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Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR: The *MSS* Case 10 Years On

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ABSTRACT

This article reassesses the impact of the concept of vulnerability as it emerges from the *MSS v Belgium and Greece* case of the European Court of Human Rights, and subsequent developments relating to the rights of refugees and asylum seekers. This examination is performed in light of the human rights principle of equality. The choice of the principle of equality is justified by frequent claims that vulnerability allows more substantive equality outcomes. Examining the concrete functions and consequences of the recourse to vulnerability in relation to refugees and asylum seekers in post-*MSS* judgments, the article argues that, in the European setting at least, vulnerability produces a set of negative consequences. More specifically, the article demonstrates that the deployment of the language of vulnerability results in the positioning of refugees and asylum seekers as passive recipients of benevolence rather than as active rights claimants, the introduction of additional layers of subjectively constructed stratification, and the erasure of the specificity of refugees' and asylum seekers' experience. It is contended that these negative consequences of deploying the concept of vulnerability can be mitigated if recourse to vulnerability is accompanied by a highly skilled technical discussion of the principles of substantive equality as they are known in international human rights law, including such aspects of substantive equality as structural discrimination and intersectionality.

1. INTRODUCTION

The European Court of Human Rights (ECtHR) in its judgment in *MSS v Belgium and Greece*[1] determined, for the first time, that refugees and asylum seekers were vulnerable because of everything they had been through.[2] This finding was regarded as especially

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1 *MSS v Belgium and Greece* App No 30699/09 (ECtHR, 21 January 2011).

2 ibid para 232. See also the discussion in part 5 below.

promising in the European context owing to its potential to impose stronger obligations on States to assist and support refugees and asylum seekers.[3] At the same time, vulnerability theory – which argues for the use of vulnerability as a foundational pillar of equality and States' obligations to address vulnerability – grew in popularity.[4] The encounter between these two developments produced an important body of literature asserting that the concept of vulnerability can lead to better outcomes and produce more substantive equality for refugees and asylum seekers.[5] With the so-called refugee 'crisis' around 2015, the number of cases addressing the situation of refugees and asylum seekers increased. Given the developments mentioned above, this resulted in a surge in the active and widespread use of the term 'vulnerability' in the area of refugee law and policy.[6] Although earlier uses of the terms 'vulnerability' or 'vulnerable refugee' can also be attested, such uses had remained marginal.[7] The widespread use of the concept of vulnerability today in such varied contexts as refugee status determination, access to protection, and allocation of resources – to name just a few – positions the concept as one of the central tools on which the very effectiveness of the international protection system hinges. In many contexts, the concept of vulnerability determines whether a particular person receives the necessary support, rights protection, and other essential assistance that will allow a life in safety. Considering its central and decisive role relating to the rights of refugees and asylum seekers, as well as approximately 10 years of hindsight, it is crucial to now evaluate whether the introduction of the concept of vulnerability by the ECtHR has resulted in positive developments for the rights of refugees and asylum seekers. In view of the length constraints imposed by the article format, this contribution focuses on only one aspect of the deployment of the concept

[3] The generally positive reception of this judgment features in many scholarly writings on the topic, some of which are highlighted in this article.

[4] The emergence of vulnerability theory and its link to the concept of equality are discussed in more detail in part 3.

[5] This claim is substantiated in part 3 and section 5.1 below.

[6] This is a conventional narrative of the emergence of the concept of vulnerability in the context of refugee law. It should be noted that the ease with which recourse to the concept of vulnerability multiplied in this context can only be explained by the fact that the practical and theoretical terrain was already well prepared, thanks to earlier work of the United Nations High Commissioner for Refugees (UNHCR). This work was mainly aimed at improving refugee status determination procedures both within UNHCR and in the national asylum systems of several States. See especially Chrystalla Katsapou, *Response to Vulnerability in Asylum: Project Report* (UNHCR 2013) ch 1, which explains how this study of vulnerability in asylum was based on earlier efforts to develop quality assurance in asylum procedures.

[7] See eg occasional references to the vulnerability or special needs of asylum seekers in UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (2003). In a more academic context, see Edward Newman and Joanne van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability and the State* (United Nations University Press 2003). The concept of 'vulnerability' was also used outside the refugee context. Particularly notable was its use in humanitarian emergency and disaster settings. See eg World Health Organization, 'Vulnerable Groups: Environmental Health in Emergencies and Disasters' (2002); World Food Programme, 'Vulnerability Analysis: Concepts and Case Studies in Emergency, Recovery, and Development Settings' (2004).

of vulnerability in relation to refugees and asylum seekers. The article assesses the claim (emerging at the intersection between the *MSS* case and its embodiment in the context of vulnerability theory) that recourse to the concept of vulnerability in relation to refugees and asylum seekers leads to more positive outcomes and, in particular, to stronger guarantees of equality for refugees and asylum seekers.

It is argued that, 10 years after the *MSS* judgment, the deployment of the concept of vulnerability in relation to refugees and asylum seekers, while it has occasionally brought benefits to some, has produced several unintended negative effects overall. First, the article demonstrates that refugees and asylum seekers become even more disempowered and their enjoyment of rights becomes a subjective matter of highly uncertain charity. Moreover, the analysis reveals that the concept of vulnerability operates to further increase stratification, creating hierarchies within the already marginalized categories of refugees and asylum seekers. Recourse to the concept of vulnerability signals a desire and a need to consider more seriously issues of substantive equality in relation to refugees and asylum seekers. However, as this article will argue, so far, vulnerability has operated as a simplistic and inadequate substitute for the complex reasoning required by the principle of equality in human rights law. In conclusion, the article argues for a return to, and deeper engagement with, the principle of equality in relation to refugees and asylum seekers, especially in its substantive understanding and with particular attention to structural and intersectional discrimination.

In order to develop and defend this argument, the article first draws the main lines of the traditional equality framework in human rights law, including its application to refugees and asylum seekers. It then demonstrates that, despite vulnerability theory's claim as to its ability to bring about enhanced equality outcomes, such a claim needs to be taken cautiously and evaluated against concrete backgrounds. A quantitative and qualitative analysis of the deployment of the concept of vulnerability by the ECtHR follows, allowing an initial demonstration of the negative effects noted above, and then moving into a more detailed discussion of vulnerability's negative consequences. The article next demonstrates that these negative consequences of the deployment of the concept of vulnerability in relation to refugees and asylum seekers can be alleviated by the injection of a substantive equality analysis. The conclusion formulates some suggestions for moving forward.

2. EQUALITY IN HUMAN RIGHTS AND REFUGEE LAW

2.1 Equality in human rights law

The centrality of the principle of equality in human rights law is indisputable.[8] However, the principle has evolved significantly over time. In particular,

[8] The principle of equality in relation to human rights is proclaimed in the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 557 UNTS 143, preamble para 2, arts 1(3), 13(1)(b), 55(c), 76(c). The principle is also enshrined in the two principal human rights treaties: the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 2(1), 26; and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(2). It also forms a core pillar of the refugee regime as enshrined in the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 3.

contemporary understanding of equality in international human rights law is clearly a substantive, rather than a formal, understanding. The formal equality logic is often illustrated with the image of a race in which all the participants are placed at the same starting point and start the race at the same time, regardless of the different conditions that might affect their ability to compete on equal terms, such as disability, different levels of testosterone, or different quality of the racetrack. The substantive equality framework starts from the recognition that all humans are different, live in different conditions, and require different treatment for the attainment of the full enjoyment of their human rights.[9] In this recognition of difference, the substantive equality framework puts the individual human being, with all his or her specific characteristics that might require different individualized measures, at its centre. However, it recognizes that, in order to understand and fully address these individual differences, it is necessary to look at society at large. The concepts of structural (or systemic)[10] inequality or discrimination[11] and intersectionality can be compared to lenses through which the substantive equality framework views individualized differences in their societal context.

The idea of structural inequality or systemic discrimination explains that some of the differences between individuals are due to the societal structures themselves,

[9] A more detailed theoretical elaboration of the concept of substantive equality is subject to scholarly and jurisprudential debate. However, the general premise about the need to pay attention to individual differences and thus adopt special measures and request more action from relevant authorities to address these differences is shared. For an example discussing possible differences in the understanding of substantive equality across several jurisdictions, see Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712. For the centrality of substantive equality to the universal human rights framework, see eg Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', UN doc CEDAW/C/GC/28 (16 December 2010) para 20; Committee on Economic, Social and Cultural Rights, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)', UN doc E/C.12/GC/20 (2 July 2009) para 8. Overall, it is possible to clearly identify the spread and domination of the substantive view of equality in General Comments and recommendations of various treaty-monitoring bodies, starting from the CEDAW and later covering all other bodies, including the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

[10] 'Systemic discrimination' and 'structural discrimination' are used synonomously. See eg Ronald L Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality* (Martinus Nijhoff Publishers 2006) 326.

[11] The terms 'discrimination' and 'inequality' are also used synonymously here. Although some scholars have attempted to draw a line between the two, in human rights law such a distinction is non-existent. Legal scholarship focusing on equality in domestic settings mostly rejects this distinction as useless from the perspective of legal regulation. See eg Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing 2014) 14–19.

including State institutions or laws.[12] Thus, the Committee on Economic, Social and Cultural Rights defines systemic discrimination as 'legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups'.[13] Therefore, it demands that the State adopt an active position in addressing structural causes of inequality. The State's duty consists not only of the requirement to address known structural or systemic causes of inequality, but also to actively enquire whether such causes of inequality remain hidden.[14] The systemic discrimination prism explains why more favourable treatment of people belonging to some groups does not violate the principle of equality, but is required by it. It also correctly allocates the source of inequality within society, thus placing the responsibility for addressing this inequality on the State and on society at large.

Intersectionality theory supplements both the substantive equality framework and the structural inequality lens.[15] The additional insights of intersectionality theory have two important aspects. The first widely recognized insight is that the law needs to pay attention to how some individuals are affected differently because of their positioning at the intersection of multiple grounds of discrimination. The original example refers to black women who can experience more pervasive forms of discrimination that are more difficult to identify and address because the women simultaneously experience gender- and race-based discrimination.[16] The second insight is less widely acknowledged. Intersectionality theory emphasizes the significance of categories of identity for politics and power struggle:

> But to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. … This project [intersectionality] attempts to unveil the processes of subordination and the various ways those processes are experienced by people who are subordinated and people who are privileged by them.[17]

[12] For a good overview of the meaning and place of structural inequality in international human rights law using violence against women as an example, see Elisabeth Veronika Henn, *International Human Rights Law and Structural Discrimination: An Example of Violence against Women* (Springer 2019).

[13] Committee on Economic, Social and Cultural Rights, 'General Comment No 20' (n 9) para 12.

[14] The proactive and future-oriented role of the State in this regard is constantly emphasized by various human rights treaty-monitoring bodies. See eg CEDAW, 'General Recommendation No 28' (n 9) para 24. See also CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, UN doc A/59/38 (2004) annex 1, paras 10–11.

[15] On intersectionality in general, see Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 149. Crenshaw is the first academic to introduce this concept. For a broader contemporary discussion, see eg Patricia Hill Collins, *Intersectionality as Critical Social Theory* (Duke University Press 2019).

[16] See generally Crenshaw (n 15).

[17] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241, 1296–97.

Thus, intersectionality explains that, within the current societal and political structures, one simply cannot escape the group-based categories that govern social life, and it attempts to understand how different people are differently impacted by these categories, thus requiring States to actively identify and implement *individually* tailored responses. Thus, in the substantive equality framework, both the structural discrimination prism and intersectionality analysis provide a way of addressing the inevitable group-based dynamics within society, while maintaining focus on the individualized empowerment of each person.

2.2 Equality and refugee law

As human beings first of all, refugees and asylum seekers are entitled to the enjoyment of all human rights. Their particular situation raises the question of States' obligations to grant them protection as a supplementary right that does not negate the need to ensure respect for other human rights. Thus, theoretically at least, refugees and asylum seekers are entitled to the general level of protection of their right to equality articulated in human rights law. However, in practice, the situation is more complicated. First, the applicability of the guarantee of equality in relation to refugees and asylum seekers is weakened by human rights law's acceptance of certain distinctions in treatment between nationals and non-nationals.[18] Although the precise contours of the acceptability of this distinction are subject to continuing debate, its reasonableness and acceptability as a matter of principle remain firmly anchored in human rights law.[19] This article excludes from its scope further discussion of this aspect of equality in relation to refugees and asylum seekers,[20] and focuses on the second aspect, namely equality between refugees and asylum seekers as a group. While the distinction between refugees, on the one hand, and asylum seekers, on the other, is also generally viewed as valid for the purposes of establishing certain forms of differential treatment, the article does not address this either.[21] The type of situation that remains in the purview of this article concerns those cases where persons are in exactly the same situation as far as their legal status as either asylum seekers or refugees is concerned. In these situations, the legal

[18] James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 129–47. Hathaway places emphasis on the guarantee of equality and its interpretation by the Human Rights Committee, but the same principles apply to the human rights guarantee of equality in other contexts too, including in regional human rights systems.

[19] The examples used in Hathaway (n 18) are telling. The pattern of judgments from the ECtHR concerning refugees and asylum seekers, which regularly affirm States' 'undeniable sovereign right to control aliens' entry into and residence in their territory', is also very illustrative: see *Amuur v France* App No 19776/92 (ECtHR, 26 June 1996) para 41. This phenomenon is sometimes described as a tension between sovereignty and human rights, or between sovereignty and equality as a human right. For an extensive treatment of this issue as applicable to the socio-economic sphere in the European Union, see Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Hart Publishing 2014).

[20] This exclusion should not be interpreted as acceptance by the author of this distinction as unproblematic or unworthy of examination. The exclusion is dictated solely by restrictions on the length of this article.

[21] This exclusion is also justified by considerations of brevity.

status itself cannot be used as a relevant criterion for establishing a differential treatment. Historically, refugee scholars have signalled disparity in the treatment of refugees and asylum seekers across countries, including in relation to an issue as fundamental as refugee status determination.[22] In addition, recently, in various contexts, the difference in treatment has been introduced with reference to the concept of vulnerability, but without any analysis of the principle of equality. Before moving to an analysis of the recent deployment of the concept of vulnerability and its negative consequences in relation to refugees and asylum seekers, it is necessary to discuss the connection between the concept of vulnerability and the principle of equality in more general terms.

3. VULNERABILITY AND EQUALITY

The development and growing popularity of vulnerability theory as proposed by Martha Fineman[23] is one of the decisive factors that has contributed to the increased recourse to the concept of vulnerability in relation to refugees and asylum seekers[24] and, as a consequence, has shaped understanding of the concept of vulnerability in this context.[25] Importantly, this vulnerability theory was developed as a tool to address

[22] This is a well-documented phenomenon since at least the publication of Jaya Ramji-Nogales, Andrew L Schoenholtz, and Philip G Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York University Press 2009). However, it continues to the present. For a more recent example, see Martina Burmann and Madhinee Valeyatheepillay, 'Asylum Recognition Rates in the Top 5 EU Countries' (2017) 15 IFO DICE Report 48; Innessa Colaiacovo, 'Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006–2011)' (2013) 1 Journal on Migration and Human Security 122.

[23] First articulated in Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1. Examples of later expansion include co-edited collections, such as Fineman's own contributions: eg Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing 2013); Martha Albertson Fineman, Ulrika Andersson, and Titti Mattsson (eds), *Privatization, Vulnerability, and Social Responsibility: A Comparative Perspective* (Routledge 2017).

[24] As mentioned in n 6 above, the concept of vulnerability was not absent from discourse on refugees and asylum seekers before the emergence of the vulnerability theory, but it was marginal and did not produce the negative consequences detailed in this article, perhaps because it was not linked to the idea of equality as explained in this part.

[25] It does not mean that vulnerability theory is strictly followed by all. Further discussion in this article provides examples of criticisms of vulnerability theory. However, constant references to this theory, its multiple discussions and often positive evaluation of at least some of its aspects is a clear sign of its impact on the field. For recent examples that support and promote Fineman's vulnerability theory in relation to refugees and asylum seekers, see Laura Tarvainen, 'Embodied and Embedded Vulnerable Subject: Asylum Seekers and Vulnerability Theory' (2019) 17 No Foundations: An Interdisciplinary Journal of Law and Justice 183; Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2020) 38 Netherlands Quarterly for Human Rights 12. For an example of an approach that does not unambiguously align with Fineman's theory but positions it as a foundation for vulnerability analysis without any disapproval, see Eleonore Kofman, 'Gendered Mobilities and Vulnerabilities: Refugee Journeys to and in Europe' (2019) 45 Journal of Ethnic and Migration Studies 2185.

insufficiencies of the formal equality framework prevalent in the United States (US). The US understanding of equality as limited to formal equality is far removed from the understanding of equality in many European countries, and especially from the substantive equality framework of general international human rights law.[26] Fineman's main goal was to develop a theory that allowed an argument for a more interventionist attitude of the State in the US context, and placed more positive obligations on the State.[27] In this context, Fineman posits vulnerability as a universal human condition that needs to be addressed by the State.[28] Her vulnerability theory is postulated as a post-identity theory, since vulnerability in this context is not conceived as yet another element of identity, but as an ontological condition and thus shared by all.[29] Often, this ontological vision of vulnerability is contrasted with an essentialized vision of vulnerability, which posits vulnerability as an inherent characteristic of certain groups or individuals, such as women, children, or disabled persons. This essentialized view of vulnerability is often criticized, including by Fineman, because arguably it reinforces passivity, weakness, and thus inequality.[30]

Many scholars have found Fineman's positioning of vulnerability as a shared human condition attractive, and have deployed it for their own purposes in different contexts.[31] However, like the essentialized view of vulnerability, the positioning of vulnerability as a shared ontological condition conceals pitfalls that exacerbate existing inequalities and create new ones. For example, several authors have criticized the inability of ontological vulnerability to address the needs and rights of specific traditionally disadvantaged groups and thus to challenge systemic inequalities.[32] In sum, regardless of the particular

[26] A telling example is provided by the comparison of the understanding of gender equality in the US to that developed in international human rights law. See Janet Benshoof, 'US Ratification of CEDAW: An Opportunity to Radically Reframe the Right to Equality Accorded Women under the US Constitution' (2011) 35 New York University Review of Law and Social Change 103.

[27] See Fineman (2008) (n 23) 2 and the article as a whole, which mentions only the US context. In particular, there is no reference to international human rights law.

[28] ibid 1.

[29] ibid 1, 8–15.

[30] See eg Martha Albertson Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92 Boston University Law Review 1713, 1750–51; Erinn Canniff Gilson, 'Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence' (2016) 42 Signs: Journal of Women in Culture and Society 71.

[31] The literature on vulnerability is extremely large and thus it is impossible to provide a focused overview. The examples mentioned in n 25 above demonstrate this in relation to refugees and asylum seekers. As far as the ECtHR is concerned, telling examples are Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056; and Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Fineman and Grear (eds) (n 23).

[32] A practical example is provided in relation to racial profiling by Frank Rudy Cooper, 'Always Already Suspect: Revisiting Vulnerability Theory' (2015) 1993 North Carolina Law Review 1339. A more theoretical discussion of this point, including Fineman's arguments, is contained in Alyson Cole, 'All of Us Are Vulnerable, but Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique' (2016) 17 Critical Horizons: A Journal of Philosophy and Social Theory 260, 265–68.

understanding of vulnerability that is being transferred into contexts affecting refugees and asylum seekers, the analysis must remain vigilant to the concrete functions fulfilled by the concept of vulnerability in various contexts and the consequences for refugees and asylum seekers. In this regard, based on the analysis of the functioning of the concept of vulnerability in the context of the ECtHR, the article argues that the introduction of the concept of vulnerability in this setting confirms the criticisms expressed in the literature about the insufficiency of the concept of vulnerability – whether ontological or essentialized – in tackling fundamental questions of equality. The next part provides evidence of the detachment of the concept of vulnerability from the principle of equality in the ECtHR. This is followed by an analysis of the concrete ways in which the concept of vulnerability functions in its detachment from equality, and indicates some of the consequences.

4. ABSENCE OF EQUALITY

The purpose of this part is to demonstrate that, statistically, the ECtHR's recourse to the concept of vulnerability is not linked to considerations of the principle of equality, despite the arguments of some of the commentators referenced in part 3. In fact, the reverse appears to be true, based on the data presented in this part and further substantiated in the remainder of this article: recourse to vulnerability operates to absolve decision makers of the need to consider the principle of equality.

References to vulnerability have increased significantly in the case law of the ECtHR over the past decade.[33] Moreover, there has been a generally positive reception of the growing role of the concept of vulnerability in the case law of the court.[34] Most importantly, according to commentators viewing the recourse to the concept of vulnerability by the ECtHR as a welcome development, the positive role of vulnerability in the ECtHR has been associated with the emergence of a more substantive approach to equality.[35] This might be a correct assessment for some contexts. However, as the following analysis demonstrates, the effects of the recourse to vulnerability in relation to

[33] There are very few references to vulnerability in the ECtHR's judgments up to 2000 (0–4 judgments each year, with occurrences of the term 'vulnerability' before 2000). Naturally, as the total number of judgments delivered each year increased, statistically there was also a small increase in the number of judgments with references to vulnerability, but the numbers remained in line with the trends of previous years (5–17 each year, up to 2009). The most recent decade (2010–19) witnessed a significant increase in occurrences of the term 'vulnerability', taking into account that this was accompanied by a corresponding reduction in the total number of judgments delivered each year due to optimization measures adopted by the court. The number of judgments each year with references to vulnerability from 2010 to 2019 was 24–56. Data on the total number of ECtHR judgments by year was obtained from ECtHR, 'Overview 1959–2019' (2020) 4. Data on the total number of judgments referring to vulnerability was obtained using HUDOC database searches with the full-text key term 'vulnerability' on 15 November 2020.

[34] This is best illustrated by the widely cited work of Peroni and Timmer (n 31). See also Oddny Mjöll Anardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review 4.

[35] See eg Peroni and Timmer (n 31) 1074–82, although Anardóttir's (n 34) conclusions are similar in this regard.

refugees and asylum seekers are often negative, denying the principle of equality and introducing high levels of uncertainty and arbitrariness. In fact, as the statistics in the next paragraph show, most instances of recourse to the concept of vulnerability by the ECtHR occur without any reference to the principle of equality.

Statistically, in the ECtHR's jurisprudence, recourse to the concept of vulnerability with a simultaneous consideration of the principle of equality (article 14, the only express provision of the European Convention on Human Rights (ECHR)[36] addressing non-discrimination and equality) rarely occurs. Thus, of a total of 1,333 judgments containing the keyword 'vulnerability',[37] the relevant dataset showed that only 133 of these judgments contained an invocation of article 14. In only 60 cases of the 133 invocations of article 14 was there a finding of violation of the article. Only one of the 133 judgments concerned the situation of a recognized refugee,[38] while as few as 15 concerned non-nationals. Moreover, the research revealed that there was no single case in the ECtHR where the principle of equality would be applicable to the situations envisaged in this article, namely equality between refugees and asylum seekers. Thus, the emphasis in scholarship on the positive capacity of vulnerability to bring about a more substantive approach to equality, at least as far as refugees and asylum seekers are concerned, is unfounded.[39] The next part substantiates this argument further through discussion of the ECtHR's deployment of the concept of vulnerability. This discussion also forms the basis for unveiling the functions of the concept of vulnerability in relation to refugees and asylum seekers.

5. CONCRETE FUNCTIONS OF THE CONCEPT OF VULNERABILITY

5.1 Introductory remarks

The most widely celebrated recourse to the concept of vulnerability by the ECtHR in relation to refugees and asylum seekers occurred in the *MSS* case. In this case, the court emphasized the *inherent* vulnerability of asylum seekers.[40] It further noted the *particular* vulnerability of asylum seekers 'because of everything [they] had been through during [their] migration and the traumatic experiences [they were] likely to have endured previously'.[41] The references to vulnerability cited in the two previous sentences

[36] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (ECHR).

[37] The search was performed in the HUDOC database for Grand Chamber and Chamber judgments, using the full-text search term 'vulnerab*' to cover all instances where either the term 'vulnerable' or the term 'vulnerability' appear. The search was performed on 22 December 2020.

[38] In this particular case, the claim related to the equality of treatment of refugees compared to other migrants legally present in the territory of the particular State. Therefore, it falls outside the scope of this article. The relevant case is *Hode and Abdi v United Kingdom* App No 22341/09 (ECtHR, 6 November 2012).

[39] Given the findings of my research in relation to the ECtHR, I would argue that, even in cases not related to non-citizens, the reasons for recourse to vulnerability are not primarily related to its capacity to transform the approach to equality, but instead lie elsewhere. However, given the scope of the present article, this additional argument is not elaborated upon or defended here.

[40] *MSS* (n 1) para 233.

[41] ibid para 232.

occur in the context of the ECtHR's finding of a violation of article 3 prohibiting torture, inhuman or degrading treatment or punishment because of the conditions of the applicant's detention. The court formulated similar observations on the vulnerability of the applicant as an asylum seeker in the context of its finding of a violation of article 3 on account of the applicant's living conditions in Greece.[42] The judgment was hailed as 'legally groundbreaking',[43] 'fantastic',[44] and even as a 'promoter for change in … securing human rights for all'.[45] Focusing more specifically on the function of the concept of vulnerability in this judgment, scholars affirmed its furtherance of 'the redistributive aspect of substantive equality',[46] or claimed more broadly that the 'vulnerability principle can make a significant contribution to achieving "substantive equality"'.[47] As argued earlier, such optimism appears excessive taking into consideration the main tenets of vulnerability theory situated against general human rights law's substantive equality framework. The purely quantitative analysis of the ECtHR's judgments performed in part 4 also militates against excessive optimism. Part 5 now focuses on a qualitative analysis of the added value of references to vulnerability in relation to refugees and asylum seekers in the ECtHR's post-*MSS* judgments.

The research involved an analysis of all English-language ECtHR judgments delivered post-*MSS* in which the terms 'vulnerability' and/or 'vulnerable' appear. Once the list of judgments was generated using the Human Rights Documentation (HUDOC) database, only judgments dealing with refugees or asylum seekers were selected.[48] This resulted in a dataset of 118 judgments.[49] After this initial selection, an additional identical search for judgments in French, not translated into English, was performed. This produced 19 additional results. All 137 judgments were then analysed with the main aim of determining the meaning and function of vulnerability in each specific context. Furthermore, the analysis of the function of vulnerability in all judgments included an assessment of whether, similarly to the *MSS* judgment, any of the subsequent decisions of the ECtHR activated the vulnerability of refugees and asylum seekers as such (vulnerability because of

[42] ibid para 251, where the court notes that it 'attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'. See also paras 259, 263.

[43] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 262.

[44] Marie-Bénédicte Dembour, *When Humans Become Migrants* (Oxford University Press 2015) 422.

[45] Patricia Mallia, 'Case of *MSS v Belgium and Greece*: A Catalyst in the Re-Thinking of the Dublin II Regulation' (2011) 30(3) Refugee Survey Quarterly 107, 126.

[46] Peroni and Timmer (n 31) 1077.

[47] Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press 2019) 115.

[48] To ensure the widest possible coverage, the terms 'refugee' and 'asylum seeker' were attributed the widest possible meaning and included situations of people seeking admission to a State's territory on broader humanitarian grounds that do not strictly fall under the Refugee Convention definition.

[49] It is important to note that for cases that were first decided by one of the sections of the ECtHR and then transferred to the Grand Chamber, both judgments were counted, since the way the concept of vulnerability operates in each of the judgments can differ.

everything they went through) to their benefit. In this particular regard, it was important to distinguish the pure vulnerability of asylum seekers and refugees from the vulnerability of some asylum seekers and refugees compounded by other vulnerability factors such as age, health, or disability, to name just a few. Unfortunately, none of the judgments delivered in the 10 years following the *MSS* judgment utilized the concept of vulnerability to the benefit of refugees' and asylum seekers' claims without additional vulnerability factors. In all cases where vulnerability operated in favour of refugees and asylum seekers, the ECtHR emphasized the *particular* vulnerability of some refugees and asylum seekers compared to 'an averagely vulnerable' refugee or asylum seeker. Of course, the ECtHR does not use this exact expression, but this notion is implicit in its reasoning, as the analysis of the cases below reveals.

In order to demonstrate that the concept of vulnerability applied to refugees and asylum seekers does not have any significant added value as a legal argument, the discussion below shows that in the *MSS* judgment such an added legal value of vulnerability was almost absent. This argument is then reinforced through discussion of the court's subsequent case law. Following the structure of the *MSS* judgment, the analysis is divided into two parts: consideration of vulnerability in relation to detention conditions, and then an examination of vulnerability in relation to living conditions.

5.2 Detention conditions

The general conditions of detention experienced by the applicant in the *MSS* case are vividly described by the court:

> [T]he sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq m space. In a number of cells there was only one bed for 14 to 17 people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.[50]

If these detention conditions are compared to the detention conditions of the general population in prisons where the ECtHR also found a violation of article 3, it is difficult to see how the conditions described in the *MSS* case would not be considered a violation of article 3 for any person, even the least vulnerable. As a comparison, it is possible

[50] *MSS* (n 1) para 230.

to draw on a few of the court's key cases concerning the detention of nationals.[51] For example, in *Muršić v Croatia*,[52] the court found a violation of article 3 simply on the ground that the detainee was held for 27 consecutive days in a cell providing only 2.62 square metres of personal space.[53] In this and similar cases, it was not necessary to even consider other conditions relating to detention, such as the availability of sanitary facilities or the possibility of access to the outdoors. In other cases where the court had to consider shorter detention periods for prisoners – for example, eight consecutive days with 2.55 square metres of personal space at their disposal – the court also considered other elements, such as access to exercise, open space, and sanitary facilities, as well as the hygienic conditions of the facilities.[54] For example, in *Ananyev v Russia*, the court stated:

> [I]n deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the court has to have regard to the following three elements:
>
> (a) each detainee must have an individual sleeping place in the cell;
> (b) each detainee must have at his or her disposal at least three square metres of floor space; and
> (c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.
>
> The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.[55]

Applying these principles to *MSS*, where detainees had at their disposal only 0.8 square metres of personal space, no individual sleeping places, and deplorable hygienic conditions, it is difficult to envisage that the ECtHR would not find a violation of article 3, even if the detainees were not refugees or asylum seekers. This is further confirmed by another statement of the ECtHR in *ZA v Russia*,[56] where the court had to examine detention conditions for asylum seekers that were appalling, but slightly better in some

[51] The cases are used here for illustrative purposes and necessarily represent a selection from the significant body of case law on the topic. However, the criteria and elements of analysis from the cases that are used here constitute established and constantly repeated standards. Therefore, the analysis that follows compares the standards of the *MSS* case to the established standards of the ECtHR's case law on conditions of detention, not just an arbitrary selection of cases.

[52] *Muršić v Croatia* App No 7334/13 (ECtHR, 20 October 2016).

[53] ibid paras 151–53.

[54] See eg ibid paras 129–35.

[55] *Ananyev v Russia* App Nos 42525/07 and 60800/08 (ECtHR, 10 January 2012) para 148. This judgment is considered a pilot judgment in relation to the issue of the condition of cells. See ECtHR, 'Factsheet: Detention Conditions and Treatment of Prisoners' (October 2020) 2. The court has routinely repeated this quotation in subsequent judgments.

[56] *ZA v Russia* App Nos 61411/15, 61420/15, 61427/15, and 3028/16 (ECtHR, 21 November 2019).

respects than the conditions in *MSS*. In this case, when finding a violation of article 3 related to detention conditions, the court made no recourse to the concept of vulnerability but affirmed that 'the Court considers it unacceptable that *anyone* might be detained in conditions in which there is a complete failure to take care of his or her essential needs'.[57] Therefore, the reference to the vulnerability of asylum seekers in the *MSS* case provides no added value to the finding of a violation of article 3 on account of the detention conditions.

This is confirmed by subsequent developments in the case law of the ECtHR. Reference to the vulnerability of asylum seekers as such in the context of detention conditions has not so far materialized in the finding of a violation of article 3 in any of the subsequent cases dealing with asylum seekers or refugees, despite the invocation of this concept in many of the subsequent cases.[58] On the contrary, the court constantly repeats its statement about the vulnerability of refugees and asylum seekers but, despite this reference to vulnerability, sees no reason to find a violation of article 3 on account of detention conditions if the applicant is not found at the same time to be more vulnerable than any other adult asylum seeker or refugee in the same detention facility. In all the cases subsequent to the *MSS* judgment where vulnerability played a role in finding a violation of article 3 on account of detention conditions, the court introduced an element of vulnerability in addition to the general vulnerability of refugees and asylum seekers, such as the minor age or the health status of the claimants. A series of cases dealing with detention conditions in one country over the same period of time illustrates this argument.

The ECtHR had to consider a series of cases brought by various asylum seekers who had complained about detention conditions in Malta over approximately the same period.[59] The applicants in all the cases faced similar detention conditions, a situation confirmed by the court's factual description of comparable shortcomings of the detention facilities in all instances. However, the court found a violation of article 3 in only three of the five cases: in two cases because the general vulnerability of the applicant as an asylum seeker was heightened by vulnerability resulting from the person's fragile health status, and in one case vulnerability was accentuated by the minor age of the applicants at the time of their initial detention.[60] In the two cases in which the ECtHR

[57] ibid para 108 (emphasis added).

[58] Of the 137 judgments analysed, 17 concerned detention conditions.

[59] The cases taken into account here are those that were issued after the *MSS* judgment, and that dealt with the detention of asylum seekers and contained at least one reference to vulnerability. Based on these criteria, a total of five judgments were identified (in chronological order): *Aden Ahmed v Malta* App No 55352/12 (ECtHR, 23 July 2013); *Mahamed Jama v Malta* App No 10290/13 (ECtHR, 26 November 2015); *Moxamed Ismaaciil and Abdirahman Warsame v Malta* App Nos 52160/13 and 52165/13 (ECtHR, 12 January 2016); *Abdi Mahamud v Malta* App No 56796/13 (ECtHR, 3 May 2016); *Abdullahi Elmi and Aweys Abubakar v Malta* App Nos 25794/13 and 28151/13 (ECtHR, 22 November 2016).

[60] Health status was the additional factor in *Aden Ahmed* (n 59) and *Abdi Mahamud* (n 59). The case dealing with vulnerability resulting from minor age is *Abdullahi Elmi and Aweys Abubakar* (n 59). In both instances, it is important to note that the discussion that follows is not intended as an analysis of, or a contribution to, the body of literature dealing with the vulnerabilization of children or people suffering from mental health problems. The cases are used simply to illustrate the inoperability of the concept of vulnerability in relation to refugees and asylum seekers if they do not possess an additional layer of vulnerability.

declared that the detention conditions did not reach the threshold of severity required for finding a violation of article 3, the court first mentioned that each of the two applicants, 'being an asylum-seeker, was particularly vulnerable because of everything she had been through during her migration and the traumatic experiences she was likely to have endured previously'.[61] However, it then qualified this statement by adding that 'the Court does not lose sight of the fact that the applicant in the present case was not more vulnerable than any other adult asylum seeker detained at the time'.[62] This can be contrasted with the way in which an additional finding of vulnerability worked in favour of the applicants, for example, in *Abdullahi Elmi and Aweys Abubakar*.[63] In that case, the court first restated the applicants' vulnerability as asylum seekers and then added that, '[m]oreover, in the present case the applicants, who were sixteen and seventeen years of age respectively, were even more vulnerable than any other adult asylum seeker detained at the time because of their age'.[64]

This series of cases demonstrates the ECtHR's consistent avoidance of basing its findings in favour of applicants on the general vulnerability of refugees and asylum seekers as such. For a claim to be successful, the applicant, in addition to his or her vulnerability as an asylum seeker or a refugee, has to demonstrate some type of additional vulnerability. However, discussion of this additional vulnerability by the ECtHR remains obscure since it operates each time in response to a particular case-based claim of a particular type of additional vulnerability, without situating it in a broader predefined framework that would provide an objectively understood frame of reference for justifying differential treatment as required by the principle of equality. Ten years after the *MSS* judgment, an overall definition, and a clearer articulation of types of vulnerability, remains absent, despite the availability of opportunities to the ECtHR as highlighted in the next section. The negative consequences that result from the ECtHR's attitude are discussed after an analysis of the court's approach to vulnerability in relation to living conditions.

5.3 Living conditions

The invocation of vulnerability with regard to applicants' living conditions operates in a similar way to the invocation of vulnerability with regard to detention conditions analysed previously. Nonetheless, in the context of the *MSS* case itself, the vulnerability of the applicant carried a higher degree of impact in relation to living conditions. When arriving at the conclusion that the applicant's living conditions reached the threshold of severity constituting a violation of article 3, the ECtHR emphasized that 'in view of the obligations incumbent on the Greek authorities under the Reception Directive … the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker'.[65] Moreover, when highlighting the importance of the applicant's

[61] *Mahamed Jama* (n 59) para 100. Almost identical wording can be found in *Moxamed Ismaaciil and Abdirahman Warsame* (n 59) para 95.

[62] *Mahamed Jama* (n 59) para 100.

[63] *Abdullahi Elmi and Aweys Abubakar* (n 59).

[64] ibid para 113.

[65] *MSS* (n 1) para 263.

vulnerability as an asylum seeker and thus in need of special protection, the court directly linked this special protection attached to the status of an asylum seeker to the relevant legislative developments in European Union law, namely the standards set out in the Reception Directive.[66] Thus, while scholars are right in highlighting the uniqueness of the *MSS* judgment in that it represents the first time living conditions gave rise to State responsibility under article 3,[67] 10 years later, the *MSS* judgment remains as unique and exceptional as it was at the time it was delivered, as an analysis of subsequent cases demonstrates.[68]

In the judgments selected and analysed according to the procedure described above (section 5.1), six dealt with living conditions in the country of refuge,[69] while nine concerned reception conditions in countries of return, based on the Dublin system.[70] The vulnerability of refugees and asylum seekers as such did not play a role in a finding in favour of the applicants in any of the judgments, despite its invocation. In 11 judgments, the applicants were not successful at all, while success in the remaining cases was due either to additional vulnerability factors as identified in previously analysed

[66] ibid para 251. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96 (Reception Directive).

[67] See eg Veronika Flegar, 'Vulnerability and the Principle of Non-Refoulment in the European Court of Human Rights' (2016) 8 Contemporary Readings in Law and Social Justice 148, 157.

[68] Due to space constraints, this article does not discuss the possible impact of the uses of vulnerability in relation to living conditions in the countries of origin of refugees and asylum seekers. However, the analysis performed did not indicate any single instance where this would make a difference except the widely discussed case of *Sufi and Elmi v United Kingdom* App Nos 8319/07 and 11449/07 (ECtHR, 28 June 2011). In fact, the judgment in *KAB v Sweden* App No 886/11 (ECtHR, 5 September 2013) could even be read as a reversal of *Sufi and Elmi*, as the Dissenting Opinion of Judge Power-Forde (joined by Judge Zupančič) in *KAB* indicates.

[69] In chronological order: *VM v Belgium* App No 60125/11 (ECtHR, 7 July 2015); *VM v Belgium* [GC] App No 60125/11 (ECtHR, 17 November 2016); *NTP v France* App No 68862/13 (ECtHR, 24 May 2018); *MD v France* App No 50376/13 (ECtHR, 10 October 2019); *NH v France* App Nos 28820/13, 75547/13, and 13114/15 (ECtHR, 2 July 2020); *BG v France* App No 63141/13 (ECtHR, 10 September 2020).

[70] In chronological order: *Mohammed v Austria* App No 2283/12 (ECtHR, 6 June 2013); *Sharifi v Austria* App No 60104/08 (ECtHR, 5 December 2013); *Safaii v Austria* App No 44689/09 (ECtHR, 7 May 2014); *Mohammadi v Austria* App No 71932/12 (ECtHR, 13 July 2014); *Tarakhel v Switzerland* App No 29217/12 (ECtHR, 4 November 2014); *AS v Switzerland* App No 39350/13 (ECtHR, 30 June 2015); *ZM and RH v Switzerland* App No 60119/12 (ECtHR, 8 December 2015); *Ilias and Ahmed v Hungary* App No 47287/15 (ECtHR, 14 March 2017); *Ilias and Ahmed v Hungary* [GC] App No 47287/15 (ECtHR, 21 November 2019). In *ZM and RH*, the court did not have to decide on the reception conditions but only on the right to family life because the applicants withdrew their claim based on art 3. In *Ilias and Ahmed*, although the Grand Chamber found in favour of the applicants, the judgment is not comparable to the *MSS* case because the violation of art 3 was based on a procedural element, namely the failure of the authorities to examine reception conditions in the country where the applicant has to be sent, not on the nature of the conditions themselves. For statistical accuracy, both judgments are still counted in the total of positive outcomes.

judgments related to detention conditions,[71] or occurred independently of references to vulnerability.[72]

In *NH*,[73] the court, in finding a violation of article 3 on account of the living conditions of three of the four applicants, highlighted not their vulnerability as asylum seekers, but the failure of authorities to comply with the obligations imposed on them by national legislation.[74] This failure of national authorities was then evaluated based on the subjective appreciation of the judges without clear criteria. Thus, the court did not find a violation of article 3 on account of living conditions for the fourth applicant because the time during which the applicant experienced the most adverse conditions – without resources and without accommodation – was shorter than that of other applicants.[75] Although the fourth applicant spent nine months living on the streets, he was without resources from State support for 63 days only, compared to 133 days for the second applicant, who in turn lived on the streets for 170 days, a significantly shorter time than did the fourth applicant.[76] The court does not explain how these different factors intervened in its reasoning, but simply lists the facts. This leaves applicants with a significant degree of uncertainty as to the relevant criteria applicable to their situations and can generate a sentiment of unfairness.

Additional vulnerability factors can sometimes contribute to a finding in favour of applicants. For example, in *VM*[77] and *Tarakhel*,[78] the findings in favour of the applicants were determined by additional vulnerability factors, most importantly the age of the children and the number of the children.[79] At the same time, even the presence of additional vulnerability factors, such as children, cannot secure success for applicants in all situations. Thus, in *BG*,[80] the court did not find that the living conditions of a family with three children, the youngest then aged two, amounted to a violation of article 3, despite recognizing that the family had spent three months and 11 days in a saturated camp, occupying a tent installed on concrete, in critical sanitary conditions that over time became unsanitary.[81] Similarly, in *NTP*, a mother with three children,

[71] See the Second Section judgment of 7 July 2015 in *VM* (n 69), as well as *Tarakhel* (n 70), both discussed below.

[72] See *NH* (n 69), discussed below, and the Grand Chamber judgment in *Ilias and Ahmed* (n 70), discussed in n 70.

[73] *NH* (n 69).

[74] ibid para 184. Of course, the court mentions the *MSS* judgment in its reasoning (para 115), as it does routinely in all cases, but the impact of this reference remains marginal and entirely dependent on the existence of national and European legislation on the matter.

[75] *NH* (n 69) paras 179, 187.

[76] ibid 176–83. The first and third applicants spent even more days without resources.

[77] See the Second Section judgment of 7 July 2015 in *VM* (n 69).

[78] *Tarakhel* (n 70).

[79] See the Second Section judgment of 7 July 2015 in *VM* (n 69) paras 138, 153, 162; *Tarakhel* (n 70) paras 119, 121.

[80] *BG* (n 69).

[81] ibid paras 84–89. This case also raises the question of the value of vulnerability in relation to the easing of the burden of proof for applicants, which was another widely noted positive consequence of the recourse to vulnerability. However, while this aspect remains outside the scope of this article due to space constraints, the *BG* case can be argued as reversing *MSS*'s stance in this regard.

all aged under five years, lived for three months in accommodation where she and her children could only stay overnight and had to leave each morning.[82] The conditions in these two cases can be juxtaposed against some of the findings in *Tarakhel*. In that case, a family with six children opposed its return to Italy based on reception conditions in Italy which included overcrowding, using an example of five or six people sharing 15 square metres of space,[83] and insufficient sanitary conditions.[84] Against the backdrop of the ECtHR's decisions in the two previously mentioned cases, which both describe conditions comparable in various regards to the Italian situation in *Tarakhel*, it is difficult to discern where and how the court draws the line between conditions that reach the threshold of article 3 and those that do not. Thus, as already mentioned, recourse to the concept of vulnerability produces a high degree of arbitrariness and uncertainty incompatible with the principle of equality, since reasonable and objective justification for differential treatment remains either absent or unclear.

The Grand Chamber of the ECtHR had an excellent opportunity to clarify the meaning and function of the concept of vulnerability as it relates to violations of asylum seekers' rights under article 3 on account of living conditions, but did not seize it. This occurred in the context of *VM*. The applicants' representative lost contact with the clients and the court decided to discontinue the case,[85] while four judges expressed a dissenting opinion arguing that 'the Grand Chamber should have taken advantage of the opportunity provided by the present case to define or adjust the concept of "vulnerability"'.[86] The refusal of the majority of the judges to introduce more clarity operates to maintain the arbitrariness and opacity of the concept of vulnerability, leading to further negative consequences.

6. CONSEQUENCES OF VULNERABILITY

The analysis of the ECtHR's judgments in the previous part reveals three elements important for further discussion of the consequences of vulnerability in its relationship to equality. First, the recourse to vulnerability is not associated with a discussion of the guarantee of equality. Secondly, all post-*MSS* judgments have shown that, in order to achieve a successful outcome, it is not sufficient to invoke the general vulnerability of refugees and asylum seekers. Additional vulnerability factors, while not guaranteeing success, are indispensable to a positive outcome. Thirdly, the value of additional vulnerability factors and the rules of their deployment remain obscure and even arbitrary. Based on these initial findings, this part provides additional observations on the consequences of such deployment of vulnerability for refugees and asylum seekers.

First, obscurity around the concept of vulnerability transforms the predictability and clarity usually associated with legal reasoning into rather arbitrary and – from the point of view of claimants – not easily comprehensible outcomes, which the court can

[82] *NTP* (n 69) para 6.

[83] *Tarakhel* (n 70) para 66.

[84] ibid paras 113, 120.

[85] See the Grand Chamber judgment of 17 November 2016 in *VM* (n 69) paras 40–41.

[86] ibid Dissenting Opinion of Judge Ranzoni, para 5. Judges López Guerra, Sicilianos, and Lemmens joined Judge Ranzoni in dissent.

easily change by invoking yet another type of vulnerability. For example, in *Abdullahi Elmi and Aweys Abubakar*, the ECtHR derived additional vulnerability of the claimants from their minor ages (16 and 17 years respectively).[87] However, in his concurring opinion, Judge Sajó voiced concerns regarding this reasoning, pointing out that all previous jurisprudence of the court on the special standards of care for children in detention concerned 'small children'.[88] Therefore, Judge Sajó 'd[id] not consider that case-law based on the problems of small children is applicable to adolescents'.[89] In light of these divergences, it might not be unreasonable to expect that, faced with more constraints and limitations on States' resources, the court will one day decide to apply this reasoning and introduce further levels of vulnerability within the category of children.[90] The question then becomes what drives the court's determination of vulnerability, and how can applicants objectively predict possible assessments of levels of vulnerability in order to present their cases more persuasively? So far, the court's assessment of the value of vulnerability remains guided by the subjective perception of decision makers who each have different levels of familiarity with the situation on the ground and different sensibilities. Paradoxically, this discussion of levels of vulnerability leads to the sidelining and almost complete erasure of the specificity of refugee experience, which turns into simple rhetoric without enhancing refugees' rights protection.[91]

Similar obscurity around the concept of vulnerability leaves applicants with a high degree of uncertainty and transforms refugees and asylum seekers from active rights claimants into passive recipients of benevolent charity. This finding is in line with previously mentioned criticisms of vulnerability, especially its essentialized forms. Moreover, this also confirms that an injection of ontological vulnerability into these contexts – which some scholars argue occurs[92] – does not change the situation. This is because vulnerability theory does not supply effective legal or policy tools to fairly and efficiently deal with the differential treatment that is necessary in some contexts.[93] The principle of equality understood substantively, together with its various facets, provides

87 *Abdullahi Elmi and Aweys Abubakar* (n 59) para 113.

88 ibid Concurring Opinion of Judge Sajó.

89 ibid.

90 Additional discrepancies in the ECtHR's reasoning were identified in the previous part when cases where the presence of children worked in favour of applicants were contrasted with those where such a positive effect was not produced. Similar sets of questions can be raised in relation to almost any aspect of vulnerability.

91 This is comparable to the negative consequences of the shift from 'refugee studies' to 'forced migration studies' highlighted in James C Hathaway, 'Could We Agree Just to "Date"?' (2007) 20 Journal of Refugee Studies 349.

92 See eg Timmer (n 31) 169, where she concludes that the ECtHR 'struggles between a liberal subject approach and a vulnerability approach'.

93 This is one of the major criticisms and persistent conundrums of vulnerability theory: if all are vulnerable while resources are limited, difficulties arise in designing fair policies in relation to issues requiring any type of resource allocation without betraying ontological vulnerability. See generally Nina A Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26 Yale Journal of Law and Feminism 1, especially 11–14.

significantly more efficient mechanisms for this purpose without turning claimants into passive recipients of subjective benevolence as the next part substantiates.

However, in addition to this already recognized impact of the deployment of vulnerability, another alarming trend is developing in relation to refugees and asylum seekers. The examples discussed in the previous part, as well as recent empirical studies of the use of vulnerability in domestic contexts by both governmental and non-governmental actors, demonstrate how the label of vulnerability operates to distinguish within the broad category of refugees and asylum seekers those deserving of protection, and thus rights, from those who are undeserving.[94] This highlights vulnerability's function as a device that creates stratification in an already precarious legal category, justifying further exclusions and inequalities. One of the perverse consequences of this function of vulnerability is the practice of the 'performance of vulnerability in a way that complies with a given set of expectations'.[95] This, in turn, can lead to the creation of vulnerabilities where they did not previously exist.[96] Thus rights, turned into the question of moral deservingness, have simply to be performed according to the script of those in the position of power. Although it is possible to read this performance of vulnerability by those seeking protection as a certain form of exercise of agency through a strategic submission to dominant scripts, this is of limited utility to those who are most vulnerable, and whose capacity to perform has been compromised.

An analysis based on substantive equality avoids these types of questions of gradation because such analysis focuses on the entirety of the situation of one individual situated in specific personal and societal circumstances, as explained in part 2. The outcomes of a substantive equality analysis always emphasize, not the position and the characteristics of the individual in relation to other individuals situated in similar circumstances, like the analysis of vulnerability discussed above, but the sufficiency or not of State actions and necessary support structures available to the individual. The dynamic of victimization, victim-blaming, or the turning of claimants into passive recipients of benevolence, so characteristic of the recourse to vulnerability, is simply absent. Similarly, stratification is avoided because differences of treatment are based not on moral deservingness determined by decision makers' subjective sensibilities, but on quite complex yet objective analysis that takes into account the claimant's situation and embeds it in local realities and individual experiences, connecting them to technical legal concepts developed over years. Such analysis requires specialized knowledge that not all judges possess, but it ensures a stronger respect for both the specificity of refugees' and asylum seekers' experience and the principle of equality, and thus attention

[94] Kate Smith and Louise Waite, 'New and Enduring Narratives of Vulnerability: Rethinking Stories about the Figure of the Refugee' (2019) 45 Journal of Ethnic and Migration Studies 2289; Andreja Mesarič and Elena Vacchelli, 'Invoking Vulnerability: Practitioner Attitudes to Supporting Refugee and Migrant Women in London-Based Third Sector Organisations' (2021) 47 Journal of Ethnic and Migration Studies 3097, 3097–98.

[95] Mesarič and Vacchelli (n 94) 3099.

[96] An example of this artificial production of vulnerability is represented by cases where women intentionally get pregnant to access certain services and preferential treatment in the country of asylum. In general, on the performance of vulnerability, see eg Smith and Waite (n 94) 2296 and Mesarič and Vacchelli (n 94) 3099–100, with further references.

to individual needs. To illustrate this point, the next part offers the example of a successful argument for, and application of, intersectionality by the ECtHR. Based on this example, the conditions required for a move away from stratification and victimization through vulnerability to substantive equality are also extrapolated.

7. ADVANTAGES OF EQUALITY ANALYSIS

This part uses one of the most celebrated equality cases of the ECtHR – *BS v Spain*[97] – as an example to demonstrate and reinforce the following arguments of the article:

(1) Vulnerability so far functions only as a simplistic and inadequate replacement of the principle of equality;
(2) Substantive equality analysis avoids all the negative consequences of recourse to the concept of vulnerability discussed previously in this article;
(3) Substantive equality analysis simultaneously achieves better outcomes for refugees and asylum seekers, positioning them as empowered individuals without erasing the specificity of their experience.

The judgment in *BS* contains no references to intersectionality, except in describing the contents of third-party submissions.[98] The passage that is usually quoted as indicating the court's taking into account of intersectionality in fact uses the language of vulnerability; the court refers to the 'particular vulnerability inherent in [the applicant's] position as an African woman working as a prostitute'.[99] The court's analysis does not contain any other significant analysis of, or engagement with, the ideas of intersectionality or substantive equality. As scholars have successfully demonstrated, a combination of factors ensured the success of structural and intersectional discrimination claims in this case.[100] These factors included the presence of a strategic alliance between the social actors supporting the claimant with complaint drafting and litigation, including as third parties, with a 'high level of theoretical knowledge and the legal competence'.[101] As correctly pointed out, intersectional discrimination analysis requires a high level of technical expertise and knowledge that is not yet available in the ECtHR.[102] The same can be said about substantive equality and structural discrimination analysis.

97 *BS v Spain* App No 47159/08 (ECtHR, 24 July 2012).

98 ibid paras 56–57.

99 ibid para 62.

100 The analysis in question was performed by MariaCaterina La Barbera and Marta Cruells López, 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *BS v Spain*' (2019) 53 Law and Society Review 1167.

101 ibid 1188. See also 1179, 1181, 1185.

102 ibid 1188. See also 1189, where the authors correctly point out that, in other cases where intersectionality was relevant, the ECtHR decided not to engage in this analysis.

Although the technical knowledge and argumentative skills of third parties were key to the success of the case, the text of the judgment itself does not reflect this complexity. Instead, the concept of vulnerability operates as a simplistic substitute:

> Referring to the more familiar terminology of 'vulnerability' advanced 'the purpose of adopting less technically oriented terminology, which appeals to people's common sense while at the same time, intuitively informing about the phenomenon of multiple discrimination'.[103]

This echoes one of the reasons invoked in support of the deployment of the concept of vulnerability in scholarship – its ability to generate compassion.[104] However, despite all possible positive intentions behind this deployment of the language of vulnerability, 'the project of vulnerability studies constitutes an effort to address the epistemological ignorance of the privileged, theorizing vulnerability predominantly from their point of view'.[105] As a consequence, vulnerability inevitably places those labelled as 'vulnerable' in the position of passive victims awaiting benevolence from those in positions of privilege. In addition, in terms of legal analysis, such a shortcut hides the complexities of reasoning, thus making consistent recourse to the principles underlying substantive equality analysis impossible for applicants. Simultaneously, important complex technical legal knowledge elaborated over decades of scholarly and judicial work is gradually lost and replaced with a vague and unclear notion that favours decision makers' subjective perspectives.

Although *BS* concerned the situation of a migrant woman who was neither a refugee nor an asylum seeker, the above discussion of the case highlights the difference intersectionality and substantive equality can make for claimants with an asylum seeker or a refugee status. While equality-related reasoning is only rudimentarily present in the judgment, the very statement of the violation of the principle of equality, in addition to an independently recognized violation of article 3, positions the applicant differently. Even the reference to the vulnerability of the applicant in the judgment becomes secondary to the inadequate actions of the State. Moreover, such an analysis requires a holistic consideration of all aspects of a particular claimant's experience. Therefore, attention to specificities of refugees' and asylum seekers' experience can become a real focus of decisions and not simply rhetoric. While the detailed analysis

[103] ibid 1190. The quotation is from an interview with a clerk working on the case. The reference to 'multiple' rather than to 'intersectional' discrimination is thus also by the clerk. This indicates a low level of familiarity with concepts related to equality and discrimination. 'Intersectional discrimination' as a complex web of various forms of discrimination affecting an individual is normally distinguished from 'multiple discrimination', understood as a simple addition of more than one form of discrimination. For a discussion of this distinction, see eg ibid 1171–72.

[104] Scholars use diverse language to designate this element of vulnerability. For example, Gilson uses 'empathy': Erinn C Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge 2014) 2. Kittay refers to the ethic of 'care': Eva Feder Kittay, *Love's Labor: Essay on Women, Equality, and Dependency* (Routledge 2013) 49–74. However, the basic focus on the emotional or affective side of compassion remains.

[105] Cole (n 32) 274.

required in relation to substantive equality, including intersectionality, is absent in the *BS* judgment, the scholarly examination of the case demonstrates the difference recourse to the technical argumentation underpinning such an analysis can make. It is unfortunate that this reasoning in the context of the ECtHR remains relegated to third-party interventions, which are invisible to the general public and even to some scholars. The change advocated in this article requires that this reasoning, at least in its main components, finds its way into the text of judgments themselves. Substantive equality, including intersectionality analysis, permeates many areas of human rights law and remains its central pillar. However, recourse to equality reasoning in relation to refugees and asylum seekers remains marginal. Vulnerability appeared out of the need to include some elements of equality analysis in relation to refugees and asylum seekers. However, it proves to be an inadequate and highly simplistic substitute. Even if the courts and other bodies find the language of vulnerability appealing and might decide to keep it, they need to combine it with the analytical tools developed within substantive equality scholarship in order to avoid all the negative consequences of recourse to the concept of vulnerability.

8. CONCLUSION

The concept of vulnerability has spread widely across a variety of areas affecting refugees and asylum seekers. There are various reasons for the concept's surge in popularity, most of them certainly connected to the desire of those witnessing the plight of refugees and asylum seekers to achieve fairer outcomes for them, especially through the generation of compassion. However, altruistic motivations are not always a guarantee of positive change. This article argued that the concept of vulnerability, detached from the technical complexities of substantive equality, in fact produces extremely concerning negative consequences. Although in some individual cases, and for some individual refugees and asylum seekers, the concept of vulnerability might produce the desired outcomes, overall it disempowers refugees and asylum seekers, repositioning them not as active rights claimants but as passive recipients of benevolence. It has also introduced layers of stratification within the category of refugees and asylum seekers that erase the specificity of their experience and that are based on the subjective, and thus quite arbitrary, determinations of decision makers. In order to alleviate these negative consequences of deploying the concept of vulnerability, it is important to stop using it as a substitute for a fully fledged substantive equality analysis. The complex and highly technical legal knowledge required for a genuine substantive equality analysis, including the facets of structural discrimination and intersectionality, should become part and parcel of the skills of all decision makers dealing with refugees and asylum seekers and should be fully reflected in their decisions.