VULNERABILITY, IRREGULAR MIGRANTS' HEALTH-RELATED RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The protection of irregular migrants' health-related rights brings to the fore the tensions that exist between human rights, citizenship and the sovereign state, and exposes the protection gaps in the international human rights regime. With this in mind, I consider the merits of a vulnerability analysis in international human rights law (IHRL). I posit that, detached from specific groups and reconceptualised as universal, vulnerability can be reclaimed as a foundation and tool of IHRL. I further contend that the deployment of a vulnerability analysis can alleviate the exclusionary dimension of IHRL and extend protections to irregular migrants. On this basis, I investigate the development of a vulnerability analysis in the case law of the European Court of Human Rights. I argue that, in contrast with the Court's vulnerable population approach, a vulnerability analysis can improve protection standards for irregular migrants in the field of health.

Keywords: vulnerability; vulnerable groups; irregular migrants**;** health-related rights; European Court of Human Rights.

1. Introduction

The protection of irregular migrants' health-related rights brings to the fore the tensions that exist between human rights, citizenship and the sovereign state,[1] and exposes the gaps in the international human rights regime. Health is 'a special good with an intrinsic value'[2] and as such is recognised as a basic human right.[3] Yet international human rights law (IHRL) has by and large failed to respond to irregular migrants' protection needs in the field of health. In particular, IHRL has done little to counter receiving states' restrictions on irregular migrants' access to health resources.[4] I attribute these failings of IHRL to its inability to

[1] B. S. Turner, *Vulnerability and Human Rights*, (University Park: The Pennsylvania State University Presses, 2006) p. 2 and p. 89.

[2] L. Bernier, "International socio-economic human rights: the key to global health improvement", *The International Journal of Human Rights* 14(2) (2010) 246-279, p. 249.

[3] The right to health is enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976). For a comprehensive analysis of the content of the right to health, see B.C.A., Toebes, *The Right to Health as a Human Right in International Law*, (Antwerpen: Intersentia, 1999) pp. 243-289.

[4] S. Da Lomba, "Immigration status and basic social human rights: a comparative study of irregular migrants' right to health care in France, the UK and Canada", *Netherlands Quarterly of Human Rights* 28(1) (2010) 6-40.

recognise non-citizens as fully-fledged IHRL subjects on account of their immigration status and ensuing lack of membership in the receiving state. While irregular migration covers a range of situations including clandestine arrival in the receiving state, stay beyond the permitted period of residence,[5] and refused asylum claim,[6] irregular migrants have in common that their immigration status places them outside the national community of the receiving state.

With this in mind, I explore the merits of a vulnerability analysis in IHRL. Importantly, vulnerability in this context is reconceptualised as universal[7] and is therefore shared by all human beings.[8] More specifically, I investigate whether the development of a vulnerability analysis in the case law of the European Court of Human Rights (ECtHR) can improve protection standards under the European Convention on Human Rights (ECHR) in the field of health for irregular migrants.[9] There are four reasons for focusing on the ECHR. First, irregular migrants' access to basic social rights has been identified as a particular cause for concern in Europe.[10] Secondly, while the rights enshrined in the ECHR are in the main civil and political, the Convention can apply to socio-economic conditions.[11] Thirdly, the ECHR is central to the European human rights system. Finally and importantly, it follows from Article 1 ECHR that irregular migrants present in States Parties to the Convention can avail themselves of its protection.[12] This is a critical point as irregular migrants commonly fall outside the protection of the law on account of their immigration status.[13]

[5] Elspeth Guild, "Who is an Irregular Migrant?" in: B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden/Boston, Martinus Nijhoff Publishers, 2004) pp. 3-28, p. 3. Irregular migration also covers working without a permit or in a manner inconsistent with one's immigration status (*ibid.*).

[6] S. Da Lomba, "Irregular migrants and the human right to health care: a case-study of health-care provision for irregular migrants in France and the UK", *International Journal of Law in Context* 7(Special issue 03) (2011) 357-374, p. 357. The term irregular migrant also applies to foreign nationals who enter on false papers and regularised migrants who fall back into an irregular situation (*ibid.*).

[7] M. A. Fineman, "The vulnerable subject: anchoring equality in the human condition", *Yale Journal of Law & Feminism* 20(1) (2008) 1-23, p. 1.

[8] B. S. Turner, *supra* note 1, p. 1.

[9] European Convention on Human Rights, CETS No. 005, 4 November 1950, entry into force 3 September 1953.

[10] R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Council of Europe Publishing, Strasbourg, December 2005).

[11] European Court of Human Rights, *Airey v. Ireland*, App. no. 6289/73, Judgment of 9 October 1979, para 26.

[12] Article 1 ECHR provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms […] [set out in the ECHR].'

[13] Council of Europe, Commissioner for Human Rights, CommDH/IssuePaper (2007) 1, *The Human Rights of Irregular Migrants in Europe*, 17 Dec. 2007.

The concept of vulnerability has gained momentum in IHRL and the international human rights regime confers specific protection on groups deemed vulnerable. However, having established that the vulnerable group approach struggles to bring irregular migrants under the protection of IHRL, I consider the concept of universal vulnerability. I posit that, detached from specific groups, vulnerability can be reclaimed as a foundation and tool of IHRL. I further contend that the deployment of a vulnerability analysis can alleviate the exclusionary dimension of IHRL and extend protections to irregular migrants. On this basis, I explore how the ECtHR's emerging vulnerable group approach plays out in health-related cases involving migrants with precarious immigration statuses. In particular, I examine how the Court distinguishes between 'vulnerable' and 'invulnerable' migrants. Having shown that the ECtHR's approach erodes protection standards, notably under Article 3 ECHR, I argue that the development of a vulnerability analysis in the Court's case law can improve protection standards for irregular migrants in the field of health.

2. Vulnerable Groups, International Human Rights Protection and Irregular Migrants

In this section, I argue that the concept of vulnerable group in IHRL exposes rather than addresses the protection gaps in the international human rights regime, with the consequence that, by and large, irregular migrants remain outside the protection of IHRL.

2.1. *Vulnerable Groups in IHRL*

IHRL grants specific protection to groups who are singled out on the basis of their vulnerability. Protection is conferred through population-specific instruments such as the Convention on the Rights of the Child (CRC),[14] the International Convention on the Elimination of All Forms of Racial Discrimination,[15] or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[16] This phenomenon is sometimes described as the 'pluralization' of IHRL.[17] The need to protect vulnerable groups is also a recurrent theme in the work of human rights treaty bodies,[18] including judicial bodies such as the ECtHR and the Inter-American Court of Human Rights.[19] The concept of vulnerable

[14] Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

[15] International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly resolution 2106 A (XX) of 21 December 1965, entry into force 4 January 1969.

[16] Convention on the Elimination of All Forms of Discrimination against Women, General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981.

[17] F. Mégret, "The Disabilities Convention: human rights of persons with disabilities or disability rights*?", Human Rights Quarterly* 30 (2008) 494-516, p. 495.

[18] A. R. Chapman, B. Carbonetti, "Human rights protections for vulnerable and disadvantaged groups: the contributions of the UN Committee on Economic, Social and Cultural Rights", *Human Rights Quarterly* 33 (2011) 682-732.

[19] For example, in *Furlan and Family v. Argentina*, the Inter-American Court of Human Rights 'reiterate[d] that any person who is in a vulnerable situation [- in this instance a child with disabilities -] [was] entitled to special protection' (I/A Court H.R., Case of *Furlan and Family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 134).

group assumes shared characteristics among members that set them apart from the general population and places them at a greater disadvantage.[20] Vulnerable groups' common characteristics may relate to their identity; racial, ethnic, and religious minorities, the elderly and persons with disabilities have been cast vulnerable on this basis.[21] The groups' (assumed) characteristics may also pertain to their socio-economic, immigration or health status. Accordingly, migrant workers, prisoners and persons living with HIV-AIDS have been found to constitute vulnerable groups.[22] These two categories of characteristics are not mutually exclusive and groups can be considered vulnerable on the basis of both identity and status-based criteria.[23] However, in the absence of a coherent set of criteria, what exactly makes a group vulnerable remains unclear as the case law of the ECtHR shows.[24]

Moreover, the construction of groups as vulnerable is not without problems. There is not sufficient space to comprehensively discuss the flaws in the vulnerable group approach, but these may be outlined. First, because it assumes the existence of cohesive groups, the vulnerable population approach can obscure significant differences between members[25] while concealing similarities between members and the wider population.[26] Thus, the concept of vulnerable group can be 'both over- and under- inclusive.'[27] Secondly, because it closely links vulnerability to notions of harm and suffering,[28] this concept comes with negative associations that often erode individuals' agency.[29] For instance, the construction

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[20] Martha Albertson Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics", in: M.A. Fineman and A. Grear (eds.), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham/Burlington: Ashgate, 2013) pp. 13-26, p. 16.
[21] See A. R. Chapman, B. Carbonetti, *supra* note18, p. 706.
[22] *Ibid*.
[23] *Ibid.*, p. 707.
[24] See section 4 of this article.
[25] Martha Albertson Fineman, *supra* note 20, p. 16; and L. Peroni, A. Timmer, "Vulnerable groups: the promise of an emerging concept of European Human Rights Convention Law", *International Journal of Constitutional Law* 11(4) (2013) 1056-1085, p. 1071.
[26] Martha Albertson Fineman, *supra* note 20, p. 16.
[27] *Ibid*.
[28] For example, women have been constructed as a vulnerable group on the basis of harm caused by historical experiences of discrimination. CEDAW emphasises that "extensive discrimination against women continues to exist" (Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 16, Preamble). Similarly, children have been cast vulnerable on account of their inherent dependency on others that makes them more susceptible to harm. The Convention on the Rights of the Child stresses that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth' (Convention on the Rights of the Child, *supra* note 14, Preamble).
[29] L. Peroni, A. Timmer, *supra* note 25, p. 1073-1074; and Mary Keogh, Noelin Fox, Eilionóir Flynn. "How Far Towards Equality? A Vulnerabilities Aprroach to the Rights of Disabled People". 2010. UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 29/2010. Retrieved 15 March 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1634806.

of asylum seekers as a vulnerable group in *M.S.S. v. Belgium and Greece* (*M.S.S.*) overlooks their own sources of resilience.[30] The vulnerable group approach can also stigmatise and stereotype populations. For example, in *D.H. and Others v. The Czech Republic*, the ECtHR questioned the capacity of *all* Roma parents to perform their parental duty on account of their vulnerability as a group.[31] Thirdly, the vulnerable group approach can prove paternalistic in that it requires individuals to identify with a disadvantaged group when they may not recognise themselves as members of this group. For instance, Keogh, Fox and Flynn note that '[m]ost disabled people want to be treated as ordinary members of the community', not as members of a vulnerable group.[32] The risk of paternalism also arises from the state's responses to the protection needs of vulnerable groups.[33] Fourthly, because it is context-specific, the vulnerable group approach is inherently exclusionary.[34] For example, in *Horie v. the United Kingdom*, the ECtHR held that New Travellers could not be considered a vulnerable group and therefore be afforded the same level of protection as vulnerable nomadic populations because 'they live[d] a nomadic lifestyle through personal choice and not on account of being born into any ethnic or cultural group'.[35] The vulnerable group approach can cause resentment on the part of excluded populations as well as set protected groups as competitors.[36] Lastly and importantly, being cast vulnerable does not necessarily mean greater protection for the groups concerned. For example, FitzGerald points out that the categorisation of female trafficked migrants as a vulnerable group 'provides the state with a rationale for a series of exclusionary tactics intended to keep geo-specific populations out of Europe'.[37]

Opinions on how the recognition of vulnerable groups in IHRL and the ensuing pluralization of IHRL sit with its universal premise are divided. For some, this development does not challenge the universality of human rights; it simply recognises 'the needs of specific groups or categories within humanity as worthy of a specific human rights protection.'[38] Others - and I share their view – contend that population-specific human rights instruments are manifestations of the failures of IHRL to protect the most vulnerable. Grear points out that

[30] European Court of Human Rights [GC], *M.S.S. v. Belgium and Greece*, App. no. 30696/09, Judgment of 21 January 2011.
[31] European Court of Human Rights [GC], *D.H. and Others v. The Czech Republic*, App. no. 57325/00, Judgment of 13 November 2007, para. 203.
[32] *Supra* note 29.
[33] See e.g., A. B. Kaplan, "Father doesn't always know best: rejecting paternalistic expansion of the direct threat defense to claims under the Americans with Disabilities Act", *Dickinson Law Review* 106(2) (fall 2001) 389-414.
[34] M. A. Fineman, *supra* note 7, p. 8; and Martha Albertson Fineman, *supra* note 20, p. 14. Fineman makes this point in the context of the US approach to equality.
[35] European Court of Human Rights, *Horrie v. the United Kingdom*, App. No. 31845/10, Decision on admissibility 1 February 2011, paras. 28 and 29.
[36] Martha Albertson Fineman, *supra* note 20, p. 15. Although Fineman's observations were made in the context of the US approach to equality, these are relevant beyond the US context and anti-discrimination laws and policies.
[37] S. A. FitzGerald, "Biopolitics and the regulation of vulnerability: the case of the female trafficked migrant", *International Journal of Law in Context* 6(3) (2010), 277-294, p. 279.
[38] F. Mégret, *supra* note 17, p. 495.

'[t]he contemporary human rights movement is profoundly conscious of such exclusions and the contradiction between these and the logic of universalism.'[39] Grear attributes the failures of IHRL to its inherently exclusionary nature. Exclusion stems from the centrality of the liberal subject in IHRL. The human rights universal is shaped by the liberal rights theory with the consequence that the IHRL subject is an abstract legal subject who is invulnerable.[40] Because the IHRL subject is detached from the *real human* embodied subject,[41] IHRL struggles to recognise and respond to the 'key incident of human embodiments [that] is human vulnerability'.[42] This in turn explains the protection gaps in the international human rights regime.

2.2. *Irregular Migrants and Protection Gaps in IHRL*

Grear points out that '[a]ll too often human rights law simply fails to protect vulnerable humanity in its most exposed position beyond the outer margins of any given political community.'[43] The exclusion of 'non-citizens' points to another paradox in IHRL: rights are conferred on persons as human beings; yet IHRL assumes that the universal subject enjoys some degree of membership in the nation-state. Consequently, 'despite the widespread adoption of the universal language by many actors, including States, there remains a gap between the promise of human rights for all, and the reality of discrimination and abjection routinely faced by many migrants.'[44] Dembour and Kelly stress that '[t]his gap is noticeable in respect of all rights which are recognised in human rights law'.[45] The question of human rights for irregular migrants brings to the fore the tensions that exist between sovereign states, citizenship and human rights[46]; these tensions are particularly acute in the social domain. IHRL confers rights – including social rights - on irregular migrants as human beings; yet their immigration status significantly constrains the realisation of their human rights. This is because states perceive irregular migrants as a threat to both their power to control their borders and the national community's right to self-determination.[47] States object to the idea of social rights for these migrants because their immigration status locates them outside the national community.[48] Two factors compound states' objections: first, the crisis of the welfare state means that the distribution of limited national resources to non-citizens is increasingly set against national priorities;[49] secondly, states take the view that welfare

[39] A. Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal* Humanity, (Basingstoke: Palgrave MacMillan, 2010) p. 104.
[40] *Ibid.*, p. 43.
[41] *Ibid.,* pp. 96-113.
[42] *Ibid*., p. 126.
[43] *Ibid*., p. 151.
[44] Marie-Bénédicte Dembour, Tobias Kelly, "Introduction", in: M.B. Dembour and T. Kelly (eds), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Oxon: Routledge, 2011), pp. 1-6, p. 3.
[45] *Ibid*.
[46] B. S. Turner, *supra* note 1, p. 2 and p. 89.
[47] D. Dauvergne, "Sovereignty, migration and the rule of law in global times", *Modern Law Review*, 67(4) (2004) 588-615, p. 601.
[48] S. Da Lomba, *supra* note 6.
[49] *Ibid.,* p. 369.

provision for irregular migrants encourages irregular migration[50]. Curtailments on health care provision for irregular migrants exemplify the tensions between sovereign states, citizenship and human rights.[51] These tensions are also apparent in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention).[52] The Convention seeks to respond to the specific protection needs of migrant workers as a vulnerable group.[53] However, while the Migrant Workers Convention confers basic social rights on irregular migrants, enhanced social rights are only granted to regular migrants.[54] The state-centred nature of IHRL explains the significance accorded to migrant workers' immigration status. IHRL forms part of international law and as such is profoundly shaped by two recurrent principles of international law: the 'state consent supernorm',[55] which relates to the state's primary role in the creation, implementation and enforcement of international law, and national sovereignty.[56] It follows from the state-centred nature of IHRL that the government immigration power has a significant bearing on its normative content. IHRL has, at times, been successful in countering states' attempts to curtail protection for irregular migrants, notably in the social sphere. For example, in *International Federation of Human Rights Leagues (FIDH) v. France*, the European Committee of Social Rights found that, by depriving irregular migrants' children from immediate access to health care, France had fallen short of its obligations under Article 17 of the revised Social Charter (right of children and young persons to social, legal and economic protection).[57] However, such positive developments cannot of themselves bring irregular migrants to the fore of IHRL protections.

It follows from the above that two factors inhibit protection for irregular migrants in IHRL. First, the construction of the IHRL subject as an invulnerable abstract legal subject means

[50] *Ibid.*, p. 367 and p. 370.
[51] *Ibid*.
[52] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, General Assembly resolution 45/158 of 18 December 1990, entry into force 1 July 2003.
[53] The preamble to the Migrant Workers Convention draws attention to 'the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment' (*ibid.*).
[54] *Ibid.*, respectively Parts III and IV.
[55] A. Buchanan, "From Nuremburg to Kosovo: the morality of illegal international legal reform", *Ethics* 111(4) (2001) 673-705, p. 688.
[56] Saladin Meckled-García, Basak Çali, "Human rights Legalized – Defining, Interpreting and Implementing an Ideal", in: S. Meckled-García & B. Çali (eds.), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (London/New York: Routledge, 2005) pp. 1–31, pp. 17-18.
[57] European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, 7 October 2004, Collective complaint No. 14/2003. For an analysis of this decision, see S. Da Lomba, *supra* note 6, p. 371-372. See also European Committee of Social Rights, *Defence for Children International (DCI) v The Netherlands*, 20 October 2009, Collective complaint No 47/2008.

that IHRL is ill-equipped to address lived vulnerability. Secondly, it follows from the state-centred nature of IHRL that immigration status constrains protection. As 'non-citizens' irregular migrants typify 'liberalism's "Others"[58] and the concept of vulnerable group has done little to bring them under the protection of IHRL. However, I contend that, notwithstanding the failings of IHRL, all may not be lost for irregular migrants and IHRL. In the next section, I draw on the work Fineman and Turner and posit that the concept of vulnerability can be reclaimed as a foundation and tool of IHRL with a view to alleviating protection gaps.

3. Vulnerability as a Foundation and Tool of IHRL

Drawing on the work of Fineman and Turner, I posit that the concept of vulnerability may be reclaimed as a foundation and tool of IHRL. I further argue that the deployment of a vulnerability analysis can alleviate protection gaps in the international human rights regime, notably in respect of irregular migrants.

3.1. *Fineman's Vulnerability Analysis*

At the core of Fineman's vulnerability theory is a strong rebuttal of the liberal tradition's construction of the human subject as an independent and invulnerable actor.[59] Fineman convincingly posits that the vulnerable subject must replace the liberal subject.[60] She stresses that '[e]very actual human being, no matter how strong and independent he or she may seem, is both presently and has been in the past reliant on others and on social institutions.'[61] Vulnerability is understood to be 'universal and constant, inherent in the human condition.'[62] Thus, vulnerability is no longer seen as an exceptional affliction that only affects those who do not live up to the liberal subject's expectations. Because vulnerability is no longer context-specific, a vulnerability analysis escapes most of the pitfalls that come with constructing vulnerable groups.[63] A vulnerability analysis is inclusive rather than exclusionary and, below, I note that Fineman's theory frees vulnerability from negative connotations such as harm. I accept that Fineman's vulnerability analysis does not totally eradicate the risk of paternalistic state responses to our shared vulnerability and that awareness of this potential drawback is critical to its effective deployment. However, in my view, her vulnerability theory significantly reduces the risk of paternalism because it does not rest on the construction of vulnerable groups. Moreover, the recognition that vulnerability is also generative, as explained below, further minimises this risk.

Importantly, Fineman recognises that vulnerability is also particular. She emphasises that we 'have different forms of embodiment and also are differently situated within webs of

[58] Alexandra Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights", in: M. A. Fineman and A. Grear (eds.), *Vulnerability, Reflections on a New Ethical Foundation for Law and Politics* (Farnham/Burlington: Ashgate, 2013) pp. 147-170, p. 162.
[59] M. A. Fineman, *supra* note 7, pp. 10-12**.**
[60] *Ibid.*
[61] M.A. Fineman, "Elderly" as vulnerable: rethinking the nature of individual and societal responsibility", *The Elder Law Journal* 20(2) (2012) 71-112, p. 88.
[62] M. A. Fineman, *supra* note 7, p. 1.
[63] These pitfalls are outlined in Section 2 of this article. .

economic and institutional relationships.'[64] Thus, vulnerability 'is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command.'[65] The conceptualisation of vulnerability as both universal and particular, in my opinion, does not point to a paradox in Fineman's theory. On the contrary, her analysis captures lived vulnerability in all its diversity.

Significantly, Fineman argues that the affirmation of the universal subject calls for a responsive state. She notes that 'it is through institutions that we gain access to resources with which to confront, ameliorate, satisfy, and address our vulnerability.'[66] Whether we can access the resources we need depends on our 'location within webs of social, economic, political, and institutional relationships that structure opportunities and options.'[67] '[We] are [therefore] dependent not only on each other but also on the institutions and political structures [we] build.'[68] This, in Fineman's view, calls for a redefinition of the relationship between the state and its institutions, and the individual with a view to making the state 'more responsive to, and responsible for, vulnerability.'[69] Fineman recognises that societal institutions cannot eradicate vulnerability and acknowledges that institutions are themselves vulnerable.[70] 'Significantly, the counterpoint to vulnerability is *not* invulnerability, for that is impossible to achieve, but rather the resilience that comes from having some means with which to address and confront misfortune.'[71]

3.2. ***Vulnerability and IHRL***

Fineman does not envisage vulnerability as a human rights concept. She contends that, in contrast with a human rights discourse, a vulnerability analysis focuses on 'the *human* part, rather than the *rights* part'.[72] However, drawing on Turner's work, I posit that vulnerability can develop as a foundation and tool of IHRL, thereby addressing Fineman's misgivings about human rights discourse. Turner contends that '[t]he idea of vulnerable humanity recognizes the obviously corporeal dimension of existence; it describes the condition of sentient, embodied creatures who are open to the dangers of their environment and are conscious of their precarious circumstances.'[73] He shares Fineman's view that vulnerability is both universal and particular.[74] However, in contrast with Fineman, Turner does not recognise the generative nature of vulnerability and closely associates this concept with suffering.[75] Fineman accepts that vulnerability can result in 'weakness, or physical or

[64] M. A. Fineman, "The vulnerable subject and the responsive state", *Emory Law journal* 60(2) (2010-11) 251-275, p. 269.
[65] M. A. Fineman, *supra* note 7, p. 10.
[66] M.A. Fineman, *supra* note 61, p. 98.
[67] *Ibid.*, p. 99.
[68] *Ibid.,* p. 98.
[69] M. A. Fineman, *supra* note 7, p. 13.
[70] *Ibid.,* p. 12.
[71] M. A. Fineman, *supra* note 64, p. 269.
[72] *Ibid.*, p. 255.
[73] B. S. Turner, *supra* note 1 p. 28
[74] *Ibid.,* p. 108.
[75] *Ibid.,* p. 26.

emotional decline',[76] but she warns against reducing vulnerability to harm and equating vulnerability to weakness.[77] Fineman emphasises that 'our vulnerability [also] presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach out to others, form relationships, and build institutions.'[78] In my view, the focus on harm and suffering risks reducing the vulnerable subject to a helpless subject, a 'victim' of her embodiment and circumstances; as noted above, this concern is commonly raised in relation to the vulnerable group approach.[79] Importantly, to acknowledge the generative nature of vulnerability is to recognise that 'people always possess sources of *resilience* in the face of their vulnerabilities.'[80]

Tuner's theorisation of our 'shared vulnerability' as 'the common basis of our human rights'[81] profoundly alters the nature of the IHRL subject; it establishes the vulnerable subject, namely the *human* subject, as the IHRL subject. I posit that the recognition of the vulnerable subject gives substance to the universal premise of IHRL in that it firmly establishes *real* human beings as the focus of the international human rights regime. Turner emphasises that, as vulnerable subjects, we need collective arrangements, including human rights protection.[82] Because the *invulnerable* liberal subject is replaced by the *vulnerable human* subject, human rights protections can be extended to the most vulnerable. With the affirmation of the universal subject, irregular migrants are no longer constructed as 'liberalism's "Others".[83] However, this does not mean that a vulnerability analysis can fully disentangle protection for irregular migrants from the exercise of the government immigration power. This is because the deployment of a vulnerability analysis cannot obviate the state-centred nature of IHRL. What the development of a vulnerability analysis in IHRL can do, however, is 'constrain governments to meet certain minimum conditions'[84] in respect of irregular migrants on account of their vulnerable humanity. Significantly, a vulnerability analysis gives international human rights bodies a critical role in making IHRL more responsive to these migrants' vulnerabilities. I argue that it provides these bodies with a potent tool for the identification of human rights obligations that make IHRL subjects more resilient to their vulnerabilities. Accordingly, a vulnerability analysis can underpin the recognition of human rights obligations that restrict states' ability to exclude irregular migrants from distributive arrangements such as health care systems. Below, I investigate how a vulnerability analysis can, to an extent, turn the ECtHR into an asset-conferring institution that can assist ECHR subjects, including irregular migrants, in building resilience.

[76] M.A. Fineman, *supra* note 61, p. 96.
[77] *Ibid*. Grear also contends that 'human vulnerability should be conceptualised as more than the capacity for suffering' (A. Grear, *supra* note 39, p. 133).
[78] M.A. Fineman, *supra* note 61, p. 96.
[79] For example, Keogh, Fox and Flynn observe that '[t]he terms "vulnerable" and "disability" read together can further compound society's predominant medical and tragic views on disability, which are largely driven from a charity perspective and in return dehumanise and marginalise disabled people' (Mary Keogh, Noelin Fox, Eilionóir Flynn, *supra* note 29).
[80] L. Peroni, A. Timmer, *supra* note 25, p. 1074.
[81] B. S. Turner, *supra* note 1, p. 1.
[82] *Ibid.,* p. 10, emphasis added.
[83] Alexandra Timmer, *supra* note 58, p. 162.
[84] B. S. Turner, *supra* note 1, p. 110.

Some take the view that vulnerability is ill-suited to human rights because this concept is essentially relevant to social and economic rights – such as the right to health - because these are the rights which are designed to protect us against our embodied vulnerability.[85] Turner dismisses this argument on the ground that social and economic rights cannot be enjoyed without civil and political rights.[86] However, I concur with Grear that 'embodied vulnerability offers a more all-embracing theoretical foundation for human rights'[87] in that it acknowledges that some civil and political rights are deeply linked to our vulnerability.[88] This goes to the core of my argument in favour of the development of a vulnerability analysis in the ECtHR's case law.

4. The ECtHR, Vulnerable Groups and Protection in the Field of Health: Distinguishing between 'Vulnerable Migrants' and 'Invulnerable Migrants'.

In this section, I focus on the ECtHR's approaches in *M.S.S.*[89] and *N v. the United Kingdom* (*N v. UK*)[90] to explore how the concept of vulnerable group plays out in health-related cases involving migrants with precarious immigration statuses.[91] I posit that the Court's responses to these migrants' vulnerabilities are set against concerns over national resources and immigration control, with the consequence that protection standards in the field of health are lowered for this population.

4.1. *The ECtHR's Approach in M.S.S.*

The applicant in *M.S.S.* was an Afghan asylum seeker who had entered the EU through Greece where he was detained and then released before making his way to Belgium. He was subsequently returned to Greece by the Belgian authorities pursuant to the Dublin II Regulation.[92] Both Greece and Belgium were found in breach of Article 3 on account of the applicant's detention and living conditions in Greece.[93] For the first time, the ECtHR accepted that Article 3 was capable of having extraterritorial effect when applied to socio-economic circumstances.[94] Significantly, the applicant's vulnerability was factored into the ECtHR's assessment that his detention and living conditions in Greece amounted to

[85] *Ibid.*, p. 36.
[86] *Ibid*., p. 37.
[87] Grear, *supra* note 39, p. 135.
[88] *Ibid*., pp. 160-161.
[89] *Supra* note 30.
[90] European Court of Human Rights [GC], *N v. the United Kingdom*, App no. 26565/05, Judgment of 27 May 2008.
[91] For a comprehensive analysis of the ECtHR's emerging vulnerable group approach see: L. Peroni, A. Timmer, *supra* note 25; and Alexandra Timmer, *supra* note 58.
[92] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
[93] *Supra* note 30, paras 233-23, paras. 263-264, and paras. 367-368.
[94] For a comprehensive analysis of the ECtHR's judgment in *M.S.S. v. Belgium and Greece*, see G. Clayton, "Asylum seekers in Europe: M.S.S. v Belgium and Greece", (2011) 11(4) *Human Rights Law Review* 758-773.

treatment contrary to Article 3. The ECtHR held that, as an asylum seeker, the applicant was a member of 'a particularly underprivileged and vulnerable population group in need of special protection'.[95] The Court opined that asylum seekers' vulnerability primarily stemmed from their dependency on state support to meet their basic needs, including health care.[96] In keeping with its emerging case law on the concept of vulnerable group, the ECtHR closely links vulnerability to harm. In its early articulation of the concept of vulnerable group, the Court focused on harm arising from groups' experiences of '(historical) prejudice and stigmatization'.[97] Accordingly, the Court has found that members of the Roma community and persons with mental disabilities constitute vulnerable groups.[98] More recently, the Court has started to use 'more complex indicators linked to social disadvantage and material deprivation'.[99] Groups considered vulnerable on this basis include, in addition to asylum seekers, persons in detention,[100] and 'women in domestic violence or precarious reproductive health situations'.[101]

4.2. *The ECtHR's Approach in N v. UK*

In *N v. UK*, a refused asylum seeker who was HIV-positive claimed that her deportation to Uganda would violate Article 3 because she would not have access to the treatment she needed there. In *D v. the United Kingdom* (*D v. UK*), the Court held that the deportation of a terminally ill HIV patient would engage Article 3 because 'the conditions of adversity which await[ed] [the applicant] in St Kitts [would] further reduce his already limited life expectancy and subject him to acute mental and physical suffering'.[102] In *N v. UK*, however, the Grand Chamber found that the applicant's deportation would not violate Article 3. The Court distinguished *N v. UK* from *D v. UK* on the basis that the former case did not disclose 'very exceptional circumstances'[103].[104] While the Court concurred with the applicant that her removal would cause her condition to deteriorate and would significantly shorten her life expectancy,[105] it noted that she was not 'critically ill'[106] and that she was 'fit to travel'.[107] Significantly, the ECtHR did not deploy the concept of vulnerable group in *N. v. UK*.[108]

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[95] *Supra* note 30, para. 251.
[96] *Ibid.*, para. 253.
[97] Peroni and Timmer refer to these cases as 'misrecognition cases' (*supra* note 25, p. 1065).
[98] E.g., *D.H. and Others v. The Czech Republic*, *supra* note 31 (the Roma community); and European Court of Human Rights, *Alajos kiss v. Hungary*, App. no. 38832/06, Judgment of 20 May 2010 (persons with mental disabilities).
[99] L. Peroni, A. Timmer, *supra* note 25, p. 1065. Peroni and Timmer describe these cases as 'maldistribution cases' (*ibid.*).
[100] E.g., European Court of Human Rights [GC], *Salman v. Turkey*, App. no. 21986/93, Judgment of 27 June 2000.
[101] E.g., European Court of Human Rights, *Bevacqua and S v. Bulgaria*, App. no. 71127/01, Judgment of 12 June 2008. See Alexandra Timmer, *supra* note 58, pp. 155-156.
[102] European Court of Human Rights, *D v. the United Kingdom*, App. no. 30240/96, Judgment of 2 May 1997, paras. 52 and 53.
[103] *Ibid.*, para. 53.
[104] *Supra* note 90, para. 51.
[105] *Ibid*., para. 50.
[106] *Ibid*.

4.3. *Choosing between the M.S.S. Approach and the N v. UK Approach: S.H.H. v. the United Kingdom*

The *M.S.S.* and *N v. UK* approaches were considered in *S.H.H. v. the United Kingdom* (*S.H.H)*.[109] As was the case in *N v. UK*, the applicant was a refused asylum seeker. He claimed that his deportation to Afghanistan would breach Article 3 because of the foreseeable degradation of his living conditions. He asserted that, without family support, he would be left to his own device and would not be able to meet his most basic needs.[110] He also pointed out that his disabilities would put him at an increased risk of violence and further injury or death in the ongoing armed conflict in Afghanistan.[111] On this basis, the applicant submitted that 'he was plainly a member of a particularly underprivileged and vulnerable population group in need of special protection' and that his application should therefore be decided in the light of the ECtHR's judgment in *M.S.S*.[112] The ECtHR disagreed with the applicant; the Court held that his situation ought to be distinguished from that of the applicant in *M.S.S.* and that his application should consequently be determined in the light of the Grand Chamber's judgment in *N v. UK*.[113] The Court found that the applicant's case did not display 'very exceptional circumstances'.[114] The ECtHR noted that he had received medical treatment and support in Afghanistan. While the Court accepted that the applicant's quality of life would be 'negatively affected' by his return to Afghanistan, it stressed that this fact alone could not be decisive.[115] On this basis, the ECtHR found that his deportation would not breach Article 3.[116] As was the case in *N v. UK*, the ECtHR did not use the concept of vulnerable group. I posit that these three judgments show that the ECtHR's deployment of the concept of vulnerable group in health-related cases is subject to resource and immigration control considerations.

[107] *Ibid*., para. 47.

[108] In a subsequent immigration case, the ECtHR held that 'people living with HIV [were] a vulnerable group with a history of prejudice and stigmatization' (European Court of Human Rights, *Kiyutin v. Russia*, App. no. 2700/10, Judgment of 10 March 2011, para. 64). On this basis, the Court found that denying the applicant a residence permit on the ground that he was HIV-positive breached his Article 8 and Article 14 rights (*ibid*., para. 74). Importantly, the Court's judgment did not place socio-economic obligations on the respondent state.

[109] European Court of Human Rights, *S.H.H. v. the United Kingdom*, App. no. 60367/10, Judgment of 29 January 2013.

[110] *Ibid*., para. 57.

[111] *Ibid*., para. 56.

[112] *Ibid*., para. 57.

[113] *Ibid*., para. 89.

[114] *Ibid*., para. 95.

[115] *Ibid*., para.93.

[116] *Ibid*., para.95.

It is well-established in the ECtHR's case law that the Convention may apply to socio-economic conditions and give rise to socio-economic obligations.[117] Accordingly, the Court has, for example, asserted that states' failure to provide prisoners with adequate medical assistance breaches Article 3 when the ensuing harm attains the requisite severity threshold.[118] The Court has also accepted that health care standards in ECHR states may beget complaints under Article 2[119] and that Article 8 can give rise to obligations in the field of health care.[120] However, the ECtHR remains 'extremely hesitant about reading into the Convention a positive obligation to provide health care' beyond what may be regarded as extreme circumstances.[121] Importantly, the ECtHR is always cautious not to 'impose an impossible or disproportionate burden' on states[122] and, for this reason, limits the breadth of ECHR positive obligations in the socio-economic domain. The ECtHR has repeatedly held that 'the Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.'[123]

In health-related cases involving irregular migrants, concerns over resources are closely intertwined with immigration control considerations, which further restrict the range of socio-economic obligations that the ECtHR is willing to place on states. Critically, in *N v. UK*, the Grand Chamber stressed that '[a]dvances in medical science, together with social and economic differences between countries, entail[ed] that the level of treatment available in

[117] *Airey v. Ireland*, *supra* note 11, para 26. This is often referred to as the ECtHR's integrated approach to interpretation (V. Mantouvalou, "N v UK: no duty to rescue the nearby needy?", 72(5) (2009) Modern Law Review 815-828, p. 820).

[118] For example, in *Keenan v. the United Kingdom*, the Court found that the lack of adequate medical treatment for a prisoner suffering from schizophrenia amounted to degrading treatment (European Court of Human Rights, *Keenan v. the United Kingdom*, App. no. 27229/95, Judgment of 3 April 2001, para. 116).

[119] E.g., European Court of Human Rights, *Nitecki v. Poland*, App. no. 65653/01, Decision on Admissibility of 21 March 2002; European Court of Human Rights, *Pentiacova and Others v. Moldova*, App. no. 14462/03, Decision on admissibility of 4 January 2005; and *LCB v. the United Kingdom*, App. no. 23413/94, Judgment of 9 June 1998, para. 36.

[120] E.g., *Pentiacova and Others v. Moldova*, *supra* note 119. The ECtHR found the Article 8 complaint to be manifestly ill-founded (*ibid.*).

[121] Luke Clements, Alan Simmons, "European Court of Human Rights, Sympathetic Unease", in: Malcolm Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (Cambridge/New York/Melbourne/Madrid/Cape Town/Singapore/São Paolo/Delhi/Tokyo/Mexico City: Cambridge University Press, 2008) pp. 409-427, p. 418.

[122] European Court of Human Rights, *Kontrová v. Slovakia*, App. no. 7510/04, Judgment of 31 May, para. 50, citing: European Court of Human Rights, *Osman v. the United Kingdom*, App. no. 23452/94, Judgment of 28 October 1998, para. 116.

[123] European Court of Human Rights, *Pancenko v. Latvia*, App. no. 40772/98, Decision on admissibility of 28 October 1999. See also e.g., European Court of Human Rights, *O' Rourke v. the United Kingdom*, App. no. 39022/97, Decision on admissibility of 26 June 2001; and European Court of Human Rights, *Botta v. Italy*, App. no. 21439/93, Judgment of 24 February 1998, para. 28.

the Contracting State and the country of origin may vary considerably'.[124] On this basis, the Court held that to find the respondent state in breach of Article 3 would amount to requiring states 'to alleviate such disparities through the provision of free and unlimited health care to *all aliens without a right to stay* within its jurisdiction.'[125] This, in the Court's opinion, would place 'too great a burden on Contracting States'.[126]

I contend that resource and immigration control considerations have a significant bearing on the ECtHR's vulnerable group approach. They explain why the applicant in *M.S.S*. was deemed 'vulnerable' while the applicants in *N v. UK* and *S.H.H.* were considered 'invulnerable'. Two factors set these applicants apart: their immigration status and the source of harm. The applicant in *M.S.S.* was an asylum seeker whose claim was still pending while the applicants in *N v. UK* and *S.H.H.* had been refused asylum and were therefore categorised as irregular migrants.[127] In *M.S.S*., the risk of harm arose from 'deliberate actions or omissions' of the authorities[128] while, in *N v. UK* and *S.H.H.,* the risk of harm stemmed from a lack of adequate resources in the receiving country. In my view, the ECtHR's approach in *N v. UK* and its decision to apply this approach in *S.H.H.* clearly show that the Court is concerned with containing the development of socio-economic obligations in health-related cases concerning irregular migrants. I posit that these concerns are central to the ECtHR's decision not to deploy the concept of vulnerable group in *N v. UK* and *S.H.H.*

Timmer observes that, in Article 3 cases, 'vulnerability weighs heavily and can have an absolute prioritizing force' in assessing whether treatment meets the requisite severity threshold.[129] For example, in *Mubilanzila Mayeka and Kaniki v. Belgium* (*Mubilanzila*), one of the applicants' 'extremely vulnerable situation' as a very young unaccompanied irregular migrant was critical to the ECtHR's finding of a breach of Article 3.[130] The applicants, a mother and daughter, successfully claimed that the child's detention and subsequent deportation to the DRC violated, *inter alia*, their Articles 3 rights.[131] The Court emphasised that, given the absolute nature of the protection afforded by Article 3, it took precedence

[124] *Supra* note 90, para. 44.
[125] *Ibid.* (emphasis added).
[126] *Ibid*.
[127] The term irregular migrant is used in the ECtHR's press releasing concerning its judgment in *S.H.H*. (European Court of Human Rights. *A Disabled Asylum Seeker failed to Prove that his Removal would Expose him to Inhuman or Degrading Treatment*, Press Release, ECHR 034 (2013), 29 January 2013).
[128] *Supra* note 30, para. 250. In *Sufi and Elmi v. the United Kingdom*, the ECtHR applied the *M.S.S.* approach rather than the *N v. UK* approach because the risk of harm could be attributed to the deliberate actions or omissions of the authorities (European Court of Human Rights, *Sufi and Elmi v. the United Kingdom*, App. no. 8319/07 and 11449/07, Judgment of 28 June 2011, para. 282-283). The Court found that, in the absence of an internal relocation alternative, both applicants were at risk of treatment contrary to Article 3 if returned to Somalia (*ibid*., paras 284-292).
[129] Alexandra Timmer, *supra* note 58, p. 164.
[130] European Court of Human Rights, *Mubilanzila Mayeka and Kaniki v.* Belgium, App. no. 13178/03, Judgment of 12 October 2006, para. 55.
[131] *Ibid.*, paras. 59, 63 and 71.

over immigration control considerations.[132] While I concur with Timmer that vulnerability can have a significant bearing on the Court's Article 3 assessments, I contend that a more balanced account of its potency must be offered. Significantly, and in stark contrast with the ECtHR's approach in *Mubilanzila*, it is the state's right to control immigration that prevails over the state's ECHR obligations in *N v. UK*, with the consequence that the fundamental nature of Article 3 is eroded. In *N v. UK*, the Court increases the requisite Article 3 severity threshold[133] and balances the applicant's right not to be subjected to ill-treatment against societal interests, notwithstanding the absolute nature of this provision.[134] Paradoxically, while the ECtHR does not use the concept of vulnerable group, it (implicitly) balances competing vulnerabilities: the applicant's vulnerability is set against the vulnerability of the national community, the national health care system, and the sovereign state. I further posit that the importance that the ECtHR attaches to the applicant's vulnerability in *M.S.S.* must be assessed in the light of the respondent states' EU asylum law obligations. The fact that both Greece and Belgium were legally bound under EU law to provide asylum seekers with minimum reception standards is critical to the Court's finding of an Article 3 violation.[135] The significance that the ECtHR accords to the existence of EU obligations is apparent in *S.H.H*. The Court stressed that the case concerned the living conditions in a state (Afghanistan) that had no legally binding obligation to provide asylum seekers with minimum living standards.[136] Thus, in my opinion, the impact of the *M.S.S.* approach on the extent of the socio-economic dimension of the ECHR must not be overstated and I strongly disagree with Judge Sajó's view that this approach brings the ECtHR close to imposing an obligation to respond to the vulnerable's basic needs through the provision of material services.[137]

In my view, the *N v. UK* and *M.S.S.* approaches reveal the ECtHR's resistance to develop the socio-economic dimension of the ECHR in respect of migrants with precarious immigration statuses. Having shown that the ECtHR's vulnerable group approach struggles to bring irregular migrants under the protection of the ECHR in health-related cases, I seek to explore whether the deployment of a vulnerability analysis in the Court's case law can contribute to improving protection standards for these migrants.

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[132] *Ibid.*, para. 55.

[133] In *Yoh-Ekale Mwanje v. Belgium*, some of the judges expressed the view that the 'extreme severity threshold – to be close to dying [applied in N v. UK] - could not be easily reconciled with the letter and spirit of Article 3 (European Court of Human Rights, *Yoh-Ekale Mwanje v. Belgium*, App. no. 10486/10, Judgment of 20 December 2011, Partly Concurring Opinion of Judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto De Albuquerque, para. 6). Regrettably, the Court adopted the same approach as in *N v. UK,* notwithstanding these judges' misgivings. They explained that their decision to follow the Grand Chamber's approach in *N v the United Kingdom* sought to preserve 'legal certainty' (*ibid.*).

[134] Yet it is well-established in the ECtHR's case law, including non-refoulement cases, that Article 3 rights cannot be balanced against societal interests, no matter how legitimate these may be (e.g., European Court of Human Rights [GC], *Chahal v. the United Kingdom*, App. no. 22414/93, Judgment of 15 November 1996, para. 79).

[135] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[136] *Supra* note 109, para. 90.

[137] *Supra* note 30, Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

5. The Deployment of a Vulnerability Analysis in the ECtHR's Case Law

Drawing on the work of Turner and Fineman, I have established that vulnerability can be conceptualised as a foundation and tool of IHRL. In my view, such a development makes IHRL more responsive to lived vulnerability and as such helps remedy the exclusionary dimension of IHRL. I have also shown that the ECtHR's vulnerable group approach struggles to bring irregular migrants under the protection of the ECHR in health-related cases. With this in mind, I posit that a vulnerability analysis provides the ECtHR with a potent tool to increase protection standards for irregular migrants in the field of health.

5.1. *The Vulnerable Subject as the ECHR Subject*

A vulnerability analysis requires, in the first place, that the ECtHR affirms the vulnerable human subject as the ECHR subject, albeit within the confines of Article 1.[138] To date, the ECHR subject is modelled on the IHRL subject and as such is anchored in the liberal tradition. For this reason, the ECHR subject is not inherently vulnerable. Timmer emphasises that the ECtHR's vulnerable subjects – and this is the case of asylum seekers - are 'examples of marginalized and stigmatized subjects: they do not function as an alternative to the liberal subject, but are classic examples of liberalism's "Others".[139] Because the Court does not challenge the myth of the liberal invulnerable subject, its case law contributes to the marginalisation of the very groups it seeks to protect. Importantly, the ECtHR's approaches in *M.S.S.* and *N v. UK* reveal that the Court's vulnerable subject must enjoy some degree of membership in the respondent state, albeit minimal in the case of asylum seekers. Because their immigration status locates them outside the national community, irregular migrants are not regarded as vulnerable subjects. For this reason, the Court's concept of vulnerable group cannot capture and therefore respond to these migrants' vulnerabilities in health-related cases. The recognition of the vulnerable subject as the ECHR subject demands that the ECtHR reassesses the significance of irregular migrants' immigration status for the purpose of affording protection in the field of health. This, in turn, requires that the Court reconsiders the centrality of the state's right to regulate immigration.

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[138] Paradoxically, while the ECHR compares favourably with the European Social Charter (in its original and revised form) in that it clearly bestows rights on irregular migrants present in ECHR States, the European Committee of Social Rights has proved more willing to extend protections to this group. The Social Charter (in its original and revised form) provides that rights are conferred on 'foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned' (European Social Charter, CETS No. 35, 18 October 1961, entry into force 26 February 1965, Appendix, point 1; Revised European Social Charter, CETS No. 163, 3 may 1996, entry into force 1 July 1999, Appendix, point 1). The European Committee of Social Rights has nonetheless brought irregular migrants under the protection of the Social Charter, albeit within limits, on the basis that 'the Charter must be interpreted so as to give life and meaning to fundamental social rights' and that restrictions on rights must 'be read restrictively' (*International Federation of Human Rights Leagues (FIDH) v. France*, *supra* note 57, para. 29). See also *Defence for Children International (DCI) v The Netherlands* (*ibid.*).

[139] Alexandra Timmer, *supra* note 58, p. 162.

5.2. *Vulnerability and the ECtHR's Assessments in Irregular Migrants' Health-Related Claims*

I accept that a vulnerability analysis cannot fully 'disable' the government immigration power and make immigration status totally irrelevant to ECHR protection in the field of health. However, I have shown that a vulnerability analysis can nonetheless help close protection gaps in the international human rights regime. On this basis, I argue that the development of a vulnerability analysis in the ECtHR's case law can advance protection standards for irregular migrants in the field of health. Importantly, because a vulnerability analysis recognises irregular migrants as fully-fledged ECHR subjects, their claims to protection and therefore to resources are no longer systematically set against those of 'members in the national community'. It follows that a vulnerability analysis can firmly entrench the fundamental nature of Article 3 and consequently compel the ECtHR to reconsider its approach in *N v. UK*. I have pointed out that this approach rests on troubling distinctions based on the applicant's immigration status, the source of harm, and the nature of the claim, which have caused the ECtHR to depart from well-established ECHR principles. Elsewhere I have shown that, in addition to undermining the fundamental nature of Article 3, the *N v. UK* approach retreats from the Court's integrated approach to interpretation and, contrary to its well-established case law, subjects states' ECHR obligations to their right to control immigration.[140] Significantly, the *N v. UK* approach is oblivious to the applicant's vulnerabilities. I posit that a vulnerability analysis with the 'new' vulnerable ECHR subject at its core would not permit this kind of oversight; the applicant's vulnerability - understood as both universal and particular – would, as a matter of course, be factored into the ECtHR's assessments of ECHR breaches. This of course would not carry a violation finding in all instances.

Because a vulnerability analysis is concerned with making the ECHR subject more resilient to her vulnerabilities, it offers a tool for investigating the state's role in the construction of irregular migrants' vulnerabilities and the complexities of global migration. Paradoxically, in *N v. UK*, the ECtHR makes the 'floodgate argument' central to its reasoning;[141] yet the Court does not attempt to explore this argument and simply endorses receiving states' view that welfare provision encourages irregular migration and as such places an undue burden on national resources.[142]. Crucially, a vulnerability analysis commands that states' policy choices be scrutinised in the light of their human rights obligations. This would mark a

[140] Sylvie Da Lomba, "The ECHR, Health Care, and Irregular Migrants", in: M. Freeman, S. Hawkes and B. Bennett (eds.), *Law and Global Health: Current Legal Issues Volume 16* (Oxford: OUP, 2014) pp. 149-164.

[141] The 'floodgate argument' rests on the assumption that welfare provision acts as a pull factor for irregular migration. It is commonly used by governments to justify curtailments of welfare provision for irregular migrants, (S. Da Lomba, *supra* note 4, pp. 9-10).

[142] The dissenting judges pointed out that the majority were concerned that finding the UK in breach of Article 3 'would open up the floodgates to medical immigration and make Europe vulnerable to becoming the "sick-bay" of the world' (*supra* note 90, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann, para. 8). The dissenting judges further observed that 'when one compares the total number of requests received (and those refused and accepted) as against the number of HIV cases, the so-called "floodgate" argument is totally misconceived' (*ibid*.).

significant shift in the way the ECtHR assesses health-related and, more broadly, social claims. Indeed, the Court holds the view that states are better placed to make assessments regarding the prioritisation and distribution of resources and, for this reason, exercises minimum scrutiny over states' policy decisions.[143] In *Connors v. the United Kingdom*, the Court stated that 'in spheres such as housing, which play[ed] a central role in the welfare and economic policies of modern societies, it w[ould] respect the legislature's judgment as to what [wa]s in the general interest unless that judgment [wa]s manifestly without reasonable foundation'.[144] Moreover, the Court has constantly held that states enjoy a very wide margin of appreciation in respect of 'issues involv[ing] an assessment of [national] priorities in the context of the allocation of limited resources'.[145] The ECtHR's case law supports the idea that supra-national human rights bodies lack the necessary expertise and legitimacy to adjudicate social claims. Yet, as Langford points out, if judges' role 'is not to decide policy and resource allocation but rather to assess whether the State […] ha[s] adequately complied with [its] legal obligations, then they need not be "policy wonks". What is required is essentially the exercise of "traditional" judicial competences'.[146] Besides, 'when courts lack technical knowledge, judges can be trained and can hear experts' opinions'.[147] Moreover, greater scrutiny of states' policy choices can help promote 'a culture of justification', which in turn fosters government accountability and legitimacy.[148]

Timmer observes that the concept of vulnerability is not without risks for the ECtHR; she notes that 'the Court's very protection of especially vulnerable and *unwanted* people

[143] *Pentiacova and Others v. Moldova*, *supra* note 119.

[144] European Court of Human Rights, *Connors v. the United Kingdom*, App. no. 66746/01, Judgment of 27 May 2004, para. 82.

[145] *Pentiacova and Others v. Moldova*, *supra* note 119. The case concerned the distribution of health care resources. In contrast with the ECtHR, the European Committee of Social Rights is more willing to assess whether states' social policy decisions are congruent with their obligations under the European Social Charter. In *Autism-Europe v. France*, the Committee rejected the complainant organisation's argument that funding for the education of autistic children and adults should come from the education budget, which would have amounted to ring fencing funding (European Committee of Social Rights, *Autism-Europe v. France* (2003), Complaint No. 13/2002, para. 54). The Committee held that 'France ha[d]failed to achieve sufficient progress in advancing the provision of education for persons with autism' (*ibid.*). France was found in breach of Articles 15 (right of persons with disabilities to independence, social integration and participation in the life of the community) and Article 17 (right of children and young persons to social, legal and economic protection) (*ibid.*).

[146] Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory", in: Malcolm Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (Cambridge/New York/Melbourne/Madrid/Cape Town/Singapore/São Paolo/Delhi/Tokyo/Mexico City: Cambridge University Press, 2008) pp. 3-45, p. 35.

[147] Virginia Mantouvalou, "In Support of Legalisation", in: C. Gearty and V. Mantouvalou, *Debating Social Rights* (Oxford/Portland, Hart Publishing, 2011) pp. 85-171, p. 118.

[148] This expression was coined by Etienne Mureinik (E. Mureinik, "A bridge to where? Introducing the Interim Bill of Rights", *South African Journal of Human Rights* 10 (1994) 31-48, pp. 31-32).

renders the Court vulnerable and unwanted itself.'[149] I agree with Timmer that the Court is vulnerable[150] and I do not dispute that setting protection standards in the social sphere when national resources are limited and levels of welfare provision varied across ECHR states present the ECtHR with difficult challenges.[151] However, I take issue with the idea that the Court's vulnerability is unavoidably set against the vulnerability of those who find themselves at the outer margins of human rights protections. On the contrary, I posit that lowering protection standards for the 'especially vulnerable and *unwanted*' poses a greater risk for the ECtHR and the whole ECHR system. Crucially, the *N v. UK* approach caused the Court to erode the fundamental and absolute nature of Article 3, a cornerstone of the ECHR system. Palmer points out that 'emphasis has been put on the special responsibilities and expectations that are placed on international courts and monitoring bodies in developing the content of socio-economic rights'.[152] I concur with Palmer that a Court of 'such standing as the ECtHR' has a critical part to play in developing the socio-economic dimension of the ECHR, notwithstanding the institutional difficulties that the identification of socio-economic obligations entail.[153]

6. Conclusion

In this article, I have shown that the deployment of a vulnerability analysis in the ECtHR's case law can improve protection standards for irregular migrants in the field of health. This is because a vulnerability analysis can support their claims to health resources as ECHR subjects. I accept that the development of a vulnerability analysis would signify a radical change in the ECHR system in that it eschews the traditional liberal subject and upholds the vulnerable subject as the ECHR subject. In addition to fundamentally transforming the nature of the ECHR subject, a vulnerability analysis would profoundly alter the way the ECtHR assesses irregular migrants' socio-economic claims. First, the Court would have to reassess the significance of the state's right to regulate immigration for the purpose of affording protection in the field of health. Secondly, the Court would be expected to explore how immigration laws and policies can create or perpetuate disadvantage. Finally, a vulnerability analysis would call for greater Court's scrutiny of states' decisions on the allocation of resources in the light of their ECHR obligations.

Importantly, the deployment of a vulnerability analysis in the ECtHR's case law has significance beyond the protection of irregular migrants in the field of health. The aim of a vulnerability analysis is to make the ECHR more responsive to the vulnerabilities of all ECHR subjects in all spheres of life.[154] This, in turn, requires that the ECtHR recognises the deep link that exists between their vulnerabilities and ECHR rights as well as fully accepts that the

[149] Alexandra Timmer, *supra* note 58, p. 168 (emphasis added).
[150] Fineman accepts that institutions can be vulnerable (*supra* note 7, p. 1); similarly, Turner recognises that they are precarious (*supra* note 1, p. 31).
[151] Palmer makes a similar point (E. Palmer, "Beyond arbitrary interference: the right to a home? Developing socio-economic duties in the European Convention on Human Rights", Northern Ireland Legal Quarterly 61(3) (2010) 225-243, p. 242).
[152] *Ibid*.
[153] *Ibid*.
[154] For example, Timmer observes that the ECtHR has seldom deployed the vulnerable group concept in respect of the elderly (Alexandra Timmer, *supra* note 58, pp. 152-153).

Convention can give rise to socio-economic obligations. The affirmation of the socio-economic dimension of the ECHR is therefore central to the development of a vulnerability analysis.

The Court's approach in *M.S.S.* was strongly criticised for overstretching the ECHR socio-economic obligations and for profoundly altering the nature of the Convention.[155] However, in my view, this argument overestimates the ECHR's ability to give rise to socio-economic obligations. For example, the range of health-related obligations that the Convention may beget cannot be as extensive as the obligations arising from Article 12 of the International Covenant on Economic, Social and Cultural Rights, which enshrines the right to health.[156] I further contend that, rather than being deplored, the extension of the ECHR's socio-economic domain should be construed as an affirmation of the interrelated, interdependent and **i**ndivisible nature of human rights.[157] As the ECtHR emphasised in *Airey v. Ireland*, there can be 'no water-tight division' between social and economic rights and civil and political rights.[158]

[155] *Supra* note 30, Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

[156] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The Right to the Highest Attainable Standard of Health,* UN Doc. E/C.12/2000/4, 11 August 2000.

[157] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Part I, para. 5.

[158] *Supra* note 11, para 26.