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VULNERABILITY AND ITS IMPLICATIONS: SOME COMMENTS IN THE LIGHT OF THE STRASBOURG CASE LAW CONCERNING ASYLUM SEEKERS

VULNERABILIDADE E SUAS IMPLICAÇÕES: ALGUNS COMENTÁRIOS À LUZ DA JURISPRUDÊNCIA DE ESTRASBURGO SOBRE OS REQUERENTES DE ASILO

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Abstract: A decade has passed since the European Court of Human Rights (ECtHR/Court) for the first time recognized asylum seekers as 'a particularly underprivileged and vulnerable population group in need of special protection' (ECtHR, 2011). For many years this approach could be seen as forming a part of the Strasbourg paradigm with regard to the protection of rights and freedoms of foreigners seeking for international protection in States Parties to the European Convention on Human Rights (ECHR). Despite a noticeable shift within this paradigm (see especially *Ilias and Ahmed v. Hungary*, 2019), vulnerability – although now on more individualized, in contrast to its group form, when the applicant's vulnerability is determined by belonging to a specific category of persons still have a role to play in the ECtHR's assessments of responsibility of the respondent States with regard to the violations of the applicant's rights. Recognizing vulnerability as a normative category in the Strasbourg case law, thus as a qualification that produces concrete, legal effects for States' obligations under the ECHR (which must be seen as a primary, overriding justification for its application by the Court), the present article examines the ECtHR's references to vulnerability of asylum seekers, explaining the structure of this argument (how and to what extent it is applied, on what grounds), with a special focus on the legal consequences associated to it in the light of the Strasbourg case law.
Keywords: European Convention on Human Rights, European Court of Human Right, vulnerability, asylum-seekers.

Resumo: Uma década se passou desde que o Tribunal Europeu de Direitos Humanos pela primeira vez reconheceu os requerentes de asilo como "um grupo populacional particularmente desprivilegiado e vulnerável que precisa de proteção especial" (M.S.S. v. Bélgica e Grécia, 2011). Por muitos anos, esta abordagem pode ser vista como parte do paradigma de Estrasburgo no que diz respeito à proteção dos direitos e liberdades dos estrangeiros que buscam proteção internacional nos Estados Partes da Convenção Européia de Direitos Humanos. Apesar de uma mudança notável nesse paradigma (ver especialmente Ilias e Ahmed v. Hungria, 2019), a vulnerabilidade – embora agora de forma mais individualizada, em contraste com sua forma de grupo, quando a vulnerabilidade do solicitante é determinada por pertencer a uma categoria específica de pessoas ainda têm um papel a desempenhar nas avaliações do Tribunal sobre a responsabilidade dos Estados demandados em relação às violações dos direitos do demandante. O objetivo deste artigo é examinar as referências da Corte à vulnerabilidade dos requerentes de asilo, explicando a estrutura desse argumento, com especial incidência nas consequências jurídicas que lhe estão associadas à luz da jurisprudência de Estrasburgo. O artigo reconhece, pois, a vulnerabilidade como uma categoria normativa na jurisprudência de Estrasburgo, como uma qualificação que produz efeitos jurídicos concretos para as obrigações dos Estados nos termos da Convenção.
Palavras-chave: Convenção Europeia de Direitos Humanos. Tribunal Europeu de Direitos Humanos. Vulnerabilidade. Asilo.

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Introduction

In 2011 the European Court of Human Rights (ECtHR/Court) delivered its judgment in the case of *M.S.S. v. Belgium and Greece*, in which the Court recognized for the first time that asylum seekers constitute 'a particularly underprivileged and vulnerable population group in need of special protection[2] (ECtHR, 2011) and made it a key argument in assessing the responsibility of the respondent States with regard to the violations of the applicant's rights. The significance of this finding has been recognized in human rights and migration literature (Brandl & Czech, 2017), as well as by the ECtHR itself, which on a later occasion noted that with *M.S.S. v. Belgium and Greece* 'initiated a change in its jurisprudence[3] (ECtHR, 2015) concerning migrants seeking international protection, however it also met certain criticism (including on the part of some judges of the Court)[4]. Despite controversies, the ECtHR had consistently maintained for many years its approach recognizing asylum seekers as a vulnerable group, which resulted in recognizing that each such person required a special protection under the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms[5], that is the European Convention on Human Rights (ECHR/Convention)[6]. Thus, for many years this approach could be seen as forming a part of the Strasbourg paradigm with regard to the protection of rights and freedoms of foreigners seeking for international protection. Although the Court's judgment of 2019 in the case of *Ilias and Ahmed v. Hungary* (ECtHR, 2019) may be perceived as reflection of a shift in this paradigm[7], for it actually

[2] For commentaries on the judgments in various aspects see for example: 1) Clayton G. (2011). Asylum seekers in Europe: M.S.S. v. Belgium and Greece, in: Human Rights Law Review, 2011, 11(4), 758-772; 2) Brandl U., Czech Ph. (2017), General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?. p. 248. In Ippolito F., Iglesias Sánchez S. (Eds.). *Protecting Vulnerable Groups. The European Human Rights Framework*; 3) Mikołajczyk B. (2015). Europejski Trybunał Praw Człowieka a „system dubliński". Uwagi w związku z wyrokiem ETPCz w sprawie M.S.S. przeciwko Belgii i Grecji. In: Brodowska L., Kuźniar-Kwiatek D. (Eds.). *Unia Europejska a prawo międzynarodowe: księga jubileuszowa dedykowana Prof. Elżbiecie Dyni*. Rzeszów 2015, s. 267-276. Also more recently: Baumgärtel M. (2020). Facing the challenge of migratory vulnerability in the European Court of Human Rights. In: Netherlands Quarterly of Human Rights. v. 38(1), 12-29.

[3] (delivered by the Chamber, subsequently replaced by the judgment of the Grand Chamber strucking the application from the list without entering into the merits, see: the Grand Chamber judgment of 17 Nov. 2016).

[4] Eg. Partly Concurring and Partly Dissenting Opinion of Judge Sajó, *M.S.S. v. Belgium and Greece*, [GC]. Dissenting Opinion of Judge Ranzoni, joined by Judges López Guerra, Sicilianos and P. Lemmens, the Grand Chamber judgment of 17 Nov. 2016 in the case of *V.M. and Others v. Belgium*, p. 5.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (CETS n. 005); the ECHR was opened for signature in Rome on 4 Nov. 1950, it entered into force on 3 Dec. 1953. Currently there are 47 State Parties to the Convention.

[6] Compare: Brandl and Czech. p. 251. See decisions of the ECtHR: *Mohammed Hussein and Others v, the Netherlands and Italy,* n. 27725/10, of 02 April 2013, particularly p. 76-78; *Daytbegova and Magomedova v. Austria*, n. 6198/12, of 04 Jun. 2013, p. 65; *Halimi v. Austria and Italy*, n. 53852/11, of 18 Jun. 2013; in particular p. 64. Also, indirectly, references to the *M.S.S. v. Belgium and Greece* judgment in two decisions on the Nagorno-Karabakh conflict, in which the ECtHR found that, by analogy with asylum seekers, a particularly vulnerable and underprivileged population group are displaced persons (*Chiragov and Others v. Armenia*, n. 13216/05, of 14.12.2011, para 146; *Sargsyan v. Azerbaijan*, n. 40167/06, of 14.12.2011, p. 145).

[7] The judgment is part of Strasbourg jurisprudence, in which the Court acknowledges that the so-called the migration crisis in Europe constitutes an important context, which should be taken into account by the Court, when assessing violations of the ECHR.

departs from the group vulnerability argument with regard to asylum seekers, it should be noted that it does not abandon vulnerability considerations as such.

This article does not purport to analyze in details the shift in the Strasbourg paradigm with regard to asylum seekers and application of group vulnerability argument (its rationale, dynamics and effects). Rather it takes a more modest perspective, tending to describe and explain the legal effects associated with the vulnerability characteristics in the light of the case law concerning asylum seekers. With this aim in mind, it precedes with some comments on legal effects, with a brief description of vulnerability as a normative category in the Strasbourg case law and explanation of how the Court applied in its case law vulnerability argument to asylum seekers.

Vulnerability as a normative category in the Strasbourg case law

In general terms, vulnerability of a person may be described as an increased susceptibility of that person to threats and risks of harm (therefore being a potential or actual risks) and in consequence also to violations of his/her human rights[8] (Nifosi-Sutton, 2017), wherein such susceptibility may have various origins/sources. The ECtHR for over a dozen of years now has been paying increasing attention to the applicant's vulnerability when assessing alleged violations of human rights enshrined in the ECHR[9]. Particular attention is payed to the ECtHR's reference to vulnerability regarding a certain population group[10]. Then the entire, specified category of entities is considered to be particularly vulnerable, and thus the applicant's vulnerability is determined by belonging to this category of persons, and not by his/her individual characteristics or circumstances in which he or she was found[11].

The ECtHR does not provide an abstract definition of vulnerability in its jurisprudence[12] and the content of the concept must be decoded on *the case by case* basis. The argument based on

[8] The Protection of Vulnerable Groups under International Human Rights Law. London. p. 4.

[9] See the data presented in: Al Tamimi Y. (2016). *T*he Protection of Vulnerable Groups and Individuals by the European Court of Human Rights. In: Journal européen des droits de l'homme/European Journal of Human Rights". n. 5, p. 563 (the data cover the period to the end of 2013, but show well the quantitative change that has occurred in this respect since 2006).

[10] About vulnerability in international human rights law see e.g.: Xenos D., (2009). The Human Rights of Vulnerable. In: *The International Journal of Human Rights, 13*(4), 591-614; Peroni L., Timmer A. (2013), Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law. *In:* International *Journal of Constitutional Law.* 11(4), 1056-1085. https://www.academic.oup.com/icon/article/11/4/1056/698712 [access: 15 Feb. 2020]; Timmer A. (2013). A Quiet Revolution: Vulnerability in the European Court of Human Rights. p. 147-170. In: Fineman M., Grear A (Eds.). Vulnerability: Reflections on a New Ethical Foundation for Law and Politics, Farnham 2013; Ruet C. (2015). La vulnérabilité dans la jurisprudence de la Cour européenne des droits de l'homme. In: Revue trimestrielle des droits de l'homme, n. 102, p. 317-340; Al Tamimi; Ippolito F., Iglesias Sánchez S. (Eds.). (2017) *Protecting Vulnerable Groups. The European Human Rights Framework*; Oxford; Nifosi-Sutton.

[11] For discussion on advantages and disadvantages of this approach see i.a. Baumgärtel M. (2020). Facing the challenge of migratory vulnerability in the European Court of Human Rights. In: Netherlands Quarterly of Human Rights. v. 38(1), 12-29 (with references).

[12] The ECtHR avoids an 'abstract generalization' in the framework of adjudication (Mowbray, 2005). The Creativity of the European Court of Human Rights. Human Rights Law Review. n. 1, p. 61, and one may argue that introducing by the Court specific terms always has a practical justification.

vulnerability appears to be flexible, leaving to the Court a substantial discretion to assess the facts in a particular case through the prism of vulnerability and to attribute to them certain consequences as regards the responsibility of the States parties to the ECHR. While, there is some ambiguity with this regard and the Court does not apply vulnerability in a systematized, coherent manner, one may also agree with those Authors, who see the advantages of such an approach with its flexibility that allows the Court to adequately take into account specific circumstances and contexts of the case (Baumgärtel, 2020).

What is evident, is that the Court customarily associates the vulnerability characteristic with the requirement of 'special considerations" or 'special protection'[13]. This requirement, in turn, may entail an extended (broadened) scope of positive obligations[14] incumbent on State-Parties to the ECHR or lead to narrowing down the margin of appreciation which is normally granted to States with regard to limitations imposed by them on the enjoyment of human rights and fundamental freedoms[15]. In addition, vulnerability of the applicant/victim of a violation of the ECHR may impact his/her procedural status in the framework of the Convention mechanism[16]. All the above means that, the characteristic of vulnerability clearly has legal effects in the jurisprudence of the ECtHR and as such it must be perceived as a normative category in the Strasbourg case law, notwithstanding any lacks of clarity or consistency which may accompany its application[17].

Vulnerability of asylum seekers in the light of the Strasbourg case law

1. Before 2011, when the Court delivered its judgment in the case of *M.S.S. v. Belgium and Greece*, in cases where the applicants were asylum seekers, the Court (and the European Commission of Human Rights) had drawn attention to the vulnerability of some of the applicants, but such vulnerability resulted, for example, from being a minor[18], belonging to a discriminated national minority (ECtHR, 2008; ECtHR, 2010) or sexual minority (ECtHR, 2004a; ECtHR, 2004b) or from a detention situation where the applicant, as 'a foreigner in prison', was under the sole control of the state (ECtHR, 2000). The applicants' particular vulnerability underlined in the arguments of the ECtHR did not, however, stem from their status as asylum seekers[19]. It is also worth adding that, in principle, it was not a decisive argument in the sense that, for example, in

[13] Eg. *Oršuš and Others v. Croatia*,[GC] n. 15766/03, of 16 Mar. 2010, para 147. Also e.g. Baumgärtel (2020, p. 23).

[14] Eg. with regard to detainees see: ECtHR, *Keller v. Russia,* n. 26824/04, of 17 Oct. 2013, in particular p. 81; with regard to Roma people see: ECtHR, *Horváth and Kiss v. Hungary*, n. 11146/11, of 29 Jan. 2013 in particular p. 116.

[15] With regard to alleged violations of Article 14 of the ECHR (prohibition of discrimination) see: ECtHR, *Kiyutin v. Russia,* n. 2700/10, of 10 Marc. 2011, in particular p. 63.

[16] Eg. ECtHR, *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, n. 47848/08, of 17 Jul. 2014 (with regard to locus standi requirement).

[17] Compare Peroni and Timmer. With regard to vulnerability the Authors claims that 't]he term *does* something: it allows the Court to address different aspects of inequality in a more substantive manner'.

[18] European Commission of Human Rights, Özdemir *v. the Netherlands*, n. 35758/97, of 07 Sep. 1998.

[19] But see also: ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* n. 13178/03, of 12 Dec. 2006.

most cases relating to the allegation of inhuman and degrading treatment in breach of Article 3 of the ECHR, it was not sufficient to exceed the minimum level of severity required - despite the applicant's vulnerability being noted, their allegations were considered manifestly unfounded and the complaints inadmissible[20].

2. Against this background, the already mentioned judgment in the case of *M.S.S. v. Belgium and Greece* case stood out, for the Court took a totally different approach compering to its previous case law. It recognized all asylum seekers as a particularly underprivileged and vulnerable population group (ECtHR, 2011). The case concerned an Afghan citizen who, having fled Kabul via Iran and Turkey, reached Greece. There the applicant was imprisoned for a week, after which he was released and ordered to leave the territory. M.S.S. did not apply for international protection in Greece, but did so only in Belgium, to which he fled. The Belgian Authority, on the basis of the rules in force in the European Union at the time[21], asked the Greek authorities to take responsibility for examining the complainant's asylum application. After receiving confirmation from them that the applicant would be able to apply for asylum in Greece, Belgium deported M.S.S. On his arrival in Athens the applicant was arrested and placed in a detention facility near the airport. After four days, he was released and received a document proving his status as an asylum seeker. M.S.S. had no means of subsistence or a place where he could live and use sanitary facilities and facilities. He lived in one of the Athens parks where other Afghans seeking asylum in Greece gathered. He made two more attempts to leave Greece, once using false documents, for which he was again arrested and imprisoned in the same detention facility near Athens airport. At the time when the ECtHR was examining the complaint, the procedure of his asylum application had still not been completed and the applicant's living conditions had not improved in any way.

In the judgment the Grand Chamber referred on several occasions to the applicant's exceptional situation as a particularly vulnerable person. First, this argument was applied when the ECtHR assessed the compliance of the conditions of the applicant's detention during his double imprisonment by the Greek authorities in the airport detention center with the requirements of Article 3 of the ECHR, and secondly, when the Grand Chamber examined the complaint of a violation of the same provision of the Convention in relation to the conditions of extreme poverty in which the applicant had to live in Greece while pending the examination of the application for international protection.

In the detention center the applicant, inter alia, was held in a small room with the other 20 inmates, had no access to the fresh air, was given little food and slept either on a dirty mattress or on the floor, and the use of the toilet was only allowed with the permission of the guards. In assessing whether the applicant's detention under the above conditions constituted a violation of

[20] Based on the Author's review of cases available in the Hudoc database. See the decisions invoked supra. In contrast: *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium.*

[21] In that time the so called Dublin II Regulation (OJ 25 Feb. 2003, L 50, p. 1-10).

Art. 3 of the Convention, despite the fact that it lasted relatively short (4 days for the first and 7 days for the second time), the Court emphasized that it 'must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously' (ECtHR, 2011, p. 232). Later in its argumentation, the ECtHR added that: 'the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker' (ECtHR, 2011, p. 233).

Next, when dealing with the alleged violation of Article 3 of the ECHR on the basis of the conditions of extreme poverty in which the applicant lived while he waited for the asylum proceedings to be completed in his case, the Court stated 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 (…). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive (ECtHR, 2011, p. 251).

Assessing the measures taken by the Greek authorities, the ECtHR also noted that it 'was known' that asylum seekers lived in Greece in 'the particular state of insecurity and vulnerability' and for that reason the state authorities should provide shelter for M.S.S., without waiting for him to go to the police station with the information that he is homeless'(ECtHR, 2011, p. 259).

In conclusion, regarding violation of Article 3 of the ECHR by Greece, taking into account the applicant's situation, the Court found 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 (ECtHR, 2011, p. 263).

The above excerpts from the judgment shows that in the *M.S.S. v. Belgium and Greece* case the qualification of the applicant as a vulnerable did not stem from his individual characteristics, nor a particular affiliation distinguishing him from other asylum seekers, nor his individual experiences, but it resulted of the very status of the asylum-seeker, to whom vulnerability is inherently linked. According to this approach, it is an affiliation with this particularly vulnerable group of people – regardless of its internal diversity – that is decisive and in consequence each individual belonging to it is entitled to such special protection[22].

In the subsequent case law the Court confirmed that qualification of asylum seekers as a vulnerable group is applicable to each one of them, regardless of the country in which he or she seeks

[22] See Brandl and Czech, p. 249-251. See also Partly Concurring and Partly Dissenting Opinion of Judge Sajó, *M.S.S. v. Belgium and Greece*, [GC].

international protection[23]. Also it clearly distinguished the status of asylum seekers as a vulnerable group from the status of foreigners whose application for asylum has already been examined and rejected or who have not applied for it at all[24].

3. The recognition by the ECtHR of asylum seekers as a vulnerable group in need of special protection under the ECHR was not based directly on the text of the Convention, but was the result of its judicial interpretation by the Court. In doing so, the ECtHR invoked the existence of a 'broad international and European consensus', which it identified exclusively through references to the Geneva Convention, UNHCR's activities and EU reception regulations. Referring to the European consensus or individual acts of international, European and national law has already played an important argumentative role when the Court decided to distinguish a particular group of people as a vulnerable one for the purposes of the Convention[25]. However in such instances, the consensus was treated as a confirmation that a given group had experienced in the past discrimination, marginalization or prejudice by society, leading to their social exclusion[26], which in turn was the source and cause of the Court's recognition of their vulnerability. It is therefore noteworthy that, with regard to asylum seekers, the ECtHR did not explicitly indicate the reasons to distinguish them as a particularly vulnerable group other than 'broad international and European consensus', which did not identify the source of vulnerability, but rather confirmed the need for 'special protection' of this category of entities[27].

Thus, when trying to understand the essence/source of vulnerability regarding asylum seekers, one should search for the guidelines in the Court's findings with regard specific circumstances of the *M.S.S. v. Belgium and Greece* case. The analysis reveals that in the light of the judgment there are two elements which make asylum-seekers particularly vulnerable, since such persons not only

[23] See a number of decisions and judgments in cases of asylum seekers in Italy (e.g. ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy*, n. 27725/10, of 02 Apr. 2013,76; ECtHR, *Halimi v. Austria and Italy,* N. 53852/11, 18 Jun. 2013; ECtHR, *Tarakhel v. Switzerland*, [GC], of 04 Nov. 2014; ECtHR, *FM and Others v. Denmark*, N. 20159/16, of 19 Sep. 2016). The situation in Italy itself, according to the ECtHR, cannot, however, be compared with the situation in Greece at the time of the judgment in the *M.S.S. v. Belgium and Greece* case.

[24] In *Hunde v. the Netherlands* (ECtHR, n. 17931/16, of 05 Jul. 2016, para 55) the ECtHR found such differences to be significant, although it also held that the loss of the right to legally stay in the territory of the Netherlands due to the rejection of an asylum application 'did not automatically affect his [the applicant - KG] particular vulnerability as a migrant'. However, the ECtHR also pointed that the applicant's situation in *Hunde v. the Netherlands* differed from that of M.S.S., as in the latter case it was 'linked to his status as an asylum seeker and, consequently, his suffering could have been alleviated if the Greek authorities quickly examined his asylum application'. In contrast, in *Khlaifia and Others v. Italy*, the Grand Chamber admitted, in assessing the conditions of their detention, that the applicants had been 'mentally and physically weak' after having made the dangerous crossing of the Mediterranean Sea, but made it clear that they were not asylum seekers and they did not possess the particular vulnerability inherent in such status, nor did they claim to have experienced traumatic experiences in their country of origin (ECtHR, 2016, p. 194).

[25] Thus, pointing to the need for special protection of the Roma population, the Tribunal referred in its explanatory memorandum to the recommendations of various bodies of the Council of Europe (Parliamentary Assembly, Committee of Ministers, the European Commission against Racism and Intolerance, the Commissioner for Human Rights), similarly in the case of people infected with HIV or patients with AIDS, in which he additionally referred to the relevant documents of the United Nations.

[26] See Al Tamimi Y, p. 569–570 with references to the ECtHR case law.

[27] Noted by Brandl and Czech (p. 249). Also Baumgärtel (2020).

arrive in the receiving State in a vulnerable condition, but that State makes them vulnerable[28]. The Grand Chamber classified the applicant as vulnerable 'because of everything he had gone through during the migration and the traumatic experiences he possibly had previously experienced', adding that vulnerability was inextricably linked to his status as an asylum seeker, on the other hand, it stated that

the situation complained of by the applicant had been in place since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and the fact that his asylum application has not yet been investigated by the Greek authorities. In other words, the Court is of the opinion that if they had examined the applicant's asylum application promptly, the Greek authorities could significantly alleviate his suffering (ECtHR, 2011, p. 262).

Therefore, vulnerability of asylum seekers results from the difficult experiences that led them to flee their homeland (vulnerability ex ante), and on the other hand from the situation in which they found themselves while waiting for a decision on international protection (vulnerability ex post) (ECtHR, 2011, p. 262). The second element that makes up vulnerability is the result of the actions and omissions of a state party to the ECHR leading to violations of human rights[29]. Such understanding of vulnerability of asylum seekers, that encompasses also vulnerability ex post, which in turn depends directly on the actions and omissions of the State Party to the Convention, introduces an additional element of relativity into this characteristic.

4. While recognizing all asylum seekers as vulnerable, the ECtHR also takes into account the fact that, in the case of some applicants, their vulnerability is not only linked to the status of applicants for international protection, but also stems from the fact of belonging to a different category of people in need of special protection, like e.g. children, single mothers with young children, mentally ill people[30]. The literature on the subject use the term compounded vulnerability[31] regarding such instances, in which there is more than one basis of the applicant's vulnerability, which makes his/her position 'extreme' or 'accentuated' (ECtHR, 2012, p. 91).

5. At the end of this part of the article, one should explain the difference in approach taken by the ECtHR in the already mentioned Hungarian case (*Ilias and Ahmed v. Hungary*). Here, the Court applied a distinct standard of vulnerability comparing to its previous case law, focusing on verification whether the applicants 'may be classified as particularly vulnerable'(*Ilias and Ahmed v. Hungary*, 2019, p. 191). In this case the ECtHR paraphrased its *M.S.S. v. Belgium and Greece* dictum, stressing that 'it is true that asylum seekers may be considered particularly vulnerable due to everything they have gone through during migration and the traumatic experiences they may have had before' (emphasis

[28] After Brandl and Czech, p. 250.

[29] The term *vulnerability ex post* taken from: Timmer A., p. 155. As a confirmation of such understanding of vulnerability of asylum seekers, including both its *ex ante* and *ex post* from can be read the already mentioned decision in the *Hunde v. the Netherlands* case.

[30] Eg. ECtHR (2006), ECtHR (2012), ECtHR (2016, p. 23).

[31] The term proposed by Timmer A., p. 161, also used by Brandl and Czech, p. 250.

- KG), and at the same time the Court observed that 'here are no indications that the applicants in this case were more vulnerable than any other adult asylum seeker'(*Ilias and Ahmed v. Hungary*, 2019, p. 192) held in a transit area[32]. Thus, in this case the Court departed from the group vulnerability approach with regard to asylum seekers - an asylum seeker may be a particularly vulnerable person, but this is determined by specific circumstances, his individual characteristics or experiences, and not affiliation with the group of asylum seekers. Moreover, in assessing whether the applicants were particularly vulnerable, the Court appraised them not through the prism of other members of society, but in comparison with other asylum seekers, reducing in this way the number of migrants seeking international protection, who could be considered to be in need of special protection as a consequence of their vulnerability within the meaning of the Strasbourg case law.

Vulnerability of asylum seekers: the legal effects in the light of the Strasbourg case law

Turning back to the *M.S.S. v. Belgium and Greece* judgment, in this part of the article, the legal consequences of the group vulnerability approach taken towards asylum seekers will be discussed. The argument is taken into account by the ECtHR, in particular, when assessing the allegations of violation by states parties to the ECHR of the prohibition of inhuman or degrading treatment, as set out in Article 3 of the Convention. The applicants' particular vulnerability to threats is one of the factors influencing the assessment of the minimum level of severity - the threshold criterion which must be met for Article 3 of the ECHR to be applicable and, consequently, the criterion of key importance for establishing a violation of that provision[33]. According to settled case-law, the Court associates with the characteristics of vulnerability the obligation of a State Party to the ECHR to provide effective protection to all vulnerable persons within its jurisdiction. In the framework of this obligation the State must take reasonable steps to prevent all instances of ill-treatment, that it knew or should have known. The applicant's vulnerability is a significant element taken in consideration by the ECtHR for the purposes of assessing the State's compliance with that obligation.

In the *M.S.S. v. Belgium and Greece*, the ECtHR pointed to the existence of two types of positive obligations towards asylum seekers which, under Article 3 of the ECHR are incumbent on the States-Parties to the Convention. The first one was actual in the situation of detention, while the existence of the second was related to the conditions of extreme poverty in which the applicant had to live, awaiting the conclusion of the proceedings concerning granting him international protection.

[32] The Court's assessment took into account the fact that the difficult experiences referred to by the applicants took place several years earlier, as well as the material conditions in the transit area, the relatively short duration of the applicants' deprivation of liberty and the awareness of both applicants of the pending asylum proceedings in their cases (*Ilias and Ahmed v. Hungary*, 2019, p. 192-193).

[33] With regard to vulnerability and minimum level of severity see especially (ECtHR, 2016, p. 160).

As regards the first obligation, the ECtHR found a violation of the Convention, despite the relatively short period of detention (4 days for the first and 7 days for the second deprivation of liberty, respectively). As the ECtHR emphasized, given the applicant's particular vulnerability as an asylum seeker, these periods could not be considered 'as being insignificant' (ECtHR, 2011, p. 232). Ultimately, the Court took the position that taken together 'the feeling of arbitrariness and inferiority and fear often associated with it, as well as the profound impact that such conditions of detention undoubtedly have on the dignity of a person' detention constituted degrading treatment within the meaning of Article 3 of the ECHR (ECtHR, 2011, p. 233), which was further exacerbated by the applicant's vulnerability 'connected with his situation as an asylum seeker' ((ECtHR, 2011, p. 233). The above reveals that the applicant's affiliation with a vulnerable group causes a lowering of the minimum level of severity threshold for the purposes of Article 3 of the Convention. The same treatment, which in the instance of another person, e.g. due to its length, would not be considered severe enough to generate responsibility of a State party to the ECHR for a violation of Article 3, applied to an asylum seeker, may lead to violation of the prohibition of ill-treatment[34].

The impact of the argument based on the vulnerability of asylum seekers is even more evident in the light of the Court's findings in the *M.S.S. v. Belgium and Greece* concerning obligations of State Parties to the ECHR with regard to living conditions in extreme poverty. For the ECtHR has repeatedly emphasized that the interpretation of the ECHR cannot lead to the reading of the obligation of States Parties to provide a home to all persons under their jurisdiction, as well as providing financial assistance to refugees enabling them to maintain a certain standard of living[35]. However, in the *M.S.S. v. Belgium and Greece* case, relying essentially on two grounds, namely the applicant's vulnerability as an asylum seeker, and the fact that the obligation to provide decent material conditions to asylum seekers arises directly from the provisions of Greek national law implementing the EU law, the Court stated that Greece, under Article 3 of the ECHR, was obliged to provide the applicant with living conditions in which his basic needs could be met[36].

The Court's reasoning clearly shows that vulnerability is a yardstick for assessing the fulfillment of both conditions of responsibility in relation to the positive obligations of the States Parties under Article 3, namely the criterion of knowledge ('whether he had or should have had knowledge of the risk of ill-treatment') and the criterion of taking reasonable steps to prevent ill-treatment. In the *M.S.S.* judgment, the ECtHR expressed the opinion that it did not see how the

[34] Peroni and Timmer rightly point that ill-treatment 'looks bigger through the vulnerability lens'. This position adopted with regard to the minimum level of severity was upheld by the Court in the subsequent case law.

[35] ECtHR (2011, p. 232) with references to the case law.

[36] In the commentary on the judgment in the case of *M.S.S. v. Belgium and Greece* G. Clayton indicated that there could be different interpretations of the position regarding the responsibility of ECHR States Parties to the extreme poverty of asylum seekers. According to the first of them, the reference by the ECtHR to the provisions of national law implementing the EU directive has an impact, but is not decisive, for inferring a positive obligation in this respect. In the light of the second interpretation, however, this is a constitutive premise (condition) of the obligation (Clayton, p. 767). Subsequent case law has shown that the second interpretation is correct.

Greek authorities might not have noticed or assumed (ECtHR, 2011, p. 258) that the applicant was homeless and argued that given the particular state of insecurity and vulnerability in which asylum-seekers were known to live in Greece, the authorities should have taken measures to provide shelter to the applicant without waiting for him to inform them of his homelessness (ECtHR, 2011, p. 259). Moreover, the Court also found that the State should not only have provided the applicant with shelter, but also had a duty to find a way to inform him that such shelter had been secured for him (ECtHR, 2011, p. 260).

4. The Grand Chamber's findings in *M.S.S. v. Belgium and Greece*, as regards violation of Article 3 in view of the conditions of the applicant's detention and the conditions of his life in extreme poverty, also had consequences for the finding that Belgium was responsible under the ECHR for deporting the applicant to Greece, where he had suffered degrading treatment. It should be emphasized that this was a departure from the previously consistent position of the Court, according to which, the continued use of medical and special services or assistance by a foreigner in an ECHR country is not an argument that a migrant may effectively rely on in order to obtain the right to stay on territory of that State. Only in exceptional circumstances, i.e. when it is justified by 'compelling humanitarian grounds' (ECtHR, 2008a, p. 42), a decision to expel a seriously ill person from the territory may give rise to a finding of a violation of Article 3 of the Convention. Although several Authors observed that the *M.S.S.* judgment could forecast more flexible position of the Court towards social and economic vulnerability of asylum seekers[37] and while such an interpretation could seem to be justified in the light of the judgment in the case of *Sufi and Elmi v. the United Kingdom* (ECtHR, 2007, 2011), nevertheless the Court began to place greater emphasis on the fact that in the M.S.S. the obligation to ensure adequate living conditions was part of the positive Greek law to which the Greek authorities were bound.

The conditions for applying the criteria established in the judgment of M.S.S. v. Belgium and Greece, the ECtHR specified further in its judgment in the case of *S.H.H. v. the United Kingdom* (ECtHR, 2013) and subsequently confirmed in the 2014 Grand Chamber judgments in *Tarkahel v. Switzerland* (ECtHR, 2014) and in 2016 in *Paposhvili v. Belgium* (ECtHR, 2016). In these judgments, the Court has clearly delimited the cases which, in its opinion, should be examined in accordance with the principles established in the *M.S.S.* and others concerning the expulsion of foreigners from the territories of State Parties to the Convention. In doing so, the ECtHR noted, first, that in the *M.S.S.* the conditions of extreme poverty in which the applicant lived were the result of an omission by Greece, a party to the ECHR, which was under a positive obligation under national and European law to ensure adequate reception conditions for asylum seekers (S.H.H. v. United Kingdom, 2011, p. 90). Second, the Court considered that in the *M.S.S*. the applicant's extreme poverty was related

[37] E.g. Timmer (2013, p. 160).

to his status as an asylum seeker and the failure of the Greek authorities to process his application (*S.H.H. v. United Kingdom*, 2011, p. 90).

Conclusions

The ECtHR for over a dozen of years now has been paying increasing attention to the applicant's vulnerability when assessing alleged violations of human rights enshrined in the ECHR. In some instances the Court refers to the concept of vulnerability regarding a certain population group. In such cases the entire specified category of entities is considered to be particularly vulnerable, and thus the applicant's vulnerability is determined by belonging to this category of persons, and not by its individual characteristics or circumstances in which he or she was found. The characterization of an applicant as a 'vulnerable' always produces certain legal effects linked to the requirement of 'special protection', they are determined by the Court itself. As producing legal consequences in the area of States' obligations, the vulnerability must be perceived as a normative category in the ECHR law.

In 2011 the ECtHR acknowledged that asylum seekers constitute 'a particularly underprivileged and vulnerable population group in need of special protection', setting a new direction in Strasbourg case law concerning this group of persons.

The Court's recognition of vulnerability of asylum seekers has consequences for the State Parties to the Convention regarding positive obligations. It should be emphasized that these obligations do not result directly from the text of the ECHR, but have been formulated by the Court through its interpretation of the Convention. The essence of these obligations is to take action, therefore they require activity on the part of the State. At the same time, very often these are activities in the social sphere, which was not explicitly included in the scope of the Convention, but to which, according to the position of the ECtHR expressed in the late 1970s, the interpretation of guarantees established by the ECHR by the Court may extend (ECtHR, 1979, p. 26).

In cases concerning asylum seekers it can be observed that the Court associates social implications with guarantees, which are 'typical' guarantees belonging to the sphere of civil rights, which are liberties in nature. By way of example, it can be pointed out that the degrading conditions of detention of persons characterized by the ECtHR as vulnerable may not only lead to an infringement of Art. 3 of the ECHR, but also have consequences for the assessment of the compliance of the deprivation of liberty of these persons with the requirements resulting from the guarantee of the right to liberty and personal security (Article 5 (1) (f) of the ECHR). Indeed, according to the case law of the ECtHR, in order for a person to be deprived of liberty in a manner compatible with the requirements of the above-mentioned provision of the Convention, it must not only be used for the purpose of executing deportation, but also there must be 'a certain link between the grounds of deprivation of liberty and the place and conditions of detention'. The fact

that the conditions of detention have not been adjusted, for example, to the 'extreme vulnerability' of children, is a factor that may determine a State's responsibility for violating Article 5 (1) lit. f of the ECHR.

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