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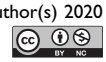

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# Facing the challenge of migratory vulnerability in the European Court of Human Rights

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**Abstract**
The European Court of Human Rights has struggled to integrate the lived experience of migrants into the legal reasoning that underlies a determination of human rights violations. This article introduces the concept of migratory vulnerability in an effort to remedy that shortcoming by making an already existing legal principle fit for the daunting task posed by migration cases. The objective is to preserve (and potentially expand) the legal effects of the principle of vulnerability whilst approximating it to the more consistent conception of vulnerability theorists, which would remove some of its ambiguities and negative side effects. Migratory vulnerability describes a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and in different forms. It therefore should be conceptualized neither as group membership nor as a purely individual characteristic, but rather determined on a case-by-case basis and in reference to identifiable social processes. Depending on its specific expression, migratory vulnerability may give rise to distinct legal effects such as enlarged scopes of protection, shifts in the burden of proof, procedural and positive obligations, a narrower margin of appreciation, and possibly even the 'triggering' of proceedings under Article 14 ECHR.

**Keywords**
Migrants, vulnerability, ECtHR, *M.S.S.*, positive obligations

## 1. INTRODUCTION

The politicized question of migration has been a persistent headache for the European Court of Human Rights ('ECtHR' or 'Court'). Eminent scholars and practitioners have criticised the Court's approach from diametrically opposed perspectives to the extent that its institutional legitimacy is

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put in doubt.[1] On the one hand, its interference with immigration policies has been alleged to amount to 'judicial activism' through which it asserts itself as Europe's asylum court.[2] On the other hand, it has been claimed that its deferential attitude to States and their sovereign right to control migration has left notable gaps in human rights protection.[3] Strikingly, both types of critiques do without a systematic inquiry into the structural reasons behind the steadily rising number of migration cases before the ECtHR.[4] This is even more surprising given that questions regarding the vulnerability of migrants such as asylum seekers were at the heart of the landmark ruling in *M.S.S. v Belgium and Greece* ('*M.S.S.*') more than nine years ago.[5] Already then, they underlined the urgent need to come to terms with when, how, and why migrants become vulnerable and how these complex factors should influence legal reasoning. If at all, critics discuss the challenge of migrants' vulnerability abstractly and in an empirical vacuum, evaluating the principle from within the familiar confines of legal doctrine and related considerations of the separation of powers.[6]

Building on my recent book which raises the possibility in general terms,[7] this article introduces the concept of *migratory vulnerability* in an effort to remedy this lack of theorization and make the principle fit for the daunting practical tasks of doing justice to immigration cases. The objective is to preserve and possibly expand the legal effects of the principle of vulnerability whilst approximating it to the more consistent conceptions of vulnerability theorists, thus removing some of its ambiguities and negative side effects. In short, migratory vulnerability as presented here describes a cluster of objective, socially induced, and temporary characteristics that affect persons to varying extents and forms. It therefore should be conceptualized neither as group membership nor as a purely individual characteristic, but rather determined on a case-by-case basis and in reference to identifiable social processes. Depending on its specific expression, it will give rise to distinct legal effects such as enlarged scopes of protection, shifts in the burden of proof, procedural and positive obligations and a narrower margin of appreciation, possibly even 'triggering' proceedings under Article 14 ECHR. This article, in short, introduces migratory vulnerability as a tool for the Court to 'capture' more reliably and consistently the lived reality of individual migrant applicants, which would, in turn, enable the Court to find the appropriate legal responses to the cases in question.

In this contribution the argument for the legal principle of migratory vulnerability consists of three building blocks, starting in section 2 with a short depiction of vulnerability as an analytical concept, referring in particular to the insightful works of Fineman. Section 3 deals with vulnerability as used generally in the case law of the ECtHR, comparing it to the previously described

1. For a recent analysis of the Court's approach to migration cases that seeks to make sense of its approach using a 'neo-republican' framework, see Lieneke Slingenberg, 'The Right Not to be Dominated: The Case Law of the European Court of Human Rights on Migrants' Destitution' (2019) 19 Human Rights Law Review 291.
2. See Marc Bossuyt, *International Human Rights Protection: Balanced, Critical, Realistic* (Intersentia 2016) and Marc Bossuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' (2010) 3 Inter-American & European Human Rights Journal 3.
3. See most notably Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) and Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2016).
4. Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (CUP 2019) 5.
5. *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
6. See Marc Bossuyt, 'Categorical Rights and Vulnerable Groups: Moving Away from the Universal Human Being' (2015) 48 George Washington International Law Review 717, 739-741.
7. Baumgärtel (n 4) 113-114, 150-152.

analytical notion. Turning to the migration specifically, section 4 considers some of the most relevant causes of vulnerability in this context as it engages with sociological scholarship that investigates why migrants' rights are under pressure. Section 5, then, effectuates the three-pronged line of argumentation, using the Court's seminal *M.S.S.* judgment as an analytical foil to set out how migratory vulnerability ought to be properly determined. The subsequent section 6 explains the variety of legal effects that could, in specific cases, result from a finding of migratory vulnerability. The conclusion in section 7 summarises the findings and ends with a short reflection on the feasibility of, and the advantages related to adding migratory vulnerability to the ECtHR's legal toolkit.

## 2. VULNERABILITY AS AN ANALYTICAL CONCEPT

Vulnerability as an 'en vogue'[8] concept has come to play a role in various disciplines. A multivalent notion that does 'a lot of heavy lifting these days' to provide 'new ways to rethink enduring problems, ranging from social marginality and economic insecurity to international warfare', vulnerability has unsurprisingly drawn both enthusiasm and criticism.[9] As this section can only offer a selective introduction to the debates surrounding the rich theoretical notion of vulnerability, it focuses on those aspects needed for developing a workable legal principle of migratory vulnerability. To this end, this section draws primarily on Martha Fineman's seminal conception of vulnerability, a substantive critique of the limitations of legal and especially formal equality,[10] which has been particularly influential in human rights circles.[11] As will become clear subsequently, the points discussed here are potentially of direct relevance to the ECtHR and its approach to migration cases.

According to Fineman, much of legal theory has been centred around an illusory 'universal human subject' defined by 'autonomy, self-sufficiency, and personal responsibility'.[12] Equal treatment guarantees provide that individuals should be treated in accordance with such an ideal and, therefore, equally.[13] Fineman's analysis leads her to the conclusion that such a vision is shortsighted and inadequate as it fails to address some of the underlying reasons of inequality (such as disparities in wealth and power) and also because it may ultimately entail adverse consequences such as the curtailing of affirmative action.[14] Fineman thus abandons the notion of equality due to the shortcomings of its premise. She advocates instead for the adoption of a new 'heuristic device', the vulnerability approach, to explore how the 'ever-present possibility of harm, injury and misfortune' inherent in the human condition affect various persons differently.[15]

8. Samantha Besson, 'La vulnérabilité et la structure des droits de l'homme' in Laurence Burgorgue-Larsen (ed), *La vulnérabilité saisie par les juges en Europe* (Pedone 2014) 59, 79.
9. Alyson Cole, 'All of Us Are Vulnerable, But Some Are More Vulnerable Than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 Critical Horizons 260, 262.
10. Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133, 134-135.
11. See for instance Besson (n 8) 70, Baumgärtel (n 4) 150, and most prominently Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056, 1059.
12. Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 10.
13. ibid 3.
14. ibid.
15. ibid 9.

Fineman's conception of vulnerability can certainly be challenged, for example for its emphasis on universality. Although seemingly adopted by 'the field as a whole', this assertion invites the criticism of presenting vulnerability as 'so broad as to obscure the needs of specific groups and individuals'.[16] And while it cannot therefore be applied to legal reasoning one-to-one, it is insightful especially when we consider how vulnerability plays out in the context of migration.

First, it underscores that defining certain 'identity categories' to combat inequality will backfire since 'it is not discrimination in general that is prohibited, only discrimination based on [. . . ] designated distinguishing characteristics' such as gender, race or religion.[17] Other groups may simply find themselves belonging to the 'wrong' type of discriminated group. Potentially adverse consequences also include pitting protected groups against another, encouraging practices of boundary-drawing within groups, and reinforcing (rather than decreasing) prejudice and stigma.[18] These risks, as we will see, apply also to the group-based notion of vulnerability,[19] whose usage by the Court can therefore be questioned.[20]

Second, Fineman discards an identity-based conception in favour of a notion of vulnerability as a 'socially embedded' process that will affect persons differently depending on where they are 'situated within webs' of societal relationships.[21] The inherently relational quality of vulnerability has been a central premise not only for Fineman but for vulnerability scholars in general.[22] Judith Butler, for instance, highlights that vulnerability is 'existential' as much as it is 'a socially induced condition' that becomes exposed when 'those infrastructural conditions characterizing our social, political and economic lives start to decompose'.[23] One cannot overstate the relevance of this insight for the subsequent analysis that deals with migration. Vulnerability as a situational experience bespeaks a world where the act of moving across national borders can, depending on the context, be an exercise in 'migration' or in 'mobility', result in an 'alien' or in an 'expat' life, and give rise to deportation or to protection. Moreover, a vulnerability analysis so conceived does not merely reject group categories but 'provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place'[24]. This, as evidenced below, is an important observation for a migratory context.

Finally, and much in line with the foregoing insights, Fineman's approach focuses sharply on societal institutions and their responses to the challenges of vulnerability.[25] The promotion of a 'responsive state' is a large part of this story and arguably one of the markers of Fineman's theory.[26]

16. Cole (n 9) 267. See also Baumgärtel (n 4) 150.
17. See Fineman (n 12) 4 and Martha Fineman,' The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 252.
18. Fineman (n 17) 253, 266.
19. Valeska David, 'Crossing Divides and Seeing the Whole: An Integrated View of Cultural Difference and Economic Disadvantage in Regional Human Rights Courts' (PhD thesis, Ghent University 2018) 107.
20. See section 3.
21. Fineman (n 10) 145.
22. See for instance Robert E. Goodin, *Protecting the Vulnerable: A Re-analysis of our Social Responsibilities* (University of Chicago Press 1985) and Catriona Mackenzie, Wendy Rogers, and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014).
23. Judith Butler, 'Rethinking Vulnerability and Resistance' in Judith Butler, Zeynep Gambetti and Leticia Sabsay (eds), *Vulnerability in Resistance* (Duke University Press 2016) 12, 19 and 25.
24. Fineman (n 12) 16.
25. ibid 12-13.
26. Cole (n 9) 263.

Her stated objective is to foster 'resilience' among individuals for them to obtain 'some means with which to address and confront misfortune'.[27] Resilience, in turn, is determined by the accumulated physical, human, social, ecological and existential 'assets' that can be obtained through various institutions, often organised in and around the State.[28] The range of relevant institutions is wide, however, including workplaces, the family, and the church, and arguably also supranational bodies such as the ECtHR. The fact that both State and societal institutions are critical to enhancing resilience in the face of vulnerability comes as an important reminder when we look at the situation of vulnerable migrants. Even where migration control is the priority, it mostly falls upon those same institutions to respond to the most detrimental difficulties that policies may create.

To sum up, vulnerability scholarship provides several potentially important insights for developing a notion of migratory vulnerability within the context of the ECHR. Drawing primarily on Fineman, it has been shown that the concept of vulnerability, emerging as a response to the limitations of non-discrimination and equality law, is not supposed to designate or delimit specific groups. Vulnerability, rather, is situational and the result of social, political and economic relationships within which individuals happen to find themselves. Finally, Fineman's theory in particular comes out in favour of a strong and responsive State that equips individuals with the assets and capacities to compensate for this vulnerability, and thus address vulnerability so conceived.

## 3. THE PRINCIPLE OF VULNERABILITY AS USED BY THE ECTHR

Vulnerability theory provides a critical counterpoint to the ECtHR's own notion of vulnerability. However, although it arguably predates the analytical concept,[29] the Court's continued reliance on the term has only recently been scrutinised in several instructive works.[30] This section briefly recounts the main insights provided by this scholarship, thereby outlining the meaning and effects of this by now established legal principle.

One key question surrounding the usage of the notion of vulnerability has been how the Court determines whether an applicant is vulnerable. On the one hand, the ECtHR has offered some reflections regarding most of the vulnerable groups at some point.[31] On the other hand, its determinants are varied, including vulnerability as a result of history, in the context of State control, and in reference to other international instruments (which, as we will see, begs the question how these have made their determinations).[32] 'Intrinsic' or 'natural' may be as relevant as 'extrinsic' or 'circumstantial' causes.[33] While not very predictable, such pragmatism has one important

27. Fineman (n 17) 269.
28. These provide, amongst others, for secure laws, education, and a liveable environment; ibid 270-272.
29. The Court spoke of 'vulnerable members of society' for the first time in *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981), para. 47. For some illustrative statistics on the Court's practice, see Yussef Al Tamimi, 'The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights' (2016) 5 European Journal of Human Rights 561, 563.
30. See amongst others, Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013), Peroni and Timmer (n 11), Besson (n 8), Al Tamimi (n 29), David (n 19), and Baumgärtel (n 4).
31. Al Tamimi (n 29) 572.
32. ibid 571.
33. Besson (n 8) 70-71. An example of 'intrinsic vulnerability' are cases involving children, such as *Z and Others v UK* App no 29392/95 (ECtHR, 10 May 2001), para. 73. For an instance of 'extrinsic vulnerability' caused by police custody, see *Salman v Turkey* App no 21986/93 (ECtHR, 27 June 2000), para. 99

advantage: the open and unsystematic approach to the reasons for vulnerability has enabled the Court to remain 'context-sensitive'[34] at least in its initial assessment. This is much in line with how theorists like Fineman conceptualise vulnerability, evaluating the *specific* situation in which a person finds him or herself as a concrete expression of a risk of vulnerability that is universally shared. More problematic, by contrast, is the Court's next step. Once it has found applications belonging to the same or a similar group being vulnerable on multiple occasions, situational vulnerability is likely to evolve into a 'categorical' vulnerability that characterizes a group as a whole.[35] Whilst this may seem economical and in certain instances even factually justified, it in practice ends up confounding two distinct types of vulnerability, given that the Court continues to consider situational elements as well.[36] The unfortunate result in the context of migration is, as argued below, that reified categorical considerations come to replace much-needed contextual evaluations of the discrete human rights situations that migrants find themselves in. From the perspective of vulnerability theory more generally, the 'group-based' notion is also a regrettable return to the identity categories that its proponents wished to escape from. Indeed, the usage of group-based vulnerability has on some occasions led to essentialisation, stigmatisation and paternalism,[37] which confirms the fears expressed by Fineman.

Once vulnerability has been determined, it variably gives rise to a number of distinct legal effects. While these differ somewhat depending on the type of case,[38] it generally allows the Court 'to legitimise taking a stronger and more proactive position vis-à-vis State authorities'[39]. Even more positive from the perspective of vulnerability theory, it leads to 'a human rights law that is more responsive to the needs of vulnerable people'[40]. The principle may thus imply a positive obligation for governments to give 'special consideration' or 'special protection' to vulnerable applicants.[41] This is reflected, for example, in the Court's holding that States have (to a certain degree) the obligation to facilitate a Roma 'lifestyle'.[42] In other contexts, it informs the 'relative' assessment of the level of severity that is required for conduct to be considered contrary to Article 3 ECHR,[43] which effectively extends the protective scope of the prohibition of torture and inhumane and degrading treatment.[44] Vulnerability may also feature as an additional factor in proportionality analyses where limitations of certain rights, for instance under Article 8 ECHR, are at stake.[45] The

34. Timmer (n 30) 162.
35. Besson (n 8) 70.
36. See most notably *M.S.S.* (n 5) as discussed extensively in section 5. Another example is the *Tarakhel* case where the Court starts from the observation that both asylum seekers and children constitute distinct vulnerable groups only to go on and elaborate that contextual factors (such as the children's age and whether they are accompanied by their parents) could have further increased their vulnerability; *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014), paras. 118-119.
37. Peroni and Timmer (n 11) 1071-1073.
38. The possible effects for migration cases in particular will be outlined in Section 6.
39. Al Tamimi (n 29) 583.
40. Timmer (n 30) 169.
41. Peroni and Timmer (n 11) 1076.
42. See *Chapman v UK* App no 27238/95 (ECtHR, 18 January 2001) as discussed in Peroni and Timmer (n 11) 1076.
43. For example, *M.S. v UK* App no 24527/08 (ECtHR, 3 May 2012), paras. 38-39; *Blokhin v Russia* App o 47152/06 (ECtHR, 23 March 2016), para. 148.
44. Peroni and Timmer (n 11) 1079.
45. ibid 1080.

Court's employment of the principle may also have procedural effects, for example in questions of admissibility and in reversing the burden of proof.[46]

One final aspect that has recently gained some attention is the complicated relationship between the vulnerability principle and Article 14 ECHR, the anti-discrimination provision. On the one hand, vulnerability has been used by the Court to identify prohibited grounds of discrimination, such as mental disability.[47] It also permits it to 'single out the most disadvantaged subgroups' within the broader group defined by the discrimination ground in a more fine-grained analytical framework that is able to capture specific contexts of discrimination.[48] On the other hand, vulnerability is not a required 'marker' of discrimination grounds, which raises the question whether a concurrence of the two elements should change the legal assessment under Article 14 ECHR in specific cases.[49] The Grand Chamber in particular seems to be reluctant to flesh out how the two principles interact, often eschewing vulnerability reasoning for a legal analysis based exclusively on Article 14 ECHR.[50] What may once again be construed as pragmatism arguably ends up downgrading the status of vulnerability from a guiding legal principle that has to be applied consistently to an 'argumentative tool'[51] that the Court uses without much rigour[52] or, to put it bluntly, with a good dose of opportunism.

In short, vulnerability as a legal principle has been employed by the Court with quite some flexibility both in terms of its meaning and in terms of the legal effects that it creates. While this has certainly increased its utility, the Court's approach also displays some striking ambiguities and negative consequences. As will become clear in the subsequent sections, the group-based conception of vulnerability is particularly problematic when it comes to the migratory context. Not only is it unduly homogenizing and possibly stigmatising, but it also fails to capture the social processes that underlie the rights deficit experienced by many migrants.

## 4. MIGRATION CONTROL AND THE PRODUCTION OF VULNERABILITY

Before it can be reworked into a legal principle, the sociological causes of migratory vulnerability must be understood at least in its broad contours. The argument defended here is simple and could even be described as obvious: the difficulties experienced by many migrants are the result of political and social processes. However, this realisation is not universally shared and has, important for this article, not yet informed the approach taken by the ECtHR. Against this background, the goal of this section is to clarify and underline the extent to which migration control acts as a 'producer' of vulnerability. This will be achieved by looking at a select number of particularly

46. Besson (n 8) 77-78.
47. *Alajos Kiss v Hungary* App o 38832/06 (ECtHR, 20 May 2010), para. 42 as discussed in Peroni and Timmer (n 11) 1081.
48. Oddny Mjoll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (2017) 4 Oslo Law Review 150, 166 and 169. The example provided by the author concerns a case in which the Court found there to be disability discrimination 'by association' where the applicant himself did not have a disability; *Guberina v Croatia* App o 23682/13 (ECtHR, 22 March 2016).
49. Besson (n 8) 78.
50. Arnardóttir (n 48) 170. One notable example mentioned by the author is *Biao* in which the Grand Chamber overturned the Chamber decision in an extensive ruling that found there to be indirect race discrimination; see *Biao v Denmark* App o 38590/10 (ECtHR, 24 May 2016).
51. Arnardóttir (n 48) 170.
52. Besson (n 8) 80-81.

instructive works of the comprehensive body of literature on migration that has come to prove this point in the last decades.

The first basic insight is, as Saskia Sassen states, that 'international migrations are produced, [ . . . ] patterned, and [ . . . ] embedded in specific historical phases'.[53] The identifiable reasons for persons to migrate are likely to include both 'push' factors such as war, generalised violence and poverty in the country of origin as well as 'pull' factors such as a demand in cheap labour and family ties.[54] To be sure, determining the exact reasons at any given point in time has been difficult because of the complexity of the phenomenon of migration, which itself transforms the societies that condition it.[55] What is clear is that migration frequently elicits responses from receiving States that try to control the process, for example by closing and securitising borders.[56] The resulting human costs of the measures in the form of border deaths are well-known.[57] Yet, the reach of migration policies is far larger as it operates also within the territory 'in the shadow of the border'[58], for instance by creating precarious working conditions characterised by an absence of labour rights.[59] Another prominent example is the lack of access to even basic social services for migrants whose asylum applications have been rejected or who are otherwise 'irregular'.[60] Many other forms of disadvantage for migrants could be enumerated here. Crucially, the measures taken by receiving States are often intended as roadblocks for persons who have migrated. As Jean-Yves Carlier rightly observes, migration law is by definition a 'producer' of vulnerability in the sense that its purpose is to deny certain rights and freedoms (in the broad sense) to certain people.[61] Negating such an exclusionary intent equates to rejecting that measures are being taken to control migration. After all, how can the movement of persons be contained if not through the application of sanctions? This is, for all intents and purposes, simply a withholding of rights and freedoms.

As already mentioned, migration scholarship argues that vulnerabilities are both 'pervasive' and 'experienced differently by migrants'.[62] A useful analytical framework for understanding the immense variety of such vulnerabilities can be found in the work of Kate Nash, who differentiates between five categories of 'citizens' with different intertwined legal, social and political statuses: super-citizens, marginal citizens, quasi-citizens, sub-citizens and un-citizens.[63] The first two types

53. Saskia Sassen, *Guests and Aliens* (The New Press 1999) 155.
54. Klaus F. Zimmermann, 'European Migration: Push and Pull' (1996) 19 International Regional Science Review 95.
55. Stephen Castles, 'Understanding Global Migration: A Social Transformation Perspective' (2010) 36 Journal of Ethnic and Migration Studies 1565.
56. Jef Huysmans, 'The European Union and the Securitization of Migration' (2000) 38 Journal of Common Market Studies 751.
57. Thomas Spijkerboer, 'The Human Costs of Border Control' (2007) 9 European Journal of Migration and Law 127.
58. Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9, 18.
59. Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 Work, Employment and Society 300.
60. Ryszard Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Council of Europe 2005).
61. Jean-Yves Carlier, 'Des droits de l'homme vulnérable à la vulnérabilité des droits de l'homme, la fragilité des équilibres' (2017) 79 Revue interdisciplinaire d'études juridiques 175, 185. To clarify, 'rights' do not, in this context, refer only to legal rights as recognised in international instruments such as the ECHR but also more generally to the various rights and freedoms that individuals may enjoy under domestic laws and legislation.
62. Khalid Koser and Helma Lutz, 'The New Migration in Europe: Contexts, Constructions and Realities' in Khalid Koser and Helma Lutz (eds), *The New Migration in Europe: Social Constructions and Social Realities* (Palgrave 1998) 1, 14.
63. Kate Nash, 'Between Citizenship and Human Rights' (2009) 43 Sociology 1067.

include full legal citizens (who differ in their economic and social status) while migrants fall within the last three categories. Nash counts among the 'quasi-citizens' long-term residents with employment, EU citizens and recognised refugees, whose status is relatively but not absolutely secure especially at a time when States tighten their national security policies. 'Sub-citizens' include asylum seekers, persons with exceptional leave to remain or family members of migrants, who in many cases are without employment or entitlement to State benefits. The term 'un-citizen', finally, describes irregular migrants and other '*homini sacri'* whose legal status have been (almost) entirely stripped (for example detainees in Guantanamo Bay prison). According to Nash, this 'proliferation of statuses' fuels

> the multiplication of differences which are also inequalities: packages of rights that are adapted to time and place – to the particular configurations of citizens and non-citizens who happen to find themselves living under a particular jurisdiction in particular political circumstances.[64]

Other authors argue likewise that migration control creates 'both a formal system of differentiated rights and a parallel dynamic of gain and deficit, as well as a vehicle for the exercise of control'.[65] Next to such intended effects, one also needs to consider the more unintended (or tacitly tolerated) consequences that accompany such practices, including the entrenchment of racial and xenophobic sentiments among large segments of the population.[66] These, in turn, can lead to vulnerabilities that involve private rather than State actions, which may include hate crimes and racial violence. Another example of an unintended consequence is the often significant psychological toll of living with a clandestine status.[67] In short, the manifold vulnerabilities of migrants are 'socially induced' (to use Butler's phrase) in the sense that they can be attributed to social processes. However, this also means that they could be rectified through concrete actions. The identification of the specific type of migratory vulnerability is the first step that needs to be taken to this end.

## 5. DETERMINING MIGRATORY VULNERABILITY

Returning to the jurisprudence of the ECtHR, the question of how to determine instances of migratory vulnerability shall be addressed by engaging with its legal reasoning in *M.S.S.* Usually put forward as a positive example,[68] the judgment actually incorporates both the positive and negative features of the Court's principle of vulnerability described above. Understanding this ambivalence is important: the case continues to be used regularly as a benchmark for evaluating the vulnerability of asylum seekers (and sometimes even other kinds of status holders).[69] To be sure, *M.S.S.* stands out also in other regards, for instance by convincingly tackling the delicate question

64. ibid 1080.
65. Lydia Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (2003) 37 International Migration Review 74, 96.
66. Liz Fekete, 'The Emergence of Xeno-Racism' (2001) 43 Race & Class 23.
67. Alice Bloch, 'Living in Fear: Rejected Asylum Seekers Living as Irregular Migrants in England' (2014) 40 Journal of Ethnic and Migration Studies 1507.
68. See Peroni and Timmer (n 11) 1068-1070, Timmer (n 30) 159, and Al Tamimi (n 29) 567.
69. See for instance *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017), para 87, *Abdi Mahamud v Malta* App no 56796/13 (ECtHR, 3 May 2016) para 88, *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 1 September 2015) para 194, *Tarakhel* (n 36), paras 116-121, and *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013), para 97.

of whether an EU Member State had to presume compliance with human rights standards by another Member State, which was not the case.[70] Most significant from a practical point of view, it stalled Dublin returns to Greece, which probably makes it the clearest example of a judgment with a systemic impact.[71] All these accomplishments notwithstanding, the treatment of asylum seekers' vulnerability creates a number of problems that an improved approach would want to avoid.

In its extensive judgment, the Grand Chamber enumerates several reasons why the applicant, as an asylum seeker, should have been considered as vulnerable by the Greek authorities. Looking at his detention of four days at Athens airport, the Court points out that any distress could have been 'accentuated' by 'everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.[72] Moreover, it is argued that there was a 'particular state of insecurity and vulnerability in which asylum seekers *are known to live in Greece'*, which made it unlikely that they would approach the police even for 'essential needs'.[73] Next to the explicitly mentioned factors, the Court also alludes to the relevance of several other aspects that, taken together, created a reality 'characterized by material and psychological want' in Greece.[74] This included the fact that the job market was not practically accessible,[75] a shortage of accommodation places in reception centres,[76] and the lack of responsiveness of State authorities to the pleas of asylum seekers.[77] According to the Court, destitution was compounded by 'the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving'.[78]

The number of factors taken into account by the Grand Chamber is remarkable and reflects, as Lourdes Peroni and Alexandra Timmer rightly point out, a 'textured and complex' evaluation of why the applicant was to be considered vulnerable.[79] The problem begins at the point where the judgment generalises this situation, referring to the applicant, an asylum seeker, as 'a member of a particularly underprivileged and vulnerable population group'.[80] As such a sweeping determination cannot be deduced from an analysis of the specific situation in Greece, the Court refers to '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'. This altogether different type of assertion regarding vulnerability finds an immediate rejoinder in the separate opinion of Judge Sájo, who uses the ambiguous relation between vulnerability and discrimination as an argumentative inroad ('a particularly vulnerable group in society [has] suffered considerable discrimination in the past').[81] Alleging that asylum seekers are neither a homogenous group nor 'historically subject to prejudice' such as for example mentally disabled persons, he then discusses entitlements

70. *M.S.S.* (n 5) paras 338-340.
71. Baumgärtel (n 4) Chapter 3.
72. *M.S.S.* (n 5) paras 232-233.
73. ibid, para 259 (emphasis added).
74. Peroni and Timmer (n 11) 1069.
75. *M.S.S.* (n 5) para. 261.
76. ibid para 258.
77. ibid para 262.
78. ibid para 254.
79. Peroni and Timmer (n 11) 1070.
80. *M.S.S.* (n 5) para 251.
81. Partly Concurring and Partly Dissenting Opinion of Judge Sájo in *M.S.S.* (n 5).

to welfare services to pit one vulnerable group against the other. Judge Sájo finally doubles down on his retort by claiming that asylum seekers 'are not socially classified, and consequently treated, as a group' and that, while being 'caught up in a humanitarian crisis', the latter 'was not *caused* by the State'.[82] In his view, any positive obligation that Greece may have would be limited to particularly 'needy' asylum seekers and would not flow from the ECHR but from European Union law.

Judge Sájo's assertions are very questionable but the real trouble seems to be of the majority's making. First, designating asylum seekers as a vulnerable group did not add to the reasoning in this judgment; the analysis of applicant's situation already provided sufficient reasons to consider him vulnerable. Furthermore, by referring to a 'broad consensus at the international and European level', the Court conveniently, but not convincingly, avoids answering the actual question: What, exactly, renders migrants vulnerable? The answer, of course, is complex and dependent on the specific case but has – *pace* Judge Sájo – everything to do with 'civic stratification' and the proliferation of statuses and inequalities that it entails.[83] Strikingly, such inequalities are reinforced even by those legal measures that are supposedly aimed at countering them, with national and European laws on integration being a case in point.[84] While many processes emanate from the State with its quasi-absolute power to grant residency status, they are shaped by a multitude of other actors including service providers, employers, landlords – in short, society at large. As we have seen, these vulnerabilities take various degrees and expressions; in that sense, 'migrants' (and even 'asylum seekers' more narrowly speaking) truly are not a homogenous group.[85] However, they all are *migratory* vulnerabilities in the sense that they are linked to the fact that a person once crossed or tried to cross State borders. This *characteristic*, which all vulnerable migrants share *to a varying extent temporarily* – namely up to the point either of return or of obtaining a permanent residency – are *socially induced* rather than innate but nonetheless *real*.

Adopting such a notion of migratory vulnerability has several advantages. For one, as a transitory and situational adjective, it does not conclusively define a person, making it less likely to reproduce stigmatisation and prejudice. Speaking of migratory vulnerability also does not create any new disadvantaged group or 'identity', thus rendering it unnecessary to engage in difficult discussions about (the existence of) historical discrimination. At the same time, it is broader than for example the category of asylum seekers, which leaves out undocumented migrants or persons whose asylum claims have been rejected. Even more important is that it permits us to explore the kinds of questions so validly raised by the Court in *M.S.S.*: What happens to migrants when they arrive in country X? *As migrants*, do they have a realistic chance to find shelter and work? Do the authorities, in providing services, consider their material and psychological needs? In short, migratory vulnerability draws attention to social processes as much as to the individual person. It therefore is a principle whose application is complex as it cannot be reduced to a predefined set of factors. Furthermore, there may be intersections with other kinds of vulnerabilities (such as an applicant being a child), which also needs to be taken into account in the assessment.[86] The

82. ibid (original emphasis).
83. Nash (n 63).
84. Sarah Ganty, 'Intégration choisie: Droit européen de l'intégration des non-nationaux.ales: typologies et analyses critiques' (PhD thesis, Université libre de Bruxelles 2019).
85. For a similar argument questioning whether persons who find themselves in 'broad legal categories' such as asylum seekers or irregular migrants 'necessarily all have the same difficulties', see Slingenberg (n 1) 313.
86. See for instance *Tarakhel* (n 36) para 99 and *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006), para 55.

context-sensitive elements of the vulnerability discussion in *M.S.S.* prove, however, that such an approach is feasible if the only Court is willing to engage in it. Introducing the principle of migratory vulnerability as defined here would turn it into a legal requirement, thus amplifying the importance of information relevant to the specific case at hand and 'refactualizing' any determination of vulnerability.

What is the basis that informs such a determination? In this regard, *M.S.S.* is already leading the way, with the Court grounding its arguments regarding the applicant's migratory vulnerability in an extensive analysis of reports written by international organizations about the situation of asylum seekers in Greece.[87] The systematic review of information altered not only the legal framework (notably by lowering the burden of proof on the applicant) but also sharpened the Court's subsequent assessment of the alleged violations of Articles 3 and 13 ECHR.[88] Reports from international organizations and NGOs are likely to play a central role as 'cues' for the Court to further inquire into the issue of vulnerability,[89] but are not the only kind of information that could be considered. Academic research on migration, which has picked up considerably in recent years, provides essential information on many questions ranging from stark regional inequalities in the assessment of asylum applications[90] to the security situation confronting migrants in certain parts of eastern Germany.[91] Migratory vulnerability, therefore, has to be determined *in concreto*. As such, it is not a default label that can be attached to everyone outside of their own country and without a permanent residency.

## 6. POSSIBLE LEGAL EFFECTS OF MIGRATORY VULNERABILITY

As described above, the notion of vulnerability is a legal allrounder in the sense that it can influence judicial reasoning in various ways.[92] Speaking of migratory vulnerability specifically would allow the Court to adapt its legal analysis to the lived experiences of migrants. Importantly, it would also pressure national administrations and judiciaries to take these into account more carefully.[93] In line with what has been argued so far, various expressions of migratory vulnerability will require different legal responses depending on where, how and to what extent they manifest themselves. This section considers the legal effects one by one starting with those that are already identifiable in the ECtHR's case law, for example enlarged scopes of protection and shifts in the burden of proof. Other effects, most notably the imposition of positive and procedural obligations,

87. *M.S.S.* (n 5) paras. 159-172.
88. Dembour (n 3) 408-410.
89. Peroni and Timmer (n 11) 1084.
90. See Lars Andersen, 'Flemish judges almost twice as strict on migrants as their French-speaking colleagues' (*Brussels Times*, 6 March 2019) <www.brusselstimes.com/belgium/14342/flemish-judges-in-council-of-alien-law-litigation-take-tougher-line> accessed 11 March 2019.
91. See 'Neue Bundesländer sind für Asylbewerber zehnmal gefährlicher' (*Die Welt*, 24 February 2019) <www.welt.de/politik/deutschland/article189302907/Studie-Ost-Bundeslaender-sind-fuer-Asylbewerber-zehnmal-gefaehrlicher.html> accessed 11 March 2019.
92. See Section 3.
93. This follows from the principle of subsidiarity, which compels domestic institutions to approximate their factual and legal reviews to the standards adopted by the ECtHR. This presumption is particularly important in the context of migration as the Strasbourg Court would otherwise run the risk of turning into a first instance court, for example for asylum applications; as argued by Thomas Spijkerboer, 'Subsidiarity and 'Arguability': The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 International Journal of Refugee Law 48.

exist but are somewhat more debateable. This section closes by discussing effects on admissibility and the 'triggering' of ECHR's equality provision, Article 14, which are not currently a part of the Court's practice.

The first way in which migratory vulnerability would impact judicial reasoning is by *enlarging the protective scope* of certain articles.[94] The immense utility of this legal effect is highlighted by the fact that the ECtHR has already invoked vulnerability for this purpose on a number of occasions. In *M.S.S.*, for example, the Court reasoned that the 'particularly vulnerable' state of the applicant underwrote the finding that even two relatively short periods of detention were in contravention of Article 3 ECHR.[95] The reasoning in this seminal case was repeated on a number of occasions, most notably in cases concerning Malta, where vulnerability contributed to a 'cumulative effect' that resulted in migration detention amounting to the same breach.[96] While most commonly invoked in relation to the prohibition of inhumane and degrading treatment under Article 3 ECHR, migratory vulnerability can also expand the scope of other provisions. In *Chowdury and Others v Greece*, for instance, the Court referenced the vulnerability of irregular migrants ('at risk of being arrested, detained and deported') to conclude that the applicants' situation as seasonal agricultural workers qualified as forced labour within the scope of Article 4(2) ECHR.[97] A somewhat different yet relevant provision whose 'protective scope' could be expanded through migratory vulnerability is Rule 39 of the Rules of Court regarding interim measures.[98] While not specifically referring to the applicant's vulnerability, the Grand Chamber noted in *M.S.S.* that it took into account the specific context, and more specifically 'the lack of any reaction on the part of the Greek authorities', when it required them to not deport the applicant.[99] Migratory vulnerability, in this sense, could inform the Court's determination whether applicants face an 'imminent risk of irreparable harm'[100].

From the perspective of migrants, the applications of vulnerability in the context of substantive provisions effectively *lighten the burden of proof*, on certain occasions (for example in *M.S.S.*) seemingly even shifting it to the responding State.[101] While potentially far-reaching, such an effect is certainly not unreasonable: immigration detention and clandestine labour, to stick to these two examples, pose known and serious risks to migrants' human rights. This documented reality should be recognisable also in legal proceedings. Examinations should therefore focus on whether an applicant's specific situation can be characterised in these terms and whether States have taken appropriate measures to reduce the resulting migratory vulnerability that he or she is experiencing. Both questions are factual in nature, with answers likely to differ from case to case. Crucially, however, migratory vulnerability as a legal principle would force the Court to take into consideration the variety of social processes that lead to the marginalisation of migrants where they can be

94. See Peroni and Timmer (n 11) 1079 and Besson (n 8) 76.
95. *M.S.S.* (n 5) paras. 232-233.
96. For example, *Abdi Mahamud* (n 69) paras 88-90, *Abdullahi Elmi and Aweys Abubakar v Malta* App no 25794/13 28151/13 (ECtHR, 2 November 2016) paras 113-115, and *Aden Ahmed* (n 69), paras 92-100. See, however, *Ilias and Ahmed* (n 69), para 87 and *Mahamed Jama v Malta* App no 10290/13 (ECtHR, 26 November 2015) para 101, where the 'cumulative grounds' had not, according to the Court, factually reached this threshold.
97. *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017) paras. 97 and 101. See also *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005) para 126.
98. I would like to thank the anonymous reviewer for raising this pertinent point.
99. *M.S.S.* (n 5) para 40.
100. *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/9 (ECtHR, 4 February 2005), para 104.
101. Dembour (n 3) 408.

proven empirically. States, in turn, would not be able to benefit from a migrant's vulnerability rendering her unable to demonstrate the same, or from particular experiences of migratory vulnerability falling 'between the cracks' of presumably homogenous groups such as asylum seekers or economic migrants.

This insight carries forth the next legal effect of vulnerability, including a reformed notion of migratory vulnerability, which relates to State Parties' *positive obligations* under the Convention. The recognition that vulnerability gives rise to 'specificities' and 'needs' has been recognised in the case law at least since *Chapman v UK*,[102] and has found its way also into its migration-related judgments. The Court thus held in *M.S.S.* that the Greek authorities' 'inaction' had placed the applicant in a situation of extreme material want that made him 'the victim of humiliating treatment'.[103] To be sure, the Court mentioned on this occasion also the limitations of such positive obligations, which encompass neither a requirement to provide housing nor financial assistance to refugees.[104] This detail is crucial given that the scope of positive obligations is possibly large – one of the main concerns expressed in Judge Sájo's dissent.[105] So where should a limit be placed? Migratory vulnerability offers some help in answering this difficult question. Evidence of various types of migratory vulnerabilities could inform assessments of whether the state knew or should have known about the risk of harm, which is a prerequisite for any positive obligation.[106] In addition, whether a State can reasonably be expected to respond to such a risk also depends on its materiality and immediacy, which are factors that change with the degree of migratory vulnerability.[107] Where these conditions have been met, the Court often imposes *procedural demands* on State Parties to establish effective safeguards that are capable of preventing such harm.[108] Yet, an understanding of the specific migratory vulnerability may also lead to the conclusion that procedural safeguards alone are not sufficient in a given context.[109] This applies to *M.S.S.* but for example also to the case of *Sakir v Greece*, where the Greek authorities had failed to inquire and counteract the racially motivated assault against a migrant in an Athens neighbourhood known for such incidents.[110] An appreciation of this significant and imminent risk associated to migratory vulnerability in this part of the city could have guided the Court's assessment of what sort of positive measures would have been required by the authorities.

102. Chapman (n 42) 96, as discussed in Peroni and Timmer (n 11) 1076.
103. *M.S.S.* (n 5) para. 263.
104. ibid para. 249. However, in *Tarakhel* (n 36), the Swiss authorities were obliged to obtain diplomatic assurances from Italy that an family of asylum seekers with five children would be provided with housing.
105. Sájo (n 81).
106. Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309.
107. ibid.
108. Vladislava Stoyanova, 'How Exceptional Must "Very Exceptional" Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium'* (2017) 29 International Journal of Refugee Law 580, 610-615. For instance, the Court has consistently held in refoulement cases that remedies against deportation must have a suspensive effect, for example in *I.M. v France* App no 9152/09 (ECtHR, 2 February 2012) paras. 155-159, *Khlaifia* (n 69) paras. 168-172, and *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECtHR, 3 October 2017) paras 116-122.
109. Stoyanova (n 108) 613.
110. *Sakir v Greece* App no 48475/09 (ECtHR, 24 March 2016) paras 70-73. The Court thus found Greece to be in violation of Article 3 ECHR.

Finally, there are legal effects that are not found in the Court's current approach but that may be appropriate responses to specific vulnerabilities. For instance, considerations of migratory vulnerability could make a difference at the *admissibility stage* when applicants and their legal representatives experience difficulties to maintain contact especially if persons have been deported or have returned to difficult circumstances.[111] As Judge Ranzoni pointed out in his dissenting opinion in *V.M. and Others v Belgium*, the Court may examine an application under Article 37(1) *in fine* in 'special circumstances [. . .] relating to respect for human rights' even if the applicants do not intend to pursue their case.[112] Decisions on whether or not such 'special circumstances' exist could be assessed against the background of migratory vulnerability, relevant questions being, for instance, whether the non-pursuance of a claim was truly an individual choice or rather attributable to factors such as the existence of other overriding concerns (such as surviving an ongoing civil war, as was the case in *Hussun and Others v Italy*), fear and distrust in public institutions given past experiences, or simply a lack of means of communication or of knowledge of the exigencies of legal proceedings. Another potential application of the concept could be in *narrowing margins of appreciation*, for instance in health-related matters that concern the prioritisation and distribution of resources. In such cases the ECtHR has traditionally granted State Parties much discretion.[113] In cases similar to *N. v the United Kingdom* or *Paposhvili v Belgium*,[114] the Court would be able to subject State policies to greater scrutiny. Importantly, such elevated scrutiny would not depend on legal status[115] but on more concrete experiences of migratory vulnerability, with documented areas of concern being exposure to infectious diseases as well as maternal and mental health.[116] Evidently, this may once again result in positive obligations with all the previously mentioned qualifications applying.

Finally, and most controversially, migratory vulnerability could be considered as *a ground of discrimination* in the context of Article 14 ECHR, which prohibits discrimination in the enjoyment of the rights stipulated in the ECHR. Such a usage would admittedly represent a significant departure from the Court's current approach, which considers the provision only in the rarest of cases where discrimination on the basis of nationality is alleged.[117] While I elaborate elsewhere on the need and necessary steps for changing this practice,[118] it can be noted here that a reassertion of Article 14 ECHR would enable the Court to consider a number of cases that are not per se

111. See most notably *Hussun and others v Italy* App nos 10171/05, 10601/05, 11593/05 (ECtHR, 19 January 2010); *N. and M. v Russia* App nos 39496/14 and 39727/14 (ECtHR, 26 April 2016); *G.J. v Spain* App no 59172/12 (ECtHR, 21 June 2016), and *V.M. and others v Belgium* App no 60125/11 (ECtHR, 17 November 2016).
112. Dissenting Opinion of Judge Ranzoni, joined by Judges López Guerra, Sicilianos and Lemmens in *V.M. and others* (n 111).
113. Sylvie Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21 European Journal of Health Law 339, 361.
114. *N. v UK* App no 26565/05 (ECtHR, 27 May 2008) and *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016).
115. As argued by Da Lomba (n 113), who focuses on the situation of irregular migrants.
116. World Health Organisation, *Report on the health of refugees and migrants in the WHO European Region*: *No Public Health without Refugee and Migrant Health* (2018) 24-38.
117. Until today, the two leading cases in which Article 14 ECHR was successfully invoked by non-citizens are *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 September 1996) and *Koua Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003).
118. Moritz Baumgärtel and Sarah Ganty, 'Reasserting Article 14 of the European Convention on Human Rights in a Context of Migratory Vulnerability', unpublished manuscript.

violations of substantive Convention articles but that could fall within their 'ambit' if persons are affected because of their migratory vulnerability.[119] As we have seen above, vulnerability has been used to identify new categories of prohibited discrimination.[120] Admittedly, it would not be appropriate to elevate migratory vulnerability to the status of an 'a priori suspect' ground of discrimination comparable to race, sex or ethnic origin – migration control is commonly regarded as legitimate State interference. Still, it would come to qualify as 'suspect' in at least a few cases, namely where the facts display that 'irrational motives' (such as xenophobic sentiments) undergird a specific measure of differentiation and/or where they promote an image that migrants are 'different, second-rate and inferior'.[121] The question, however, is whether it would be practically feasible for the Court to consider migratory vulnerability a ground of discrimination: not being a group characteristic, it is difficult to apply the delicate yet common 'comparator' test,[122] making this shift reliant on the Court endorsing a progressive notion of 'substantive' (rather than merely formal) equality.[123] While strong arguments exist in favour of such an approach, it is entirely understandable if some readers prefer to not go as far as ascribing such a significant legal effect to migratory vulnerability. Even so, the added legal value of the principle lies in its flexibility and versatility (as reflected in its many effects) rather than in its ability to turn upside down judicial practice as regards one specific provision.

## 7. CONCLUSION

The adequate incorporation of the diverse lived experiences of migrants into legal reasoning is not a new challenge even if it is a daunting one. Around 15 years ago, the Inter-American Court of Human Rights decided to respond, in its Advisory Opinion No. 18,[124] by proposing a conception of migrants' vulnerability that was mindful of the 'broad sociological causes'[125] of their difficulties and destitutions. This article recommends the ECtHR to go in a similar direction. It is important to realise that significant strides have already been made, with the Strasbourg Court's seminal ruling in *M.S.S.* accounting for much of this development. Most notably, it accepted that migrants such as the applicant in this case can face a variety of problems ranging from psychological trauma to an exposure to physical risk, all of which will influence the assessment of whether their human rights have been violated. What is more, the ECtHR used externally provided information (especially NGO reports) to substantiate the asserted facts and the finding that there was a vulnerable person in need of protection. Against this background, the ECtHR was able to find both Greece and Belgium in violation of Articles 3 and 13 (in conjunction with Article 3) of the Convention, effectively overruling its awkward precedent in *K.R.S. v the United Kingdom.*[126] As in other domains,

119. Where the 'ambit' requirement is met, a case might be considered under Article 14 ECHR.
120. See n 47.
121. Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013), 13 Human Rights Law Review 99, 115.
122. Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the Convention' (2009) 29 Legal Studies 215, 217-218.
123. Baumgärtel and Ganty (n 118).
124. *Juridical Condition and the Rights of the Undocumented Migrants* Advisory Opinion OC-18/03 (IACtHR 17 September 2003).
125. Dembour (n 3) 298.
126. ibid, 412-413.

vulnerability proved to be a valuable addition to the Court's arsenal of legal techniques, above all because it enabled it to duly consider the context of the specific case.

If *M.S.S.* reflects the best features of the Court's notion of vulnerability, it also incorporates its worst, showcasing inconsistencies and a confusion regarding the reasons of vulnerability. The works of vulnerability theorists such as Fineman teach us that the concept is not there to designate seemingly homogenous groups of persons but that it is rather a socially induced condition – temporary but nonetheless objective – that will affect persons differently even if their experiences are sometimes comparable. It is precisely this understanding that is reflected in the principle of migratory vulnerability as proposed in this article. Migrants are not an 'underprivileged population group' (as suggested at some point in *M.S.S.*) but rather persons who, in quite different ways, have come to suffer from the consequences of migration control. Generally speaking, their vulnerability is therefore best understood as a cluster of objective, socially induced, and temporary characteristics that affect individuals in various ways. As a consequence, migratory vulnerability needs to be examined and determined in each case and in reference to authoritative reports and studies that document the expressions that it can take. Whilst the applicant in *M.S.S.* proved to be a vulnerable migrant, that does not imply that he or she is a part of a homogenous group or that one can infer without further examination that other persons 'hold' the same vulnerability. The principle of migratory vulnerability as proposed here is specifically designed to avoid this mistake.

The final part of this article set out the various legal effects that migratory vulnerability could have. This includes already established practice such as extending the scope of protection of certain provisions as well as changes in the burden of proof in favour of the applicant. Migratory vulnerability could also come into play when the Court decides on the extent of positive and procedural obligations. Finally, and this would expand the list of effects in the domain of migration, it could influence findings of admissibility, the margin of appreciation granted to State Parties, as well as the relevance of Article 14 ECHR. Whether or not migratory vulnerability should be used to any of these effects is an altogether different and complicated question that I extensively discussed elsewhere.[127] The purpose of this article has merely been to present the possibilities that exist. What is sure, however, is that speaking of migratory vulnerability would provide the Court with the ability to capture complex realities that are similar and dissimilar at the same time. Furthermore, it would pressure national authorities and domestic courts to take a similar approach, thereby possibly reforming the system of human rights protection from the top down to become more mindful of the discrete contexts that exist when we speak of the lives of migrants. Evaluating whether their human rights have been violated or not demands nothing less: while we cannot define migratory experiences in the abstract, we must not pass over the fact that they all emanate from the regulation of migration, and thus by default from state action.

## Author's note

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127. See Baumgärtel (n 4) Chapter 5.

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