Court attaches considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (…). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.”

In \textit{Popov v. France}\(^{139}\), the Court referred to the EU Council Directive 2003/9/EC of 27 January 2003, the Reception Directive, to highlight the vulnerability of minors in an illegal immigration setting. The case concerned the detention of a family for two weeks in France pending their removal to Kazakhstan. Among the detained family members were a baby and a young child. The family complained that their detention was in violation of the Convention. When listing the relevant international law, the Court mentions Article 17 of the Reception Directive, which holds:

“Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (…).”

The Court subsequently uses the directive to emphasize the vulnerability of illegal immigrants of young age:

“It is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (…). The European Union directive concerning the reception of aliens thus treats minors, whether or not they are accompanied, as a category of vulnerable persons particularly requiring the authorities’ attention (…).”

The Court’s reference to a categorization of vulnerable subject in the judgment of the \textit{Popov v. France} case originating from an EU document might point to a harmonization of the Court’s understanding of vulnerability with the meaning of vulnerability in EU law. However, there are no further indications that this is the case. The Reception Directive, or other EU legislation that contain a listing of vulnerable persons\(^{140}\), have not been mentioned in other Court 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 \textit{Salah Sheekh v. the Netherlands}\(^{141}\), 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

\(^{137}\) ECtHR 12 June 2008, no. 71127/01 (Bevacqua and S. v. Bulgaria); ECtHR 30 November 2010, no. 2660/03 (Hajduova v. Slovakia); ECtHR 16 July 2013, no. 61382/09 (B. v. The Republic of Moldova).


\(^{139}\) ECtHR 19 January 2012, nos. 39472/07, 39474/07 (Popov v. France).

\(^{140}\) For example the EU Regulation No. 1107/2009 of 21 October 2009, see Article 3, under 14.

\(^{141}\) ECtHR 11 January 2007, no. 1948/04 (Salah Sheekh v. the Netherlands).
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, which stands out, is a case concerning the injuries sustained by the applicant due to alleged police brutality.\(^\text{142}\) In this case, the Court does not refer to international documents, but notably refers to its own case law as a reason for recognizing the vulnerability of victims:

“(...) given the Court’s relevant case-law, criminal suspects appear to be one the most vulnerable group of victims of ill-treatment by the police.”

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.

2.5 OTHER DETERMINANTS

Other factors the Court considers as determinants of vulnerability are mentioned less frequently in the Court’s case law.

In two of its earlier cases involving vulnerability, the Court held that non-nationals are vulnerable to domestic legislation, because, unlike nationals, non-nationals play no part in how the legislation has been formed. As a result, the Court ruled that a distinction made between nationals and non-nationals in the expropriation law in the United Kingdom, which favored non-nationals, was not in violation of Article 1 of the First Protocol of the Convention.\(^\text{143}\)

In cases involving victims, the Court has held that victims are in a vulnerable position because they might find themselves less ready or willing to lodge a complaint. For example, in Eremia v. The Republic of Moldova\(^\text{144}\), the applicant was a victim of domestic violence. Her aggressor, however, was a police officer and he had the support of his colleagues and other local authorities. The Court held that these circumstances made the applicant’s attempts to obtain protection more difficult, and therefore recognized her as a vulnerable person.

2.6 CLOSING REMARKS

This chapter began with remarking that the legal literature on vulnerability generally takes the view that the Court hardly ever explains the reasons that form the basis for group or individual vulnerability. Truscan states in her article:

“The Court rarely provides details about how it determines vulnerability.”\(^\text{145}\)

Peroni and Timmer remark:

“(…) what exactly ties all these groups together is still not entirely clear, as the Court has not (yet) fully developed a coherent set of indicators to determine what renders a group vulnerable.”\(^\text{146}\)

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\(^{142}\) ECtHR 15 May 2012, no. 23893/03 (Kaverzin v. Ukraine).

\(^{143}\) ECtHR 21 February 1986, no. 8793/79 (James and others v. the United Kingdom); ECtHR 8 July 1986, no. 9006/80 (Lithgow and others v. the United Kingdom).

\(^{144}\) ECtHR 28 May 2013, no. 3564/11 (Eremia v. The Republic of Moldova). See also, among others, ECtHR 3 June 2004, nos. 33097/96, 57834/00 (Bati and others v. Turkey).

\(^{145}\) Truscan, Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights, p. 75.
The cases discussed in this chapter show that the Court has clarified the factors that determine the vulnerability of the following subjects: 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 recognized as vulnerable in its case law, the data in Chapter One has 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, unlike the abovementioned authors have stated, the Court has clarified the determining factors of the vulnerability of subjects that are most often recognized as vulnerable in its case law. The only large group of which the Court has yet to explain what determines its vulnerability is the group of children.

Therefore, a close look at the Court’s case law shows that the statement made by the abovementioned authors is incorrect. The view held by the authors – that the Court hardly ever explains the reasons of vulnerability – 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. Therefore, Truscan and Peroni and Timmer are paradoxically wrong with their statements: although the Court rarely mentions the determinants of vulnerability, the Court has clarified the determinants of the most-mentioned vulnerable subjects in its case law.

Finally, one of the aims of examining the determinants of vulnerability in this chapter was to consider whether it is possible to generalize the Court’s reasoning regarding vulnerability to other subjects. Certainly, the Court’s strong considerations with regard to the historical discrimination and stigmatization of groups in society open up the possibility for other groups to be considered as vulnerable by the Court. The Court gives ample indications in its cases to establish 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.

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CHAPTER THREE: THE LEGAL IMPLICATIONS OF VULNERABILITY

3.1 INTRODUCTION

Until now, we have seen that a wide range of individuals and groups have been recognized as vulnerable in the Court’s case law. This recognition of vulnerability is not without consequences. When the Court recognizes a group or an individual as a vulnerable subject, something seems to change in the Court’s judgments. A first glance at the cases gives the impression that the recognition of vulnerability has two main implications: either the positive obligations of the state are expanded or the margin of appreciation that is normally imparted to the state is narrowed.

In this chapter, the legal implications of vulnerability in the Court’s judgments will be analyzed and categorized. The aim is to identify whether the Court consistently ascribes legal implications to vulnerability. Moreover, by listing the Articles of the ECHR to which the Court applies the vulnerability reasoning, this chapter will also give an insight into how vulnerability influences the different ECHR Articles. The following legal implications are discussed in this chapter: the expanded positive obligations of the state, the narrowed margin of appreciation, procedural implications and implications for the awarding of just satisfaction to the applicant. To be clear, this chapter does not discuss whether the mentioned legal implications are specific to vulnerability cases (i.e. whether these implications do not appear in cases that do not mention vulnerability). That important question will be the subject of Chapter Five.

3.2 EXPANDED POSITIVE OBLIGATIONS

The most evident consequence of recognizing a subject as vulnerable is that the state has a special positive obligation to protect that subject. The Court has, in different situations and with regard to different Articles of the ECHR, made clear that vulnerable individuals and groups require special protection by the state. The obligations differ per vulnerable subject and interest that needs to be protected.

3.2.1 OBLIGATIONS WITH REGARD TO THE RIGHT TO LIFE (ARTICLE 2 ECHR) AND THE PROHIBITION OF INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ARTICLE 3 ECHR)

The Court has put special positive obligations on the state with regard to the right to life (Article 2 ECHR) and the prohibition of inhuman or degrading treatment or punishment (Article 3 ECHR) in cases where authorities are concerned with vulnerable subjects. These obligations especially occur in detention cases.

In multiple cases about mentally disabled detainees, the Court has held that the assessment of whether a treatment or punishment is compatible with the standards of Article 2 and Article 3 ECHR has to take into consideration the vulnerability of detainees. The special duty of authorities in the context of detention was specified in Alexandru Marius Radu v. Romania, a case about physical abuse a detainee had suffered while in pre-trial detention. The Court held that:

“(…) having regard to the vulnerable position of detained persons, national authorities should not wait until serious incidents occur before taking adequate measures of protection but on the contrary, they

147 ECtHR 16 October 2008, no. 5608/05 (Renolde v. France); ECtHR 3 April 2001, no. 27229/95 (Keenan v. The United Kingdom); ECtHR 9 October 2012, no. 1413/07 (Çoşelav v. Turkey); ECtHR 18 October 2012, no. 37679/08 (Bureš v. The Czech Republic).
148 ECtHR 21 July 2009, no. 34022/05 (Alexandru Marius Radu v. Romania).
should act promptly once they have been made aware of a real danger to an individual’s physical integrity."

The expanded obligations vis-à-vis detainees under Article 3 ECHR were further developed in *Orchowski v. Poland* 149. This case dealt with the overcrowding in Polish prisons. The Court gives a specific description of what it requires of a detention policy in order to be in accordance with Article 3 ECHR, namely that a person is detained “in conditions which are compatible with respect for his human dignity”. The Court relied on the vulnerability of detainees to demand a higher level of diligence from the state, and ultimately found a breach of Article 3 ECHR was made by the state:

“(…) persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

(...) The Court also notes that for many years the authorities appeared to ignore the existence of overcrowding and inadequate conditions of detention and, instead, chose to legitimise the problem on the basis of a domestic law which was ultimately declared unconstitutional (…). In the Court’s opinion, such practice undermined the rule of law and was contrary to the requirements of special diligence owed by the authorities to persons in a vulnerable position such as those deprived of liberty.”150

Additionally, a lack of medical attention for detained persons with HIV or other health issues is regarded as a violation of Article 3 ECHR. States are obliged to take the vulnerability of these individuals into consideration in their treatment of them and have a special duty to provide them with adequate and necessary medical assistance, in particular when it has been established that such treatment is urgent.151 Adequate medical assistance means that the detainee is regularly checked by “sufficiently qualified medical personnel” capable of effectively assessing his condition and setting up an adequate course of treatment for his health issues.152 This obligation pertains all the more to the assistance of detainees with a physical disability.153 Further special positive obligations which the Court has placed on the state relying on the vulnerability of detainees vary greatly and have a big impact on prison policy, including the obligation to minimize the risk of attempts to escape or commit suicide154, to take measures with regard to the sanitation facilities in a prison155 and to separate the accommodation of different groups in a prison (for instance, between persons facing criminal proceedings for the first time and those with a criminal record).156

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150 ECtHR 22 October 2009, no. 17885/04 (*Orchowski v. Poland*).

151 ECtHR 20 January 2009, no. 44369/02 (*Wenerski v. Poland*); ECtHR 16 December 2010, no. 33099/08 (*Kozhokar v. Russia*).

152 ECtHR 16 December 2010, no. 33099/08 (*Kozhokar v. Russia*); ECtHR 12 March 2013, no. 15351/03 (*Zarzycki v. Poland*).

153 ECtHR 25 June 2013, no. 6087/03 (*Grimailovs v. Latvia*).

154 ECtHR 17 October 2013, no. 26824/04 (*Keller v. Russia*); ECtHR 16 October 2008, no. 5608/05 (*Renolde v. France*).

155 E.g. ECtHR 25 June 2013, no. 6087/03 (*Grimailovs v. Latvia*).

156 ECtHR 17 January 2013, no. 17116/04 (*Sizarev v. Ukraine*).
The Court also considers children as vulnerable and state authorities are therefore expected to give extra weight to the question of children’s vulnerability in protecting them from breaches of personal integrity under Article 3 ECHR. The Okkali v. Turkey case concerned a twelve-year-old minor who was subjected to ill-treatment at the police headquarters. The Court found that the subsequent proceedings failed to provide the necessary extra protection to the minor in question, particularly since there was no mention in the case file of any obligation to inform the parents immediately when the minor was arrested. More in general, the Turkish law lacked any domestic provisions relating to the protection of minors. As a result, the judicial system in Turkey did not sufficiently protect the vulnerable minor from an infringement of Article 3 ECHR:

“In the light of the Court’s case-law according to which children, who are particularly vulnerable to various forms of violence, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (…), the authorities could have been expected to lend a certain weight to the question of the applicant’s vulnerability.”

Along the same line, the Court has held that authorities need to take into account the particular vulnerability of victims of torture and ill treatment. In Opuz v. Turkey, the Court found that domestic violence can constitute a breach of Articles 2 and 3 ECHR if the state fails to exercise due diligence in the prevention, investigation and punishment of domestic violence. The Court ultimately found a violation of the Convention because the state failed to protect the vulnerable applicant from her violent husband.

The state’s obligation to protect the right to life of children also applies outside the context of a state-controlled setting like the judicial system. In a case concerning a school bus scheme, which resulted in a seven-year-old pupil freezing to death, the authorities were held responsible for failing to take measures which might have avoided the risk to the child’s life. In concreto, the Court rules that, in the circumstances of the case, where a primary school was exceptionally closed early due to bad weather conditions, it cannot be considered as unreasonable to expect the school authorities to take basic precautions to minimise any potential risk and to protect the pupils. Therefore, the Court considers that, by neglecting to inform the municipality’s shuttle service about the early closure of the school, the domestic authorities failed to take measures which might have avoided a risk to the life of the pupil.

In M.S.S. v. Belgium and Greece, the Court ruled that the vulnerability of asylum seekers gives rise to their special protection under Article 3 ECHR. The Court found that, despite the fact that Article 3 ECHR does not contain a general positive obligation to provide asylum seekers with a home or with financial assistance, Greece had violated its obligations under the Reception Directive (Directive 2003/9/EC), which entails the obligation to provide accommodation and decent material conditions to impoverished asylum seekers. Therefore, the Greek authorities had to be held responsible for the situation in which the applicant was; living on the street, without resources or access to sanitary facilities, and without any means of providing for his essential needs.

Next to the considerations where the Court has ascribed specific positive obligations to the state toward detainees, children or specific vulnerable groups, the Court has also derived a general obligation from Article 2 and Article 3 ECHR that applies to all vulnerable persons. In Haas v. Switzerland, the Court held that

157 ECHR 17 October 2006, no. 52067/99 (Okkali v. Turkey).
158 ECHR 20 January 2011, no. 14811/04 (Gisayev v. Russia).
159 ECHR 9 June 2009, no. 33401/02 (Opuz v. Turkey).
160 ECHR 10 April 2012, no. 19986/06 (İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey).
161 ECHR [GC] 21 January 2011, no. 30696/09 (M.S.S. v. Belgium and Greece): “The Court attaches considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.” Compare to ECHR 12 October 2006, no. 13178/03 (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium), where a young illegal immigrant was deemed extremely vulnerable by the Court, and the Belgian State was therefore required to take adequate measures to provide care and protection as part of its positive obligations under Article 3 ECHR.
162 ECHR 20 January 2011, no. 31322/07 (Haas v. Switzerland).
the state has an obligation under Article 2 ECHR to protect all vulnerable persons in order to prevent them from taking their own life if the decision has not been taken freely and with full understanding of what is involved. The case concerned the Swiss prohibition of assisted suicide, which the Court ultimately found not to be in violation of the Convention. The Court stated:

“(…) it is appropriate to refer, in the context of examining a possible violation of Article 8, to Article 2 of the Convention, which creates for the authorities a duty to protect vulnerable persons, even against actions by which they endanger their own lives (…). For the Court, this latter Article obliges the national authorities to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved.”

Similarly, in Z and others v. the United Kingdom163, the Court held that Article 3 ECHR obliges the state to take measures that ensure that individuals are not subjected to torture or inhuman or degrading treatment, and that these measures “should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge”.

3.2.2 OBLIGATIONS WITH REGARD TO THE RIGHT TO PRIVATE AND FAMILY LIFE (ARTICLE 8 ECHR)

As with Article 2 and Article 3 ECHR, the Court has derived a general positive obligation of the state from Article 8 ECHR to protect vulnerable persons. The standard consideration of the Court in vulnerability cases concerning Article 8 ECHR reads:

“Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.”164

This special protection also encompasses situations that occur in a private context. In the important case of Storck v. Germany165, the Court had to assess the placement of a psychiatric patient in a private clinic. The patient had tried to escape from the clinic, but was forcibly returned. The Court found that the applicant’s medical treatment had been carried out against her will and interfered with her right to respect for private life. Furthermore, there was a lack of effective state control over private psychiatric institutions; a person who had been harmed in a private clinic could only claim damages afterwards. The Court notes that “such retrospective measures alone are not sufficient to provide appropriate protection of the physical integrity of individuals in such a vulnerable position as the applicant”.166 The state therefore failed to comply with its positive obligations under Article 8 to protect the psychiatric patient.

As mentioned above, the Court has found that states are obliged to give special protection to members of vulnerable groups with a history of discrimination and stigmatization. In Aksu v. Turkey167, a case concerning the publication of a book and a dictionary that contained defamatory remarks on Roma people, the Court chose to specify the state’s positive obligations vis-à-vis Roma people in a special way. Considering that Roma are a vulnerable group due to their history of racial discrimination, the Court reasoned that it is the state’s obligation under Article 8 ECHR to fight the negative stereotypes in order to ensure effective respect for the private life of Roma people:

163 ECHR 10 May 2001, no. 29392/95 (Z and others v. the United Kingdom).
164 Among others, see ECHR 22 October 1996, nos. 22083/93, 22095/93 (Stubbings and others v. the United Kingdom); ECHR 2 December 2008, no. 2872/02 (K.U. v. Finland); ECHR 17 December 2009, no. 16428/05 (Gardel v. France).
165 ECHR 16 June 2005, no. 61603/00 (Storck v. Germany).
166 Ibid.
“The Court observes that discrimination on account of, inter alia, a person’s ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”

The Court ultimately found that the Turkish authorities had fulfilled their positive obligations to secure to the applicant effective respect for his private life. There was no violation of Article 8 ECHR.

3.2.3 FURTHER OBLIGATIONS

Positive obligations placed on the state on the basis of vulnerability under other Articles occur less frequently in the Court’s case law. This paragraph discusses a number of these special obligations.

In a number of cases, the Court has held that the state has special obligations under Article 6 ECHR when it comes to vulnerable persons. In Komnatsky v. Ukraine168, the state had acted in violation of Article 6 ECHR, because an administrative decision in the applicant’s favour had remained unenforced for more than three years. The Court notes that the state should have taken into account the vulnerable status of the applicant, an older person, and that the enforcement of the decision therefore had required particular diligence.

With regard to victims in a criminal trial, the Court has ruled in the Ristic v. Serbia case that the state is required to afford adequate protection to victims, “particularly where they happen to be young and vulnerable”.169 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 of Article 6 ECHR.

In other cases mentioned earlier170, the Court has held that, under certain circumstances, Article 6 ECHR requires the domestic courts to assist the most vulnerable party in the proceedings.171 Similarly, persons with no legal capacity172 or persons who have been caught up in a procedure that has taken a very long time (the Court uses the term ‘legal limbo’)173 are considered vulnerable and require special consideration on the basis of Article 6 ECHR.

Furthermore, a number of cases concerning Roma include positive obligations based on Article 2 of the First Protocol in conjunction with Article 14 ECHR. These cases deal with the right to education of Roma children. In D.H. and Others v. the Czech Republic,174 the Court found that the state has a positive obligation vis-à-vis Roma children to put in place “safeguards (…) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class”. Peroni and Timmer note in this regard that it seems that the Court goes a step further in Horváth and Kiss v. Hungary175 by demanding a more substantive and far-reaching positive obligation from the state “to undo a history of racial segregation in special schools”.176 The Court derives a similar far-reaching positive obligation from Article 8 ECHR in the Aksu v. Turkey case mentioned above.

168 ECtHR 15 October 2009, no. 40753/07 (Komnatsky v. Ukraine).
169 ECtHR 18 January 2011, no. 32181/08 (Ristic v. Serbia). Similarly, see ECtHR 14 October 2003, no. 77759/01 (Porembsko v. Poland).
170 See Chapter One, paragraph five.
171 ECtHR 11 December 2008, no. 21539/02 (Trapeznikova v. Russia); ECtHR 15 January 2009, no. 42454/02 (Menchinskaya v. Russia); ECtHR 1 April 2010, no. 5447/03 (Korolev v. Russia (No. 2)).
172 ECtHR 16 July 2009, no. 20082/02 (Zehentner v. Austria).
173 ECtHR 26 June 2012, no. 26828/06 (Kurić and others v. Slovenia).
174 ECtHR 13 November 2007, no. 57325/00 (D.H. and Others v. the Czech Republic).
175 ECtHR 29 January 2013, no. 11146/11 (Horváth and Kiss v. Hungary)
Another implication of vulnerability in the Court’s case law is that the margin of appreciation of the state with regard to the vulnerable subject is narrowed. In several cases, the Court has held that the margin of appreciation afforded to the State is narrow when the restriction on fundamental rights applies to a vulnerable person.

Firstly, in the context of Article 14 ECHR, the Court has found that the margin of appreciation of the State is narrowed when a difference of treatment is based on sex or sexual orientation.177 In these cases – which concerned the discriminatory treatment of homosexuals by the government —, the Court notes that “the distinction in question operates in this intimate and vulnerable sphere of an individual's private life”. Therefore, particularly weighty reasons are required by the state to justify the difference of treatment.

In two cases concerning persons infected with HIV, the margin of appreciation afforded to the state under Article 14 ECHR was narrowed “substantially”.178 As mentioned earlier, the Court has found that people with HIV form a particularly vulnerable group due to the historical prejudice and discrimination directed at them. In these two cases, the Court goes a step further by applying a narrower margin of appreciation in the context of all groups that are vulnerable as a result of their history:

“If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.”179

Along the same line, the Court has limited the margin of appreciation of the state under Article 3 of the First Protocol of the Convention, which enshrines the right to vote. In the Alajos Kiss v. Hungary180 case, Hungarian legislation that made it impossible for mentally disabled people under partial guardianship to vote was put under scrutiny. 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. The Court ultimately ruled that Article 3 of the First Protocol of the Convention was violated.

With this approach, the Court aims to strictly reduce the discrimination directed towards particularly vulnerable groups. By narrowing the state’s margin of appreciation, further discrimination against these groups is prevented. Therefore, the Court seems to work with two measures with which it aims to reduce the stigmatizing effect against vulnerable groups: (1) demanding positive obligations from the state to fight negative stereotypes (in Aksu v. Turkey181 and Horváth and Kiss v. Hungary182) and (2) substantially narrowing the margin of appreciation afforded to the state.

3.4 PROCEDURAL IMPlications

When a group or an individual is recognized as vulnerable, a number of changes seem to occur in the proceedings before the Court. In this paragraph, the procedural implications of vulnerability will be examined.

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177 ECtHR 2 March 2010, no. 13102/02 (Kozak v. Poland); ECtHR 12 June 2012, no. 9106/06 (Genderdoc-M v. Moldova); ECtHR 9 October 2012, no. 24626/09 (X. v. Turkey).
178 ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia); ECtHR 3 October 2013, no. 552/10 (I.B. v. Greece).
179 ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia).
182 ECtHR 29 January 2013, no. 11146/11 (Horváth and Kiss v. Hungary)
3.4.1 IMPLICATIONS FOR THE ADMISSIBILITY OF CASES

In a number of intriguing cases, vulnerability played a central role in the question whether the applicants’ complaints were admissible before the Court. The Court’s judgments reveal that vulnerability might function as a remedy when an applicant has failed to exhaust all the domestic legal possibilities at his disposal as required by Article 35, paragraph one, ECHR. Exemplar in this respect is the case of Tokić and others v. Bosnia and Herzegovina. In this case, the applicants were charged with several criminal offences. They were all found not guilty due to insanity and ordered to be detained in the psychiatric wing of a prison. The case concerned the applicants’ complaint about the unlawfulness of their detention in that institution. One of the applicants, Mr Alibašić, had failed to go to the Constitutional Court, and therefore had not exhausted all domestic remedies. Nevertheless, the Court held that Mr Alibašić’s vulnerable position and the fact that the Constitutional Court had already ruled in a similar case made his complaints admissible:

“(…) the Court notes that the applicant failed to pursue in a proper manner either an appeal to then Human Rights Chamber or an appeal to the Constitutional Court. However, in view of the fact that a judgment of the Constitutional Court in a similar case ordering general measures has not been complied with by the national authorities (…) and the particularly vulnerable position of the applicant (a psychiatric detainee), the Court considers that the Government’s objection on grounds of failure to exhaust domestic remedies cannot be upheld with regard to Mr Alibašić.”

Similarly, the Court has held that while examining the exhaustion of domestic remedies by minors or people with mental disabilities, consideration has to be given to their vulnerability, and “in particular their inability in some cases to plead their case coherently”. For instance, in a case concerning a heavily beaten up applicant, the Court did not require that all domestic remedies had to be exhausted:

“The Court is satisfied in these circumstances that the matter was sufficiently drawn to the attention of the relevant domestic authority. Given that Abdüllatif İlhan’s circumstances would have caused him to feel vulnerable, powerless and apprehensive of the representatives of the State, he could legitimately have expected that the necessary investigation would have been conducted without a specific, formal complaint from himself or his family.”

However, vulnerability does not always have thisremediying effect in cases concerning vulnerable persons. In a number of cases involving detainees, the Court acknowledged that detained persons are “often in a stressful situation and also vulnerable to pressure”, but their applications were nevertheless partly not admitted by the Court. These were cases where the applicant was assisted by a legal representative throughout the proceedings or the applicant failed to exhaust the available domestic remedies with no apparent

183 As mentioned in the Introduction to this thesis, the research in this thesis does not include Court decisions. Vulnerability might also play a role in the admissibility of the applicant in the Court’s decisions. This paragraph only discusses the Court’s judgments in which vulnerability plays a role in the admissibility.
184 ECtHR 8 July 2008, nos. 12455/04, 14140/05, 12906/06, 26028/06 (Tokić and others v. Bosnia and Herzegovina).
185 Ibid. See also ECtHR 24 November 2009, no. 23968/05 (Halilovic v. Bosnia and Herzegovina).
186 ECtHR 19 February 2013, no. 1285/03 (B. v. Romania (No. 2)). See also ECtHR 14 February 2012, no. 2151/10 (A.M.M. v. Romania); ECtHR 16 February 2010, no. 7078/02 (V.D. v. Romania); ECtHR 11 July 2006, no. 33834/03 (Riviere v. France). The Court has judged similarly with regard to applicants who were the surviving relatives of two killed persons, and were therefore considered to be in a vulnerable position; see ECtHR 27 February 2007, no. 56760/00 (Akpinar and Altun v. Turkey).
187 ECtHR 27 June 2000, no. 22277/93 (İlhan v. Turkey).
188 ECtHR 1 March 2007, no. 72967/01 (Belevitskiy v. Russia); ECtHR 8 November 2007, no. 25948/05 (Knyazev v. Russia); ECtHR 13 October 2009, nos. 19637/05, 43197/06, 39164/07 (İnan and others v. Turkey).
reason. As mentioned in Chapter One of this thesis, the Court has found that different factors, such as the presence of a legal representative, might reduce the detainee’s vulnerability. However, these were cases where the applications of the detainees were admitted before the Court. Apparently, there is a level of vulnerability below which the Court will not admit an application, even if the applicant belongs to a group that is usually considered as vulnerable, such as detainees. Sometimes the Court’s reason not to admit a case remains unclear in the judgment’s wording.

3.4.2 BURDEN OF PROOF

A second procedural implication of vulnerability is the reversal of the burden of proof from the applicant onto the authorities. The most significant reversal of the burden of proof occurs in cases concerning detention. In these cases, the Court has found that due to the vulnerable position of detained persons – the state is required to provide an explanation if the person were to be harmed while in detention:

“Detained persons are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (...). The obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter.”

Likewise, with regard to persons placed in mental health hospitals, the Court considers that it is the state’s obligation to show that the legal remedies to challenge hospitalisation are effective.

The only case where the burden of proof was reversed in a situation outside state control (detention or mental hospital) is Feyzi Yildirim v. Turkey. In this case, three witnesses had withdrawn their testimonies in court, having previously given incriminating evidence to the prosecutor about the accused, who was a police officer. They claimed that the accused had threatened them to withdraw their testimonies. The Court held that “in the absence of plausible explanations from the Government, there is no cause to doubt the sincerity of the accusation”. Their vulnerability as witnesses entitled them to protection.

3.5 IMPLICATIONS FOR THE AWARD OF JUST SATISFACTION

The recognition of an individual or group as vulnerable also influences the way the Court deals with a claim for just satisfaction in a case. Article 41 ECHR provides that the Court shall ‘afford just satisfaction to the injured party’ if the Court finds that there has been a violation of the Convention. The Court determines the amount of the just satisfaction at its own discretion. As a result, the case law under Article 41 ECHR is characterized by a lack of consistency and systematization.

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189 ECtHR 8 November 2007, no. 25948/05 (Knyazev v. Russia); ECtHR 14 October 2008, no. 68337/01 (Buzychkin v. Russia); ECtHR 13 October 2009, nos. 19637/05, 43197/06, 39164/07 (İnan and others v. Turkey).
190 See Chapter One, paragraph three.
191 See for instance ECtHR 29 May 2012, nos. 16563/08, 18656/10, 40841/08 (Julin v. Estonia): “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”.
192 See among many others ECtHR [GC] 27 June 2000, no. 21986/93 (Salman v. Turkey).
193 ECtHR 19 April 2012, no. 2452/04 (M. v. Ukraine).
194 ECtHR 19 July 2007, no. 40074/98 (Feyzi Yildirim v. Turkey).
certain amount of money has to be awarded to the harmed applicant. Due to the lack of systematization in the Court’s just satisfaction scheme, it is unclear if a subject’s vulnerability (substantially) raises the amount of satisfaction rewarded. However, these cases do have in common that vulnerability is consistently mentioned in the Court’s considerations on non-pecuniary damages. Therefore, vulnerability seems to have an increasing effect on the just satisfaction of non-pecuniary damages in particular. This is also the case when only non-pecuniary damages are compensated and no just satisfaction for pecuniary damage is awarded.

3.6 CLOSING REMARKS

In this chapter, I have taken a closer look at the legal implications of the Court’s recognition of a group or an individual as a vulnerable subject. The most prevalent implications have been discussed: the expanded positive obligations of the state, the narrowed margin of appreciation, procedural implications and implications for the awarding of just satisfaction to the applicant. The case law discussed shows a wide variety of implications that differs per vulnerable subject and interest that needs to be protected. Especially the special positive obligations of the state and the reversal of the burden of proof seem to require an extra effort by the state to make sure the human rights of vulnerable persons are guaranteed. In combination with a well-defined understanding of what vulnerability is, these implications might play an important role in establishing a more substantive protection of vulnerable groups and individuals in society. In the next chapter, I will examine the Court’s understanding of vulnerability in more detail.

196 ECtHR 27 November 2007, no. 41578/05 (David v. Moldova). See also ECtHR 2 March 2006, no. 11886/05 (Dolgova v. Russia); ECtHR 3 May 2007, no. 71156/01 (Members of Gldani Congregation of Jehovah’s Witnesses and others v. Georgia); ECtHR 22 January 2013, no. 33117/02 (Lashin v. Russia).
197 See for example ECtHR 14 November 2006, no. 60860/00 (Tsfayo v. the United Kingdom); ECtHR 11 October 2011, no. 30951/10 (Gorobet v. Moldova).
198 More on this function of vulnerability reasoning, see Timmer, A Quiet Revolution: Vulnerability in the European Court of Human Rights, p. 167.
CHAPTER FOUR: UNDERSTANDING THE COURT’S VULNERABILITY CONCEPT

4.1 INTRODUCTION

The case law of the Court discussed in this thesis has shown that vulnerability is not a single or generic concept. The Court applies vulnerability in a variety of ways and adjusts its use of vulnerability in order to fit it to individual circumstances. For instance, in some cases the Court has referred to a certain subject as vulnerable, while in other cases the Court finds that the subject is in a vulnerable situation or position.

This chapter aims to further analyze the Court’s understanding of vulnerability. The analysis will give an insight into the various ways the Court applies vulnerability and whether these distinctions have an influence on the Court’s judgments. The first distinction that will be discussed is the division between vulnerable subjects and vulnerable situations or positions. Then the distinction between persons that feel vulnerable and persons that are vulnerable is examined. After that, we take a closer look at cases where the Court chooses to recognize an individual as vulnerable and cases where a complete group is recognized vulnerable. Moreover, cases where not the applicant but a person related to the applicant is deemed vulnerable are discussed. Finally, cases where the Court has judged that subjects are ‘particularly vulnerable’ in contrast to the usual vulnerability are examined.

4.2 VULNERABLE SUBJECTS VS. VULNERABLE SITUATIONS

A first distinction in the Court’s case law that catches the eye is the division between vulnerable subjects and vulnerable situations or positions. In some cases, the Court refers to a certain individual or group as vulnerable, while in other cases the Court finds that the individual or group is in a vulnerable situation or position.

In most cases concerning detention, the Court has held that “persons in custody are in a vulnerable position”\(^\text{199}\) or that “a State is responsible for any person in detention, who is in a vulnerable situation while in its charge”.\(^\text{200}\) 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’).\(^\text{201}\) In the same way, the Court takes into account “the particularly vulnerable situation of victims of torture”\(^\text{202}\) and “the vulnerable situation of women in south-east Turkey”\(^\text{203}\). The Court has also spoken of the vulnerable

\(^{199}\) ECtHR [GC] 27 June 2000, no. 21986/93 (Salman v. Turkey).
\(^{200}\) ECtHR 8 January 2004, nos. 32578/96, 32579/96 (Colak and Filizer v. Turkey).
\(^{201}\) Among the 236 vulnerability cases involving detainees, there are only four exceptions to this rule. In ECtHR 1 March 2007, no. 72967/01 (Belevitskiy v. Russia) the Court stated that “persons held in custody are (...) vulnerable to pressure”. In ECtHR 8 November 2007, no. 25948/05 (Knyazev v. Russia) and ECtHR 14 October 2008, no. 68337/01 (Buzychkin v. Russia) the Court spoke of “the vulnerability of detainees”. Finally, in ECtHR 15 June 2010, no. 29226/03 (Creangă v. Romania), the Court spoke of “the particular vulnerability of persons who find themselves under the exclusive control of State agents”.
\(^{202}\) See among others ECtHR 3 June 2004, nos. 33097/96, 57834/00 (Bati and others v. Turkey).
\(^{203}\) ECtHR 9 June 2009, no. 33401/02 (Opuz v. Turkey).
‘position’ of torture victims\textsuperscript{204}, suspects\textsuperscript{205}, disabled persons\textsuperscript{206} and Roma\textsuperscript{207}. In many other cases, the Court has spoken of vulnerable situations and positions when applicants where under specific grave circumstances.\textsuperscript{208}

In a number of cases, 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”.\textsuperscript{209} The same holds true for cases involving Kurds\textsuperscript{210}, mentally\textsuperscript{211} and terminally ill persons\textsuperscript{212}, non-nationals\textsuperscript{213} and victims\textsuperscript{214}. In the case of groups that are considered as vulnerable, such as Roma, HIV-positive persons or mentally ill persons, the Court has referred to these groups as ‘vulnerable minority’ of ‘vulnerable group’.\textsuperscript{215}

All in all, the Court’s distinction between subjects who are vulnerable themselves and subjects who are in a vulnerable situation or position seems at first glance to be somewhat meaningless. This conclusion is backed by the fact that several applicants, such as Roma and victims, are (with no telling purpose) sometimes called vulnerable by the Court, and other times held to be in a vulnerable situation or position. Therefore, the distinction does not seem to have an effect on how the Court deals with a subject’s vulnerability. However, the detention cases discussed in paragraph 3.4.1 – regarding the implications of vulnerability on the admissibility of applicants – might indicate a slight difference as a result of the Court’s 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\textsuperscript{216}, 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.

\textsuperscript{204} See among others ECtHR 25 September 1997, no. 23178/94 (Aydin v. Turkey).
\textsuperscript{205} ECtHR 15 September 2011, no. 24652/04 (Paskal v. Ukraine).
\textsuperscript{206} See among others ECtHR 19 February 2013, no. 1285/03 (B. v. Romania (No. 2)).
\textsuperscript{207} ECtHR [GC] 18 January 2001, no. 27238/95 (Chapman v. the United Kingdom).
\textsuperscript{208} For example, see ECtHR 12 October 2006, no. 13178/03 (Mubilanzila Mayeka and Kaniki Mitunga v. Belgium); ECtHR 28 June 2012, no. 14499/09 (A.A. and others v. Sweden); ECtHR 22 January 2013, no. 33117/02 (Lashin v. Russia).
\textsuperscript{209} See among others ECtHR 14 November 2013, no. 47152/06 (Blokhin v. Russia); ECtHR 12 January 2006, no. 35978/02 (Mihailova v. Bulgaria).
\textsuperscript{210} Among others ECtHR 25 May 1998, no. 24276/94 (Kurt v. Turkey).
\textsuperscript{211} Among others ECtHR 27 July 2004, no. 57671/00 (Slimani v. France).
\textsuperscript{212} ECtHR 29 April 2002, no. 2346/02 (Pretty v. the United Kingdom).
\textsuperscript{213} Among others ECtHR 16 June 2005, no. 60654/00 (Sisojeva and others v. Latvia).
\textsuperscript{214} Among others ECtHR 4 May 2006, no. 633/03 (Oudek v. Poland); ECtHR 28 May 2013, no. 3564/11 (Eremia v. the Republic of Moldova).
\textsuperscript{215} See respectively, ECtHR 17 October 2013, no. 27013/07 (Winterstein and others v. France); ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia); ECtHR 8 November 2012, no. 28973/11, (Z. H. v. Hungary); ECtHR 29 May 2012, nos. 16563/08, 18656/10, 40841/08 (Julin v. Estonia).
4.3 FEELING VULNERABLE VS. BEING VULNERABLE

Another distinction in the Court’s case law is the division 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.217 The applicants had undergone gender re-assignment surgery and lived in society as females, but, for legal purposes, they had remained males. This had effects on their life where sex was of legal relevance, such as in the area of pensions and retirement age. The Court ruled that the law in the United Kingdom with regard to transsexuals may give the applicants feelings of vulnerability, humiliation and anxiety:

“A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, 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 a number of cases, the Court held – with regard to the admissibility of the cases – 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.218

In Panovits v. Cyprus219, 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. The fact that the young suspect had waived his rights to a legal representative did not preclude this obligation. The Court found that the authorities had not fulfilled their obligations, and therefore violated the suspect’s rights under Article 6 ECHR.

Finally, in two cases concerning victims, the Court found that the applicants’ rights under Article 3 ECHR were violated.220 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. The cases concerned the harassment and the use of unnecessary force by the police during a raid into the applicants’ respective houses. With regard to the vulnerability that the applicants experienced, the Court noted:

“The Court, taking into account the circumstances of the incident as a whole, is of the opinion that the applicants must have experienced a profound sense of vulnerability, powerlessness and affront which can reasonably be described as humiliating and therefore degrading within the meaning of Article 3 of the Convention.”221

Although the Court has not applied this type of reasoning – a person’s feeling of vulnerability – frequently in its case law, the reasoning seems to be a strong instrument to impose obligations on the authorities when a law or policy has led to circumstances that have put an individual into a harmful state. Feelings of vulnerability seem an easy, abstract way for the Court to define the consequences of such

217 ECtHR 11 July 2002, no. 25680/94 (I. v. the United Kingdom); ECtHR 11 July 2002, no. 28957/95 (Christine Goodwin v. the United Kingdom).
218 See ECtHR 27 February 2007, no. 56760/00 (Akpinar and Altun v. Turkey); ECtHR 4 December 2008, no. 1200/03 (Umoyeva v. Russia); ECtHR 24 July 2003, no. 26973/95 (Yöyler v. Turkey).
219 ECtHR 11 December 2008, no. 4268/04 (Panovits v. Cyprus).
220 ECtHR 28 July 2009, no. 47709/99 (Rachwalski and Ferenc v. Poland); ECtHR 11 October 2011, no. 42697/05 (Hristovi v. Bulgaria).
221 ECtHR 28 July 2009, no. 47709/99 (Rachwalski and Ferenc v. Poland).
circumstances, without further having to elaborate on what these feelings exactly imply. Moreover, in a number of the abovementioned passages, the Court notes that the applicants “could have felt” vulnerable. This hypotheticality is something that is not found in other cases involving vulnerable subjects (there are no cases where the Court states that a person ‘might have become vulnerable’). Therefore, the Court might apply the reasoning of ‘feelings of vulnerability’ whenever circumstances that generate a vulnerable state have occurred, but the vulnerability of the applicant has not (yet) been established.

4.4 INDIVIDUAL OR GROUP VULNERABILITY?

A prominent distinction in the Court’s case law is the distinction between group and individual vulnerability. There are cases where the Court chooses to recognize an individual as vulnerable and other cases where a complete group is recognized as vulnerable. As discussed earlier, the Court has held in *M.S.S. v. Belgium and Greece* that asylum seekers are vulnerable as a group. Similarly, the Court has held that Roma, Kurds, victims and other groups are vulnerable. Members of these groups are automatically regarded as vulnerable persons by the Court.

As discussed in Chapter One, 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. Martha Fineman, the driving force behind 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. 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 recognizing a group as vulnerable, however well-defined and homogeneous that group may be.

Peroni and Timmer provide a cunning solution to the challenge of reconciling the Court’s group approach to 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.” Peroni and Timmer argue that this statement shows that the Court’s group-based approach and Fineman’s universal approach can be merged. Moreover, they find that this holistic approach fits well with the paradoxical nature of vulnerability of being universal and particular at the same time.

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 thesis, there are plenty of illustrations where the Court makes a clear distinction between vulnerable and not-vulnerable subjects. This has been exemplified in Chapter One, where cases were discussed in which the Court explicitly judged that the persons considered

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223 Among others ECHR [GC] 18 January 2001, no. 27238/95 (*Chapman v. the United Kingdom*).
224 Among others ECHR 25 May 1998, no. 24276/94 (*Kurt v. Turkey*).
225 Among others ECHR 20 January 2011, no. 14811/04 (*Gisayev v. Russia*).
229 Ibid., p. 1060.
were not vulnerable and therefore did not require special state protection. In some cases, the Court expressly ruled that the applicant does not require special consideration because he falls outside the protection of vulnerable subjects.²³⁰ This points to an approach that rules out at least a significant number of persons from being regarded as vulnerable.

4.5 CASES WHERE THE VULNERABILITY DOES NOT LIE WITH THE APPLICANT

Vulnerability has played a role in a number of cases where not the applicant, but a person related to the applicant, was deemed vulnerable. The most notable case in this regard is the case of Nechiporuk and Yonkalo v. Ukraine.²³¹ In this case, the applicant is a man who has a pregnant wife who was “particularly vulnerable given her advanced stage of pregnancy” and who, as the applicant knew, was in police custody. The Court finds that this “must have exacerbated considerably his mental suffering”. Despite the applicant not being a vulnerable subject, the vulnerability of his pregnant wife also affects the Court’s ruling on him.

This case again illustrates the possible expanding function of vulnerability. In paragraph 1.5, I mentioned that the Hutten-Czapska v. Poland case²³² gave a reason to think that the Court might take reasoning which it previously applied to vulnerable groups or individuals, and use it for other subjects who are essentially not vulnerable themselves. Thus, vulnerability reasoning can lay the basis for more extensive protection. In Nechiporuk and Yonkalo v. Ukraine, the Court uses the vulnerability of a person related to the applicant to change its approach toward the applicant, who is essentially not vulnerable himself. This shows that vulnerability can have consequences that are not limited exclusively to the vulnerable persons themselves.

Other cases where not the applicant was deemed vulnerable, but other persons, also demonstrate that the Court takes into account the vulnerability of these persons in assessing the applicant’s complaints. These cases often concern the situation in which the government claims that its legislation or actions are justified, because the purpose of the legislation or action was to afford safeguards for the vulnerable members of society.²³³ The Court then proceeds to balance the interests of vulnerable persons against the interests of the applicant.

4.6 ‘PARTICULARLY VULNERABLE PERSONS’

For some persons, the Court has held that the subjects are ‘particularly’ vulnerable rather than the usual vulnerability. These persons are:

- Children²³⁴
- Detainees with special circumstances, e.g. mental disorder²³⁵
- Suspects²³⁶

²³⁰ ECtHR 7 July 2009, no. 12278/03 (Padalevicius v. Lithuania); ECtHR 18 February 2010, no. 51243/08 (Puzan v. Ukraine); ECtHR 20 May 2010, no. 3990/06 (Kaminshev v. Ukraine); ECtHR 10 February 2011, no. 12343/10 (Dzhaksyberg-Enov (Aka Jaxybergerenov) v. Ukraine); ECtHR 3 March 2011, no. 66317/09 (Elmuratov v. Russia); ECtHR 11 October 2011, no. 18414/10 (Sharipov v. Russia); ECtHR 21 June 2012, no. 34124/06 (Schweizerische Radio- Und Fernsehgesellschaft Srg v. Switzerland); ECtHR 26 March 2013, no. 33234/07 (Valiulienė v. Lithuania).
²³¹ ECtHR 21 April 2011, no. 42310/04 (Nechiporuk and Yonkalo v. Ukraine).
²³² ECtHR 19 June 2006, no. 35014/97 (Hutten-Czapska v. Poland).
²³³ See e.g. ECtHR 22 October 1981, no. 7525/76 (Dudgeon v. the United Kingdom), ECtHR 21 February 1986, no. 8793/79 (James and others v. the United Kingdom); ECtHR 8 July 1986, no. 9006/80 (Lithgow and others v. the United Kingdom); ECtHR 4 May 2006, no. 633/03 (Dudek v. Poland).
²³⁴ E.g. ECtHR 17 October 2006, no. 52067/99 (Okkali v. Turkey).
²³⁵ E.g. ECtHR 24 November 2009, no. 23968/05 (Halilovic v. Bosnia and Herzegovina).
²³⁶ E.g. ECtHR 27 November 2008, no. 36391/02 (Solduz v. Turkey).
• Mentally ill persons\textsuperscript{237}
• Victims\textsuperscript{238}
• Persons who lack legal capacity\textsuperscript{239}
• Refugees and internally displaced persons\textsuperscript{240}

This list shows a great variety of persons being labeled ‘particularly vulnerable’ persons. There is no obvious reason in the Court’s judgments that explain why the Court makes this particular semantic choice in its rulings. Only once does the distinction between vulnerable and particularly vulnerable seem to be relevant in a judgment. In the case of \textit{Julin v. Estonia}\textsuperscript{241}, also discussed in paragraph 4.2 above, the Court holds that a detainee was not in such a grave situation that made him particularly helpless, despite being a vulnerable person:

“(...) 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.”

The detainee in this case had, among others, been subjected to a strip search at the prison when he had returned from an administrative court hearing. He argued that he was searched in a degrading manner by the prison officers. The Court ruled that this was not a systematic search conducted on the detainee, that the search was carried out in a room set apart, that the search was performed by prison officers of the same sex and that, as quoted above, he did not appear to have been in a ‘particularly’ helpless situation. Due to these mitigating circumstances, the Court found that the search did not reach the minimum level of severity that is prohibited by Article 3 ECHR. Therefore, the detainee’s complaints about the strip search in this case were inadmissible.

4.7 VULNERABILITY: CAUSE OR EFFECT?

In a research article by Chapman and Carbonetti on the protection of vulnerable groups by the UN Committee on Economic, Social and Cultural Rights, the authors make a distinction between situations where vulnerability is the cause of a human rights violation and situations where vulnerability is the consequence of such a violation.\textsuperscript{242} In other words, did the person concerned become vulnerable because of the violation or is there a violation because the person was in a vulnerable position?

How does the Court understand vulnerability, as a cause or as an effect? In the case of \textit{Kurić and others v. Slovenia}\textsuperscript{243}, the Court ruled that the applicants had become vulnerable as a result of being caught up in a legal procedure that had taken a very long time. Therefore, the applicants’ vulnerability was the consequence of the violation of Article 6 ECHR:

“(…) the Court cannot overlook the fact that the applicants, who did not have any Slovenian identity documents, were left for several years in a state of legal limbo, and therefore in a situation of vulnerability and legal insecurity.”\textsuperscript{244}

\textsuperscript{237} E.g. ECtHR 20 May 2010, no. 38832/06 (Alajos Kiss v. Hungary).
\textsuperscript{238} E.g. ECtHR 3 June 2004, nos. 33097/96, 57834/00 (Bati and others v. Turkey).
\textsuperscript{239} E.g. ECtHR 16 July 2009, no. 20082/02 (Zehentner v. Austria).
\textsuperscript{240} ECHR 17 December 2009, no. 4762/05 (Mikayil Mammadov v. Azerbaijan).
\textsuperscript{241} ECtHR 29 May 2012, nos. 16563/08, 18656/10, 40841/08 (Julin v. Estonia).
\textsuperscript{243} ECtHR 26 June 2012, no. 26828/06 (Kurić and others v. Slovenia).
\textsuperscript{244} Ibid. See also ECtHR 8 July 2004, no. 48787/99 (Ilaşcu and others v. Moldova and Russia).
The same approach can be found in cases concerning victims of torture and of domestic violence. In these cases, the persons become vulnerable after, and because of, suffering the act of torture or abuse.\textsuperscript{245} Timmer conceptualizes this as a form of \textit{ex-post} vulnerability.\textsuperscript{246}

Despite these cases, the predominant approach by the Court is that the persons or groups concerned in a case are already in a vulnerable position or situation prior to and independent from the violation. This vulnerability is then regarded by the Court as one of the factors that generate the violation. Detainees, for example, are in a vulnerable position due to their imprisonment, regardless of whether their human rights are violated. Therefore, in most cases, vulnerability is taken to be a state that precedes the violation, rather than being its consequence. The violation can also have an exacerbating effect on a person’s vulnerability\textsuperscript{247}, in which case the cause and effect of the vulnerability are entangled.

4.8 \textsc{Closing Remarks}

The aim of this chapter was to further analyze the Court’s understanding of vulnerability in order to get an insight into the various ways the Court applies vulnerability in its case law. There seem to be a number of unclear and at times arbitral distinctions in the Court’s use of vulnerability. However, I have illustrated in this chapter that several cases show that some distinctions point to important nuances in the Court’s use of vulnerability. One distinction made by the Court is the division between vulnerable subjects and vulnerable situations or positions. The relevance of this distinction 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 layereddness of vulnerability with a minimum threshold of vulnerability below which the Court will not admit an applicant. Another distinction is the division between persons that feel vulnerable and persons that are vulnerable. In a number of cases, the Court has ruled that the applicants “could have felt” vulnerable. This hypotheticality is something that is not found in other cases involving vulnerable subjects (there are no cases where the Court states that a person ‘might have become vulnerable’). Therefore, the Court might apply the reasoning of ‘feelings of vulnerability’ whenever circumstances that generate a vulnerable state have occurred, but the vulnerability of the applicant has not (yet) been established. A third important distinction is the distinction between group and individual vulnerability. There are cases where the Court chooses to recognize an individual as vulnerable and other cases where a complete group is recognized as vulnerable. Members of these groups are automatically regarded as vulnerable persons by the Court. Other distinctions made by the Court do not seem to have a particularly altering effect on the Court’s reasoning.

\textsuperscript{245} For victims of domestic violence, see ECHR 12 June 2008, no. 71127/01 (Bevacqua and S. v. Bulgaria) and ECHR 30 November 2010, no. 2660/03 (Hajduova v. Slovakia). For victims of torture, see ECHR 25 September 1997, no. 23178/94 (Aydin v. Turkey).

\textsuperscript{246} Timmer, \textit{A Quiet Revolution: Vulnerability in the European Court of Human Rights}, p. 155.

\textsuperscript{247} See, for example, ECHR 26 October 2000, no. 30210/96 (Kudla v. Poland) and ECHR 18 December 2007, no. 41153/06 (Dybeku v. Albania).
CHAPTER FIVE: THE IMPACT OF VULNERABILITY REASONING

5.1 INTRODUCTION

At this point, I have extensively analyzed the Court’s use of the term vulnerability, the groups and individuals to which the term is applied and the consequences that the Court attaches to its use of the term. One question remains to be answered, however, and it is the question 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 word that the Court uses to describe a circumstance that the Court already used to integrate in its reasoning? Or is the increased use of vulnerability a sign of a new notion of the function of human rights and an increased prioritization of vulnerable subjects by the Court?

I intend to answer these questions in this chapter in the following way. For a selected number of vulnerable categories, I will place the case law involving vulnerability reasoning alongside cases on these subjects where the word vulnerability does not appear. These categories are: detainees, victims, mentally disabled persons and persons with HIV. I have chosen these four categories, because the Court has attached the most clear-cut legal implications to these categories, as I have demonstrated in Chapter Three: for detainees and victims, the Court has placed special positive obligations on the state’s authorities (especially under Articles 2 and 3 ECHR); 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 a proper comparison of this case law to cases on these same categories where the word vulnerability does not appear. If the same consequences do not occur in the latter cases, this will be an indication that the vulnerability of the subjects plays a significant role in determining the degree of human rights law protection these subjects warrant.

The cases that will be discussed in this chapter 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 word vulnerability will be made apparent. This diachronic method will give us a clear impression of the extent to which the term vulnerability has an impact on the reasoning of the Court.

5.2 DETAINES: FROM PROCEDURAL TO SUBSTANTIVE PROTECTION

The protection of detained persons has always been a prominent part of the ECtHR’s case law. In the important case of Golder v. the United Kingdom, the Court held that the interference with a detainee’s correspondence with a lawyer by the state’s authorities constituted a breach of the Convention. The issue in the Golder case was that the applicant was refused permission by the Home Secretary to consult a solicitor with the aim of bringing libel proceedings against a prison officer. The Court found that a prohibition on doing so infringed his right of access to a court as guaranteed by Article 6 ECHR and the right to correspondence in Article 8 ECHR.

249 ECtHR 21 February 1975, no. 4451/70 (Golder v. the United Kingdom).
The Court’s principled approach in the Golder case had a major impact on the development of prisoners’ rights in the United Kingdom and the rest of Europe.\(^{250}\) However, the decision was made in the context of a right (the right to correspondence) that was specifically recognized by the Convention. Generally speaking, in the first three decades of its work, the role of the Court was at its strongest when it came to recognizing procedural aspects of the rights of prisoners.\(^{251}\) A similar emphasis on procedure rather than substance was noticeable in other early decisions. In the case of Campbell and Fell v. the United Kingdom\(^{252}\), the Court established the rights of prisoners to be represented by lawyers when they are being tried for disciplinary offences that could result in their losing remission and thus spending longer in prison than they would otherwise have had to do. This finding formed the basis for an increasing recognition of the procedural rights of prisoners in prison disciplinary matters.\(^{253}\)

These progressive procedural rulings are in contrast to the Court’s more conservative position in cases where the substantive question was whether the imprisonment was implemented in violation of Article 3 ECHR. The Court was careful not to use the term ‘torture’ for anything except for deliberate inhuman treatment causing extreme suffering.\(^{254}\) 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. Stephen Livingstone noted the following in his study on the Court’s stance toward detainees:

“(...) while the Court has shown itself willing to develop the standards of protection for those in detention at what might be called the higher end of the spectrum, it has remained reluctant to extend the scope of Article 3 at the lower end to cover more routine conditions produced by neglect. (...) Thus it is only in the case of political detainees (...) that the Commission and Court have been prepared to find breaches of Article 3 in relation to things like overcrowding or inadequate medical treatment.”\(^{255}\)

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 optional protocol to the ECHR to ensure legally binding protection of prisoners on matters such as accommodation, medical care, and the right of association.\(^{256}\) Such a protocol was never implemented.

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.\(^{257}\) In several major cases, the Court strengthened the protection of prisoners’ rights. 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.\(^{258}\) In 1997, in the case of Aydin v. Turkey, the rape of a detainee by an official had also been held to constitute torture.\(^{259}\) In 1999, in the important case of Selmouni v. France\(^{260}\), 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”.

\(^{250}\) Van Zyl Smit and Snacken, Principles of European Prison Law and Policy, p. 11.
\(^{251}\) Ibid.
\(^{252}\) ECtHR 28 June 1984, nos. 7819/77 and 7878/77 (Campbell and Fell v. the United Kingdom).
\(^{254}\) Ibid.; ECtHR 18 January 1978, no. 5310/71 (Ireland v. United Kingdom).
\(^{257}\) Van Zyl Smit and Snacken, Principles of European Prison Law and Policy, p. 32.
\(^{258}\) ECtHR 18 December 1996, no. 21987/93 (Aksoy v. Turkey).
\(^{259}\) ECtHR 25 September 1997, no. 23178/94 (Aydin v. Turkey).
\(^{260}\) ECtHR 28 July 1999, no. 25803/94 (Selmouni v. France).
Other Articles of the Convention were also accorded increased importance in the prison context. In *Messina v. Italy*\(^{261}\), the protection of family life in Article 8 ECHR was used to find that a policy that made family visits virtually impossible violated the Convention. The state has a positive duty to facilitate a detainee’s correspondence with his family. A complete ban on the right of sentenced prisoners to vote was also denounced by the Court on the basis that it infringed the right to participate in the democratic process established by Article 3 of Protocol 1 to the ECHR.\(^{262}\)

All in all, the Court became a more significant contributor to substantive European prison law than it had been before.\(^{263}\) A number of factors could explain the Court’s transformation from a procedural to a more substantive protection of prisoners. First, the Court had, after a couple of decades, settled itself as a respected court of human rights. The Court was no longer new, and was becoming more assertive in many areas, not only prisoners’ rights. Secondly, the Court had endured a lot of criticism for its inaction on detainee human rights issues, which even led to suggestions that there should be an optional protocol to the ECHR to ensure the protection of prisoners. Thirdly, a procedural factor that has been mentioned in the literature is that, in 1998, the European Commission of Human Rights was abolished as a result of Protocol 11 of the ECHR. The Commission was a special tribunal to which applicants had to apply in order to be allowed to take a case to the Court. With the Commission gone, the Court could hear more cases directly. At the same time, the capacity of the Court was also enlarged, which enabled it to deal with more cases.\(^{264}\)

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 cases from 1996 and 1997 mentioned above, respectively *Aksoy v. Turkey* and *Aydin v. Turkey*, the Court regarded both applicants as vulnerable persons. In these early cases, however, the vulnerability of the applicants was not yet related to their position as detainees. The Court found that, in *Aksoy v. Turkey*, the applicant was vulnerable *qua* Kurdish person, and, in *Aydin v. Turkey*, that the applicant was vulnerable *qua* victim. In the case of *T.W. v. Malta* in 1999\(^{265}\), 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.

Since the case of *Salman v. Turkey* in the year 2000, cases involving detainees usually contain a standard reference to the vulnerable situation of detained persons *qua* detained persons. In the Salman case, the Grand Chamber established the following ruling:

“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.”\(^{266}\)

The Court has broadened this protection to Article 3 ECHR in the *Iwanczuk v. Poland* case in 2001\(^{267}\), where it emphasized 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”. In more 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’.\(^{268}\) As I have noted in Chapter Three, the specific special positive obligations that the Court has placed on the state in recent years, relying on the vulnerability of

\(^{261}\) ECHR 28 September 2000, no. 25498/94 (*Messina v. Italy* (no. 2)).

\(^{262}\) ECHR 30 March 2004, no. 74025/01 (*Hirst v. the United Kingdom* (no. 2)).


\(^{264}\) Ibid., p. 31.

\(^{265}\) ECHR 29 April 1999, no. 25644/94 (*T.W. v. Malta*).

\(^{266}\) ECHR [GC] 27 June 2000, no. 21986/93 (*Salman v. Turkey*).

\(^{267}\) ECHR 15 November 2001, no. 25196/94 (*Iwanczuk v. Poland*).

\(^{268}\) See e.g. ECHR 8 January 2009, no. 36220/02 (*Barabanshchikov v. Russia*).
detainees, vary greatly and extend from measures with regard to the health of detainees\(^\text{269}\) to the obligation to minimize the risk of attempts to escape or commit suicide\(^\text{270}\).

What does this tell us about vulnerability? The correlation between the emergence of 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 an interesting and seemingly strong 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 year 2000 and allowed it to reason that detainees need to be protected more substantively. The Court can justify imposing more stringent positive obligations on the state by claiming that these people are vulnerable and are, therefore, in need of special protection. Thus, the use of vulnerability in detainee cases marked a change in attitude by the Court from (only) procedural to (also) substantive protection of detainee’s human rights. Vulnerability is an instrument with which the Court can legitimize taking a stronger and more pro-active position vis-à-vis state authorities.

5.3 SPECIAL PROTECTION OF VICTIMS

When state authorities are dealing with victims, the Court has placed special positive obligations on the state’s authorities. As shown in Chapter Three, 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\(^\text{271}\). 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”\(^\text{272}\). 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 throughout Europe. In recent years, the phenomenon of victims’ rights has moved to the forefront of law- and policymaking on both domestic and international platforms and especially in academic circles\(^\text{273}\). While criminal law has traditionally been conceptualized as a mechanism for the state to resolve its grievances against offenders, it is now broadly accepted that justice cannot be administered effectively without the recognition of the rights of the victims that were affected by the criminal action\(^\text{274}\).

The protection of victims by the Court, however, has been recognized 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\(^\text{275}\), the Court found a violation of the human rights of a 16-year-old rape victim, because her

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\(^{269}\) ECHR 20 January 2009, no. 44369/02 (Wenerski v. Poland); ECHR 16 December 2010, no. 33099/08 (Kozhokar v. Russia).

\(^{270}\) ECHR 17 October 2013, no. 26824/04 (Keller v. Russia); ECHR 16 October 2008, no. 5608/05 (Renolde v. France).

\(^{271}\) ECHR 20 January 2011, no. 14811/04 (Gisayev v. Russia).

\(^{272}\) ECHR 18 January 2011, no. 32181/08 (Ristic v. Serbia).


\(^{275}\) ECHR 26 March 1985, no. 8978/80 (X and Y v. The Netherlands).
mental handicap was such that she was unable to make a personal complaint and her father was not authorized to file one on her behalf. The Court ruled that civil remedies were not an adequate remedy for rape victims, thus creating a right of access to criminal remedies for rape victims.

In the following years, the Court expanded the rights of victims considerably under different Articles of the Convention. For instance, in cases involving a violation of Article 2 or Article 3 ECHR the Court has interpreted the Convention as placing a duty on states to carry out effective official investigations that can lead to the prosecution of those responsible. Moreover, the Court held on several instances that the Convention provides victims with a number of procedural rights. For instance, with regard to the right to information, the Court found a violation of Article 2 ECHR in a number of cases where the state failed to inform victims and their next-of-kin of decisions not to prosecute. The Court requires that victims are allowed access to documents in the investigation and also to be given the right to introduce evidence in order to add to the record of the case. The Court further found that the right to a remedy requires that states provide victims with the opportunity to claim compensation and that the victim has the right that the proceedings are conducted within a reasonable amount of time.

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. The same can be said about the current case law on victims. Although the Court regularly uses vulnerability to describe victims, not all victims are recognized as such. I have mentioned earlier that the Court’s case law shows a tendency toward a categorical approach of recognizing all victims as vulnerable, but that there have also been recent victim cases where the Court made a specific statement about the vulnerability of the victim. More importantly, 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. In the case of A. v. Croatia, the Court ruled on the failure of the Croatian authorities to implement court orders intended to afford the applicant protection from her violent husband. The husband had been diagnosed as having mental health problems and there had been multiple proceedings regarding the husband’s violent and threatening conduct to his wife. On one occasion he was sentenced to serve a custodial sentence, but the authorities reported that there was no room available for him in prison and the sentence was not enforced. The woman was subsequently forced to live in hiding with her child. The Court found that the state had breached its positive obligations arising under Article 8 ECHR to protect the woman’s private life. This case develops the principles articulated by the Court in Opuz v. Turkey, its landmark judgment in which it found that domestic violence can constitute a breach of Articles 2 and 3 ECHR if the State fails to exercise its duties in the prevention, investigation and punishment of the domestic violence. The first time that the Court found a breach of the positive obligations of the state under Article 8 ECHR in relation to a victim of domestic violence was in the case of Bevacqua and S. v. Bulgaria. Whereas in the Opuz case and the Bevacqua and S. case the Court regarded the applicants as vulnerable, the Court did not mention vulnerability in A. v. Croatia.

The same holds true for other cases where the Court has required the special protection of victims by the state. Perhaps the most striking example is the case of Valiulienė v. Lithuania, which I have mentioned

276 See e.g. ECtHR 27 September 1995, no. 18984/91 (Mcconn and Others v. the United Kingdom); ECtHR 28 October 1998, no. 24760/94 (Assenov and Others v. Bulgaria).
277 ECtHR 27 July 1998, no. 21593/93 (Gülçen v. Turkey); ECtHR 20 May 1999, no. 21594/93 (Oğur v. Turkey).
278 ECtHR 20 May 1999, no. 21594/93 (Oğur v. Turkey).
279 ECtHR 19 February 1998, no. 22729/93 (Kaya v. Turkey).
280 ECtHR 23 October 1990, no. 11296/84 (Moreira de Azevedo v. Portugal); ECtHR 17 January 2002, no. 32967/96 (Calvelli and Ciglio v. Italy).
281 See paragraph 1.3.3.
282 E.g. ECtHR 18 January 2011, no. 32181/08 (Ristic v. Serbia).
283 ECtHR 14 October 2010, no. 55164/08 (A. v. Croatia).
284 ECtHR 9 June 2009, no. 33401/02 (Opuz v. Turkey).
286 ECtHR 26 March 2013, no. 33234/07 (Valiulienė v. Lithuania).
before. In this case, the female applicant, who had been the victim of domestic violence by her husband, pleaded the following:

“The applicant further considered that she, as a woman, had been a victim of gender-based violence, thus falling within the group of “vulnerable individuals” entitled to a higher degree of State protection.”

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*:

“Noting that the context of “domestic violence” does not necessarily attract the State’s responsibility under Article 3 of the Convention, the Government maintained that the applicant could not be automatically considered a vulnerable person because of her age – as, for example, children would be – or her gender or social status, contrary to the Court’s judgment in *Opuz* (cited above). The situation of women in Lithuania could be described as being significantly different from that of women in Turkey, given that the applicant and J.H.L. had shared ownership of an apartment and, moreover, they had been business partners. The applicant thus had not been financially dependent on J.H.L.; she was an educated, independent woman who owned her own property. Eventually their relationship had become discordant and the applicant had entered into a close relationship with another man, her future husband, who had later moved in to live with her.”

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 made the case important:

“(…) whilst in the circumstances of the present case it is unable to fully share the applicant’s view that she, as a woman, by default fell into the category of vulnerable persons (…), the Court nonetheless notes that, as it had been acknowledged by the Government, following the enactment of the Law on Protection against Domestic Violence, crimes of such a nature fall into the category of those having public 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, thus not providing appropriate redress to the victim. Therefore, it seems that the Court is willing to find special positive obligations to be in place, despite denying a victim’s vulnerability in a concrete situation.

In conclusion, it seems that vulnerability has had a less significant impact on the Court’s reasoning with regard to victim’s rights than with prisoners’ rights. Although the increased use of vulnerability in victim cases after 2006 can be correlated 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 since the case of *X and Y v. The Netherlands* in 1985. Moreover, different recent cases involving victims do not contain a reference to the vulnerability of the victim, while still attending to their 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.

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287 See paragraph 1.4.3.
5.4 VULNERABILITY IN DISCRIMINATION CASES: MENTALLY DISABLED PERSONS AND PERSONS INFECTED WITH HIV

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. A trend that can be discerned from these cases is that the Court uses vulnerability to explicitly address the stereotyping of groups whose protection against discrimination had previously not been guaranteed in the Court’s jurisprudence. Two of these groups are mentally disabled persons and persons infected with HIV.

The Court has held in the case of Alajos Kiss v. Hungary\(^2\) that mentally ill persons are a particularly vulnerable group because they have a history of being a discriminated group in society. As a result, the Court limited the margin of appreciation of the state under Article 3 of the First Protocol of the Convention, which enshrines the right to vote. 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:

“In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (...). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (...).”

Thus, the Court ruled that Article 3 of the First Protocol of the Convention was violated by the Hungarian state. The Court did accept the government’s contention that only citizens capable of making conscious and judicious decisions should participate in public affairs, but did not accept the consequence that the Hungarian legislation attached to it, namely an automatic exclusion of mentally disabled people from the right to vote. The Court thus held that the ban was disproportionate.

Alajos Kiss v. Hungary was a landmark judgment in many ways. In general, the Court’s discrimination case law contains little jurisprudence directly addressing the rights of (mentally) disabled people.\(^3\) One of the few is the case of Glor v. Switzerland.\(^4\) In this case, the Court addressed a Swiss tax law that obliged people to pay a tax if they did not do their military service. The applicant was declared unfit for military service by a medical doctor, but was nevertheless required to pay a tax for not doing his military service, because the authorities found that the applicant was less than 40% physically or mentally disabled. The Swiss legislation did not provide for any exemption from the tax in question for those who were below the 40% disability threshold. The Court found that there was a violation of Article 14 taken in conjunction with Article 8 ECHR, finding that the applicant had been the victim of discriminatory treatment as there had been no reasonable justification for the distinction between persons who were unfit for service and not liable to the tax in question and those who were unfit for service but were nevertheless obliged to pay the tax.

In the Alajos Kiss case, specifically in the passage quoted above, the Court condemns the stereotyping indulged in by the Hungarian legislators. This is the first case where the Court has explicitly employed an anti-

\(^2\) ECtHR 20 May 2010, no. 38832/06 (Alajos Kiss v. Hungary).


\(^4\) ECtHR 30 April 2009, no. 13444/04 (Glor v. Switzerland).

\(^9\) Further discrimination cases were either found inapplicable (ECtHR 24 February 1998, no. 21439/93 (Botta v. Italy), no violation of Article 8 with Article 14) or declared inadmissible (ECtHR 14 May 2002, no. 38621/97 (Zehnalova and Zehnal v. the Czech Republic)).
stereotyping approach in a disability-context. The Court referred to the United Nations Convention on the Rights of Persons with Disabilities (2006), of which Article 8 stipulates that the state has a responsibility to fight stereotypes: “States Parties undertake to adopt immediate, effective and appropriate measures: (...) (b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life”.

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 appreciation afforded to the state under Article 14 ECHR was narrowed “substantially”. The first case, Kiyutin v. Russia, 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, 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. In these two cases, the Court applies a narrower margin of appreciation in the context of groups that are vulnerable as a result of their history:

“If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.”

In both cases the HIV-positive persons were recognized as vulnerable subjects. Indeed, these are the only cases where the Court found that HIV-positive persons were discriminated against. 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. While scrutinizing the state’s justifications, the Court dismantles a stereotype that underlies the state’s measure, namely that persons infected with HIV will indulge in unsafe behaviour:

“Excluding HIV-positive non-nationals from entry and/or residence in order to prevent HIV transmission is based on the assumption that they will engage in specific unsafe behaviour and that the national will also fail to protect himself or herself. This assumption amounts to a generalisation which is not founded in fact and fails to take into account the individual situation, such as that of the applicant.”

After an investigation of the justifications brought forward by the state, the Court concluded that the state had not acted reasonably and objectively and that the applicant was a victim of discrimination.

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, another case where the Court has regarded the applicant – this time a Roma applicant – as vulnerable due to the particular history of the Roma, but where the Court did not find that the stereotyping led to discrimination. The case concerned the publication of a book and a dictionary that contained defamatory remarks on Roma people. Aksu complained that these publications offended him in his Roma identity, as a matter of Article 14 in conjunction with Article 8 ECHR. As with mentally disabled persons and HIV-positive persons, the Court considers that the Roma have become a specific type of disadvantaged and vulnerable minority due to their particular history. However, the Court decided to not examine the complaint.

292 ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia).
293 ECtHR 3 October 2013, no. 552/10 (I.B. v. Greece).
294 ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia).
295 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 13 March 2007, no. 39177/05 (V.A.M. v. Serbia).
296 ECtHR [GC] 15 March 2012, nos. 4149/04, 41029/04 (Aksu v. Turkey). Also discussed in paragraph 3.2.2.
under article 14 ECHR. The Court found that “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 on 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 sense the publications to have 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. The Court ultimately examined the Aksu case under Article 8 ECHR, and found that the Turkish authorities had fulfilled their positive obligations to secure to the applicant effective respect for his private life. There was no violation of the Convention.

In conclusion, the landmark cases with regard to both mentally disabled persons as well as persons infected with HIV emphasized the vulnerability of the applicants due to their discrimination in the past. It might be said that, 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. Therefore, vulnerability opens the way for a more inclusive protection of different groups and individuals from discrimination. However, the case of Aksu v. Turkey shows that the Court’s case law with regard to stereotyping is still developing. Despite recognizing the applicant as vulnerable, the Court refused to deal with the stereotyping of Roma under the banner of discrimination and ultimately found that there was no violation of the Convention by the state.

5.5 CONCLUDING REMARKS

The aim of this chapter was to find out whether the increased use of the word vulnerability in the Court’s case law points to a new notion of human rights protection of the Court. I have demonstrated that, with regard to detainees, there is a strong correlation between the increased attention for the substantive rights of these groups and the emergence of the word vulnerability in the Court’s reasoning. From this, I have concluded that the Court uses the word vulnerability to legitimize taking a stronger and more pro-active position vis-à-vis state authorities. Therefore, vulnerability considerations mark an increased protection of vulnerable groups and individuals and result in the extension of their rights through the doctrine of positive obligations.

A similar trend can be detected with regard to discrimination cases concerning groups whose protection against discrimination had previously not been guaranteed in the Court’s jurisprudence. For mentally disabled persons as well as persons infected with HIV, the foundational cases that addressed the discrimination and stereotyping of these groups both contained vulnerability reasoning. This is an indication that vulnerability can function as a justification for the Court to protect ‘new’ groups from discrimination and stereotyping.

However, the relation between the use of the word vulnerability and the impact it has on the Court’s judgment is less clear-cut in other instances. For victims, it seems that vulnerability has had a less significant impact on the developments of victims’ rights. Likewise, the vulnerability of an applicant is not a consistently decisive factor in establishing discrimination.

Therefore, it is clear that not all instances where the Court has used the word vulnerability have impacted the Court’s judgment, but, for some categories, there is a clear relation between the Court’s change in attitude and the appearance of the word.
CONCLUSION

ANSWERS TO THE CENTRAL QUESTION

In this thesis, I have tried to lay down a conceptual analysis of the term vulnerability in the European Court of Human Rights’ case law by analyzing all 557 cases that contain the word vulnerability (and its variations). This has resulted in a comprehensive view of the Court’s understanding of vulnerability, the groups and individuals that have been qualified as vulnerable and the consequences that the Court draws from recognizing a subject as vulnerable. Furthermore, applying the conceptual analysis to such a broad range of cases has brought to light interesting developments in human rights law protection and, at times, curious inconsistencies in the Court’s jurisprudence.

The final conclusions of this thesis are multiple. The central aim of the thesis was to answer the following central question:

Does the case law of the European Court of Human Rights confirm the view that the Court has applied vulnerability reasoning more often in the past few years, how does the Court give substance to vulnerability in its case law, and does this point to a new notion by the Court of the role of vulnerability in human rights law?

The first subquestion of the central question is: (a) Does the case law of the European Court of Human Rights confirm the view that the Court has applied vulnerability reasoning more often in the past few years?

Conclusion 1: The Court’s use of vulnerability reasoning in its case law has increased in the past few years.
This first subquestion can be answered emphatically with yes. Vulnerability has played a role in 557 cases of the Court up until, and including, 2013. I have shown that the number of mentions of vulnerability has strongly increased, as can be seen from the chart on the next page. 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. Therefore, the claim that was made in the literature 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 my thesis.

The second subquestion of the central question is: (b) How does the Court give substance to vulnerability in its case law? I have spent a good part of my thesis analyzing the use of the term vulnerability in the Court’s case law. In Chapter One, I have examined the individuals and groups that have been recognized as vulnerable by the Court. The number of mentions of vulnerability differs greatly per category: vulnerability has played a role in 236 detention cases, while most vulnerable categories have only appeared in a few cases. Examining these different categories raised many questions which I have discussed in the following chapters and which led to the following conclusions.

Conclusion 2: The Court has clarified the determinants of vulnerability for the subjects that are most often recognized as vulnerable in its case law.
In Chapter Two, I dealt with the question whether there is a consistent reasoning in the Court’s case law with regard to the reasons why it considers a subject as vulnerable. The most prevalent determinants of vulnerability in cases are: a history of prejudice, discrimination and stigmatization, a situation of state control, or an international consensus on the vulnerability of a certain group. In contrast to the prevailing opinion in the
current legal literature on vulnerability, I argued that the Court has clarified the determining factors of the vulnerability of subjects that are most often recognized as vulnerable in its case law. The cases discussed in Chapter Two show that the Court has clarified the factors that determine the vulnerability of the following subjects: detainees, victims, asylum seekers, suspects, Roma, mentally ill persons and persons infected with HIV. The only large group of which the Court has yet to explain what determines its vulnerability is the group of children. The view held in the literature – that the Court hardly ever explains the reasons of vulnerability 297 – might be the result of the fact that only a small number of cases contain a comprehensive reasoning by the Court. However, I have shown that 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. Therefore, the current opinion in the literature is incorrect: although the Court rarely mentions the determinants of vulnerability, the Court has clarified the determinants of the most-mentioned vulnerable subjects in its case law.

Conclusion 3: Recognizing an individual or group as vulnerable can have several legal implications, including expanded positive obligations on the state, a narrowed margin of appreciation for the state, procedural implications and implications for the awarding of just satisfaction to the applicant. When a person is recognized as vulnerable by the Court, the Court has held explicitly on different occasions that the person requires special consideration. In Chapter Three, the specific legal implications of vulnerability in the Court’s judgments were analyzed and categorized. The most prevalent implications are: the expanded positive obligations of the state (especially on the basis of Articles 2, 3 and 8 ECHR), the narrowed margin of appreciation, procedural implications (e.g. reversal of the burden of proof) and implications for the awarding of just satisfaction to the applicant. The case law discussed shows a wide variety of implications that differs per vulnerable subject and interest that needs to be protected. Especially the special positive obligations of the state and the reversal of the burden of proof seem to require an extra effort by the state to make sure the human rights of vulnerable persons are guaranteed.

Conclusion 4: The Court’s distinction between group and individual vulnerability is still ambiguous; but the distinction makes clear that the Court rules out a number of persons from being regarded as vulnerable. The analysis of the use of vulnerability by the Court brought to light a number of inconsistencies in the Court’s use of the word. At first glance, the Court seems to make several unclear and at times arbitral distinctions in its use of vulnerability. One such distinction is the distinction between group and individual vulnerability. There are cases where the Court chooses to recognize an individual as vulnerable and other cases where a complete group is recognized as vulnerable. Members of these groups are automatically regarded as vulnerable persons by the Court. However, there are also categories where the Court is still hesitating and switches between a group and an individual approach (e.g. victims) 298. These cases show that the Court is thinking about, but not completely ready, to make a statement about the vulnerability of these groups in general. On the other hand, for other categories, namely persons entitled to social security, the Court has made a general statement about the vulnerability of the group, while it has refrained from specifying the vulnerability of the specific applicants. 299

The distinction between group and individual vulnerability is also subject to debate in the literature on vulnerability. I have demonstrated that the so-called ‘holistic approach’ raised in the literature 300, which argues

297 See Truscan, Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights, p. 75; Peroni and Timmer, Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law, p. 1064.

298 See paragraph 1.3.3.

299 See paragraph 1.4.7.

that the Court finds all applicants vulnerable, but some more vulnerable than others, is not supported by the jurisprudence of the Court. In the Court’s case law discussed in this thesis, there are plenty of illustrations where the Court makes a clear distinction between vulnerable and not-vulnerable subjects. This has been exemplified in Chapter One, where cases were discussed in which the Court explicitly judged that the persons considered were not vulnerable and therefore did not require special state protection. In some cases, the Court expressly ruled that the applicant does not require special consideration because he falls outside the protection of vulnerable subjects. This points to an approach that rules out at least a significant number of persons from being regarded as vulnerable.

Conclusion 5: The Court makes several other distinctions between different types of vulnerability, a number of which are important for a good understanding of the Court’s use of the word.

Another distinction made by the Court is the division between vulnerable subjects and vulnerable situations or positions. In some cases, the Court refers to a certain individual or group as vulnerable, while in other cases the Court finds that the individual or group is in a vulnerable situation or position. The relevance of this distinction 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.

Moreover, the Court distinguishes between persons that feel vulnerable and persons that are vulnerable. In a number of cases, the Court has ruled that the applicants “could have felt” vulnerable. This hypotheticality is something that is not found in other cases involving vulnerable subjects (there are no cases where the Court states that a person ‘might have become vulnerable’). Therefore, the Court might apply the reasoning of ‘feelings of vulnerability’ whenever circumstances that generate a vulnerable state have occurred, but the vulnerability of the applicant has not (yet) been established.

Conclusion 6: Not all instances where the Court has used the word vulnerability have impacted the Court’s judgment, but, for some categories, there is a clear relation between the Court’s change in attitude and the appearance of the word.

The final subquestion of the central question is: (c) Does the increased use of vulnerability have substantive implications for the human rights protection afforded by the Court? I have tried to answer this question in Chapter Five by placing the case law involving vulnerability reasoning of a selected number of vulnerable categories alongside cases on these subjects where the word vulnerability does not appear. These categories are: detainees, victims, mentally disabled persons and persons with HIV.

I demonstrated that, with regard to detainees, there is a strong correlation between the increased attention for the substantive rights of these groups and the emergence of the word vulnerability in the Court’s reasoning. From this, I have concluded that the Court uses the word vulnerability to legitimize taking a stronger and more pro-active position vis-à-vis state authorities. Therefore, vulnerability considerations mark an increased protection of vulnerable groups and individuals and result in the extension of their rights through the doctrine of positive obligations. A similar trend can be detected with regard to discrimination cases concerning groups whose protection against discrimination had previously not been guaranteed in the Court’s jurisprudence. For mentally disabled persons as well as persons infected with HIV, the foundational cases that addressed the discrimination and stereotyping of these groups both contained vulnerability reasoning.

However, the relation between the use of the word vulnerability and the impact it has on the Court’s judgment is less clear-cut in other instances. For victims, it seems that vulnerability has had a less significant

301 ECtHR 7 July 2009, no. 12278/03 (Padalevicius v. Lithuania); ECtHR 18 February 2010, no. 51243/08 (Puzan v. Ukraine); ECtHR 20 May 2010, no. 3990/06 (Kamyshev v. Ukraine); ECtHR 10 February 2011, no. 12343/10 (Dzhaksyberg-Enov (Aka Jaxybergenov) v. Ukraine); ECtHR 3 March 2011, no. 66317/09 (Elmuratov v. Russia); ECtHR 11 October 2011, no. 18414/10 (Sharipov v. Russia); ECtHR 21 June 2012, no. 34124/06 (Schweizerische Radio- Und Fernsehgesellschaft Srg v. Switzerland); ECtHR 26 March 2013, no. 33234/07 (Valiulienė v. Lithuania).
impact on the developments of victims’ rights. Likewise, the vulnerability of an applicant is not a consistently
decisive factor in establishing discrimination.

Therefore, it is clear that not all instances where the Court has used the word vulnerability have
impacted the Court’s judgment, but, for some categories, there is a clear relation between the Court’s change
in attitude and the appearance of the word.

FINAL THOUGHTS

With this thesis, I hope to have laid down a comprehensive view of the Court’s understanding of vulnerability
which opens the way for a broader discussion about the role that vulnerability does and should have in human
rights law. The concept of vulnerability proves to be a rich topic for research and can have major legal as well
as political and philosophical implications. I started my thesis with a quote by Robert E. Goodin, a political
philosopher who has suggested a responsibility theory based on the vulnerability of others towards our actions
and choices. Goodin urges his readers that it is essential not only to react to the vulnerability of others, but also
to reduce the causes of vulnerability whenever these vulnerabilities lead to the exploitation of people. With
this approach he reacts to a statement by John Stuart Mill, who said that “it is the great error of reformers and
philanthropists (...) to nibble at the consequences of unjust power, instead of redressing the injustice itself”.

While not internalizing Fineman’s argument for the universal vulnerability of the human being, the
Court does implement important parts of her theory by recognizing 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 certainly seems to be on its way to substantively address the
vulnerability of people and to move states to take this vulnerability into account in their law- and policymaking
activities.

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302 J.S. Mill, Principles of Political Economy: With Some of Their Applications to Social Philosophy (abridged
LIST OF CASES

List of ECtHR judgments mentioning vulnerability and referred to in this thesis

1. ECtHR 22 October 1981, no. 7525/76 (Dudgeon v. the United Kingdom)
2. ECtHR 21 February 1986, no. 8793/79 (James and others v. the United Kingdom)
3. ECtHR 8 July 1986, no. 9006/80 (Lithgow and others v. the United Kingdom)
4. ECtHR 26 May 1993, nos. 14553/89, 14554/89 (Brannigan and Mcbride v. the United Kingdom)
5. ECtHR 16 September 1996, no. 21893/93 (Akdivar and others v. Turkey)
6. ECtHR 22 October 1996, nos. 22083/93, 22095/93 (Stubbings and others v. the United Kingdom)
7. ECtHR 18 December 1996, no. 21987/93 (Aksoy v. Turkey)
8. ECtHR 25 September 1997, no. 23178/94 (Aydin v. Turkey)
9. ECtHR 23 October 1997, nos. 21319/93, 21449/93, 21675/93 (National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom)
10. ECtHR 28 November 1997, no. 23186/94 (Menteş and others v. Turkey);
11. ECtHR 25 May 1998, no. 24276/94 (Kurt v. Turkey)
12. ECtHR 29 April 1999, no. 25644/94 (T.W. v. Malta)
13. ECtHR [GC] 27 June 2000, no. 21986/93 (Salman v. Turkey)
14. ECtHR 27 June 2000, no. 22277/93 (Ilhan v. Turkey)
15. ECtHR 26 October 2000, no. 30210/96 (Kudia v. Poland)
16. ECtHR 26 October 2000, no. 30985/96 (Hasan and Chaush v. Bulgaria)
17. ECtHR [GC] 18 January 2001, no. 27238/95 (Chapman v. the United Kingdom)
18. ECtHR 3 April 2001, no. 27229/95 (Keenan v. The United Kingdom)
19. ECtHR 10 May 2001, no. 29392/95 (Z and others v. the United Kingdom)
20. ECtHR 15 November 2001, no. 25196/94 (Iwanczuk v. Poland)
21. ECtHR 29 April 2002, no. 2346/02 (Pretty v. the United Kingdom)
22. ECtHR 11 July 2002, no. 25680/94 (I. v. the United Kingdom)
23. ECtHR 11 July 2002, no. 28957/95 (Christine Goodwin v. the United Kingdom)
24. ECtHR 12 March 2003, no. 46221/99 (Öcalan v. Turkey)
25. ECtHR 24 July 2003, no. 26973/95 (Yöyler v. Turkey)
26. ECtHR 14 October 2003, no. 77759/01 (Porembbska v. Poland)
27. ECtHR 4 December 2003, no. 39272/98 (M.C. v. Bulgaria)
28. ECtHR 8 January 2004, nos. 32578/96, 32579/96 (Colak and Filizer v. Turkey)
29. ECtHR 27 May 2004, no. 66746/01 (Connors v. the United Kingdom)
30. ECtHR 3 June 2004, nos. 33097/96, 57834/00 (Bati and others v. Turkey)
31. ECtHR 8 July 2004, no. 48787/99 (Ilaşcu and others v. Moldova and Russia)
32. ECtHR 27 July 2004, no. 57671/00 (Slimani v. France)
33. ECtHR 9 June 2005, no. 55723/00 (Fadeyeva v. Russia)
34. ECtHR 16 June 2005, no. 60654/00 (Sisaja and others v. Latvia)
35. ECtHR 16 June 2005, no. 61603/00 (Storck v. Germany)
36. ECtHR 8 November 2005, no. 34056/02 (Gongadze v. Ukraine)
37. ECtHR 12 January 2006, no. 35978/02 (Mihailova v. Bulgaria)
38. ECtHR 2 March 2006, no. 11886/05 (Dolgova v. Russia)
39. ECtHR 9 March 2006, no. 59261/00 (Menesheva v. Russia)
40. ECtHR 4 May 2006, no. 633/03 (Dudek v. Poland)
41. ECtHR 19 June 2006, no. 35014/97 (Hutten-Czapska v. Poland)
42. ECtHR 11 July 2006, no. 33834/03 (Riviere v. France)
43. ECtHR 13 July 2006, no. 26853/04 (Popov v. Russia)
44. ECtHR 12 October 2006, no. 13178/03 (Mubilanzilo Mayeka and Kaniki Mitunga v. Belgium)
45. ECtHR 17 October 2006, no. 52067/99 (Okkali v. Turkey)
46. ECtHR 14 November 2006, no. 60860/00 (Tsfayo v. the United Kingdom)
47. ECtHR 11 January 2007, no. 1948/04 (Salah Sheekh v. the Netherlands)
48. ECtHR 13 July 2007, no. 40074/98 (Feyzi Yildirim v. Turkey)
49. ECtHR 9 October 2007, no. 9375/02 (Saoud v. France)
50. ECtHR 6 November 2007, no. 8207/06 (Stepuleac v. Moldova)
51. ECtHR 8 November 2007, no. 25948/05 (Knyazev v. Russia)
52. ECtHR 13 November 2007, no. 57325/00 (D.H. and Others v. the Czech Republic)
53. ECtHR 19 July 2007, no. 41578/05 (David v. Moldova)
54. ECtHR 27 November 2007, no. 74258/01 (Urbar ska Obec Trencianske Biskupice v. Slovakia)
55. ECtHR 18 December 2007, no. 41153/06 (Dybeku v. Albania)
56. ECtHR 7 February 2008, no. 35421/05 (Mechenkov v. Russia)
57. ECtHR 13 May 2008, no. 19009/04 (McCann v. the United Kingdom)
58. ECtHR 12 June 2008, no. 2872/02 (K.U. v. Finland)
59. ECtHR 21 October 2008, no. 1200/03 (Umayeva v. Russia)
60. ECtHR 12 February 2009, no. 2512/04 (Nolan and K. v. Russia)
61. ECtHR 19 February 2009, no. 24465/04 (Khristov v. Ukraine)
62. ECtHR 15 January 2009, no. 42454/02 (Menchinskaya v. Russia)
63. ECtHR 20 January 2009, no. 28300/06 (Sławomir Musiat v. Poland)
64. ECtHR 20 January 2009, no. 4378/02 (Bykov v. Russia)
65. ECtHR 9 June 2009, no. 33401/02 (Opuz v. Turkey)
66. ECtHR 7 July 2009, no. 12278/03 (Padalevicius v. Lithuania)
90. ECtHR 16 July 2009, no. 20082/02 (Zehentner v. Austria)
91. ECtHR 28 July 2009, no. 47709/99 (Rachwalski and Ferenc v. Poland)
92. ECtHR 30 July 2009, no. 4487/04 (Svetlana Orlova v. Russia)
93. ECtHR 13 October 2009, nos. 19637/05, 43197/06, 39164/07 (İnan and others v. Turkey)
94. ECtHR 15 October 2009, no. 2295/06 (Chaykovskiy v. Ukraine)
95. ECtHR 15 October 2009, no. 40753/07 (Komnatskyy v. Ukraine)
96. ECtHR 22 October 2009, no. 17885/04 (Orchowski v. Poland)
97. ECtHR 3 November 2009, no. 30814/06 (Lautsi v. Italy)
98. ECtHR 24 November 2009, no. 23968/05 (Halilovic v. Bosnia and Herzegovina)
99. ECtHR 8 December 2009, no. 18176/05 (Wieczorek v. Poland)
100. ECtHR 17 December 2009, no. 16428/05 (Gardel v. France)
101. ECtHR 17 December 2009, no. 40753/07 (Komnatskyy v. Ukraine)
102. ECtHR 2 March 2010, no. 13102/02 (Kozak v. Poland)
103. ECtHR [GC] 16 March 2010, no. 15766/03 (Oršuš and others v. Croatia)
104. ECtHR 1 April 2010, no. 5447/03 (Korolev v. Russia (No. 2))
105. ECtHR 1 April 2010, no. 57813/00 (S.H. and others v. Austria)
106. ECtHR 13 April 2010, nos. 32940/08, 41626/08, 43616/08 (Tehrani and others v. Turkey)
107. ECtHR 20 May 2010, no. 38832/06 (Alajos Kiss v. Hungary)
108. ECtHR 20 May 2010, no. 3990/06 (Kamyshev v. Ukraine)
109. ECtHR 15 June 2010, no. 29226/03 (Creangă v. Romania)
110. ECtHR 15 July 2010, no. 16695/04 (Gazeta Ukraina-Tsentr v. Ukraine)
111. ECtHR 13 April 2010, nos. 32940/08, 41626/08, 43616/08 (Tehrani and others v. Turkey)
112. ECtHR 12 October 2010, no. 44614/07 (Milanovic v. Serbia)
113. ECtHR 16 December 2010, no. 33099/08 (Kozhokar v. Russia)
114. ECtHR 18 January 2011, no. 32181/08 (Ristic v. Serbia)
115. ECtHR 20 January 2011, no. 14811/04 (Gisayev v. Russia)
116. ECtHR 20 January 2011, no. 31322/07 (Haas v. Switzerland)
117. ECtHR [GC] 21 January 2011, no. 30696/09 (M.S.S. v. Belgium and Greece)
118. ECtHR 10 February 2011, no. 12343/10 (Dzhaksyberg-Aka Jaxybergenov v. Ukraine)
119. ECtHR 3 March 2011, no. 66317/09 (Elmuratov v. Russia)
120. ECtHR 10 March 2011, no. 2700/10 (Kiyutin v. Russia)
121. ECtHR 21 April 2011, no. 42310/04 (Nechiporuk and Yonkalo v. Ukraine)
122. ECtHR 21 July 2011, no. 44438/06 (Breukhoven v. The Czech Republic)
123. ECtHR 15 September 2011, no. 24652/04 (Paskal v. Ukraine)
124. ECtHR 4 October 2011, no. 31725/04 (Badila v. Romania)
125. ECtHR 11 October 2011, no. 18414/10 (Sharipov v. Russia)
126. ECtHR 11 October 2011, no. 30951/10 (Gorobet v. Moldova)
127. ECtHR 11 October 2011, no. 42697/05 (Hristov v. Bulgaria)
128. ECtHR 18 October 2011, no. 13099/04 (Lautaru v. Romania)
129. ECtHR 20 October 2011, no. 55463/09 (Samina v. Sweden)
130. ECtHR 20 October 2011, no. 5774/10, 5985/10 (Mandic and Jovic v. Slovenia)
131. ECtHR 25 October 2011, no. 27520/07 (Altuç Taner Akçam v. Turkey)
139. ECtHR 25 October 2011, nos. 2033/04, 171/05, 19125/04 (Valkov and others v. Bulgaria)
140. ECtHR 13 December 2011, no. 15297/09 (Kanagaratnam and others v. Belgium)
141. ECtHR 19 January 2012, nos. 39472/07, 39474/07 (Popov v. France)
142. ECtHR 14 February 2012, no. 2151/10 (A.M.M. v. Romania)
143. ECtHR [GC] 15 March 2012, nos. 4149/04, 41029/04 (Aksu v. Turkey)
144. ECtHR 20 March 2012, no. 26692/05 (C.A.S. and C.S. v. Romania)
145. ECtHR 14 February 2012, no. 2151/10 (A.M.M. v. Romania)
146. ECtHR 19 April 2012, no. 2452/04 (M. v. Ukraine)
147. ECtHR 19 April 2012, no. 26984/05 (Gorgiev v. "The Former Yugoslav Republic Of Macedonia")
148. ECtHR 24 April 2012, no. 918/02 (Solovyev v. Russia)
149. ECtHR 15 May 2012, no. 23893/06 (Genderdoc-M v. Moldova)
150. ECtHR 15 May 2012, no. 56030/07 (Fernández Martínez v. Spain)
151. ECtHR 29 May 2012, nos. 16563/08, 18656/10, 40841/08 (Julin v. Estonia)
152. ECtHR 17 July 2012, no. 2913/06 (Munjaz v. the United Kingdom)
153. ECtHR 19 July 2012, no. 47159/08 (B.S. v. Spain)
154. ECtHR 9 October 2012, no. 1413/07 (Çoşelav v. Turkey)
155. ECtHR 9 October 2012, no. 24626/09 (X. v. Turkey)
156. ECtHR 16 October 2012, no. 11435/07 (Eylem Baş v. Turkey)
157. ECtHR 18 October 2012, no. 37679/08 (Bureš v. The Czech Republic)
158. ECtHR 30 October 2012, no. 57375/08 (P. and S. v. Poland)
159. ECtHR 8 November 2012, no. 28973/11, (Z.H. v. Hungary)
160. ECtHR 13 November 2012, no. 15966/04 (I.G. and others v. Slovakia)
161. ECtHR 13 November 2012, no. 7678/09 (Van Colle v. the United Kingdom)
162. ECtHR 13 November 2012, nos. 47039/11, 358/12 (Hristozov and others v. Bulgaria)
163. ECtHR 10 January 2013, no. 43418/09 (Claes v. Belgium)
164. ECtHR 17 January 2013, no. 17116/04 (Sizarev v. Ukraine)
165. ECtHR 22 January 2013, no. 33117/02 (Lashin v. Russia)
166. ECtHR 29 January 2013, no. 11146/11 (Horváth and Kiss v. Hungary)
167. ECtHR 5 February 2013, no. 76317/11 (Bubnov v. Russia)
168. ECtHR 19 February 2013, no. 1285/03 (B. v. Romania (No. 2))
169. ECtHR 12 March 2013, no. 15351/03 (Zarzycki v. Poland)
170. ECtHR 26 March 2013, no. 33234/07 (Valiulienė v. Lithuania)
171. ECtHR 11 April 2013, no. 17828/05 (Ochelkov v. Russia)
172. ECtHR 11 April 2013, no. 20372/11 (Vyerentsov v. Ukraine)
173. ECtHR 2 May 2013, no. 11737/06 (Zagidulina v. Russia)
174. ECtHR 28 May 2013, no. 3564/11 (Eremia v. the Republic of Moldova)
175. ECtHR 30 May 2013, no. 35985/09 (Martin v. Estonia)
176. ECtHR 18 June 2013, no. 28775/12 (R.M.S. v. Spain)
177. ECtHR 25 June 2013, no. 6087/03 (Grimailovs v. Latvia)
178. ECtHR 16 July 2013, no. 61382/09 (B. v. The Republic of Moldova)
179. ECtHR 3 October 2013, no. 552/10 (I.B. v. Greece)
180. ECtHR 15 October 2013, no. 33882/05 (Șandru v. Romania)
181. ECtHR 17 October 2013, no. 26824/04 (Keller v. Russia)
182. ECtHR 17 October 2013, no. 27013/07 (Winterstein and others v. France)
189. ECtHR 29 October 2013, no. 11160/07 (D.F. v. Latvia)
190. ECtHR 14 November 2013, no. 47152/06 (Blokhin v. Russia)

List of ECtHR judgments mentioning vulnerability, not referred to in this thesis

191. ECtHR 27/11/1992, no. 13441/87 (Olsson v. Sweden (No. 2))
192. ECtHR 23/09/1998, no. 25599/94 (A. v. The United Kingdom)
193. ECtHR 29/04/1999, no. 25642/94 (Aquilina v. Malta)
194. ECtHR 08/07/1999, no. 23763/94 (Tanrikulu v. Turkey)
195. ECtHR 10/10/2000, nos. 22947/93, 22948/93 (Akkoc v. Turkey)
196. ECtHR 16/11/2000, no. 23819/94 (Bilgin v. Turkey)
197. ECtHR 21/11/2000, no. 27308/95 (Demiray v. Turkey)
198. ECtHR 18/01/2001, no. 25154/94 (Jane Smith v. The United Kingdom)
199. ECtHR 18/01/2001, no. 25289/94 (Lee v. The United Kingdom)
200. ECtHR 18/01/2001, no. 24882/94 (Beard v. The United Kingdom)
201. ECtHR 18/01/2001, no. 25642/94 (Coster v. The United Kingdom)
202. ECtHR 10/04/2001, no. 26129/95 (Tanli v. Turkey)
203. ECtHR 10/05/2001, no. 25781/94 (Cyprus v. Turkey)
204. ECtHR 10/05/2001, no. 25316/94, 25317/94, 25318/94 (Denizci and others v. Cyprus)
205. ECtHR 30/01/2001, no. 24876/94 (Dulaş v. Turkey)
206. ECtHR 18/01/2001, no. 25154/94 (Akkoc v. Turkey)
207. ECtHR 10/04/2001, no. 26129/95 (Tanli v. Turkey)
208. ECtHR 10/07/2001, no. 25657/94 (Avsar v. Turkey)
209. ECtHR 14/03/2002, no. 46477/99 (Paul And Audrey Edwards v. The United Kingdom)
210. ECtHR 18/06/2002, no. 25656/94 (Orhan v. Turkey)
211. ECtHR 10/10/2002, no. 38719/97 (D.P. & J.C. v. The United Kingdom)
212. ECtHR 26/11/2002, no. 33218/96 (E. and others v. The United Kingdom)
213. ECtHR 10/12/2002, no. 53236/99 (Waite v. The United Kingdom)
214. ECtHR 04/02/2003, no. 50901/99 (Van Der Ven v. The Netherlands)
215. ECtHR 04/02/2003, no. 52750/99 (Lorse and others v. The Netherlands)
216. ECtHR 06/02/2003, no. 37021/97 (Zeynep Avci v. Turkey)
217. ECtHR 25/03/2003, no. 77597/01 (R.O. v. Poland)
218. ECtHR 24/04/2003, no. 24351/94 (Çelik v. Turkey)
219. ECtHR 22/07/2003, no. 24209/94 (Y.F. v. Turkey)
220. ECtHR 27/11/2003, no. 65436/01 (Henaf v. France)
221. ECtHR 11/12/2003, no. 39084/97 (Yankov v. Bulgaria)
222. ECtHR 10/02/2004, no. 42023/98 (Naoumenko v. Ukraine)
223. ECtHR 17/02/2004, no. 25760/94 (İpek v. Turkey)
224. ECtHR 06/04/2004, no. 21689/93 (Ahmet Ozkan and others v. Turkey)
225. ECtHR 08/04/2004, no. 32457/96 (Özalp and others v. Turkey)
226. ECtHR 20/07/2004, no. 40154/98 (Mehmet Emin Yüksel v. Turkey)
227. ECtHR 27/07/2004, no. 26144/95 (İkincisoy v. Turkey)
228. ECtHR 05/10/2004, no. 45508/99 (H.L. v. The United Kingdom)
229. ECtHR 12/10/2004, no. 42066/98 (Bursuc v. Roumanie)
230. ECtHR 26/10/2004, no. 44093/98 (Çelik And İmret v. Turkey)
231. ECtHR 02/11/2004, no. 30494/96 (Tuncer And Durmuş v. Turkey)
232. ECtHR 30/11/2004, no. 46082/99 (Klyakhin v. Russia)
233. ECtHR 24/02/2005, nos. 57947/00, 57948/00, 57949/00 (Isayeva, Yusupova And Bazayeva v. Russia)
234. ECtHR 12/04/2005, no. 36378/02 (Shamayev and others v. Georgia And Russia)
235. ECtHR 24/05/2005, no. 25660/94 (Süheyla Aydin v. Turkey)
236. ECtHR 31/05/2005, no. 30949/96 (Yasin Ateş v. Turkey)
237. ECtHR 31/05/2005, no. 27306/95 (Kismir v. Turkey)
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268. ECtHR 15/11/2007, no. 29361/02 (Kukayev v. Russia)
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283. ECtHR 31/07/2008, no. 9297/02 (Nadrosov v. Russia)
284. ECtHR 18/09/2008, no. 33086/04 (Turkan v. Turkey)
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298. ECtHR 08/01/2009, no. 43170/04 (Dzhamayeva and others v. Russia)
299. ECtHR 13/01/2009, no. 33750/03 (Yeter v. Turkey)
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308. ECtHR 08/01/2009, no. 13670/03 (Arzu Akhmadova and others v. Russia)
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316. ECtHR 02/04/2009, no. 13310/04 (Dzhabayeva v. Russia)
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318. ECtHR 16/04/2009, no. 34438/04 (Egeland And Hanseid v. Norway)
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320. ECtHR 28/05/2009, no. 13737/03 (Nenayev and others v. Russia)
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325. ECtHR 30/07/2009, no. 10638/08 (Alekhin v. Russia)
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329. ECtHR 01/10/2009, no. 27001/06 (Amanat Ilyasova and others v. Russia)
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353. ECtHR 08/04/2010, no. 32968/05 (Abdurashidova v. Russia)
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355. ECtHR 22/04/2010, no. 43702/04 (Sevastyanov v. Russia)
356. ECtHR 22/04/2010, no. 38798/07 (Gulmammadova v. Azerbaijan)
357. ECtHR 29/04/2010, no. 5453/08 (Yuriy Yakovlev v. Russia)
358. ECtHR 12/05/2010, no. 39685/06 (Shakhabova v. Russia)
359. ECtHR 20/05/2010, no. 32362/02 (Visloguzov v. Ukraine)
360. ECtHR 22/05/2010, no. 14146/02 (Artjomov v. Russia)
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363. ECtHR 01/06/2010, no. 22978/05 (Gafgen v. Germany)
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365. ECtHR 08/06/2010, no. 67/04 (Dolhamre v. Sweden)
366. ECtHR 10/06/2010, no. 26966/06 (Ilyasova v. Russia)
367. ECtHR 10/06/2010, no. 2220/05 (Vakayeva and others v. Russia)
368. ECtHR 17/06/2010, no. 26876/08 (Kolesnik v. Russia)
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372. ECtHR 22/07/2010, no. 8347/05 (Benuyeva and others v. Russia)
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376. ECtHR 16/09/2010, nos. 412/03, 35677/04 (Holy Synod Of The Bulgarian Orthodox Church (Metropolitan Inokenty) and others v. Bulgaria)
377. ECtHR 21/09/2010, no. 29772/05 (Popa v. Moldova)
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388. ECtHR 16/12/2010, no. 11528/07 (Taymuskhanovy v. Russia)
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403. ECtHR 10/02/2011, no. 1572/07 (Nasukhanovy v. Russia)
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408. ECtHR 03/03/2011, no. 33488/04 (Khambulatova v. Russia)
409. ECtHR 15/03/2011, no. 39414/06 (Serdar Güzel v. Turkey)
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427. ECtHR 21/06/2011, no. 29846/05 (Nakayev v. Russia)
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438. ECtHR 26/07/2011, no. 32798/02 (Musiałek And Baczyński v. Poland)
439. ECtHR 19/07/2011, no. 3937/03 (Kondratishko and others v. Russia)
440. ECtHR 21/07/2011, no. 28274/08 (Heinisch v. Germany)
441. ECtHR 26/07/2011, no. 30614/06 (Iwaszkiewicz v. Poland)
442. ECtHR 26/07/2011, no. 32798/02 (Musiałek And Baczyński v. Poland)
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448. ECtHR 29/09/2011, no. 16698/05 (Iwaszkiewicz v. Poland)
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458. ECtHR 20/12/2011, nos. 18299/03, 27311/03 (Finogenov and others v. Russia)
459. ECtHR 20/12/2011, nos. 18299/03, 27311/03 (Finogenov and others v. Russia)
460. ECtHR 24/01/2012, no. 24893/05 (Nechto v. Russia)
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463. ECtHR 12/01/2012, no. 39908/05 (Iglin v. Ukraine)
464. ECtHR 22/11/2011, no. 35254/07 (Makharadze And Sikharulidze v. Georgia)
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469. ECtHR 14/02/2012, no. 9296/06 (Shumkova v. Russia)
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472. ECtHR 17/01/2012, no. 33497/07 (Krone Verlag Gmbh And Krone Multimedia Gmbh v. Austria)
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474. ECtHR 27/10/2011, no. 25303/08 (Stojkovic v. France and Belgium)
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476. ECtHR 22/02/2012, no. 39758/05 (Trosin v. Ukraine)
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478. ECtHR 28/02/2012, no. 14662/07 (Edilova v. Russia)
479. ECtHR 28/02/2012, no. 14662/07 (Edilova v. Russia)
480. ECtHR 28/02/2012, no. 14662/07 (Edilova v. Russia)
481. ECtHR 28/02/2012, no. 14662/07 (Edilova v. Russia)
483. ECtHR 19/06/2012, no. 36937/06 (Hajnal v. Serbia)
484. ECtHR 19/06/2012, no. 27306/07 (Krone Verlag Gmbh v. Austria)
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506. ECtHR 17/01/2013, no. 35939/10 (Mihailovs v. Latvia)
507. ECtHR 17/01/2013, no. 31963/08 (Mitić v. Serbia)
508. ECtHR 05/03/2013, no. 1777/06 (Geanopol v. Romania)
509. ECtHR 14/03/2013, no. 47215/07 (Avkhadova and others v. Russia)
510. ECtHR 09/04/2013, no. 33759/10 (Iurcu v. The Republic Of Moldova)
511. ECtHR 17/01/2013, no. 38906/07, 52025/07 (Karabet and others v. Ukraine)
512. ECtHR 22/01/2013, no. 35939/10 (Mihailovs v. Latvia)
513. ECtHR 22/01/2013, no. 31963/08 (Mitić v. Serbia)
514. ECtHR 12/02/2013, no. 17008/07 (Eduard Popa v. The Republic Of Moldova)
515. ECtHR 12/02/2013, no. 152/04 (Yefimenko v. Russia)
516. ECtHR 05/03/2013, no. 1777/06 (Geanopol v. Romania)
517. ECtHR 14/03/2013, no. 47215/07 (Avkhadova and others v. Russia)
518. ECtHR 09/04/2013, no. 33759/10 (Iurcu v. The Republic Of Moldova)
519. ECtHR 11/04/2013, no. 17299/12 (Aswat v. The United Kingdom)
520. ECtHR 23/04/2013, no. 13885/05 (Süzer v. Turkey)
521. ECtHR 25/04/2013, no. 71386/10 (Savriddin Dzhurayev v. Russia)
522. ECtHR 30/04/2013, no. 49872/11 (Tymoshenko v. Ukraine)
523. ECtHR 02/05/2013, no. 44283/06 (Samartsev v. Russia)
524. ECtHR 30/05/2013, no. 7973/10 (Lavida and others v. Greece)
525. ECtHR 04/06/2013, no. 24999/04 (Iulian Popescu v. Romania)
526. ECtHR 18/06/2013, no. 48609/06 (Nencheva and others v. Bulgaria)
527. ECtHR 27/06/2013, no. 68411/10 (N.A.N.S. v. Sweden)
528. ECtHR 27/06/2013, no. 72413/10 (M.K.N. v. Sweden)
529. ECtHR 27/06/2013, no. 68335/10 (N.M.B. v. Sweden)
530. ECtHR 27/06/2013, no. 50859/10 (M.Y.H. and others v. Sweden)
533. ECtHR 27/06/2013, no. 71680/10 (A.G.A.M. v. Sweden)
534. ECtHR 04/07/2013, no. 7461/08 (Baysultanova and others v. Russia)
535. ECtHR 09/07/2013, no. 2330/09 (Sindicatul "Păstorul Cel Bun" v. Romania)
536. ECtHR 09/07/2013, no. 35943/10 (Vona v. Hungary)
537. ECtHR 16/07/2013, no. 74839/10 (Mudric v. The Republic Of Moldova)
538. ECtHR 23/07/2013, no. 55352/12 (Aden Ahmed v. Malta)
539. ECtHR 25/07/2013, no. 32133/11 (Kummer v. The Czech Republic)
540. ECtHR 09/07/2013, no. 35943/10 (Vona v. Hungary)
541. ECtHR 09/07/2013, no. 35943/10 (Vona v. Hungary)
542. ECtHR 16/07/2013, no. 74839/10 (Mudric v. The Republic Of Moldova)
543. ECtHR 23/07/2013, no. 55352/12 (Aden Ahmed v. Malta)
544. ECtHR 25/07/2013, no. 32133/11 (Kummer v. The Czech Republic)
545. ECtHR 30/07/2013, no. 14609/10 (Mircea Dumitrescu v. Romania)
546. ECtHR 15/10/2013, no. 34529/10 (Gutsanovi v. Bulgaria)
547. ECtHR 24/10/2013, nos. 62880/11, 62892/11, 62899/11 (Navone and others v. Monaco)
548. ECtHR 24/10/2013, no. 59731/09 (Sergey Savenko v. Ukraine)
549. ECtHR 31/10/2013, no. 23180/06 (Bandaletov v. Ukraine)
550. ECtHR 05/11/2013, no. 36716/07 (Mesut Deniz v. Turkey)
551. ECtHR 07/11/2013, no. 4494/07 (Belousov v. Ukraine)
552. ECtHR 07/11/2013, no. 43165/10 (Ermakov v. Russia)
553. ECtHR 12/11/2013, no. 5786/08 (Söderman v. Sweden)
554. ECtHR 12/11/2013, no. 23502/06 (Benzer and others v. Turkey)
555. ECtHR 14/11/2013, no. 13642/06 (Rybatsev v. Russia)
556. ECtHR 14/11/2013, no. 29604/12 (Kasymakhunov v. Russia)
557. ECtHR 28/11/2013, no. 25703/11 (Dvorski v. Croatia)
558. ECtHR 28/11/2013, no. 33954/05 (Aleksandr Novoselov v. Russia)
559. ECtHR 19/12/2013, no. 22490/05 (Marina Alekseyeva v. Russia)
560. ECtHR 19/12/2013, no. 45872/06 (Yuriy Volkov v. Ukraine)
561. ECtHR 19/12/2013, no. 18407/10 (Dobriyeva and others v. Russia)

List of ECtHR judgments referred to, which do not mention vulnerability

ECTHR 21 February 1975, no. 4451/70 (Golder v. the United Kingdom)
ECTHR 18 January 1978, no. 5310/71 (Ireland v. the United Kingdom)
ECTHR 28 June 1984, nos. 7819/77 and 7878/77 (Campbell and Fell v. the United Kingdom)
ECTHR 26 March 1985, no. 8978/80 (X and Y v. The Netherlands)
ECTHR 23 October 1990, no. 11296/84 (Moreira de Azevedo v. Portugal)
ECTHR 27 September 1995, no. 18984/91 (Mccann and Others v. the United Kingdom)
ECTHR 25 September 1996, no. 20348/92 (Buckley v. the United Kingdom)
ECTHR 19 February 1998, no. 22729/93 (Kaya v. Turkey)
ECTHR 24 February 1998, no. 21439/93 (Botta v. Italy)
ECTHR 27 July 1998, no. 21593/93 (Güleç v. Turkey)
ECTHR 20 May 1999, no. 21594/93 (Oğur v. Turkey)
ECTHR 28 July 1999, no. 25803/94 (Selmaoui v. France)
ECTHR 28 September 2000, no. 25498/94 (Messina v. Italy (no. 2))
ECTHR 17 January 2002, no. 32967/96 (Calvelli and Ciglio v. Italy)
ECTHR 14 May 2002, no. 38621/97 (Zehnalova and Zehnal v. the Czech Republic)
ECTHR 30 March 2004, no. 74025/01 (Hirst v. the United Kingdom (no. 2))
ECTHR 13 March 2007, no. 39177/05 (V.A.M. v. Serbia)
ECTHR 30 April 2009, no. 13444/04 (Glor v. Switzerland)
ECTHR 14 October 2010, no. 55164/08 (A. v. Croatia)
ECTHR [GC] 7 July 2011, no. 37452/02 (Stummer v. Austria)
ECTHR 23 July 2013, no. 41872/10 (M.A. v. Cyprus)
Cases of the European Commission of Human Rights

*Kurt v. Turkey* (5 December 1996, no. 24276/94)
LITERATURE


