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Vulnerabilisation: Between mainstreaming and human rights overreach

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Abstract

There is an ongoing process of ‘vulnerabilisation’ of international protection. This process is the outcome of the establishment of special protection regimes within human rights law and of extending and specifying the scope of existing norms. Vulnerabilisation also increasingly takes place through the expansion of the sphere of international actors embedding the protection of vulnerable groups as a core element of their policymaking. This article takes hold of this ongoing vulnerabilisation and sets out to explore some of its consequences. Vulnerabilisation, the article claims, is a necessary and important element of ensuring protection of those most in need. However, the development also comes with possible downsides. Vulnerability-reasoning enables selectivity and prioritisation, which can turn into exclusion and politicisation. The vulnerabilisation phenomenon also comes with compartmentalisation and potential instrumentalisation of protection. As such, vulnerabilisation walks a tightrope between mainstreaming and overreach.

Keywords

Human rights, special protection, social protection, vulnerability, mainstreaming

I. INTRODUCTION

Enduring societal problems, such as social marginalisation, inequality, and discrimination, are nowadays often addressed through the special protection of individuals and groups. Those

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eligible for special treatment have traditionally been given labels such as the ‘marginalised’, the ‘disadvantaged’ or the ‘discriminated’. Today, these groups are commonly subsumed under the concept ‘vulnerable’, even to the point where the vulnerability rhetoric is referred to as the new ‘lingua franca of global and international justice’.¹ There appears to be widespread consensus that special or targeted measures are needed to overcome persisting injustices and ensure the universality of human rights.

Many scholars have, during the last decade, paid attention to the increased use of vulnerability argumentation in international law and politics, for example, in the case law of the European Court of Human Rights (ECtHR or Court) and the practice of the United Nations (UN) treaty bodies.² The vulnerabilisation phenomenon takes place on many different fronts.³ On the one hand, it is an outcome of the establishment of special protection regimes within human rights law – such as the 1989 Convention on the Rights of the Child and the 2006 Convention on the Rights of Persons with Disabilities (Disability Convention) – and of extending and specifying the scope of existing norms in respect of the vulnerable through interpretation. Both of these processes aim at ensuring that groups and individuals who traditionally have not seen their human rights fully realised would do so. In the human rights context, vulnerability is thus generally invoked to point to protection gaps and to specify – or particularise – States’ obligations to respond to the specific protection needs of particular individuals or groups.⁴ On the other hand, vulnerabilisation is taking place through an expanding sphere of international organisations and other actors, elevating the protection of vulnerable groups into an element of their policy-making.⁵ Along with ‘social protection’ emerging as a central paradigm of global policy-making, the protection of vulnerable groups has simultaneously grown into one of its core embodiments. Vulnerabilisation, in other words, not only affects the application and interpretation of human rights law but is also mainstreamed beyond the framework of that particular legal regime.

The existing scholarship on vulnerabilisation has so far mainly focused on establishing this phenomenon by identifying various references to vulnerability in, for example, case law and instruments produced by international actors. Much of this scholarship points out that the merits of

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1. Alyson Cole, ‘All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique’ (2016) 17 *Critical Horizons* 260, 263.
 2. See, for example, Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 147; Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (Routledge 2017).
 3. Brown talks about the ‘vulnerability zeitgeist’, Kate Brown, ‘Questioning the Vulnerability Zeitgeist: Care and Control Practices with “Vulnerable” Young People’ (2014) 13 *Social Policy & Society* 371.
 4. See, for example, Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso, ‘Disability and Vulnerability: A Human Rights Reading of the Responsive State’ (2020) 24 *The International Journal of Human Rights* 1180. In this article, the concept of ‘particularisation’ is used to denote the use of *special* measures for *particular* individuals or groups. Often this particularisation concurs with ‘vulnerabilisation’, which here is used to refer to particularisation that takes place to ensure that rights or interests of individuals or groups defined as vulnerable (or the like) are realised. Sometimes, the authors also use the concept of ‘special protection’ to refer to the same turn to vulnerabilisation/particularisation.
 5. For an overview of social protection policies of international organisations, see Viljam Engström and Alina Vegar, ‘Social Protection Policies of International Organizations’ (2021) Åbo Akademi University, Institute for Human Rights Working Paper 1/2021, <<https://www.abo.fi/wp-content/uploads/2021/08/2021-Engstrom-and-Vegar-Social-Protection-Policies-of-IOs.pdf>> accessed 11 November 2021.

this development are in ensuring effective human rights protection for everyone.⁶ The authors of this article acknowledge the many positive outcomes that the vulnerabilisation process has had. However, in a broader vulnerability discourse a more critical tone can also be identified, emphasising for example the patronising aspects of vulnerability reasoning.⁷ A growing number of scholars especially within social sciences are critical towards the vulnerabilisation trend, arguing that it may in fact be more part of the problem than a solution.⁸ This criticism seems not to have entered the international legal discourse to any great extent so far. Importantly, the aim of this article is not to make a verdict on whether vulnerabilisation *per se* is good or bad, but rather to highlight how vulnerabilisation as a phenomenon can be ‘profoundly ambiguous in its effects’.⁹ While acknowledging the value of a vulnerability approach in human rights law and beyond, it seeks to exemplify potential risks attached.

Vulnerabilisation, the article claims, can be used for various purposes. The article seeks to illustrate how the concept of vulnerability can enable selectivity. It posits that while vulnerabilisation as a phenomenon often (at least at the level of rhetoric) aims at ensuring that everyone’s human rights are fulfilled, the prioritising function inherent in it can generate inequalities at the level of implementation. This can be the result of the diversification of actors identifying vulnerabilities and implementing protection, leading to a compartmentalisation of special protection. Undesirable outcomes may also arise from the blurred contours of the vulnerability narrative. By building on critical vulnerability discourse, the current article argues that the persuasiveness of the vulnerability concept should not ignore its inherent indeterminacy, and the consequent potential for its politicisation and instrumentalisation.¹⁰ This article argues that the vulnerability narrative can eventually also bring with it a human rights devaluation by becoming a device for prioritisation and exclusion.¹¹

The article posits that within human rights law and connected legal fields such as international refugee law, the ever-increasing vulnerabilisation has resulted in a situation where being found vulnerable has become a key to enjoying full protection. A common pattern of thought seems to be that, given the limited resources, we need to prioritise the protection of those most in need of it. This puts particularity as an element of human rights law in a new light as personhood no longer appears to be the sole basis for distributing human rights protection, as particular

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6. See, for example, Eva Brems, ‘Smart Human Rights Integration’ in Eva Brems and Saïla Ouald-Chaib (eds), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives* (Edward Elgar 2018) 165 and following (referring to the phenomenon as target group specialisation); Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 I-CON 1056.
 7. See, for example, Kate Brown, ‘“Vulnerability”: Handle with Care’ (2011) 5 Ethics and Social Welfare 313, 315–316.
 8. For a fundamental critique, see David Chandler and Julian Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (Rowman & Littlefield International 2016). For another account see, for example, Lewis Turner, ‘The Politics of Labeling Refugee Men as “Vulnerable”’ (2021) 28 Social Politics 1 with multiple references and examples of aspects of this critique.
 9. Compare Martti Koskenniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (2010) 1 Humanity 47.
 10. Compare Kate Brown, Kathryn Ecclestone, and Nick Emmel, ‘Review Article: The Many Faces of Vulnerability’ (2017) 16 Social Policy & Society 497. Methodologically, the article is thus inspired by scholars that seek to explore the function of concepts in legal discourse, and identify instances of indeterminacy and bias. See Koskenniemi (n 9) 47.
 11. Compare John Tasioulas, ‘Saving Human Rights from Human Rights Law’ (2019) 52 Vanderbilt Journal of Transnational Law 1167.

vulnerability emerges as an additional threshold.¹² This seems to be a shared point of departure also within social protection policies of international organisations. With this, the question ‘whose vulnerability do we recognise?’ becomes central,¹³ as does the question of whether this development – the expanding focus on special protection – entails a risk for a devaluation of the human rights project as a protective regime for all. There is, after all, a thin line between particularisation that aims at enhancing the universal enjoyment of rights, and a potential selectivity resulting from the prioritising of some individuals or groups over others.

Vulnerabilisation, it seems, conceals a dual logic. Vulnerability comes with the promise of enhanced protection. It is a tool for making human rights law truly universal. As far as vulnerabilisation supports and strengthens such universality, it can be regarded as an instance of successful mainstreaming.¹⁴ But any process of mainstreaming has two sides to it, as mainstreaming also sets priorities and has effects on the rights of others.¹⁵ The other side of the coin, then, is that mainstreaming vulnerability as the focal lens of protection always also constitutes particularisation of that protection. Particularisation concurs with vulnerabilisation when extending or enhancing protection to particular individuals or groups. But as a defining feature of vulnerabilisation, the inherent particularisation can also have unintended consequences. As the article illustrates, vulnerabilisation can therefore initiate processes that run counter to the promise of universality. The mainstreaming of human rights through vulnerabilisation can also run the risk of conceptual overreach, ‘a process of expansion or inflation’ in which the concept ‘absorbs ideas and demands that are foreign to it’.¹⁶ It is this nexus that the present article seeks to exemplify. It does so by exemplifying instances of proliferation and identifying risks for devaluation – core concepts of the special issue this article is part of – as focal lenses of the analysis. With this approach, the article wishes to show that despite the strong case that can be made for the merits of the broad phenomenon of vulnerabilisation,¹⁷

12. Compare the idea that in the post-Second World War era (when human rights law emerged) personhood replaced citizenship as the basis for entitlement to rights. Marike Borren, ‘Review: Rightless in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants’ (2017) 16 *Contemporary Political Theory* 269, 270.

13. Compare John Tasioulas, ‘Are Human Rights Taking over the Space Once Occupied by Politics?’ (*The New Statesman*, 26 August 2019) <<https://www.newstatesman.com/2019/08/are-human-rights-taking-over-space-once-occupied-politics>> accessed 11 November 2021 (‘The second form of overreach relates [...] to who gets to decide what counts.’).

14. On the concept of mainstreaming, see, for example, Yeshanew (‘Mainstreaming [...] is concerned with the conscious, systematic and concrete integration of certain values and standards into policies, plans, programmes, priorities, processes and results of the work of an organisation. Human rights mainstreaming refers to the deliberate infusion of human rights standards into the work of organisations [...].’) Sisay Alemahu Yeshanew, ‘Mainstreaming Human Rights in Development Programmes and Projects: Experience from the Work of a United Nations Agency’ (2014) 32 *Nordic Journal of Human Rights* 372.

15. Paraphrasing Koskeniemi (n 9).

16. John Tasioulas, ‘The Inflation of Concepts’ (*Aeon*, 29 January 2021) <<https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason>> accessed 11 November 2021. Also see Hurst Hannum, ‘Saving Human Rights’ (*Open Global Rights*, 24 September 2019), <<https://www.openglobalrights.org/saving-human-rights/>> accessed 11 November 2021.

17. By way of a disclaimer, the current article does not claim to exhaust the discussion on the vulnerability concept and the related case law and practice but builds on existing vulnerability scholarship and the insights gained by the authors within the research project ‘Vulnerability as Particularity: Towards Relativizing the Universality of Human Rights?’ (Åbo Akademi University Institute for Human Rights, ‘Vulnerability as Particularity: Towards Relativizing the Universality of Human Rights?’ (*Åbo Akademi University*, 2017–2021) <www.abo.fi/vulnerability/> accessed 13 January 2022.

there are by now enough accumulated examples and analytical insights into different aspects of vulnerability reasoning to enable a synthesising critical discussion.

2. INCREASED ATTENTION TO SPECIAL PROTECTION IN INTERNATIONAL LAW AND POLITICS

In terms of treaty law, the international human rights regime has for long evolved mainly through special protection regimes – such as the 1951 Refugee Convention and its 1967 Protocol; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1989 Convention on the Rights of the Child; and the 2006 Disability Convention – adopted with a central goal to ensure that universal human rights are *de facto* available to all. Lately, the need to acknowledge vulnerabilities and to provide special protection has also increasingly been emphasised in the practice of various human rights bodies.¹⁸ The institution with the most extensive case law on vulnerability and positive obligations is the ECtHR. In *Tarakhel v. Switzerland*, this Court for instance noted that the assessment of ill-treatment according to Article 3 of the European Convention on Human Rights (ECHR) is ‘relative’ and that in such evaluations the individual situation of the applicant is of relevance. The Court also emphasised that there is a requirement of special protection regarding asylum-seekers because they are a particularly disadvantaged and vulnerable population group, and that this requirement of special protection is especially important concerning child asylum-seekers because of their ‘extreme vulnerability.’¹⁹ Similar reasoning can be found in many other cases before the ECtHR.²⁰

Human rights obligations incumbent on States in relation to vulnerable groups and individuals are also present in a number of general comments and concluding observations of human rights treaty monitoring bodies.²¹ Amongst others, the Committee on Economic, Social and Cultural Rights (CESCR or Committee) regularly calls for the protection of the most vulnerable individuals and groups within societies.²² For example, when considering grounds for discrimination, the Committee has attached importance to the fact that certain groups are ‘vulnerable and have suffered and continue to suffer marginalization’.²³ Likewise, the Committee on the Rights of the Child (CRC) has noted how multiple discrimination ‘based on a combination of factors, i.e., indigenous girls with disabilities, children with disabilities living in rural areas and so on’ make children with disabilities ‘one of the most vulnerable groups of children’ and how this discrimination ‘increase[s] the vulnerability of certain groups’.²⁴ Along the same lines, the Committee on the Elimination of Discrimination against Women (CEDAW) and the CRC have in their joint general recommendation

18. See, for example, Human Rights Council, ‘Guiding Principles on Extreme Poverty and Human Rights’ (2012) UN Docs A/HRC/RES/21/11 and A/HRC/21/39. See further the references in (n 2, 6).

19. *Tarakhel v. Switzerland* App no 29217/12 (ECtHR, 4 November 2014), paras 118–119.

20. See, for example, *O.M. v. Hungary* App no 9912/15 (ECtHR, 5 July 2016); and *Rahimi v. Greece* App no 8687/08 (ECtHR, 5 April 2011).

21. See, for example, Nifosi-Sutton (n 2) 126 and following.

22. See, for example, Audrey R. Chapman and Benjamin Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’ (2011) 33 *Human Rights Quarterly* 682.

23. CESCR, ‘General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights’ (2 July 2009), UN Doc E/C.12/GC/20, para 27.

24. CRC, ‘General Comment No. 9 (2006): The Rights of Children with Disabilities’ (27 February 2007) UN Doc CRC/C/GC/9, para 8.

on harmful practices emphasised how, for example, social exclusion and poverty increase girls' and women's 'vulnerability to exploitation, harmful practices and other forms of gender-based violence'. They have further stressed State Parties' 'obligation to challenge and change patriarchal ideologies and structures that constrain women and girls from fully exercising their human rights and freedoms.'²⁵ Also the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has emphasised the obligation of State Parties to 'identify vulnerable groups prone to abuse and take special measures to prevent violations from occurring'.²⁶

Special attention given to vulnerable individuals and groups is also an important building block of the so-called human rights-based approach to development, a conceptual framework based on international human rights standards that guides the policies of many development actors since the early 2000s.²⁷ Similarly, several mandates within the special procedures of the Human Rights Council are focused on particular groups, such as the mandates of the Special Rapporteur on the rights of persons with disabilities, the Special Rapporteur on the rights of indigenous peoples, and the Independent Expert on the enjoyment of all human rights by older persons.²⁸ All in all, special protection is today an established part of modern human rights law.

In parallel, the emergence of social protection as a new paradigm in global social discourse is notable both at the domestic as well as the international level.²⁹ As this paradigm underlines resilience and development in a long-term perspective, it comes with enhanced attention to vulnerabilities.³⁰ Consequently, one of the few elements of social protection upon which there seems to be strong consensus is that social protection should be geared to poor and vulnerable individuals and groups in particular.³¹ One of the more prominent expressions of the active push for elevating social protection to the global agenda are the Sustainable Development Goals with target 1.3 on ending poverty, which

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25. CEDAW/CRC, 'Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices' (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, para 61. Also see Veronika Flegar and Emma Iedema, 'The Use of the "Vulnerability" Label by the Committee on the Elimination of Discrimination against Women: Protecting or Stigmatizing Women and Girls in the Forced Migration Context?' (2019) 1(41) Brill Open Law.
 26. *The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*, Comm no 006/Com/002/2015 (ACERWC, 2018) para 47. On the African treaty-monitoring bodies' vulnerability-related practice, see, for example, Mikaela Heikkilä and Maija Mustaniemi-Laakso, 'Vulnerability as a Human Rights Variable: African and European Developments' (2020) 20(2) African Human Rights Law Journal 777; and Nifosi-Sutton (n 2) 174–182.
 27. OHCHR, 'Frequently Asked Questions on a Human-Rights-Based Approach to Development Cooperation' (2006) <<https://www.ohchr.org/Documents/Publications/FAQen.pdf>> accessed 11 November 2021; Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 The International Journal of Human Rights 664.
 28. OHCHR, 'Thematic Mandates' <<https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en>> accessed 11 November 2021.
 29. Concerning the domestic-level 'turn' in low and middle-income level countries, see Armando Barrientos and David Hulme, 'Social Protection for the Poor and Poorest in Developing Countries: Reflections on a Quiet Revolution' (2008) 30 Brooks World Poverty Institute Working Paper; Arjan de Haan, 'The Rise of Social Protection in Development: Progress, Pitfalls and Politics' (2014) 26 European Journal of Development Research 311; UNRISD, *Policy Innovations for Transformative Change: UNRISD Flagship Report* (October 2016).
 30. Lutz Leisering, *The Global Rise of Social Cash Transfers: How States and International Organizations Constructed a New Instrument for Combating Poverty* (OUP 2019) 262.
 31. Steen Lau Jorgensen and Paul B. Siegel, 'Social Protection in an Era of Increasing Uncertainty and Disruption: Social Risk Management 2.0' (2019) 1930 World Bank Group Discussion Paper.

guides States to ‘[i]mplement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable’.³²

An expression of the expanding social protection interest is the growing attention to vulnerabilities in social protection policies of international organisations.³³ Out of organisations, the International Labour Organisation (ILO) has been at the forefront of promoting social protection, most notably through its 1952 flagship Social Security (Minimum Standards) Convention (No. 102) and the 2012 ILO Recommendation on Social Protection Floors (No. 202).³⁴ In the 2012 ILO recommendation, social protection floors are defined as nationally prescribed sets of basic social security guarantees, aimed at preventing or alleviating poverty, vulnerability and social exclusion.³⁵ In 2015, the CESCR endorsed the idea of social protection floors.³⁶ More widespread international political support for the idea of social protection with a focus on the protection of vulnerable groups materialised in 2009 through the Social Protection Floor Initiative. This initiative – led by the ILO and the World Health Organization and joined by organisations such as the Organisation for Economic Co-operation and Development, UN Development Programme, World Bank, the International Monetary Fund (IMF), UN Refugee Agency and UN Children’s Fund (UNICEF)³⁷ – set out to coordinate and improve the efficiency of the UN’s development efforts in the area of social protection, with one of the core aims being alleviation of vulnerability.³⁸ One of the most recent, and certainly most long awaited, international organisations to engage in social protection is the IMF, which in 2019 adopted the Strategy for IMF Engagement on Social Spending. In this strategy, social spending is defined as social protection, health, and education spending, for the promotion of inclusive growth, addressing inequality and the protection of vulnerable groups.³⁹

3. PROLIFERATION THROUGH VULNERABILITY-SENSITIVE READING OF RIGHTS

When discussing the ‘constant expansion of human rights’ and the rights of vulnerable groups, Freedman notes that ‘it swiftly became apparent that vulnerable or marginalised groups – initially

32. UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.

33. For an overview, see Engström and Vegar (n 5).

34. Also see Michael Cichon, ‘The Social Protection Floors Recommendation, 2012 (No. 202): Can a Six-Page Document Change the Course of Social History?’ (2013) 66 *International Social Security Review* 21; Ebenezer Durojaye, ‘The ILO Social Protection Floors Recommendation 202, and Poverty Reduction’ (2015) 25 *Development in Practice* 270.

35. ILO Social Protection Floors Recommendation No 202, Article I (2).

36. CESCR, ‘Statement on Social Protection Floors: An Essential Element of the Right to Social Security and of the Sustainable Development Goals’ (6 March 2015) UN Doc E/C.12/54/3, para 4.

37. As well as bilateral partners, research institutes and international non-governmental organisations, see ILO, ‘22. Social Protection Floor’ <<http://www.ilo.org/global/topics/dw4sd/themes/sp-floor/lang-en/index.htm>> accessed 11 November 2021; ILO and World Bank Group, ‘A Shared Mission for Universal Social Protection: Concept Note’, <https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/genericdocument/wcms_378996.pdf> accessed 11 November 2021.

38. USP2030, ‘Joint Fund Window for Social Protection Floors’ <<https://www.usp2030.org/gimi/RessourcePDF.action?id=55065>> accessed 11 November 2021; Heidi Hautala in Magdalena Sepúlveda and Carly Nyst, *The Human Rights Approach to Social Protection* (Ministry for Foreign Affairs of Finland 2012), 7.

39. IMF, ‘IMF Policy Paper: A Strategy for IMF Engagement on Social Spending’ (14 June 2019) (hereafter ‘IMF Social Spending Strategy’).

women, but later to include many others – required specific promotion and protection of their rights’, that is, that general human rights instruments were not efficient enough in promoting the rights and interests of these groups even though they theoretically should have been so as they apply to everyone.⁴⁰ The resulting special protection instruments do not create new human rights obligations for States, but rather *specify* or *spell out* the obligations that States have in relation to particular individuals and groups. This has been noted, among others, in relation to the Disability Convention: ‘While the Convention does not establish new human rights, it does set out with much greater clarity the obligations on States to promote, protect, and ensure the rights of persons with disabilities.’⁴¹ At the same time, as noted by Mégret regarding the same Convention, the special human rights treaties may enrich and modify the content of existing rights.⁴² They may even give rise to new categories of rights that significantly expand existing rights, coming close to creating new rights, he argues.⁴³ In a similar vein, Brems refers to emancipation rights as a ‘distinct category of human rights’, with reference to, for example, women’s rights, children’s rights, and LGBTI rights, which are ‘rights that are intended to correct a legacy of structural discrimination of specific groups and to provide members of such groups equal opportunities and equal enjoyment of their rights.’⁴⁴ As such, the special conventions may significantly expand understandings of the applicability of the pre-existing rights.

A changed understanding of the content and scope of various rights may also take place through interpretation, for example, when treaty-monitoring bodies identify positive State obligations. From a vulnerability perspective, it is noteworthy that in many cases the identification of positive State obligations has taken place in contexts involving vulnerable individuals or groups. One area, in which vulnerability argumentation has been used to shape human rights obligations relates to the right to housing, where different treaty-monitoring bodies have indicated that the State obligations are more comprehensive in relation to vulnerable groups and individuals. For example, the European Committee of Social Rights (ECSR) has held that in the case of the Roma, ‘equal treatment implies that Italy should take measures appropriate to Roma’s particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless’.⁴⁵ The Committee has further specified the positive obligations arising from this to include ‘measures specifically aimed at improving their housing conditions, including the possibility for

40. Rosa Freedman, ‘Is the Constant Expansion of Human Rights Consolidating or Weakening Their Protection and Respect?’ in Workshop Expansion of the Concept of Human Rights: Impact on Rights Promotion and Protection, European Parliament, DROI (March 2018), <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603865/EXPO_STU\(2018\)603865_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603865/EXPO_STU(2018)603865_EN.pdf)> accessed 11 November 2021, 10.

41. UN, Department of Economic and Social Affairs, ‘Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities’ <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/frequently-asked-questions-regarding-the-convention-on-the-rights-of-persons-with-disabilities.html>> accessed 11 November 2021.

42. Frédéric Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30(2) *Human Rights Quarterly* 494, 498. Also, Saïla Ouald-Chaib, ‘Introduction’ in Eva Brems and Saïla Ouald-Chaib (eds), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives* (Edward Elgar 2018) 1, 3 on layers of human rights law.

43. Mégret (n 42) 498.

44. Eva Brems, ‘Lessons for Children’s Rights from Women’s Rights? Emancipation Rights as a Distinct Category of Human Rights’ in Eva Brems, Ellen Desmet and Wouter Vandenhoele (eds) *Children’s Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017) 93, 94–95.

45. *ERRC v Italy* Compl no 27/2004 (ECSR, 7 December 2005), para 21.

an effective access to social housing'.⁴⁶ Also, while the ECHR does not give rise to an obligation on State parties to provide housing, the ECtHR has held that 'an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases'.⁴⁷ Besides, by identifying positive obligations, the ECtHR praxis on vulnerability may also affect a State's leeway of action in other ways. More specifically, the Court has held that 'if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower, and it must have very weighty reasons for the restrictions in question'.⁴⁸

While it may be argued that the specification of human rights through new instruments and case law does not as such establish new human rights, they may entail a proliferation of human rights in that matters previously approached as essentially political or domestic become viewed as matters of international human rights law.⁴⁹ The declaration by Hillary Clinton at the UN World Conference on Women in Beijing in 1995 that 'Women's Rights are Human Rights'⁵⁰ for example epitomises the urge to acknowledge the need to increasingly view the treatment of women as a question of human rights law. A similar development is taking place within criminal law, an area that is traditionally viewed as an essentially domestic field of law where the international influences have been insignificant, but one which today is facing an increasing internationalisation (and in Europe, a *Europeanisation*). In this vein, as Heri discusses, human rights increasingly 'shape' or 'inform' State obligations in the field of criminal justice. This happens in particular through positive State obligations to criminalise, prevent, police, and prosecute with a view to protect the vulnerable that Heri refers to as the 'coercive power of vulnerability'.⁵¹ The same phenomenon is considered by Zimmermann, who on her part writes about 'legislating for the vulnerable' and special duties under the ECHR.⁵² An example of such duties is present in *M.C. v. Bulgaria* (2003), which involved the alleged rape of a 14-year-old girl. In that case, the ECtHR noted that while States enjoy a wide margin of appreciation in the field of criminal justice in order to be able to take into account 'perceptions of a cultural nature, local circumstances and traditional approaches', they must provide effective deterrence against grave acts such as rape in particular in cases involving vulnerable individuals.⁵³ Based on this, the Court held that the Bulgarian rape definition requiring proof of physical force and physical resistance did not meet the 'contemporary standards and

46. *ERRC v Italy* (n 45), para 46.

47. *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012), para 130.

48. *Alajos Kiss v Hungary* App no 38832/06 (ECtHR, 20 May 2010), para 42.

49. For a discussion on proliferation, see, for example, European Parliament's Subcommittee on Human Rights (DROI), 'Workshop: Expansion of the Concept of Human Rights: Impact on Rights Promotion and Protection' (2018) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603865/EXPO_STU\(2018\)603865_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603865/EXPO_STU(2018)603865_EN.pdf)> accessed 12 November 2021; Rosa Freedman and Jacob Mchangama, 'Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates' (2016) 38 *Human Rights Quarterly* 164.

50. UN, 'Women's Rights Are Human Rights' (2014) <<https://www.ohchr.org/documents/events/whrd/womenrightsarehr.pdf>> accessed 12 November 2021.

51. Corina Heri, 'Shaping Coercive Obligations through Vulnerability: The Example of the ECtHR' in Laurens Lavrysen, and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020) 93 and following.

52. Nesa Zimmermann, 'Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights' (2015) 25 *Swiss Review of International and European Law* 539.

53. *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003), paras 150 and 154.

trends in that area' anymore.⁵⁴ Some more recent human rights conventions, such as the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011 Istanbul Convention) contain extensive State obligations in the field of criminal justice for 'the vulnerable'.

In other words, proliferation through vulnerabilisation can take the form of transforming previously domestic matters into questions of international human rights law. As a phenomenon, such proliferation is not unforeseen considering how human rights are to be interpreted. Based on the widely established interpretative principle, human rights should be interpreted considering their object and purpose, in a dynamic and evolutive manner for them to both effectively provide the protection they are designed for and to remain relevant within the ever-changing needs and contexts faced by societies and individuals. The ECtHR, for example, often underlines both the principle of effectiveness and the character of the ECHR as a living instrument to be interpreted 'in the light of present-day conditions'.⁵⁵ The need for such dynamism finds an explanation in the often quite general wording of the human rights treaties. References to, for example, all appropriate means and all necessary laws and measures imply by definition that to be effective and to meet the object and purpose of the human rights treaties, the operationalisation of rights must adapt to the context-specific protection needs of individuals.⁵⁶ Vulnerabilisation serves, by its dynamic nature, as a necessary tool to this end, attaching attention to the heightened need for protection that individuals may have in different circumstances and in different stages of their life course. At the same time, such a dynamic way of reading rights may give rise to opposition and accusations of human rights overreach in a negative sense. In particular, if the case concerns culturally or politically sensitive areas, such as LGBTI rights or irregularly staying migrants, reluctant governments may feel that the interpretations represent unjustified interference into domestic matters. Similarly, some special protection conventions have been met with scepticism because they have been felt to go 'too far'. For example, some States have contemplated the withdrawal from or non-ratification of the Istanbul Convention on the basis that it is perceived to impose a foreign 'gender ideology' on the country.⁵⁷ Expansive/dynamic interpretation and further proliferation, in other words, can also generate a political backlash undermining the intended progressive development.

4. COMPARTMENTALISATION OF PROTECTION

Proliferation is an outcome of vulnerabilisation that has spread over several legal sources and policymaking of a variety of actors in both human rights law and beyond. Each layer of human rights law has been created out of a perceived need for increased protection. Specialisation through a pluralisation of human rights law is seen as complementary rather than contradictory to the idea of a

54. *M.C. v Bulgaria* (n 53), paras 156 and 166.

55. See, for example, *Tyrer v United Kingdom* App No 5856/72 (ECtHR 25 April 1978), para 31. See also *Al-Adsani v United Kingdom* App no 35763/97 (ECtHR, 21 November 2001), para 55, where the Court reiterates that the Convention 'cannot be interpreted in a vacuum' and 'should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.

56. International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(1); International Covenant on Civil and Political Rights, Article 2(2); and International Convention on the Rights of the Child, Article 2(2).

57. Claudia Ciobanu, 'Poland Begins Push in Region to Replace Istanbul Convention with "Family Rights" Treaty' (*Reporting Democracy*, 6 October 2020) <<https://balkaninsight.com/2020/10/06/family-rights-treaty/>> accessed 12 November 2021.

coherent and efficient human rights framework.⁵⁸ However, as a systemic question of the structure of human rights law, this ‘pluralisation’ is by more critical scholars labelled as ‘fragmentation’.⁵⁹ Whereas there are several aspects to the fragmentation of human rights law, the growth of special protection regimes demonstrates how a contextualisation of the content of rights of particular groups brings with it a compartmentalisation both of what vulnerability is and what type of protection (if any) a finding of vulnerability should result in. That children are holders of ‘children’s rights’ is, for example, often stressed, whereas their subjectivity as holders of general human rights may be overseen.⁶⁰ As noted by Brems, Desmet and Vandenhole: ‘Children’s rights law is often perceived and studied in *isolation* from the broader field of human rights law.’⁶¹ By this development, a claim can be made that there is a risk of creating fault-lines (or compartments) that can hide from sight the intersectionality which is at the heart of vulnerability. Such compartmentalisation can also institute hierarchies in terms of implementation that are not necessarily to the benefit of the vulnerable group or person.⁶² Special protection can give rise to heightened expectations that the legal recognition of special vulnerability will solve embedded socio-economic injustices. However, to address such injustices a focus on the broader human rights framework can be preferable.⁶³ In fact, a strong case can be made that the labelling of individuals and groups as vulnerable aims to mitigate the *effects* of injustices rather than provide tools for addressing their *causes*.⁶⁴

Such a process of compartmentalisation, or ‘siloining’ (perhaps the more common term in the context of organisations), is amplified through increasing enactment of vulnerability reasoning in the policymaking of international organisations. Whereas there may be relative consistency in the conceptual definition of social protection among international organisations, and a recognition of the need to protect vulnerable individuals or groups at the heart of that, the individual mandates of organisations mean that they operationalise the protection differently. In fact, in some cases a selection of whose vulnerability is recognised may be determined purely on a bureaucratic division of the work programme.⁶⁵ Siloining has also been identified as an inherent characteristic of the bureaucracy of organisations that can give rise to hurdles to the adoption of holistic approaches to protection.⁶⁶

58. Brems (n 6) 177.

59. Lixinski points out that the two notions are essentially different viewpoints of the same phenomenon. Lucas Lixinski ‘Comparative International Human Rights Law: An Analysis of the Right to Private and Family Life across Human Rights “Jurisdictions”’ (2014) 32 *Nordic Journal of Human Rights* 99.

60. For a discussion on a more integrated approach, see, for example, Eva Brems, ‘We Need to Look at International Human Rights Law (Also) as a Whole’ (*EJIL Talk!*, 17 October 2014) <<https://www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/>> accessed 12 November 2021.

61. Eva Brems, Ellen Desmet and Wouter Vandenhole, ‘Children’s Rights Law and Human Rights Law: Analysing Present and Possible Future Interactions’ in Eva Brems, Ellen Desmet and Wouter Vandenhole (eds) *Children’s Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge 2017) 5 (italics in original).

62. For an illustration in the context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, see Margaret L. Satterthwaite, ‘Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers’ (2005) 8 *Yale Human Rights and Development Law Journal* 1.

63. Compare Hannum (n 16).

64. Chandler and Reid (n 8). For a similar point in respect of social protection more broadly, John Linarelli, Margot E. Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 252–253.

65. Julie Van Domelen and Laura Rawlings, ‘Social Protection Strategy: Stocktaking of International Agency Policies and Programs in Social Protection’ (Worldbank 2012).

66. See Carolin Anthes, *Institutional Roadblocks to Human Rights Mainstreaming in the FAO: A Tale of Silo Culture in the United Nations System* (Springer 2020).

The functional nature of international organisations entails the presumption that organisations are limited in all their tasks to the pursuit of their particular aims and purposes.⁶⁷ This suggests that any engagement of international organisations in the protection of the vulnerable will always be focused, but at the same time limited and partial in some respect. Whereas the ILO and UNICEF, for example, actively promote a rights-based approach to social security, they do not share the same focus in relation to vulnerable groups. While international labour rights lie at the heart of the ILO mandate,⁶⁸ the mandate of the UNICEF entails an emphasis on the poorest and the most vulnerable children and families.⁶⁹ In other words, even in the case of human rights-based organisations, not all vulnerable groups fall within the scope of their activities.⁷⁰ When moving beyond the ILO and UNICEF, the specificity with which particular vulnerable groups can enter the restricting impact of the operational horizon of organisations becomes even more apparent. IMF may constitute a good example, where children as a group has seemingly had a hard time to enter the policymaking of the Fund due to the so-called macro-criticality restriction on the IMF mandate.⁷¹

Furthermore, as vulnerabilisation spreads across regimes, each regime not only brings its own principles, expertise, and ‘ethos’ to the process of identifying vulnerable groups,⁷² but also its focus on particular vulnerabilities of that group. Based on an acknowledgement that inequality is associated with less sustained growth and other risks, the IMF has increasingly been promoting, for example, gender-responsive budgeting.⁷³ Some have even characterised the IMF as a ‘global leader’ in highlighting inequality.⁷⁴ Yet, while there may at some level be an understanding of the scope of gender inequality issues at the IMF,⁷⁵ the Fund typically focuses on female labour

67. See, for example, Marie von Engelhardt, *International Development Organizations and Fragile States: Law and Disorder* (Palgrave Macmillan 2018) 108, characterising the function of the World Bank political prohibition clause to prevent over-ambiguous expansion of its development mandate.

68. ILO, ‘Declaration on Fundamental Principles and Rights at Work and Its Follow-Up’ (18 June 1998, annex revised 15 June 2010).

69. UNICEF, ‘UNICEF’s Global Social Protection Programme Framework’ (2019).

70. The World Bank has neatly captured this complexity in stating: ‘Social protection figures prominently in many international conventions, but there is divergence among agencies as to how this right is actually perceived’. World Bank, ‘Resilience, Equity, and Opportunity: The World Bank’s Social Protection and Labor Strategy 2012–2022’ (2012), annex 6.

71. The requirement basically means that only such social spending targets can be included in country lending programmes that affect or have the potential to affect domestic or external stability. See Viljam Engström, ‘The IMF and Protection of Vulnerable Groups’ (2020) 89 *Nordic Journal of International Law* 209. Also see IMF Social Spending Strategy (n 39).

72. Compare Martti Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission’ (13 April 2006) UN Doc A/CN.4/L.682.

73. Christian Gonzales and others, ‘Catalyst for Change: Empowering Women and Tackling Income Inequality’ (2015) IMF Staff Discussion Note.

74. Chiara Mariotti, Nick Galasso and Nadia Daar, ‘Great Expectations: Is the IMF Turning Words into Action on Inequality?’ (2017) Oxfam Briefing Paper 2. Both the present and the former IMF Managing Directors have underlined the commitment of the Fund to focus on gender equality. Erna Solberg and Christine Lagarde, ‘It’s Time to Let Women Thrive’ (*Project Syndicate*, 24 January 2018) <<https://www.project-syndicate.org/commentary/women-labor-force-participation-by-erna-solberg-and-christine-lagarde-2018-01?barrier=accesspaylog>> accessed 12 November 2021; Andrea Shalal, ‘“Buckle up.” New IMF Chief Vows “Relentless” Focus on Gender Equality’ (Reuters, 16 October 2019) <<https://www.reuters.com/article/us-imf-economy-women/buckle-up-new-imf-chief-vows-relentless-focus-on-gender-equality-idUSKBN1WU32H>> accessed 12 November 2021.

75. See, for example, Gonzales and others (n 73).

force participation rates and the gender pay gap in its operational action, hereby highlighting only two elements of the multifaceted gender equality problem.⁷⁶ On the one hand, then, IMF engagement, due to its political influence, can have a great impact on how States pay attention to inequalities. At the same time, in a rights-based perspective, the IMF approach to gender inequality remains fairly limited.⁷⁷

5. BALANCING BETWEEN PRIORITISATION AND EXCLUSION

5.1. VULNERABILISATION AS PRIORITISATION

As vulnerability reasoning seeks to enhance the effective realisation of rights, claiming protection in terms of vulnerability can be seen to perform a prioritising function. This is visible, for example, in how the obligations of progressive implementation relating to economic, social, and cultural (ESC) rights are interpreted. While the human rights system calls upon States to ensure the full realisation of all human rights, given finite resources, attention must in practice be directed towards certain questions and prioritisations need to be made. Such prioritisation is an inherent element of the progressive implementation requirement central to ESC rights.⁷⁸ As the identification of vulnerability gears attention to situations where positive measures for special protection are needed, it serves as one of the benchmarks in striking preferences. It has been noted, by the ECSR among others, that when implementing obligations ‘to the maximum of their resources’, States parties ‘must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities’.⁷⁹ Treaty monitoring bodies have also held that in the prioritisation of scarce resources, vulnerability should guide States to direct their help and support those whose needs are most pressing.⁸⁰ In this regard, the ECSR has in relation to austerity measures underlined that States must assess the effects of State measures and take efforts to at least ‘maintain a sufficient level of protection for the benefit of the most vulnerable members of society’.⁸¹ In the same vein, the CESCR has stressed that ‘even in times of severe resource constraints whether caused by a

76. The IMF itself recognises that measures such as budget cuts on subsidies, social programmes, and the public-sector wage bill, are examples of policies that could exacerbate gender inequality. IMF, ‘How to Operationalize Gender Issues in Country Work’ (2018), para 26. Yet, these are frequently recommended as ways of reducing government spending to promote economic stability and growth (as the main purpose of the IMF). Philip Alston, ‘Report of the Special Rapporteur on Extreme Poverty and Human Right’ (8 May 2018) UN Doc A/HRC/38/33, paras 28–29; Bretton Woods Project, ‘The IMF and Gender Equality: Operationalising Change’ (18 February 2019) <<https://www.brettonwoodsproject.org/2019/02/the-imf-and-gender-equality-operationalising-change/>> accessed 12 November 2021.

77. Juan Pablo Bohoslavsky, ‘Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights’ (18 July 2018) UN Doc A/73/179, para 88.

78. According to which States are to take steps towards the full implementation of their obligations within the maximum extent of their resources, while at the same time respecting the obligation of non-discrimination and promoting substantive equality. See ICESCR Article 2; CESCR, General Comment No 20 (n 23); Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para 39; and Rodrigo Uprimny and others, ‘Bridging the Gap: The Evolving Doctrine on ESCR and “Maximum Available Resources”’ in Katharine G. Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 653.

79. *International Association Autism-Europe (IAAE) v France* Compl no 13/2002 (ECSR, 4 November 2003), para 53.

80. For a discussion, see Peroni and Timmer (n 6) 1084.

81. *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece* Compl no 79/2012 (ECSR, 7 December 2012), para 76. See also *Greek General Confederation of Labour (GSEE) v Greece* Compl no 111/2014 (ECSR, 23 March 2017), para 90.

process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.⁸² The same logic is present in the case law of the ECtHR, which held in *Nencheva and Others v. Bulgaria* that despite the severe economic crisis that the country was facing, Bulgaria should have nevertheless taken effective measures to prevent the death of vulnerable children and young people suffering from mental and physical disabilities that had been placed in the care of the State.⁸³

The vulnerability concept, it has been noted, can be ‘stretched to cover almost any person, group, or situation’.⁸⁴ This is certainly one of the strengths of the concept as it is this dynamism that allows its use as a safety valve in cases where protection through regular means would not be available and – in ideal situations where the political will and resources do exist – enables individualised and contextualised assessment of protection needs.⁸⁵ At the same time, for the prioritising function to enter, not everyone can be identified as vulnerable or as ‘particularly vulnerable’. As social (protection) policies of States are always fundamentally an outcome of politico-economical decisions and priorities, also among ‘the vulnerable’ hierarchies need to be created in order to target protection measures.⁸⁶ Human vulnerability, after all, is layered as individuals are subject to different ‘sources and states of vulnerability’.⁸⁷ The varying degrees of vulnerability are used to single out the most disadvantaged sub-groups to be prioritised in terms of protective measures.⁸⁸ In the vulnerability narrative, this is reflected in the use of different attributes to qualify vulnerabilities. While, for example, the ECtHR has referred to asylum-seeking children as ‘extremely’ vulnerable,⁸⁹ the ECSR has identified some households as ‘the most’ vulnerable households,⁹⁰ and the ACERWC some children as the ‘most vulnerable’ children.⁹¹

This prioritising function of vulnerability is also inherent to social protection policies of organisations. In accordance with the IMF Social Spending Strategy, mitigation of adverse effects of adjustment should concern in particular ‘the poor and vulnerable groups’.⁹² The Social Spending Strategy, while avoiding lists of groups that should be given particular

82. CESCR, ‘CESCR General Comment No. 3: The Nature of States Parties’ Obligations’ (14 December 1990) UN Doc E/1991/23, para 12. Likewise, according to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), retrogressive measures may be taken where they are ‘with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups’.

83. *Nencheva and Others v Bulgaria* App no 48609/06 (ECtHR, 18 June 2013), paras 85, 106, 118–121.

84. Carol Levine, ‘The Concept of Vulnerability in Disaster Research’ (2004) 17 *Journal of Traumatic Stress* 395, 398.

85. For example. Heikkilä and Mustaniemi-Laakso (n 26).

86. Sepúlveda and Nyst (n 38) 38.

87. Catriona MacKenzie, Wendy Rogers, and Susan Dodds, ‘Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory’ in Catriona MacKenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 18.

88. Oddný Mjöll Arnadóttir, ‘Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?’ (2017) 4 *Oslo Law Review* 150, 169.

89. *Tarakhel v Switzerland* (n 19), para 99.

90. ECSR, ‘Conclusions 2009 (Finland)’ (regarding restriction of pension rights). This argument was also raised by the Greek government in *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece* Compl no 76/2012 (ECSR, 7 December 2012), para 67.

91. *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v Kenya* Decision No 002/Com/002/2009 (ACERWC, 22 March 2011), para 61.

92. IMF Social Spending Strategy (n 39) 32.

attention, does mention the elderly, women, youth, and the poor. These groups can also be considered macro-critical and can therefore enter IMF social protection policies also beyond mitigating measures in economic adjustment.⁹³ Given the politically influential role of the IMF especially towards lending countries, this means that groups identified as vulnerable in its policymaking will *de facto* see their rights enjoy a higher degree of protection. However, the inclusion of all these groups in constructing country-specific policies is by no means self-evident. The responsibility is upon staff/country teams to make prioritisations on social spending on vulnerable groups.⁹⁴

5.2. PRIORITISATION AS EXCLUSION

As discussed above, the concept of vulnerability serves to prioritise both between vulnerable and non-vulnerable groups, and between competing claims to enhanced protection to ensure protection of at least those deemed ‘most vulnerable’.⁹⁵ However, as vulnerabilities are identified and assessed *in casu*, taking into consideration particular circumstances and sources of vulnerability, the prioritising function allows for bias and selectivity, which can have an excluding effect. This may result from a lowering of the general level of protection through a ‘vulnerability contest’ where vulnerability serves as a gatekeeper for competing claims to protection.⁹⁶ As noted by Ippolito and Sánchez, ‘attempts to define vulnerability are often coupled with a narrowing-down of the specific groups of individuals that could be considered “vulnerable”’.⁹⁷ In other words, in some cases, individuals and groups need to be seen as ‘vulnerable enough’ to enjoy enhanced – or even some level of – protection. This aspect of the vulnerability concept becomes particularly emphasised in situations of crisis, such as economic distress, when decisions on the affordability, level, and prioritisation of protection become imminent.⁹⁸

An exclusionary function is also visible in the race to the bottom undertaken by States to manage migration. In the governance of migration there is a well-documented phenomenon of reducing social rights of refugees, or for example qualifying access to healthcare only to particularly vulnerable groups within asylum-seekers or the migrant population.⁹⁹ Research on the situation of asylum-seekers indicates that being labelled as vulnerable is increasingly used as a threshold for access to various benefits and services, in effect excluding persons and groups from the scope of

93. IMF Social Spending Strategy (n 39) 9; Engström (n 71).

94. IMF, ‘Guidance Note for Surveillance under Article IV Consultation’ (May 2015), para 75 (figure 3) and para 76.

95. Compare Sepúlveda and Nyst (n 38) 38.

96. For a discussion on the ‘vulnerability contest’, see Daniel Howden and Metin Kodlak, ‘The Vulnerability Contest’ (*News Deeply*, 17 October 2018) <<https://www.newsdeeply.com/refugees/articles/2018/10/17/the-vulnerability-contest>> accessed 12 November 2021.

97. Francesca Ippolito and Sara Iglesias Sánchez, ‘Introduction’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 1.

98. The Guiding Principles on Human Rights Impact Assessments of Economic Reforms emphasise the need to take into account the impact on most disenfranchised or marginalised individuals and vulnerable groups. Juan Pablo Bohoslavsky, ‘Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights (19 December 2018) UN Doc A/HRC/40/57.

99. Wolfgang Benedek, ‘Recent Developments in Austrian Asylum Law: A Race to the Bottom?’ (2016) 17 *German Law Journal* 949; for the situation in Europe, see WHO European Region, ‘Health of Refugees and Migrants: Regional Situation Analysis, Practices, Experiences, Lessons Learned and Ways Forward’ (2018).

enhanced protection or leaving individuals beyond the scope of protection altogether.¹⁰⁰ While asylum-seekers generally as a group are viewed as vulnerable,¹⁰¹ there is, for example, reluctance to perceive irregularly staying migrants as such,¹⁰² despite established knowledge of the precarious situation in which undocumented migrants often find themselves.¹⁰³ This implies that the minimum core content of rights, including access to emergency health care and shelter that is made available to all individuals within States' jurisdiction, is deliberately kept low in order to deter further irregular migration. As Sözer notes, the emergence of the vulnerable refugee label 'now serves to cut assistance from the supposed larger set of not-so-vulnerable refugees' and has resulted in redistribution of the limited resources available to forced migrants.¹⁰⁴

The prioritising function inherent to vulnerability-reasoning can also perform an exclusionary function if vulnerable groups or individuals are being 'played out' against each other. Single men, for example, have for long been found 'at the bottom of the vulnerability priority list'.¹⁰⁵ While more and more research demonstrates the various vulnerabilities of men, for example, as refugees, the vulnerabilities of refugee men continue to be juxtaposed with the vulnerability of refugee women.¹⁰⁶ As an expression of gendering of vulnerability, this has important impacts on the protection of refugees by potentially hiding some vulnerabilities from sight.¹⁰⁷ As a result, the assumptions on vulnerability and non-vulnerability may create an incentive for individuals to try to be perceived as vulnerable according to the predefined definitions, as, reportedly, in the case of Syrian families in Jordan registering as female-headed households in order to access the enhanced aid structures which would not be available for them as 'complete' family units.¹⁰⁸

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100. Constantin Hruschka and Luc Leboeuf, 'Vulnerability: A Buzzword or a Standard for Migration Governance?' (*Population Europe*, 20, January 2019), <https://population-europe.eu/files/documents/pb20_vulnerability_web.pdf> accessed 12 November 2021; Martina Tazzioli, *The Making of Migration: The Biopolitics of Mobility at Europe's Borders* (Sage 2020) 52–54; Rebecca Yeo, 'The Regressive Power of Labels of Vulnerability Affecting Disabled Asylum Seekers in the UK' (2020) 35 *Disability & Society* 676, who also identifies other regressive elements in the vulnerability-rhetoric.
101. For example, *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), paras 232–233.
102. For example, Elina Nieminen, 'Maassa luvattomasti oleskelevien haavoittuvuus Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä' (2019) 48 *Oikeus* 127.
103. For example, FRA, 'Fundamental Rights of Migrants in an Irregular Situation in the European Union' (2011) <<https://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>> accessed 12 November 2021.
104. Hande Sözer, 'Humanitarianism with a Neo-Liberal Face: Vulnerability Intervention as Vulnerability Redistribution' (2020) 46 *Journal of Ethnic and Migration Studies* 2163, 2169.
105. Christina Clark, 'Understanding Vulnerability: From Categories to Experiences of Young Congolese People in Uganda' (2007) 21 *Children & Society* 284, 288.
106. Turner (n 8) with various examples.
107. Lewis Turner, 'Are Syrian Men Vulnerable Too? Gendering The Syria Refugee Response' (*MEI*, 29 November 2016) <<https://www.mei.edu/publications/are-syrian-men-vulnerable-too-gendering-syria-refugee-response>> accessed 12 November 2021. For an interesting discussion, also see, Corina Heri, 'Between a Rock and a Hard Place: The Court's Difficult Choice in *Khamtokhu and Aksenchik v. Russia*' (*Strasbourg Observers*, 17 March 2017) <<https://strasbourgobservers.com/2017/03/17/between-a-rock-and-a-hard-place-the-courts-difficult-choice-in-khamtokhu-and-aksenchik-v-russia/>> accessed 12 November 2021.
108. Turner (n 107). Compare also Aoife O'Higgins, 'Vulnerability and Agency: Beyond an Irreconcilable Dichotomy for Social Service Providers Working with Young Refugees in the UK' (2012) 136 *New Directions for Child and Adolescent Development* 79, 87 ('It also became apparent that when young people exercised their agency, or did not conform to expectations of vulnerability, they were denied support.')

While the practices described above raise concerns of exclusion, they also raise the question whether vulnerabilisation runs the risk of devaluating rights, as the practices imply a recalibration of the general level of protection granted to all. A pre-categorised way of addressing vulnerabilities may also devalue equal access to protection, if the identification of vulnerabilities is not done based on the actual protection needs of individuals. In this way, categorisations between the vulnerable and the non-vulnerable, and the less and more vulnerable also become subject to political fault lines.¹⁰⁹ Where vulnerability is used as a tool for othering, the exclusion of unwanted ‘outsiders’ from protection becomes an expression of a political understanding of who should be seen as eligible for and ‘deserves’ protection.¹¹⁰ If the universality of vulnerability, as Butler puts it, in the political discourse becomes ‘radically exacerbated or radically disavowed’,¹¹¹ vulnerabilisation risks eroding the power of the narrative of rights as a vehicle for equal and universal protection.

6. IMPOSED VULNERABILISATION?

The phenomenon of vulnerabilisation as such does not merely indicate a conceptual change, potentially affecting the dynamics of international human rights law. As an additional layer, the identification of vulnerable groups is on track to become a threshold for the State to live up to its obligations, as well as a condition for receiving aid and other benefits. As a consequence, States may not only be more inclined, but even feel obliged to portray a set of groups as vulnerable. One example derives from the action of humanitarian donors such as NGOs launching aid programmes, which can generate a need for finding a ‘vulnerable population’ to enact such programmes upon.¹¹² A similar pattern may grow out of the vulnerabilisation of the policymaking of financial institutions. If, for example, social spending floors to protect vulnerable groups are embedded in IMF lending as binding loan conditions, States are thereby expected to identify vulnerable groups and take measures of protection relating to IMF conditionality in that programme.¹¹³

Another example of imposed vulnerabilisation derives from the expectation that States are to define their social protection needs in Poverty Reduction Strategy Papers (PRSPs). PRSPs are national planning frameworks for low-income countries, which both the World Bank and the IMF require countries to produce as a condition for debt relief and concessional lending.¹¹⁴ A basic yardstick in assessing the

109. Compare Katie E. Oliviero, ‘Vulnerability’s Ambivalent Political Life: Trayvon Martin and the Racialized and Gendered Politics of Protection’ (2016) 28 *Feminist Formations* 1, 10 and 21.

110. On othering, see, for example, Dorota Gozdecka, and Magdalena Kmak, ‘Law and the Other – Special Issue’ (2018) 15 *No Foundations*. Mustasaari has discussed how narratives of threat and belonging have affected public perceptions of the Finnish women and children in al-Hol and willingness to provide protection. She notes that ‘[p]resenting the women as an extremely grave security concern and utterly unworthy of state protection was necessary’ to justify inaction. In the public debate, compassion was generally also only shown to very small children, whereas the vulnerability of older teenagers was questioned. As such, processes such as securitisation and othering may result in reluctance to acknowledge certain types of vulnerabilities. Sanna Mustasaari, ‘Affective Constructions of Justice: ISIS-Families and the Law in the Finnish Public Debate’ (2020) 11 *Oñati Socio-Legal Series* 1036, 1053.

111. Judith Butler, *Frames of War: When Is Life Grievable?* (Verso 2009) 48.

112. Turner (n 8) 13, in the context of preventing violent extremism.

113. Although the lending arrangement is not formally a legally binding treaty, the conditions as set forth in the Memorandum of Understanding between the IMF and the lending State have an impact on the political autonomy of the State, as loan disbursement is made conditional upon meeting the programme goals. Christian Joerges, ‘Three Transformations of Europe and the Search for a Way Out of its Crisis’ in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism Versus Democratic Governance* (Hart 2014), 24 and following.

114. IMF, ‘IMF Support for Low-Income Countries’, Factsheet (16 February 2021).

content of PRSPs is whether they contain information and analysis on specific poverty groups and social categories that may be subject to exclusion. While these strategies focus on poverty reduction, they are expected to identify sources and levels of vulnerability.¹¹⁵ The mandatory nature of the PRSP process has even been noted to render the content of the PRSPs close to binding requirements.¹¹⁶

As a point of departure across regimes in such contexts, vulnerability is defined on a case-by-case basis, with the nation State at the heart of that determination. This has been noted to lend the vulnerability concept to a dual use of, on the one hand, providing a mechanism for compelling State response, while on the other hand legitimating regressive State agendas that increase intervention and control.¹¹⁷ What the dynamics described above highlight is that the current culture of vulnerabilisation also transcends the State as the primary guarantor of rights. International pressure to identify vulnerabilities that comes from a broad set of actors and processes can highlight social circumstances that generate or aggravate vulnerabilities, calling attention to structurally or politically ignored or denied vulnerabilities that would otherwise remain unattended. At the same time, this pressure may enhance the exclusive function of vulnerabilisation as there can be but a thin line between enhanced protection and instrumental vulnerabilisation, whereby the label is applied for economic or other reasons, with the socio-human vulnerability of the individual, or the societal causes underlying that vulnerability, becoming secondary.¹¹⁸

7. CONCLUDING REMARKS

With the growing realisation that more needs to be done to address the structural inequalities that the neoliberal global order fails to address (and even aggravates), the position of vulnerable groups and individuals has assumed centre stage in protection efforts. An active push both within human rights law and in global social protection discourse to mainstream protection of vulnerable groups has grown into a global phenomenon of vulnerabilisation. This focus undoubtedly answers to an identified need. Regarding LGBTI rights, for example, special protection measures have proved a helpful strategy in contributing to the levelling of the protection of human rights in practice.¹¹⁹ Several benefits have been noted also with the Disability Convention.¹²⁰ In parallel, vulnerabilisation also takes place through expanding the mandate of international institutions and engaging them in the practice of protection. This is a welcome development in that the strive for universal protection of human rights calls for a variety of measures to be realised. For some organisations such as the IMF, it also comes with a long-awaited promise of deeper social engagement.

115. Gobind Nankani, John Page and Lindsay Judge, 'Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (OUP 2005), 476–497; Adam McBeth, *International Economic Actors and Human Rights* (Routledge 2010) 191–193.

116. Celine Tan, 'The New Biopower: Poverty Reduction Strategy Papers and the Obfuscation of International Collective Responsibility' (2011) 32 *Third World Quarterly* 1039, 1043.

117. Vanessa E. Munro and Jane Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 *Feminist Legal Studies* 189; Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16 *Social Policy & Society* 469, 474–475.

118. By analogy, Munro and Scoular (n 117) 193.

119. For a discussion, see, for example, Malcolm Langford, 'Who's Afraid of More Human Rights?' (2018) in Workshop 'Expansion of the Concept of Human Rights: Impact on Rights Promotion and Protection' <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603865/EXPO_STU\(2018\)603865_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603865/EXPO_STU(2018)603865_EN.pdf)>, 9 accessed 12 November 2021.

120. For example, Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 *Syracuse Journal of International Law and Commerce* 563, 585. Also see Ouald-Chaib (n 42) 3.

As vulnerability-reasoning has grown into an inherent element of the realisation of human rights, this proliferation of protection has certainly extended the outreach of protection to those most in need. What this article has sought to illustrate is that vulnerabilisation, however, also comes with potential side-effects. These effects can be witnessed on multiple levels. Conceptually, the development comes with a built-in need to find ever more vulnerable individuals and groups, and to compare these in terms of the degree of their vulnerability to secure protection for at least those 'most vulnerable'. A corresponding development is the expansion of issues being addressed in terms of rights and the expansive interpretations of existing rights.

As vulnerabilisation comes with the promise of identifying who 'at least' should be protected in situations of prioritisation, it can also be put to exclusionary use. This is particularly visible in migration management where vulnerability is being instrumentalised as a tool for restricting access to rights. Proliferation of protection by focusing on vulnerable groups, in other words, does not escape, but can rather invite, politicisation. The strong expansion of vulnerability reasoning in the policymaking of international organisations also contributes to a compartmentalisation of protection. As the set of actors and instruments by which vulnerabilities are addressed becomes ever more diverse, also the identification of vulnerabilities as well as the means of addressing them will become ever more varied. 'Ownership' of the protection of vulnerable groups, in other words, becomes fragmented in both human rights law and beyond. Domestic level actors, international human rights bodies, and international organisations, all bring their own conceptualisation of vulnerability, whose vulnerabilities to prioritise, and what level of protection that particular vulnerability provides an entitlement to. In this discourse, calling something 'overreach' then becomes a way of expressing dislike of the uses to which the protection of vulnerable groups as a human rights concept is put.

The expansion of the special protection of vulnerable groups into a core guiding principle in human rights law, as well as in the social protection engagement of international organisations, has created a culture of vulnerabilisation in international law and politics. As an expression of its persuasiveness, it stands out as one of the rare concepts with a strong human rights dimension that even formerly reluctant actors as the IMF can embrace. The protection of vulnerable individuals and groups is a success story of mainstreaming both within human rights law and beyond that is difficult to match. But in its success also lies the threats. A blind eye should not be turned to the fact that the prioritisation invited, or even compelled, can create protection biases, and encourage misuse. The more frequent such practices become, the more apparent it also becomes that the protection of vulnerable groups is on a tightrope between enhanced protection and human rights overreach.


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