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Introduction: Approaches to Vulnerability in Times of Crisis

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Abstract
With a view to contributing to a more nuanced view on the use of the vulnerability rhetoric in times of crisis, the article addresses the relationship between the "crisification" and "vulnerabilization" of human rights protection. In so doing, it discusses the concepts of crisis and vulnerability, as well as the related human rights obligations incumbent on states. By contemplating upon some of the processes through which the rhetoric of vulnerability both opens doors to protection and closes them, the article deconstructs vulnerabilization as an active legal and societal process in addressing different situations seen as crises. In so doing, it challenges the on-face neutrality of the concept of vulnerability as a tool to target protection in exceptional times and calls for an approach to vulnerability in times of crisis that is more firmly anchored in the normative baseline of international human rights law.

Keywords Crisis · Human rights · Vulnerability · Securitization

Introduction

The past two decades have been characterized by a continuum of different situations of crisis not only in the Global South but also in many of the welfare states of the Global North. The peace and security crisis unraveling with the Russian invasion of Ukraine in 2022 follows a host of other global crises, such as the widespread security crisis after the 9/11 attacks, the financial crisis of the late 2000s, the migration "crisis" of 2015–2016 and the health crisis caused by the COVID-19 pandemic in the shift of the 2020s. The crises of the twenty-first century of course only follow suit to earlier ones, such as the famines of the 1980s and the Cuban missile crisis in the 1960s (Ruiz Fabri 2022, pp. 35–36). Along with some ongoing long-term

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challenges, such as the climate crisis, it seems legitimate to argue that the state—or the narrative—of crises in many ways is the normalcy that defines the context where the different levels of global, national, and local governance operate. As noted by Lawrence (2014, p. 194), "[r]ather than being a politics out of the ordinary, crises are, in some sense, politics as usual."

With this, it is clear that the capacity of states to protect the rights of individuals is often put to the test. The current challenges that the international community is facing with, for example, the COVID-19 pandemic and climate change, as Mbengue and d'Aspremont (2022, p. 1) note, test the build-up and the operation of international law and institutions. States are increasingly confronted with complex choices that require weighing the protection of individuals' rights against the general interests of the society and finding new benchmarks for distributing rights and protection in situations where the access and availability of resources are affected. In acute situations, such decisions are made under considerable pressure and often lacking knowledge of all the circumstances that are of relevance for decision-making (Marique 2020, p. 63). The legal and other tools at states' disposal may also be experienced as insufficient or unsuitable to respond to the situations at hand, given that crises—both the sudden and the more long-coming ones—can, by definition, be seen as situations where familiar normative and cognitive terminologies lose their capacity to explain what happens (van Genugten and Bulterman 2014, p. 4).

While there is not one generally accepted definition of crisis—that can be vastly different in terms of nature, scope, and severity—usually the term is used to refer to a situation that entails a break from normalcy. Crises therefore challenge our habitual ways of organizing and responding to different circumstances (cf. Coombs 2010, p. 18). This seems to hold true also for the way in which the international and regional standards of human rights law are perceived in times of the exceptional. While an established body of international law regulates and limits states' margin of maneuver, including in states of emergencies, recent developments have made it clear that this rule book is easily circumvented in times of crises. As Authers and Charlesworth (2014, p. 30) note, "[o]utside the context of formally declared emergencies, ideas of crisis have […] been deployed to whittle away human rights protection." As a result, the capacity of the human rights system to adapt to the new normal is of growing concern both as a legal but very much also as a practical politico-social question. As alarming concerns on the levels of protection available for some groups of individuals are being recorded (e.g., Council of Europe 2021), it can be argued that a fundamental change in thinking in how deviations from protection are being justified as responses to crises—perceived or real—is taking place. As Ruiz Fabri observes (2022 p. 39), characterizing something as an exception has become the legal technique of our time to attend to arising challenges.

Often such *crisification* of human rights protection, that is, the ways in which states (re)interpret human rights norms and (re)distribute protection with a reference to crises, is linked to an intensifying *vulnerabilization* of human rights, whereby the general levels of protection are brought down and the access to protection is more and more focused on the most acute and severe protection needs. Vulnerabilization, through which enhanced protection is channeled to those who are seen to be in the most vulnerable position, is not new to human rights—the various special

protection regimes, such as the 1989 Convention on the Rights of the Child, testify to this. As such, vulnerabilization is an important and established tool in rendering human rights protection universally and effectively available to all (e.g., Heikkilä et al. 2020). However, what may be seen as a reaction to the various crises, such as the economic recession, climate change, and the growth in irregular migration, is a renewed search for tools through which to differentiate some individuals from others in terms of protection needs. The prevailing ideology—which is also visible in the increasing use of the notion of vulnerability in legal reasoning—seems to be that, given the limited resources, we need to prioritize in distributing protection.

This relationship between what is here referred to as the crisification and the vulnerabilization of human rights protection is something that this special issue sets out to analyze and to problematize. Through a selection of six contributions from different areas of law and practice, it identifies different uses of the vulnerability concept in the context of crises and takes a critical look at vulnerability reasoning as a structural element of crisis management both in law and politics. In so doing, it pays special attention to both how the deviations and the enhanced access to protection are justified, and how such choices are informed by the rhetoric of vulnerability and crises. The articles demonstrate that situations of crises can be instrumental in exposing previously unseen protection needs and can thereby provide important openings for enhancing the protection of those whose rights have previously remained unrealized. At the same time, the contributions highlight that while vulnerability has become something of a catchword in protection discourse, its functions remain ambiguous and may open to different, also politicized, uses, especially in times of crises. This may partly be due to the fact that vulnerability as such is not defined in human rights law but gathers different meanings in different contexts.

The general understanding in human rights praxis appears to be that vulnerability refers to individuals in situations where their rights are at an increased risk of not being realized at par with others (Heikkilä and Mustaniemi-Laakso 2020). The sources to such a risk can take different and overlapping forms. In general, the sources to vulnerability are considered to arise from inherent (e.g., age), situational (e.g., economic and environmental contexts), and/or pathogenic factors (e.g., abusive social relationships) (Mackenzie et al. 2014, pp. 7–9). To address these sources, vulnerability theories and human rights praxis call for a responsive and responsible state that takes hold of the structural causes to vulnerability and the needs of the differently resilient individuals (Fineman 2010; Heikkilä et al. 2020). This call for responsible responsiveness is also something that unites the articles in this special issue.

By way of an introduction, the current article exposes the reader to the focal themes of the issue by discussing and problematizing some of the key questions that form the analytical and substantive "glue" tying together the articles, such as the concepts of crisis, crisification, vulnerability, vulnerabilization, and the related obligations incumbent on states. Building on and elaborating on this framework, the articles of this issue contextualize and critically assess the linkages between crises and the different uses (and misuses) of vulnerabilization in times of crises. To that end, in the two opening articles, Sormunen and Zimmermann discuss the disproportionate burden that individuals in vulnerable situations carry in times of crises.

With a focus on the climate crisis and intimate partner violence in COVID-19 times, respectively, they shed light on different structural sources to vulnerabilities in situations of exception, and the elevated obligations that states have in mitigating them.

Continuing on structural sources of vulnerability, the ensuing articles by Oude Breuil, Phillips, and da Lomba and Vermeylen examine vulnerabilities arising from attitudes and cemented power structures that often are accentuated in times of crisis. Who do we see as deserving of protection as a vulnerable individual in times of hardship is a question that cuts across these contributions. Oude Breuil addresses the issue from the perspective of belonging. Putting the Dutch politics of denial towards sex workers in COVID times into a broader historical and social context, she explores the conception of vulnerability in the interference of moral politics and gut feelings, asking whether questions of morality and immorality affect our conceptions of vulnerability. Questions of belonging and deservingness as well as othering and inclusion are surveyed also in the articles by Phillips, and da Lomba and Vermeylen that discuss the categorization of migrants according to the layers of their vulnerability. Reviewing the role of the vulnerability and crisis rhetoric in migration management policies, they problematize the ways in which such language is contributing to increasing divides between "us" and "others" and is being used as an extension of the policy objectives of states to manage migration. With this background, Engström, in his article, explores vulnerabilization as a policy tool in the work of international financial institutions, analyzing how the exceptional times have driven their engagement in the protection of vulnerable groups. Taking a future-oriented look, he contemplates upon the vulnerability focus within the global social justice discussion, asking whether the lessons from the COVID-19 pandemic are likely to change its role.

Human Rights in Crises—or Human Rights in a Crisis?

What the first decades of the twenty-first century have made clear is that different societal crises in many ways are a touchstone for the capacity of states to protect the rights of individuals. This may be the case where economic assets are decreasing due to a downturn as in the global financial crisis, which led to austerity measures and other public spending cuts in many countries, resulting in a significant deterioration of social security benefits and various public services (e.g., Bald and Walker 2020, p. 162). It may also be a result of the fact that the societal structures and policies to implement human rights that have been set up in "normal times" are struggling to attend to the needs of an unexpected number of rights-holders, as was the case in the European refugee reception crisis of 2015–2016 (e.g., Pirjatanniemi et al. 2020). Similarly, amid the COVID-19 pandemic, states faced difficult choices and prioritizations in ensuring the sustainability of their health care systems in front of the unforeseen numbers of patients in need of medical care. The transboundary and long-term nature of climate change and its effects requires an entire reinterpretation of the rules of global responsibility sharing as it challenges the capacity of each individual state to protect the individuals within its jurisdiction from the effects of global warming and the loss of biodiversity. In other words, while different in

their nature, acuteness, and scope, many of the crises that define the "new normal" require a certain recalibration of how we interpret, understand, and use human rights for them to make sense in the changing contexts in which we live. In many ways, such contextuality in reading human rights obligations is, of course, a natural and longstanding part of the dynamic interpretation of human rights, and indeed a core requirement for the effectiveness of human rights. As such, various measures to address exceptional times can, where adopted and implemented within the criteria set out in public international law, be seen as legally acceptable responses to changing realities.

When assessing the protection of human rights in times of crises, it should be noted that the concept of crisis does not exist in the normative vocabulary of international human rights law. In this light, what is a crisis is a question that international human rights law does not give a direct answer to. What international human rights law does provide, however, is certain limits to what states can and cannot do in situations of exception, whether they are called crises or something else. The closest equivalent for a crisis in human rights law is the concept of emergency, which allows temporary derogations from some human rights to the extent that such derogations are strictly required by the situation (e.g., International Covenant on Civil and Political Rights [ICCPR], art. 4; European Convention on Human Rights [ECHR], art. 15). The bar for such deviations is deliberately set rather high. A state applying a derogation needs to comply with a set of strict procedural requirements, for example, vis-à-vis notification, and the derogation cannot contravene the state's other obligations under international law (ibid.). Also, for derogations to be accepted, a situation needs, generally speaking, to amount to a threat to the life of the nation (ibid. See also e.g., ICCPR, art. 4(1); ECtHR in *Lawless v. Ireland*, para. 28; OHCHR 2020). This is not an easy threshold to meet given that "[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation […]" (UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3). It also needs to be taken into account that some rights, such as the prohibition of torture, are considered absolute in the sense that they cannot be derogated from under any circumstances (e.g., ICCPR art. 4; ECHR art. 15). Such absolute rights are often seen to fall under the realm of peremptory norms of general international law (*jus cogens*) recognized as non-derogable by the international community. In addition, some rights, such as the right to liberty, while not absolute, are non-derogable and can only be subject to article-specific restrictions that are expressly defined in the treaty itself (e.g., UN Doc. CCPR/C/21/Rev.1/Add.11, para. 7).

Limiting human rights is possible also outside of emergencies. Many rights, such as the right to private and family life, are, in fact, qualified, entailing that they can be limited subject to specific conditions if such limitations are seen as necessary for a legitimate aim (e.g., ECHR, art. 8; International Covenant on Economic, Social and Cultural Rights, art. 4). This is a part of the "search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights" that is an inherent element of human rights protection (ECtHR *Soering v. the United Kingdom*, para. 89). Such limitations are in human rights treaties allowed, inter alia, in order to secure national security, public health, public morals, public order, and public safety (e.g., ECHR art. 8. See

further e.g., Müller 2009). Within the realm of the ECHR, adaptations to different situations are possible also through the margin of appreciation doctrine, which allows states parties a margin of domestic discretion in implementing their convention obligations in the national context. A wide margin of appreciation is allowed, for example, in relation to the protection of public morals, of which the definition is context-bound and varies between the states' parties (ECtHR *Handyside v. UK*, paras 48–49). In limiting, care is, however, to be taken of several principles, such as proportionality and necessity. Importantly, limitations shall also have a basis in law and respect the principle of non-discrimination and are not to interfere with the essential core content of each human right (see, e.g., U.N. Doc. E/CN.4/1985/4).

The human rights system allows, in other words, quite a wide margin of maneuver for states in the implementation of their obligations to different situations. Yet, the limits of these margins seem to be overstepped in state praxis. This is evident from the comments by the different human rights actors, in which, for example, the proportionality, necessity, and legal basis of many of the above-mentioned crisis responses have been questioned. Migration management policies, such as the externalization of migration control beyond the EU borders and the use of criminal law measures to address migration (i.e., the "crimmigration" of migration), have been widely criticized in this regard (e.g., Marin and Spena 2016; Human Rights Watch 2021). The same holds true for the different policies of the "war on terror" that have been scrutinized by human rights bodies (e.g., Council of Europe 2018). Similarly, state measures to curb the effect of COVID-19 on public health have in some cases been found to be disproportionate to their objectives (e.g., Sun et al. 2022). In addition, research finds that many COVID-19 measures are vaguely formulated or lack a clear legal base (Grogan et al. 2021). As Sormunen (in this issue) notes, crisis decision-making, especially where emergency powers or actions are resorted to, also often takes the form of informal executive decisions and can, as such, weaken the possibilities of the individuals to hold decision-makers accountable for the crisis measures.

The use of emergency powers is another area where states seem to be stretching the limits of what is foreseen by the law. While the system for derogations is meant as a temporary safety valve for human rights protection (Neuman 2016, p. 21; Criddle 2016b, p. 33), states sometimes resort to emergency measures in a more permanent and open-ended manner. Such prolonged use of the state of emergency has been criticized for normalizing the exception especially within the field of securitization measures (Ní Aoláin 2016). UN human rights experts have raised concerns, for example, on the use of unilateral sanctions by the USA and questioned the grounds for the long-term exceptional measures noting that "[i]nstead of being true emergencies, they seem like excuses to impose sanctions indefinitely" (OHCHR 2021). On the other hand, states are sometimes using exceptional powers to restrict rights protection without officially declaring public emergencies (Ní Aoláin 2016, p. 130). This was the case, for example, for some states during the COVID-19 pandemic (Ponta 2020). Through such a tactic of "disguised emergencies" (Ní Aoláin 2016), the emergency narrative is used without submitting the measures to the above-mentioned requirements and boundaries for the use of emergency powers. These examples epitomize the fact that the realities of human rights implementation

may not always reflect the dichotomous expectation of full respect for human rights in "normal" times on the one hand and regulated and monitored derogations in times of declared emergencies on the other. There is, in other words, a certain disconnect between the letter of the human rights law and the ways in which states actually use emergency powers (Criddle 2016a, p. 4).

Based on the above discussion, it seems that both in situations of declared emergencies and beyond, the narrative of crisis is used to stretch the limits of what is allowed in human rights law (Authers and Charlesworth, 2014, p. 30). The aim of a crisis framing can be diagnostic (identifying the problem and attribution of blame), prognostic (proposing a solution or suggesting strategies and tactics) or motivational (providing rationale for action) (Snow and Benford 1988, pp. 200–202). In many cases, a framing builds on a sense of danger that underlies a crisis narrative, by which a situation is portrayed as one that requires urgent action. As such, crises often are connected to transitions (Authers and Charlesworth 2014, p. 23), in which established patterns to approach different questions are found non-working. As a result, a crisis is collectively felt to justify—or require—urgent action to address a structural threat, implying that a change to the status quo is needed to prevent it (Henderson 2014, 2018). Whether such a logic is supported by an actual threat analysis is often secondary, Henderson (2018, p. 19) notes, as the force of the framing comes from the dynamisms it entails, that "in claiming crisis, something is done." To her, then, declaring crisis is "a tool that can be used by those hoping to bring about change in law or politics," and "for calling for foundational change" (ibid., pp. 12 and 82).

In this sense, crises may function as a distraction for human rights (Authers and Charlesworth 2014, pp. 28–30), whereby interpretations of human rights become challenged and questioned in what are—or are portrayed as—exceptional times. This explains why the crisis discourse so easily lends itself as a tool for different agendas of change, also those that entail restrictions to rights, and why extraordinary measures often are warranted by a crisis—real or perceived. This has been particularly evident in so-called security crises, such as the one following the 9/11 attacks in relation to terrorism as well as the migrant reception crisis, in which crisis arguments often have been used to circumvent established human rights norms. As noted by Kremer (2013, p. 10), in times of crisis, security arguments easily become the justification for the adoption of suspensions and legal exceptions. The "wars" against terrorism and serious crime, with considerable effects on, for example, the right to privacy, appear to be based on the thought that the end justifies the means, reflecting the idea that security as an issue "[…] is the move that takes politics beyond the established rules of the game" (Buzan et al. 1998, p. 23). As noted by da Lomba and Vermeylen in this issue, the approach to irregular migration as a risk factor in Europe is justified by referring to the situation as a crisis, which is then instrumentalized as a tool of securitization. A similar security framing is visible as a response to the COVID-19 pandemic. While the narratives between countries differ, representations such as the "war" against the coronavirus and a threat to national security have not been uncommon as justifications for the securitization of public health amid the pandemic, coupled with suggestions about the "imperative of emergency responses, including expanded policy powers, national lockdowns, and

border closures" (Kirk and McDonald 2021, p. 1; Guéguin 2021). Consequently, in the interest of securing access to health care, several countries have introduced policies that infringe, for example, on privacy rights (Aaron 2020) and the freedom of movement, the effects of which have been particularly severe on some individuals (UN 2020). Some of these reactions can be addressed as arising from a panic frame where certain groups of individuals, or given behavioral patterns, are perceived as a threat factor, thereby requiring especially harsh restrictions to be placed upon them (Breuil in this issue).

As a result, the continuing states of crises in many ways challenge the legitimacy of the human rights system as it stands. In times of crisis, as Chimni (2022, p. 52) notes, "new elements of disequilibrium are introduced in the international legal order threatening its effectiveness, stability, and legitimacy." Coupled with the challenges that human rights are facing with rising levels of populism and authoritarianism in many parts of the world (see further Alston 2017; de Búrca 2021), the human rights system is in many ways facing a watershed moment in re-legitimizing itself. As will be discussed more in detail below, a key element in this is assessing the ways in which the crisis approach to human rights stands up to the fundamental requirements of proportionality and non-discrimination that exist at the core of the rights project.

Vulnerabilization as an Element of Crisification of Human Rights Protection

Previously we noted how crises—and largely, the *sense of a crisis*—may bring down the overall levels of human rights protection as a response to the actual or perceived need to react to the decreasing resources and opportunities that states have at their disposal to ensure the protection of rights. Arguably, such crisification of rights protection is often coupled with a gearing of the protective efforts towards those individuals whose rights are seen to be seriously at risk of not being realized. This trend that is here referred to as the vulnerabilization of protection is visible, for example, in the policy choices by many European states as a reaction to the European reception crisis of 2015–2016 to limit access to asylum and to different basic rights for the vulnerable asylum seekers, such as children. The same logic has typically steered the policy guidance by international organizations to states regarding COVID-19 measures to safeguard access to, for example, social protection services and education to the most vulnerable groups within societies (WHO 2020).

Such focused approaches to the rights of the individuals that are seen to be in the most vulnerable situation in terms of having their rights realized are, as such, nothing new. Besides the emergence of several instruments of special protection, such as the 2006 Convention on the Rights of Persons with Disabilities, various human treaty-monitoring bodies have paid attention to the fact that targeted special protection measures are sometimes needed to ensure the de facto realization of human rights at an equal level to all. The ECtHR, for example, has resorted to vulnerability reasoning when specifying state obligations that arise from the ECHR in connection to, for example, children, persons with disabilities

and the Roma (e.g., *D.H. and Others v. the Czech Republic*; *Oršuš and Others v. Croatia*; *V.D. and Others v. Russia*). The idea that states have special protection obligations in relation to vulnerable groups and individuals is present also in many general comments and concluding observations that have been adopted by human rights treaty monitoring bodies (for examples, see Nifosi-Sutton 2017). As such, vulnerabilization is a recognized instrument in attaching attention to the situations where protective measures are most needed and in making human rights protection universally and effectively available to all (e.g., Heikkilä et al. 2020). In this way, vulnerability serves as one of the yardsticks for identifying priorities in distributing protection (Engström et al. 2022).

In times of crises, as seen above, the need for such prioritizations is typically accentuated, which brings the vulnerabilization of protection into the limelight of protective efforts in times of the exception. At the same time, heightened obligations apply on states to ensure that the limitations made to human rights in times of crises do not disproportionately affect the rights of individuals in vulnerable situations, especially as regards the core of their rights. In relation to the measures taken in response to the COVID-19 pandemic, the WHO (2020), for example, has underlined that it is the "[…] dignity and rights of those most vulnerable that requires additional attention […]." Likewise, the Fundamental Rights Agency (FRA) (2020) of the EU has stressed that "[…] some people are more vulnerable than others […]" and that the EU countries should therefore ensure that these groups receive enhanced protection in the fight against the virus. This is a natural consequence of the above-discussed requirement that the core content of each human right is to be ensured for all individuals also where the general access to rights is being limited and that such limitations shall not violate the principle of non-discrimination or disproportionately affect certain individuals.

Such a requirement is inherent also in the idea of the progressive implementation of economic, social, and cultural rights, whereby steps are to be taken towards the full implementation of their obligations within the maximum extent of their resources. In so doing, states are to respect the obligation of non-discrimination, which is an immediate obligation applicable in all situations, and promote substantive equality. As the Chairperson of the Committee on Economic, Social and Cultural Rights has underlined, in times of crises, the latter means that states shall ensure that any policies undertaken "[…] mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalised individuals and groups are not disproportionately affected […]," making sure that the core content of rights is always safeguarded (UN Doc. CESCR/48th/SP/MAB/SW). To that end, the Committee on the Rights of the Child (UN Docs CRC/C/DJI/CO/3–5, para. 39(d) and CRC/C/MDG/CO/5–6, para. 39(d)), for example, has called on states to address the inequalities generated among children by the measures taken to curb the COVID-19 pandemic. Similarly, treaty monitoring bodies underline that states are to make sure that targeted measures are taken to protect the most vulnerable individuals within societies also during economic distress (e.g., UN Doc. E/1991/23, para. 12; ECSR, *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, paras 74–76).

Crisification as a Source to Vulnerability—and as a Disguise to Active Othering

As seen above, a relatively well-developed legal framework guides states to acknowledge and address the specific protection needs of individuals in vulnerable situations also—and in particular—in times of crises. In practice, however, such needs are not always adequately considered in designing and implementing crisis measures. As a result, individuals in vulnerable positions in such situations often lack access to rights at an equal level to others and suffer disproportionate harm. The reasons for this are various, including the sense of urgency typical to crises that entails that positive special protection obligations owed to the vulnerable may be overshadowed by the general interest of the society at large, leaving the individual vulnerabilities un- or inadequately addressed. Structural vulnerability impact assessments are often put aside or are carried out ineffectively, and without or with minimal participation by the affected vulnerable individuals (e.g., European Ombudsman 2017; for discussion, also see, Durocher et al. 2016, p. 228). Consequently, individual protection needs are at risk of remaining insufficiently identified and addressed. Such "[u]tilitarianism for the 'common good'," coupled with technocratic decision-making, tends to bring about disproportionate effects for those who already find themselves in a vulnerable position (Kamiloğlu 2020, p. 19).

Also, seeing that some individuals in vulnerable positions often rely more on the resilience-building structures within societies than people in general, they generally are particularly affected by crises in which societal and other safety nets, and access to assets, commonly are not working as they should. The effects of climate change, for example, have been found to be particularly harsh for individuals already finding themselves in vulnerable situations (e.g., UN Doc. A/HRC/RES/47/24. Also, see Sormunen in this issue). This has also been strikingly evident during COVID-19 with some groups of individuals being particularly hard hit by the pandemic and the measures taken to curb its effects. This was the case with the overburdening of the health care systems and the lockdown of schools, as a result of which some of the most vulnerable children were left beyond their most central safety nets (UNICEF). For children, the pandemic and the ensuing education crisis have been a global source of enhanced vulnerability, which has affected especially the most vulnerable and marginalized children with difficulties to fully respond to measures such as online distance learning in the absence of their regular safety nets (e.g., UN Doc A/HRC/44/39). The situation of individuals residing in institutions, such as prisoners and the elderly, was in many places left largely unsupervised for certain periods during the pandemic, where access to the institutions by oversight mechanisms was barred due to health reasons and restrictions of movement (FRA 2021, pp. 27–34). Similar concerns apply to victims of domestic violence, as Zimmerman (in this issue) points out, by way of the restrictions of movement both limiting their access to resilience-building structures, such as shelters, and confining them to their homes, where the violence against them remained invisible for authorities and added to their

risk factors. Furthermore, in the area of social protection, the pandemic responses have been criticized for insufficiently addressing gendered challenges and needs, thereby adversely affecting the rights and needs of women and girls (O'Donnell et al. 2021; Engström in this issue). Likewise, as Phillips (in this issue) notes, for many asylum-seekers, the measures to halt the spread of COVID-19 have meant that asylum effectively ceased to exist, placing many migrants in a legal limbo with no effective access to protection and being pushed even further into the margins of society and to different forms of compounded vulnerability. On the one hand, these examples underline the fact that crises often multiply the human rights injustices for those whose rights are already at risk due to other factors. On the other hand, they illustrate that where crisis measures fail to accommodate the different sources to vulnerability, they may in themselves constitute sources of vulnerability, both generating new and enhancing existing situational and inherent vulnerabilities. As a result, as Zimmermann (in this issue) observes, vulnerabilities often are exacerbated in exceptional times, giving rise to different individual and collective crises within the crisis with intersecting and overlapping sources to vulnerabilities.

A further element of vulnerabilization is that individuals may need to prove themselves vulnerable enough to access protection (cf. ECtHR in *Tarakhel v. Switzerland*, para. 99). Recent research on asylum-seekers, for example, indicates that being labelled as a vulnerable asylum-seeker more and more often is crucial to gaining access to various benefits and services (for discussion, see, Hruschka and Leboeuf 2019; Tazzioli 2020; Yeo 2020). The perception of some refugees as vulnerable, Sözer (2020, p. 2169) notes, also "[…] now serves to cut assistance from the supposed larger set of not-so-vulnerable refugees." In a similar vein, Timmer et al. (2021, pp. 193–194) observe that vulnerability has started to function "[…] as an additional basis for social protection for migrants who lack social or legal membership." The need for such vulnerability considerations is accentuated in many situations of crisis, where prioritizations are guided by questions of resources and acuteness (e.g., UN Doc. A/HRC/40/57, princ. 17). This is one of the side effects of the prioritizing function of the vulnerability rhetoric, which, at its best, functions as a security valve to attach attention to otherwise unaddressed protection needs, but also can translate into a tool for limiting the access to special protection. After all, as noted above, if vulnerability is to serve a prioritizing function, not everyone can be recognized as equally vulnerable. Combined with a lowering of the general level of protection, this may result in a "vulnerability contest" (e.g., Howden and Kodalak 2018) where being recognized as vulnerable can become the key to effective protection.

If being characterized as vulnerable enough is key to receiving protection, the question of how and by whom vulnerability is defined and identified becomes central. The above examples reflect the fact that the various protection policies of states in the end are outcomes of politico-economic decision-making. This can turn the prioritizing function of the vulnerability narrative into a potentially powerful extension of politics in (re)distributing protection, the objectivity and inclusiveness of which should not be taken at face value, especially given that vulnerability as a concept remains blurred and open to different interpretations. As Da Lomba and Vermeylen

(in this issue) point out, where vulnerability is misconceptualized to serve inhospitable policy objectives, it can turn into a tool for exclusion through restrictive categories to which individuals need to qualify and leaving the "in"vulnerable without or with very limited access to protection. This may be so even if their actual protection needs might be equally critical and may become even more so when their needs remain unaddressed. This can be the case in situations where crises are linked to "moral panics"—that is, situations where a given group or a phenomenon is labelled as a "threat to societal values" (Cohen 2011, p. 1) or a threat to "us" (cf. Wodak and Angouri 2014, p. 418).

This is visible, for example, in migration management in Europe where a broadening split between how states treat their nationals as opposed to others is justified by framing the situation as a crisis, which it inevitably is, but arguably more so for the asylum-seekers pursuing refuge than for Europe as such (Da Lomba and Vermeylen; and Phillips in this issue). Splits are also created between different groups of migrants, Phillips (in this issue) notes, with some groups being readily seen as vulnerable, while the vulnerability of others, such as that of young healthy males, rarely fits the categories of special protection. Even minors who often are viewed as vulnerable can, as irregularly arriving or staying migrants, be seen as potential threats—for example, if they are male, poor, and Muslim (Kovner et al. 2021, p. 1748).

Vulnerability labels can also function as extensions of politics or different moral causes where the exception to normalcy is used to limit the rights of certain individuals with the pretext of protecting them. The imposed vulnerabilization of sex workers during the COVID-19 crisis in the Netherlands analyzed by Oude Breuil (in this issue) is a case in point in this regard, exemplifying how situations of crisis may be used to put forward socially and morally excluding policies with the justification of protecting the vulnerabilized individuals and the society as a whole. In so doing, vulnerability as "assumed and projected" is used to advance a protective cause detached from the lived realities of individuals, often based on "normative conceptions of risky behavior, or ascription of normative identity categories" (Cowan 2012, p. 267). Da Lomba and Vermeylen (in this issue) argue that this approach is inherent also in many of the European migration management measures that are said to protect the irregularly arriving migrants, but in many cases in fact perpetuate their vulnerability. This can be seen as an example of "governing through vulnerability" (Tazzioli 2020, pp. 52–54), whereby ascribed vulnerability labels become both gatekeepers to access to rights and tools for orchestrating groups of individuals that are unwanted or whose behavior is undesired.

Where vulnerability is instrumentalized as a narrative to further such objectives, it may turn into a vehicle of active othering (on othering, see, e.g., Gozdecka and Kmak 2018) whereby the threat narrative masks the vulnerability of those individuals whose vulnerability we do not want to see and to whom we are not willing to extend protection. Perceived deservingness is one of the attributes that often guides such selectivity, with factors such as identity and responsibility over one's own situation directing the policy choices and the identification of vulnerability (Slingenberg 2021). The more like "us" the individuals are and the less in control they are over their own situation, the more likely it is that their vulnerability is recognized (ibid.).

Such selectivity in acknowledging protection needs is recognizable in the European approach to refugees currently fleeing the war in Ukraine as opposed to the refugees from, for example, Syria, as Phillips, and Da Lomba and Vermeylen remark below. While the sources to vulnerability are seemingly largely similar for the two groups of refugees, their reception by the European states is in many ways dissimilar, resulting in a "two-tier refugee protection system" (Wilde 2022). Through such selectivity, the universality of vulnerability may—supported by the crisis framing—become an abstraction, and the vulnerability rhetoric may instead contribute to maintaining the status quo of unequal power structures. In this sense, being aware of the narratives and the meanings that are ascribed to the different vulnerability labels and being sensitive to how such discourses are instrumentalized to further different causes (see e.g., FitzGerald 2012, pp. 229–232) is central to a responsible approach to vulnerability overall. This is even more so in times of exception as it is known that the contours of the concept of crises are fluid and open for different uses, also politically sensitive ones. As Lawrence (2014, p. 192) suggests "affirming or altering our understanding of how government can and should operate," a crisis narrative as a political discourse can function as a "technique of government." As such, in creating a momentum for furthering policy objectives, a situation of exception may be an opportunity to give effect to political ambitions, including ones that poorly fit the guiding principles of the human rights project.

Reminder: the Normative Baseline for Vulnerabilization Applies also During Crises

In general, crises are described as situations that "go beyond normalcy" (van Genugten and Bulterman 2014, p. 4). Yet, as described above, crises have in many ways become the normal, with different phases and grades of exceptionality fluctuating throughout the 2000s and before. With this, narrow readings of human rights have in many situations been normalized as measures to address the different crises, coupled with the focus being shifted on the protection of the vulnerable, or the vulnerable enough, opening the vulnerability rhetoric to use as an extension of crisis politics. Ideally, this means that an understanding of different vulnerabilities guides states in prioritizing protection in times of crisis, sensitized by the fact that special measures will be needed to ensure the realization of the essential level of rights at par for all. However, in that the different processes of vulnerabilization also lend themselves to exclusionary uses often detached from the actual protection needs of individuals, vulnerability may also become an instrument for cementing and reinforcing existing power dynamics rather than mitigating inequalities. Due to this, some authors to this special issue question the viability of the vulnerability narrative in its present state as a tool for ensuring the necessary and equal levels of protection for all individuals, asking what role it should play in responses to future crises.

As responses to crises, recourse is often had to "quick-fixes" (cf. Marique 2020, p. 63), solutions to overcome the acute state of crisis that, although meant as temporary, can have fundamental—and in many cases long-term—effects on the development of the global human rights protection system. This momentum of change

produced by crises is not easy to put a stop to, Kamiloğlu (2020, p. 19) notes, and may affect decisions wherein "new norms in the new normal" are being negotiated. In this context, the increasingly used extensions of power give rise to concerns about the extraordinary uses of power becoming a part of the quotidian, a "part of the permanent legal and political order" (Fatovic 2019, p. 1). Different forms of stages in between the exceptional and the normal may also appear, placing new challenges on striking the balance between the use of extraordinary and ordinary powers and restoring the normal legal order (Webber 2020, p. 182). The question that many of the authors to this special issue ask, therefore, is whether there exists a risk that the crisis discourse opens the floodgates for shifting priorities and reducing the levels of human rights protection for all, and most notably for those in most vulnerable positions (e.g., Phillips in this issue). That is, does the crisis level of protection become the state of new normalcy of protection? The COVID-19 pandemic, as Engström (in this issue) proposes, and the mitigation of its effects in the years to come, presents, in many ways, a litmus test case in this regard. Beyond the initial responses to the pandemic, concerns have been expressed regarding the more long-lasting effects that the crisis and the securitization framing may have in terms of discriminatory practices (Duarte and Valença 2021, p. 235). Such a securitization trend of health (see, e.g., Sekalala et al 2022) is feared to contribute to "normalising the trade-offs made in the name of perceived safety," including limitations that would otherwise not be accepted (Gozdecka 2021, p. 213).

At the same time, a further dimension of crisification that should be stressed is that the expectation of change underlying the crisis rhetoric can be productive, functioning as a catalyst for positive change (for discussion, see Authers and Charlesworth 2014, p. 25; Lawrence 2014, p. 189). After all, the whole human rights movement came about as a reaction to the atrocities of World War II. Importantly, research shows that the momentum, and the space for change that crises generally entail, has the potential to give rise to possibilities for those traditionally excluded to resist the prevailing state of affairs (Henderson 2018, p. 14). This may be the result of the fact that crises, such as the COVID-19 pandemic, may force states to take hold of structural vulnerabilities and "go beyond what they would normally be doing to address the extra layers of vulnerability" (Bald et al. 2020, p. 148). Crises may also expose gaps and inadequacies in protection levels, as well as shed light on structural flaws and inequalities in the international (legal) order (Chimni 2022, pp. 40–42; Cusato 2022, p 120). To a certain extent, this is what has happened in the area of global social protection efforts as a response to the financial crisis and the pandemic, Engström (in this issue) notes. The fact that crises—or crises narratives—create political opportunities out of the ordinary, possibilities for fundamental changes can, in other words, potentially generate openings for the special protection needs of the particularly vulnerable and for the voice of the vulnerable to be heard.

For such an opening to materialize into a responsible and responsive approach to vulnerability would, however, require a shift in the approaches to vulnerabilization, (re)directing the attention from those who are labelled as vulnerable to those who vulnerabilize and exclude (Oude Breuil in this issue), and (re)attaching the policy goals of vulnerabilization to the actual human realities and protection needs (Da Lomba and Vermeylen in this issue). This implies that if vulnerabilization is to be

taken seriously as a tangible tool for human rights protection, as Zimmermann (in this issue) notes, it cannot be misappropriated as a disguise for reinforcing underlying power dynamics. Nor can it function selectively to provide protection only to those whom we want to protect, or who, to our mind, deserve the protection (Oude Breuil in this issue). In this perspective it is important to recognize that crisis measures often are based on fragmentary understandings of the situation, which offer piecemeal solutions, potentially masking and diverting attention from more wide-based structural or historical injustices (Charlesworth 2002). Costello (2020, p. 21) speaks of a policy paralysis in this regard, in which the urgency of the crisis is used as an excuse not to address more structural problems. In spurring a positive change, care should therefore be taken not to overlook the "silences of crises" (Charlesworth 2002, p. 388), the inequalities and injustices embedded in the structures of power, and the voices that have not been heard during the crises or, for that matter, before it. This applies also to reassessing the structures of the international legal framework itself, as Charlesworth (2002, p. 389) observes. For this, understanding vulnerability and acknowledging its different sources, be they inherent, situational, or pathogenic (Mackenzie et al. 2014), is crucial.

In engaging in a critical debate on the role of the welfare state in protecting individuals, in particular as regards the most vulnerable within societies, the articles in this special issue provide guidance and new perspectives to that end. They do so while at the same time reminding that the special protection to be granted to individuals in vulnerable positions is part and parcel of the fundamental principles to which states are bound under international human rights law. Recognizing the normative role of vulnerability as a foundation for state responsibility is central in this regard (e.g., Zimmermann in this issue), entailing an acknowledgement of the accountability of states to individuals in vulnerable situations and to each other (Da Lomba and Vermeylen in this issue). This means that the detailed and established positive human rights duties that vulnerabilization entails for states, both nationally and globally, should be taken seriously (e.g., Zimmermann 2015). This lens is indispensable for capturing and addressing the layered vulnerabilities that have their sources in or are exacerbated by times of crises.

An important realization is, therefore, that the crisis responses to vulnerability should very much follow the same resilience-building logic that should inform states' work on special protection in general, making human rights protection effectively and equally available to all. To achieve this, policy choices should be based on reliable information on their effects. *Ex ante* measures and the role of impact and vulnerability assessments, as well as participation by the vulnerable individuals themselves in such processes, are key in making the responses effective in practice (see, e.g., UN Doc. A/HRC/40/57, princ. 19). A move from expertification to enabling the voices of the individuals in vulnerable situations to be heard in measures affecting them (cf. Durocher et al. 2016, p. 228) and ensuring that they have access to effective remedies where their rights are not fulfilled is important in this regard (Sormunen in this issue). So are cross-cutting responses to resilience-building that move beyond the normative, as Engström (in this issue) observes, and the realization that the inclusiveness inherent in the human rights thinking does not stop at

the borders of states, as Da Lomba and Vermeylen (in this issue) point out in their account of a fuller vulnerability analysis.

Above all, as the contributions to this issue demonstrate, the principle of non-discrimination requires that any decision of vulnerabilization is to be made on grounds that further the object and purpose of human rights, including substantive equality, with limited and time-bound deviations from this rule being justified in crisis situations only where they are specified in law and are based on objective grounds. In re-legitimizing human rights as an equitable approach to crises, this is essential. The prolonged state of crisis of human rights protection that we are currently witnessing is something that both the human rights system and the states as parts of it should seize as a moment of self-reflection. The recognition of this should prompt decision-makers, but also lawyers and academics, to self-scrutiny in light of the object and purpose of human rights and to carefully reflect on the effects that the crisis measures have on the global human rights protection system. Due care needs to be taken for the state of the exceptional not to be normalized (cf. e.g., Guéguin 2021) and for international human rights law not becoming a tool for justifying the current state of affairs (cf. Charlesworth 2002, p. 391) through which the more powerful govern for and about the vulnerable. This does not mean that vulnerability as a prioritizing tool within human rights, as such, should be abandoned, but the ways it is interpreted should be more firmly anchored in the basic tenets of human rights law.

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Declarations

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