

CATEGORICAL RIGHTS AND VULNERABLE GROUPS: MOVING AWAY FROM THE UNIVERSAL HUMAN BEING

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INTRODUCTION

The traditional concept of human rights, as conceived in the French Declaration of the Rights of Man and the Citizen in 1789, and in the American Bill of Rights in 1791, refers to rights that every individual is entitled to as a human being. These are rights that everyone—whoever, wherever, and whenever—is entitled to. These rights concern important and legitimate aspirations, legally protected by international conventions and national constitutions, which can be legally enforced by a judge and that every State, regardless of the available resources, is capable of respecting.¹

To some extent, the traditional concept of human rights has been abandoned at the universal and the regional levels. Starting with the Universal Declaration (1948), social rights also are included in the same or different human rights instruments adopted since on both levels. Moreover, in the last thirty-five years, some international human rights treaties dealing with categorical rights have been adopted, such as specific rights of women, children, migrant workers, and persons with disabilities. In Europe, the European Court of Human Rights (the Court) identified in 2010 and 2011 particularly vulnerable groups: the Roma population, mentally disabled persons, asylum seekers, and people living with HIV. The question may be raised whether those new developments are strengthening or weakening the universality of human rights.

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1. See MARC BOSSUYT, *INTERNATIONAL HUMAN RIGHTS PROTECTION: BALANCED, CRITICAL, REALISTIC*: 7–8 (2016).

I. DIFFERENT CATEGORIES OF RIGHTS

The Universal Declaration of Human Rights of 1948 contains not only civil rights and fundamental freedoms, which correspond to the traditional concept of human rights, but also social rights, which do not have the same legal characteristics.² For that reason, States are not burdened with the same obligations with respect to social rights as with respect to civil and political rights.³ As clarified in Article 2.1 of the International Covenant on Economic, Social, and Cultural Rights, the States Parties to the Covenant have not undertaken “to respect and to ensure”⁴ those rights, but instead to take steps, *to the maximum of their available resources*, with a view to achieving *progressively* the full realization of those rights.⁵ The distinct characteristics of the two categories of rights explain why two different covenants were adopted in 1966.

Indeed, not only the obligations of the States Parties but also the supervisory mechanisms in the International Covenant on Civil and Political Rights, differ considerably from those in the International Covenant on Economic, Social and Cultural Rights.⁶ During the drafting process of the Covenants by the Commission on Human Rights, opinions on these issues were summarized, stating that “[a]lthough it was generally agreed that economic, social and cultural rights on the one hand, and civil and political rights on the other, were equally important, the opinion was expressed that the former were not justiciable rights and the method of their implementation was therefore different.”⁷ Similarly, the Annotations on the text of the draft International Covenants on Human Rights, prepared by the Secretary-General, stated, as follows:

2. See Marc Bossuyt, *La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels*, 8 HUM. RTS. J. 783, 789–95 (1975).

3. *Id.* at 788.

4. International Covenant on Economic, Social and Cultural Rights art. 2, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3.

5. *Id.*

6. The supervision of the International Covenant on Civil and Political Rights is entrusted to a Human Rights Committee, composed of eighteen independent experts, competent to adopt general comments based on reports submitted by the States Parties, which may also recognize the competence of the Committee to receive inter-State and individual communications. Originally, the supervision of the International Covenant on Economic, Social and Cultural Rights was entrusted to a political body, the Economic and Social Council. See generally International Covenant on Civil and Political Rights, art. 2, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171.

7. U.N. Secretary-General, *Annotations on the Text of the Draft International Covenants on Human Rights*, ch. 1, ¶ 9, U.N. Doc. A/2929 (July 1, 1955); see also Marc Bossuyt, *Les Travaux Préparatoires*, in LE PACTE INTERNATIONAL RELATIF AUX DROITS CIVILS ET POLITIQUES. COMMENTAIRE ARTICLE PAR ARTICLE 7 (Emmanuel Decaux ed., 2011).

9. Those in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an 'absolute' character, while economic, social and cultural rights were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual 'against' the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social and cultural rights, and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.

10. The question of drafting one or two covenants was intimately related to the question of implementation. If no measures of implementation were to be formulated, it would make little difference whether one or two covenants were to be drafted. Generally speaking, civil and political rights were thought to be 'legal' rights and could best be implemented by the creation of a good offices committee, while economic, social and cultural rights were thought to be 'programme' rights and could best be implemented by the establishment of a system of periodic reports. Since the rights could be divided into two broad categories, which should be subject to different procedures of implementation, it would be both logical and convenient to formulate two separate covenants.⁸

Debate on the decision of whether to draft a single, or instead two separate conventions, continued; in 1951, the Economic and Social Council invited the General Assembly to reconsider its decision, asking it "to include in one covenant articles on economic, social and cultural rights, together with articles on civil and political rights."⁹ Finally, after a long debate lasting from November 1951 to February 1952, the General Assembly requested that the Economic and Social Council ask the Commission on Human Rights, as follows:

To draft two covenants on human rights . . . , one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two covenants simultaneously and open them at the same time for signature, the two covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible.¹⁰

8. U.N. Secretary-General, *supra* note 7, ch. 2, ¶¶ 9–10.

9. *Id.* ch. 2, ¶ 6.

10. *Id.* ch. 1, ¶¶ 31–32.

The preparatory work of the International Covenants does not confirm that the Cold War is the reason why the two categories of rights are contained in two different treaties.¹¹ Instead, they show that the differences in the nature of the rights and in the obligations of the States led the drafters to opt for two covenants. The Council of Europe, whose Member States were exclusively Western and did not wage a cold war among each other, also opted for two separate treaties—one for civil rights and fundamental freedoms (the European Convention on Human Rights), and one for social rights (the European Social Charter).¹² The existence of different conventions for civil and social rights is not the result of an old-fashioned liberalism blind to social needs.¹³ It does not result from a regretful negligence or ignorance of the real world.¹⁴ It is also not as much the result of a pre-determined choice of lawyers, politicians, and diplomats, but instead due to the intrinsic differences between the two categories of rights.¹⁵

Contrary to social rights (which, in the absence of sufficient resources, all States are not capable of realizing all at once for all persons), civil rights and fundamental freedoms must be respected immediately and for everybody.¹⁶ The human person envisaged by those civil rights and fundamental freedoms is the universal human being. That somewhat abstract conception of a universal human being is defined by what he or she has in common with all human beings, in opposition to the more concrete notion of human beings having characteristics which distinguish each of them from other people.¹⁷ While human beings, taken *in concreto*, are all different, they are—abstraction made of those differences—all equal, as far as their (human) rights are concerned.

In a 1971 Report of the Parliamentary Conference on Human Rights of the Council of Europe, the question was raised: “[w]hich

11. It has often been asserted that the differences between civil and social rights date back to the Cold War when each side claimed a set of rights built on their political ideology. *See, e.g.*, Sofia Guerrero & Lucy Coronel, *Civil and Political Rights vs. Economic-Social-Cultural Rights*, (Oct. 10, 2012) humanrightsfight.blogspot.be; *see also* Marc Bossuyt, *Social Rights: A Specific Category of Human Rights?*, in *MEXICAN SUPREME COURT OF JUSTICE, A DIALOGUE BETWEEN JUDGES: WRITINGS OF THE SUMMIT OF PRESIDENTS OF CONSTITUTIONAL, REGIONAL AND SUPREME COURTS* 359, 364 (2014).

12. *Id.*

13. MARC BOSSUYT, *L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME* 184 (1976) [hereinafter BOSSUYT, *EQUALITY & DISCRIMINATION*].

14. *Id.*

15. *Id.*

16. *Id.* at 187–88.

17. *Id.* at 211–12.

human being should be taken into consideration in protecting his rights?”¹⁸ The Rapporteur, Pierre Mertens, wondered whether beyond the “abstract human being” protected by the European Convention on Human Rights, particular categories of human beings should be protected, taking into account the particular situations that qualify and characterize them.¹⁹ The Rapporteur envisaged the following categories: women, children, aliens, vagrants, nomads, detainees, mentally handicapped persons, men in uniform, and foreign press correspondents.²⁰ More recently, a 2006 book on human rights by Elisabeth Reichert denoted vulnerable groups as including the following: women, children, victims of racism, persons with disabilities, persons with HIV-AIDS, older persons, and gays and lesbians.²¹ In 2013, Alexandra Timmer identified through case law of the European Court of Human Rights the following categories of vulnerable persons: children and persons with mental disabilities, persons in detention, women in domestic violence or precarious reproductive health situations, persons who are accused and persons who lack legal capacity, demonstrators and journalists, detention and expulsion of asylum seekers, Roma, people with impaired health, and (to some extent) asylum seekers.²² Beyond women and children, these newer categories correspond to modern trends in present day society.

II. UNITED NATIONS TREATIES PROTECTING CATEGORICAL RIGHTS

The more categorical approach to human rights led to the United Nation’s adoption of conventions specifically protecting particular categories of persons. The first of such treaties (among

18. Pierre Mertens, *Quel homme doit être pris en considération quant à la protection de ses droits*, in CONSEIL DE L’EUROPE, ASSEMBLÉE CONSULTATIVE, CONFÉRENCE PARLEMENTAIRE SUR LES DROITS DE L’HOMME, VIENNA, 18-20 OCTOBER 1971, 36 (1972).

19. *Id.* (“Au-delà de ‘l’homme abstrait’ que protègent déjà une série de textes, telle la Convention européenne des Droits de l’Homme, la réalité sociale nous met en présence de catégories particulières d’hommes situés, datés, spécifiés, fongibles’ que qualifie et caractérise une situation particulière et qu’il convient précisément de protéger à travers cette situation.”) [Beyond the abstract human being already protected by a number of texts, such as the European Convention on Human Rights, social reality confronts us with particular categories of human beings “situated, marked, specified, fungible” qualifying and characterizing a particular situation that precisely should be protected through that situation (author’s translation)].

20. *Id.* at 36–58.

21. ELIZABETH REICHERT, UNDERSTANDING HUMAN RIGHTS: AN EXERCISE BOOK 78–89 (2006).

22. Alexandra Timmer, *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 152–61 (Martha Fineman & Anna Grear eds., 2013).

the core international human rights treaties)²³ were the Convention on the Elimination of All Forms of Discrimination against Women,²⁴ adopted on 18 December 1979, and the Convention on the Rights of the Child,²⁵ adopted on 20 November 1989. These treaties were followed by the International Convention on the Protection of the Rights of All Migrant Workers,²⁶ adopted on 18 December 1990, and the Convention on the Rights of Persons with Disabilities,²⁷ adopted on 13 December 2006. It is interesting to give some attention to the position these conventions take with respect to economic and social rights.

A. *Discrimination Against Women*

In the Convention on the Elimination of All Forms of Discrimination against Women, economic and social rights are not specifically mentioned. The Convention defines “discrimination against women” as follows:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁸

The last words of that definition are deliberately confusing by enumerating the different categories of rights in a random order: “political, economic, social, cultural, civil or any other field.” The clear intention²⁹ is to reject any idea of possible differences

23. See United Nations Human Rights Office of the High Commissioner, *The Core International Human Rights Treaties*, 93, 119, U.N. Doc. ST/HR/3/Rev.1 (2014).

24. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

25. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

26. See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Convention on the Protection of the Rights of All Migrant Workers].

27. See Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

28. Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 24, art. 1.

29. As aimed at by the Court in its Chamber judgment of 9 October 1979 in the case *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 1, 12 ¶ 26 (1979), “[T]here is no water-tight division separating that sphere [of social and economic rights] from the field covered by the Convention” and by the Vienna World Conference on Human Rights in point 5 of its Declaration and Programme of Action, adopted on 25 June 1993: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” World Conference on Human Rights, *Vienna Declaration and Programme of Action* 3, ¶ 5 (1993).

between economic, social, and cultural rights, on the one hand, and civil and political rights, on the other hand. This sharply contrasts with the International Covenants on Human Rights. It may be explained, to some extent, by the method used in the Convention on discrimination against women: protecting a category of persons through the spectrum of the prohibition of discrimination, a principle that applies as well to economic, social, and cultural rights, as to civil and political rights.

B. *Rights of the Child*

With regard to economic, social and cultural rights, Article 4 of the Convention on the Rights of the Child states that “States Parties shall undertake such measures *to the maximum extent of their available resources* and, when needed, within the framework of international cooperation.”³⁰ The phrase “to the maximum extent of their available resources,” is clearly inspired by Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, which states, as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³¹

C. *Rights of Migrant Workers*

The International Convention on the Protection of the Rights of All Migrant Workers enumerates a long list of civil rights but does not specifically mention socio-economic rights. Among the rights it enumerates are the freedom “to leave any State,”³² “the right to life,”³³ the prohibition “to be subjected to torture or to cruel, inhuman or degrading treatment or punishment”³⁴ or “to be held in slavery or servitude,”³⁵ “the right to freedom of thought, conscience and religion,”³⁶ “the right to hold opinions without inter-

30. Convention of the Rights of the Child, *supra* note 25, at art. 4 (emphasis added).

31. See International Covenant on Economic, Social and Cultural Rights, *supra* note 4, art. 2.1 (emphasis added).

32. International Convention on the Protection of the Rights of All Migrant Workers, *supra* note 26, art. 8.

33. *Id.* art. 9.

34. *Id.* art. 10.

35. *Id.* art. 11.

36. *Id.* art. 12.

ference” and “the right to freedom of expression,”³⁷ the right to “privacy, family, home, correspondence or other communications,”³⁸ the right to “property,”³⁹ “the right to liberty and security of person,”⁴⁰ the right of persons “deprived of their liberty [to] be treated with humanity,”⁴¹ the right to fair trial,⁴² and the non-retroactivity of criminal law.⁴³ All those rights and freedoms belong to the category of civil rights.

D. *Rights of Persons with Disabilities*

Article 4.2 of the Convention on the Rights of Persons with Disabilities shares many similarities with the wording of Article 2.1 of the International Covenant on Economic, Social and Cultural Rights. Article 4.2 states, as follows:

With regard to economic, social and cultural rights, each State Party undertakes to take measures *to the maximum of its available resources* and, where needed, within the framework of international cooperation, *with a view to achieving progressively the full realization of these rights*, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.⁴⁴

The Convention on the Rights of Persons with Disabilities contains several provisions dealing with civil and political rights, such as the “right to life,”⁴⁵ “equal recognition before the law,”⁴⁶ “access to justice,”⁴⁷ “freedom from torture or cruel, inhuman or degrading treatment or punishment,”⁴⁸ “freedom from exploitation, violence and abuse,”⁴⁹ “protecting the integrity of the person,”⁵⁰ “liberty of movement and nationality,”⁵¹ “freedom of expression and opinion, and access to information,”⁵² “respect for privacy,”⁵³ “respect for

37. *Id.* art. 13.

38. *Id.* art. 14.

39. *Id.* art. 15.

40. *Id.* art. 16.

41. *Id.* art. 17.

42. *See id.* art. 18.

43. *See id.* art. 19.

44. Convention on the Rights of Persons with Disabilities, *supra* note 27, art. 4.2 (emphasis added).

45. *Id.* art. 10.

46. *Id.* art. 12.

47. *Id.* art. 13.

48. *Id.* art. 15.

49. *Id.* art. 16.

50. *Id.* art. 17.

51. *Id.* art. 18.

52. *Id.* art. 21.

53. *Id.* art. 22.

home and the family,”⁵⁴ and “participation in political and public life.”⁵⁵ The Convention also mentions economic, social, and cultural rights such as “education,”⁵⁶ “health,”⁵⁷ “habilitation and rehabilitation,”⁵⁸ “work and employment,”⁵⁹ “adequate living and social protection, [including adequate food, clothing, and housing],”⁶⁰ and “participation in cultural life, recreation, leisure and sport.”⁶¹

The Conventions on discrimination against women and on migrant workers are silent on the issue of social rights. Two other conventions, one on the rights of children and one on the rights of persons with disabilities, state explicitly that, with regard to economic, social, and cultural rights, the States Parties undertake measures *to the maximum of their available resources*.⁶² By adding that such measures are taken “with a view to achieving *progressively* the full realization of these rights,” the most recent convention (on persons with disabilities) is closest to that of the International Covenant on Economic, Social, and Cultural Rights.⁶³ This demonstrates that States are still aware, as they were when drafting the two International Covenants on Human Rights, that the obligations they have undertaken with regard to the implementation of social rights are different from those undertaken with regard to civil rights (comparatively, in the International Covenant on Civil and Political Rights, the States Parties do not undertake “to take steps”; instead, they undertake the more stringent obligation “*to respect and to ensure*” the rights recognized in the Covenant).⁶⁴

54. *Id.* art. 23.

55. *Id.* art. 29.

56. *Id.* art. 24.

57. *Id.* art. 25.

58. *Id.* art. 26.

59. *Id.* art. 27.

60. *Id.* art. 28.

61. *Id.* art. 30.

62. Convention of the Rights of the Child, *supra* note 25, art. 4; Convention on the Rights of Persons with Disabilities, *supra* note 27, art. 4.2.

63. Convention on the Rights of Persons with Disabilities, *supra* note 27, art. 4.2 (emphasis added).

64. Compare International Covenant on Economic, Social and Cultural Rights *supra* note 4, art. 2.1 (adopted Dec. 19, 1966) (emphasis added) with International Covenant on Civil and Political Rights, *supra* note 6, art. 2.1 (adopted Dec. 19, 1966) (emphasis added).

III. VULNERABLE GROUPS IN THE CASE LAW OF THE STRASBOURG COURT

In contrast with the European Convention on Human Rights, the European Court of Human Rights (the Court) in Strasbourg is moving away from protecting the universal human being and towards the protection of some specific categories of particularly vulnerable persons.

A. *Four Categories of Vulnerable Persons*

In judgments rendered in 2010 and 2011, the European Court of Human Rights identified four vulnerable groups: the Roma population, mentally disabled persons, asylum seekers, and people living with HIV.

1. The Roma Population

In a 2001 Grand Chamber⁶⁵ judgment, *Chapman v. the United Kingdom*, the applicant urged the Court to take into account recent international developments in reducing the margin of appreciation accorded to the States Parties, in light of the recognition of the problems of vulnerable groups, such as Gypsies.⁶⁶ The Court responded, as follows:

[T]here may be said to be an emerging [international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle . . . , not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.⁶⁷

However, the Court was not yet persuaded that there was “sufficiently concrete” consensus “for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation.”⁶⁸ Nevertheless, in a 2010 Grand Chamber case, *Oršuš and Others v. Croatia*, the Court, noting that the applicants were members of the Roma minority, did take into

65. See generally Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, arts. 26, 30 [hereinafter European Convention on Human Rights] (establishing that a Chamber of the Court, composed of seven judges, may relinquish jurisdiction in favor of the Grand Chamber of seventeen judges when a case pending before that Chamber raises a serious question or when the resolution of a question might have a result inconsistent with a judgment previously delivered by the Court).

66. See *Chapman v. United Kingdom*, 2001-I Eur. Ct. H.R. 41, ¶ 93.

67. *Id.*

68. *Id.* ¶ 94.

account the “specific position” of the Roma population.⁶⁹ The Court observed that, “as a result of their history, the Roma [had] become a specific type of disadvantaged and vulnerable minority” and that they therefore required “special protection.”⁷⁰

2. Mentally Disabled Persons

In a 2010 Chamber judgment, *Alajos Kiss v. Hungary*, the Court did not accept that “an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.”⁷¹ The Court stated, as follows:

[I]f a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. [. . .] The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.⁷²

3. Asylum Seekers

In a 2011 Grand Chamber judgment, *M.S.S. v. Belgium and Greece*, the Court identified a new category of vulnerable persons: “asylum seekers.”⁷³ Regarding his detention, the Court took into account that “the applicant, being an asylum-seeker, was particu-

69. See *Oršuš & Others v. Croatia*, 2010-II Eur. Ct. H.R. 247 ¶ 147.

70. *Id.*; see also *Horvath & Kiss v. Hungary*, App. No. 11146/11, Eur. Ct. H.R. ¶¶ 102, 110 (2013), <http://hudoc.echr.coe.int/eng?i=001-116124>.

71. *Alajos Kiss v. Hungary*, App. No. 38832/06, Eur. Ct. H.R. ¶ 42 (2010), <http://hudoc.echr.coe.int/eng?i=001-98800>.

72. *Id.*; see also *Mifobova v. Russia*, App. No. 5525/11, Eur. Ct. H.R. ¶ 54 (2015), <http://hudoc.echr.coe.int/eng?i=001-150792>; *Zagidulina v. Russia*, App. No. 11737/06, Eur. Ct. H.R. ¶ 52 (2013), <http://hudoc.echr.coe.int/eng?i=001-119043> (asserting that “individuals suffering from a mental illness constitute a particularly vulnerable group”). Cf. *Mircea Dumitrescu v. Romania*, App. No. 14609/10, Eur. Ct. H.R. ¶¶ 6, 59 (2013), <http://hudoc.echr.coe.int/eng?i=001-122975> (observing that the applicant, who suffered from flaccid paralysis of both of his lower limbs since he was a child, “undoubtedly belongs to a particularly vulnerable group given his severe disability”); *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, App. No. 47848/08, Eur. Ct. H.R. ¶ 135 (2014), <http://hudoc.echr.coe.int/eng?i=001-145577> (featuring an NGO acting on behalf of a “vulnerable patient” who had been left without any legal assistance or protection when admitted to a psychiatric institution).

73. See *M.S.S. v. Belgium & Greece*, 2011-I Eur. Ct. H.R. 255 ¶ 251; Marc Bossuyt, *Belgium Condemned for Inhuman or Degrading Treatment Due to Violations by Greece of EU Asylum*

larly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.”⁷⁴ Also, concerning the lack of accommodation of the applicant, the Court attached considerable importance to the applicant’s “status as an asylum-seeker and, as such, as a member of a particularly underprivileged and vulnerable population group in need of special protection.”⁷⁵ Referring to the European Union Council Directive 2003/9/EC (the Reception Conditions Directive) of January 27, 2003⁷⁶ “laying down minimum standards for the reception of asylum-seekers,” the Court stated that “the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law.”⁷⁷

In his dissent, Judge András Sajó of Hungary argued that asylum seekers cannot “be unconditionally considered as a particularly vulnerable group,” because they do not constitute a group that has been “historically subjected to prejudice with lasting consequences, resulting in their social exclusion.”⁷⁸ He states that the position of the Court on an applicant’s living conditions are “perfectly compatible with the concept of the Social Welfare State and social rights, at least for a constitutional court adjudicating on the basis of a national constitution that has [constitutionalized] the Social Welfare State.”⁷⁹ In Judge Sajó’s opinion, “[t]here seems to be only a small step between the Court’s present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the ‘vulnerable.’”⁸⁰

Law: M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, January 21, 2011, 5 EUR. HUM. RTS. L. REV. 582, 583 (2011) [hereinafter Bossuyt, M.S.S.].

74. M.S.S., 2011-I Eur. Ct. H.R. ¶ 232.

75. *Id.* ¶ 251.

76. 2003 *OJ* (L 31) 18–25. From July 21, 2015 on, that Directive has been replaced by Directive 2013/33/EU of the European Parliament and Council of June 26, 2013, “laying down standards for the reception of applicants for international protection.” 2013 *OJ* (L 180) 96–116.

77. M.S.S., 2011-I Eur. Ct. H.R. ¶ 250.

78. *Id.* at 101–02 (Sajó, J., dissenting). In his opinion, M.S.S. was not particularly vulnerable, *id.*, “the applicant was in possession of considerable means,” *id.* at 106 (he had paid his smuggler \$12,000, *id.* ¶ 15), and “as a former interpreter he was capable of communicating in a foreign environment,” *id.* at 106. The applicant himself alleged that he “spent months living in a state of the most extreme poverty . . . and the ever-present fear of being attacked and robbed.” *Id.* ¶ 254. The contradiction between those two elements apparently escaped the attention of the Court.

79. *Id.* at 103.

80. *Id.*

4. People Living with HIV

In its 2011 Chamber judgment, *Kiyutin v. Russia*, referring to its above mentioned statement in *Alajos Kiss*, the Court stated that “people living with HIV are a vulnerable group with a history of prejudice and [stigmatization] and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.”⁸¹ The Court took “into account that the applicant belonged to a particularly vulnerable group, that his exclusion has not been shown to have a reasonable and objective justification, and that the contested legislative provisions did not make room for an [individualized] evaluation.” Based on its findings, the Court found that “the Government overstepped the narrow margin of appreciation afforded to them in the instant case” and that the applicant had been “a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken in conjunction with Article 8.”⁸²

B. Evaluation

From March 2010 to March 2011, the Court identified four categories of persons constituting “particularly vulnerable groups,” but the approach adopted in doing so was not always the same.

1. The Approach in the Chamber Judgments

In *Kiyutin*, the last of those four judgments, the Court noted that it had previously identified a number of vulnerable groups that suffered different treatment on account of their sex,⁸³ sexual orientation,⁸⁴ race or ethnicity,⁸⁵ mental faculties,⁸⁶ or disability.⁸⁷ By referring to “different treatment,” the Court put the concept of

81. *Kiyutin v. Russia*, 439 Eur. Ct. H.R. ¶¶ 63–64 (2011).

82. *Id.* ¶ 74; *see also* *I.B. v. Greece*, App. No. 552/10 Eur. Ct. H.R. ¶¶ 79–81 (2013) (summarizing outcome of *Kiyutin* decision).

83. *See* *Abdulaziz, Cabales & Balkandali v. United Kingdom*, App. No. 9214/80, Eur. Ct. H.R. (Ct. Plen) ¶ 78 (1965); *Burghartz v. Switzerland*, App. No. 16213/90, Eur. Ct. H.R. (Ct. Plen App. No.) ¶ 27 (1994).

84. *See* *Schalk & Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. ¶ 97 (2010); *Smith & Grady v. United Kingdom*, App. No. 33985/96 Eur. Ct. H.R. ¶ 90 (2000); *Alajos Kiss*, App. No. 38832/06, Eur. Ct. H.R. ¶ 42; *E.B. v. France*, App. No. 43536/02, Eur. Ct. H.R. ¶ 94 (2008).

85. *See* *D.H. & Others v. Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. ¶ 182 (2007); *Timishev v. Russia*, App. No. 55974/00, Eur. Ct. H.R. ¶ 56 (2005).

86. *Alajos Kiss*, App. No. 38832/06, Eur. Ct. H.R. ¶ 42; *Shtukaturv v. Russia*, Eur. Ct. H.R. ¶ 95 (2008).

87. *Glor v. Switzerland*, 2009-III Eur. Ct. H.R. ¶ 84.

vulnerability in a context of discrimination.⁸⁸ These cases concern persons who were the subjects of a difference in treatment, considered discriminatory because the treatment was based on the grounds rendering them vulnerable. Such persons were treated less favorably than others not having those distinctive characteristics. The Chamber judgments in *Alajos Kiss* and *Kiyutin* proceeded from that approach: *Alajos Kiss* was prohibited from voting because he was mentally ill, and *Kiyutin* was refused a residence permit because he was living with HIV.

2. The Approach in the Grand Chamber Judgments

In the two Grand Chamber judgments, the approach taken was different. In *Oršuš and Others*, the Court required “special protection” because the applicants, as members of the Roma population, belonged to “a specific type of disadvantaged and vulnerable minority.”⁸⁹ In *M.S.S.*, the Court considered the applicant “in need of special protection” because, as an asylum seeker, the applicant was “a member of a particularly underprivileged and vulnerable population group.”⁹⁰ In those cases, the applicants were entitled to more favorable treatment than others because they were persons belonging to a particularly vulnerable group. Therefore, acceptable Government treatment of individuals not belonging to such vulnerable groups becomes unacceptable when it concerns individuals belonging to a “particularly vulnerable” group.

Asylum seekers are the best example of this approach: the brief detention of *M.S.S.*, which once lasted four days and another time seven days, was considered degrading, because “the applicant, being an asylum-seeker, was particularly vulnerable.”⁹¹ Moreover, the scope of application of Article 3 was also enlarged: while the Court stated that “Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home,” nor to “entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living,” the Court considered that Article 3 does require decent living conditions for asylum seekers as prescribed by the E.U. Reception Directive.⁹²

88. *Kiyutin*, 439 Eur. Ct. H.R. ¶ 63.

89. *Oršuš*, 2010-II Eur. Ct. H.R. ¶ 147.

90. *M.S.S.*, 2011-I Eur. Ct. H.R. ¶ 251.

91. *Id.* ¶ 232.

92. *Id.* ¶ 249.

The Court does not clearly distinguish between refugees and asylum seekers. A refugee is a person who may not be expelled or returned to his country, owing to a well-founded fear of being persecuted for reasons mentioned in the Geneva Convention Relating to the Status of Refugees.⁹³ Refugee status is obtained only when one is recognized as such by the competent authorities having determined that the conditions set out in the Geneva Convention are fulfilled. It is obvious that someone who had the courage to take risks for his liberty, his physical integrity, or even his life for reason of his opinion, deserves special protection. On the contrary, to obtain the “status” of asylum seeker, no conditions have to be fulfilled and no procedure followed: any person who applies for asylum to the authorities of a country other than his own is an asylum seeker.

Asylum seekers are a self-elected category. It is by deciding to seek asylum that they become members of the category of asylum seekers.⁹⁴ There are no reasons why an asylum seeker would automatically need special protection, regardless of his personal condition, his country of origin, or his motives for applying.⁹⁵ In *M.S.S.*, the Court stated that Article 3 of the Convention does not “entail any general obligation to give *refugees* financial assistance to enable them to maintain a certain standard of living,”⁹⁶ but that the same Article 3 entails “the obligation to provide accommodation and decent material conditions to impoverished *asylum-seekers*.”⁹⁷

In his dissent in *M.S.S.*, Judge Sajó criticized the reliance of the Court on E.U. law: “[h]uman rights as defined by the Convention differ from humanitarian concerns” and “[t]here is a difference [. . .] between European Union law and conventional obligations which originate from the prohibition of inhuman and degrading treatment.”⁹⁸ The Court imposed considerably larger obligations for the twenty-eight Member States of the European Union than for the nineteen other States Parties to the Convention who are not E.U. Members. Interpretations by the Court, relying on E.U.

93. Convention Relating to the Status of Refugees art. 1A(2), July 28, 1951, 189 U.N.T.S. 137.

94. Marc Bossuyt, *Judicial Activism in Strasbourg*, in INTERNATIONAL LAW IN SILVER PERSPECTIVE: CHALLENGES AHEAD 31, 40 (Karel Wellens ed., 2015) (hereinafter Bossuyt, *Judicial Activism*).

95. Marc Bossuyt, *The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues*, 5 EUR. J. HUM. RTS. 581, 594 (2015).

96. *M.S.S.*, 2011-1 Eur. Ct. H.R. ¶ 249 (emphasis added).

97. *Id.* ¶ 250 (emphasis added).

98. *Id.* at 104 (Sajó, J., concurring in part, dissenting in part).

regulations and directives, cannot affect the obligations under the Convention of the nineteen non-E.U. States Parties, nor can those obligations differ between E.U. and non-E.U. States Parties.⁹⁹ The rights that must be respected by the States Parties to the Convention are human rights, meaning that they are universal rights and not rights that can only be respected by a small number of affluent States. The obligations accepted by the States Parties to the Convention are minimum obligations. According to the preamble of the Convention, the Parties were resolved to take the “first steps” for the collective enforcement of “certain” rights stated in the Universal Declaration.¹⁰⁰ E.U. obligations additional to the European Convention should be supervised by the E.U. Court of Justice of Luxembourg, which is set up to uphold E.U. law by the twenty-eight Member States of the European Union, and not by the European Court of Human Rights of Strasbourg, which is set up to uphold respect of the European Convention by the forty-seven States parties to that Convention.¹⁰¹

3. The Approach in Judgments of the First Section

Yet another approach is adopted by the First Section¹⁰² of the Strasbourg Court in qualifying persons to be expelled or extradited by Russia to Kyrgyzstan or to Uzbekistan as belonging to “a particularly vulnerable group” or to “a vulnerable group.” In *Gayratbek Saliyev*,¹⁰³ *Kadirzhanov and Mamashev*,¹⁰⁴ and *Khamrakulov*,¹⁰⁵ ethnic Uzbeks from Kyrgyzstan are qualified as “particularly vulnera-

99. See Bossuyt, *Judicial Activism*, *supra* note 94, at 53.

100. Marc Bossuyt, *Should the Strasbourg Court Exercise More Self-Restraint*, 28 H.R.L.J. 321, 328 (2007).

101. Bossuyt, *Judicial Activism*, *supra* note 94, at 53; Bossuyt, *M.S.S.*, *supra* note 73, at 592.

102. The Court has five Sections. A Section of the Court is an administrative entity composed of nine or ten judges. European Court of Human Rights, *Composition of the Court* (2016), <http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#NewComponent-134615204144>. A Chamber, composed of seven judges, is a judicial formation of the Court within a given Section. Cases against the Russian Federation are dealt with by the First Section. European Convention on Human Rights, *supra* note 65, art. 27.1.

103. *Gayratbek Saliyev v. Russia*, App. No. 39093/13, Eur. Ct. H.R. ¶ 62 (2014).

104. *Kadirzhanov & Mamashev v. Russia*, Eur. Ct. H.R. ¶ 92 (2014).

105. *Khamrakulov v. Russia*, App. No. 68894/13, Eur. Ct. H.R. ¶ 66 (2015). The standard formula in those judgments reads, as follows:

Given the widespread use by the Kyrgyz authorities of torture and ill-treatment in order to obtain confessions from ethnic Uzbeks charged with involvement in the inter-ethnic riots in the Jalal-Abad Region, which has been reported by both U.N. bodies [the Committee on the Elimination of Racial Discrimination and the Committee against Torture] and reputable NGOs [Amnesty International and Human Rights Watch], the Court is satisfied that the applicant belongs to a *particularly vulnerable group*, the members of which are routinely subjected to treatment pro-

ble.” Persons charged of religiously or politically-motivated crimes in Uzbekistan, in *Eshonkulov*,¹⁰⁶ *Khalikov*,¹⁰⁷ and *Mukhitdinov*,¹⁰⁸ are termed “vulnerable.” No different meaning appeared to correspond to the Court’s slightly different qualification of the vulnerability of those applicants.

In any case, on the basis of the *M.S.S.*, they were already—as asylum seekers—entitled to special protection, with respect to their conditions of detention and their living conditions in the country where they have applied for asylum. Their present identification as persons belonging to “a (particularly) vulnerable group” (because they are ethnic Uzbeks from Kyrgyzstan or persons charged with religiously or politically-motivated crimes in Uzbekistan) provides them with substantial grounds for believing that they would be exposed to a real risk of being subjected to inhuman or degrading treatment upon return to their country of origin. That identification is not relevant for the “status” of asylum seeker but does constitute substantial grounds for obtaining the “status of refugee,” because Uzbeks having those specific characteristics may not be returned “to the frontiers of territories where their life or freedom would be threatened.”¹⁰⁹

In a judgment against Turkey,¹¹⁰ the Court found a violation in the conditions of detention of a forty-five year old British woman held in Istanbul Atatürk Airport for three days in an overcrowded room. Although she had not applied for asylum, the Court did not

scribed by Article 3 of the Convention in the requesting country. *Id.* (emphasis added).

In its judgment *Mamadaliyev v. Russia*, also, the Court noted that the *applicant*, an ethnic Uzbek in Kyrgyzstan, was as such “a member of a *particularly vulnerable group* that faced a serious risk of ill-treatment if handed over to the Kyrgyz authorities. *Mamadaliyev v. Russia*, App. No. 27239/13, Eur. Ct. H.R. ¶ 51 (2014) (emphasis added).

106. *Eshonkulov v. Russia*, App. No. 68900/13, Eur. Ct. H.R. ¶¶ 34–35 (2015).

107. *Khalikov v. Russia*, App. No. 66373/13, Eur. Ct. H.R. ¶¶ 42–43 (2015).

108. *Mukhitdinov v. Russia*, App. No. 20999/14, Eur. Ct. H.R. at ¶¶ 45–46 (2015). The standard formula in those judgments reads, as follows:

It has been the Court’s constant position that individuals whose extradition was sought by the Uzbek authorities on charges of religiously or politically motivated crimes constituted a *vulnerable group*, running a real risk of treatment contrary to Article 3 of the Convention in the event of their transfer to Uzbekistan. *Id.* ¶ 45 (emphasis added).

Similarly, in the Court’s judgment in *Mamazhonov v. Russia*, it concluded that the Russian authorities had substantial grounds for believing that the individuals, whose extradition was sought by the Uzbek authorities on charges of religiously or politically motivated crimes, constituted “a vulnerable group.” *Mamazhonov v. Russia*, App. No. 17239/13, Eur. Ct. H.R. ¶ 141 (2014).

109. Geneva Convention Relating to the Status of Refugees, *supra* note 93, art. 33.1.

110. *T. & A. v. Turkey*, App. No. 47146/11, Eur. Ct. H.R. (2014). Her detention in the Istanbul airport detention facility lasted from 9 till 12 November 2010. *Id.* §§ 9-22.

require a higher threshold.¹¹¹ It shows that the quality of being an asylum seeker has been used as a pretext for lowering the threshold of Article 3, rather than being the real ground for doing so. In all this, the Court also contributed to the widespread confusion between refugees, asylum seekers,¹¹² and irregular migrants or other aliens not authorized to stay on the territory of the States parties.

IV. THE ANALYSIS OF PERONI AND TIMMER

A 2013 study by Lourdes Peroni and Alexandra Timmer, entitled “Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law,” continues this analysis of “vulnerable groups.”¹¹³

A. A Mainly Sociological Analysis

The authors of the study noted that “the appearance of the vulnerable-group concept in the Court’s legal reasoning has so far escaped scholarly attention.”¹¹⁴ As a result, their analysis is confined “to the case law in which the Court speaks of vulnerable groups.”¹¹⁵ They do not deal with the “considerable amount of case-law in which the Court recognizes that the applicant is in a vulnerable position individually, notably in cases concerning prisoners or children,” because these cases “lack a group-centered analysis”¹¹⁶ The authors recognize that the meaning of vulnerability is “imprecise and contested.”¹¹⁷ They further describe these

111. In the absence of any element indicating that the treatment of the applicant in that case was harsher than in any case concerning asylum seekers in which the Court has found a violation of Article 3 of the Convention, a detention of three days constitutes a threshold which is even lower than in nearly all asylum cases. See Marc Bossuyt, *Is the European Court of Human Rights on a Slippery Slope?*, in THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH 27, 36 (Spyridon Flokaitis, Tom Zwart, & Julie Fraser eds., 2013).

112. See *supra* Part III.B.2.

113. Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 INT. J. CONST. L. 1056, 1056–1085 (2013).

114. *Id.* at 1056.

115. *Id.* at 1057 n.7 (emphasis added).

116. *Id.* For that other area of the Court’s case law, see Timmer, *supra* note 22.

117. Peroni & Timmer, *supra* note 113, at 1058; see also Solbakk Jan Helge, *Vulnerability: A Futile or Useful Principle in Healthcare Ethics?*, in THE SAGE HANDBOOK OF HEALTH CARE ETHICS: CORE AND EMERGING ISSUES 228, 229 (Ruth Chadwick et al., eds., 2011) (stating that the principle of vulnerability is complex and confusing); Mary C. Rouf, *Vulnerability, Vulnerable Populations, and Policy*, 14 KENNEDY INST. ETHICS J. 411, 411 (2004); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 9 (2008–2009).

new concepts as “[c]onfusing, complex, vague, [and] ambiguous,” and that ultimately, “what exactly ties all these [vulnerable] groups together is still not entirely clear.”¹¹⁸ As they understand it, the concept of “group vulnerability” used by the Court, has three characteristics: relational,¹¹⁹ particular,¹²⁰ and harm-based.¹²¹ In the authors’ view, the Court’s case law reveals “some blanks or inconsistencies,” because “there are more groups that could have fallen within the notion of vulnerable groups” such as “national minorities, religious minorities and LGBT people.”¹²²

Among the drawbacks of the Court’s account of group vulnerability, Peroni and Timmer particularly fear the risks of reinforcing the vulnerability of certain groups by essentializing,¹²³ stigmatizing,¹²⁴ victimizing, and paternalizing¹²⁵ them. In their opinion, the Court should ensure that, as follows:

- i) it is specific *why* it considers that *group* particularly vulnerable
- and ii) it demonstrates *why* that makes the *particular applicant* more prone to certain types of harm or why the applicant

118. Peroni & Timmer, *supra* note 113, at 1058, 1064.

119. *Id.* at 1064. The vulnerability is located “not in the individual alone but rather in her wider social circumstances,” “as shaped by social, historical, and institutional forces” and linked “to the social or institutional environment” of the applicant. *Id.*

120. *Id.* “[T]he Court tends to talk of ‘particularly vulnerable groups’ rather than just of ‘vulnerable groups’[;]” “people belonging to these groups are simply ‘more’ vulnerable than others[;]” and “the Court’s vulnerable subject is a group member whose vulnerability is shaped by specific group-based experiences.” *Id.*

121. *Id.* at 1064–69. The indicators “prejudice and stigmatization” point to “the harm of *misrecognition*,” because they are “less than full partners in social interaction,” and to “*maldistribution*,” because they “lack the necessary resources to interact with others as peers.” *Id.* (citing Nancy Fraser, *Rethinking Recognition*, 3 *NEW LEFT REV.* 107, 113 (2000)). Examples given for misrecognition are—besides the already mentioned judgments of Oršuš, 2010-II Eur. Ct. H.R.; Alajos Kiss, App. No. 38832/06, Eur. Ct. H.R.; Kiyutin, 439 Eur. Ct. H.R.; Horvath & Kiss, App. No. 11146/11, Eur. Ct. H.R.—D.H. & Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R.; Sampanis & Others v. Greece, App. No. 32526/05, Eur. Ct. H.R. (2008); V.C. v. Slovakia, 2011-IV Eur. Ct. H.R. (2011). Examples given for maldistribution are Yordanova & Others v. Bulgaria, App. No. 25446/06, Eur. Ct. H.R. (2012); M.S.S., 2011-I Eur. Ct. H.R. (“has significantly broadened the Court’s notion of group vulnerability”). According to the authors, “it is not quite clear whether *all* asylum seekers are to be considered vulnerable, or just the ones who arrive in Greece.” Peroni & Timmer, *supra* note 113, at 1069. Subsequent judgments of the Strasbourg Court tend towards the former preposition.

122. Peroni & Timmer, *supra* note 113, at 1070.

123. *See id.* at 1071 (“reifying one experience as paradigmatic, at the expense of other experiences”).

124. *See id.* at 1072 (vulnerability takes on a “master status” when it overshadows all other aspects of an applicant’s identity, his talents and abilities).

125. *See id.* In D.H. & Others, for example, the Court was “not satisfied that the parents of the Roma children . . . were capable of weighing up all the aspects of the situation and the consequences of giving their consent.” D.H. & Others, App. No. 57325/00, Eur. Ct. H.R. ¶203.

should be considered and treated as a vulnerable member of that group in the instant case. The test should therefore entail two interrelated levels of inquiry: collective and individual.¹²⁶

Peroni and Timmer nevertheless believe that the emergence of this concept has had “positive implications” in the Court’s case law, that it is “a welcome development,” and that it “represents a crucial step towards an enhanced antidiscrimination case law and a more robust idea of equality.”¹²⁷

Referring to the writing of Sandra Fredman,¹²⁸ Peroni and Timmer argue that the Court’s insertion of the notion of vulnerable groups has addressed the four chief aims of substantive equality: a) participation, by compensating for the absence of political voice; b) transformation, by removing the detriment which is attached to difference rather than difference itself; c) redistribution, by breaking the cycle of disadvantage; and d) recognition, by promoting “respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an identity group.”¹²⁹

B. *Different Manifestations of the Vulnerable Group Approach*

According to Peroni and Timmer, the vulnerable group approach of the Court is manifested as follows:

1. More Pronounced or Special Positive Obligations Under the European Convention on Human Rights¹³⁰:

In *Chapman*, the Court recognized “a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.”¹³¹ In *Oršuš*, the Court required “safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to [the] special needs of [Roma children] as members of a disadvan-

126. Peroni & Timmer, *supra* note 113, at 1073 (emphasis added).

127. *Id.* at 1074.

128. SANDRA FREDMAN, DISCRIMINATION LAW 25–33 (2d ed., 2011).

129. Peroni & Timmer, *supra* note 113, at 1074–75 (quoting FREDMAN, *supra* note 128, at 25).

130. See [First] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, enacted Mar. 20, 1952 (Right to Education) [hereinafter Protocol for European Convention on Human Rights]; European Convention on Human Rights, *supra* note 65, art. 14 (Prohibition of Discrimination) art. 3 (Prohibition of torture), art. 8 (Right to respect for private and family life).

131. Chapman, 2001-I Eur. Ct. H.R. ¶ 96.

taged group.”¹³² In *M.S.S.*, the Court stated that “the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.”¹³³ Peroni and Timmer described the Court as deriving “positive obligations in the social and economic sphere from the civil and political right encapsulated in Article 3 of the European Convention on Human Rights.”¹³⁴ In *V.C.*, the Court required “effective legal safeguards to protect the reproductive health of women of Roma origin in particular,” by ensuring that their “full and informed consent” in procedures concerning that matter was obtained.¹³⁵ In *Yordanova and Others*, the Court considered that “the principle of proportionality required that due consideration be given to the consequences of their removal and the risk of their becoming homeless,” meaning that “an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases.”¹³⁶ In *Horvath and Kiss*, the Court required “guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools,”¹³⁷ because otherwise these children are “unlikely to break out of this system of inferior education, resulting in their lower educational achievement and poorer prospects of employment.”¹³⁸

2. Increased Weight of Harm in the Scope and Proportionality Analyses:¹³⁹

In *M.S.S.*, as stated by Peroni and Timmer, “the effects of his detention take a dimension that they would not have taken if the case had concerned a less vulnerable applicant,” meaning “the ill treatment caused to the applicant looks bigger through the vulnerability lens.”¹⁴⁰ In *Yordanova and Others*, the Court held that “the applicants’ specificity as a social group and their needs must be

132. Oršuš v. Croatia, App. No. 15766/03, Eur. Ct. H.R. ¶ 182 (2010), <http://hudoc.echr.coe.int/eng?i=001-97689>.

133. *M.S.S.*, 2011-I Eur. Ct. H.R. ¶ 263.

134. Peroni & Timmer, *supra* note 113, at 1078.

135. *V.C.*, 2011-IV Eur. Ct. H.R. ¶¶ 145, 151.

136. *Yordanova*, App. No. 25446/06, Eur. Ct. H.R. ¶¶ 126, 130.

137. *Horvath & Kiss* App. No. 11146/11, Eur. Ct. H.R. ¶ 127.

138. *Id.* ¶ 115.

139. European Convention on Human Rights, *supra* note 65, arts. 3, 8.

140. Peroni & Timmer, *supra* note 113, at 1079.

one of the relevant factors in the proportionality assessment that the national authorities are under a duty to undertake.”¹⁴¹ Peroni and Timmer further illustrated the need for proportionality: “they are likely to experience harm *more acutely*.”¹⁴²

3. A More Narrow Margin of Appreciation:¹⁴³

In *Alajos Kiss*, the Court held that “the treatment of a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to *strict scrutiny*.”¹⁴⁴ Similarly, in *Kiyutin*, the Court observed, as follows:

If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower and it must have *very weighty reasons* for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the [individualized] evaluation of their capacities and needs.¹⁴⁵

Peroni and Timmer further clarified the emerging legal standard, writing “certain classifications are deemed suspect ‘*per se*’ . . . when they concern groups of people that have been historically discriminated against.”¹⁴⁶

Addressing concerns that the Court is overstepping its proper role by transforming political rights into social rights, the authors reply that vulnerability might be a useful guiding principle that could be viewed as “a *limiting* rather than a *limitless* principle”—“in the prioritization of scarce resources, states give preference to those whose needs they consider most pressing.”¹⁴⁷ Concerning the margin of appreciation, the authors stress “that the Court never uses group vulnerability as an *automatic* trigger,” and that the Court’s cue should be the confirmation by activities of international organizations and human rights reports that “there is a structural failure to protect the human rights of a particular group.”¹⁴⁸

141. Yordanova, App. No. 25446/06, Eur. Ct. H.R. ¶ 129.

142. Peroni & Timmer, *supra* note 113, at 1080 (emphasis added).

143. European Convention on Human Rights, *supra* note 65, art. 14.

144. Alajos Kiss, App. No. 38832/06, Eur. Ct. H.R. ¶ 44 (emphasis added).

145. Kiyutin, 439 Eur. Ct. H.R. ¶ 63 (emphasis added).

146. Peroni & Timmer, *supra* note 113, at 1081.

147. *Id.* at 1083–84.

148. *Id.* at 1084.

In conclusion, Peroni and Timmer “perceive the Court’s increasing use of group vulnerability reasoning as a welcome development” and “as a step towards a more inclusive universal human rights subject,” provided that it avoids the pitfalls of “essentialism, stigmatization, and paternalism.”¹⁴⁹

C. Evaluation

The most useful contribution of Peroni and Timmer involves their analysis of the Court’s different manifestations of an approach toward “vulnerable groups”: a) the Court imposes even more positive obligations on States; b) an increased weight of harm in the scope and proportionality analysis; and c) a narrower margin of appreciation.¹⁵⁰ The last two manifestations are closely linked: a narrower margin of appreciation (of the government concerned) results in reducing the chances for a State to pass the proportionality test. Not passing that test results in a finding of discrimination. Notions such as “strict scrutiny”¹⁵¹ and “very weighty reasons,”¹⁵² however, are not necessarily confined to vulnerable groups. It is questionable whether the Court really needs a concept, such as “vulnerable groups,” to find a violation of the Convention when it wants to do so. However, even more questionable is the imposition on States of additional positive obligations.

The present author has already criticized the Court for “attribut[ing] positive obligations to virtually all Convention rights,” despite the negative formulation in the Convention of almost all these rights.¹⁵³ Among the dangers of the creation of positive obligations, he mentioned the non-respect of the principle of Separation of Powers,¹⁵⁴ the abandonment of the restraint

149. *Id.* at 1085.

150. Peroni & Timmer, *supra* note 113, at 1076–82.

151. Since January 1, 2010, thirty hits (occurrences of the Court using the term “strict scrutiny”) are found in judgments in the HUDOC database, <http://hudoc.echr.coe.int/>, which provides access to the case law of the European Court of Human Rights, the European Commission of Human Rights, and the Committee of Ministers of the Council of Europe.

152. Since January 1, 2010, there has been forty-eight hits (occurrences of the Court using the term “very weighty reasons”) in judgments found in the HUDOC database.

153. Bossuyt, *Judicial Activism*, *supra* note 94, at 33–37.

154. “The Court is entitled to interpret the rules, not to extend its own competences by creating new rules” and “it is up to the political authorities of the state to set up priorities as far as the rights, their beneficiaries and the timetable of their realization is concerned.” *Id.* at 50.

required in interpreting international treaties,¹⁵⁵ the deprivation of human rights of their universality,¹⁵⁶ and the relinquishing of “a considerable degree of sovereignty from the national legislator to the international judge, much more than is the case with respect to civil rights and fundamental freedoms.”¹⁵⁷ Not every imposition of a positive obligation transforms a civil right into a social right, but “when positive obligations are attributed to it which entail expenditures that many states cannot afford and that require choices and priorities at the expense of other rights or other categories of persons . . . a civil right loses its very nature.”¹⁵⁸ To the extent that the recognition of “particularly vulnerable groups” leads to such a result, it is not a development that should be welcomed.

Even more unwelcome is the search for “a more robust idea of equality,” which must be understood as “substantive equality.”¹⁵⁹ Article 14 of the European Convention does not prescribe the attainment of substantive equality.¹⁶⁰ First, Article 14 does not contain a general prohibition of discrimination, but it prohibits discrimination in the “enjoyment of the rights and freedoms set forth in this Convention.”¹⁶¹ Second, even the general prohibition contained in the Protocol 12 to the European Convention, adopted in November 2000, does not aim to achieve substantive equality. Its sole difference is that its application is not limited to “the rights and freedoms set forth” in the Convention, but is extended to the “enjoyment of any right set forth by law.”¹⁶² It applies to every right recognized in the domestic legal order, even when it is not set forth in the Convention. Because the term “any right” is not qualified, it extends as well to economic, social and cultural rights as it does to civil and political rights. However, it can only apply to “rights.” The prohibition of discrimination is not applicable to

155. “The knowledge that the jurisdiction of the Court is based on an agreement given by the states parties in the form of an international treaty, should induce the Court to exercise its jurisdiction with great restraint” *Id.* at 51.

156. “The extension of the Court’s jurisdiction to economic and social rights leads to the development of a purely regional human rights standard, unattainable by many countries and depriving human rights of their universality, which is one of the strengths of the traditional concept of human rights.” *Id.* at 51–52.

157. *Id.* at 52.

158. *Id.* at 48.

159. Peroni & Timmer, *supra* note 113, at 1074–75.

160. European Convention on Human Rights, *supra* note 65, art. 14.

161. *Id.*

162. Compare European Convention on Human Rights, *supra* note 65, art. 14, with Protocol for European Convention on Human Rights 12, *supra* note 65, art. 1.1.

interests not protected by law.¹⁶³ If the need is felt to prohibit discrimination to such an interest, it should be subjected to legal regulations that would entail, *ipso facto*, the application of the prohibition of discrimination to that legally regulated interest, as it will have become a right.¹⁶⁴

Both the discrimination clause of Article 14 of the European Convention and the general prohibition of discrimination in Protocol 12 guarantee “equality before the law,” concerning the application of the law, and “equality in the law,” concerning the creation of the law.¹⁶⁵ But neither “equality before the law” nor “equality in the law” guarantees “substantive equality.”¹⁶⁶ All persons are equal in rights, despite the possible inequalities in every one’s material position. Of course, it is laudable when governments pursue policies aimed specifically at decreasing those inequalities and take special measures to that effect, but this is the task of the legislature and the executive—not of courts, and certainly not of an international court. Either there is a misunderstanding about what is meant by “substantive equality” or the Court is acting beyond its jurisdiction.

V. CONCLUSION

Not everyone is equally enthusiastic in welcoming international treaties aimed at protecting categorical rights. Governments frequently complain about the heavy burdens that the reporting systems of treaties lay on their administrative services. Nevertheless, the continuous expansion of human rights treaties and the status of ratification of those treaties reveal how difficult it is for them to resist initiatives to draft such treaties and to withstand appeals to become parties to newly adopted human rights conventions or protocols. In any event, the legitimacy of those instruments cannot be questioned. Only States that, out of their free will, accept to

163. See BOSSUYT, EQUALITY & DISCRIMINATION, *supra* note 13, at 262; Marc Bossuyt *Prohibition of Discrimination and the Concept of Affirmative Action*, in BRINGING INTERNATIONAL HUMAN RIGHTS LAW HOME, 93–106 (2000).

164. *Id.*

165. Marc Bossuyt, *The Principle of Equality in Article 26 of the International Covenant on Civil and Political Rights*, in THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 269, 279–80 (Armand de Mestral et al., eds., 1986).

166. To the extent that the second sentence of Article 26 of the International Covenant on Civil and Political Rights (“In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination . . .”) could be understood as containing such a guarantee, it may not be applied by the judiciary without previous intervention of the legislature, since its wording is not self-sufficient. See International Convention on Civil and Political Rights, *supra* note 6, art. 26.

become parties to such treaties are in fact bound by them. In fact, two such human rights treaties are among the most frequently ratified.¹⁶⁷

The legitimacy of imposing upon States Parties to the European Convention more positive obligations by identifying “particularly vulnerable groups” is more questionable. It is doubtful that the States Parties to the European Convention have agreed that the Court is entitled to act in such a way. The Court has jurisdiction to interpret the Convention but not to amend it by imposing obligations on the States Parties “when it is not possible—in good faith—to take it for granted that they are inherent or implied in the civil rights and fundamental freedoms guaranteed by the Convention.”¹⁶⁸

And lastly, what will further developments in identifying “particularly vulnerable groups” accomplish? If women, children, the elderly, aliens, people with disabilities or suffering from illnesses, people living in poverty, and people belonging to racial, ethnic, religious, or sexual minorities are all classified as “particularly vulnerable” persons, the overwhelming majority of any country’s population will then be recognized as “particularly vulnerable.” If they all deserve particular attention from the Government and special efforts must be undertaken to meet their specific needs, one may wonder whether the small minority of persons not belonging to any of those groups do not also become vulnerable since they are not entitled to any special effort.

167. As of January 1, 2016, 196 States are parties to the Convention on the Rights of the Child, *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en, and 189 to the Convention on Elimination of All Forms of Discrimination against Women, *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. Furthermore, in less than ten years, 161 States have ratified the Convention on the Rights of Persons with Disabilities. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en. The International Convention on the Protection of the Rights of All Migrant Workers is only ratified by forty-eight States. *International Convention on the Protection of the Rights of All Migrant Workers*, UNITED NATIONS TREATY COLLECTION (2016), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en.

168. See Bossuyt, *Judicial Activism*, *supra* note 94, at 48.