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Vulnerability as a human rights variable: African and European developments

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Summary: *In human rights law the concept of vulnerability is increasingly being used to attract attention to the fact that people are differently resilient and that some are more prone to harm than others. Its use as a legal concept, however, is still embryotic and opens up to several questions. By scrutinising how the judicial bodies within two regional human rights systems – the African and the European – have referred to and used the concept, the article discusses the nature and function of vulnerability in interpreting rights. Discussing the function and the conceptualisation of vulnerability in such practice, it argues that although the idea of special protection implicit in the vulnerability thinking is not revolutionary as such, vulnerability argumentation may be*

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seen as a supplementary safety mechanism, which can be used to widen and deepen the scope of measures of protection in cases where 'regular' protection is not enough to ensure the effective realisation of rights. At the same time, the article cautions against taking the neutrality of the vulnerability concept for given, as the use of the vulnerability reasoning may also lend itself to the selective protection of rights.

Key words: *vulnerable; vulnerability; special protection; positive obligations; regional human rights protection*

1 Introduction

The concept of vulnerability has lately become an increasingly used notion in human rights law and policy. For example, in the 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted by the African Commission on Human and Peoples' Rights (African Commission), special emphasis is placed on the protection of 'vulnerable and disadvantaged groups'. Vulnerability and human rights appear to be inherently intertwined, as the human susceptibility to be harmed – often in the hands of the state – is the starting point of the whole human rights movement. Vulnerability thus is essentially an ontological human condition that affects all human beings.[1] In human rights law the concept of vulnerability, however, is often used in another sense, to pinpoint that some people are more prone to harm than others, and therefore measures of special protection are necessary to ensure the realisation of their human rights. For example, in the African Commission Principles and Guidelines, the concept of vulnerable and disadvantaged groups is used to refer to groups 'who have faced and/or continue to face significant impediments to their enjoyment of ... rights', such as women and children.[2]

While it may be argued that special protection in fact simply is a tool for realising the universality of human rights, the increased use of the concept of vulnerability makes it necessary to take a closer look at the vulnerability reasoning in human rights law. To what does the concept of vulnerability exactly refer and what does it do

1 C Mackenzie 'The importance of relational autonomy and capabilities for an ethics of vulnerability' in C Mackenzie, W Rogers & S Dodds (eds) *Vulnerability: New essays in ethics and feminist philosophy* (2014) 33. Also see M Albertson Fineman 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

2 African Commission Principles and Guidelines para 1(e).

in human rights law? The article answers to this call by scrutinising how some regional human rights treaty bodies have referred to and used the concept. The praxis by the European and African human rights systems, which both provide interesting usages of vulnerability reasoning, has been chosen as the focus for this article.[3] As no explicit references to vulnerability are to be found in any of the core regional human rights treaties, legal practice forms the main subject of study given its central role in how vulnerability over the years has turned into a question of legal concern.[4] More specifically, the analysed materials include decisions containing the search term 'vulnerability' or 'vulnerable' up to November 2019 by the African Court on Human and Peoples' Rights (African Court), the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the European Committee of Social Rights (European Social Committee).[5] Furthermore, using both the existing doctrine and case law analysis, the article scrutinises the comprehensive vulnerability case law of the European Court of Human Rights (European Court).[6]

In looking into practices of interpreting rights in light of vulnerability, attention will first be given to how vulnerability reasoning has entered the work of the selected human rights bodies, whereafter a closer look is taken at the understandings of the notion of vulnerability and its different functions in the interpretation of rights. The case law has been analysed with the help of the normative legal method focusing

3 It should be noted that similar developments have also taken place on the global plane, eg in relation to the UN Committee on Economic, Social, and Cultural Rights (ESCR Committee). Also in the Inter-American human rights system, the concept of vulnerability has been referred to. See further I Nifosi-Sutton *The protection of vulnerable groups under international human rights law* (2017); N Zimmermann 'Legislating for the vulnerable: Special duties under the European Convention on Human Rights' (2015) 25 *Swiss Review of International and European Law* 541-542. In Europe, besides the Council of Europe human rights system there is also another important rights system stemming from the European Union. In light of limitations of scope, the case law of the Court of the European Union regarding vulnerability will not be addressed here.

4 Today, references to vulnerability, however, are common in certain other types of instruments such as soft law resolutions and General Comments adopted by treaty bodies. See eg Nifosi-Sutton (n 3). The use of the vulnerability concept in such instruments is beyond the scope of this article.

5 For the European Court and the European Social Committee, the search was carried out using the search functions of the HUDOC database. For the African decisions, a keyword search was performed with the help of word search in pdf documents, where possible. Where the decisions were available only in a non-searchable format, the search was done by reading the decisions. In addition to the search terms 'vulnerable' and 'vulnerability', also 'special protection', 'marginalised' and 'disadvantaged', which sometimes appear to be used interchangeably with the notion of vulnerability, were included in the search to allow a comparison between cases where the notion of vulnerability is used and possibly similar cases where the treaty bodies have not used it.

6 Eg Nifosi-Sutton (n 3); L Peroni & A Timmer 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 *International Journal of Constitutional Law* 1056; Zimmermann (n 3).

on identifying and systematising the law as it stands, complemented with tools of discourse analysis to understand the different purposes and meanings of the language selected by the treaty bodies.[7] Furthermore, the article draws on insights from key theorisations of substantive equality[8] and vulnerability[9] to anchor the findings in the many dimensions of the vulnerabilisation development. The central claim made in the article is that while the concept of vulnerability is used as an important safety mechanism in the protection of rights, the open-endedness of the concept as well as the selectivity of its use opens up for questions that should not be neglected in developing the vulnerability reasoning further.

2 Generally on vulnerability reasoning in the European and African human rights systems

While it is difficult to say exactly when vulnerability entered the praxis of the regional adjudicatory organs, the judgment by the European Court – the court supervising the European Convention of Human Rights and Fundamental Freedoms (European Convention) and its additional protocols – in *Chapman v the United Kingdom* (2001) is often regarded as a landmark case in the European context.[10] In *Chapman* the European Court emphasised the vulnerable position of the Roma and held that special consideration had to be paid to their needs and lifestyle.[11] Even though the European Convention does not contain an explicit reference to vulnerability, the European Court since *Chapman* has recognised several other groups as vulnerable and further elaborated the legal relevance of such findings. As an indication of the growing legal relevance of vulnerability reasoning in the European Court, it may be noted that as many as over one thousand of its judgments include the notions of vulnerable or vulnerability.[12] Many of these judgments date back from the past ten years, and some scholars talk about a 'vulnerabilisation' of the

7 On the use of discourse analysis, see, eg J Niemi-Kiesiläinen, P Honkatukia & M Ruuskanen 'Legal texts as discourses' in Å Gunnarsson, E-M Svensson & M Davies (eds) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism* (2007) 69.

8 Eg S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712.

9 Eg Fineman (n 1); C Mackenzie, W Rogers & S Dodds 'Introduction: What is vulnerability, and why does it matter for moral theory?' in Mackenzie, Rogers & Dodds (n 1) 1.

10 Peroni & Timmer (n 6) 1063.

11 *Chapman v the United Kingdom* ECHR (18 January 2001) App 27238/95 para 96.

12 As of 19 November 2019, 1 394 hits for 'vulnerable' and 484 hits for 'vulnerability' in the HUDOC database. This includes hits for the whole judgments, ie including the reasoning by the applicants and the respondents, and also hits where vulnerability does not refer to human vulnerability, but eg vulnerable states.

law or a quiet vulnerability 'revolution'.[13] While the approach of the European Court may not be sufficiently coherent or purposeful to speak of a revolution as such,[14] it cannot be denied that vulnerability clearly in the course of the 2000s has become a concept that is often referred to. A comparable development may be identified in the praxis of the European Social Committee, the collective complaints procedure in relation to the European Social Charter (1961, revised 1996), the central treaty guaranteeing social and economic rights in Europe.[15]

As in the case of the European instruments, the main African human rights treaties do not explicitly refer to vulnerability. Yet, the notion figures also in the praxis of the African human rights supervisory organs, while not in similar numbers as in the European praxis, as would be expected given the lower overall number of cases decided upon owing to the younger age of the African human rights system.[16] Adopted in 1981, the African Charter on Human and Peoples' Rights (African Charter) entered into force in 1986. Today, the Charter is supervised by the African Court adopting binding judgments, and the African Commission, a so-called quasi-judicial mechanism, with complementary mandates. Since the start of its operations in 2006, the African Court has out of its roughly 50 judgments made use of the concept of vulnerability once, in 2017, in a judgment concerning the rights of an indigenous minority in Kenya.[17] As regards the African Commission, the concept of vulnerability appears from time to time in some 100 communications on which the Commission has given a decision since its establishment in 1987, with some early references found as early as in 1999 to 2003.[18] From

13 A Timmer 'A quiet revolution: Vulnerability in the European Court of Human Rights' in M Albertson Fineman & A Grear (eds) *Vulnerability: Reflections on a new ethical foundation for law and politics* (2013) 147; F Ippolito & S Iglesias Sánchez 'Introduction' in F Ippolito & S Iglesias Sánchez (eds) *Protecting vulnerable groups: The European human rights framework* (2015) 5.

14 M O'Boyle 'The notion of "vulnerable groups" in the case law of the European Court of Human Rights' Report presented at the Conference on the Constitutional Protection of Vulnerable Groups: A Judicial Dialogue organised 4-5 December 2015 in Santiago, Chile, 2.

15 Out of the around 700 decisions by the European Social Committee, 96 decisions include the word 'vulnerable' and 38 'vulnerability' as of 19 November 2019 (ESC HUDOC database).

16 It should, however, be noted that considering the considerably lower number of decisions overall as compared to the European human rights system, the relative frequency of referrals to vulnerability is actually not lower in the African system. Out of the over 60 000 judgments of the European Court, roughly 3% contain the words 'vulnerable' or 'vulnerability'. The corresponding figure for the African Court and the Commission is roughly the same or even somewhat higher.

17 *African Commission on Human and Peoples Rights v Republic of Kenya* AfCHPR (26 May 2017) App 6/2012.

18 *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 50; *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 33; *Social and Economic Rights Action Centre (SERAC) & Another v*

a special protection perspective, it is worth noting that the African Charter has been complemented by protocols on the rights of older persons, persons with disabilities and women.[19] Unlike the European system, the African human rights architecture also includes a specific instrument on children's rights, the African Charter on the Rights and Welfare of the Child (African Children's Charter) (1990), which is supervised by the (quasi-judicial) African Children's Committee. This Committee has since its first decision handed down in 2005 referred to vulnerability in most of its decisions taken on merits.[20]

3 What makes one vulnerable in the eyes of the treaty bodies?

3.1 Group-based approaches to vulnerability

Characteristic for both the European and African human rights bodies is that they often approach vulnerability in a primarily group-based – or identity-based[21] – manner. That is, even though the individual vulnerability of the applicants in the end is assessed, the evaluation often starts from the fact that the person is a member of a particular group, such as the Roma.[22] For example, the European Court has besides the Roma identified as vulnerable persons children;[23] victims

Nigeria (2001) AHRLR 60 (ACHPR 2001) para 56; *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 75; *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 50 & 52. Even before that, the African Commission had made use of the notion of vulnerability in a resolution on the situation of human rights in Africa. African Commission Resolution on the Situation of Human Rights in Africa, November 1994, ACHPR/Res14(XVI)94.

19 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (2016) (not in force); and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018) (not in force).

20 Communication 1/Com/001/2005, *Michelo Hansungule & Others (on Behalf of Children in Northern Uganda) v Uganda*, ACERWC (2013) para 63; *IHRDA & Another v Kenya* (2011) AHRLR 181 (ACERWC 2011) para 46; Communication 6/Com/002/2015 *The Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Government of Republic of Cameroon*, ACERWC (2018) paras 47 and 73; Communication 10/Com/003/2016, *Etoungou Nko'o on behalf of Mr and Mrs Elogo Menye and Rev Daniel Ezo'o Ayo v the Government of Cameroon*, ACERWC (2018) para 47; and Communication 3/Com/001/2012, *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal* ACERWC (2014) para 75.

21 Cf Fineman (n 1).

22 Eg Chapman (n 11).

23 Eg *Popov v France* ECHR (19 January 2012) App 39472/07 & 39474/07 para 91.

of crime;[24] persons with disabilities or mental illnesses;[25] persons belonging to sexual minorities;[26] the HIV positive;[27] asylum seekers;[28] and irregular migrants.[29] The approach of the European Social Committee in many respects is similar. It has referred to the Roma/Sinti;[30] women and women with children;[31] homeless children;[32] pensioners;[33] migrant children unlawfully present in a country;[34] children seeking asylum;[35] and minority children[36] as vulnerable groups. Much in the same line of reasoning, the African human rights bodies have explicitly identified as vulnerable refugees;[37] indigenous peoples;[38] women, children and asylum seekers;[39] stateless children;[40] mental health patients;[41] and civilians in areas of strife.[42]

Notably, many of the groups acknowledged as vulnerable in the case law of the European and African bodies are also groups that are given special protection in treaty law through special human rights conventions, such as the Convention on the Rights of the Child (1989) (CRC), the Convention on the Rights of Persons with Disabilities (2006) (CRPD), and the protocols to the African Charter. However, through their case law the supervisory bodies at times have

24 Eg *Aksoy v Turkey* ECHR (18 December 1996) App 21987/93 para 98 (torture); *Gisayev v Russia* ECHR (20 January 2011) App 14811/04 para 116 (torture and ill-treatment); *Bevacqua and S v Bulgaria* ECHR (12 June 2008) App 71127/01 para 65 (domestic violence); *Breukhoven v the Czech Republic* ECHR (21 July 2011) App 44438/06 para 56 (victims of trafficking).
25 Eg *Alajos Kiss v Hungary* ECHR (20 May 2010) App 38832/06 para 42; *Zehentner v Austria* ECHR (16 July 2009) App 20082/02 para 63.
26 *OM v Hungary* ECHR (5 July 2016) App 9912/15 para 53.
27 Eg *Kiyutin v Russia* ECHR (10 March 2011) App 2700/10 para 64.
28 Eg *MSS v Belgium and Greece* ECHR (21 January 2011) App 30696/09 para 251.
29 Eg *Aden Ahmed v Malta* ECHR (23 July 2013) App 55352/12 para 97.
30 Eg Complaint 46/2007, *European Roma Rights Centre (ERRC) v Bulgaria*, ECSR (3 December 2008) paras 45-51; Complaint 58/2009, *Centre on Housing Rights and Evictions (COHRE) v Italy*, ECSR (25 June 2010) paras 28-30, 39-40.
31 Complaint 86/2012, *European Federation of National Organisations Working with the Homeless (FEANTSA) v The Netherlands*, ECSR (2 July 2014) para 130.
32 Complaint 47/2008, *Defence for Children International (DCI) v The Netherlands*, ECSR (20 October 2009) paras 47 & 61.
33 Complaint 76/2012, *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, ECSR (7 December 2012) para 81; Complaint 78/2012, *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece*, ECSR (7 December 2012) paras 75-77.
34 Complaint 69/2011, *Defence for Children International (DCI) v Belgium*, ECSR (23 October 2012) para 37.
35 Complaint 114/2015, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France*, ECSR (24 January 2018) para 123.
36 *EUROCEF v France* (n 35) para 123.
37 *Doebbler v Sudan* (2009) AHRLR 208 (ACHPR 2009) para 116.
38 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) paras 148 & 204; *African Commission on Human and Peoples Rights v Kenya* (n 17).
39 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 87.
40 *IHRDA & Another v Kenya* (n 20) para 46.
41 *Purohit & Another v The Gambia* (n 18) para 52.
42 *Amnesty International & Others v Sudan* (n 18) para 50.

extended the special consideration also to other groups, such as the HIV positive, that face challenges in having their rights realised.[43] These group-based vulnerability recognitions that extend special protection to groups not covered by special treaties, however, remain somewhat unpredictable, and it is not always altogether clear why some groups are identified as vulnerable while others are not. It has, for example, been pointed out that whereas the European Court in some cases involving irregular migrants refers to vulnerability,[44] in several other cases involving such migrants the Court has chosen not to engage in outspoken vulnerability reasoning.[45] This incoherence can perhaps be due to the fact that it sometimes may be politically (or culturally) sensitive for human rights-monitoring bodies to explicitly acknowledge certain types of vulnerabilities, and that the monitoring bodies therefore choose other lines of argumentation. Differences and *lacunae* in the case law may, however, also simply arise from the fact that certain types of cases have not entered the monitoring systems and that the organs for this reason have not had the opportunity to pronounce on them. Questions of standing, such as the possibility to submit collective complaints or hurdles for individuals and non-governmental organisations (NGOs) to present complaints, may play a role in this regard.[46]

3.2 Pointers of vulnerability

While no established or clear-cut definition exists of vulnerable groups or individuals in the regional case law, certain patterns, however, can be discerned with regard to how the monitoring bodies understand vulnerability (pointers or determinants of vulnerability)[47] and what kind of language they use when categorising someone as vulnerable. To begin with, it is possible to make a distinction between cases where the treaty bodies characterise *certain persons*

43 In many of these cases, however, it is possible to find soft law human rights instruments acknowledging special protection needs. Eg UN General Assembly, Declaration of Commitment on HIV/AIDS, 27 June 2001, UN Doc A/RES/S-26/2.

44 *Aden Ahmed v Malta* (n 29) para 97; *Chowdury & Others v Greece* ECHR (30 March 2017) App 21884/15 para 97.

45 E Nieminen 'Maassa luvattomasti oleskelevien haavoittuvuus Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä' (2019) 48 *Oikeus* 127.

46 Eg, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art 5. See further C Nchekwube Ezennia 'Access to justice mechanisms for individuals and groups under the African regional human rights system: An appraisal' (2015) *African Journal of Legal Studies* 127; A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 22-25.

47 Y Al Tamimi 'The protection of vulnerable groups and individuals by the European Court of Human Rights' (2015) 6, http://njb.nl/Uploads/2015/9/Thesis-The-protection-of-vulnerable-groups-and-individuals-by-the-European-Court-of-Human-Rights.pdf (accessed 25 February 2020).

or groups *as vulnerable* ('vulnerable subjects'),[48] indicating, in other words, that a person or group of persons *is* vulnerable, and cases where they hold that individuals or groups *find themselves in vulnerable situations or positions*,[49] without characterising the person or group as vulnerable *per se*. The use of language referring to vulnerabilising situations seems to be somewhat more common in the praxis of the European human rights bodies than in that of their African counterparts[50] which, apart from the African Children's Committee,[51] often approach vulnerability as something inherent or static, referring to 'vulnerable groups' or 'vulnerable groups of persons',[52] 'vulnerable populations',[53] or the vulnerability of individuals or groups of individuals.[54] One cannot, however, speak of an established or settled usage of the terminologies in the praxis of any of the treaty bodies, which would allow drawing conclusions on any systematic distinction between the two terminologies. It also is not clear whether the choice between the two terminologies always reflects a conscious semantic choice.

Having said that, it should be noted that being labelled as a vulnerable subject may be seen as stigmatising and disempowering, which in some cases may explain the use of the notion of situational vulnerability.[55] This applies not only to the individual vulnerable subjects but also to the group/identity-based approach to vulnerability, when individuals belonging to certain groups by default are characterised as vulnerable.[56] The risk of stereotyping may be the reason, for example, for why the European Court avoids referring to women and the elderly as vulnerable groups in its majority judgment

48 Eg *Rooman v Belgium* ECHR (31 January 2019) App 18052/11 para 164.
49 Eg *Kanciał v Poland* ECHR (23 May 2019) App 37023/13 para 74.
50 See, however, reference to children in a 'disadvantaged and vulnerable situation' in *Hansungule & Others v Uganda* (n 20) para 63.
51 See eg *Hansungule & Others v Uganda* (n 20) para 63.
52 *Centre for Minority Rights Development* (n 38) para 148; *Purohit & Another v The Gambia* (n 18) para 52.
53 *Association pour la Sauvegarde de la Paix au Burundi* (n 18) para 75.
54 *Doebbler v Sudan* (n 37) para 116; *Institute for Human Rights and Development in Africa v Angola* (n 39) para 87; *Amnesty International* (n 18) para 50; *Constitutional Rights Project* (n 18) para 33; *African Commission on Human and Peoples Rights v Kenya* (n 17) para 180.
55 Cf Sandberg who notes that the Committee on the Rights of the Child has changed its wording from 'vulnerable groups of children' to 'children in vulnerable situations' in order to avoid labelling the child. K Sandberg 'The Convention on the Rights of the Child and the vulnerability of children' (2015) 84 *Nordic Journal of International Law* 236.
56 Eg C de la Cruz-Ayuso 'Human rights and vulnerable groups in the EU's Policy on the Fight Against Poverty and Social Exclusion (2016) *European yearbook on human rights* 176-177; C Heri 'Between a rock and a hard place: The Court's difficult choice in *Khamtokhu and Aksenchik v Russia' Strasbourg Observer* 17 March 2017, https://strasbourgobservers.com/2017/03/17/between-a-rock-and-a-hard-place-the-courts-difficult-choice-in-khamtokhu-and-aksenchik-v-russia/ (accessed 25 February 2020).

in *Khamtokhu and Aksenchik v Russia*, despite extensive vulnerability argumentation by the parties in the case.[57] In some situations, vulnerability terminology may also be avoided due to unwelcome connotations. For example, in relation to disability, the concept of vulnerability is sometimes avoided due to associations that its use has with problematic practices such as large-scale institutionalisation of persons with disabilities.[58] The static language characterising someone or a group of individuals as vulnerable may, moreover, be regarded as insufficiently reflecting the many sources to vulnerability that often interact. In particular, the role of societal structures in the creation and aggravation of vulnerabilities may be hidden by group-based approaches to vulnerability.

As regards such different sources of vulnerability, the treaty body praxis may be roughly said to distinguish between (a) *inherent vulnerability* that refers to 'sources of vulnerability intrinsic to the human condition' (for example, age and health); and (b) *situational vulnerability* that denotes vulnerability arising of the societal context.[59] The former often comes up in the context of, for example, children, who by their age and developing capabilities are typically seen as vulnerable by default.[60] Situational vulnerability, on the other hand, is more often brought up in the context of, for example, questions of status, deprivation or dependence. As will be discussed further in part 3.3., the intersections between the two types of vulnerability also find recognition in the decisions by the treaty bodies, some of which highlight the *increased* or *particular* vulnerability of individuals due to the combined vulnerabilities arising from both inherent and situational vulnerability. In the praxis of the European Social Committee, for example, it is possible to find cases where the inherent vulnerable 'condition' of all children is emphasised,[61]

57 *Khamtokhu and Aksenchik v Russia* ECHR (24 January 2017) App 60367/08 & 961/11 paras 35, 39-40, 47 & 53 ff. The question of whether women are a vulnerable group was also addressed by the European Court in *Valiulienè v Lithuania*, in which the Court put forward that women do not by default fall into the category of vulnerable persons. *Valiulienè v Lithuania* ECHR (26 March 2013) App 33234/07 para 69. That said, the European Court has recognised the special vulnerability of women in some situations, as in the *Opuz v Turkey* case where the Court took notice of the vulnerable situation of women in South-East Turkey in relation to domestic violence. *Opuz v Turkey* ECHR (9 June 2009) App 33401/02 para 160.

58 B Clough 'Disability and vulnerability: Challenging the capacity/incapacity binary' (2017) 16 *Social Policy and Society* 474-475.

59 Mackenzie, Rogers & Dodds (n 9) 7.

60 Eg *Popov v France* (n 23) para 91. Cf, however, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* ECHR (12 October 2006) App 13178/03 para 55 ('applicant's position was characterised by her very young age' which was one of the factors that put her in 'an extremely vulnerable situation').

61 *EUROCEF v France* (n 35) para 56 ('this is due to their condition as "children" and to their specific situation as "unlawful" migrants, combining vulnerability and limited autonomy').

and cases where a reference is made to the vulnerable 'situation' of children to highlight the particular vulnerability in which some children find themselves, due to the fact they, for example, are 'unlawfully present' in a territory.[62] The European Court has also highlighted that the protection of vulnerable individuals should not be based only on their 'formal group classification' but should build on an individualised assessment of the 'cumulative effect' of contextual factors and the inherent vulnerability of individuals.[63]

While the vulnerability semantics in the two regional systems is not altogether systematic as regards the recognition of the different sources to vulnerability, it is evident that situational vulnerability as a phenomenon is recognised in both systems. This means that besides inherent pointers of vulnerability, 'social, historical, and institutional forces' are also recognised as sources (or generators) of vulnerability, and as such vulnerability is not seen as merely an individual characteristic but also as something that arises from the societal context and circumstances. This is clearly visible in how *social exclusion resulting from stigma or discrimination* is an indicator that has 'crucially informed the [European] Court's assessment of group vulnerability', as Peroni and Timmer point out.[64] This emphasis on 'historical patterns of stigma or discrimination' has, for example, been clearly visible in many European cases involving the Roma.[65] One such case is *DH & Others v the Czech Republic* where the European Court holds the vulnerability of the Roma to arise from 'their turbulent history and constant uprooting'.[66] Similarly, the European Court on several occasions has emphasised that the HIV positive are a vulnerable group 'with a history of prejudice and stigmatisation'.[67]

The vulnerabilising effect of exclusionary policies has also been emphasised by the African Court which in *African Commission on Human and Peoples Rights v Republic of Kenya* identified an indigenous people, the Ogieks, as vulnerable.[68] In this context, the Court refers to the fact that indigenous populations have 'often been affected by economic activities of other dominant groups and large-scale

62 Eg *DCI v The Netherlands* (n 32) paras 25, 38 & 64.
63 *Tomov & Others v Russia* ECHR (9 April 2019) App 18255/10 and 5 Others para 189.
64 Peroni & Timmer (n 6) 1065.
65 O'Boyle (n 14) 2. See also Zimmermann (n 3) 540-541.
66 *DH & Others v the Czech Republic* ECHR (13 November 2007) App 57325/00 para 182. Also eg *Chapman v the UK* (n 11) para 96; *Oršuš & Others v Croatia* ECHR (16 March 2010) App 15766/03 para 147.
67 Eg *Kiyutin v Russia* (n 27) para 64.
68 *African Commission on Human and Peoples' Rights v Kenya* (n 17) para 112.

developmental programmes'.[69] Due to their vulnerability they have 'at times, been the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution, whereas some have encountered extinction of their cultural distinctiveness and continuity as a distinct group'.[70] While the African Court does not explicitly state this, the logic behind its reasoning appears to be that such contextual factors vulnerabilise – or sustain the vulnerability of – the indigenous populations. Exclusionary policies and discrimination as well as stigma that prevent individuals from accessing their rights are correspondingly referred to by the African Commission among the root causes of vulnerability. The Commission notes in *Open Society Justice Initiative v Côte d'Ivoire* that the failure by the respondent state to grant legal status to a part of the population based on ethnic grounds prevented this group from accessing their right to work and violated their right to dignity, thereby vulnerabilising them.[71] The African Commission further attaches significance to the stigma arising from the status as undocumented which, according to the Commission, compromises 'the very existence of the victim', robbing the individual of his or her subjecthood before law and social recognition within communities.[72] A similar line of reasoning is found in *Centre for Minority Rights Development*, in which the African Commission points to the marginalisation of certain societal groups due to having been 'victimised by mainstream development policies and thinking' and having had 'their basic human rights violated'.[73]

Besides historical and rooted patterns of discrimination, an individual's *dependency* on a state or authorities is an important pointer of situational vulnerability recognised by both the European and African bodies.[74] This is evident, for example, in the many European

69 *African Commission on Human and Peoples' Rights v Kenya* (n 17) para 180.
70 As above.
71 Communication 318/06, *Open Society Justice Initiative v Côte d'Ivoire*, ACHPR (27 May 2016) paras 140-141. Also see Communication 317/2006, *The Nubian Community in Kenya v Kenya*, ACHPR (30 May 2016) paras 131, 133 & 149.
72 *Open Society Justice Initiative v Côte d'Ivoire* (n 71) para 141.
73 *Centre for Minority Rights Development* (n 38) para 148.
74 Dependency may be due to both situational factors (eg detention) and inherent factors (eg age); Zimmermann (n 3) 541. In the European context, the *MSS* judgment is significant in the sense that it opened up the interpretation of the European Court to a wider understanding of vulnerability, extending the pointers of vulnerability beyond those of historical stigma and discrimination. Such an interpretation, however, was not welcomed by all. In his partly dissenting opinion, Sajó J argued that '[a]lthough many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group ... where all members of the group, due to their adverse social categorisation, deserve special protection' as asylum-seekers are 'not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion'. See *MSS v Belgium and Greece* (n 28) partly concurring and partly dissenting opinion of Sajó J. The successive case law of the European

Court cases emphasising the vulnerable position in which detained persons find themselves, especially detained persons with further 'vulnerabilising features' such as mental disabilities or detainees who do not speak the language of the detaining authorities.[75] Interestingly, the European Court moreover has occasionally placed the emphasis on *material deprivation* as a factor of vulnerability in the form of, for example, poverty,[76] or being 'wholly dependent on State support' in terms of catering for one's 'most basic needs'.[77] Factors of dependency, and the *insecurity* arising from such dependency, have regularly been brought up also in relation to refugees and asylum seekers. For example, the dependence of unaccompanied migrant children on state support, and the insecurity arising from uncertain status determination proceedings, are noted as factors of vulnerability by the European Social Committee.[78] Similarly, the European Court has characterised irregular migrants as vulnerable persons due to the dependence and insecurity that they face due to their status.[79] Comparably, in the African human rights system, the African Commission in *Doebbler v Sudan* found refugees in Sudan to be extremely vulnerable given their 'state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation'.[80] In a similar vein, the African Children's Committee points to the right to nationality as essential for children's access to rights and protections and that statelessness exposes children to a 'legal limbo' vulnerabilising them to expulsion.[81] Dependence and insecurity, in other words, are sometimes seen as arising from *lacking access to rights*, a further pointer of vulnerability. The African Commission, for example, explicitly refers to the lack of access to land as a source of vulnerability to 'further violations/dispossession' for indigenous populations,[82] and notes that '[c]itizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights'.[83]

Court, however, indicates that it does not limit its findings of vulnerability to historical prejudice.

75 Eg *TW v Malta* ECHR (29 April 1999) App 25644/94 para 43; *Rooman v Belgium* (n 48) para 145.

76 Peroni & Timmer (n 6) 1065-1068.

77 *MSS v Belgium and Greece* (n 28) paras 253-254.

78 *EUROCEF v France* (n 35) para 56.

79 *Chowdury* (n 44) para 97.

80 *Doebbler v Sudan* (n 37) para 116.

81 *IHRDA* (n 20) para 46.

82 *Centre for Minority Rights* (n 38) para 204. A similar reference is made by the African Commission in another case, in which the Commission refers to the African people as vulnerable to foreign misappropriation due to the history of colonial exploitation; *SERAC* (n 18) para 56.

83 *Constitutional Rights Project* (n 18) para 33.

3.3 Degrees of vulnerability

As mentioned above, it is also evident from the case law that the treaty bodies regard some groups and individuals as more vulnerable than others. This is the case especially in situations where more than one pointer of vulnerability intersect. For example, the African Children's Committee has characterised certain groups of children as especially vulnerable 'because they experience, or are at risk of experiencing, violations of the rights ... to a greater extent than other children in comparable situations'.[84] Such a finding is implicit, for example, in the *Nubian case*, in which the Committee points to the difficult conditions of stateless children in Kenya affecting their position in relation to the exercise and enjoyment of their rights, with statelessness making them 'vulnerable to expulsion from their home country' and constituting an 'antithesis to the best interests of children'.[85] Similarly, the European Court has recognised the 'extreme vulnerability' of, for example, asylum-seeking children.[86] Sometimes, however, only one pointer of vulnerability is sufficient to entail that a person belongs to the 'the most vulnerable'.[87] The European Social Committee, for example, in relation to persons with autism has referred to special 'heightened vulnerabilities'.[88] As regards degrees of vulnerability, it is also worth noting that there are some cases where the European Court has held that it does *not* regard particular individuals or groups to be persons with enhanced vulnerability, indicating that a certain level of vulnerability is 'normal' in certain situations and does not as such give rise to enhanced obligations on the part of the state.[89]

While it not possible to elicit a clear 'vulnerability hierarchy' from the analysed regional praxis, it appears that where vulnerability is given particular legal relevance, the vulnerability is specified with words such as 'particular', 'extreme' or the 'the most'. Arguably, this is something that can be taken to indicate that in human rights law there is a need for variables that function as particularising elements in the interpretation of human rights obligations. In this

84 Nifosi-Sutton (n 3) 179.
85 *IHRDA* (n 20) para 46.
86 Eg *Tarakhel v Switzerland* ECHR (4 November 2014) App 29217/12 para 99.
87 The concept of 'the most vulnerable' is used in eg Complaint 39/2006, *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, ECSR (5 December 2007) para 54. See also *Association pour la Sauvegarde de la Paix au Burundi* (n 18) para 75, which refers to the 'most vulnerable populations'.
88 Complaint 13/2002, *Autism-Europe v France*, ECSR (4 November 2003) para 53.
89 Eg *Beuze v Belgium* ECHR (9 November 2018) App 71409/10 para 168 ('no other particular circumstance can be noted which would indicate that the applicant was in a greater state of vulnerability than that in which persons interviewed by investigators would generally find themselves').

light, it is necessary to take a step back and to *unpack* the notion of vulnerability as a structural element in the interpretative praxis of the organs. What is the notion of vulnerability, an interpretative principle or something else?

4 Vulnerability in legal reasoning

The exact role played by vulnerability reasoning for the outcomes of cases sometimes is difficult to discern, as judgments are often written so that the decisive legal considerations are not expressly pinpointed. However, there are several judgments, especially in the European system, where vulnerability explicitly is mentioned as 'the decisive factor'[90] or as a factor to which the court 'attaches considerable importance'.[91] The fact that the monitoring bodies refer to earlier vulnerability case law, also indicates that the references to vulnerability are not mere *dicta*. Below, the ways and contexts in which the adjudicative bodies have used vulnerability reasoning will be considered further to understand how a finding of vulnerability can affect outcomes and the reading of states' obligations.

To begin with, it should be noted that while it is generally held that special vulnerability does not create new human rights,[92] a finding of vulnerability is something that can affect the interpretation of the existing rights and the state obligations arising therefrom. In practice, vulnerability often is seen as something that increases the likelihood for human rights violations and as a factor that enhances the effect of such violations.[93]

In many vulnerability cases, a central question has been *whether the state has done enough to ensure that substantive equality is achieved*. While not expressly referring to vulnerability, this is explicitly stated, for example, by the African Commission, according to which 'real or substantive equality requires that groups who have suffered previous disadvantages or continue to suffer disadvantages within a state are entitled to some advantageous treatment'.[94] Often states are expected to have taken measures for special protection to enable

90 *Tarakhel v Switzerland* (n 86) para 99.
91 *MSS v Belgium and Greece* (n 28) para 251.
92 Eg U Brandl & P Czech 'General and specific vulnerability of protection-seekers in the EU: Is there an adequate response to their needs?' in Ippolito & Iglesias (n 13) 253.
93 Cf AR Chapman & B Carbonetti 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 724 ('when is vulnerability a cause and when it is an effect?').
94 Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola*, ACHPR (5 November 2013) para 117.

the effective realisation of rights for the vulnerable individuals. For example, in *Doebbler v Sudan* the African Commission refers to the practical hurdles for refugees in Sudan to seize the available domestic remedies when deciding on the admissibility of the communication, and implies that special consideration is to be taken of the situation of such individuals.[95] Likewise, the African Court has submitted that indigenous peoples deserve special protection due to their vulnerability.[96] Special protection measures for vulnerable children, through integrated programmes, for example, are likewise highlighted by the African Children's Committee, noting, for example, that there is a 'more urgent responsibility to plan and provide for basic health service programmes' in relation to the 'most vulnerable' children who face a 'heightened risk' to their enjoyment of health due to the living conditions in informal settlements and slum areas.[97] In Europe, both the European Court and the European Social Committee have held that special measures for the benefit of members of a vulnerable group sometimes are necessary to ensure equal access to rights.[98] The European Court has referred to the need to attach 'special consideration' or to give 'special protection' to those identified as vulnerable.[99] The European Social Committee, on its behalf, has emphasised 'the imperative of achieving equal treatment by taking differences between individuals into account', that is, that special consideration should be given to the needs of vulnerable groups.[100] Regarding the severity of violations, the Social Committee has even found in *Centre on Housing Rights and Evictions (COHRE) v Italy* that vulnerability has an effect on establishing an aggravated violation where measures violating human rights are specifically targeting and affecting vulnerable groups, and where public authorities not only remain passive in ending such violence but also contribute to it.[101]

In practice, substantive equality is in the treaty praxis often pursued through identifying *(enhanced) positive state obligations*.[102] As Zimmerman notes, such positive obligations can be 'of both

95 *Doebbler v Sudan* (n 37) paras 116-117.
96 *African Commission on Human and Peoples Rights v Kenya* (n 17).
97 *IHRDA* (n 20) para 61. The Committee also states that '[i]n all the 10 occasions where the word "special" is used in the African Children's Charter, it is in the context of children who find themselves in disadvantaged and vulnerable situations'. See *Hansungule* (n 20) para 63.
98 Eg Complaint 67/2011, *Médecins du Monde – International v France*, ECSR (11 September 2012) para 132.
99 Eg *Chapman v the UK* (n 11) para 96; *MSS v Belgium and Greece* (n 28) para 251.
100 *Médecins du Monde* (n 98) para 40.
101 *COHRE v Italy* (n 30) para 76.
102 Eg *X and Y v The Netherlands* ECHR (26 March 1985) Ser A 91 paras 23-24 & 27; *Bevacqua and S v Bulgaria* (n 24) para 64. See further Peroni & Timmer (n 6) 1076-1079. On substantive equality, see further Fredman (n 8).

procedural and substantive nature, and include obligations to protect and fulfil', and may include administrative, factual or legislative measures to be taken.[103] For example, in a case involving domestic violence, the European Court has emphasised that '[c]hildren and other vulnerable individuals, in particular, are entitled to effective protection' and that 'the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection' may entail positive obligations for states to protect individuals against violence from other private individuals.[104] Enhanced positive obligations incumbent on states in relation to safeguarding the rights of vulnerable individuals so that such rights are effectively and *de facto* available and accessible to them are raised also in the *MSS* case regarding asylum seekers. In this case the European Court considered that

> the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.[105]

Similarly, the European Social Committee has emphasised states' positive obligations to ensure effective exercise of rights to vulnerable groups, for example, in relation to the right to health[106] and housing or shelter.[107] The African Commission has also called for positive measures in the form of special treatment to enable mental health patients to 'not only attain but also sustain their optimum level of independence' and to enable them through positive measures to avail of their right to access to legal procedures.[108]

In certain cases the supervisory organs have explicitly held that states have positive obligations to take *legislative measures*, such as the adoption of criminalisation, to protect vulnerable groups.[109]

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103 Zimmermann (n 3) 553. See also C Heri 'The responsiveness of a positive state – Vulnerability and positive obligations under the ECHR' *Strasbourg Observer* 13 October 2016, https://strasbourgobservers.com/2016/10/13/blog-seminar-on-positive-obligations-4-the-responsiveness-of-a-positive-state-vulnerability-and-positive-obligations-under-the-echr/ (accessed 25 February 2020).

104 *Bevacqua and S v Bulgaria* (n 24) paras 64-65.

105 *MSS v Belgium and Greece* (n 28) para 263.

106 *ERRC v Bulgaria* (n 30) para 45. See also Complaint 110/2014, *International Federation for Human Rights (FIDH) v Ireland*, ECSR (12 May 2017) para 140.

107 *FEANTSA v The Netherlands* (n 31) para 135. See also *EUROCEF v France* (n 35) paras 56-57.

108 *Purohit* (n 18) paras 52 & 81.

109 Eg *A and B v Croatia* ECHR (20 June 2019) App 7144/15 paras 111-112 ('the Court reiterates that in cases of sexual abuse children are particularly vulnerable ... In view of the above, the Court considers that States are required ... to enact provisions criminalising the sexual abuse of children and to apply them in

However, markedly, in some cases it is explicitly stated that legislative measures alone are not sufficient to address the situation of vulnerable individuals. The African Children's Committee, for example, notes in relation to sale, trafficking and abduction, and using children in the form of begging, that besides legislative measures, 'the State Party should also take *administrative and other appropriate measures* to ensure that children are not subjected to begging or trafficking', also with regard to protecting them from the acts of private individuals or non-state actors.[110] When a state is expected to adopt different types of measures or, otherwise, does so, it is significant that the European Court in several cases has underlined that a finding of particular vulnerability may narrow states' margin of appreciation, that is, their leeway in interpreting their obligations arising under the European Convention.[111] This has been the case especially in relation to cases involving discrimination of particularly vulnerable groups, such as the HIV positive. For example, in *Novruk & Others v Russia* the European Court stressed that '[i]f a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered significant discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for imposing the restrictions in question'.[112]

A finding of vulnerability may also give rise to special state obligations to carry out *impact assessments*. To this end, the African Children's Committee notes that '[i]n order to prevent violation of human rights, States must identify vulnerable groups prone to abuse and take special measures to prevent violence from occurring'.[113] The European Social Committee has also in a number of cases emphasised the special obligations incumbent on states to investigate the effects of planned or adopted state measures, for example, in relation to housing[114] and austerity measures,[115] on the 'most vulnerable'. In this regard, it has stressed that 'the rights recognised in the Charter must take a concrete and effective, rather than purely theoretical, form',

practice through effective investigation and prosecution'); *Zehentner v Austria* (n 25) para 63.

110 *Centre for Human Rights* (n 20) para 80 (our emphasis).

111 Peroni & Timmer (n 6) 1080.

112 *Novruk & Others v Russia* ECHR (15 March 2016) App 31039/11 para 100.

113 *Institute for Human Rights and Development in Africa* (n 20) para 47. Also see para 73.

114 Eg Complaint 33/2006, *International Movement ATD Fourth World v France*, ECSR (5 December 2007) paras 60 & 67; *FEANTSA v The Netherlands* (n 31) para 111; Complaint 100/2013, *European Roma Rights Centre (ERRC) v Ireland*, ECSR (1 December 2015) para 59.

115 *IKA-ETAM v Greece* (n 33) para 79. Similarly, *ISAP v Greece* (n 33) para 74; Complaint 79/2012, *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, ECSR (7 December 2012) paras 76-77; Complaint 111/2014, *Greek General Confederation of Labour (GSEE) v Greece*, ECSR (23 March 2017) para 90.

which, among other thing, means that the state parties must 'pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable'.[116] Relatedly, with a view to an obligation on states to conduct impact assessment on the effect of policies on vulnerable individuals, the African Commission notes with regard to sanctions that the legitimacy of such action depends on 'whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose'. This is why the effects of sanctions 'must be carefully monitored' and the 'measures must be adopted to meet the basic needs of the most vulnerable populations'.[117] Noticeably, in assessing such impact, hearing the affected vulnerable individuals can be essential, as the European Court notes in *Stanev v Bulgaria*: 'Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny.'[118] In assessing risks and to prevent the abuse of rights, to thereby effectively address vulnerabilities, the identification of vulnerable individuals, of course, is key, as the African Children's Committee has repeatedly noted.[119]

5 Concluding remarks

Above it was outlined how the concept of vulnerability has been used in regional human rights reasoning and how a finding of vulnerability in different ways can affect the outcome of cases. Whether the increased use of vulnerability reasoning in case law signifies a 'revolution',[120] a 'paradigm'[121] or, for example, a novel 'doctrine', as suggested by some authors, especially when discussing the European developments, however, is questionable.[122] One should bear in mind that the adoption of special measures of protection and/or of affirmative action to ensure substantive equality is not new to human rights law – the various special or thematic human rights conventions testify to this.[123] Furthermore, as noted above in relation

116 *FEANTSA v France* (n 87) para 54; Complaint 104/2014, *European Roma and Travellers Forum (ERTF) v the Czech Republic*, ECSR (17 May 2016) para 72.
117 *Association pour la Sauvegarde de la Paix au Burundi* (n 18) para 75.
118 *Stanev v Bulgaria* ECHR (17 January 2012) App 36760/06 para 153.
119 Eg *Institute for Human Rights and Development in Africa* (n 20) para 47; *Nko'o v Cameroon* (n 20) para 47.
120 A Timmer 'A quiet revolution: Vulnerability in the European Court of Human Rights' in Albertson Fineman & Grear (n 13) 147.
121 Nifosi-Sutton (n 3) 243.
122 Cf O'Boyle who finds it inaccurate to speak of a vulnerability doctrine (n 14) 2.
123 Eg Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention on the Rights of the Child (1989); and Convention on the

to the European Court, there are cases where vulnerability reasoning has not been used by the Court despite a close similarity to cases where such reasoning has played a major role. A corresponding overall finding of a sporadic usage of the vulnerability reasoning also holds true for the African human rights bodies.[124] The reasons for not engaging in vulnerability reasoning are not known but may vary from political sensitivity to more practical issues, such as that the parties to the case have not advanced vulnerability arguments. It may also very well be that the monitoring bodies are still searching for the proper role that vulnerability should have in their reasoning. As such, it seems too early to speak of a full vulnerability doctrine that would coherently inform the interpretation of rights by the supervisory organs.[125] This finding finds a basis also in the fact that the uses of the vulnerability argumentation within and across the treaty body organs still appears characterised by a certain level of inconsistence, both in terms of definitions and functions.

That being said, the amount of cases in which vulnerability reasoning has been used is significant enough to merit attention and to discern certain patterns. Generally, it appears that where a finding of vulnerability is made, such a finding often has legal implications. As such, it may be argued that vulnerability today is a factor that can affect outcomes of decisions by treaty-monitoring bodies and which can be used to widen and deepen the scope of measures of special protection. To further understand the role of vulnerability as a factor in the interpretation of rights, one needs to go back to the definitions of vulnerability in the treaty body praxis. From the above analysis, it is evident that the investigated supervisory organs operate with different degrees of vulnerability often based on a sliding scale assessment of the different degrees of 'enhanced' or 'particular' vulnerabilities arising from both inherent and situational sources that may fluctuate over time and between different contexts, and which often have an impact on the level and scope of states' obligations. In this sense, vulnerability may be seen as a *variable*, a factor that is liable to vary and change, and which affects the interpretation of the different legal doctrines, such as the state's margin of appreciation and the rule of effectiveness, in each specific context. Based on the analysed treaty body praxis, it is clear that the vulnerability considerations do not outplay, or in any way replace,

Rights of Persons with Disabilities (2006).

124 Eg Nifosi-Sutton (n 3) 174 176 182.

125 It should, however, be noted that also established doctrines, such as the doctrine of the margin of appreciation before the European Court, have been criticised for being incoherently applied. Eg J Gerhards 'Margin of appreciation and incrementalism in the case law of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 501 ff.

such established doctrines and principles,[126] rather informing their interpretation often with the explicit aim of ensuring the effective realisation of rights. This can happen through, for example, limiting the leeway available to the states under their margin of appreciation, as seen above, or through highlighting a certain positive obligation that is seen as instrumental for the effective realisation of the object and purpose of a human rights treaty in a given context.

The variability inherent in the use of the vulnerability concept, coupled with the fact that the vulnerability reasoning lacks an explicit basis in regional treaty law, is not necessarily entirely unproblematic. When developing the vulnerability reasoning further, certain drawbacks of the vulnerability language should, therefore, not be overlooked. As noted, vulnerability as a concept comes with a risk of stigmatisation of those characterised as vulnerable, and of their agency and individual circumstances being overlooked. In addition, it is important to recognise that while such argumentation so far appears to have been used to ensure *enhanced* protection of universal rights for vulnerable individuals, it can also work as a particularising tool in another way. The 'potential to prioritize'[127] that accompanies the concept of vulnerability may be used for different purposes, as a tool for *selective* protection, for example, in situations where the general level of human rights protection is cut down. Is there a risk that one in the future needs to be recognised as 'extremely' vulnerable in order to receive full human rights protection?[128] This is a valid question to ask, given that the case law of the two regional human rights systems indicates that vulnerability functions on a sort of a sliding scale basis, with extreme or particular vulnerability giving rise to a more stringent level of enhanced obligations. It should, therefore, be acknowledged that instead of functioning as a 'magnifying glass'[129] drawing our attention to the specific positive measures that need to be taken for all individuals to be able to enjoy their human rights at an equal level, the concept may also lend itself to be used as a 'spotlight' that directs the attention to certain types of vulnerabilities or violations only. A certain level of caution not

126 Among the vulnerability cases, there are also cases that have been decided against the applicants who have been identified as vulnerable. In this regard O'Boyle has pointed out that '[t]he mere fact of belonging to a vulnerable group does not necessarily trump other important factors in a case such as the requirements to exhaust remedies or other admissibility rules or the margin of appreciation'. O'Boyle (n 14) 9.

127 A Timmer 'A quiet revolution: Vulnerability in the European Court of Human Rights' in Albertson Fineman & Grear (n 13) 163.

128 Cf Tazzioli who argues that in the context of migration one can discern a trend of 'governance through vulnerability', where protection presupposes a vulnerability finding. M Tazzioli *The making of migration: The biopolitics of mobility at Europe's borders* (2020) 52-53.

129 Peroni & Timmer (n 6) 1079.

to take the objectivity of the concept of vulnerability at face value, therefore, may be necessary in assessing vulnerability as a variable in the interpretation of human rights.

That having been said, the open-endedness of vulnerability as a variable may at the same time be one of its strengths.[130] As an additional tool for special protection, the notion of vulnerability allows the treaty body organs the possibility to 'show particular vigilance' when assessing the interests and needs of individuals, whose situation requires such special consideration,[131] sometimes beyond the scope of the special protection regimes. As such, vulnerability reasoning may be seen as an important yardstick against which to assess and measure the effectiveness and proportionality of different measures and policies from the perspective of the realisation of human rights for all.

130 However, as noted by Spielmann regarding the margin of appreciation, judge-made doctrines can only be 'predictable to a certain degree' and that is 'the nature of the beast' to have a certain vagueness that allows sensitivity to the 'legal and factual context of each case'. D Spielmann 'Whither the margin of appreciation' UCL – Current Legal Problems lecture 20 March 2014 6, https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf (accessed 25 February 2020). See also O'Boyle (n 14) 2 10.

131 Cf *VD & Others v Russia* ECHR (9 April 2019) App 72931/10 para 115.