



**WRITTEN SUBMISSIONS  
of Third-party interveners**

pursuant to the President of the Grand Chamber's grant of leave dated 23 November 2017  
under Rule 44 § 3 of the Rules of Court.

*in the case*

***Ilias and Ahmed v. Hungary***

Application No. 47287/15

EUROPEAN COURT ON HUMAN RIGHTS  
GRAND CHAMBER

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I. *Introduction*

1. The following analysis is meant to provide a systematic overview of the notion of vulnerability as interpreted and applied within national and international practice.

2. During the last two decades, the emerging concept of vulnerability has gained ground especially before human rights monitoring bodies and international courts.<sup>1</sup> Despite its inclusion in various legal instruments, such as conventions, resolutions, recommendations, declarations, reports, the notion of vulnerability remains unclear and controversial at European and international level.<sup>2</sup>

3. The analysis of vulnerability clearly shows the constant need to balance the protection of certain, particularly vulnerable individuals and the protection of general interests of the international community as a whole or a group of states. These efforts raise questions related to the nature, the real

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<sup>1</sup> For a general overview, see – *inter alia* – R. Adorno, “*Is vulnerability the Foundation of Human Rights?*” in A. Masferrer, E. García-Sánchez (eds.), *Human Dignity of the Vulnerable in the Age of Rights*, Ius Gentium, 2016, at p. 257; R.E. Goodin, *Protecting the Vulnerable. A Re-Analysis of our Social Responsibilities*, Chicago: University of Chicago Press, 1985, at p. 110; B.S. Turner, *Vulnerability and Human Rights*, University Park: The Pennsylvania state university, 2006, at p. 26; A. Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*, New York: Palgrave Macmillan, 2010, at pp. 128-133; F. Luna, “*Elucidating the Concept of Vulnerability: Layers Not Labels*”, in *International Journal of Feminist Approaches to Bioethics*, Vol. 2, 2009, at pp. 121-129; L. Burgorgue-Larsen (ed.), *La vulnerabilité saisie par les juges en Europe*, Paris, Pédone, 2014.

<sup>2</sup> F. Ippolito, S. Iglesias-Sanchez (eds.) *Protecting Vulnerable Groups*, Oxford – Portland, Hart Publishing, 2015; L. Peroni & A. Timmer, “*Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law*”, in *International Journal of Constitutional Law*, vol. 11, No. 4, 2013, at p. 1058.



meaning, the limits and the degree of protection that can be afforded by relying on different notions of vulnerability.

4. Despite an increasing recourse to this concept, the European Court has not provided a definition of vulnerability. The absence of a complete definition can have positive effects, as the notion of vulnerability is not “static”, but it can evolve over time and vary depending on the context. A rigorous definition would therefore risk reducing or limiting the application of the notion of vulnerability.

5. Undoubtedly, the judge remains competent for ascertaining the existence of vulnerability and drawing the consequences that derive from its application. The following analysis deals with the criteria and standards used to establish vulnerability and the implications, both procedural and substantive, that derive from the application of this notion.

6. Vulnerability has basically two dimensions – individual and collective – as it can express the condition of a single person or an entire group. Somehow, the notion has inevitably a collective dimension as it implies a comparison between a purely individual (or group) situation and that of a broader group of persons. Thus, particular attention will be devoted to both group vulnerability and individual vulnerability in order to demonstrate that, depending on how vulnerability is classified, a different level of protection could be claimed (I).

7. Framing human vulnerability into a conclusive definition risks to be simplistic. Therefore, the following analysis has the purpose of delineating the main criteria and parameters developed by international and domestic courts and tribunals according to which vulnerability can be established. The interdependence and relative weight of such criteria and parameters will be taken into account so as to provide the Court with a template that can ensure a consistent and effective vulnerability assessment (II).

8. Finally, the analysis will be devoted to the main procedural implications of the application of vulnerability. Especially, attention will be drawn to the Court’s assessment of the victim status, the exhaustion of domestic remedies, the evaluation of evidence by the Court, and the adoption of interim measures (III).

## II. *The Notion of Vulnerability*

9. From a general standpoint, vulnerability has two main meanings. First, the notion refers to the inherent and inescapable fragility of every human being. Therefore, it has a *universal* character,<sup>3</sup> and the State, through its institutions and structures, shall do everything possible to reduce everyone’s vulnerability. Second, vulnerability expresses a *relational* link and refers to the particular condition of certain human beings when compared to the broader group to which they belong. The exposition to the *vulnera* occurs in various ways, depending on degree of dependence and autonomy, on resilience as well as on capacity to cope to changes and harmful events. The result is that some individuals or groups are more vulnerable than others. Thus, the notion is inevitably complex: indeed, several studies refer to vulnerability as a “heuristic device”,<sup>4</sup> *i.e.* a dynamic and inter-relational instrument of research, both descriptive and prescriptive in its nature.

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<sup>3</sup> M. Fineman, “*The Vulnerable Subject: Anchoring Equality in the Human Condition*”, in *Yale Journal of Law & Feminism*, vol. 20, No. 1, 2008; M. Fineman, “*The Vulnerable Subject and the Responsive State*” in *Emory Law Journal*, vol. 60, 2010, at pp. 266-267.

<sup>4</sup> M. Fineman, “*The Vulnerable Subject*”, 2008, *cit.*, at p. 9; L. Peroni & A. Timmer, “*Vulnerable Groups*”, *cit.*, at p. 1059.



10. From a legal perspective, vulnerability is used to rectify social disadvantages and bolster substantial equality.<sup>5</sup> The legal notion of vulnerability stipulates an explicit link between an individual or a segment of the population, on the one hand, and an obligation of the State, on the other, so as to afford special or additional protection in specific situations. The legal concept of vulnerability has evolved over time through the practice of international courts and monitoring bodies, which have stressed the important role of human rights standards as a vehicle for the protection of vulnerable groups. Accordingly, States are required to adopt special protective measures, in order to ensure some degree of priority consideration.<sup>6</sup> The main purpose of the notion of vulnerability is therefore to identify what kind of specific protection can be addressed to vulnerable subjects.

11. Under international law, two main approaches can be identified with respect to the concept: according to the first one, vulnerability can be recognised by taking into account either a particular and intrinsic characteristic of the individual concerned that is common to a set of persons (such as youth,<sup>7</sup> pregnancy,<sup>8</sup> mental disorder<sup>9</sup>) or a structural situation which is external to the individual (such as being in detention,<sup>10</sup> being tortured or abused, being an undocumented migrant<sup>11</sup>).

12. This first approach tends to *individualise the notion of vulnerability*. International practice would evaluate the vulnerable *status* and determine who is entitled to a wider degree of protection on a case-by-case basis. A clear example of such approach can be found in the European Union (EU) legal framework in the field of international protection. In particular, the Common European Asylum System has adopted a selective notion of vulnerability, according to which not all asylum seekers are vulnerable but only some of them, such as unaccompanied minors, pregnant women, individuals belonging to a sexual minority and so on.<sup>12</sup> Similarly, this Court adopted such an approach regarding irregular migrants, whose vulnerability is not considered inherent of their status (differently than asylum seekers) but rather considered on their specific and particular characteristics.<sup>13</sup>

13. It is clear that different causes (whether intrinsic or extrinsic) of vulnerability can have a cumulative effect and entail a higher degree of vulnerability and therefore of protection. Another consequence of individualising vulnerability is what scholars have identified as “*compounded vulnerability*”, *i.e.* a particular form of vulnerability which results, for example, from being an

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<sup>5</sup> See *e.g.* M. Fineman, “*The Vulnerable Subject*”, 2008, *cit.*, at p. 10; C.Y. Furusho, “*Uncovering the Human Rights of the Vulnerable Subject and correlated State Duties under Liberalism*”, in *UCL Journal of Law and Jurisprudence*, Vol. 5, No. 1, 2016, at p. 179.

<sup>6</sup> See – *inter alia* – UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States Parties Obligations* (art. 2, para. 1 of the Covenant), adopted on 14 December 1990. For a general overview on this topic, A.R. Chapman, B. Carbonetti, “*Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*”, in *Human Rights Quarterly*, vol. 33, No. 3, 2011, at pp. 682-732.

<sup>7</sup> ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga v. Belgium*, 12 October 2006, § 55.

<sup>8</sup> ECtHR, *R.R. v. Poland*, 26 May 2006, § 159; *Khamtokhu and Aksenchik v. Russia*, 24 January 2017, Joint partly Dissenting Opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadmayer, § 7.

<sup>9</sup> IACtHR, *Furlan and Family v. Argentina*, 31 August 2012, §§ 201-202.

<sup>10</sup> CAT, *Arkauz v. France*, 9 November 1999, § 11.5; ECtHR, *Algür v. Turkey*, 22 October 2002, § 44.

<sup>11</sup> IACtHR, Advisory Opinion No. 18, *Juridical Condition and Rights of the Undocumented Migrants* (2003), §§ 112-114; *Jesus Velez Loor v. Panama*, 2010, § 98.

<sup>12</sup> It is important to stress that in all the various legal instruments of the EU asylum *acquis* the categories of vulnerable subject are not always consistent. See *e.g.* Chapter IV and, particularly, Article 21 of Reception Conditions Directive (2013/33/EU), and Article 20 of Qualification Directive (2011/95/EU).

<sup>13</sup> See, recently, ECtHR, *Chowdury and Others v. Greece*, 30 Mars 2017. A different approach has been adopted by the Inter-American Court of Human Rights regarding irregular migrants since its Advisory Opinion No. 18, *cit.*, § 112. The Court often determines the existence of the so-called “*situational vulnerability*”, *i.e.* a vulnerability that is considered in a specific context. According to such approach, it is the context to give rise to vulnerability more than personal factors.



irregular migrant/asylum seeker and a child,<sup>14</sup> or a detainee and a person belonging to a sexual minority.<sup>15</sup>

14. On the other hand, individuals can be particularly vulnerable because they are members of a *specific group/category*: in human rights law, this second approach is referred to with the term “vulnerable groups”.<sup>16</sup> International tribunals introduced this concept first for the Roma people,<sup>17</sup> and then applied it to other groups such as asylum seekers,<sup>18</sup> people with mental disabilities,<sup>19</sup> indigenous people.<sup>20</sup>

15. In international practice that relied on this group-centred interpretation of the concept, vulnerability is perceived as an attribute of the entire class and becomes a personal condition through membership. The reason for an enhanced protection in such cases is the special needs of the group as a whole, which would facilitate the establishment of vulnerability. According to *M.S.S.*, there is no need to demonstrate that individual asylum seekers are vulnerable because the group as such is vulnerable.<sup>21</sup>

16. A fundamental question concerns the opportunity to adopt a comprehensive and consistent approach toward vulnerability by taking into account both individual and group-centred vulnerability. One possible solution is to consider group-centred vulnerability as a rebuttable presumption with regard to their members: according to this approach, the Court could use the group-centred approach as a starting point, but come to a different conclusion with respect to an analysis of individual and situational vulnerability. Such approach would allow the necessary flexibility that is essential for a case-by-case determination of that complex notion. Furthermore, it is consistent with the Court’s approach in other fields, such as equivalent protection. In that regard, the case law of the Court progressively moved away from a strict general presumption of equivalent protection provided by the EU order,<sup>22</sup> to combine this presumption with more detailed criteria to be applied on a case-by-case basis.<sup>23</sup> Similarly, it can be recalled that several EU Member State’s internal judicial decision<sup>24</sup> have

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<sup>14</sup> ECtHR, *Rahimi v. Greece*, 5 April 2011; *Popov v. France*, 19 January 2012; *Elmi and Aweys Abubakar v. Malta*, 22 November 2016 and *S.F. and Others v. Bulgaria*, 7 December 2017; IACtHR, *Yean and Bosico Children v. The Dominican Republic*, 8 September 2005 and *Pacheco Tineo family v. Bolivia*, 25 November 2013.

<sup>15</sup> ECtHR, *O.M. v. Hungary*, 5 July 2016.

<sup>16</sup> See e.g. Article 18 of the African Charter on Human and Peoples’ Rights (entitled “Protection of the Family and Vulnerable Groups”). The text includes among “vulnerable” groups: women, children, elderly persons and persons with disabilities. For the practice of UN human rights treaty bodies see in particular HRC, *Campbell v. Jamaica*, communication No. 307/1988, 24 March 1993, CCPR/C/47/D/307/1988; CAT, *General Comment 1*, 21 November 1997; CAT, *N.P. v. Australia*, communication No. 106/1998, 6 May 1999, CAT/C/22/D/106/1998; CAT, *Elmi v. Australia*, communication No. 120/1998, 14 May 1999, CAT/C/22/D/120/1998; CAT, *Hajrizi Dzemaïl et al. v. Serbia and Montenegro*, communication No. 161/2000, CAT/C/29/D/161/2000; CAT, *Y.H.A. v. Australia*, communication No. 167/2000, 23 November 2001, CAT/C/27/D/162/2000.

<sup>17</sup> ECtHR, *Chapman v. the United Kingdom*, 18 January 2001, § 96; CAT, *Hajrizi Dzemaïl et al. v. Serbia and Montenegro*, cit., §§ 3.6 and 9.2;

<sup>18</sup> ECtHR, *M.S.S. v. Belgium and Greece [GC]*, 21 January 2011, §§ 233 and 251.

<sup>19</sup> IACtHR, *Ximenes-Lopes v. Brazil*, 4 July 2006, § 103-105.

<sup>20</sup> IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 15 June 2005, § 63; and ACtHPR, *African Commission on Human and Peoples’ Right v. Republic of Kenya*, 26 May 2017, §§ 112 and 181.

<sup>21</sup> However, the approach of the Court in the Chamber judgment of *Ilias and Ahmed* appears to be partially different (§87).

<sup>22</sup> ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi c. Irlande [GC]*, 30 June 2005, § 150 ss.

<sup>23</sup> ECtHR, *Michaud v. France*, 6 December 2012, § 103 ss. In this perspective, see also Partly concurring and partly dissenting opinion of judge Sajó, ECtHR, *M.S.S. v. Belgium and Greece*, cit.

<sup>24</sup> For example, Germany, Administrative Court of Frankfurt, 7 August 2015 (VG 3 L 169/15.A); Austria, Federal Administrative High Court (VwGH), 8 September 2015 (Ra 2015/18/0113); The Netherlands, The Hague District Court (Rechtbank den Haag), 16 October 2015 (AWB 15/11534); Finland, the Supreme Administrative Court, 20 April 2016 (KHO:2016:53); Italy, Administrative High Court (Consiglio di Stato), 27 September 2016 (731/2016).



rebutted the statutory presumption according to which another Member State is safe for asylum seekers due to the vulnerable status of the applicants.<sup>25</sup>

### III. *Vulnerability criteria and the complexity of vulnerability assessment*

17. Applicants' vulnerability is used to reinforce the need for a greater State involvement in their protection, working as a driving factor to establish positive obligations on Contracting States. Vulnerability is also connected to the risk of being exposed to harm and it could be used to evaluate the severity of certain treatments.<sup>26</sup> In addition, vulnerability can have a bearing in the proportionality text when balancing applicants' rights with public interests under Article 8 of the Convention.

18. The different uses and appreciation of criteria to assess vulnerability may impact legal determinations. The following paragraphs illustrate the judicial dynamic of courts in identifying and using vulnerability criteria, focusing attention on the complexity of vulnerability assessment.

19. *Individual vulnerability* - From a substantive point of view, specific elements and criteria have been developed by international courts and monitoring bodies to assess vulnerability. Individual elements include health conditions, dependence, and individual inherent conditions (such as gender, and age) that are important to identify specific group vulnerability. In these cases, vulnerability is a condition pre-existing the harm. This kind of pre-existing vulnerability is taken into account while assessing human rights violations or in specific context.<sup>27</sup>

20. *Group vulnerability* - Social perception has also contributed to define other groups as particularly vulnerable. This is the case of Roma, people belonging to sexual minorities, or people suffering HIV. Being part of such a group always implies the need of special protection against different forms of discrimination, including social exclusion, or homophobic attitudes, as in the case of LGBT people.<sup>28</sup>

21. *Context vulnerability* - If exposure to harm gives visibility to "primary human vulnerability", the existence of other causes or compelling grounds of vulnerability – emerging from the context under examination – might increase the level of degree of applicants' vulnerability.<sup>29</sup> Moreover, according to a well-established practice, the same condition, as expulsion or detention, is not experienced in the same way by all individuals.<sup>30</sup> For what it matters here, recourse to context vulnerability and the weight attached to contextual factors by judicial bodies is crucial for the vulnerability assessment.

22. A rigorous method of vulnerability interpretation requires both the proper selection of relevant individual, group and contextual criteria and their proper assessment. An inconsistent approach to vulnerability criteria and related parameters could be detrimental to specific instances of protection. This is especially alarming when certain criteria potentially having a major weight in raising the degree of vulnerability are not assessed. All the foregoing intends to stress the importance of ensuring a rigorous method of vulnerability assessment in the case under discussion.

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<sup>25</sup> Concerning Hungary, see the recent report of FIDH, "*Hungary: Democracy under Threat*", released on November 2016, at pp. 51-58.

<sup>26</sup> ECtHR, *Soering v. United Kingdom*, 7 July, 1989, §§ 100 and 110.

<sup>27</sup> In the context of expulsion, see, e.g., Article 15 of the ILC Draft Articles on Expulsion of Aliens, (entitled Vulnerable Persons).

<sup>28</sup> In this respect, see Non-discrimination Principles, as elaborated in the *Yogyakarta Principles*, in 2006.

<sup>29</sup> ECtHR, *Mubilanzila Mayeka And Kaniki Mitunga v. Belgium*, 12 January, § 55.

<sup>30</sup> With reference to forcibly displacement, see, e.g., UNHCR EXCOM Conclusion No. 105 (LVII) – 2006.



23. Based on the foregoing, two considerations are in order: first, vulnerability assessment *per se* is extremely complex and, second, there is urgent need for a rigorous and comprehensive systematisation of all those criteria and parameters used in vulnerability assessment. For sake of brevity, the following analysis will focus on two vulnerability parameters: dependence and time. The choice of dependence is merely speculative, and time is particularly relevant for the case before the Court. In any case, the following considerations apply to the generality of criteria and parameters.

24. When assessing vulnerability through the examination of *even* a single criterion, due attention should be paid to its multiple functions. In the case of dependence, it may operate both as a condition causing vulnerability, as for asylum seekers<sup>31</sup> and children, and as a condition potentially exacerbating vulnerability. In addition, dependence is not a one-dimensional concept: indeed, the Court has identified different forms of dependence which include *emotional dependence*,<sup>32</sup> *State dependence*<sup>33</sup> and *economic dependence*.<sup>34</sup> Moreover, in order to ensure a proper and rigorous assessment of vulnerability, it is important to evaluate not only whether dependence constitute a ground of vulnerability *per se*, but also whether it could have a bearing together with contextual elements that characterise the applicant's position, as in the case of removal procedures.<sup>35</sup>

25. The time factor deserves special attention as it was crucial in the case now before the Court. Time has an impact on vulnerability assessment. Time as a temporal factor is a relevant criterion to evaluate the existence of certain conditions such as fear, especially in relation to expulsion and refugee cases. However, this criterion alone is not sufficient to establish vulnerability because it is affected by many variables. Time, as well as dependency, is not a one-dimensional criterion. Indeed, when referring to time, it is important to consider it in all its forms: time as *length*; time as *duration*; time as *imminence*.<sup>36</sup> Depending on the way in which each of these temporal factors are used, as a valuable criterion of assessment facts, as well as in combination with other concurring factors, it could be a valuable criterion of vulnerability assessment.

26. As far as substantive aspects are concerned, the following general tendencies emerging from international case law can be pointed out: 1) there is no precise definition of the notion of vulnerability; 2) a consistent approach is possible by adopting constant criteria and parameters in the ascertainment of both group and individual vulnerability; 3) vulnerability assessment is carried out on a case-by-case basis so that flexibility can be ensured in the assessment of the specific circumstances of each case; 4) vulnerability assessment has an important role ensuring a more equitable protection of human rights and a fairer balance between individual and group protection.

#### IV. Procedural Implications of the Vulnerability Standard

27. The application of the vulnerability standard in the proceedings before the Court may have significant procedural implications. Two situations deserve special attention. First, vulnerability may

<sup>31</sup> ECtHR, *M.S.S. v. Belgium and Greece*, cit., § 251.

<sup>32</sup> Emotional dependency is often taken into account in case-law related to the right of family life (Article 8 of the ECtHR). See C. Costello, "*The Human Rights of Migrants and Refugees in European Law*", Oxford, at pp. 117-130 and related case law.

<sup>33</sup> IACtHR, *Servellon Garcia and Others v. Honduras*, 21 September 2006, §§ 110-111.

<sup>34</sup> ECtHR, *Budina v. Russia*, 18 June 2009.

<sup>35</sup> V. Flegar, "*Vulnerability and the principle of non-refoulement in the European Court of Human Rights: Towards an increased scope of protection for persons fleeing from extreme poverty?*", in *Contemporary Readings in Law and Social Justice*, 2016, at pp. 148-169. See, *inter alia*, ECtHR, *N. v. UK*, 27 May 2008, § 24; *D. v. UK.*, 2 May 1997, § 54.

<sup>36</sup> Imminence, in refugee context, is a crucial criterion for evaluating the risk of harm: how 'imminent' does that harm need to be before another country has an obligation to protect them?



have an impact on the admissibility of individual applications, with the result that the jurisdiction of the Court can be broadened or narrowed down according to the particular notion of vulnerability that is adopted. Second, vulnerability, once ascertained, has an impact on both the treatment of evidence and the margin of appreciation afforded to the State. In both these cases, it is the exercise of the Court's judicial function that is affected either by simplifying the establishment of violations of the Convention or by extending its review function.

28. As regards admissibility issues, vulnerability can have an impact on the assessment of the victim status under Article 34 and the exhaustion of local remedies under Article 35(1). Vulnerability is among the circumstances that the Court takes into consideration under Article 34 when called upon to assess whether a Contracting State has hindered the effective exercise of the right of application. This right entails that the applicants or potential applicants be able to communicate freely with the Court “without being subjected to any form of pressure from the authorities to withdraw or modify their complaints”.<sup>37</sup> The “form of pressure” relevant from the standpoint of Article 34 is determined on a case-by-case basis, having regard, among other factors, to the “vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities”.<sup>38</sup> Therefore, vulnerability plays a role in rendering more effective the Court's exercise of its judicial function.

29. In addition, pursuant to Article 34 of the Convention, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. The Court has repeatedly held that the victim criterion “is not to be applied in a rigid, mechanical and inflexible way”.<sup>39</sup> In this respect, the condition of vulnerability has a bearing in the assessment of the victim status, especially when the Court is called upon to assess whether an applicant may be an “indirect” or a “potential” victim. A similar, flexible approach can be found in the case law of the Inter-American Court of Human Rights.<sup>40</sup>

30. With respect to “indirect” victims, namely those applicants only indirectly affected by a violation, in order to grant them standing, the Court has already expressly given relevance, among other elements, to the “vulnerable position” of the direct victim.<sup>41</sup> As far as “potential” victims are concerned, there seems to be no mention thus far in case law to a possible role attached to the condition of vulnerability. However, the Court has reiterated that “[i]t is [...] open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, [...]if he is a *member of a class of people* who risk being directly affected by the legislation”.<sup>42</sup> Therefore, it would be consistent with the general approach of the Court that vulnerability plays a role in the establishment of “potential” victims' standing.<sup>43</sup>

31. Vulnerability may also affect the Court's assessment of the exhaustion of domestic remedies in accordance with Article 35(1). As the Court reiterated, this provision “must be applied with some degree of flexibility and without excessive formalism”, having regard to the particular circumstances of each case, including the “personal circumstances of the applicant”.<sup>44</sup> Among such personal

<sup>37</sup> ECtHR, *Klyakhin v. Russia*, 30 November 2004, § 119.

<sup>38</sup> ECtHR, *Kurt v. Turkey*, 25 May 1998, § 160; *Tanrikulu v. Turkey*, 8 July 1999, § 130.

<sup>39</sup> ECtHR, *Ziętal v. Poland*, §§ 54-59.

<sup>40</sup> See, inter alia, IACtHR, *Villágran-Morales et al. v. Guatemala*, 19 November 1999, §§ 171-177; *Bámaca Velásquez v. Guatemala*, 25 November 2000; *Gómez-Paquiyaauri Brothers v. Peru*, 8 July 2004; *Serrano-Cruz Sisters v. El Salvador*, 1 March 2005.

<sup>41</sup> ECtHR, *Kurt v. Turkey* (No. 2), §§ 130-134; *Y.F. v. Turkey*, 22 July 2003, § 31; *İlhan v. Turkey*, § 55.

<sup>42</sup> ECtHR, *Michaud v. France*, cit., §§ 51-52 (emphasis added).

<sup>43</sup> S. Besson, “*La vulnérabilité et la structure des droits de l'homme. L'exemple de la jurisprudence de la Cour européenne des droits de l'homme*”, in L. Burgorgue-Larsen (ed.), *La vulnérabilité saisie par les juges*, Bruxelles: Bruylant 2014, pp. 59-77.

<sup>44</sup> ECtHR, *Foka v. Turkey*, 9 November 2006, § 11.



circumstances, in several cases individual or group vulnerability has played a crucial role by attenuating the application of the rule.<sup>45</sup> The same trend is apparent in the decisions of other international human rights bodies, such as the Inter-American Court of Human Rights.<sup>46</sup>

32. Turning to the impact of individual and group vulnerability on the Court's exercise of its judicial function, the Court has repeatedly endorsed the principle of freedom in the admission and assessment of evidence.<sup>47</sup> In particular it has adopted a flexible approach especially with respect to the treatment of the burden of proof and the standard of proof. This approach is consistent with a broader tendency in international case law: questions of evidence have always been treated with a considerable degree of flexibility.<sup>48</sup>

33. The burden of proof has been treated in a rather flexible manner in the Court's case law. While in principle resting on the party making a claim, some cases reveal a shift of the burden of proof to the respondent State dictated, among other factors, by considerations relating to vulnerability of groups or individuals involved. This is the case, for example, of complaints relating to indirect discrimination<sup>49</sup> and to torture or inhuman or degrading treatment or punishment.<sup>50</sup>

34. Victim's vulnerability can also affect the required standard of proof. While the Court has often endorsed a "beyond reasonable doubt" standard, it has clarified that "it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention".<sup>51</sup> In addition, this standard of proof has been lowered down when special circumstances so required.<sup>52</sup> Indeed, these cases generally involved victims recognised as vulnerable, such as detained persons.<sup>53</sup>

35. The impact of vulnerability bears particular significance in certain cases, especially when it comes to proceedings for the adoption of interim measures pursuant to Article 39 of the Rules of the Court. As stated by President Costa, "the application of Rule 39 has preserved the physical integrity,

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<sup>45</sup> ECtHR, *Aksoy v. Turkey*, 18 December 1996, §§ 56-57; *Hajduová v. Slovakia*, 30 November 2010, § 41; *Akdivar and Others v. Turkey*, 16 September 1996, §§ 73-75; *Kurić and Others v. Slovenia*, 13 July 2010; *Tokić and Others v. Bosnia and Herzegovina*, 8 July 2008.

<sup>46</sup> See e.g. *Velásquez-Rodríguez v. Honduras*, 26 June 1987, preliminary objections, § 93; Advisory opinion of 10 August 1990, OC-11/90). A similar approach is also followed by the African Commission on Human and Peoples' Rights (see e.g. *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, 31 October 1997, No. 71/92, para. 14; *African Institute for Human Rights and Development (on Behalf of Sierra Leonean Refugees in Guinea) v. Guinea*, 7 December 2004, No. 249/02, §§ 32-36) and the African Court on Human and Peoples' Rights (see e.g. *Christopher Jonas v. United Republic of Tanzania*, 28 September 2017, § 53; *Mohammed Abubakai v. United Republic of Tanzania*, 3 June 2016, § 92, relating to the determination of the time frame for seizure of the Court).

<sup>47</sup> ECtHR, *Ireland v. United Kingdom*, 18 January 1978, § 210 ("the Court, being master of its own procedure and of its own rules, has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it").

<sup>48</sup> ICJ, *Corfu Channel case*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4, at 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, § 209; IACHR, *Velásquez Rodríguez v. Honduras*, 29 July 1998, §129; *Eritrea v. Ethiopia Claims Commission, Partial Award: Prisoners of War – Eritrea's Claim 17*, 1 July 2003, RIAA XXVI, § 47 and § 38. For a comparison between the jurisprudence of the European and the Inter-American Courts of Human Rights in matter of evidence relating to enforced disappearances cases, see O. Claude, "A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence", in *Intercultural Human Rights Law Review*, 5 (2010), at p. 407.

<sup>49</sup> ECtHR, *Horváth and Kiss v. Hungary*, 29 January 2013, §§ 102.

<sup>50</sup> ECtHR, *Salman v. Turkey*, 27 June 2000, §§ 99-100; *Z.H. v. Hungary*, 8 November 2012, §§ 31-32.

<sup>51</sup> ECtHR, *El-Masri v. The former Yugoslav Republic of Macedonia*, 12 December 2012, § 151.

<sup>52</sup> J. Christoffersen, "Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights", Leiden-Boston: Martinus Nijhoff 2009, at pp. 174-176.

<sup>53</sup> W. A. Schabas, "The European Convention on Human Rights. A Commentary", Oxford: OUP 2015, at pp. 811-812.





the liberty and even the lives of many people who by definition are vulnerable”.<sup>54</sup> Therefore, the adoption of interim protection should be facilitated when the requesting party is particularly vulnerable. That would be consistent with the role recognised to vulnerability in the context of the adoption of provisional measures by other international courts, such as the International Court of Justice.<sup>55</sup>

36. Finally, vulnerability has an impact on the extension of the margin of appreciation afforded to the respondent State. In several cases, mostly related to discriminations under Article 14, the Court has in fact narrowed the State’s margin of appreciation when confronted with particularly vulnerable applicants.<sup>56</sup> However, there are many other cases in which group vulnerability was not taken into account. A clarification in that respect would be essential to assess the scope of the Court’s jurisdiction.

## V. Conclusion

37. This brief analysis summarises the far-reaching application of vulnerability and the criteria for its assessment in order to demonstrate that a more consistent approach is important for the Court and the protection of human rights as well as to clarify both procedural and substantial implications of the notion.

38. The case *Ilias and Ahmed v. Hungary* represents an occasion for a clarification of the main criteria for vulnerability assessment and its legal implications. A decision that clarifies the scope and use of vulnerability would represent a landmark precedent and could ultimately ensure substantial equity and “fair justice” for the victims of human rights violations.

The Third-Party Intervenors  
Serena Bolognese  
Beatrice I. Bonafè  
Maura Marchegiani  
Loris Marotti  
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<sup>54</sup> Speech given by Mr Jean-Paul Costa, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 28 January 2011, ECtHR, Annual Report 2011, Registry of the European Court of Human Rights, Strasbourg 2012, 35, at 40.

<sup>55</sup> ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, p. 111, § 43; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353, § 143; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017 (not yet reported), § 96, and Separate opinion of Judge Cançado Trindade.

<sup>56</sup> ECtHR, *Kozak v. Poland*, 2 March 2010; *Genderdoc-M v. Moldova*, 12 June 2012; *X. v. Turkey*, 9 October 2012; *Kiyutin v. Russia*, 10 March 2011; *I.B. v. Greece*, 3 October 2013. But see also *Alajos Kiss v. Hungary*, 20 May 2010; *Z.H. v. Hungary*, 8 November 2012.