# THE SELECTIVE FRAMING OF 'VULNERABILITY' IN THE EUROPEAN AND THE INTER-AMERICAN HUMAN RIGHTS COURTS: A SOCIO-LEGAL ANALYSIS OF JURIDICAL PRAXIS

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**Abstract**

Previous research has underscored the emergence of ‘vulnerable groups’ in the case-law of the European Court of Human Rights (Timmer and Peroni 2013) and its Inter-American counterpart (Beloff and Clerico 2014), as well as its ethical and normative implications. This thesis argues that the processes by which 'vulnerable' applicants are recognised, shaped and regulated within the legal discourse of these human rights courts entail the selective framing of 'vulnerability'. To do so, the thesis critically examines selected court rulings and 33 qualitative interviews which I conducted with judges and lawyers who practice in these regional judicial systems. My empirical analysis maps how interviewees justify the legal practice of framing certain applicants as vulnerable and not others. Based on my findings, the thesis posits that legal practitioners do not simply create categories of 'vulnerable groups', but they engage in relational processes whereby vulnerability is produced and mobilised in between and across bodies. I further examine the consequences of selectively framing vulnerable groups, particularly how distinct human rights duties are ascribed to States in response to the perceived vulnerability of certain alleged victims.

Drawing on interdisciplinary feminist theories on vulnerability in law, ethics, philosophy and politics (Butler 2016, Mackenzie, Dodds and Rogers 2013, Gilson 2014, Fineman 2008), the thesis contributes to existing literature by adding an empirically grounded critique of how human rights courts discursively and juridically shape the 'vulnerable other' and the implications thereof. Focusing on the postcolonial dynamics of migration, gender and race, I contend that human rights courts’ 'frames of recognition' (Butler 2009) abide by modes of relationality whereby certain kinds of vulnerability become more salient than others. I argue that applicants labelled as vulnerable are selectively recognised, engendering an uneven politics of inclusion which raises social justice and equality concerns. The thesis further traces how vulnerability as a juridical phenomenon can emerge intersubjectively between legal practitioners and presumed victims whose human rights are systematically and disproportionately violated in contexts of structural precarity, violence and oppression.

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## List of Abbreviations

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| ECtHR | European Court of Human Rights |
| IACtHR | Inter-American Court of Human Rights |
| Commission | Inter-American Commission on Human Rights |
| MUDHA | Movimiento de Mujeres Dominico-Haitianas |
| UK | United Kingdom |
| US | United States |
| ACHR | American Convention on Human Rights |
| UDHR | Universal Declaration of Human Rights |
| ECHR | European Convention on Human Rights |
| ICJ | International Court of Justice |
| VCLT | Vienna Convention on the Law of Treaties |

# Chapter 1 - Introduction

Lourdes Peroni and Alexandra Timmer (2013) contend that the recognition of vulnerable groups by the European Court of Human Rights ('ECtHR') has been a noticeable and welcome development, a commentary that is mirrored by Laura Clerico and Mary Beloff (2014) with respect to the Inter-American Court of Human Rights ('IACtHR'). In the European context, the Roma minority, children, women, persons with disabilities, refugees and asylum-seekers, and HIV-positive persons are among those who have been recognised as vulnerable; for its Inter-American counterpart, some examples include indigenous populations, women, undocumented migrants, children, and persons deprived of their liberty. While many scholars posit that the evolution of case-law on 'vulnerable groups' in the ECtHR and the IACtHR signals a move towards greater inclusion, equality and social justice (Peroni and Timmer 2013; Beloff and Clérico 2016), insufficient critical attention has been paid thus far to which groups are juridically 'included' and how these processes of recognition unfold. In the thesis, I argue that juridical processes of recognising 'vulnerability' in human rights courts can be selective, and the inclusion of 'vulnerable groups' within the juridical framework also comes with unintended exclusions. To better understand how 'vulnerable' applicants are recognised, I analyse not only court judgments but also 33 qualitative interviews I conducted with lawyers and judges in the European and Inter-American systems of human rights protection.

The thesis examines the legal praxis of vulnerability in the courts and digs deeper into how legal practitioners engage with categories of 'vulnerable groups'. I theorise vulnerability in supranational human rights courts as a discursive-material phenomenon that emerges as emotions and reasons are mobilised and produced within and across bodies in juridical narratives, encounters and relations. These are ultimately imprinted in court judgments which frame certain bodies as 'vulnerable' and 'victims' while denying juridical recognition to other bodies. I also examine the implications of selectively framing certain individuals and groups as vulnerable, particularly the types of normative responses that are engendered with respect to the responsibility of the State towards marginalised and oppressed populations. On the one hand,

the ever-shifting boundaries of 'vulnerability' are evidenced by the increasing number of categories corresponding to 'vulnerable groups' in the case-law of human rights courts, pointing towards expansion. On the other hand, framing groups as 'vulnerable' may perpetuate reductive stereotypes and stigma, as though 'vulnerability' were an immutable characteristic, rather than a state of being or context which is dynamic, relational and subject to change. Faced with the decision-making nature of human rights courts, legal reasoning tends to rely on superficial or simplistic accounts of subjectivity which fail to capture the human reality of interdependence. This invites a critical examination of the ways in which power relations operate in legal practice, and how legal practitioners navigate the agency/vulnerability spectrum when ascribing meaning to 'vulnerability' in concrete cases, or when conjuring juridical categories of 'vulnerable groups'. I am interested in how thinking about vulnerability can help us ethically and normatively re-signify human rights and corresponding State duties, pushing the boundaries of critique to examine how the operation of human rights law may open up or foreclose possibilities for thinking otherwise.

Drawing on interdisciplinary feminist theories on vulnerability in law, ethics, philosophy and politics (Butler 2006; Butler 2009; Butler, Gambetti and Sabsay 2016; Fineman 2008; Fineman and Grear 2013; Gilson 2013; Mackenzie, Rogers and Dodds 2013), the thesis contributes to existing literature by adding an empirically-grounded critique of how human rights courts discursively shape the 'vulnerable Other' and the implications thereof. Focusing on the postcolonial dynamics of migration, gender and race, I contend that human rights courts' 'frames of recognition' (Butler 2009) reproduce hegemonic modes of relationality whereby certain kinds of vulnerability become more salient than others. I argue that the so-called 'vulnerable' applicants are selectively recognised, engendering an uneven politics of inclusion which raises social justice and equality concerns. The thesis further traces how juridical framing is not only an act of power but a power relation conditioned by the concomitant epistemic privilege and ignorance of legal practitioners.

The thesis makes use of legal and qualitative research methods, as I will elaborate in Chapter 3. My choice of using an interdisciplinary methodology, namely socio-legal methods, is an attempt to address the gap of empirical research in the literature regarding international human rights courts. Prior to this thesis, very few academics had undertaken a qualitative analysis through the use of interviews with judges and/or lawyers in international human rights courts (Dzehtsiarou, 2015 and Terris et al., 2007). Using qualitative methods to analyse the concept of vulnerability in international human rights courts brings to the fore an important yet under-explored dimension of legal praxis, namely, how these courts exercise their power to frame. In the absence of a legal definition of vulnerability, lawyers and judges navigate uncharted territory when they apply special protection standards to applicants they recognise as vulnerable, creating new interpretive paths and arguably contributing to jurisprudential evolution. Hopefully, the findings presented in this thesis will be of interest to lawyers, judges, and human rights practitioners working with constitutional law and human rights regimes in different international and domestic jurisdictions. The thesis also aims to contribute to the work of multidisciplinary scholars interested on themes such as judicial decision-making, critical victimology, feminist and postcolonial critiques, and socio-legal research. The empirical fieldwork I undertook brings fresh data and critical analyses which aims to shed light on how legal praxis unfolds while human rights lawyers and judges recognise, frame, translate and shape structures of vulnerability within legal discourse.

## International human rights courts' power to frame

Drawing inspiration from feminist and critical theories on vulnerability, my thesis focuses on how juridical frames of recognition capture or fail to encapsulate subjects and groups in contexts of vulnerability, as well as the normative consequences of recognising vulnerable subjects. With respect to processes of recognition, Judith Butler asserts that frames of recognition are essential to constructing vulnerability as a precondition of the 'human' (Butler 2006, p. 43). In the context of international human rights law, Anna Grear conceives of framing as an 'inescapable exercise of epistemic closure', in which one draws attention to selected

features at the expense of others (Grear 2012, pp. 17-18). Abiding by a logic whereby some aspects are highlighted as normatively relevant to the detriment of others, the act of framing produces a concomitant invisibility or concealed existence of competing aspects. In this vein, Grear asserts that 'international human rights law can be understood as deploying a power verging on the 'anthropogenetic' – that is to say, the power precisely to 'name' (and thus discursively to 'create') the "human" itself' (Grear 2012).

In the thesis, I will explore the processes through which vulnerability is recognised or dismissed in victimisation claims before the ECtHR and the IACtHR, examining how their normative frames of recognition come about, and how we might understand their implications (Butler 2009). Butler suggests that frames of recognition depend upon apprehension and intelligibility schemes, in that apprehension consists in the rudimentary mode of knowing that precedes recognition. Intelligibility would then refer to the historical scheme that defines domains of what is knowable, that is, that which may be captured by our cognition and transformed into knowledge. 'The frame that seeks to contain, convey and determine what is seen' is subject to the condition of 'reproducibility' (Butler 2009, p.8). Given the absence of a legal definition of vulnerability, standards and criteria for recognising whether or not an alleged victim is vulnerable are not set in stone, and controversies may arise in different cases.

Although human rights courts are not bound by a doctrine of precedents (that is, they do not have to decide future cases on the basis of what it has been decided in previous judgments), predictability and legal certainty are values that are upheld under an idea of fairness and coherence. Indeed, coherence in the case-law, including fairness in judging similar cases in a similar fashion, are important elements to sustain the institutional legitimacy of a court's authoritative decisions. The jurisprudence of the courts thus relies on these principles, unless compelling reasons, factual or legal, are put forward to justify departing from the legal rationale outlined in previous cases. Thus, interpretative reasons and standards in previously decided cases, for example the recognition of asylum-seekers as a vulnerable group in the ECtHR's case-law, may become part of a human rights court's frames of recognition. Through these frames, an asylum-

seeker who claims to be a victim might be recognised or recognisable as vulnerable, which engenders consequences in how this applicant's claim of victimisation is processed and adjudicated.

At a certain moment in time, a human rights court's frames of recognition constitute part of the human rights juridical knowledge framework. This framework is then learnt and applied by legal practitioners on individual cases brought before these jurisdictional systems. Therefore, the shaping and reshaping of frames of recognition are connected to the reproduction of legal expertise and juridical power. This technical knowledge is embedded in the courts' case-law and it becomes a legal frame of reference for those who speak the language of law and rights. This specific form of juridical knowledge is further endowed with the moral authority of international judicial institutions, who are entrusted to make decisions regarding human rights which purport to be universal. It is hence implied that despite their regional orientation, the legal rationale underlying their judgments could be universally applicable. Notably, in the context of human rights law as a field of expertise, the premise of universality would entail that all subjects are rights-bearers; however, only a few legal experts, notably, those in a position of power, for example lawyers and judges, are responsible for defining and framing what is required to fulfill or breach these rights.

Recognising vulnerability is an act of framing, and hence, an act of power. By framing the 'vulnerable', international human rights law is also reframing the 'human' and the 'inhuman', which affects how we understand States' moral and legal obligations with respect to those under their jurisdictional power. By recognising the vulnerability of certain groups and denying the relevance of the vulnerability of other groups, supranational human rights courts exercise the power not only to frame, but to dismiss. Although shedding light on vulnerable groups is a strategy aimed at including marginalised individuals (Timmer 2013), I suggest that this categorisation can also produce exclusions, given that courts' frames of recognition might have blind spots. To identify how blind spots and spotlights are created through vulnerability reasoning, I focus on how vulnerability is juridically framed in judgments issued by the courts

and in interviews conducted with lawyers and judges in the European and Inter-American system of human rights protection.

Enforcing rights through courts occurs mostly by processing individual applications on a case-by case basis, as it can be attested by the case-law of the ECtHR and the IACtHR[1]. Although more than one applicant can lodge an application, international human rights courts aim to adjudicate cases involving individual victims, rather than collective claims from groups who are fighting for structural change, social justice and inequality, which traditionally belong in the realm of politics. As Wendy Brown elaborates, rights are politically sought by groups, and once this endeavor becomes successful, the 'we-ness' dissolves, paving the way for these rights to be conferred upon 'depoliticised individuals' ((Brown 1995, p. 98). Notwithstanding the political achievements of bringing minority agendas to the fore through international instruments, the increasing use of vulnerability in the case-law of courts indicates international courts' role in bringing about change in legal frameworks by innovative forms of interpreting individual cases, with over-spilling effects on international and domestic jurisdictions.

On imagining 'a radical politics for human rights', Illan del Rua Wall suggests that 'traditional international human rights law frameworks, by their nature, miss the fact that historically rights were often the tools of sedition' (2014, p. 113). Wall makes reference to the historical struggles of resistance to oppression which paved the way for the emergence of a language of human rights law. From the American and French Revolutions to the creation of multilateral and regional systems of human rights protection, the genealogy of transnational and international human rights law can be traced back to a succession of what we gradually came to recognise as systematic rights breaches, that is, forms of violence that for a long time remained unnamed and therefore, invisible to the law. In this context, international human rights law has

[1] In addition to judgments on individual cases, the ECtHR and IACtHR also issue Advisory Opinions.

emerged through political movements of resisting structural forms of violence, such as imperial hegemony. Political mobilisation of vulnerability through insurgence movements and historical struggles to achieve legal change has foregrounded our extant international human rights legal framework. For example, refugees and asylum-seekers nowadays rely on a framework of international human rights law, including instruments with specific protections, which is very robust comparatively to the legal protection established to other migrant groups; the same does not apply to migrants who do not fall within this category, as States (which accede to these instruments) are not under the legal obligation to protect them by the same protective standards. Legal knowledge evolves through legal practice, and the proliferation of treaties protecting specific groups has been a noticeable trend in international human rights law in the last decades. The thesis focuses on another trend: the development of human rights courts' case-law recognising vulnerable groups and human rights victims.

To analyse the relationship between vulnerability and victimisation in the juridical praxis of human rights courts, it is helpful to differentiate how assigning the victim label in international human rights courts differs from how it is done in international criminal courts[2]. In international criminal courts, the focus is on holding individuals accountable for the commission of international crimes, such as genocide and crimes against humanity. Victims are shaped through the same processes by which those accused of committing crimes against them are held accountable. The juridical relation is formed by the litigating parties are defendant and prosecutor, and victims are arguably not the focus of these criminal courts, which aim to combat impunity and bring perpetrators to justice for the commission of heinous crimes. By contrast, in the case of human rights courts, the main juridical relationship opposes individual victim(s) to responding State(s). When human rights courts adjudicate on individual cases, their role is to issue a decision determining whether or not applicants can be juridically recognised as victims, that is, whether or not the

[2] Examples include: International Criminal Court (ICC) the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for former Yugoslavia (ICTY).

applicant's human rights have been violated by State conduct, either by action (when State officials torture detainees, for example) or omission (*e.g.*, when the State fails to fulfill its positive obligations of providing means for survival for refugees).

Individuals and groups might face specific forms of disadvantage in society by virtue of structural contexts which render them disproportionately vulnerable to different forms of oppression, for example, discrimination on the basis of race, gender or nationality. In the field of international human rights law, this disadvantage relates to one's capacity to enjoy human rights or fundamental freedoms. When a State fails to respect, protect and promote the human rights of someone under its jurisdiction, this person can seek legal remedies from the ECtHR or the IACtHR, provided that domestic remedies have been exhausted (or unreasonably delayed or inefficient), that this State has accepted the jurisdiction of either one of the courts, and the application passes the admissibility requirements. States are not monolithic entities, but rather the conjunction of distinct institutions and representatives whose decision-making processes and agendas might not only differ, but be at odds with one another. However, in international law, States are considered to be uniquely positioned to remedy and prevent identifiable patterns of violence and exploitation, such as modern slavery and torture. Consonant with this power, States are not only the traditional human rights violators, but they also bear the responsibility of being the primary duty-holders insofar as human rights protection is concerned.

States should be held accountable, but courts should also be held accountable for actions, as well as omissions. The ECtHR or the IACtHR then decides whether a human rights violation has occurred, entitling the victim to legal remedies and holding the State accountable for the breach. In a way, the victim label, which is juridically (and authoritatively) assigned by these courts, determines whether something will happen or if all will stay the same: if the ruling determines that the applicant is a victim, the court will first, declare that the State violated the victim's human right(s), and secondly, establish reparations for victims and perhaps even structural changes in laws and policies.

It is important to note that a court ruling declaring the State's wrongdoing can have a big impact in propelling changes in the State's behavior, given that the State is legally bound to comply with the court judgment. Rulings also signal a warning for other States in the region, or even beyond, setting out standards for State duties with respect to human rights. The need for State adoption of international human rights conventions are nevertheless an indication of the success of a political agenda which points to the insufficiency of 'universal human rights' in guaranteeing that human rights are enjoyed by all. Group-specific human rights instruments are an attempt of including under the protective umbrella of human rights law right-holders who are hindered from enjoying their human rights to the same extent as others due to inequalities deriving from, inter alia, structural violence across patriarchal, neocolonialist and neoliberal axes - translated into categories such as gender and sex, race, national background, religion and class. Examples of exclusions present in legal frameworks are people who have been historically sidelined from decision-making spheres and socially excluded, such as the Roma minority in Europe, indigenous populations in Latin America, migrants, children, persons with disabilities.

Arguably, human rights courts are institutions that have the power to define what it means to be 'human' through their power to frame (Grear 2012). Human rights courts are conferred the power to define, reshape and advance human rights legal knowledge. In other words, they have a standard-setting mandate which entails elaborating on whether or not state practices are compliant with a universal human rights framework. The European and the Inter-American human rights courts' primary role is to set out standards with respect to human rights protection in their respective regions by issuing judgments that have binding effect on States who are bound by their jurisdictional power. As primary human rights-holders, individuals who file applications before these courts must prove that domestic remedies have been exhausted. In this way, human rights courts' jurisdiction is subsidiary to the jurisdictional power of states. Also, States are only legally bound if they accede to international agreements which establish the jurisdiction of the courts. Notwithstanding, the standard-setting impact of international human rights courts transcends State Parties to their respective human rights conventions.

By using qualitative interviews and case-law analysis, I examine the juridical praxis of 'vulnerability' in the European and the Inter-American courts of human rights. The thesis explores how the surge in judgments imposing special obligations to protect ‘vulnerable groups’ signifies a particular shift in the evolution of their jurisprudence. This work is inserted within a logic of perennial struggle to enhance legal dispositions and better regulate ethical responsibilities, especially towards those whose voices are marginalised, dismissed and excluded. The aim is to understand how human rights law can be enhanced to be a tool of legal empowerment, especially for those who are disproportionately affected by socioeconomic and political inequalities and made invisible by hegemonic power relations, such as postcolonial and patriarchal modes of relationality. Can a ‘vulnerability’ approach to human rights interpretation better serve the interests of global and transnational social justice? And if so, under what conditions does the use of vulnerability by human rights courts actually work in the service of realising greater ideals of justice and equality? Informed by these wider questions, my research questions are the following:

*Through which rationales, processes and relations are judges and lawyers persuaded to effect change in juridical decision-making by exercising their power to frame certain migrant and indigenous applicants as 'vulnerable' and not others? By framing 'vulnerable groups', to what extent are legal practitioners responding to the vulnerability and agency of postcolonial 'Others' in human rights adjudication?*

I have three sets of practice-oriented sub-questions which provide a stepped approach to answering my theoretically-informed research questions. Each set of sub-questions is addressed sequentially in the analysis chapters of the thesis.

- ***On human rights courts' power to frame.*** *What are the ethico-legal implications of recognising certain categories of migrants as 'vulnerable groups' while denying recognition to others?*
- ***On the judicial power to frame.*** *What kinds of rationale underlie judges' decisions to accept the argument that certain migrant groups are entitled to special protection due to their vulnerabilities?*

¶ ***On lawyers' power to frame.*** *Through which processes do lawyers decide to argue that the vulnerabilities of members of indigenous communities and other alleged victims are relevant to the adjudication of their human rights claims?*

My questions stem from a measure of scepticism with respect to a linear understanding of the evolution of knowledge in the realm of human rights law. I analyse 'change' or 'evolution' in the case-law of the courts as intrinsically connected to the 'living-instrument' approach to the interpretation of the ECtHR and the IACtHR. According to the living-instrument approach, which has been analysed in doctrinal sources investigating both the ECtHR and the IACtHR (Beloff and Clérico 2016; Letsas 2007a), evolving interpretive standards in human rights legal reasoning entails interpretive progress. Under this lens, increasingly providing 'special protection' measures for applicants recognised as vulnerable would instantiate interpretive improvement (Timmer 2013). But what kind of progress does this interpretive change bring about, and who has the power to define who are the 'vulnerable groups'? Also, how do these courts deliver the promise of adjudicating 'universal human rights' in contexts strained by inequalities of power? Particularly, I refer to the unequal distribution of security, and by the same token, of risks, to being disproportionately subjected to violence, exploitation and oppression. And finally, how do judges and lawyers respond to human rights claims made by those they perceive as 'vulnerable'? These questions and sub-questions guide my deeper incursion into juridical relations and processes which enable human rights courts to mobilise the concept of 'vulnerability' in juridical interpretation. To do so, I delve deeper into legal practitioners' experiences by engaging with their narratives about applicants and alleged victims whom they recognise as 'vulnerable' or not.

To clarify, I use the terms 'applicant', commonly used within the ECtHR, and 'alleged victim'[3], formally used within the IACtHR[4], to refer to individuals who file applications before a human rights court claiming that one of their rights under the respective human rights convention has been violated by a Contracting State[5]. Drawing on feminist and other critical theories on vulnerability, law, politics, ethics and human rights, I explore the ethical and normative dimensions of the concept of 'vulnerability' in reshaping our understanding of human rights and corresponding State obligations within international human rights law. Furthermore, I delve deeper into the legal praxis of 'vulnerability' of the European and the Inter-American Courts of Human Rights. The thesis attempts to show vulnerability is mobilised and operationalised within decision-making processes in the ECtHR and the IACtHR. I explore how judges and lawyers justify the use and the relevance of the concept in legal reasoning and adjudication of concrete cases.

Legal scholars have not yet provided an account of how relations of power and affect underlie processes of framing 'vulnerability' within human rights courts. Drawing on feminist and other works of critical scholarship, the thesis attempts to fill this gap by delving into legal practitioners' narratives and experiences of recognising or denying 'vulnerability' entitlements in concrete cases involving vulnerable populations. I explore how juridical decision-making unfolds in practice through the perspectives of lawyers and judges, how 'vulnerability' is used as a tool for interpretation, and at the same time, how these narratives affect them in ways that they cannot always foresee or control. The significance of this exploration it to push the critique of human rights courts one step further and to gain a deeper understanding

3 In Spanish, 'presunta victima', Reglamento de la Corte Interamericana de Derechos Humanos.

4 See, for example, the Rules of Procedure of the Inter-American Court of Human Rights.

5 Contracting States are States who have accepted the court's jurisdiction by ratifying the respective human rights treaty.

of the challenges of exploring the ethical possibilities of vulnerability in legal interpretation, bearing in mind the challenges, tensions and ambivalences which judicial decision-making entails:

> '[t]he law is necessarily committed to the form of universality and abstract equality; but a just decision must also respect the requests of the contingent, incarnate and concrete other, it must pass through the ethics of alterity in order to respond to its own embeddedness in justice. (Douzinas, Goodrich and Hachamovitch 1994, pp.23-24)

By underscoring potential limitations and re-imagining possibilities in human rights courts' interpretive praxis of vulnerability, I suggest a more critical framework to analyse international legal knowledge production may also arise. In my analysis, I look into how framing vulnerable subjectivities often relies on preconceived notions of what a 'vulnerable' person may or may not be. I also examine how vulnerability is often framed within an agency/vulnerability dichotomy, as if these concepts were mutually exclusive. I argue that binary thinking precludes a more nuanced and complex understanding of vulnerability which reconciles vulnerability and agency, an understanding that is sensitive to how vulnerability both preconditions and emerges in resistance, for example, when bodies expose their vulnerability in demonstrations against failing infrastructure or violence in order to resist (Butler 2016). By shifting the focus from vulnerable subjectivities to relationships of interdependence in which vulnerability is felt and communicated within and across bodies, I propose that we can formulate an ethical critique which considers how contingent power relations unfold by, through and across subjects who act upon others and are acted upon at the same time.

## Contextualising the European and the Inter-American Human Rights Courts

Regional human rights courts aim to deliver justice to victims in cases where States have failed to do so, provided that domestic remedies have been exhausted. Similar to domestic judicial courts, international human rights courts rely on legal interpretation to decide over a concrete case. Alleged victims lodge an application and judges are responsible for analysing the facts and applying relevant legal norms. Among many forms of normative regulation, legal norms may prescribe or proscribe certain behaviors, tackling

harmful forms of exploitation and violence. Two examples are the rights not to be tortured and not to be enslaved in the main legal and textual sources for human rights courts' legal interpretation, namely the European Convention on Human Rights, or Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ('ECHR'), and the American Convention on Human Rights of 1969 ('ACHR'), their respective human rights conventions.

Despite being contextually situated within different cultural scenarios (and thereby facing distinct factual and legal issues), both the ECtHR and the IACtHR share key structural characteristics. Their commonalities include a range of human rights that are protected in their respective human rights conventions, based on the rights and freedoms set out in the Universal Declaration of Human Rights of 1948 ('UDHR'). These courts are hence responsible for interpreting international and national instruments having, as a premise, that human rights are universal. The Preamble of the ACHR, adopted in 1969, establishes that the intention of its signatories is to consolidate a hemispheric 'system of personal liberty and social justice based on respect for the essential rights of man', in accordance with the UDHR, within the framework of the United Nations. More cogently in their commitment to the universal system of human rights protection, in the Preamble of the European Convention on Human Rights, adopted in 1950, European States explain the adoption of the convention as an effort to 'take the first steps for the collective enforcement of certain of the rights stated in the Declaration [UDHR]'. However, in practice, human rights are not fulfilled, protected and guaranteed to all to the same degree. Socioeconomic inequalities, for example, condition the extent to which socioeconomic rights of all people within the same territory are realised (or even realisable).

To reach and justify a judicial decision, human rights courts' judges make their underlying legal reasoning explicit in the judgment – in the majority, concurring or dissenting opinions contained in the

judgment[6]. Once a decision is issued, the legal reasoning outlines which arguments have prevailed, and which were rebutted to decide in favour of the State (a ruling declaring that the State did not commit a human rights violation), or the presumed victim (a ruling confirming the presumption that the applicant is in fact a victim of a human rights violation by the State). Arguably, it is difficult to ascertain the boundaries of legal interpretation. A premise that is common in legal scholarship and practice is that judges should not make the law, but only apply it (Greenawalt 2018, p. 80); however, certain legal scholars believe that when deciding hard cases, judges may also partake in the activity of law-making (Dworkin 1975). Given that 'people can reasonably disagree' over what constitutes or not 'interpretation', Greenawalt suggests that the vital question refers to what judges do and what they should do under the law (Greenawalt 2018, p. 95). George Letsas (2007) asserts that the ECtHR endeavors in evolutive interpretation, in consonance with the living-instrument approach to the European Convention on Human Rights[7]. Under this approach, the Convention would from then on be interpreted 'in the light of present-day conditions.'

Similarly, the IACtHR has expanded its jurisdictional scope with even more boldness than its European counterpart, under the principle of *iura novit cura* (Neuman 2008), as its case law further reveals. Moreover, the IACtHR determined that the principles of non-discrimination, equality before the law and equal protection before the law are part of *jus cogens* whenever an employment relationship is established[8]. The innovation is part of a trend that is deemed by some authors as excessively progressive and part of an expansionist tendency that might compromise State compliance of the Court's decisions (Bianchi 2008). In

6 One caveat is that sessions of deliberation are held behind closed doors, and only judges and Registry lawyers can attend.

7 *Tyrer v the United Kingdom, appl.5856/72, Judgment (ECtHR) 25 Apr 1978,* was the decision which inaugurated the adoption of the living-instrument approach by the Strasbourg Court (Letsas 2007b).

8 Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, IACtHR (ser. A) No. 18 (2003).

two Advisory Opinions[9], The IACtHR has endorsed the International Court of Justice's perspective that international legal instruments should be interpreted in the light of the normative framework in force at the moment interpretation is carried out[10]. Moreover, in another Advisory Opinion[11], the IACtHR set out that legal obligations should be interpreted in a dynamic manner whenever human rights interests are involved, so as to cover new situations on the basis of pre-existing rights[12].

Jurisprudential progress or evolution is premised upon the idea that the European Convention on Human Rights adapts to new realities and organically evolves as though it were a living instrument. The recognition that the particular vulnerability of refugees and asylum-seekers entitles them to special protection from States, who have incremental duties to ensure their wellbeing, is an example of evolving jurisprudence. A way of determining if and how the Convention is evolving is to assess whether the court is expanding the scope of individual rights, rather than restricting it, by comparing a case to previously decided cases involving similar factual circumstances. Following this rationale, the increasing use of vulnerability as lens of analysis by the ECtHR and the IACtHR can be considered evolution in their case-

9 See IACtHR., 'Other treaties' subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1 and also IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the ACHR. Advisory Opinion OC-10/89 of July 14,1989. Series A No.10, with reference to article 31 of the VCLT.

10 ICJ Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) of 21 June 1971.

11 IACtHR., The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No.16.

12 To former IACtHR Judge Antonio Augusto Cançado Trindade, literal interpretation should be ruled out with the purpose of implementing the 'effect utile', or effective application, of the instrument, as the different aspiration of human rights treaties impose the undertaking of different interpretation. Moreover, it is noteworthy that article 29 of the ACHR precludes certain kinds of interpretation which would espouse a narrow or restrictive interpretive approach.

Considering this normative invitation to expand interpretation in the ACHR and the construing of article 31 of the Vienna Convention on the Law of Treaties (1969) as a guideline to adopt a teleological interpretation of international law, the IACtHR has fully incorporated the living-instrument approach. Under the assumption of human rights norms constitute an overarching regime, not separate from international law, it follows that the IACtHR's stance on human rights interpretation posits that 'the multiple legal sources engage in a dialogue, rather than opposition, and all cooperate towards achieving the best possible result'.

law. In this context, vulnerability can be seen as a force propelling changes in the interpretation of human rights courts.

By establishing that vulnerable groups are entitled to 'special protection'[13], the ECtHR establishes more State duties and incremental obligations as safeguards, enlarging the scope of State accountability. Arguably, the Strasbourg court has improved protective standards in cases involving applicants who are considered vulnerable. In the case of *D.H. v Czech Republic*[14], the ECtHR recognised the Roma minority as a vulnerable group. This case involved the school segregation of eighteen Roma children, who were denied inclusion in regular school programmes and sent to schools for kids with special needs. The Court ruled that the systematic practice of ethnically segregating Roma children amounted to a denial of their right to education, breaching their human right not to be discriminated in conjunction with their human right to education[15]. This landmark case established the Roma minority as a vulnerable group in the jurisprudence of the ECtHR, pointing to an effort by the Strasbourg court to become more attuned to the needs of this historically disadvantaged group. This case was considered as a step forward towards recognising the particular vulnerability of this minority group and enforcing higher standards of accountability on States to guarantee their protection against discriminatory practices, a turning point in the case-law of the Court in relation to previous judgments involving Roma applicants. In *Yakye Axa v. Paraguay*[16], dozens of indigenous families were denied land ownership to their ancestral lands, protesting

13 This expression is repeatedly found in the jurisprudence of vulnerable groups of both human rights courts, e.g., *M.S.S. v. Belgium and Greece*, appl. 30696/09, GC Judgment (ECtHR), 21 Jan 2011, paragraph 25.

14 *D.H. v. Czech Republic* (2007), Grand Chamber Judgment. In this case, the Grand Chamber found a violation of the right to education (art.2, Protocol 1) in combination with the right to enjoy freedoms and human rights without discrimination (Article 14). In the judgment of *D.H.*, 'historical discrimination' was highlighted as an identifying factor for recognising vulnerability, bringing to the fore historically entrenched power asymmetries.

15 Article 14, ECHR and Article 2, Protocol No. 1 to the ECHR.

16 *Yakye Axa Indigenous Community v. Paraguay*, Judgment (IACtHR) of 01 Feb 2006. In *Yakye Axa Indigenous Community v Paraguay*, the IACtHR found violations of the rights to property, access to court and right to life of the Yakye Axa indigenous community, acknowledging that it dealt with a high risk vulnerable group and setting the

against the Paraguayan State[17]. The IACtHR recognised the *Yakye Axa* indigenous community as a vulnerable group, ruling that there had been violations of the rights to property, life and access to court and setting out the State's positive obligation to ensure a dignified life for its members, guaranteeing the protection of civil as well as social rights, namely, the provision of health, food and educational services (Beloff and Clérico 2016).

These cases exemplify how juridically assigning the label 'vulnerable' to a group may signify a widening of the scope of these human rights courts' frames of recognition, with consequences to interpretation and the outcome of concrete cases involving vulnerable applicants[18]. Upon the enactment of a judgment which recognises a group as vulnerable for the first time, a court's frames of recognition are reshaped. New light is shed on harms which, prior to this recognition, may have been invisible, propelling them to become intelligible within human rights law. As a result, alleged victims who are at risk (and who would otherwise have their victimisation denied by courts), gain visibility and recognition. The increasing use of vulnerability by human rights courts can arguably be interpreted as, firstly, an attempt to empower

State's positive obligation to ensure a dignified life for its members, guaranteeing the protection of civil as well as of socioeconomic rights, pursuant to the San Salvador Protocol. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 19 November 1999) 69 OAS (San Salvador Protocol).

17 According to the organiszaation CEJIL, in the nineteenth century, Paraguay had sold this land to British entrepreneurs through the London Stock Exchange. Ranches were established and by initiative of the Anglican church who had purchased Paraguayan lands and started development projects, members of the Yakye Axa community were moved to a ranch called 'El Estribo' in the 1970s. As the move did not contribute to improving their conditions of poverty and dispossession, they decided to return to their original land in the 1990s, but were not allowed to enter what had become private property of ranchers. They protested their right to land, during which sixteen members of the community died due to the situation of extreme poverty in which they found themselves.

18 For the purposes of this thesis, I focus on human rights victimisation connected to gross human rights violations, namely torture, inhuman or degrading treatment, slavery, servitude, and forced or compulsory labour. That being said, a striking caveat is how recognition of vulnerability may produce the exact opposite effect in claims of infringement of the right to privacy and family life, for example, when a person with disability wishes to exercise autonomy and counter a State-mandated action, such as being institutionalised or a terminally ill patient with disability wishes to be euthanised, as exemplified by the ECtHR judgment in the case of *Pretty v. the United Kingdom*, appl. 2346/02, Fourth Section Judgment, 29 Apr 2002. Albeit important, these cases will not be discussed herein for falling outside of the delimited scope of this research.

those in a situation of disempowerment; and secondly, as enabling juridical novelty and to some extent, a change in the interpretive patterns and reasoning in the case-law of these courts.

On the relevance of 'landmark cases' to international human rights jurisprudence, Lupu and Voeten (2012) contend that although '[t]here is no norm of *stare decisis*[19]… international courts do *de facto* use precedents' (p. 1). Despite the absence of the obligation to follow 'precedents', the judgment in *M.S.S. v. Belgium and Greece* not only mentions accordance and consistency to 'the Court's case-law'[20], but also relies on the expression 'well-established case-law'[21], which more accurately depict the relevance of previously adjudicated cases to the interpretation of the law in future cases. Jurisprudential conformity is sought for the sake of fairness and equity in case-law[22]. Indeed, the use of previous judgments to support the legal reasoning of new decisions is an argumentative strategy that seeks to build systemic coherence in decision-making of similar cases and bolster the legitimacy of the Court's decisions. Thus, when human rights courts recognise vulnerable groups, there is a ripple effect insofar as this recognition can have more enduring effects in the jurisprudence of the courts. Judges will consider that 'special protection' might be required in cases involving applicants who are members of this group in subsequent cases in light of this interpretive change. But what kind of change and transformation does vulnerability reasoning enable for populations that are oppressed, marginalised and excluded?

19 Stare decisis is a doctrine recognised by Common Law systems according to which precedent is legally binding, that is, courts are obligated to follow certain principles or rules of legal reasoning from previously adjudicated cases that present similar characteristics to the case at hand (see, for example, Waldron, 2012).

20 *M.S.S. v. Belgium and Greece*, appl. 30696/09, GC Judgment (ECtHR), 21 Jan 2011, Paragraphs 325 and 326.

21 Paragraphs 342 and 365.

22 For instance, an effort towards jurisprudential conformity was the introduction of the Jurisconsult in the ECtHR, an internal mechanism composed of a team of Registry lawyers who are responsible for ensuring quality and consistency of its case-law. In the court, I spoke to a lawyer working in the Jurisconsult team, who explained that this group of court lawyers weekly advises all judges and court staff on pending cases through case-law research and legal opinions.

Innovative legal remedies for human rights breaches can arguably be a source of transformation for the lives not only of victims but also groups and populations, when reparation measures address the need to prevent further victimisation from happening. The diverse and creative range of legal remedies imposed on States by the IACtHR has been praised for its avant-garde and bold nature, including but not exhausted by: monetary and non-monetary compensations, symbolic reparations, investigation and punishment, legal reform, victim and witness protection and many forms of preventive measures to tackle victimisation (Basch *et al.* 2010). The most forward-looking measures involve prevention through training public officials, raising awareness through media outlets, carrying out legal reforms and strengthening or creating public institutions. In *Vélez Loor v. Panama*[23], the Court imposed the obligation upon the Panamanian State to implement capacity-building and training for personnel of the National Migration and Naturalisation Service. Through this specific measure, the Court aimed to enforce and promote international standards of human rights of migrants. In contrast with the IACtHR bolder stance, arguably the ECtHR has been less progressive in establishing legal remedies for victims, though narrower remedies might correlate to less problematic issues of State compliance with its decisions (Neuman 2008).

Timmer (2013) refers to the ECtHR's increasing trend of using 'vulnerability reasoning' as a 'silent revolution'. In the same vein, Beloff and Clerico (2016) argue that the IACtHR is enhancing its interpretive framework by recognising 'vulnerable groups' in its case-law. At the same time, theories on vulnerability have gained increasing attention over the past fifteen years in feminist and other critical interdisciplinary approaches, particularly in the fields of ethics, politics, philosophy, law and social policy research. These theories put forward vulnerability as grounds for rethinking ethical and normative obligations and advancing a more relational understanding of human beings as interdependent, rather than self-sufficient individuals (Fineman 2008; Grear 2013; Butler 2016). Drawing on this theoretical framework, I critically

[23] *Vélez Loor v. Panama*, Judgment on Preliminary Objections, Merits, Reparations, and Costs. (IACtHR), 23 Nov 2010.

engage with definitions, narratives and meanings evoked by the use of 'vulnerability' in the interpretive framework of the ECtHR and the IACtHR. The thesis problematises these human rights courts' power to frame applicants as 'vulnerable' by questioning the processes and relations underlying the juridical framing of 'vulnerable groups'. By using legal and qualitative methods, I examine these processes and relations which, as I will later suggest, might result in the selective framing of vulnerable groups and subjectivities within juridical discourse. In my socio-legal analysis, I suggest here that there is as much need for wariness as there is room for optimism with respect to the use of 'vulnerability' in the interpretation of human rights courts.

Timmer and Peroni (2013) refer to the substantive and procedural measures stemming from the provision of special protection to vulnerable applicants by the ECtHR as 'vulnerability reasoning'. Vulnerability reasoning signals that human rights courts are concerned with addressing the inequalities inherent to contexts such as oppression, violence and discrimination. Therefore, recognising vulnerable applicants would enable human rights courts to set out higher standards of protection and care for victims in contexts of vulnerability. Given the emphasis on remedying social injustice and inequality, Timmer and Peroni (2013) argue that the recognition of vulnerable groups in human rights interpretation is a welcome development for strengthening victmisation claims made by those considered to be marginalised groups.

However, Timmer and Peroni (2013) also acknowledge that certain dangers ensue from vulnerability reasoning, namely stigmatisation, stereotyping and paternalistic approaches that may ensue. Despite the alleged improvements that vulnerability reasoning may represent human rights interpretation (Timmer 2013), I suggest that vulnerability reasoning can be selective. Thus, rather than a mechanism of social and juridical inclusion of marginalised populations, selectivity implies exclusions might also take place. Excluding marginalised populations is arguably a form of double marginalisation. If vulnerability in human rights interpretation should move the needle of the law

towards equality, nondiscrimination, inclusion and social justice, I contend that exclusions might reinforce patterns of injustice and victimisation instead. In the thesis, I identify themes and case studies that are illustrative of the promises and pitfalls of vulnerability in the interpretation of human rights courts. The case study that showed more potential was vulnerability in the context of migration.

## Conceptualising the 'Ideal Migrant Victim': Between Vulnerability and Otherness

The thesis explores many cases of vulnerability in the context of migration, which is an overlapping theme of concern and application of 'vulnerability reasoning' in the ECtHR and the IACtHR. In my analysis, I will contend that human rights courts may either reinforce or tackle patterns of human rights violations by identifying laws and policies which structurally enable, create and distribute privileges and disadvantages to human beings within the borders of a State. For example, when national security is invoked as an argument for more stringent immigration laws or policies, the underlying premise is that the human security of citizens should prevail over concerns about the security of migrants. Immigration laws affect only migrants directly, imposing restrictions and conditions for belonging and procedures for non-belonging to the polity. By belonging, I mean being entitled to rights within the borders of a State and corresponding State duties to enforce, ensure, protect and promote these rights. Immigration laws and policies regulate who is entitled to fully benefit from membership status compared to citizens.

This legal architecture indirectly affects everybody living in that State, since it defines who and in what ways one can live, study or work, and access justice, medical care, collective resources and institutions, as well as participate in decision-making spheres. Extant immigration laws entail the conditional inclusion of migrants as an exception and exclusion as a rule, whereas it reinforces the unconditional belonging of citizens and exclusions of membership as an exception (for example, criminally convicted citizens who are disenfranchised in the U.K. or in the U.S.). Based on differentiations along the migrant/citizen continuum, citizens are entitled to the full protection of States

when it comes to their human rights, whereas migrants are placed in different legal categories of protection (including lack thereof, in the 'illegal' category). Indeed, migrants may even be constructed as 'dangerous others' in social imaginaries.

Globalisation has taken place alongside the strengthening of border controls and securitisation of migration (Bosworth and Guild 2008). The conservative discourse on migration relies on the ascription of the status of 'folk devils' (Cohen 2002) in the collective conferring of deviance to asylum-seekers, refugees and undocumented migrants. This negative image which links migration and the stigma of illegality often propels audiences to feelings of anxiety and fear, paving the way for misrecognition, exclusion, othering and even racism (O'Neill 2010). Aas (2010) reminds us that irregular immigrants might be considered as the "global others". Global mobility is shaping novel labels of outsiders and new 'others' in the globalised arena, in that some populations are caught up in 'non-spaces' exemplified by refugee camps and detention facilities (Hannah-Moffat and Lynch 2012). To Garland's (2001), illegal immigrants and others who commit legal offences are considered as another 'kind' of human, intrinsically different from law-abiding citizens and constructed as threats to the existing social order. Aas argues that the public eye interprets and expresses concern over migration, perceiving foreigners as 'contaminating the local' (2010, p. 437), especially in issues of human trafficking, terrorism and transnational organised crime.

Regarding the punitive tendency of States against migrants, 'crimmigration law' is the depiction of a phenomenon that blurs the boundaries between criminal justice and immigration policy, with increasing reliance of immigration procedures in criminal law processes and crime control through immigration processes (Stumpf 2006). Practices of detaining asylum-seekers and illegal migrants illustrate how immigration has borrowed criminal punitiveness (Hannah-Moffat and Lynch 2012). This stigmatising depiction of migrants as dangerous others leads to increased forms of lawful violence and coercion aiming at detaining, excluding, imprisoning and marginalising migrants. At the margins, other structures such as racism, sexism and other forms of discrimination encounter a breeding ground (Calavita 2005). Against

this backdrop, migrants are a priori seen as dangerous threats, increasing their potential to be ideal offenders, hence, farther away from being considered as ideal victims.

In light of the polarised debate surrounding the limits of ethical State responses to migration, two radical discourses can be identified. On the one hand, it is deeply worrisome how the notion of the deviant and dangerous migrant 'other' in societal imagination bears an intimate link to the 'moral panics' underlying national security discourses and increasingly stricter 'crimmigration' laws (Aas 2010). The ascension of this derogatory stereotype resonates with Nils Christie's assessment that the more foreign and less human a perpetrator is, the closer they are to the notion of ideal offender (1986). On the other hand, I suggest an expansion of globalised networks of solidarity has propelled a powerful albeit double-edged discourse on migrant vulnerability in human rights advocacy, framing 'vulnerable migrants' as ideal victims of human rights violations and thus taking a diametrically opposite stance from the anti-migrant discourse. Against this backdrop, I draw on the notion of ideal victim can help explicate promising achievements as well as uncover potentially exclusionary dimensions of human rights discourse on migrant vulnerability, leading to the normalisation of invisible harms. To fulfill this purpose, Christie's 'ideal victim' typology underpins a critical analysis of the recognition of human rights victims in the context of migration, focusing on how regional human rights courts adopt the notion of vulnerability as legal heuristic.

Christie explains that being a victim cannot be apprehended as an objective fact, but rather as a societal or group definition of a particular situation: whereas some emphasise it, others choose to deem it less relevant. In this context, the ideal victim would be a category of individuals to whom the victim status is more readily and completely attributed, without any question regarding its legitimacy. An ideal victim has certain identifiable attributes. First of all, the victim is weak, helpless and female. Secondly, she is careful and respectable, neither exposing herself to risk nor doing something morally reprehensible. Thirdly, although disempowered in her archetypical frailty, she must be empowered enough to make her case known and claim victim status, not having counter-powers to silence her claims. Last but not least, an

ideal victim must have as a counterpoint an ideal offender, whose main features consist in being ‘big’, ‘bad’, and a stranger to the victim. According to Christie, the more foreign and the less human, the more ideal the offender; that is, this archetype is shored up by social anxiety and fear in relation to the idea of a monster from far away who can be differentiated from common and dignified citizens. Thus, the ideal offender plays an important role in creating the ideal victim: the more ideal the offender, the more ideal the victim and the reverse logic also applies. What ensues is that when offenders are victimised, they are far from being ideal victims, for example when drug traffickers become addicts, victims of their own trade (1986, pp. 21-25).

One insightful contribution of Christie's concept is the conclusion that individuals who want to have their plights heard and their victim status recognised have better odds at achieving their goal if they have the right amount of power: neither too much to threaten established societal interests of dominant classes nor too little that their voices are completely unheard. Hence, ideal victims must be strong enough to be listened to but also weak enough not to become a threat to other important interests and undermine public sympathy associated with being a victim (1986, p. 27). In an interesting example, Christie cites the case of domestic abuse laws until the 1980s in Finland, which were handled as noise complaints; he correctly suggests that reducing violence to noise is a way to narrow down the problem as a nuisance that must be silenced, rather than a serious issue to be resolved and tackled. He argues that with the empowerment of women in male dominated societies, domestic rape and beating became denaturalised, as women gradually attained positions of power that allowed them to raise concerns and change previous definitions; they hence became closer to the ideal victim than in the past. He continues on to assert that when gender equality is achieved, though, their credibility as victims will be compromised due to the reduced amount of sympathy they will elicit when making a claim, as weakness and subordination are necessary criteria to fit within the ideal victim archetype.

In this respect, Miers (1990) suggests that complex interacting processes unfold whereby individuals are either categorised as victims or excluded from this category altogether. Drawing on his account, Walklate (2007) places the following question at the heart of a feminist-informed critical victimology: how is the victim label created and who has the power to place that label? It is important to factor into the equation the uncertainty of emotions, such as public sympathy and compassion, and the asymmetrical strength of political actors who play a key role. These influential elements might be decisive in the assignment of the victim label. Conversely, Miers argues that creating a victim could also be a powerful way to harness emotions from the public, such as public sympathy, towards political goals. Concerning the latter, Miers warns about the potential danger that ensues from constructing a victim, since focusing on a specific kind of victimisation may be a political strategy to naturalise even more hazardous harms: '[t]he presence, or the possible identification, of a victim is routinely used to emphasise other people's deviance, diverting attention from other (worse) forms, or reiterating traditionally accepted forms.' (1990: 220). It is interesting to note how this indicates that the legal and political realms are entwined in a mutually reinforcing relationship, in that the power to be a victim, which is affected by public emotions in the political arena, can be used to achieve the position of victim in the legal sphere and the power of being labelled as a victim by a court of law concomitantly may affect the capacity to harness sympathy from the public and tilt the scales of political struggles in favour of certain agendas.

Drawing on Christie's provocative framework, some points can be raised regarding how migrants are framed in the interpretation of human rights courts. First of all, the identification of vulnerable applicants and the assignment of the vulnerable label seem to point to a quasi-legal categorisation, indicating proximity to the ideal victim archetype. On the basis of a need for special protection, it follows that vulnerable applicants should be treated differently, that is, with a higher level of protective obligations by States, which is often a rationale premised upon care, dependence and compassion, reconciling the apprehension of social contexts of vulnerability with individual narratives of victimisation. I argue that vulnerability can thus be

seen as increasing the odds of an applicant to be acknowledged as a victim of a human rights violation, constituting a measurement for 'ideal victimhood'.

Since the obligations of the State are increased from merely protecting to providing 'special protection', recognition of vulnerability entails a higher degree of accountability by the State with regard to the vulnerable subject. This enhanced protection translates into incremental duties, which arguably increases the applicant's odds of being considered as a victim. Revisiting Christie's ideal victim, the more vulnerable the applicant, the more readily and easily the victim status is assigned to her. Hence, vulnerability can be considered as a measurement of a person's proximity to embodying what the ideal victim should be. In the social imaginary, images linger of those who could 'deservingly' merit to have their suffering deemed relevant and be recognised as a victim, that is, archetypes of ideal victims, as well as of ideal offenders to be placed opposite to them and further highlight their vulnerable situation. Vulnerability provides a reason to bolster the idea of a 'deserving' ideal victim. For instance, the vulnerability of a migrant child, a seemingly uncontroversial assumption, brings her close to the top of the ideal victim pyramid, making her case from the outset much stronger when claiming a human rights violation, as shall be further discussed in Chapters 4 and 5.

In other words, I suggest that vulnerability may be a proxy to measuring how ideal a prospective victim may be in social imaginaries. The ideal victim concept helps delineate the extent to which societies might be able to recognise forms of vulnerability and vulnerable subjects, as there are stereotypes and characteristics associated with the ideal victim which also apply to the recognition of vulnerable groups. If vulnerability can be a measurement of how ideal a victim is, it seems logical to infer that individuals or groups whose vulnerability is conspicuous and recognisable are better off than those who are not when claiming that they are victims before human rights courts. In other words, applicants who are successful in their claims before human rights courts and are assigned the victim label have juridical validation of their narrative and can benefit from compensation and other forms of redress from the State in question.

Meanwhile, applicants whose victim status has not been recognised due to an inability from the Court to take into consideration their vulnerability do not benefit from ensuing material reparations and guarantees of non-repetition. Thus, to understand whether or not human rights courts rely on preconceived stereotypes of frailty, helplessness and weakness to ascertain the boundaries of the 'vulnerable subject' in concrete cases, the concept of ideal victim can offer a useful analytical starting point.

Highlighting vulnerability reasoning can shed light on the invisible victimisation of marginalised groups and trigger juridical responses to pre-existing inequalities and power imbalances. Thus, human rights courts have the power to frame vulnerable subjects and groups and reshape the very content of what it means to be a human rights victim and what a human rights violation requires and entails. This means that vulnerability reasoning can be a mechanism that can bolster inclusion and social justice for marginalised groups, altering and even expanding the scope of what we understand as human rights victimhood, and reassigning duties owed by States and institutions towards those considered to be particularly vulnerable. The ECtHR establishes, for instance, that refugees or asylum-seekers can be defined as a 'vulnerable group', but not economic migrants. Consequently, different normative implications ensue for each group.

Arguably, Global South migrants are rendered vulnerable by legal and political arrangements based on States' sovereign power to discretionarily decide upon the legality of human beings who cross the borders. These arrangements structurally enable States to systematically exclude human beings from the most fundamental freedoms and human rights, from depriving them of liberty by detaining them and separating migrant families, to deporting and criminalising human mobility with immigration offences such as border crossing or providing shelter to individuals with 'illegal status'. A pertinent reflection posited by Christie in relation to the ideal victim is that real victims rarely possess all of the features associated with the ideal victim, thereby not fitting the archetype and encountering more hindrances in gaining societal validation as victims. Consequently, the victimisation of certain subjects who do fit the ideal victim

archetype might not be as easily and readily recognisable as such. This raises the question of whether the same applies to human rights courts' recognition of vulnerable subjects. Particularly in the case of migrants, are there migrant groups that are more visible, that is, more easily and readily assigned the vulnerable label, than others? If refugee children are more easily recognised as vulnerable because of the visible features that can be associated with frailty, weakness and innocence, are there migrant groups that are less visible to being recognised as vulnerable despite their heightened susceptibility to suffering harm, exploitation and violence, such as economic migrants who cross the Mediterranean or the Atlantic with their families trying to reach Europe or the US?

As real-life victims do not always meet the threshold for recognition of vulnerability within societal frames of recognition, the thesis explores the extent to which juridical frames of recognition abide by similar forms of reasoning, opposing 'vulnerable' bodies whose frailty is visible to bodies that are conceived as dangerous, as instantiated by Christie's concept of the 'ideal offender'. As the act of framing in international human rights law entails highlighting certain features and obscuring others (Grear 2012), selectively framing certain migrants as vulnerable and not others means bringing to the fore the vulnerability of some and the 'invulnerability' of others, with juridical consequences on the ways human rights and corresponding State duties are assigned and understood. Beyond the strict application of rules and definitions, I suggest that investigating the phenomenon of vulnerability in human rights courts and how it may engender, in addition to more visible inclusions, an exclusionary mechanism that is less visible, requires being wary of how power and affect might be mobilised within juridical relations.

With respect to groups of migrants recognised as vulnerable by the ECtHR and the IACtHR, some similarities and a striking difference are noticeable between the regional systems. Whereas asylum-seekers, refugees and migrant children and women receive this recognition by both Courts, only the IACtHR vehemently confers the vulnerable status to irregular migrants. Undocumented migrants might be vulnerable to victimisation and violence in different ways, from human trafficking to modern slavery and

other exploitative practices. Moreover, their illegal status can affect their confidence and ability to report crimes that are committed against them. Ana Beduschi (2015) claims there exists a problem of perception of undocumented migrants as 'individuals who are appropriately deprived - or less entitled to - human rights' and asserts the importance of human rights courts and international instruments in shoring up these rights and defining their content. Does the ECtHR's omission in recognising irregular migrants as vulnerable indicate that it upholds, to some extent, the negative perception of migrants as 'others' who are not as entitled to human rights as citizens?

From a legal anthropological approach, Marie-Benedicte Dembour (2015) analyses how migrants are framed in the case-law of the European Court of Human Rights, examining, as a counterpoint, the case-law of the IACtHR. Dembour argues that the European Court has a bias towards the State, whereas the Inter-American court has a *pro homine* proclivity[24], hence, a bias towards protecting the individual – particularly in contexts of migration. As Dembour recalls, these institutional biases are a product of the complex genealogical shaping of these courts, which involves historical and political forces. Dembour suggests the biases of courts might reflect political and moral values of a society and for this reason, should be explicitly put forward otherwise, the ensuing assumption would be that these biases are negative and should be redressed. She also argues that although none of these biases were inevitable, they became enduring aspects permeating the interpretation of the Courts. If Dembour is right, we can infer that the pro-State bias of the ECtHR entails, as a result, an anti-migrant stance which, at the present moment, disfavours especially illegal migrants. If this bias reflects an assimilation of 'othering' migrants in the European Court's system, how to resist, unsettle and ultimately revert this bias?

[24] A principle which dictates that in case of conflict between norms, the most favourable to the individual should prevail.

In the thesis, I explore how the courts' epistemic inclinations might manifest in their case-law through processes of recognition of 'vulnerable applicants' (or dismissal thereof). By contrasting discrepancies in the recognition of vulnerable migrants in human rights courts, notably the situation of economic migrants as a group and the selective recognition of certain subgroups, some puzzling questions arise. First, is there an exclusionary logic underlying the recognition of some groups as vulnerable, thereby compromising the exact goal that adopting vulnerability in the courts seeks to achieve, namely a stronger version of equality? Secondly, is there biased selectivity from courts when recognising group vulnerability? If so, do 'othering' strategies play a role in recognisability? And finally, is recognising someone as vulnerable a way to reinforce stigmas of passivity or victimhood or can it be empowering, fostering agency?

Rather than comparing these judicial institutions or their respective regional systems of human rights protection, I conducted qualitative interviews with legal practitioners to better understand their viewpoints on the relevance of 'vulnerability' in human rights interpretation, notably in the context of their own work. In doing so, I attempted to flesh out a more nuanced critique of what the legal praxis of 'vulnerability' in human rights courts might entail. In the analysis, I draw particular attention to how interviewees refer to the exclusion or denial of agency, as identifying signs that a 'vulnerability' exists by invoking, for instance, the notions of 'resourceless', the lack of ability to 'fend for themselves', or gender and age stereotypes implying disadvantage or inferiority with respect to individual autonomy or resilience.

I critique the trend of defining 'vulnerable groups' in human rights jurisprudence and I advocate for a more complex and nuanced way of conceptualising vulnerability as emerging through relationships of power, focusing especially in intra-court relations that are formed between on the one hand, lawyers and judges, and on the other hand, victims in contexts of vulnerability. Focusing on relations between legal practitioners and alleged victims, I suggest that both the power to affect, as well as the capacity to be affected play vital roles in how vulnerability is juridically shaped. The thesis further argues that a fuller account of the phenomenon of vulnerability in human rights interpretation

requires departing from defining it as a fixed or immutable characteristic of certain groups and embracing a relational approach. By relational, I mean looking at how vulnerability emerges within human relations and affective encounters, particularly human rights legal practice, traveling between and across bodies as an argumentative force that tips the scales in legal reasoning and disrupts traditional binaries embedded in law such as agency versus vulnerability, reason versus emotion and objectivity versus subjectivity.

## Structure of the Thesis

The thesis is composed of six further chapters. In Chapter 2, I undertake a literature review of the concept of vulnerability in human rights, feminist and other critical theories in the realms of law, political theory, ethics, philosophy and victimology. I contend that framing vulnerability within juridical language as 'vulnerable groups' implies that it is a fixed characteristic of certain individuals, incurring the pitfall of essentialising groups who are supposedly vulnerable in opposition to others who have agency. In my analysis, I propose a more complex understanding of vulnerability in human rights courts' praxis which reconciles vulnerability and agency within bodies who are in charge of defining vulnerability (legal practitioners), as well as those who are most affected by how narrow or wide the scope of these definitions may be (the so-called 'vulnerable populations', who resist dispossession and violence, struggling for recognition and justice).

In Chapter 3, I outline my socio-legal research design and methodology, including details about my fieldwork, field sites and the main research method I utilised, namely qualitative semi-structured interviews with legal practitioners. As I will further detail, I use intersectionality (Crenshaw 1989, Crenshaw 1991) as a methodological approach to disrupt preconceived notions of an 'ideal migrant victim' by problematising existing and overlapping categories. By analysing migration and other interlocking and simultaneous structural oppressions that strike a particular context (Cooper 2016), I examine how framing vulnerability happens through the specific operation of power relations and affective relationships. This

constitutes a relevant tool to deconstruct essentialised categories and reveal how power relations operate to create multiple identities and sheds light on how law succeeds or fails to take this into account. An intersectional reading will permeate case selection and my analyses, in an attempt to reveal in which ways vulnerability may or may not destabilize the juridical framing of 'victim' within human rights courts, working as inclusionary and exclusionary mechanism for marginalised groups who seek recognition and access to justice.

In Chapter 4, I explore how structures of vulnerability are used in juridical discourse, focusing on intersectional grounds of migration, gender, age and health. I analyse how framing vulnerability relies on setting persons, groups and categories apart within an agency/vulnerability binary, rather than a spectrum. In doing so, I highlight how this differentiating premise – whereby agency figures in opposition to vulnerability – consists in a structuring mechanism of how the power to frame is relationally exercised in legal language. I contend that the vulnerability of the 'Third World' or 'Global South' economic migrant is obfuscated by the conspicuous vulnerability of other migrant groups, as the ECtHR exercises its power to frame by opposing vulnerability to agency. My analysis explores intersectional juridical categories, such as gender, age and health status. Mindful of these intersectional differences, I suggest that the scope of State duties can be reshaped when alleged victims are considered vulnerable, such as asylum-seekers, whereas State action or inaction remain uncontested in cases involving certain groups who endure dire predicaments but are considered as less vulnerable or invulnerable, for example, economic migrants.

In Chapter 5, I explore judges' perspectives on the use of vulnerability in legal reasoning, focusing on the ECtHR. Drawing on my qualitative analysis, I examine the role of empathy in judges' discretionary power to frame 'vulnerability'. I attempt to show how judges negotiate the meanings of vulnerability and agency by navigating the legal and the political, as well as the affective and the rational to support their opinions and votes. More importantly, I argue that framing 'vulnerability' cannot be reduced to a single, unilateral and top-down act, since it involves a complex set of processes

wherein judges affect real-life individuals and are affected by their narratives at the same time. I challenge the idea that recognition of 'vulnerability', as well as the ensuing ethical distribution of human rights and State duties, is a strictly rational act of cognition. Instead, I argue that the affective component of how 'vulnerability' is mobilised across different stages of the juridical process carries, to some degree, argumentative persuasion.

In Chapter 6, I analyse my interviews with lawyers, assessing their role within the processes of framing 'vulnerability', focusing on the IACtHR. I argue that the power to frame the 'vulnerable' and the 'victim' is distributed - albeit unevenly – in juridical relations between legal practitioners and applicants. I will explore how Inter-American lawyers use categories of 'vulnerable groups' in their interpretive work, and the types of relations and affective exchanges that are involved in processes of recognising and weaving narratives of vulnerability into legal arguments and juridical discourse Particularly, I highlight how vulnerability can be mobilised through affect and power relations, bringing about transformations in juridical frames. I also explore how vulnerability in resistance can emerge within juridical or pre-juridical processes and relations.

In Chapter 7, I present my concluding remarks alongside the main contributions and limitations of my research. I also suggest avenues for further research. The thesis shows that human rights courts, as well as judges and lawyers who operate within these regional judicial systems might recognise vulnerability selectively, bringing about not only the inclusion, but also the exclusion of vulnerable populations in international human rights law. I contend that exclusion occurs when the 'vulnerable' is narrowly defined as a fixed disadvantage of the 'other', rather than a position that is constructed within the political and legal architecture alongside privilege, determining higher standards of human rights protection and fulfillment to some in detriment of others. I suggest that a more nuanced understanding of vulnerability in tandem with agency and resistance can enhance further engagements with vulnerability in legal praxis, both for human rights practice as well as for scholarly critiques about human rights courts. When narratives of vulnerability

appear in tandem with claims of human rights victimisation, I argue that more ethical outcomes might ensue if we rethink how vulnerability might emerge through and across power relations, and how recognising these power imabalances can inform State behavior in order to tackle patterns of human rights victimisation, such as systematic forms of violence against dispossessed Global South migrants through changes in immigration laws and policies. As we harness the power to affect those we recognise as vulnerable (and those we refuse to recognise, despite their plights) with our institutional or occupational power as lawyers, academics, activists or judges, we have to confront how we are affected by narratives of vulnerability and may resist those which might threaten our sense of agency and control.

## Chapter 2 –Theorising vulnerability in supranational human rights courts

### Introduction

The thesis investigates the increasing use of the concept of 'vulnerability' in the interpretive activity of human rights courts. In the past decades, vulnerability has also sparked growing scholarly interest in multiple disciplines, including feminist legal theory (Fineman and Grear 2013), sociology (Turner 2006), feminist bioethics (Mackenzie, Rogers and Dodds 2013), feminist moral philosophy (Butler 2006; Butler, Gambetti and Sabsay 2016; Gilson 2013) and feminist victimology (Walklate 2011). In this chapter, I aim to bridge the gap between theory and practice by fleshing out a theoretically informed critique to foreground the analytical framework of my thesis. I will examine the ethical implications underlying human rights courts' practice of conferring 'special protection' to 'vulnerable groups.' Particularly, I will draw on interdisciplinary scholarship that hinges on the concept of 'vulnerability' as grounds for rethinking ethical obligations.

To what extent can legal reasoning grounded on the concept of 'vulnerability' lead international human rights law towards enhanced ethical responsibilities in favour of 'the most vulnerable'? To answer this question, the thesis will develop a critical examination of how concepts and theories which inform the interpretation of vulnerability by human rights courts are applied by legal practitioners to generate legal knowledge. From this starting point, in subsequent chapters, I will examine how vulnerability affects the interpretation of human rights courts, particularly the processes through which courts decide, in a concrete case, whether an applicant is 'vulnerable' or not, a 'victim' or not, and which corresponding State duties are applicable.

In traditional legal theory and practice, the concept of dependency is brought to the fore as the exception, rather than the norm. Drawing on feminist and critical theories on vulnerability, I will contend that interdependence is the cornerstone for rethinking ethical responsibilities in international human rights

law. Although 'vulnerability' as grounds for ethical reasoning can be conceptualised as a universal and consistent human feature deriving from our embodiment (Fineman 2008), I suggest that a more relational and less ontological critique of 'vulnerability' can push the boundaries of human rights legal reasoning even further towards a more egalitarian ethics. A relational approach to 'vulnerability' relies on the human reality of interdependence as the starting point for ethical allocation of rights and duties. I argue that this approach challenges the liberal archetype of rights-bearer as 'invulnerable' self-sufficient agent in law, which has been compellingly criticised by feminist and critical legal scholars (Charlesworth, Chinkin and Wright 1991; Douzinas 2007; Fineman 2008; Lacey 2004a) for not corresponding to the human reality of mutual interdependence.

Firstly, to situate my field of inquiry within literatures with respect to the use of vulnerability by international human rights courts, I will critically examine the argument that the emergence of vulnerability in the case-law of the European Court of Human Rights ('ECtHR) and the Inter-American Court of Human Rights ('IACtHR') represents a step towards progress in human rights interpretation (Sijniensky 2013; Peroni and Timmer 2013; Beloff and Clérico 2016). Although this proposition is compelling, I suggest it might be overly optimistic with respect to what human rights courts have been able to accomplish. Secondly, I will explore in more depth how vulnerability is theorised in feminist and critical scholarship. I argue that putting these theories together creates a nuanced theoretical framework to critique the narrow ways in which vulnerability and agency are framed in law and politics, including in the realm of human rights law.

I will then craft an analytical framework which hinges on vulnerability as epistemic trigger. By adopting vulnerability as epistemic trigger, what I suggest is that this concept elicits responsiveness in the form of contestation and disruption of extant frames of knowledge. My analysis is circumscribed within the realm of ethical and legal obligations. As I will discuss in this chapter, the agency/vulnerability binary undergirding liberal law is premised upon an understanding of agency as the ideal legal subjectivity, fostering self-sufficiency and independence as desirable frame of reference. By contrast, 'vulnerability'

often emerges as the conceptual antonym of agency, framed in opposition to the positive archetype and associated with negative notions such as passivity, weakness and helplessness. I will attempt to flesh out a critique which disrupts this binary conceptualisation by moving away from essentialising definitions of human beings as either agentic or vulnerable. To weave an ethical critique of international human rights courts' praxis, I depart from vulnerability as an individual and fixed characteristic to embrace a more nuanced and complex understanding of vulnerability.

To analyse human rights courts' practice, I suggest that we conceptualise vulnerability as a phenomenon that arises within and across embodied subjects through the mobilisation of affect, reason and power. Thus, in my analysis, vulnerability is relational because it arises intersubjectively, as both exposure and response, while reasons and emotions travel across bodies, rather than objectively fixed on one body to be perceived by another. Moreover, I suggest that the rising phenomenon of vulnerability in the language of law and human rights can pave the way for alternative normative frameworks of human rights and State duties. My analytical framework builds on recent theories about vulnerability to craft a multidisciplinary approach, mapping the constructive connections between vulnerability and victimisation through the lens of power and affect. The juridical recognition of vulnerability sheds light on inequalities, social injustices and systematic patterns of human rights violations which disproportionately affect certain groups and populations. In the ambit of human rights courts, this recognition may constitute a mechanism of inclusion of voices that have been marginalised from decision-making instances of power. However, this inclusionary mechanism is mediated by translators, namely legal practitioners, therefore the thesis explores not only juridical processes of recognition within these courts which promote inclusions, but also attempts to investigate the kinds of exclusions that might take place at the same time. In other words, recognising vulnerability can make harms that were hitherto invisible more visible; yet, processes of recognition might not unfold in the same way in relation to all.

Political resistance through the language of human rights has historically emerged from bottom-up movements, from community organising to national movements, from local to global. By contrast, human rights are international institutions that operate through legal expert ruling, that is, top-down decision-making. Yet, human rights courts have the power to authoritatively frame vulnerable groups in juridical language. To problematise these courts' power to frame subjects and groups as vulnerable, the question that I address is the following: how are human rights courts' frames of recognition created, developed, utilised and transformed? Human rights courts might fail to recognise certain kinds of vulnerability, for instance, mis-recognising or partially recognising groups in similar contexts of vulnerability. In the absence of clearly defined standards of the role of vulnerability in human rights interpretation, it falls upon legal practitioners to recognise what is at stake and translate claims of vulnerability into juridical language and practice. Lawyers and judges operate as gatekeepers of legal language, practitioners of legal expertise and enablers of interpretive innovations that reshape rights, duties and legal knowledge. Thus, I suggest that a deeper examination of legal praxis might improve our understanding of human rights courts' practice of how these courts frame vulnerable groups. Moreover, it can open up possibilities for imagining vulnerability's role in reshaping international human rights legal knowledge.

## Vulnerability in the legal reasoning of the ECtHR and the IACtHR

Regarding legal reasoning in the ECtHR, Lourdes Peroni and Alexandra Timmer (2013) posit that vulnerability is used both as a descriptive and prescriptive tool (p. 1059). They argue that the deployment of vulnerability by the ECtHR entails positive changes in the way human rights courts decide cases, identifying three characteristics: first, it is relational, focusing on wider social circumstances; second, it is particular, mindful of how shared group-specific experiences might raise distinct concerns; and, third, it is harm-based, pointing to the harms of misrecognition in cases of discrimination and maldistribution, as well as in situations of material dispossession.

Specifically regarding the ECtHR's adjudicative role, Timmer (2013) argues that the interpretive use of vulnerability represents 'a quiet revolution' because it 'includes more fully and consistently the specific concerns of marginalised people into the legal tests of the ECtHR' (2013, p. 147). In this respect, Timmer explains that the use of vulnerability produces three types of effects on legal reasoning: firstly, prioritising among different applications to determine the order of cases; secondly, prioritising between claims by the State and the applicant to determine how the law should be interpreted and applied; and thirdly, extending rights via the doctrine of positive obligations (2013, pp. 163-167).

With respect to procedural effects, Timmer explains that the court can change its workload prioritisation because of a vulnerability consideration. In this sense, the court prioritises applications made by members of vulnerable groups in relation to other applications, even when this prioritisation entails going against the order of filing. According to Timmer, this is evidenced by the court's 'priority policy' in determining the order of cases that will be examined, in which it has implicitly embedded vulnerability considerations by including 'two groups that are considered especially vulnerable' among the categories to be given precedence, namely children and applicants requesting interim measures (2013, p. 164).

Regarding substantive effects, Timmer also contends that the use of vulnerability can entail a prioritisation between claims when it is raised as an argument with substantive weight to be considered in the proportionality and balancing assessment of the court. In cases involving torture or inhuman and degrading treatment (which do not allow for a proportionality assessment because it involves an absolute and non-derogable right), prioritisation between claims takes place in the analysis of whether or not State action or omission reached the minimum level of severity to be subsumed under Article 3 of the European Convention.

Finally, the adoption of vulnerability reasoning also produces effects on the kinds of State obligations as well as legal remedies envisioned by the court in cases involving applicants considered vulnerable. If a court rules that a human rights violation against a vulnerable victim occurred by virtue of

State omission in providing basic resources and protections, it imposes positive obligations on the State, for example the duty to provide shelter and food to refugees and asylum-seekers. Timmer argues that the court has 'repeatedly extended existing rights on the ground of vulnerability considerations', hence acting as 'an asset-conferring institution' (2013, pp.165-166). As a result, the adoption of vulnerability also produces other substantive effects (changing how the court interprets a case) and remedial implications (amplifying the range of possible reparations by imposing higher standards of State responsiveness and accountability).

With respect to the concrete implications of recognising a vulnerable applicant in the ECtHR, Timmer explains that if the applicant is considered vulnerable, the State is given a narrower margin of appreciation to justify the alleged breach on the applicant's right (Timmer 2013, p. 165). The State's range of valid justifications for interfering with the individual right is reduced; hence, the State is more likely to be found in violation of its human rights duties towards the applicant, who then, through the enactment of the judicial decision, is recognised juridically as a human rights victim. Moreover, when applying the proportionality test, which entails weighing State actions against the applicant's rights, not only does vulnerability tilt the scales towards a favourable decision for presumed victims, increasing their odds of being juridically labelled as victims, but it also extends the scope of victims' rights, for instance, with respect to legal remedies and reparations. Once a human rights victim is recognised, the ECtHR ascribes stronger positive obligations to the State, including in the socioeconomic realm. Human rights interpretation is thereby affected by vulnerability-underpinned arguments in a way that requires additional or enhanced obligations from the State towards a vulnerable individual in a context-sensitive manner. As a result, changes in legislation and policymaking are expected from the State in order to comply with the judicial rationale of the court, potentially having a wider impact in changing structures that sustain vulnerability-aggravating patterns and relationships.

Timmer argues that 'vulnerability reasoning', that is, the ECtHR's use of the concept of vulnerability in its interpretation, has 'improved its legal reasoning' and it is tantamount to a 'quiet revolution' (2013, p. 147). Timmer clarifies that her idea of improvement in legal reasoning consists in a more consistent and thorough inclusion of 'specific concerns of marginalised people into the legal tests used by the ECtHR'[25] (ibid.). Two normative implications ensue regarding States' ethical responsibility towards those juridically labelled as vulnerable. On the one hand, positioning individuals or groups differently within a vulnerability scale entails demanding distinct moral obligations by the State, since extreme forms of (perceived) vulnerability might be deemed a decisive factor for some claims to take precedence and priority over others (Fineman 2013, p. 13). On the other hand, the overall scope of ethical duties by the State to protect human rights is subject to a more complex and context-sensitive analysis that can take into account structural relations of social injustice and inequality. Arguably, identifying patterns of disadvantage and privilege that permeate the workings of law and society leads to enhancing the ways courts frame positive obligations by the State. To illustrate, vulnerability in the ECtHR has advanced the enforcement of socioeconomic rights as inextricably indissoluble from civil and political rights under a substantive egalitarian ethos. Thus, rethinking human rights obligations through the lens of vulnerability seems to lead us to question current standards of justice, reimagining how equality, universality and 'special protection' might be reconciled.

Romina Sijnienski (2013) suggests vulnerability factors mirror anti-discrimination models. Indeed, in human rights courts, similarly and at times overlapping with discrimination claims, vulnerability is mobilised to contest unjust forms of inequality. Sijnienski claims that there are risks in conflating the two

[25] Timmer outlines 'encouraging and constructive' aspects of the court's reasoning that show its 'power and transformative promise' (p. 163), namely: prioritising applications by taking into account vulnerability considerations, for example urgent health issues, or the wellbeing of a child; prioritising between claims in the court's proportionality analysis (which would only apply to derogable, not absolute rights like the prohibition of torture); extending rights to reach socioeconomic rights and set out positive obligations within the framework of State duties.

concepts, and there is a tendency to use them interchangeably. Anti-discrimination clauses normally require that legal claims be grounded on 'suspect' or prohibited categories in law, such as race, sex, language, religion or political affiliation. She concedes that the American Convention on Human Rights ('ACHR') is open-ended in nature, allowing for 'progressive' judicial interpretation outside of the enumerative (and non-exhaustive) list of reified categories that it explicitly sets out. The same applies to the ECtHR[26]. Notwithstanding, Sijnienski argues that equating vulnerability with discrimination can result in narrow or restrictive forms of interpretation which limits the number of subjects who are entitled to be treated as vulnerable to only those who are systematically and historically excluded and marginalised. Sijnienski suggests that the use of vulnerability in human rights courts enables a more comprehensive approach than anti-discrimination models for determining the need for special protection of certain groups.

The ECtHR has enhanced its nondiscrimination standards through the conceptual evolution of equality from formal to substantive equality, asserting that neutral-based rules might have a 'disproportionately burdening effect on vulnerable social groups' (Timmer 2011). O'Connell argues that the ECtHR has been responsive to the issue of indirect discrimination by setting forth a notion of 'substantive equality' and advancing the justiciability of socioeconomic rights (2009). Peroni and Timmer (2013) also argue that the adoption of group vulnerability is a welcome step towards 'substantive equality', in opposition to the formal equality implied by traditional liberal legal frameworks. As a requirement for fairness, 'formal equality' entails sameness of treatment by law (Lacey 2004a). However, in contexts where there are differently situated individuals with respect to social privilege and disadvantage, formal equality may result in disregard for structural patterns of discrimination, oppression and marginalisation as well as of mechanisms that perpetuate material inequality (Fredman 2011). Fredman further asserts that formal equality may aggravate the disadvantaged position of some while contributing to sustaining the pre-existing

[26] Article 14, ECHR, Article 2, Protocol 1 (conferir) ECHR

privilege of others. In light of the unequal distribution of disadvantage and privilege, which is perpetuated by structures such as the neoliberal political economy, formal equality may hence be an ill-fitting model when it exacerbates *de facto* inequalities in society. The application of formal equality may thus render courts complicit in the furtherance of exclusionary social and institutional mechanisms which sustain misrecognition and maldistribution, going against a social justice framework (Fraser 2005).

Fredman (2016) proposes a four-tiered framework of 'substantive equality', which is targeted at: redressing disadvantage; addressing stigma, stereotypes, prejudice and violence; enhancing participation; and, finally, accommodating difference and achieving structural change. Despite being a progressive step in relation to formal equality, that is, treating everyone the same regardless of inequalities, Fredman's framework is aspirational, rather than a practice-oriented tool to guide the interpretive activity of courts. Even references to difference and disadvantage are conveyed in neutral language, providing little guidance on how to operationalize these goals. Furthermore, it does not allow for a nuanced assessment of current practices in law and politics. Thus, the substantive equality framework, while helpful, neither suffices to guide human rights courts' practice of 'vulnerability reasoning' to advance its proposed aims, nor does it clarify how their engagement with the concept of 'vulnerability' operates.

While I do not contest the importance of the four dimensions of 'substantive equality' as a general theoretical framework, a question that might be raised is the extent to which human rights courts are actually capable of recognising all forms of societal disadvantages, prejudices and differences. Moreover, how far do their institutional role require and allow them to tackle inequality and social injustice? Human rights courts take it upon themselves to formulate regional (and international) standards of what is ethically right and wrong, under universalising aspirations of applicability. When human rights courts issue judgments, their assumptions, findings and reasoning authoritatively inform ways of framing juridical and sociocultural understandings of what, when and how the meanings of 'human' and the 'inhuman' may be framed. I suggest that we should hold international human rights courts to the highest possible ethical standards with

respect to resisting inequalities and injustices. Even if their decision-making occurs on a case-by-case basis, these courts fulfill a fundamental role in international human rights law by holding States to account regarding their human rights obligations, being uniquely positioned to uncover and tackle systematic patterns of victimisation that are inflicted upon vulnerable populations.

In a legal analysis of the case-law of the ECtHR and the IACtHR, Sijniensky (2013) asserts that the idea of vulnerability has been most commonly evoked through the notion of 'vulnerable groups', a 'wavering and flexible category of vulnerable groups entitled to special protection by the State' (ibid). Similarly, Ippolito and Sanchez note that the ECtHR moved away from identifying 'particular circumstances of vulnerability affecting specific individuals' to the recognition of 'particularly vulnerable groups', with corresponding legal obligations towards these groups (2015, p. 3). Sijnienski argues that despite the fact that there is no accepted definition of 'vulnerability' or 'vulnerable person', 'vulnerability has become 'the focus of international standard-setting through human rights treaties dealing with the right of particular groups …' (2013, p. 260). In light of these facts, legal scholarship has attempted to sketch descriptive typologies of 'vulnerable groups' within international human rights law.

According to Sjinensky, 'vulnerable groups' do not consist in a standardised list, varying according to the human right at stake; moreover, 'vulnerability' can be categorised in a threefold manner. First, 'situation-related vulnerability' refers to a position, situation or circumstances that affect a particular group or individual, associated with situational risk, such as migrants or detainees. Secondly, 'inequality-related vulnerability' relates to a group identity and the particular situation of such group in the context of a State, which she associates with structural discrimination, citing as examples violence against women in Ciudad

Juarez, Mexico[27], and structural violence against persons of Haitian descent in the Dominican Republic[28]. The third category is 'intrinsically vulnerable groups', referring to what is allegedly an 'inherent' condition of a group (Sijniensky 2013, pp. 264-265). Similarly, Ippolito and Sánchez (2015) divide 'vulnerable groups' into three 'vulnerable' categories: individuals who are exposed to potential harms (which could be accidental or intentional); persons 'at risk' due to changing contexts (whether in structural or individual situations); or those who face dependency due to disease or disability.

Categories of vulnerable groups which rest on the idea that vulnerability is intrinsic, inherent or dependency-based risk essentialising particular groups as 'vulnerable,' as the next section will further elaborate. Understanding 'vulnerability' as a fixed individual characteristic arguably narrows down the range of ways to address issues of disadvantage, harm or risk. Essentialism hinders transformative or emancipatory avenues to be imagined in law and politics. Increased dependence on State and institutions due to disease or disability, for example, might be seen not as inherent disadvantage, but as a society which has created labels, infrastructure and institutions to cater for the needs of the able-bodied healthy subject. As I will elaborate in the following section, categorising groups as vulnerable is not as illuminating for my examination of vulnerability's potential in rearranging and redistributing ethical obligations in human rights law, though they are an important indication that my undertaking entails challenging wider premises and assumptions embedded in the liberal legal framework.

[27] *González et al. (Cotton Field) v. Mexico*, Judgment on Preliminary Objections, Merits, Reparations, and Costs. (IACtHR), 16 Nov 2009.

[28] *Nadege Dorzema et al. v. Dominican Republic*, Judgment on Preliminary Objections, Merits, Reparations, and Costs (IACtHR), 24 October 2012; and *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment on Preliminary Objections, Merits, Reparations, and Costs (IACtHR), 28 Aug 2014.

**Feminist and Other Critical Theories on Vulnerability**

Legal scholars (Timmer and Peroni 2013, Sijnienski 2015, Ippolito and Sanchez 2015, Clerico and Beloff 2016) rely on feminist legal theorist Martha Fineman's 'vulnerability thesis' (2008) as theoretical foundation to expand on how vulnerability enables reinterpreting duties and rights, as prescribed by law, under a new ethical light. Fineman suggests that her 'vulnerability analysis' can define 'what constitutes ethical legislative behavior' and achieve an egalitarian political culture of 'substantive equality' against which state responses to the system of entrenched privileges and disadvantages can be measured (Fineman 2013, p. 27).

Fineman (2013) conceptualises vulnerability as a universally shared and constant characteristic deriving from human embodiment. Despite its universality and endurance, Fineman claims that vulnerability can be 'lessened' by acquiring means to become resilient over time. This would depend on asset-conferring institutions, such as State institutions. State responsiveness to vulnerability is an important aspect of Fineman's and Butler's theories. However, although her early writings seem to be compatible with an understanding of vulnerability as ontological and universal (Butler, 2004), Butler further develops her stance on vulnerability as performative and relational in more recent work (2016). This is an important shift - if not a clarification – which greatly expands the range of theoretical possibilities one can imagine by focusing on interdependence as starting point for ethical reflection. Feminist and other critical theories suggest that vulnerability is a transversal concept that provides a starting point to enhance our understanding of foundational principles in ethics, philosophy, law and politics, such as freedom and autonomy (Mackenzie, Rogers and Dodds 2013).

To Fineman, the concept of vulnerability 'has significant strength as an individual universal approach to justice' (2013, p. 13). Her vulnerability thesis is a critical response to the myth of the invulnerable, disembodied and de-contextualised subject of classical liberal law. An important concept for liberal law is autonomy. Autonomy is often conceived as an *erga omnes* freedom, a liberty of independently

choosing, free from constraints deriving from intervention by others or the State (Mill 1871). The liberal model paves the way for ascription of personal responsibility to individuals for their free choices under State-ensured realms of meritocratic achievement and failure. Moreover, the liberal model encircles the minimal sphere of acceptable State intervention by drawing the private/public divide (Mill 1971). While the public sphere was conceived to be the realm of free and independent men, dependency is often associated with a devalued notion of caretaking (the domestic realm of women) and stigmatised as pertinent solely to the private sphere of the family and domesticity, out of bounds of the acceptability threshold for State interference.

The liberal archetype of legal subjectivity is a rational, free-choosing, autonomous and able-bodied adult person who supposedly has equal standing in society in relation to others (Douzinas 2012; Fineman and Grear 2013). Many feminist and other critical legal scholars have criticised liberal law for failing to duly account for both vulnerability and its normative implications due to the problematic conceptualisation of the legal subject as essentially invulnerable (Douzinas and Gearty 2014; Fineman and Grear 2013; Lacey 2004a; Nedelsky 2011). Fineman contends that liberal theory neglects to endow socio-material needs with due normative relevance by privatising relationships of care and ascribing them the status of secondary importance (Fineman and Grear 2013, pp. 16-19). As a result, embracing these oppositional notions equates, in principle, refuting just entitlements to socioeconomic provisions by the State (p. 17).

Fineman (2008) argues that overemphasis on individual autonomy elides the fact that free and autonomous individuals necessarily need access to social, institutional and legal means to exercise their freedom. Moreover, she emphasises that autonomy is not given; it rather depends on an aggregate of resources to be internalised, developed and accumulated by individuals over time, building the necessary resilience to face adversities (Fineman 2008, p. 113). For example, a lack of material resources to survive might ensue in times of financial or environmental crisis or exploitative situations of abuse and violence. The accumulation of resources and access to a dependable network of social relationships and institutions

should not be regarded as given for all, as individuals have distinct experiences and therefore, different degrees of accumulated resilience (Fineman 2013). The political discourse surrounding the concept of resilience nonetheless raises issues concerning its critical utility, given its cooption by neoliberal discourse.

Regarding resilience, Walklate (2011) critiques the 'resilience creep', in reference to the rising popularity of the term 'resilience' in political discourse, a process which is connected to policy responses based on a discourse of risk and security and a 'heightened sense of structural fragility and perception of the everyday being hazardous (p. 409).' Within politically polarised narratives about risk and fear-mongering, Evans and Reid (2013) offer a compelling critique of the liberal co-option of the notion of resilience, arguing that contemporary neoliberal societies often ascribe an unfair burden of responsibility to individuals for their own vulnerability, such as calling for individuals to live in gated communities and hire private security, and by the same token, blaming those who do not follow these security measures – because they cannot afford to do so - when they are victims of crime or violence. In the same vein, we must also be wary of other problematic uses of vulnerability under ahistorical and acritical frameworks, which disregard the force field of power relations in which communities are embedded. In this context, Butler warns about a 'discourse of "vulnerability" pushed forward by 'dominant' groups' in order to shore up their own privilege, citing as examples white people in California claiming that the increase of non-white groups in the region was allegedly turning them into a '"vulnerable" population' (Butler 2016, p. 23).

Grear argues that liberalism overvalues the rational free-choosing mind while neglecting to acknowledge how humans are dependent on emotions, affective relations and embodied needs (2013, p. 47). She further contends that the liberal canon fails to consider how subjects are unequally positioned in the intricate social fabric of power imbalance and unequal distribution of privilege and disadvantage. Drawing on Fineman's 'vulnerability thesis', Grear (2013, p. 59) contends that the reality of human embodiment, which entails perpetual dependence on the surrounding socio-material environment, should be brought to the fore (Grear, pp. 49-50). On a similar note, Nedelsky (2011) proposes that autonomy

should be reconceptualised as relational. A relational approach to autonomy, she suggests, would involve positing relationships, private and social relations as well as those with our surroundings, institutions, and other structures, as the central feature of our capacity to exercise autonomy, which she refers to as 'relational autonomy'. Although Nedelsky does not use vulnerability as a core concept of her theory, her relational approach is in consonance with the proposition of focusing on relationships and critiquing the paradigm of self-sufficiency and independence embedded in liberal law. Through these relational approaches, Grear and Nedelsky propose that we imagine alternative legal frameworks to the traditional liberal canon.

From a sociological perspective, Bryan Turner (2006) invokes vulnerability both as a reminder of our common susceptibility to suffering (or being affected by others in negative and destructive ways), and as a compelling reason to create a social and institutional apparatus to reduce actual and imminent harms. Turner argues that the essential moral core of the human rights discourse lies in the need to recognise other human beings as equally worthy and deserving of care (2006, p. 41). Turner asserts that, albeit often being the primary source of systematic human rights abuses, States are also paradigmatic duty-holders with the obligation to respect and protect human rights (p. 33). Vulnerability may be more salient in particular contexts than others, as global resources, infrastructure and wealth are unevenly distributed, creating disadvantages and privileges with respect to access to opportunities and security, rendering some bodies disproportionately susceptible to harm, violence and exploitation. If regional systems of human rights protection seek to increase collective human security, when States devise policies and laws to minimize risks, whose security is being prioritised, or whose 'vulnerability' is being claimed as relevant? Recognising the importance of an ethics of vulnerability makes it desirable to enhance State responsiveness to human vulnerability. This may occur by incrementing a State's duties and enlarging the scope of its human rights obligations, especially (though not solely) with respect to socioeconomic rights (Turner 2006, p. 36-37).

Ethical implications arising from vulnerability can be better perceived by acknowledging that vulnerable subjects are essentially precarious lives. According to Judith Butler, 'precariousness' is the

specific vulnerability relating to the frailty of life in light of its inescapable ultimate destruction (Butler 2009, p. 13). Butler posits that vulnerable subjects ought to be regarded as precarious lives (pp. 22-23), insofar as life is imbued with fragility and destined to ultimately face death. Death happens either due to willful action or fortuitous cause (Gilson 2013, p. 3). According to Butler, precariousness may be minimised or maximised according to normative and institutional settings in which embodied existence unravels (2009, p. 23). In this sense, Butler's point is that individuals experience different degrees of precariousness by virtue of discrepant levels of societal recognition and infrastructural distribution, constituting what she coins as 'precarity', that is, the politically induced differential allocation of vulnerability. If precariousness is differently perceived and valued in different subjects, this means that the State does not demonstrate equal respect and concern for equally precarious lives.

Recognising lives as equally precarious implies acknowledging their loss as equally grievable, and by the same token, their sustaining as equally worthwhile. Linking an ethics of vulnerability to a framework of precarity brings forth the normative obligation of States to guarantee, at the very least, human security, that is, the conditions for life to be protected from destruction, for all persons under their jurisdiction. This is deeply conditioned by availability of social and material resources and thus harmed by their unequal distribution, which brings forth the need to acknowledge the state obligation to minimize precariousness under an egalitarian ethos, that is, the duty to minimize its differential allocation (Gilson 2014, p. 42-50). Premised upon human interdependence, reducing precariousness and rectifying its unequal distribution among embodied beings become normative obligations to expand the scope of State duties in relation to those who are struggling to have their human rights fulfilled due to socio-material inequalities. In other words, a normative framework arises whereby societal responsiveness to vulnerability is incremented. According to Butler, this entails reshaping and broadening the scope of moral duties by the State, particularly with regard to 'positive social obligations of food, shelter, medical care, education, mobility, expression education, shelter, food and medical care' (Butler 2009, pp. 21-24). This framework supports

arguments in favour of justiciable socioeconomic rights. Taking socioeconomic rights seriously involves strengthening human rights adjudication to take them into account.

Mackenzie (Mackenzie 2013) also suggests that enhancing socioeconomic rights and corresponding State duties as well as positive obligations by the State necessarily involves ensuring that social conditions and resources allow for substantive equality with respect to access and opportunities, utterly rejecting the libertarian notion of the ideal State as 'noninterventionist, antiregulatory and minimal' (p. 37). According to Mackenzie (2013), because we are vulnerable to others, two ethical obligations ensue in society: on the one hand, the obligation not to commit abuse or exploitation by taking advantage of one's vulnerability; on the other hand, the duty to cater for the needs of others, especially those in situations of severe vulnerability who are either suffering unjustifiably grave harms or in the imminence of facing tough predicaments deriving from deprivation of resources and care (p. 41).

Although an ethical framework of care, needs and precarity is compelling in justifying an ethics of vulnerability in the interpretation of human rights courts, there are missing links between theory and human rights courts' praxis which I explore in the thesis. Timmer (2013) posits that '"vulnerable" is an epithet that the Court attaches to some groups of applicants, but not others' (p. 152). Indeed, in cases where the issue of vulnerability is raised, there does not appear to be a consensus within human rights courts with respect to the relevance, degree or even the very existence of vulnerability in different situations. It is unclear how decision-making processes within these courts operate regarding the recognition of some groups as vulnerable and not others. Furthermore, it remains unclear which standards are used when ascertaining first, which needs should be fulfilled and secondly, to what extent and who should bear the obligation to fulfill them as a matter of ethical and legal responsibility in human rights law. This translates into uncertainty as to the types of vulnerability that human rights courts might recognise and frame as juridically relevant. The ECtHR has recognised vulnerable groups who 'are examples of marginalised and stigmatised subjects', as well as 'examples of liberalism's "Others"', such as prisoners, persons with mental disabilities and refugees

(Timmer, 2013, p. 162). Without disrupting the 'vulnerable/invulnerable' binary, or the 'autonomous dependent', Timmer asserts that the ECtHR reinforces 'the stigmatisation of the very people it seeks to protect' (idem). This is what I will discuss in more detail the following section.

**Conceptualising Vulnerability as the Opposite of Agency: On Essentialising 'Vulnerable Groups'**

By conceptualising the legal subject in liberal frameworks, that is, as self-sufficient, 'unencumbered' and independent (Douzinas 2007), we lose sight of the ways in which real-life persons are interdependent on others and the surrounding socio-cultural and institutional environment. Presupposing autonomous subjects as the desirable norm implies framing vulnerability as the determining feature of exceptional subjects, or 'others'. Hence, even when 'vulnerable groups' are included as rights-holders within legal frameworks, their subjectivity is shaped in opposition to the liberal archetype. In other words, liberal law is premised upon the vulnerability/agency dichotomy, or in other words, vulnerability is conceptualised in opposition to agency. The vulnerable subject claims her vulnerability by contrasting her experience to the archetypical able-bodied, male, property-owning, autonomous liberal legal subject. In international human rights law, group-specific demands from 'minorities' have relied on a similar logic of asserting group identity in opposition to the liberal legal subject, culminating in myriad international instruments catering for the 'special protection' needs of specific groups, such as women, people of color, children, persons with disability[29]. The rationale behind the rise of these conventions is similar to the rise of vulnerable groups at the ECtHR and the IACtHR: the recognition that certain groups arguably should be treated differently than the treatment dispensed to those who conform to the liberal legal subject archetype. But as Sijniensky

[29] Examples are: the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) of 18 December 1979, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 21 December 1965, the Convention on the Rights of the Child (CRC) of 20 November 1989 and the Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006.

(2013) explains, the case-law of the courts goes beyond minorities and categories reified in anti-discrimination laws and policies.

As Timmer (2013) warns, reducing 'vulnerability' to intrinsic disadvantage or inferiority can lead to marginalisation and stigmatisation. If juridical framings essentialise some groups by defining them as vulnerable relatively to others, this reinforces the idea that vulnerability is an exceptional and fixed characteristic of only some groups, in opposition to the norm of 'invulnerability'. Circumscribing vulnerable groups into a category of incompetence or deviance might contribute to stigmatising them as perennially disadvantaged. By essentialising groups, some members of society are framed as particularly disadvantaged and with high risk of suffering harm and little capacity to protect their own interests, whereas the rest of the population is portrayed as virtually invulnerable (Mackenzie, 2014). As a result of categorising individuals as either vulnerable or invulnerable, State responsiveness may unfold in dangerously coercive ways (Mackenzie 2014, p. 47-49). States might use this to justify paternalistic interventions through laws and policy-making, which might relegate members of groups who are perceived as vulnerable to a position of perpetual disadvantage or inferiority, naturalising their unequal status in relation to dominant groups within society. Furthermore, this type of essentialism prevents States and courts from digging deeper into the root causes of social, political and legal mechanisms of exclusion.

Butler (2016) also warns about the risk of using vulnerability to enhance paternalistic power, as '[o]nce groups are marked as 'vulnerable' within human rights discourse or legal regimes, those groups become reified as definitionally 'vulnerable' fixed in a political position of powerlessness and lack of agency' (2016, pp. 25-26). Butler argues that, consequently, all the power is maintained by States and international institutions who are entrusted to protect and advocate for the rights of populations labelled as vulnerable. Consequently, international human rights movements can act in ways that 'underestimate, or actively efface, modes of political agency and resistance that emerge within so-called "vulnerable populations"' (idem). In the context of human rights courts, essentialism presupposes that vulnerability is negative and linked to helplessness, victimhood and passivity, conceived as the opposite of autonomy (Timmer 2013, p.149). To illustrate, in the ECtHR judgment of *B.S. v. Spain*, concerning a victim of police

violence, the Court recognised 'the applicant's particular vulnerability 'inherent in her position as an African woman working as a prostitute'[30].

Arguably, the ECtHR's legal reasoning in the case was enhanced when the victim's position of vulnerability was taken into account. Vulnerability was recognised in this concrete case by evidence of repeated episodes of physical and verbal abuse by State officials motivated by intersectional sources of discrimination on the basis of race, national background and occupation. However, my point here is that the discursive framing of the victim's vulnerability as inherent might risk essentialising women into reductive categories such as 'African women' and 'prostitutes'. This implies an oversimplified narrative of individual vulnerability that reinforces gender and cultural essentialism. Chandra Mohanty problematises colonial continuities in the modes of 'appropriation and codification' of 'scholarship' and 'knowledge', particularly the discursive production of the 'Third World Woman', which is shaped by what she calls 'ethnocentric universality' (Mohanty 1984, pp. 333-335). In the same vein, Ratna Kapur argues that the Third World victim subject has come to represent the 'more victimised', or in other words, 'the real or authentic victim subject… reinforcing gender and cultural essentialism' (Kapur 2002, p. 2). This sort of essentialism can relegate marginalised subjects into a position of perennial subordination, inferiority and disadvantage, as they are seen as vulnerable by virtue of being, not due to power asymmetries and unequal allocation of vulnerability and precariousness.

Drawing on the work of postcolonial feminists, Pedwell (2010) suggests that certain categories, such as 'Third World women' (and , implicitly 'First World women') 'are (re)produced relationally through transnational circuits of power', situating 'racialised and gendered hierarchies within the context of global power relations' and highlighting the importance of these categories 'in both reifying and resisting

30 *B.S. v. Spain*, appl. 47159/08, Section III Judgment (ECtHR), 24 Jul 2012, Paragraph 62.

dominant hierarchies' (p. 44). Supranational human rights courts participate in transnational circuits of power insofar as they are entrusted with the competence to authoritatively define the boundaries of State power within the human rights framework (provided that the State in question has accepted the corresponding court's jurisdiction). In light of the growing case law of the ECtHR and the IACtHR regarding migrants, it is vital to integrate postcolonial concerns into an analysis of how migrant applicants are framed as vulnerable or as victims.

We should think more carefully about the power dynamics underlying relationships between legal experts and those who are affected by the discursive framings of legal expertise, and I am particularly interested in the power to frame migrants, given that historically they instantiate the 'Other'. To address these concerns, Pedwell proposes a relational framework of analysis which weaves together social connections among embodied practices, contesting rhetorical strategies which rely on cross-cultural decontextualised similarities between Western and non-Western practices[31]. Pedwell's web approach critiques the essentialisation of bodies and the 'flattening [of] significant historical and social particularities', suggesting that recognising our discursive and social interdependence can help us develop 'empathetic social connections across cultural and geopolitical contexts.' (2010, p. 107). She posits that 'a different kind of empathy might be engendered through recognising and mapping some of the specific ways in which we continuously affect one another and shape one another's conditions and experiences, if unequally and often violently' (p. 123).

But how do we map the ways in which vulnerability is mobilised by lawyers and judges in supranational human rights courts and imprinted in their juridical narratives? Also, what kinds of affective connections – broadly speaking, emotional responses that are felt within and through bodies, rather than

[31] Particularly, Pedwell contests comparisons between Western practices of cosmetic surgery and eating disorders to non-Western practices such as African female genital cutting and Muslim veiling.

simply objective and rational forms of cognition – are triggered by these narratives of vulnerability? Legal practitioners are still trained to privilege reason over emotions, even though feminist legal critics have consistently criticised the reason/emotion binary in law and politics over the past decades (Young 1986; Lacey 2004b; Nedelsky 2011). Jeanne Gaaker, drawing on her experience as a judge, asserts that in her occupation 'impartial sang-froid is the emotional labour that is expected under all circumstances in and outside the courtroom', masking private feelings about the case and in general (2019, p. 227). Over-reliance on reason to the detriment of emotions is a product of yet another entrenched binary (reason/emotion) in law and politics, shored up by the premises of rationality as a universal, constant and shared human trait, and feelings as private biases and subjective particularities (Lacey 2004b). However, in cases involving vulnerable subjects, which often emerge as exceptions to the norm (namely, the agentic subject of liberal law), another exception seems to be made to objective and strictly rational standards of reasoning, when victims' feelings are factored as relevant elements into legal interpretation and decision-making.

Once the alleged victim's feelings are made relevant in human rights courts' judgments, negating the role of emotions and their persuasive power can be a dangerous form of willful ignorance (Gilson 2011). However, if the relevance of emotions or feelings is conditioned upon the recognition of a vulnerable subject or group, the reproduction of binary thinking (reason/emotion and vulnerability/agency) continues. Firstly, the vulnerable subject is shaped as the exception to the norm (the 'Other', the disadvantaged, 'less than human'), in opposition to the liberal autonomous subject (the 'fully-fledged human'). Secondly, if emotions and feelings are made relevant in legal reasoning only in cases involving vulnerable subjects, this reinforces the exceptional character of vulnerability in legal reasoning, opposing vulnerable to agentic subjects. To clarify, my focus is not so much the victim's feelings as the discursive imprinting of these feelings in juridical narratives, such as legal briefs and judgments. Therefore, legal practitioners' ability to translate these feelings into legal language is a key factor in this analysis.

I am particularly interested in how empathy figures as an important concept with which to understand how affective responses – feeling empathy for the 'other' - are operationalised in legal discourse. It then falls upon lawyers and judges to exercise legal reasoning through 'top-down' empathy of sorts towards those who are vulnerable, hence deserving of compassion. I characterize empathy as 'top-down' to refer to the pyramidal judicial structure of decision-making, in which legal practitioners are gatekeepers and judges figure at the top of the hierarchy, forming an asymmetric power relationship with alleged victims. Going beyond judgments, a deeper incursion into the processes, relations and justifications of legal practitioners in utilising vulnerability in legal reasoning is warranted. As I will examine in more detail in subsequent chapters, the 'Third World woman', refugees and migrant children seem to embody 'Others' which fit the 'ideal victim' mold: helpless and non-threatening, they are seen as more deserving of empathy than adult male economic migrants[32], who are conceptualised as agentic, threatening and 'invulnerable', thus undeserving of the same level of empathy because they fit the 'dangerous Other' mould.

To critically analyse our practices of openness to being affected and the product of relational exchanges, Pedwell (2016) coins the useful concept of 'affective translation', which refers to how empathy travels across borders, producing and reproducing affect by being mobilised in and across bodies. Pedwell proposes an exploration of the possibilities of 'empathy' which is not concerned with attempts at 'emotional equivalence' or accuracy. Rather, she argues that empathy can refer to 'complex and ongoing set of translational processes involving conflict, negotiation and attunement'. Pedwell explains that 'empathetic attunement' can be fostered through 'mutual vulnerability', whereby openness exists both to affecting as well as to being affected, allowing for 'affective solidarity' to emerge. With respect to speaking for others and, more importantly, deciding when to hear an alleged victim who claims to be vulnerable, the occupational territory of lawyers and judges, I contend that the 'affective translation' framework may help

[32] *Khlaifia v Italy*, appl. 16483/12, GC Judgment (ECtHR), 15 Dec 2016.

us better understand and critically examine how legal practitioners might relationally engage with applicants and victims.

Judith Butler (2016) is sceptical of 'a move toward "authenticity"' which relies on vulnerability to inaugurate 'a new order of moral values or a sudden and widespread outbreak of 'care', based on a feelings-reliant politics', for this move would still locate vulnerability in opposition to agency (p. 26). Sharing a similar concern, Pedwell (2016) forewarns to the dangers of the use of 'empathy' as an 'affective technique' which promises 'to predict and explain' the feelings or actions or 'cultural "other[s]"', as it might reinforce dominance and subjugation. Pedwell argues that dominant imaginaries can perform strategic erasures of foreignness ('domestication') to appeal to a sense of familiarity, which at the same time can be seen as a form of discursive violence. To Gayatri Spivak (1988), 'epistemic violence' can indicate complicity in the continuities of imperialistic projects. I suggest that an example of neocolonial continuity is the unequal geopolitical distribution of resources and opportunities across the North-South divide, in tandem with the dynamic pace of neoliberal political economy. Spivak posits that '[t]he clearest available example of such epistemic violence is the remotely orchestrated, far-flung and heterogenous project to constitute the colonial subject as Other' (1988, p. 24-25). In the universalising language of human rights courts, conceptualising vulnerability as inherent feature of specific groups of Global South migrants might perpetuate colonial legacies of privileges and disadvantages and imply a form of epistemic violence. Insofar as inequalities are discursively and juridically reproduced as natural, we narrow down the scope of possibilities for reimagining relations between Global North States and Global South subjects towards emancipatory avenues of transnational social justice.

On the epistemic baggage that we carry when we endeavor in the task of recognising another subject or group, Sarah Ahmed helpfully explains that [t]to explore how bodies are perceived as dangerous in advance of their arrival requires not beginning with an encounter (a body affected by another body) but asking how encounters come to happen in this way or that . Similar to essentialising a body as dangerous,

another body can be essentialised as vulnerable. This essentialism encapsulates subjects and groups within this category and perpetuates disadvantages as if immutable or fixed, leaving little margin to re-imagine possibilities for transformation. Indeed, when we conceptualise 'vulnerability' as inherent or structural and conflate those dimensions, we risk essentialising people by relying on objective categories which divide subjects into 'vulnerable' and implicitly, 'invulnerable', as well as creating hierarchies of vulnerability.

The symbolic power of the 'ideal victim' (Christie 2018) in societal imaginaries implies a hierarchy of victimisation (Carrabine et al. 2014) which places certain individuals and populations as 'deserving' of the victim label, for example, elderly middle-class women, and others as 'unworthy' of being categorised as victims due to their high-risk lifestyle, such as sex workers or homeless people. Assigning the vulnerable label only to those who fit stereotypical features, such as helplessness and physical frailty, in other words, those who fit the mold of 'ideal victim' in the social imaginary, might create blind spots in the courts' frames of recognition. If human rights courts' power to frame abides by a narrow understanding of vulnerability as the opposite of agency, in consonance with the liberal legal framework, then some members of marginalised populations are included while others are excluded from juridical recognition.

Instead of crystallising vulnerability as inherent feature of certain groups, I propose we turn our attention to changeable legal and political arrangements which contribute to situations where individuals are rendered vulnerable and victimised. Through an ethics of vulnerability based on care, needs and the unequal allocation of precarity (Butler 2006), we can analyse deeper relational layers, such as structures which enable systematic patterns of human rights violations which disproportionately render migrants more vulnerable. Rather than thinking of the vulnerability of migrants as group-based disadvantage and leaving inequalities and social injustices uncontested, understanding vulnerability not as intrinsic and immutable can help us rethink institutional and State responses to vulnerability. Challenging implied assumptions of inherent inferiority, we can start tackling deep-rooted inequalities, their sources and mechanisms of perpetuation. In the case of refugees and asylum-seekers, for example, naturalising their vulnerability as an

inevitable harm makes us lose sight of the ways immigration laws and policies of receiving States are applied can render them more vulnerable. Thinking about Global South women, Kapur proposes identifying the 'peripheral subject' and her places of resistance in search of political and emancipatory ways of thinking about human rights (Kapur 2002, p.3).

## Reconciling Vulnerability and Agency: on Affecting and Being Affected

Feminist and other critical theories challenge the liberal legal framework for its over-reliance upon dichotomous categories *e.g.*, autonomy/dependency, reason/emotion, mind/body (Lacey 2004, p. 23-24). Lacey explains that binary constructions are not *per se* pernicious to legal analysis; in fact, the problem lies on how theorists engage with these categories, overvaluing one pole of the continuum to the detriment of the other, reflecting and corroborating the uneven assignment of privileges and disadvantages in society. Costas Douzinas affirms that liberal jurisprudence on human rights reveals more about ideologies and epistemologies than the actual content of rights, the scope of which pales in comparison to their moral and political powerfulness, as illustrated by their ubiquitous presence in international conventions, courts and institutions (Douzinas 2012, p. 58). Critical legal thinking aims to highlight and dismantle the power asymmetries which moral philosophies tend to hide (Douzinas 2012, p. 60). The hardship endured by legal theorists in their attempts to build coherent moral philosophies of human rights through rational justifications is refuted by critical scholars such as Richard Rorty (1993), who brings to the fore the under-theorised role of sentimentality in human rights philosophy. Owing to overreliance on rationality as moral justification, welfare is only translated into rights inasmuch as the rational individual egotistically reaches the conclusion that this translation is necessary. This reasoning relies on ascribing positive values to rationality to the detriment of emotions, feelings or 'sentimentality'.

According to Douzinas, rational egotism implies that the subject of law is too egotistic to care about redistribution or too rational to counter-intuitively put others' interests as priority, ahead of one's self. Loving and caring relationships are replaced by rights talk, with the aid of criminal law, police and

surveillance. The fostered notion of the good is conflated with the property-owning logic of goods, in a neoliberal society that encourages the proliferation of individual rights. Within this logic, political communities whose premise is citizenship perpetuates exclusions through ethnic, political and legal foreclosures. Oppressed and dominated individuals may assert and fight for rights; however, they stand little chance of having their rights recognised, being dismissed by the rich and powerful elites, as the rationality of liberal reasoning abides by a historically complacent and politically naïve logic (2012, p. 64).

Indeed, liberal law can end up perpetuating social inequalities by emphasising certain values whilst ignoring or devaluating others. The vulnerable, embodied, weak, whose feelings of anxiety and inferiority count in legal reasoning is constructed against the invulnerable, disembodied and rational legal subject (Fineman and Grear 2013). It is vital to understand how vulnerability can be reconciled with, rather than conceptualised in opposition to agency. Butler (2016) disrupts the agency/vulnerability binary by postulating that there is vulnerability which emerges within resistance, for example, in the political realm.[33] Butler conceptualises political resistance, such as public assembly and other forms of collective display, as the mobilisation of vulnerability involving deliberately 'being exposed and agentic at the same time' (p. 24). As public demonstrations against failing infrastructure and precariousness in refugee camps illustrate, Butler suggests that '[v]ulnerability can emerge within resistance… precisely as a deliberate mobilisation of bodily exposure' (p. 26).

Conceptualising vulnerability and agency as mutually exclusive fails to capture how vulnerability not only emerges within agency but can also be 'an incipient and enduring moment of resistance' (Butler 2016, p. 26). I suggest that Butler's theorisation of vulnerability within the political realm can to a great extent help us understand the role of vulnerability within the legal language of human rights courts insofar as the political and the juridical are intrinsically connected in international human rights law. In the case of

*Velez Loor v Panama*[34], for example, which was brought before the IACtHR, an Ecuadorian citizen was arrested for entering the country illegally and placed in a prison with criminally convicted detainees[35]. Following an individual food strike by Vélez Loor in which he stitched his mouth shut in protest against the overcrowded prison facilities, overflowing sewage and other inhuman living conditions at the prison where he was detained, he suffered retaliation from detention officers through physical and sexual violence, torture and humiliation.

Vélez Loor resisted his ordeal and described in detail what happened in the petition he filed with his representatives; he also narrated these facts in the public hearing concerning his case during court proceedings. He resisted while in prison and later on, continued fighting against the injustice he suffered by filing an application before the Inter-American Commission. The IACtHR found a violation of the alleged victim's right not to be tortured and argued that his vulnerability as an irregular migrant was compounded by his vulnerability as a detainee. It is interesting to note how the contextualisation of the victim's experience of vulnerability while resisting his predicament is imprinted in juridical narratives and court proceedings and foregrounds his claims of victimisation. Despite being away from the eyes of public scrutiny, his act of vulnerability in resistance clearly had political contours, and it gained juridical meaning once his case was brought to the Inter-American system of human rights protection. Vélez Loor's account to the IACtHR reveals how structures of vulnerability can operate within legal and political arrangements by sharing his individual experience. Insofar as the relationship between State officials and migrants is concerned, the case of *Vélez Loor v. Panama* made forms of structural violence within immigration laws

[34] *Vélez Loor v. Panama*, Judgment on Preliminary Objections, Merits, Reparations, and Costs. (IACtHR), 23 Nov 2010.

[35] This prison, La Joyita, notoriously presented bad living conditions, as confirmed by a report issued by the Inter-American Commission on Human Rights upon visiting the facilities.

and detention policies more recognisable, relevant or persuasive, tipping the scales of human rights courts' decisions towards more protective standards.

Butler suggests that vulnerability and resistance are interpenetrating concepts, positing two ideas of resistance. The first idea is resistance through vulnerability, whereby vulnerability is mobilised strategically by forms of public assembly with the intent of eliciting ethical responses, such as demonstrations. The second conception is resistance to vulnerability, which involves a psychological dimension of opposition and denial to the political claim underlying vulnerability narratives. Relatedly, Butler suggests that '[w]hen we oppose "vulnerability" as a political term, it is usually because we would like to see ourselves as agentic…' (2016, p. 23). She suggests that opposing vulnerability in the name of agency reveals a desire to see ourselves as acting, and not acted on, when in fact, 'we are invariably acted on and acting, and this is one reason performativity cannot be reduced to the idea of free, individual performance' (Butler 2016, p. 24). As a way of thinking 'that models itself on mastery', we rely on 'individual sovereignty against the shaping forces of history on our embodied lives' (pp. 24-25), resisting the fact that our agency is conditioned by our relational bonds with others and our surrounding environment, including social, political and legal institutions.

Similarly, Erinn Gilson (2011) contends that ignorance about vulnerability conditions the naturalisation of forms of exploiting vulnerability, for example, white ignorance of pervasive racism. This ignorance, Gilson argues, stems from 'a negative conception of vulnerability and the desire to avoid, ignore and repudiate vulnerability by projecting it onto others' (2011, p. 323). In this vein, recognising some kinds of vulnerability while dismissing others may reflect a wish to uphold an idea of an invulnerable self. Gilson conceptualises invulnerability as a 'closure to a certain understanding of the nature of relations with others as well as to features of the self' (Gilson 2011, p. 319 ). This closure, Gilson suggests, consists in a preference for remaining ignorant about the ways historical forces have shaped how we relate to one another than recognising relational continuities in historical legacies of colonialism, for example, which produce ignorance about racial relations and preserve 'white privilege' (p. 320). Drawing on epistemologies of

ignorance (Sullivan and Tuana 2007), Gilson explores how ignorance about relationality is constituted is not merely lack of knowledge, but rather 'actively produced and maintained' by imposing ahistorical or atemporal viewpoints, sustaining a form of strategic or 'willful ignorance' (2011, pp. 309, 320). To Gilson, denying one's vulnerability 'underlies other types of ignorance,… such as the ignorance of one's complicity in racial oppression, because to admit such complicity is to open oneself to features of one's social world and one's way of inhabiting that world that are discomfiting…' (ibid.).

Gilson argues that oppression might stem from conceptualising vulnerability narrowly, only in its negative condition, and from the ensuing action of avoiding and ignoring it by projecting it onto others. I suggest that willful or strategic ignorance can give way to epistemic violence (Spivak 1988), actively producing blind spots and erasures which hinder more transformative or emancipatory ethico-normative avenues and discursively enclose 'vulnerable populations' in immutable frames of vulnerability (in opposition to the 'invulnerability' of the autonomous liberal subject). To formulate an analytical framework that identifies spotlights and blind spots in the interpretation of supranational human rights courts, a more ambivalent way of conceptualising vulnerability in tandem with agency is illuminating. In this sense, Butler contends that 'without being able to think about vulnerability, we cannot think about resistance, and … by thinking about resistance, we are already under way, dismantling the resistance to vulnerability in order precisely to resist' (Butler 2016, p. 27).

Gilson suggests that undoing ignorance entails cultivating the attitude of someone who is 'epistemically vulnerable', rather than 'the masterful, invulnerable knower who has nothing to learn from others' (2011, p. 324). She sketches five aspects of 'epistemic vulnerability' which are forms of being open to being affected. First, openness to not knowing; secondly, openness to the possibility of being wrong but still engaging (rather than abstaining from conjecturing) and 'venturing one's ideas, beliefs, and feelings nonetheless'; third, openness 'to learn from situations where one is the unknowing, foreign, and perhaps uncomfortable party'; fourth, openness 'to the ambivalence of our emotional and bodily responses and to

reflecting on those responses in nuanced ways', drawing on the affective dimensions of knowledge; fifth, openness to change not only one's mind, that is, ideas and beliefs, but one's sense of self.

If we take it as true that we all resist modes of thinking that threaten our way of perceiving ourselves as non-vulnerable, we might resist being responsive to the vulnerability of others simply by denying that this vulnerability exists or dismissing it as irrelevant. Rather than conceptualising subjects as either vulnerable or agentic, Butler reconciles reductionist labels and enables us to focus on our interdependence as our shared reality. This leads us to rethink not only others, but also ourselves, as embedded in networks and relations upon which we depend to exercise our agency. But I find Butler's and Gilson's theoretical framework particularly useful to think about the types of resistance to vulnerability that emerge within the legal practice of lawyers and judges, as well as the ones which have emerged while writing this thesis and the ones that might arise as it is read. Even if we accept that we are trained to resist vulnerability, the mere rational cognition of this fact might not suffice to overcome it ourselves; thus, this reinforces the importance of bringing this to the fore in critical scholarship, for we might not be able to do this alone, but perhaps we can hold one another accountable for our blind spots and unwitting acts of epistemic violence.

## Conclusions

Whereas human rights law tends to focus too much on fixed notions of 'vulnerable groups' and vulnerable 'subjectivities', I argue that theories on vulnerability, notably feminist critiques (Butler 2016; Gilson 2014), help us problematise essentialistic ways of thinking about subjects and groups. Understanding vulnerability as a fixed characteristic of an individual or group is premised on a dichotomy whereby agency is conceptualised as the opposite of vulnerability. To identify and disrupt the vulnerability/agency binary in my analysis, the thesis will rely on a conceptual framework which conceptualises vulnerability in a more ambivalent way, reconciling vulnerability and agency, including 'vulnerability in resistance' (Butler 2016) and 'affective translation' (Pedwell 2014). However, human rights courts also exercise the juridical power

to frame. That means that, ultimately, judges hold the power to determine and select who may be recognised as vulnerable through the courts' juridical frames of recognition.

By understanding how vulnerability and affect are mobilised within and across bodies through discourse, I will analyse the extent to which vulnerability emerges as a relevant phenomenon in the ECtHR and the IACtHR's legal praxis. To do so, I will examine how legal practitioners exercise their capacity to affect others by enacting change through vulnerability reasoning (and jurisprudential innovation), and particularly the ways in which they recount being affected by narratives of vulnerability. To envision more critical and emancipatory ways for these courts to address inequalities and social injustices deriving from neoliberal, neocolonial and patriarchal frameworks, I will problematise the production of knowledge in international human rights courts and discursive framings which may amount to 'epistemic violence' (Spivak 1988).

# Chapter 3 – Socio-legal Methodology

## Introduction

In this chapter, I analyse the research design and methodology of my thesis, discussing issues and challenges that arose while doing my research, including how I addressed ethical concerns. I adopted legal and qualitative methods to investigate the phenomenon of 'vulnerability' in the interpretation of human rights courts. My inquiry addressed the increasing use, as well as the ethico-normative implications of 'vulnerability' in legal discourse. To that end, I examined how vulnerability emerges in court cases – particularly judgments issued by the European and the Inter-American Courts of Human rights ('ECtHR' and 'IACtHR') - and I also conducted interviews with legal practitioners. My research aim was to better understand juridical relations and processes of framing vulnerability and constructing the 'vulnerable' within the European and the Inter-American human rights courts. After nine months of fieldwork from 2016-2017, I conducted 21 interviews in the Inter-American system and twelve interviews in the European system.

The ECtHR, situated in Strasbourg, France, was created under the auspices of the Council of Europe. There are 47 ECtHR judges in total. Administratively, the Court is divided into five Sections. Each section is composed of approximately ten judges. Chambers of seven judges are formed within each of the sections and, after a Chamber decision has been issued, applicant or State may refer the case to the Grand Chamber, composed of 17 judges selected via drawing procedure. Grand Chamber judgments are final. The IACtHR, located in San Jose, exists within the framework of the Organisation of American States. There are seven judges in total. The Court is not permanent, that is, judges do not exercise their judicial role as a full-time position. They attend hearings and meet to deliberate a few times per year. Differently from the European system, individuals cannot petition the IACtHR directly; alleged victims lodge an application before the Inter-American Commission on Human Rights, located in Washington D.C., which receive

applications and process them according to admissibility procedures. Further details on judicial proceedings will be discussed in the following chapters.

My motivation was to understand how legal practitioners acted upon what they perceived as the applicant's (in)vulnerability and, by the same token, how they were acted upon in the process of mobilising (or denying) vulnerability in juridical language. Given that vulnerability is not properly a legal term, what motivated its use and how did it affect legal reasoning, that is, application of human rights law to the facts? By examining judgments in tandem with concrete narratives of legal practitioners, I hoped to understand human rights courts' framing of 'vulnerability' not only as a top-down decision, depending solely on the agency and use of legal expertise by judges, but also as the result of a bottom-up claim of injustice grounded on inequality, in an attempt to resist juridically and to move the needle of the law.

In total, I interviewed 33 legal practitioners over the course of nine months (2016-2017). From September 2016 to May 2017, fourteen interviews were conducted with judges, five with senior Registry lawyers, five with senior lawyers from the Inter-American Commission and eight with lawyers for victims. I conducted qualitative semi-structured interviews with judges and lawyers in the European and the Inter-American systems of human rights protection, focusing on their respective human rights courts (the Inter-American Court of Human Rights, 'IACtHR' and the European Court of Human Rights, 'ECtHR'). My main field sites were Strasbourg (France) and San Jose (Costa Rica), where the ECtHR and the IACtHR are located. My pilot interviews with lawyers for victims were conducted in London. My fieldwork in the Inter-American system was also conducted in Panama City (Panama) and Washington D.C. (U.S.).

At the outset, I used legal methods to investigate the phenomenon of 'vulnerability' in the interpretation of the IACtHR and the ECtHR. Legal research can be defined as an interpretive activity of law and legal doctrines from primary, namely 'hard law', case-law, domestic statutes and international treaties and customs; and secondary sources, such as scholarly literature, treatises, encyclopedias (Nolasco et al., 2010, p. 7). As primary sources, I resorted to two main legal instruments namely the Convention for

the Protection of Human Rights and Fundamental Freedoms ('ECHR') of 1950, and the American Convention on Human Rights ('ACHR') of 1969. These conventions set out the normative framework of human rights which ground the legal reasoning of the ECtHR and the IACtHR, as well as establish the creation of the courts and the main norms regulating their operation. Other primary sources that I utilised were judgments and advisory opinions issued by these courts. I also used secondary sources, namely doctrinal sources about the case-law and interpretive trends of these courts.

## Epistemological premises and rationale for research design

In the field of criminology, Herman and Julia Schwendinger (1970) contend that examination of human rights violations should take precedence over the study of crime in a harm-based scale. As I explained in the Introduction, differently from international criminal courts, international human rights courts' assessment aims to establish whether a human rights violation, rather than a crime, has happened[36]. International and domestic institutions constantly reshape and reframe the definitional range of important juridical concepts related to human rights, such as what a human rights violation requires and entails. Arguably, human rights courts should be aware of their interpretive and decision-making power, which affects individuals, structures and power relations, as well as generates knowledge in the form of case-law (Walklate 2007, p. 43). Feminist criticism of impartiality and objectivity invites us to investigate how institutional or cognitive biases might underlie the epistemic standpoint of decision-makers in law and politics. This critique directly speaks to the need to understand how power relations condition processes of

[36] Due to my research scope being confined to the study of human rights courts and adjacent institutions, I found it useful to draw this conceptual differentiation between human rights courts and criminal courts in the international legal realm. However, I note that wider approaches exist, which blur the boundaries between human rights and crime. For example, interesting developments have stemmed from Stanley Cohen's (1993) work on what he calls 'Crimes of the State' and human rights. Cohen states that 'the ways these fields (human rights and criminology) have diverged despite their common grounds [seem] worthy of attention' (1993, p.97). More recently, scholars have theorised on a victimology of State crime (Rothe and Kauzlarich 2014). Arguably, these attempts respond to the Schwendingers' provocation by bridging the gap between areas of knowledge that have proved to be mutually enhancing.

labeling human rights victims, putting in contention the presumed neutrality and objectivity of discourse (Haraway 1988; Hill Collins 2009), particularly in law (Lacey 2004). Mindful of that, the thesis aimed to delve deeper into how power and affect are mobilised through narratives of vulnerability in the interpretation of lawyers and judges, rendering certain contexts more visible and relevant than others.

According to Sandra Walklate (2007), a leading scholar in the field of feminist-informed critical victimology, relevant questions can arise when challenging the process by which the victim label is assigned and investigating the power relations underlying such assignment. Walklate proposes 'rendering visible and naming processes and experiences that were once unspoken and hidden' by challenging the law and the state's presumed neutrality and scrutinising their role in producing victimisation (2007, p. 48). In this context, feminist-informed critical victimology investigates the processes and actors involved in the construction of the 'victim' label (Walklate 2007, p. 44), especially challenging the 'ideal victim' (Christie 1986), or those with whom victimhood and vulnerability are easily and readily associated. Walklate fosters the unveiling of hidden mechanisms and processes underpinning social reality by developing 'empirically based, rational and objective science' (2007, p. 46). This engagement requires paying attention to complexities of lived embodied realities and causal links in victimising events which our everyday common perception fails to capture (Walklate 2007, p. 50). Employing a feminist-inspired epistemology, I researched the links between the ideas of vulnerability, victimisation and harm in juridical discourse.

A socio-legal methodological design thus seemed well-suited to understand the juridical phenomenon of 'vulnerability' in human rights legal reasoning, making use of legal methods and qualitative interviews. Socio-legal studies rely on empirical social science methods to investigate legal phenomena and the role of law in society based on interdisciplinary work (McCrudden 2006). Mindful of this, I explored how human rights courts conceptualise vulnerability and how legal practitioners ascribe different meanings and relevance to the concept in the absence of a legal definition. Beyond the legal language of case-law, I was interested in how legal practitioners participated in the process of translating context of 'vulnerability'

into legal language. I conducted interviews to examine how 'sense-making practices' unfolded through the co-construction of interview data by participants, looking at how 'participants engage in explaining, attributing, justifying, describing, and otherwise finding possible sense or orderliness in the various events, people, places and courses of action they talk about' (Roulston 2010, pp. 218-219).

Furthermore, I also wanted to address the scholarly gap in empirically based research on legal interpretation and practice in comparison to doctrinal and jurisprudential research, particularly in the field of international human rights courts. To mainstream legal scholarship, 'there is a lack of empirical legal literature directed to "mainstream" legal scholars, many of whom remain more or less ignorant of the importance and value of empirical research' (Cane and Kritzer, 2010, p.3). In this context, I highlight a few important milestones for empirical research on legal phenomena in the twentieth century. For example, pioneer empirical research on values underlying judges' voting patterns can be traced back to the work of C. Hermann Pritchet (1948). In Anglo-American scholarship, journals of 'Law and Society' were launched in the 1960s and 1970[37], whereas in the 1990s, 'Empirical Legal Studies' movement in the U.S. and the Socio-Legal Studies Association in the UK arose in the 1990s, more recently, 'there has been a marked increase in the vibrancy of empirical legal research' (Cane and Kritzer 2010). In fact, Shaffer and Ginsburg (2012) argue that there has been an 'empirical turn in international legal scholarship' in the past years, an incipient yet increasing trend that my thesis follows and to which it aims to make a small contribution.

Empirical and interdisciplinary approaches to research judicial practices have been developed with the emergence of socio-legal studies in the 1970s (Zaremba and Mak 2014, p. 3). Given my interdisciplinary approach to exploring the relationship between vulnerability and victimisation, I decided to employ a multi-method approach in my research. '[S]ocio-legal research … has long embraced multi-method research to better understand the relationship of law and the social world (Nielsen 2010, p. 952).' 'Multi-method

[37] For example, the Law & Society Review (1967) and the British Journal of Law and Society (1974).

research' is defined by the use of 'more than one research technique or strategy to study one or several closely related phenomena' (Nielsen 2010, p. 953). The advantage of a multi-method research design is the deployment of multiple tactics to understand a complex phenomenon, its processes and causal links, which in this thesis, is the use of 'vulnerability' in legal interpretation within human rights courts. Using different methods to study one phenomenon also enhances reliability and validity (Davies, Francis and Greer 2007).

Embracing multiple methods in legal research implies investigating a legal phenomenon as a complex set of processes that involve different actors and the interaction between victims, legal practitioners, institutional environments, social institutions and legal as well as cultural norms. As law is practiced by individuals in organisational and institutional settings which have distinct legal cultures, I chose to combine legal methods with qualitative interviews with legal practitioners, bringing forth the added value of producing empirical data to analyse in tandem with doctrinal and jurisprudential sources. Qualitative interviewing brings 'great added value and the potential to enrich legal studies as a complementing method to the classic doctrinal approach', including 'in the research field of (comparative) judicial practices' (Zaremba and Mak, 2014. p. 11). Therefore, suitability of this methodological design to my research questions and incipient empirical research on international courts and legal practice were encouraging signs to pursue further research that could supplement existing legal scholarship through the use of qualitative methods.

## Case Selection

My initial research project aimed at comprehensive and systematic case-law analysis, similar to the methods used by Al Tamimi, who examined 900 cases extracted from the ECtHR HUDOC database that contained the words 'vulnerability, 'vulnerable' or '*vulnerabilité*' (in French), in addition to secondary literature, specifically legal scholarship (2016, p. 7-8). Yet, my engagement with an interdisciplinary range of theories on vulnerability beyond legal doctrine and jurisprudence allowed me to identify a research gap pertaining to the practical challenges of vulnerability reasoning and juridical decision-making. The opportunity to

bridge more recent feminist and critical theories on vulnerability and legal praxis foregrounded my choice of main research method, namely qualitative interviews with legal practitioners about the juridical recognition of communities rendered vulnerable in the context of migration. This process led me to choose depth over breadth in selecting cases for analysis. In other words, I shifted my approach from a broader focus on vulnerable groups, in general, and systematic case-law review to a more refined focus on: (i) leading cases repeatedly cited in judgments by the ECtHR and the IACtHR and examined in legal scholarship and (ii) cases which my interviewees recounted as relevant to their legal practice. These two refinement criteria often led me to the same cases, as I will further explain. Many of the cases cited by legal practitioners in the IACtHR involved applicants who were members of indigenous communities, which I had not initially envisioned as part of my research scope. I then adjusted my research questions accordingly.

For initial case selection, I examined case-law pertaining to vulnerability that caught the attention of legal scholars. As a first step, I looked into doctrinal sources, namely legal scholarship about judgments concerning vulnerability in the ECtHR and the IACtHR. In the ECtHR, I found that *M.S.S. v Belgium and Greece*[38] was the most well-known Grand Chamber judgment and it was widely cited by legal scholars as a landmark case; similarly, the case of *Tarakhel v. Switzerland*[39] was highlighted as an important case in the Strasbourg court's case-law by different academic sources (Dembour 2015; Ippolito and Sánchez 2015; Peroni and Timmer 2013; Timmer 2011). In the IACtHR, I included the Advisory Opinions[40] issued by the San Jose court on the issue of migration because they adopted vulnerability as a relevant factor to justify the imposition of additional State duties toward migrants. Moreover, judgments involving Haitians or persons of Haitian descent against the Dominican Republic received considerable attention from legal

[38] *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.

[39] *Tarakhel v. Switzerland*, app. 29217/12, GC Judgment (ECtHR) 4 Nov 2014.

[40] Advisory Opinions 18/03 and 21/14 (IACtHR).

scholars, particularly *Niñas Yean y Bosico v. Dominican Republic and Expelled Dominicans and Haitians v. Dominican Republic*[41]. In doctrinal sources, I also found other relevant cases in the case-law of the IACtHR, particularly *Yakye Axa Indigenous Community v. Paraguay*[42] (Beloff and Clérico 2016; Peroni 2015). Following that, I obtained online access to the full text of these judgments, researching the case-law of the ECtHR through the HUDOC Database and the case-law of the IACtHR through its case-law search engine database. During my fieldwork I further examined primary (case-law) and secondary (doctrinal) sources whenever interviewees cited cases that I had not previously analysed for the purposes of this research, such as *González et al. ("Cotton Field") v. Mexico*[43] in the IACtHR and *Paposhvili v. Belgium*[44] in the ECtHR. In these cases, interviewees were keen to discuss how the recognition of women and persons with life-threatening illnesses as vulnerable by the courts led to a change in the way judges interpreted similar cases that followed.

During the course of my research, I found growing scholarly interest in the intersections of migration and vulnerability in relation to both courts (Ippolito and Sánchez 2015, Peroni 2015, Peroni and Timmer 2013). However, the case-law of the ECtHR concerning migration is more developed than that of its Inter-American counterpart, which explains why cases concerning migration in Europe figure more prominently in two of my three analysis chapters (Chapters 4 and 5). As I conducted interviews with legal practitioners working at (or filing cases before) the IACtHR and dug deeper into the case-law of the San Jose court, I noticed relevant cases concerning not only migrants, but also members of indigenous

41 *Girls Yean and Bosico v. Dominican Republic*, Judgment on Preliminary Objection, Merits, Reparations, and Costs IACtHR), 8 Sep 2005; and *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment on Preliminary Objections, Merits, Reparations, and Costs (IACtHR), 28 Aug 2014.

42 *Yakye Axa Indigenous Community v. Paraguay*, Judgment (IACtHR) of 01 Feb 2006.

43 *González et al. ("Cotton Field") v. Mexico*, Judgment (IACtHR), 16 Nov 2009, Preliminary Objection, Merits, Reparations, and Costs.

44 *Paposhvili v. Belgium*, app. 41738/10, GC Judgment 13 Dec 2016.

communities from the Global South. In addition to migrants, the vulnerability of indigenous communities was a theme that my interviewees working in (or with) the Inter-American system of human rights protections were keen to discuss, as I examine in Chapter 6. While carrying out my analysis, I noticed that there was a common thread between the contextual vulnerabilities of migrant and indigenous communities in the cases under analysis. Postcolonial power relations underlie systemic forms of exploitation suffered by migrant communities from the Global South, particularly in Europe,[45] and the continuing subjugation of indigenous communities in Latin America. Accordingly, I decided to sharpen my research focus on vulnerabilities arising in postcolonial contexts of precarity (Butler, 2006) which disproportionately affect the human rights of marginalised communities, particularly migrant and indigenous populations from the Global South.

## Intersectional analysis

My analysis drew on Kimberlé Crenshaw's concept of 'intersectionality' (Crenshaw 1989, 1991). In contrast with traditional claims made by African-American groups and women in the civil rights movement in the U.S., Crenshaw coined intersectionality in the 1980s as a framework to underscore the unique positionality and experience of black women and women of color in the context of these legal debates. In her seminal article, Crenshaw argues that 'single-axis' analyses, that is, inquiries which reduced black women's experiences to either race or gender issues, as though they were mutually exclusive categories of discrimination, limit the investigation to the concerns of 'privileged' members of these groups (1989, p. 140). In the past three decades, a wide range of research projects in the social sciences has adopted intersectionality as methodology by focusing on the complex relationship among social groups within and

[45] Postcolonial power imbalances could arguably be at the core of vulnerabilities arising in South-South migration as well, as instantiated by the oppressive situation suffered by persons of Haitian descent and Haitians in the Dominican Republic (which will be examined in Chapter 6). In these IACtHR cases, I have suggested elsewhere that Global North (neo)imperialism produces ratchet effects by designing legal and political architectures of vulnerability that are reproduced in the Global South (Furusho, 2019).

across analytical categories, for instance, educational experiences of black women in comparison to those of Hispanic and white women (Clarke and McCall 2013).

Carbado et al. (2013) describe how scholars and activists have broadened the use and conceptual scope of intersectionality since Crenshaw's first publications on the subject. The concept of intersectionality has penetrated cross-disciplinary fields, inspiring theoretical and normative debates in a range of 'issues, social, power dynamics, legal and political systems and discursive structures" (Carbado et al. 2013, p. 304). Intersectionality has moved across disciplines, shaping novel conceptual and methodological articulations and transformations. Therefore, it has become increasingly complex and contested. Nash (2016) notes the growing body of feminist scholarship proposing a return to intersectionality's foundational texts, which she calls 'intersectional originalism'. Nash further contends that intersectional originalism takes place at a time when intersectionality is subject to much contestation and debate: while it is celebrated as 'the most cutting-edge approach' and 'key analytic' of gender studies, it is also critiqued for its purported focus on identity and woundedness, or its outmodedness (2016, p. 5).

About the contested relevance of intersectionality to contemporary feminist critique, Pedwell (2010) makes a cogent case for the persisting relevance of intersectional approaches from Black and other critical theorists to current feminist scholarship and practice. Despite the 'significant progress' made by 'mainstream feminism' in challenging 'white heterosexual middle-class privilege', Pedwell argues that feminist scholarship continues to privilege gender inequality over other power imbalances in society. Hence, dominant frameworks often preclude 'sustained critique of frameworks which problematically privilege one axis of differentiation and rigorous, historical analysis of mutually constitutive processes of social differentiation and oppression' (2010, p. 37). Intersectional analyses thus remain relevant, since they can prevent the exclusion or simplification of subjective experiences of oppression which do not conform to feminist analyses that prioritise or solely focus on gender. Furthermore, by incorporating intersectional concerns into critical frameworks, scholars and practitioners are better equipped to challenge discursive

practices of 'repeated elisions and/or privileging of particular axes of social differentiation' which uphold certain kinds of knowledge and power relations as legitimate while marginalising others (Ibid.).

Given that intersectionality remains a valuable, albeit contested approach in feminist theory and practice, I chose to adopt an intersectional lens in my analysis. In the thesis, I attempted to investigate how interlocking and simultaneous structural oppressions strike particular contexts and addressing how multiple and hybrid systems of oppression operate in specific forms of power and affective relations (Cooper 2016). In the same vein, I have attempted to understand the framing of 'vulnerability' from the perspective of multiple and intersecting axes of oppression which disproportionately affect certain populations. Through an intersectional analysis, I highlighted how structures of vulnerability may be discursively (re)shaped by human rights courts when they recognise or deny the juridical relevance of 'vulnerability'. In the analyzed judgments and interviews, legal practitioners identified and compared intersectional vulnerabilities to justify which narratives of vulnerability were more compelling and juridically relevant than others.

Given the prolific case-law of the ECtHR and the IACtHR recognising the vulnerability of members of migrant and indigenous communities, I adopted postcolonial 'Othering' as central axis in my analysis. To illustrate, I compared how the vulnerabilities of sub-groups of migrants – for instance, asylum-seekers, economic migrants, migrant children and migrant women - were perceived differently, and how selective recognition of vulnerability entailed differences in the assignment (or denial) of special protective standards to applicants. To do so, I examined concrete cases concerning different structures or categories, such as gender and migration, or age and migration. As explained in the section on case selection, I gave preference to cases which have gained attention from scholars and interviewees alike. In this way, I problematised the essentialising of categories to reveal how juridical power operates on different types of 'vulnerable groups', shedding light on how human rights courts might succeed or fail to challenge hegemonic power relations through juridical discourse.

## Qualitative interviews

Given the shortage of qualitative research studies about the legal practice of judges and lawyers in international human rights courts, my aim was to join recent scholarly attempts to fill this gap (Dzehtsiarou, 2015). I intended to explore in more depth legal practitioners' perceptions and experiences of mobilising and being mobilised by narratives about 'vulnerability'. My Interview Schedule (Appendix I) contained broader topics to elicit narratives about specific cases, according to how familiar they were to interviewees and their willingness to discuss them. The topics were: the concept of vulnerability, contexts of vulnerability and victimising events, intersectional vulnerabilities and interpretive convergences involving 'vulnerable groups' between the two regional courts.

My interview strategy was to start with more general and easier questions to build rapport. My interviews began with asking the interviewee to elaborate more broadly on their notion of 'vulnerability' in the context of their work, such as: 'what is your concept of vulnerability?' and 'in your experience as a judge/lawyer, can you give me an example of a case where the notion of 'vulnerability' or 'vulnerable group' was relevant?'. Using interviewees' definitions to foreground our discussion, I would then focus on concrete cases drawn from the case-law of each court on vulnerable groups to avoid a generic and abstract discussion. I focused on eliciting narratives about concrete cases, with which interviewees had familiarity and had engaged either directly (participating in juridical proceedings in their professional capacity as lawyers or judges) or indirectly (reflected upon the judgment and legal reasoning to apply to subsequent cases in their practice). My goal was to map how they understood their role and responded and reacted to real-life narratives of 'vulnerability', translating them into juridical language.

I added transcribed parts from judgments or advisory opinions of the respective court to discuss concrete cases, which helped avoid overly abstract and theoretical discussions (which could easily detach from legal practice). For interviewees working within the Inter-American system, I added extracts of different judgments: *Yakye Axa Indigenous Community v. Paraguay* and cases involving migrants, namely

*Vélez Loor v. Panama, Girls Yean and Bosico v. Dominican Republic*[46]. I also used extracts from Advisory Opinions AO-18/03 and 21/14 which discussed, respectively, the vulnerability of undocumented migrants and of migrant children. For interviews conducted within the European system, interview schedules were tailor-made on a case-by-case basis, due to the wider availability of cases, which allowed me the possibility to address relevant cases in which judges had been directly involved. To do so, I used the search engine/ online case-law database (HUDOC) to find judgments where 'vulnerability' or 'vulnerable' were present. I examined whether consideration of the applicant as vulnerable or not could be relevant to the interpretation of the law to the facts by examining legal reasoning. When my interviewee had written a separate or dissenting opinion, I would focus on asking why their opinion diverged from the majority and through probe questions, I elicited further explanations about the relevance of vulnerability to the outcome of the case.

In sum, I customised each of these interview schedules according to cases specific interviewees would be familiar with, either because they had participated in the case or for their status as 'landmark cases' from doctrinal sources or repeated reference to these cases in the legal reasoning of subsequent judgments (similar to the logic of precedents in Common Law systems). I also left room for interviewees to bring other cases he or she would feel was relevant to the discussion. I revisited case selection after the interview, examining case-law which interviewees mentioned. After each of the interviews, I would update my list of relevant cases and write down notes, such as similarities to previous answers about engaging with vulnerability or new responses that would differ from what I had expected. Thus, I would adapt each interview to the participant and also make adaptations based on what had or had not worked in previous interviews.

[46] *Yakye Axa Indigenous Community v. Paraguay*, Judgment (IACtHR) of 01 Feb 2006; *Vélez Loor v. Panama*, Judgment on Preliminary Objections, Merits, Reparations, and Costs. (IACtHR), 23 Nov 2010; *Girls Yean and Bosico v. Dominican Republic*, Judgment on Preliminary Objection, Merits, Reparations, and Costs IACtHR), 8 Sep 2005.

Participants were given a Participant Information Sheet (in English or Spanish, Appendix I.A. and Appendix I.B.), which clarified practical and ethical steps taken over the course of conducting interviews. The Information Sheet informed participants that all data collected from interviews and research would be digitally stored and password-protected, including audio recording of interviews. All interviews were recorded in two different audio recording devices, and I ensured that audio recordings would be deleted within eighteen months of the interview date. Interviews with judges were all undertaken inside the courts, in their private offices. Interviews with lawyers happened in various locations, from their private offices to public spaces such as cafés. The Information Sheet also explained the voluntary nature of participation, including the right to withdraw participation at any time, the right to refuse to answer any questions, and my contact information, as well as the contact information pertaining to two of my supervisors, in case they needed to voice any concerns. All participants manually signed a Consent Form (in English or Spanish, Appendix III.A. and Appendix III.B.). All interview documents were subject to prior assessment and approval by the Ethics Committee of the University of Kent.

As the Information Sheet further detailed, I had envisaged that all interviewees would remain anonymous, to ensure that their personal views and opinions could be freely discussed. Most of my interviewees agreed to anonymity, and for this reason, most of my interviewees have been assigned pseudonyms. During our interview, Matías (Lawyer, IACtHR) took an issue with anonymity and asked whether he would be cited if I used any of his ideas in my thesis. I assured him that I would quote him accordingly if, at the end of the interview, he felt that he wanted attribution for an idea we discussed. I also highlighted that anonymity was a tool to protect interviewees, as anonymity in small institutions such as the IACtHR could be compromised if many chose not to remain anonymous, and he was one of my first interviewees. Matías agreed to remain anonymous, despite expressing disagreement with my ethical choice of anonymity in my research design. At the ECtHR, judge Dmitry Dedov insisted that he not be anonymised, arguing that anonymity only protects those who are concerned about 'political correctness'. As the ECtHR is a much larger institution than the IACtHR and judge Dedov was one of my last interviewees and the only

one who asked his anonymity to be waived in Strasbourg, granting his request seemed unproblematic from an ethical perspective. Many lawyers for victims, from different organisations, also felt strongly about having their real names revealed in the research, arguing that their ties to their organisations did not present any hindrance to speak their minds freely during the interview. That being said, there were certain lawyers for victims who preferred to remain anonymous, particularly those working for larger organisations.

## Participant selection

The Inter-American institutional design establishes that applicants have to file cases before the Inter-American Commission in Washington D.C., a largely political organ that filters cases and decides which ones will be referred to the analysis of the IACtHR. This institutional arrangement follows the European system's organisational procedure prior to Protocol 11[47], which abolished the European Commission of Human Rights, the institution which received applications and filtered cases to be referred to the ECtHR, operating as a gateway for individuals to reach the court. From the outset, the plan was to interview lawyers at the Inter-American Commission, to understand from the filing of a claim how vulnerability was recognised and how it might impact which cases would be sent to the IACtHR. Given the asymmetry in the number of cases decided by the ECtHR and the IACtHR and the special institutional design of the Inter-American system as compared to its European counterpart, I also decided that more qualitative interviews should be conducted in the Inter-American system.

I prioritised interviews with judges, as they were the ones who ultimately made the final decision in court proceedings, being at the top of the decision-making chain, so I considered essential to the project exploring the perspectives of some of the judges. However, interviewing judges at the IACtHR presented

[47] Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entered into force in 1994.

more challenges than at the ECtHR. First, differently from the 47 judges in Strasbourg, there are only seven judges at the San Jose court. Secondly, the IACtHR is not a permanent Court like the ECtHR, so judges from different countries in Latin America are in San Jose for some weeks in each session of the Court. Third, the Court also hosts sessions in other countries, which raised logistical concerns. To address these challenges, in addition to hearing judges' perspectives, I also interviewed senior lawyers who worked at the IACtHR's Registry and senior lawyers who worked at the Inter-American Commission on Human Rights. After a pilot interview in London with an attorney for victims who had previously worked as Registry lawyer the IACtHR, I conducted interviews in San Jose, Costa Rica and Panama City, Panama (from September until December 2016). Additionally, I conducted interviews in Washington D.C. (May 2017). Registry lawyers work full-time at the IACtHR and they are a vital piece of the functioning of the court. They assist judges in procedural and substantive matters, including doing legal research, accompanying cases and hearings, drafting briefs and helping draft judgments.

The Inter-American Commission, despite its predominantly political nature, is the starting point for filtering individual applications to the IACtHR, thus fulfilling an important juridical role. The Commission is responsible for carrying out admissibility procedures that determine which cases will be referred to the IACtHR, acting as gatekeeper of individuals who want to access the court. Due to the great relevance of the role played by lawyers at the IACtHR and the Commission, being indispensable to the juridical processes of decision-making within the IACtHR, I chose to interview more lawyers than at the European court system. In the ECtHR, a much larger institution, it was easier to gain access to judges than to Registry lawyers. I was encouraged to contact them directly. Due to the larger number of interviews with judges at the ECtHR than at the IACtHR, namely ten sitting judges against three sitting judges and one retired judge, I interviewed senior Registry lawyers at the IACtHR, Commission lawyers and lawyers for victims. In that way, I chose triangulation, that is, using different sources to investigate the same phenomenon (Gerring 2017), namely the use of vulnerability within these human rights courts juridical processes. Through purposeful selection of lawyers for victims, I chose interviewees who integrated organisations which had

participated in important cases involving vulnerability. I interviewed lawyers from Non-Governmental Organisations who had either represented victims in relevant cases involving vulnerability or issued interesting Amicus Curiae briefs, third party interventions in cases with relevant contextualisation, academic insight or research-based data.

Within the Inter-American system, in all of the cases which I examined in the IACtHR case-law concerning vulnerability, victims had been represented in the Inter-American system proceedings by the transnational organisation 'Centro por la Justicia y el Derecho Internacional – CEJIL', including *Yakye Axa Indigenous Community v. Paraguay* and *Girls Yean and Bosico v. Dominican Republic.* CEJIL was the transnational organisation which represented most of the victims in the judgments I had examined prior to fieldwork. I interviewed eight lawyers for victims, including three lawyers from CEJIL, based in Costa Rica, three lawyers who worked in national or local organisations from the Dominican Republic and Mexico and one independent lawyer from Colombia. In the European system, I reached out to Nuala Mole, lawyer and founder of the AIRE Centre, a legal charity which had acted as third party intervener in *M.S.S. v Belgium and Greece*.

In my analysis chapters, I refer to my interviewees by their first names when I use pseudonyms, followed by their occupation and the respective institution which they work or were working at the time of the interview in parentheses, for example: Santiago (Judge, IACtHR). I have chosen this unorthodox way of referring to my interviewees to indicate my proximity as a researcher from this data source, as opposed to my distance from the words imprinted in the pages of court judgments. In this way, I also differentiate interviewees' quotes from judgment extracts such as separate opinions of certain judges, in which case I attribute the quote to the judge in a more traditional way, namely by acknowledging the occupation (Judge) followed by the judge's last name and the institution in parentheses, for instance: Judge Sajó (ECtHR). With respect to interviewed judges, the only exception to this scheme of attribution is Judge Dedov, who insisted not being anonymous, so both when I refer to my interview with him, as well as to his separate opinions, I

refer to him as Judge Dedov (ECtHR). For lawyers, I also chose pseudonyms that are first names and for those who insisted not to be anonymised, I refer to their full name on the first appearance and the last name in subsequent references. My final list of interviewees (anonymised when pertinent) is as follows:

| | **Pseudonym Or Real Name** | **Role** | **System** | **Gender** | **Date, Place & Length of Interview** |
|---|---|---|---|---|---|
| **1** | Mateo | Lawyer for Victims (Former Court Registry Lawyer) | Inter-American | Male | 30 Aug 2016<br>London, UK<br>1h 32min |
| **2** | Santiago | Former Judge | Inter-American | Male | 10 Oct 2016<br>San Jose, CR<br>44 min |
| **3** | Matías | Senior Lawyer (Court Registry) | Inter-American | Male | 19 Oct 2016<br>San Jose, CR<br>1h15min |
| **4** | Juan | Legal Assistant (Court Registry) | Inter-American | Male | 14 Nov 2016<br>San Jose, CR<br>2h |
| **5** | Benjamin | Judge | Inter-American | Male | 22 Nov 2016<br>San Jose, CR<br>1h6min |
| **6** | Sofía | Senior Lawyer (Court Registry) | Inter-American | Female | 25 Nov 2016<br>San Jose, CR<br>1h19min |
| **7** | Martín | Judge | Inter-American | Male | 29 Nov 2016<br>San Jose, CR<br>Part 1 20min<br>Part 2 30 min |
| **8** | Nicolas | Judge | Inter-American | Male | 29 Nov 2016<br>San Jose, CR<br>1h16min |
| **9** | Isabella | Senior Lawyer (Commission) | Inter-American | Female | 7 Dec 2016<br>Panama City, PA<br>33min |
| **10** | Natalia Perez (Real name) | Lawyer for Victims (Comision Mexicana de Defensa, Local NGO, Mexico) | Inter-American | Female | 6 Dec 2016<br>Panama City, PA<br>1h |
| **11** | Jenny Carolina Reyes (Real name) | Senior Lawyer for Victims (MUDHA, Local NGO, Dominican Republic) | Inter-American | Female | 7 Dec 2016<br>Panama City, PA<br>1h13min |
| **12** | Liliana Dolis (Real name) | Lawyer for Victims / Co-founder (MUDHA, Local NGO, Dominican Republic) | Inter-American | Female | 7 Dec 2016<br>Panama City, PA<br>1h13min |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | (Same interview) |
| **13** | Alejandro | Lawyer for Victims (CEJIL) | Inter-American | Male | 8 Dec 2016<br>San Jose, CR<br>1h22min |
| **14** | Lucas | Senior Lawyer<br>(Court Registry; Former CEJIL Lawyer) | Inter-American | Male | 9 Dec 2016<br>San Jose, CR<br>1h14min |
| **15** | Valentina | Lawyer for Victims (CEJIL) | Inter-American | Female | 9 Dec 2016<br>Skype Interview<br>30min |
| **16** | Emma | Senior Lawyer<br>(Court Registry) | Inter-American | Female | 12 Dec 2016<br>San Jose, CR<br>52min |
| **17** | Jackson | Senior Lawyer for Victims<br>(Former CEJIL Lawyer, Former Commission Legal Consultant) | Inter-American | Male | 26 Apr 2017<br>Washington D.C., US<br>1h12min |
| **18** | Paul | Senior Lawyer (Commission) | Inter-American | Male | 26 Apr 2017<br>Washington D.C., US<br>50min |
| **19** | Martina | Senior Lawyer (Commission) | Inter-American | Female | 26 Apr 2017<br>Washington D.C., US<br>33min |
| **20** | Diego | Senior Lawyer (Commission) | Inter-American | Male | 27 Apr 2017<br>Washington D.C., US<br>37min |
| **21** | Amelia | Commissioner / Senior Lawyer (Commission) | Inter-American | Female | 27 Apr 2017<br>Washington D.C., US<br>36min |
| **22** | Nuala Mole<br>(Real name) | Lawyer for Victims / Founder (AIRE Centre) | European | Female | 10 Jan 2017<br>London, UK<br>43min |
| **23** | Liam | Judge | European | Male | 24 Mar 2017<br>Strasbourg, FR<br>(No audio recording) |
| **24** | Noah | Judge | European | Male | 29 Mar 2017<br>Strasbourg, FR<br>42min |
| **25** | Aiden | Judge | European | Male | 31 Mar 2017<br>Strasbourg, FR<br>34min |
| **26** | Olivia | Judge | European | Female | 3 Apr 2017<br>Strasbourg, FR<br>15min |

| | | | | | |
|---|---|---|---|---|---|
| **27** | Ava | Judge | European | Female | 4 Apr 2017<br>Strasbourg, FR<br>44min |
| **28** | Oliver | Judge | European | Male | 4 Apr 2017<br>Strasbourg, FR<br>33min |
| **29** | Michael | Judge | European | Male | 5 Apr 2017<br>Strasbourg, FR<br>29min |
| **30** | Layla | Judge | European | Female | 5 Apr 2017<br>Strasbourg, FR<br>44min |
| **31** | Dmitry Dedov<br>(Real name) | Judge | European | Male | 5 Apr 2017<br>Strasbourg, FR<br>1h18min |
| **32** | Charlotte | Judge | European | Female | 7 Apr 2017<br>Strasbourg, FR<br>49min |
| **33** | Sebastian | Senior Lawyer<br>(Court Registry) | European | Male | 10 Apr 2017<br>Strasbourg, FR<br>38min |

## Negotiating access

Gaining access to respondents was a challenge. I thought that a failed attempt would necessarily entail discarding one tactic and moving on to the next one, but I was proven wrong. My fieldwork experience taught me that trying the same tactic twice (or more) can have different results in different stages: with the right timing, you might spiral upward rather than end up walking around in circles. At the IACtHR, I designed a three-pronged strategy to attempt sequentially: first, institutional channels; failing that, direct contact; as last resort, third parties. To gain the trust of gatekeepers through prolonged engagement, I spent three months as a visiting researcher at the IACtHR library. Once I was settled in San Jose, I attempted to contact potential interviewees via formal institutional channels (by requesting Registry officials to forward my invitation to all lawyers and judges), but I got a very low response rate. Subsequently, attempting to contact potential respondents directly via Linkedin and in person did not yield successful results. I also

made use of third-party contacts, namely colleagues and acquaintances who could vouch for my research and credentials and refer me to lawyers inside the court.

After slowly building credibility and trust, I was able to reach and convince sitting judges to participate by resorting to institutional channels again (formal communication with the same Registry official). At the same time, I used snowball sampling, a tactic where by respondents 'recruit further respondents from their social networks' (Elliot *et al.* 2016), securing more interviews with lawyers who had been referred to me by my interviewees. Snowball sampling is commonly used to identify research participants in smaller or harder to reach populations. After showing initial interest in being interviewed, many judges and lawyers failed to commit to an interview date. Due to their busy schedules, I had to be flexible with dates and times and deal with constant rescheduling of interview dates. For this reason, I always stayed on stand-by, close to the court, to ensure that I could reach them in a timely manner in the event of last-minute availability.

By contrast, at the ECtHR, gaining access and communication were relatively straightforward. I also visited the ECtHR library as a researcher during my fieldwork. After the first interview with a judge to whom I was referred through a third party (a scholar who was a common acquaintance), I was able to reach potential interviewees directly, via their institutional email. Most judges did not reply to my invitation and several judges replied saying that they were unavailable to be interviewed. Although Dzehtsiarou (2015) conducted qualitative interviews with 33 ECtHR judges when doing his PhD research, he had previously interned at the ECtHR, having had more time and engagement with the court's judges and lawyers. Thus, I expected that my brief period of engagement as an external researcher would not yield as much collaboration as Dzehtsiarou had. Moreover, as expected when doing expert interviews, the most common reason contacted judges provided for refusing to be interviewed was related to busy work schedules. I highlight another reason for refusal that I had not anticipated: distrust or lack of interest in the

type of interview-based research that I was conducting. These are excerpts from two judges' email replies to my invitation (I have anonymised them to follow the ethical principles of my research):

> I must admit that I am never a huge fan of research based on interviews of this nature. However, I must commend you for the extremely professional manner in which you are approaching your subject. (Jane, Judge, ECtHR)

> To my regret, however, I am not able to help you in your research for the simple reason that I have no any particular experience concerning the type of cases mentioned in your request. (John, John, ECtHR)

Following Judge John's reply, I reiterated my great interest in interviewing him and I referred to 3 cases of interest for my research in which he was directly involved. His reply was:

> … with reference to the cases mentioned in your message, I have nothing more to say in comparison with what has already been stated in the respective judgments.

Their responses were an indication that socio-legal research, and particularly qualitative semi-structured expert interviews, are still not widely accepted as a relevant method within the legal community.

Despite refusals to participate, ten ECtHR judges and one Registry lawyer showed interest and availability to be interviewed and interviews were quickly scheduled and carried out without further issues. After conducting interviews in both Courts, selection of case-law that I analysed was done thematically, reassessing my which cases would be relevant according to what was discussed with interviewees during the process of analysing data.

## Analysing the data

My investigation was aimed at fleshing out concepts and assumptions behind the use of the legally undefined terms 'vulnerability' and 'vulnerable', exploring how they are juridically constructed. I set myself the task to map how 'vulnerability' was used by human rights courts in judgments and by legal experts/practitioners within these legal systems. I was particularly concerned with how interviewees

perceived and related to 'vulnerable groups'. In other words, I investigated how juridical relations that were mediated by the concept of vulnerability operated. Nielsen (2010) warns that '[q]ualitative in-depth interviews provide insight into processes and subjectivities, but often at the expense of representativeness' (2010, p. 953). With that in mind, rather than a comprehensive examination of legal praxis, I attempted to gain insight into modes of relationships and types of processes underlying human rights courts' framing of vulnerable applicants and groups. To so do, I identified relevant concepts and themes which helped explain how vulnerability was mobilised within and across narratives and bodies in legal practice.

Although legal language derives from ordinary language, the language of law is also comprised of technical terms. '[A] term may be defined as the linguistic expression of a concept', whereas a concept refers to 'abstract figures created by the human mind' (Heikki 2012, pp. 27-28). In qualitative analysis, concepts are 'ideas contained in the data', which the researcher identifies by interpreting empirical materials (Corbin and Strauss 2008, p. 159). In this context, I investigated 'vulnerability' as an emerging phenomenon in the interpretive framework of the ECtHR and the IACtHR. For the first part of my analysis, I examined the ethical and normative responses and reactions this concept has elicited when summoned by legal practitioners within their arguments and narratives. Taking vulnerability to be a concept subject to multiple interpretations and meanings, I examined how interviewees explained their own understandings of vulnerability, in abstract and generic terms. I also used probe questions to dig deeper into examples and reflections about the themes of my interview schedule: the relationship between vulnerability and victimisation, intersectional sources of vulnerability and convergences between the jurisprudence of the ECtHR and the IACtHR.

To do so, I mapped legal practitioners' descriptions and explanations about the use of vulnerability in their interpretive work within the vulnerability/agency continuum. I sought to better understand the ways in which vulnerability manifests in legal practitioners' narratives about their professional experience, including underlying assumptions, presuppositions, opinions and beliefs (Gallagher 2012; Husserl 2006). I

regarded the ascription of meanings to 'vulnerable groups' as a process that harbored conflicting views of what vulnerability was and who was entitled to claim it as relevant when alleging that human rights violations were committed against them by a State. In the second phase of my analysis, I drew on my theoretical framework to weave a relational critique, that is, a critical examination of the ways legal practitioners negotiated their power to affect the lives of applicants, frame subjectivities into juridical language and shape legal knowledge. At the same time, I explored how they were affected by expressing emotional reactions and framing 'vulnerability' through a narrower or wider lens in different cases.

I analysed the data throughout the entire research process, rather than focusing on data analysis only after data collection. Analysis began during my fieldwork period while preparing and conducting interviews and examining the relevant case-law. After each interview, I would reflect upon interviewees' responses and either record thoughts and insights about my research questions in my research diary or in my audio recorder. During the fieldwork, I also created a password-protected online blog where I compiled my research memos, information I gathered on relevant case-law in preparation for interviews, research information on potential interviewees, and at a later stage, all of the transcribed interviews. Members of my supervisory team were the only ones who were able to access my blog to keep up-to-date with my ongoing data collection and analysis. Upon completion of the fieldwork stage, I focused on polishing my analysis during the transcription period, where I would listen to and transcribe all of the interviews on the software ExpressScribe. I then passed all of my transcripts to QSR NVivo, a computer-assisted qualitative data analysis software programme. Nvivo was useful for visualising and organising my data, examining specific terms through word searches and assessing the number of times certain terms were used by interviewees, which could indicate salience.

Although I utilised these computer-based tools for data storage, organisation and management for the purposes of efficiency (García-Horta and Guerra-Ramos 2009), I did most of the analysis process manually. Contrasting judgments, interview transcripts and memos in different languages made it more

difficult to rely on a software for assistance (I conducted interviews in English and Spanish and most of my memos were in Portuguese, my native language). I used interview recordings and printed transcripts, judgments and compiled memos. My interviews abided by specific topics, as noted in the previous section, even though I remained open to emerging themes and codes based on interviewees' responses, which could be relevant to my research questions (Corbin and Strauss 2008). From one of my topics, which I assigned the concept 'intersectional vulnerable groups', certain codes emerged from my main datasets, namely judgments and interviews, such as 'migrant children', 'ill migrants', 'migrant women'. Similarly, the concept of 'hierarchy of vulnerability' arose from my analysis.

As part of my analysis, I wrote memos and assigned definitions (or sub-codes) to codes and concepts to ensure that they were applied consistently to my dataset. For instance, the concept of vulnerability gave rise to multiple codes according to interviewees' definitions: 'resourceless', 'weakness', 'inability to fend for oneself'. Specific cases from the courts' case-law were applied as codes as well, as they were an important common thread in my interview discussions. For instance, I discussed *Tarakhel v. Switzerland*[48] and *M.S.S. v. Belgium and Greece*[49] with all of my interviewees in the European system. I also applied codes to interviewees, as attributes to enable further comparison among opinions, for instance, their role and institution, such as 'Judge, ECtHR' or 'Lawyer, Inter-American Commission'.

One of the challenges that I faced was identifying and incorporating the role of emotions and feelings into my analysis, given that empathy and other emotional responses to vulnerability emerged from my findings as relevant factors. Lauren Berlant (2004) forewarns of the danger of engaging in scholarly critique on 'humanising emotions', inter alia 'compassion, sentimentality, empathy', in that a concern arises that this kind of critique 'seeks to befoul its object'. In agreement with Berlant, I stand by the idea that such

[48] *Tarakhel v. Switzerland*, app. 29217/12, GC Judgment (ECtHR), 4 Nov 2014.

[49] *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.

critique does not have to entail proving relations of affinity as inherently wrong or sentiments of compassion as false. Rather, a 'project of critique seeks not to destroy its object but to explain the dynamics of its optimism and exclusions', especially given that social optimism implies 'enforcing normative projects of orderliness or truth' (Berlant 2004, pp. 4-7). Through a critical lens, I attempted to make explicit affective encounters and translations through an intersectional, feminist and postcolonial-informed analysis of power relations underlying the framing of vulnerable subjects in human rights courts.

After I finished transcribing the interviews, I was able to run searches on NVivo to verify the number of occurrences of a code or concept in my datasets. Through these searches, I was able to establish emerging themes within my data which showed that interviewees had commonalities and differences in the ways they experienced and explained 'vulnerability' in their roles as judges or lawyers (Weiss 1994). I used colored post-its to identify these patterns and write down memos to record my own insights with reference to codes and themes. A theme that emerged from interviews was 'affective reactions', associated with interviewees' narratives of how they felt affected in different ways by narratives of vulnerability, paving the way for new in-vivo codes (extracted verbatim from interviewees' responses), such as 'empathy', 'instinct', 'feeling threatened'. Codes and sub-codes were constantly rethought during the research process, as I re-read and judgments and interview transcripts and revaluated the importance of extant and emerging concepts and themes to answer my research questions. I identified new codes which at times replaced previous codes or transformed previous codes into sub-codes, according to analytical relevance or repeated emergence in different data sources (interviews and court judgments). The biggest challenged I faced while conducting interviews and analysing the data was to identify and address some of my own blind spots with respect to applying what I conceptualised as vulnerability in theory in my research praxis, as I will detail in the final sections of this chapter.

### *'Do you feel vulnerable?': Underlying my vulnerability*

In our interview, Olivia (Judge, ECtHR) spoke about how careful the (European) court should be 'not to victimise certain groups under the heading of vulnerability.' When I asked her to elaborate on her remark, Olivia gave as example the categorisation of women as a vulnerable group. In her answer, Olivia brought to the fore not only her personal feelings with respect to being a woman, but made assumptions about my feelings as well:

> To say: oh, women are vulnerable, full stop. I mean, do you feel in general vulnerable? I don't... But of course, there might be a situation, but we shall be careful that we don't label whole groups of vulnerable per definition and it's a new form of stereotyping certain groups and discriminating certain groups. Why should a woman be by definition vulnerable, weak, we're not! (laughs). (Olivia, Judge, ECtHR)

Olivia categorically denies her own vulnerability by asserting that women, by definition, are not vulnerable. She also brings to the fore the relevance of 'feeling' vulnerable, eschewing not only her vulnerability, but also mine, as she formulates a rhetorical question, inquiring rather or not I felt vulnerable by virtue of being a woman. Olivia defends that as a group, 'we' (women) are neither vulnerable nor weak by definition. She also conflates vulnerability with weakness, a stereotype about vulnerable groups that often has a negative connotation akin to characteristics that are associated with the 'ideal victim' (Christie, 1986) such as frailty and helplessness.

Olivia's wish not to be associated with these negative characteristics and uphold a sense of agency or invulnerability (Gilson 2014), falls within a binary conceptualisation of vulnerability as the opposite of agency. Even though I was aware that Olivia had asked me a rhetorical question, bringing my identity as a woman into the spotlight and assuming that I did not feel vulnerable brought me discomfort during the interview. Concern for stereotyping and stigmatising women as a group was also expressed by Layla (Judge, ECtHR), who revealed that not all women are vulnerable, setting apart women who are situated in different contexts and also prompting my experience:

> [If[ you always stigmatise people as being vulnerable, you tend to perhaps increase their sense of being outcast and I'm not sure it's always, for an individual person, a good thing to do... They always say that the women are vulnerable, I mean, that is not true, that is simply not true. But women from rural areas in Afghanistan living among Talibans (pause)... but you and I are not a vulnerable group, perhaps (pause)... Well I don't know about you (laughs)... You don't look vulnerable to me.

Layla also vehemently states that women are not vulnerable. Rather than asking me if I felt vulnerable, as Olivia did, Layla first asserts that she and I are not vulnerable, and then rectifies her assertion by explaining that I do not appear vulnerable to her. Both Olivia and Layla's categorical denial of women as a vulnerable group show how mechanisms of recognising or framing vulnerability might be intertwined with the recogniser or framer's own sense of self. Layla and Olivia are women in a position of power. Their epistemic privilege includes the power to frame the boundaries of vulnerability, disadvantage and victimisation. These reflections led me to rethink my position of power as a researcher who is investigating the juridical power to frame.

When Layla states that women are not vulnerable but implies that the situation of women living in rural areas of Afghanistan might be an illustrative exception, the power relation between framer and framed subjects becomes more evident. I suggest that framing vulnerability, in this example, is premised upon an implicit Othering of geographically distant and often racialised female bodies. I agree with both Layla and Olivia that women by definition should not be considered as a vulnerable group; however, given the systematic occurrence of violence against women in many contexts across the globe, recognising vulnerability can be a way of shedding light on oppressive patriarchal structures and relations that create specific forms of gender-based violence and human rights violations which disproportionately affect women. As patriarchal relations and gender inequality exist across the globe, albeit in different forms, denying that women in general are vulnerable by stating that you or me are not vulnerable, without contextualising, can be a form of reasserting our privilege (agency) to the detriment of the perceived disadvantage of other women (vulnerability). If vulnerability is conceptualised as a fixed characteristic, this thought processes might reinforce oppression of women who live in postcolonial States. Detached from a

claim of victimisation (a concrete case being processed before the ECtHR), assigning vulnerability to women in general might be a form of stigmatising and naturalising a position of inferiority.

In hindsight, during the interviews I conducted, I empathised with my interviewees and saw as natural that judges would want to eschew the vulnerable label. Reflecting upon my own position as a researcher and as a woman, I felt that these remarks effaced the relevance of other identities that potentially differentiate my experience as a woman (and as a member of the legal profession) from the experience of my interviewees. To exemplify, my experiences as a woman are informed by how I relate to others and how others see me as a foreign women (non-European), as an Asian woman, and as a South American woman, as I will further detail in the next section on Reflexivity. But being labelled as 'invulnerable', as Layla and Olivia identified themselves, was actually a relief to me. Having struggled with anxiety and depression while undertaking my fieldwork and afterwards, I had felt vulnerable, insecure and anxious, despite the constant support I got from my supervisory team and loved ones. I did my best to deal with these feelings and personal challenges in the best way I could, but I realise now that I hid them from most people for two reasons, which are connected to how, in practice, I have also conceptualised vulnerability in opposition to agency, denying my own vulnerability for the sake of upholding my self-image as agentic.

First, I believed as a premise that the object of my study was detached from myself, and that any subjective experience of vulnerability of mine should not be brought to the fore, as it would only compromise or taint the methodological rigor of my research. Secondly, I did not want to be associated with the stereotypes that often come with disclosing forms of vulnerability, which I felt resonated with Olivia and Layla's comments about neither wanting to feel nor be vulnerable. To me, the fact that my interviewees perceived me as 'invulnerable' - similarly to how they own self-perception - was a relief at the time, as I inferred that they did not see me as weak, but as strong, empowered and agentic, in the same way as they perceived themselves to be. I felt that the success of my interviews depended upon coming across as an objective and rational professional, as well as upholding an image of female empowerment that was

coherent with liberal feminism. In this way, in my interview strategy, I utilised the very reductive understanding of vulnerability that I aimed to critique by undertaking my research project.

Although experiences of vulnerability indeed change according to geography and context, denying one's own vulnerability can be a form of willful ignorance. If we accept Gilson's (2011) suggestion that 'the impetus for ignorance is an attempt to avoid what might unsettle us, [and] when we ignore we are necessarily avoiding our own vulnerability' (p. 319), this denial of relationality grounds a logic of oppression. By not taking responsibility as historical agents, we contribute to the reproduction of oppressive relations of power. Gilson further contends that ignorance about vulnerability conditions the naturalisation of forms of exploiting vulnerability, for example, white ignorance of pervasive racism. This ignorance, as Gilson argues, stems from a negative conception of vulnerability and 'the desire to avoid, ignore and repudiate vulnerability by projecting it onto others' (2011, p. 323). In this vein, recognising some kinds of vulnerability while dismissing others may reflect a wish to uphold an idea of an invulnerable self. This then enables forms of ignorance about vulnerability to become entrenched in forms of knowledge, as the 'knower' attempts to uphold her position of agency and invulnerability in opposition to the vulnerability of those about whom knowledge is being constructed.

In this context, juridical sensitivity to contexts of vulnerability and vulnerable groups may require that judges disavow the self as the absolute 'knower', who affect the lives of others, to accept and be more forthcoming about how they are also affected by narratives of vulnerability about the lives of others. I suggest that beyond emotional responses to individual cases concerning vulnerable others, judges' self-perception as agentic selves is routinely performed and shaped over time by the power to affect others that they gain from exercising the judicial occupation. Their capacity to exercise agency might also relate to other privileges, such as their epistemic standpoint as European citizens or nationals. As example, framing the asylum-seeker as vulnerable and recognising that her vulnerability requires positive obligations by European States implies, at the same time, framing the European citizen as invulnerable and upholding her

privilege. Reflecting upon my own position as a researcher, the dangers of epistemic ignorance apply to me and others researchers as well. Insofar as my research experience is concerned, I will elaborate on other issues and tensions I had to reconcile in the next section.

## Reflexivity

In the thesis, I drew vastly from feminist and critical theories. I also relied on an interdisciplinary supervisory team which has pushed me to problematise essentialisms, definitions and legal categories throughout my research process, shaping my critical standpoint. However, I acknowledge that my biases and limitations have influenced many stages of my research. As I was responsible for guiding interviewees' narratives with specific topics and questions, I participated in the co-construction of meanings during the data collection and data analysis stages. I also interpreted judgments and interviewees' responses, decided what was relevant, assessed commonalities and fleshed out my critique. Nonetheless, I tried take on a reflexive approach in every phase of the research process. During interviews, for example, I attempted to develop self-awareness of my own biases and expectations which could influence my relationship with interviewees (Rubin and Rubin 2005). I took it upon myself to constantly reflect upon my own role and epistemic standpoint within the research when (re)formulating questions, engaging with interviewees, and later in the process, analysing the data.

On the one hand, I am a third-generation Asian woman in South America, and I have lived in Global North countries for the past five years. My embodied experiences daily inform the way I feel and understand issues of gender, race and class. They also inform how I analyse and relate to the world, shaping the contours of my critique. During the research process, I felt that my personal genealogy informed how I narrowed down my research focus, choosing migration as its central axis. To address my personal bias, I tried not to concentrate only on cases about which I felt strongly, such as cases involving migrant women. To ensure the intellectual integrity of the project, I followed the data and explored contexts of vulnerability involving migration, age, health and gender as they arose in the case-law and throughout interviews. When speaking

to interviewees, I used an intersectional approach to examine issues of migration in tandem with other sources of vulnerability that emerged in the case-law and in the jurisprudence. Making use of landmark cases, that is, the most commonly-cited cases in primary and secondary legal sources (case-law and doctrinal scholarship), I discussed themes and concepts as they arose in the interviews, and not according to my personal preference.

On the other hand, I am a lawyer who is sympathetic to the intentions and goals of the human rights movement and its efforts to use law as a tool of empowerment, therefore it felt hard to criticize human rights institutions, even within an academic research project. We criticize our loved ones, but we hardly ever feel that it is okay for others to do so; we become defensive. When I started to weave my critique, I found it hard to admit to myself that applying my critical framework to my empirical findings led to a critique of what other scholars deemed a progressive trend in human rights courts; it feels now even harder to share my findings as I write up my thesis. The human rights movement has been the object of fierce criticism, and attacking these institutions feels almost counter-intuitive and unethical in principle, if not a betrayal of the movement. International human rights courts routinely encounter challenges in asserting their authority. In this vein, State parties, which initially agree to be legally bound by their decisions, may contest the scope of court rulings which establish that they have not complied with their human rights obligations by invoking arguments related to State sovereignty. As with other international legal institutions, they lack the ability to enforce decisions (see, for instance, the ECtHR case about voting rights for prisoners in the UK), they have their legitimacy contested, and they even have trouble finding financial support to maintain their institutional apparatus (the Organisation of American States, for example, had its budget cut by forty percent in 2016, upon deliberation by State parties). By becoming aware of my reluctance to criticize the object of my critique, I tried to mitigate the impulse to be more descriptive and selective about which findings I would share and critically develop in my analysis.

I have learned how to speak the hegemonic language of Western culture – which is the language that I use to write this thesis - navigate the theories and adapt to academic communities in the Global North. I share Chandra Mohanty's personal realisation that 'I no longer live simply under the gaze of Western eyes. I also live inside it and negotiate it every day' (Mohanty, 2003, p. 530). Like Mohanty, I have learned to be assimilated within Western (and Global North) hegemonic frames, which contain as many (if not more) continuities as ruptures with their imperial-colonial legacies. To be assimilated, I normalised or turned a blind eye to how States ascribe rights and afford treatment to human beings according to migratory or citizenship status, reproducing postcolonial inequalities. I have obediently abided by rules that create inequalities and hierarchies among human beings, so that I could gain legal migratory status, a 'privileged' position in relation to compatriots and other foreigners. Many foreigners like me do not have the same right to freely move across the borders or remain in the States where I have lived, often living with 'illegal' status and unable to seek the protection of the law when their human rights are threatened or breached. My status of 'legal migrant' has given me membership, albeit temporarily, to Global North societies. This membership has helped me gain access to resources and opportunities to study and research, among which this doctoral dissertation, that I would not otherwise have.

I have felt ambivalent about receiving a fellowship from the European Commission, receiving such generous incentives and support from European institutions and people when undertaking my research while fleshing out a critique of Eurocentric hegemony. Similar feelings arose when thinking more critically about elitism in legal occupations. As I attempted to gain insight into legal practitioners' personal narratives, I felt ambivalent about critiquing classism and elitism in the legal profession (of which I also feel part). I suggest that 'living inside Western eyes' and using Global North theories might limit my critical ability because critique is ignited by a transgressive and resisting spirit, whereas I have often sought to be compliant and obedient to norms and boundaries. Distrust in my own voice has been an issue repeatedly highlighted by my supervisors while writing the thesis. These personal reflections that I share with you, my reader, are an invitation to read my thesis with critical eyes and use them as a starting point to identify

further blind spots and biases, as well as gaps in knowledge or reasoning. My epistemic ignorance (Gilson 2011) derives as much from my academic privilege as it does from my sense of non-belonging in the spaces I occupy as a researcher. Hopefully, my epistemic failures might be addressed in future research or critical engagements with the present work.

## Chapter 4 - Framing the threshold for 'inhuman': hierarchies of vulnerability

### Introduction

The concept of vulnerability has been increasingly used by the European Court of Human Rights ('ECtHR') and the Inter-American Court of Human Rights ('IACtHR') to establish special protection for 'vulnerable groups' and demand higher standards of State accountability (Beloff and Clérico 2016; Ippolito and Sánchez 2015; Peroni and Timmer 2013). These supranational courts have a significant power to tackle structural patterns of human rights violations by interpretively fleshing out the scope of human rights and corresponding State duties. As discussed in Chapter 2, legal scholars have assessed the emergence of 'vulnerable groups' in human rights courts' case-law as signaling progress and improvement in legal reasoning (Beloff and Clérico 2016; Peroni and Timmer 2013). In the ECtHR, Timmer (2013) argues that the use of vulnerability can foster context-sensitive interpretation of human rights violations against groups recognised as vulnerable. Despite compelling claims that the recognition of 'vulnerable groups' in specific contexts can indicate an evolution in the interpretive frameworks of human rights courts, by the same token, these courts also exercise the power to dismiss claims of vulnerability in other contexts. In this chapter, I suggest that human rights courts might lose perspective about *which* relations and structures of vulnerability perpetuate harm and *how* they are reproduced through laws and policies by focusing on ascertaining *who* should be entitled to the vulnerable label.

My contention here is that hat human rights courts' method of assigning the vulnerable label to applicants and groups is grounded on selective processes of recognition of vulnerability. This selectivity, I argue, happens due to problematic assumptions of group-vulnerability as a fixed characteristic, and denial of agency to those considered 'vulnerable'. I suggest that dismissing the vulnerability of applicants who find themselves in dehumanising situations but do not fit into the archetype of 'ideal victim' (Christie 1986) reinforce systemic patterns of human rights violations. As I discussed in the Introduction, vulnerability is often a proxy to identifying a person with the 'ideal victim' typology that exists in social imaginaries,

associated with weakness, frailty or passivity and without agency. While appearing to address social inclusion concerns by incorporating the need for 'special protection' of marginalised groups, I suggest that these interpretive processes of framing 'vulnerable groups' may produce implicit exclusions. To support my claim, I examine how vulnerability in the legal reasoning of human rights courts can have an exclusionary effect in two ways.

Firstly, dismissing the vulnerability of an applicant who claims to be vulnerable might indicate failure to recognise structures of precarity and 'slow violence' (Nixon 2009). Rob Nixon discusses the invisibility of 'slow violence' stemming from environmental catastrophes and neoliberalism in opposition to traditional understandings of 'spectacular violence', which are 'immediate and explosive'. Slow violence, for Nixon, is not instantaneous, but incremental; it might disproportionately affect certain populations and spares others. To tackle slow violence, Nixon suggests that we confront the politics of the visible and the invisible. Given our 'temporal bias' towards spectacular violence, he suggests we pay attention to the vulnerability of those who are made 'disposable' by capitalism (Nixon 2014). As discussed earlier, I suggest that Global South migrants have been subjected to forms of slow violence arising from postcolonial power imbalances, which are sustained and reproduced through legal and political architectures supported by the State. These laws and policies render certain populations disproportionately vulnerable to systematic patterns of human rights victimisation as they live in refugee camps, detention centers or perpetual illegality.

Secondly, by recognising certain groups as vulnerable (such as asylum-seekers) and, by opposition to those groups, dismissing the vulnerability of others (such as economic migrants), these courts may reinforce the stratification of migrants across intersectional categories, entrenching disadvantages and privileges in the normative framework of State duties in relation to migrants and citizens. Migration is fostered by prospects of better socioeconomic opportunities and resources (including extreme cases of ensuring survival, such as refugees fleeing from persecution or war). This infrastructure, upon which human

beings depend to exercise their human rights, freedoms and agency, has developed unequally, bringing about the unfair distribution of wealth, power, technology and opportunities.

Recognition entails the power to frame, as well as the power to dismiss who can be 'vulnerable' for the purposes of court proceedings and adjudication. Exercising this dual power can for instance mean that courts will consider a lower threshold than they normally would to rule that someone is a victim of inhuman and degrading treatment[50]. As a consequence, otherwise invisible harms pertaining to subjects considered 'vulnerable' are made visible and can be tackled when courts bring them to the fore as human rights violations. In many cases before human rights courts, these harms would not entail legal implications to the same degree without the weight given to considerations of vulnerability. Indeed, novel ways of framing the 'vulnerable subject' can shed light on hidden harms and also new juridical avenues to address situations which disproportionately affect certain individuals or groups under the rubric of vulnerability. By the same token, other normalised harms in society which disproportionately affect particular groups may remain unchallenged. In this chapter, I analyse the under-examined implications of the ECtHR's uneven recognition of vulnerability in intersecting contexts of migration, age, health and gender, with an Inter-American counterpoint.

Judith Butler (2006) describes vulnerability as a prerequisite for humanisation, which in turn is differently assigned to subjects in consonance with variable gendered, racialised, sexualised, ableist and class-based norms of recognition. But being recognised as 'vulnerable' might also work as a mode of de-humanisation through narrow modes of framing. Essentialising the subject as ontologically disadvantaged, for example associating women with helplessness and frailty and envisaging paternalistic solutions to gender inequality issues, paves the way for narrow legal remedies. My contention here is that the 'vulnerable' subject is constructed by opposing vulnerability to agency in human rights courts. By the same

50 For example, *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.

token, I suggest that legal practitioners conceive of their own position in the agency/vulnerability spectrum by constructing their subjectivity as 'invulnerable', inasmuch as the ideal of invulnerability is often valued and conflated with strength, independence and agency. In other words, legal experts shape their epistemic subjectivity, that is, their subjective position as 'knowers', within a legal frame which treats 'vulnerable' subjects differently than those whose vulnerability is not recognised. As legal practitioners navigate their understandings of vulnerability in situations where migrants claim to be victims of inhuman or degrading treatment[51], interpretive patterns emerge, which highlight spotlights and blind spots in vulnerability reasoning.

Whereas subsequent chapters will examine how legal professionals in these supranational judicial systems understand and apply the concept of vulnerability, this chapter is dedicated to an examination of how power relations shape structures of vulnerability within legal discourse. More specifically, I will analyse judgments in the Strasbourg Court's case-law involving migrant applicants and claims of inhuman or degrading treatment. I will argue that the ECtHR's framing of migrant applicants as vulnerable might not be, as previous research suggests (Peroni and Timmer 2013), a step towards social justice through recognition and redistribution (Fraser 2005; Fraser 1998). Rather, I contend that recognising certain migrant applicants as vulnerable (and not others) creates a hierarchy of vulnerability which, in certain cases, may perpetuate transnational forms of social injustice.

Subscribing to the theory that South-North migration is the legitimate pursuit of 'Third World' subjects to achieving the goal of de-colonisation (Achiume 2019), I contest how the ECtHR breaks down the larger category of migrants into piecemeal subgroups whereby certain migrants are selectively recognised as vulnerable and not others, even when they face similarly de-humanising situations of precarity (Butler 2009, p. 25). This selectivity indicates that the ECtHR's decisions can, albeit unwittingly,

[51] Under Article 3 of the European Convention on Human Rights.

be complicit in fostering a central premise of the European colonial project which goes against the heart of the human rights movement: the idea that some individuals can be treated as less than human or as sub-human. I suggest this division between humans and sub-humans is accomplished by rulings which establish narrow frames of recognition of vulnerability, as I will attempt to illustrate in cases involving migrants and claims of grave human rights violations such as subjection to inhuman or degrading treatment and slavery-like exploitation.

In this chapter, I will analyse cases whereby migrants are recognised as vulnerable and the risks and consequences of such processes of recognition. I will underscore the exceptional nature of these cases, arguing that the ensuing hierarchy of vulnerability may work to reinforce the idea that, as a rule, migrants are dangerous others, bar strict exceptions. Moreover, providing special treatment to narrow vulnerable categories of migrants might actually work against an emancipatory project of human rights for migrants. Instead, it can negate a transformative decolonising project and foster a covert de-humanising agenda inherited from colonialism. This defeats the very essence of human rights law and its universalist promise by reproducing a hierarchy of human beings according to categories such as national status, gender and age, condoning legal and political structures which disproportionately victimise certain populations and supporting palliative measures rather than tackling the root causes of structural violence.

From an intersectional approach (Carbado et al. 2013; Crenshaw 1989, 1991), I flesh out the contours of the alleged 'bias' of the Strasbourg Court in favour of the State to the detriment of migrants (Dembour 2015) by exploring cases involving refugees and asylum-seekers, economic migrants and undocumented children, ill migrants and migrant women. In the following sections, I contend that 'othering' the migrant applicant may occur either by denying her vulnerable status or via harmful essentialisations. Firstly, I will briefly discuss how the IACtHR has recognised undocumented migrants as vulnerable, a recognition which the ECtHR has resisted to make thus far. Secondly, I will examine how certain migrant applicants are recognised as vulnerable at the intersection of illness/disability and illegality. Thirdly, I will

explore how migrant children are constructed as vulnerable, a vulnerability that the ECtHR recognises despite illegal status. Finally, I will analyse the gendered shaping of vulnerability, with a focus on cases concerning migrant women.

## Framing the (in)vulnerable economic migrant

The European and the Inter-American human rights courts have a dual jurisdictional role Both courts issue judgments that settle contentious cases, as well as advisory opinions which clarify the application of their respective Conventions to concrete legal questions.[52] In this section, I discuss how the vulnerability of migrants is conceptualised in the IACtHR's advisory opinions and the ECtHR's judgments. Through advisory opinions, the courts perform a consultative role to States by providing guidance and clarification on how they should interpret and apply their respective Conventions and other provisions of international human rights to specific contexts. Through judgments, the courts perform a contentious role which consists in resolving concrete disputes between individuals and States by applying the law to make binding decisions about States' specific legal obligations. In contrast with judgments, advisory opinions have a non-binding nature; however, they set important interpretive legal standards and give authoritative guidance on complex legal issues.

Despite these differences between the courts' advisory and adjudicative roles, I chose to look not only at judgments but also advisory opinions in this chapter because they are both important sources of data on how judges conceptualise vulnerability; thus, they were both relevant to my analysis. Both types of legal text provided invaluable insights into how judges conceptualised vulnerability in the context of migration. Thus, advisory and contentious proceedings offered relevant materials to critically examine judicial understandings of migrant vulnerability in my research. Furthermore, advisory opinions and judgments

[52] The advisory jurisdiction of the courts is provided by article 64.2, ACHR and Protocol No. 16 to the ECHR.

alike are issued through decision-making processes which abide by the courts' rules of procedure and are authoritative legal sources of international human rights law. In other words, both advisory opinions and judgments are incorporated into the courts' bodies of jurisprudence to guide States on how to comply with their legal obligations under human rights conventions and other applicable norms of international law.

In Advisory Opinion OC-18/03[53], the IACtHR recognises the vulnerability of undocumented migrants, putting forward their position of disadvantage in relation to nationals and residents. This Advisory Opinion summarizes discrepancies of power underlying migrant vulnerability which contain persuasive and important considerations for national and international judges, academics and policy-makers (Cleveland 2005):

> Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State…
>
> Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity.

Moreover, the Court acknowledges the ideological dimension of vulnerability, stressing how it varies according to particular temporal and geographical settings, that is, to the extent to which each State's juridical and institutional structures in a historical period perpetuate inequalities between migrants and nationals. The vulnerability of irregular migrants, under the terms of the Court, is inscribed within an expansion of normative grounds for non-discrimination, raising this principle to the category of peremptory

53 Advisory Opinion OC-18/03, "Juridical Condition and Rights of Undocumented Migrants", OC-18/03, Inter-American Court of Human Rights (IACtHR), 17 September 2003.

norm, or 'jus cogens'[54]. Peremptory norms inhabit the top of the hierarchy of importance in international law. As Beduschi (2015) suggests, by categorising non-discrimination against irregular migrants as jus cogens, the aim of the IACtHR was to increase protection of vulnerable undocumented migrants, a position which was reiterated in subsequent cases.

Similarly, in Advisory Opinion OC-21/14[55], the IACtHR applied vulnerability analysis to enhance protections of migrant children. The IACtHR asserts that migrant children are doubly vulnerable by virtue of their situation of migration, in addition to their age. This legal opinion imposes on States a special commitment to guarantee and protect migrant children's human rights, focusing on the transversal criterion of age, but urging them to also take into account:

> … other personal factors, such as disability, being a member of an ethnic minority group, or living with HIV/AIDS, as well as the particular characteristics of the situation of vulnerability of the child, such as a victim of trafficking, or separated or unaccompanied, for the purpose of determining the need for specific additional positive measures.

Furthermore, the San Jose Court continues on to affirm that children who are unaccompanied by their families and female children may be more vulnerable to human trafficking for labour and sexual exploitation. The IACtHR calls upon States to fight trafficking with investigations, victim protection and media campaigns.

The IACtHR's detailed legal reasoning which delves into power asymmetries and the complexity of interacting vulnerability factors for individuals in contexts of migration is not replicated by the ECtHR. In fact, in a case involving economic migrants, the Strasbourg Court recognised the applicants as vulnerable

[54] Jus cogens is '[a] rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions' (Law 2018).

[55] Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection", OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014.

in the judgment issued by the Second Section, but subsequently denied them recognition as vulnerable in the Grand Chamber ruling, a change which was criticised in academic commentary as 'one step forward, one step back'(Venturi 2017). *Khlaifia v Italy* [56] was a case which concerned three Tunisian nationals who were intercepted by Italian authorities in their attempt to reach Italy during the Arab Spring. The applicants, all male adults, were transferred to an early reception centre (CSPA) in Lampedusa and detained alongside hundreds of other Tunisians in the same situation. Following a riot which culminated in a fire and violent confrontations between Italian police officers and foreign nationals, approximately 300 detainees marched on the streets of Lampedusa to protest their upcoming forced repatriation, chanting 'freedom'. [57] The applicants were then transferred to Palermo, held for several days with others in two harbored ships, before they were sent back to Tunisia.

The applicants were considered vulnerable by the Second Section of the ECtHR because they had experienced a 'dangerous journey on the high seas'. [58] Although they had been detained in the Lampedusa CSPA for a relatively short amount of time (a few days), the Chamber ruled that there had been a violation of their right not to suffer inhuman and degrading treatment. Similar to previous cases found in the ECtHR's case-law[59], recognising vulnerability was a decisive factor in determining that the situation endured by the applicants reached the level of severity of ill-treatment to fall under article 3 of the ECHR. Had they not been considered vulnerable, it stands to reason that the Chamber would not have ruled that their short stay

[56] *Khlaifia v Italy*, appl. 16483/12, Second Section Judgment (ECtHR), 1 Sep 2015.

[57] BBC News Italian police battle Tunisian migrants on Lampedusa, 21 Sept 2011.

[58] *Khlaifia v Italy*, appl. 16483/12, Second Section Judgment (ECtHR), 1 Sep 2015.

[59] The cases of Brega v. Moldova, no. 52100/08, 20 April 2010; T. and A. v. Turkey, no. 47146/11, 21 October 2014; and Gavrilovici v. Moldova, no. 25464/05, 15 December 2009, concerned periods of forty- eight hours, three days and five days respectively, as cited in *Khlaifia v Italy*, appl. 16483/12, Second Section Judgment (ECtHR), 1 Sep 2015, Paragraph 143.

in the overcrowded facility in Lampedusa amounted to a human rights violation and that these applicants were in fact, in the eyes of the Court, human rights victims.[60]

Regrettably, when the case was referred to the Grand Chamber, the ECtHR shifted its position, not endorsing the Chamber's decision regarding the violation of article 3.[61] The Grand Chamber argued that despite the fact that 'the applicants were weakened physically and psychologically because they had just made a dangerous crossing of the Mediterranean', they were not asylum-seekers as in the case of *M.S.S. v. Belgium and Greece* [62] and thus, they 'did not have the specific vulnerability inherent in that status', nor did they claim to have endured traumatic experiences in their country of origin, nor were they elders, minors or afflicted by a particular medical condition[63].

Ana Beduschi (2015) claims there exists a problem of perception of undocumented migrants as 'individuals who are appropriately deprived - or less entitled to - human rights' and asserts the importance of human rights courts and international instruments in shoring up these rights and defining their content. Asylum-seekers and refugees rely upon a robust set of judicial decisions, institutions and norms in international law, in addition to widespread media coverage which countenance the idea of this particular group is worthy of compassion due to their hyper-precarity (Lewis *et al.* 2015). By contrast, undocumented

60 The conditions in the Lampedusa CSPA included being obliged to sleep on a concrete floor outside, eat meals sitting on the ground, use toilets in appalling conditions without knowing when their legal status would be resolved, Paragraph 142.

61 My analytic focus on the case of *Khlaifia v Italy* is on Article 3 (ECHR) due to the relevance of vulnerability reasoning in the judges' decisions about whether a violation under this article had occurred. The Grand Chamber judgment (2016) reversed the ruling of the Second Section (2015) which had lowered the threshold for inhuman or degrading treatment and ruled that there had been a violation under Article 3 (ECHR), arguing *inter alia* that the applicants, who were economic migrants, were vulnerable. However, note that the Second Section of the Court had found additional violations of Article 5, Article 13 and Article 4 of Protocol No 4 of the ECHR. The Grand Chamber decision confirmed that Italy had breached Article 5 (right to liberty and security), but reversed the Second Section ruling with respect to the other alleged breaches, holding that there had been no violation of Article 3, Article 13 or Article 4 of Protocol No 4 (ECHR). See Goldenziel 2018.

62 *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.

63 *Khlaifia v Italy*, appl. 16483/12, GC Judgment (ECtHR), 15 Dec 2016, Paragraph 194.

migrants do not easily escape 'othering' strategies, especially due to the ascription of illegal or even criminal status, often embodying the imagined idea of the dangerous other, who 'autonomously' chose to migrate, rather than being forced to flee in order to survive, hence incurring a blameworthiness and a threat to the security of citizens. If migrants, especially those who live in illegality, incarnate 'the ideal offender' in social imaginaries (Christie 1986), less sympathetic responses are likely to arise, casting a shadow upon their vulnerability and victimisation. The vulnerability of the undocumented migrant is hardly recognisable due to the fact that she/he is perceived a potential risk to aggravating the vulnerability of others, particularly citizens. Concerning the recognition of Khlaifia and other economic migrants as vulnerable in the Chamber and the Grand Chamber overturning this interpretation, Aiden (Judge) summarizes:

> The Grand Chamber changed the conclusion of the Chamber… and said that since they were not asylum-seekers, [and] the applicants: they were in good health, they were young; so the Court could not consider them vulnerable persons.

Relatedly, although Judge Raimondi considered the situation that the applicants had endured in the CSPA as having reached the required threshold of severity to constitute inhuman and degrading treatment when he integrated the Chamber of the Second Section, he became convinced otherwise on the bench of the Grand Chamber. On his Concurring Opinion, Judge Raimondi explains the reasons why he departed from his initial finding:

> [I]n view of the exceptional nature of the situation and other factors such as the applicants' young age and good health, and especially the brevity of the period in which they were exposed to the undeniably difficult living conditions [64].

[64] Concurring Opinion of Judge Raimondi, *Khlaifia v Italy*, appl. 16483/12, GC Judgment (ECtHR), 15 Dec 2016, Paragraph 5.

Moreover, Judge Raimondi weighs 'the situation of extreme difficulty facing the Italian authorities at the relevant time on account of an exceptional influx of migrants'[65], placing emphasis on the 'exceptional situation in 2011' surrounding the Arab Spring whereby 'significant arrivals of migrants and a humanitarian crisis' had placed 'many obligations on the Italian authorities…creating organisational and logistical difficulties'[66]. In a similar vein, Judge Dedov's dissenting opinion sided with the Italian State, arguing that 'the authorities provided the applicants with all necessary assistance to save their lives', but '[i]n spite of that, the applicants refused to cooperate with the authorities and created inconvenience for other lawful residents, participating in a riot which caused mass disorder'. Judge Dedov also asserted that 'the applicants had put themselves in an unlawful situation, contrary to the presumption of the sovereign right of any State to control its borders', and that limiting the period of detention strictly to the time necessary to confirm the migrant's identity and lawfulness of entry into Italy 'would place an excessive burden on the authorities', given the 'critical situation of mass migration of aliens, when thousands of irregular migrants simultaneously arrive on the Italian coast'. When I interviewed him, Judge Dedov explained how physical strength, youth and being male indicated that, in his view, the applicants were not vulnerable, placing them on the other pole of the vulnerability/ agency spectrum as 'invulnerable' and hence, individually responsible for their own wellbeing:

> [S]o this is the first case where the Court said: you should take care of these people who arrive at your border, you should take care of them. (…) I disagreed with the majority, in fact, saying that 'no, they were not vulnerable and vulnerability should not be taken into account because they are strong men, young men, who should [take] care of themselves.[67]

[65] Ibid., Paragraph 6.

[66] Ibid., Paragraph 4.

[67] The majority reasoning also disavowed the vulnerability of the applicants, and Judge Dedov's dissenting opinion departed from the judgment regarding the finding of violation under Article 5 of the ECHR, namely the right to liberty and security.

Dismissing the vulnerability of economic migrants in the case of *Khlaifia v. Italy*, Judge Dedov frames individual resilience as the duty of young men, regardless of considerations pertaining to the economic and geopolitical locus which they inhabit and how these forms of slow violence, which curtail their ability to enjoy and exercise human rights due to unequal distribution of vulnerability and precarity, could render applicants vulnerable. Relying on an assumption inferred from an a-contextual inference of applicants' duty to 'take care of themselves', the focus on resilience and agency shifts the focus away from legal and political structures which create or aggravate vulnerability, such as inequalities deriving from neocolonial and neoliberal resource distribution.

I argue that this perspective on the invulnerability of economic migrants shared by Judges Raimondi and Dedov, which was adopted by the Grand Chamber, promotes a stratification of Third World migrants by opposing the vulnerability of some, namely asylum-seekers, or women and children, to the invulnerability of others, that is, adult male economic migrants. When the Court highlights the 'excessive burden… imposed on national authorities', who 'were burdened with a large variety of tasks' in face of the 'exceptional nature of the Arab Spring crisis in 2011', greater weight is assigned to the difficulties of European authorities than to the predicament of economic migrants [68]. These arguments attempt to justify the failure of the State in protecting the alleged victims; it also justifies forgoing a more attentive look to the vulnerability of neocolonial subjects. Furthermore, this line of reasoning reinforces a static and narrow framing of vulnerability as equating to helplessness and frailty, setting out as inconceivable that young and strong adult men could be considered as vulnerable in that situation of humanitarian crisis.

The narrative put forward by Judge Dedov in his dissenting opinion provides us with other contextual elements and assumptions regarding the relationship between authorities and migrant applicants, namely that 'applicants had put themselves in an unlawful situation, contrary to … the sovereign right of

[68] *Khlaifia v Italy*, appl. 16483/12, GC Judgment (ECtHR), 15 Dec 2016, Paragraphs 80 and 183.

any State to control its borders', 'authorities provided applicants with all necessary assistance to save their lives' and '[i]n spite of that, the applicants refused to cooperate with the authorities and created inconvenience for other lawful residents, participating in a riot which caused mass disorder'[69]. The riot mentioned by Judge Dedov refers to a revolt which broke out in the CSPA a few days after applicants arrived which seemed to be correlated with the precarious reception conditions of the overcrowded and police-surveilled detention center[70]. A fire ensued and migrants were relocated to a sports complex on Lampedusa, where approximately 1,800 people evaded police surveillance and walked to the village to demonstrate against the treatment they were receiving. Confrontations between the local population and the migrants ensued, as well as acts of self-harm and 'vandalism' [71].

The demonstration in Lampedusa can be seen through Butler's (2016) conceptualisation of certain modes of resistance 'that emerge in opposition to failing infrastructure… as public resistance leads to vulnerability, and vulnerability (the sense of 'exposure' implied by precarity) leads to resistance' [72]. In this way, this public assembly can be interpreted as a form of resistance not only to the de-humanising treatment of Italian authorities and receptions conditions, but also to the precarity which preceded their migratory attempt and stemmed from neoliberal and neocolonial maldistribution of resources and opportunities which characterize the Global North/South division. Butler posits that the study of public assembly 'confirms that

[69] In his partly dissenting opinion to the GC Judgment in *Khlafia v. Italy*, Judge Dedov contended that applicants' deprivation of liberty (Article 5) was lawful because it satisfied the principle of legal certainty.

[70] Anti-racist associations filed a complaint denouncing the treatment suffered by migrants after the revolt. (Par. 22) The investigations judge from Palermo depicted the 'dangerous migrant other' when narrating the facts, describing 'Tunisians had carried out an arson attack, seriously damaging the CSPA' and 'clashes … between the local population and a group of foreigners who had threatened to explode gas canisters'. The judge concluded that 'no malicious intent could be attributed to the authorities, whose conduct had been prompted first and foremost by the public interest and [t]he migrants had not sustained any unfair harm' (Par. 26).

[71] Paragraph 182.

[72] Paragraph 14.

political resistance relies fundamentally on the mobilisation of vulnerability, which means that vulnerability can be a way of being exposed and agentic at the same time' (Butler 2016, p. 24).

Judge Dedov's opinion understates economic migrants' acts of resistance by effacing any consideration of their vulnerability and framing demonstrations as disorderly actions perpetrated by the applicants. Moreover, Judge Dedov mentions that Italian authorities had 'saved their lives' while migrants were inconvenient and provoked a violent disturbance that affected 'lawful residents', a narrative that frames applicants as ungrateful foreigners who are undeserving of empathy or compassion and at the same time effaces the perception of their vulnerability. Not only does this narrative disavow the vulnerability of economic migrants, it does so by discursively shaping the migrant 'other' The migrant other is dangerous and undeserving of higher standards of human rights protection regardless of their experience of vulnerability, violence or oppression, given that they should be responsible for their 'choice' to illegally migrate despite the risks and to disturb an Italian community of lawful residents.[73] In that way, the Global South other, when emphasis is given to his/her agency, becomes a threat to the Global North citizen.

When considering the logic of economic migration from the Global South to the Global North, the specific vulnerability of migrants from the Arab Spring as well as the treatment endured in the hands of border control authorities in Europe, the European identity in relation to the Tunisian identity occupies a position of epistemic privilege and simultaneously ignorance, similar to the 'white ignorance' of experiences of racism (Gilson 2011). This theoretical formulation rests on the binary opposition between agency and vulnerability within frames of recognition, as instantiated by stereotypical notions of gender

[73] "Building resilient subjects involves the deliberate disabling of the political habits, tendencies and capacities of peoples and replacing them with adaptive ones. Resilient subjects are subjects that have accepted the imperative not to resist or secure themselves from the difficulties they are faced with but instead adapt to their enabling conditions. (…) Resistance here is transformed from being a political capacity aimed at the achievement of freedom from that which threatens and endangers to a purely reactionary impulse aimed at increasing the capacities of the subject to adapt to its dangers and simply reduce the degree to which it suffers." (Evans and Reid, 2013: 85).

roles, assigning autonomy to men and vulnerability to women. In addition to 'othering' migrants, I suggest adhering to essentialising identity frameworks is another contributing factor to the injustice of mis-framing (Fraser 2005). In other words, disavowal of economic migrants' vulnerable status despite the existence of contexts of vulnerability is an unjust form of misrecognition premised upon preconceived ideas of what a vulnerable person should be. As an example, Olivia's (Judge, ECtHR) remarks suggest that a hierarchy of vulnerable identities precedes and informs the assessment of a concrete case:

> [In] *Khlaifia* [v. Italy], they are mainly men. And then you can ask: are male migrants, by definition, less vulnerable than children and women? I think so in general.

Regarding intersectional sources of vulnerability, the Grand Chamber notes that the applicants were not asylum-seekers, thereby not having 'the specific vulnerability inherent in that status and did not claim to have endured traumatic experiences in their country of origin'; nor did they belong to the 'category of elderly persons nor to that of minors' and 'did not claim to be suffering from any particular medical condition' [194]. Albeit unwittingly, reluctance to recognise the vulnerability of economic migrants might be a form of implicit othering of adult men who migrate from developing countries, legitimising epistemic violence within human rights legal praxis.

As E. Tendayi Achiume posits, economic migration can be considered as a form of decolonisation, arguing that 'justice in immigration from Third World to First must, in important part, be a function of the distributive justice and remedial implications of the failures of formal decolonisation' (Achiume 2019, p. 1520). Achiume contends that the wealth of resources and opportunities that characterize the idea of a 'better life' in Global North countries, such as desirable educational and employment prospects, is a ramification of colonial advantage. Moreover, the refugee category according to Achiume would be an example of 'political stranger exceptionalism', an exception to the unequal power held by Global North States to exclude the Global South migrant as 'unlike the refugee, whose international flight is by definition a last resort, the term economic migrant is… popularly and legally understood to be a matter of preference, defined by a fair degree of political agency, and motivated primarily by the desire for a better life' (p. 1513).

In other words, emphasis on political agency and choice may eclipse recognition of the slow violence of situations of vulnerability to which Global South migrants are subjected in their country of departure, including dispossession, exploitation or violence, as well as the politically-induced and legally-created precariousness when they arrive in their country of destination. Failing to recognise the economic migrant as vulnerable entails granting States permission to legally exclude populations through border control and watch idly by as they die in the Mediterranean[74] - with the exception of refugees and asylum-seekers - and still be recognised as States that are compliant with human rights standards. Eschewing the vulnerability of economic migrants contributes to perpetuate a neocolonial project of exclusion of Global South migrants. It reinforces patterns of human rights violations while leaving the legal and political structure that sustains it unchallenged.

## Exceptionality and high thresholds for framing vulnerability

The ECtHR has extended the prohibition of torture and inhuman or degrading treatment or punishment[75] to 'naturally occurring illnesses, physical or mental… where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible'[76]. In this context, the Strasbourg Court has established case-law to prevent States from deporting seriously ill irregular migrants, provided that certain requirements are met. In *N v. UK*[77], a landmark Grand Chamber case, the Court set out an extremely restrictive approach in assessing the criteria to consider that deportation would risk subjecting the migrant applicant to inhuman or degrading treatment

74 Achiume also contests 'extant international migration frameworks and state policies whose predictable and escalating by- products include dead bodies of migrants in the Mediterranean and the enslavement of others attempting perilous journeys' (2019, p. 1532)

75 Article 3, ECHR.

76 *N v. the United Kingdom*, app. 26565/05, GC Judgment (ECtHR), 27 May 2008.

77 Ibid.

in her home country. The case concerned a Ugandan national who had HIV/AIDS and was facing removal proceedings in the United Kingdom. The Court ruled that deporting the applicant back to Uganda would not give rise to an Article 3 breach, despite the fact that first, she was suffering from a serious illness and the facilities for the treatment of her disease in Uganda would be inferior to those available in the UK; and secondly, that her life expectancy would be significantly reduced from decades to two years without the necessary treatment.

In the case of *N v. UK*, the Court's reasoning relied on the requirement of 'very exceptional circumstances' and also argued the following:

> [one should avoid upsetting] the fair balance inherent in the whole of the Convention between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights… [as] finding to the contrary would place too great a burden on States by obliging them to alleviate the disparities between their health-care system and the level of treatment available in the third country concerned through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdiction[78].

The decision disregarded considerations about the vulnerability of the applicant, which only appeared in dissenting opinions. Moreover, the judgment highlighted the applicant's medically-induced stable condition, in stark contrast to the vulnerability assessment carried out in the case of *M.S.S. v Beglium and Greece*. In the Court's analysis, the applicant's embodied vulnerability was dissociated from the contextual intricacies with respect to her medication-dependent health, soon to be deteriorated without appropriate healthcare. The likelihood of government-induced oppression in her home country was also ignored as a vulnerability-aggravating factor. The Court emphasised that the applicant's condition was stable and not critical by virtue of the antiretroviral medications she was taking in the UK. Moreover, it decided that assessing how fast her condition would deteriorate in Uganda and whether or not she would obtain medical

[78] *N v. the United Kingdom*, app. 26565/05, GC Judgment (ECtHR), 27 May 2008, Paragraph 44.

treatment and support from family would be speculations, dismissing the relevance of these risks. Numerous subsequent cases used *N v. UK* as case-law, declaring applications manifestly ill-founded or inadmissible for applicants who raised similar issues and suffered from HIV/AIDS or other physical or mental illnesses. The standard for considering that humanitarian considerations made it imperative to halt deportation procedures continued to rely on a judgment from the 1990s [79], a case concerning a St. Kitts national on his deathbed who faced the terminal stages of his disease.

Only by applying this extremely high 'die-with-dignity' standard would the ECtHR from then on deem a case of sufficient gravity to rule that the risk of removing the applicant would give rise to inhuman or degrading treatment. As a result, many European States continued to remove migrants from the Global South with serious illnesses to their home countries if their condition was 'under control' with medication administered in Europe and if they were considered 'fit to travel'. Similarly, the ECtHR's Second Chamber adjudicated a case (*Yoh-Ekale Mwanke v. Belgium*[80]) of a Cameroonian national who also suffered from HIV/AIDS. Interestingly, the Chamber followed the interpretation of *N v. UK*, but in a Partially Concurring Opinion, six of the seven judges who composed the bench in this case, expressed dissatisfaction with having to apply the excessively high standards of gravity of the disease (terminal stage, close to dying) but justified that their ruling followed the Grand Chamber ruling in *N v. UK*, on the grounds of upholding legal certainty. This shows that the biases of the ECtHR do not necessarily coincide with judges.

Fortunately, the ECtHR established less stringent standards on the case of *Paposhvili v. Belgium*[81], and differently from the case of *N v. UK*, this case contained many arguments for and against the particular vulnerability of the Paposhvili (respectively, made by the applicant and the Belgium government and

[79] *D v. the United Kingdom*, appl. 30240/96, Judgment (ECtHR), 2 May 1997.

[80] *Yoh-Ekale Mwanke v. Belgium*, appl. 10486/10, Second Section Judgment (ECtHR), 20 Mar 2012.

[81] *Paposhvili v. Belgium*, app. 41738/10, GC Judgment (ECtHR), 13 Dec 2016.

included in the judgment). Paposhvili was a Georgian national who had chronic lymphocytic leukaemia, a life-threatening disease, and was facing deportation. He died during judicial proceedings, but the court ruled in his favour nonetheless. The Grand Chamber ruled that the government had not examined the medical data and the impact of the removal on the applicant's state of health (even if not a terminal one), and if the applicant had been removed without such assessment, the State would have incurred in breach of Article 3. Three of the ECtHR judges I interviewed expressed their satisfaction with this outcome. However, I suggest that the slow evolution of the case-law and the new standards established for cases involving seriously ill irregular migrants still fall short of protecting their human rights on equal footing to the human rights of citizens and other lawful residents. Implementing deportation orders can equate taking away from migrants the medical treatment and access to health facilities to treat a serious disease. Even light of evidence that they will receive inferior treatment or no treatment at all in their home countries, under the current juridical standards of the ECtHR, States are legally permitted to deport ill migrants, bar exceptions.

In *Paposhvili v. Belgium*, the exceptionality of the cases where deportation would be halted was not contested in the judgment. Moreover, this judgment also upheld the need to strike a 'fair balance between the competing interests of the individual and of society as a whole', stating that State duties would vary according to this assessment. Although *Paposhvili v. Belgium* can be considered a progressive step from *N. v. UK*, it is difficult to understand how the interests of European society in deporting an irregular migrant, which are often labelled under national security and sovereignty arguments, would offer any compelling reason to impose that 'only in very exceptional circumstances' the State should not forcibly remove someone who has a serious medical condition. The wording of the judgment also left considerable margin of appreciation to national States. A high threshold of severity for Article 3, as it is the case of ill migrants, signifies low standards of protection to seriously ill people who could benefit from medical and health-related infrastructure in the country to which they migrated. This is an example of how recognising vulnerability does not suffice to uphold the human rights of migrants. Illegality and the state's right to exclude prevail over the human right of an irregular migrant not to suffer inhuman treatment, unless a very

high threshold of severity is reached. Thus, deporting sick migrants to States where they will not get the same standard of dignified care is accepted as legitimate State practice by the ECtHR.

This circles back to matters of distribution of resources, including medical technology and infrastructure, among Global North and Global South countries. From 'dangerous other', the irregular migrant who suffers from a serious illness only becomes the vulnerable Other if his prospects for agency are obliterated by a life-threatening disease. Conversely, European citizens' right to health is protected to a much higher standard, and this privilege is an implicit premise of the justification for excluding the migrant from the same level of protection and care. Vulnerability then emerges in opposition to agency, and the migrant is juridically shaped in opposition to the citizen. Consequently, the migrants' human right to health receives less protection than the citizens' human right to health, corroborating migrants' status as 'less than human', given that rights are only rights when corresponding duties ensue.

Liam (Judge, ECtHR)[82] states that it is more or less consensual that a child is always vulnerable. In this vein, Nuala Mole (legal director of the AIRE Centre, legal representative of victims before the ECtHR), candidly explains how a child's vulnerability can mobilise emotions in the public sphere:

> If, God forbid that it happens, but if a child were to die in one of those snow covered tents on Lesbos this week, in the snow, on a Greek island, if a child were to die there, something would happen. So if nobody dies, nothing happens.

As Mole graphically illustrates, highlighting the death of a child in this context sheds light on the bigger picture, which points not only to the relevance of vulnerability in bringing attention to an issue but also to which forms of vulnerability would trigger sufficient reaction for something to happen, or to elicit legal and political responses to address this issue. In this context, human rights courts can restructure State-migrant

82 Liam remarked that the fact that there were children involved in the case of *D.H. and Others v. the Czech Republic*, appl. 57325/00, GC Judgment (ECtHR), 13 Nov 2007., which I discuss in Chapter 1, played a relevant role to the recognition of vulnerability and favourable ruling of the Court.

relations by enacting decisions that alter the framework of State obligations with respect to the human rights of 'vulnerable groups'. Courts may respond to vulnerability of alleged victims by determining that the scope of State accountability should be broadened, for example in cases involving alleged victims who are migrants in a situation of perceived vulnerability. In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[83], a case concerning Tabitha, a five-year-old Congolese migrant, and her mother Pulchérie Mubilanzila. the ECtHR ruled that by placing the applicant child in a detention center for adults for months, unaccompanied by her parents, and subsequently deporting her, the Belgian State had violated her human rights not to be subjected to inhuman or degrading treatment and her right to liberty[84]. Instantiating how vulnerability analysis is incorporated into legal reasoning, the Court highlighted that the applicant was of a 'very young age', an 'illegal immigrant in a foreign land' and 'unaccompanied by her family'. The ECtHR then used these arguments to conclude that her 'vulnerability as a child' should prevail over her 'illegal status'.

In *Mubilanzila v. Belgium*, the applicant's age was a decisive factor to ruling on her victim status; had she not been a minor, it stands to reason that the Court would have ruled it differently, not assigning her the status of human rights victim and establishing that the State had failed its positive obligation to cater for the specific needs of children who are in a vulnerable situation, as the victim was detained under a law that had no special provisions for minors. The Court's legal reasoning was based on the assessment that Tabitha's vulnerability as a child prevailed over the illegality of her migratory status. The Court ruled that the mother of the child was also a victim of inhuman and degrading treatment for withstanding the distress and anxiety of her daughter's detention. As legal remedies, the ECtHR awarded the family 35,000 Euros for non-pecuniary damages. The case of *Mubilanzila v. Belgium* was cited in subsequent judgments concerning migrants. In the case of *Muskhadzhiyeva v. Belgium*[85], *Mubilanzila v. Belgium* was cited to

83 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, appl. 13178/03, First Section Judgment (ECtHR), 12 Jan 2007.

84 Articles 3 and 5, ECHR.

85 *Muskhadzhiyeva and others v. Belgium*, appl. 41442/07, Second Section Judgment (ECtHR), 19 Apr 2010.

strengthen standards of protection of the State in relation to migrant children. Conversely, in *Khlaifia v. Italy*, the case I examined above, *Mubilanzila v. Belgium* was invoked to justify not affording the same standards of human rights protection to adult migrants that were applied to migrant children. In other words, the ECtHR used the vulnerability of migrant children as counterpoint to implicitly embed the invulnerability of economic migrants in the jurisprudence of the Court.

On the one hand, human rights courts' recognition of illegal migrant children as vulnerable may make a dent in the othering scheme, bringing hope with regard to the possibilities of resisting oppressive State practices against undocumented migrants, such as placing them in detention centers. Conversely, should any breach of immigration rules be punishable with detention? Although this merits deeper scrutiny, crimmigration (Stumpf 2006) has already established an answer. Regarding the punitive tendency of states against migrants, crimmigration denotes a phenomenon that blurs the boundaries between criminal justice and immigration policy, as immigration laws increasingly rely on criminal law and crime control procedures and rules (ibid.). Immigration detention illustrates how the lines between immigration and criminal punitiveness have gradually become increasingly blurred (Bosworth 2017). Bosworth also warns about detention and expulsion abiding by a criminal punitive logic.

Citizens who belong to ethnic minorities and foreigners have constituted an increasing part of the prison populations in European countries since the 1990s (Melossi 2003). This stigmatising depiction of migrants as dangerous others leads to increased forms of lawful violence and coercion aiming at detaining, excluding, imprisoning, and marginalising migrants. Stumpf (2006) posits that the lines between criminal law and immigration law have merged and offers an explanation for such confluence rooted in membership theory. Insofar as criminal and immigration law converge by means of the expansion of the state's discretionary power, Stumpf argues that criminally convicted citizens and foreigners alike are excluded from membership in a collectivity stemming from a social contract. In other words, 'it marks out the boundaries of who is an accepted member of society' by restricting membership-deriving rights and

privileges, such as the right to vote or to remain in US territory (Stumpf 2006, pp. 377–378). In both criminal law and immigration law, the state is able to exercise its exclusionary power by morally condemning and stigmatising, as well as administering punishment, which creates both precarious forms of membership and 'bordered penality' (Aas 2014, p. 534).

In sum, whatever harms which arise from this systematic legal practice to the human rights of migrants will be naturalised harms inasmuch as detention centers are not contested on an overarching normative level, bar few exceptions made to those labelled as vulnerable. The ECtHR's selective recognition of 'vulnerable migrants' points to two conclusions. First, the Court maintains its reputation of looking after those thought to be the most vulnerable in social imaginaries, in consonance with public emotions of sympathy towards refugees and those who seek asylum, migrant children or victims of trafficking, whilst 'non-ideal' or 'non-vulnerable' migrants, whose vulnerability is not recognisable are excluded from the material reparations that such recognition may entail (Miers 1990, p. 221). Given that denying vulnerability often signifies a step farther from recognition as victims of inhuman and degrading treatment, this exclusion operates not only on a material level, but also through discursive, symbolic and juridical norms. Secondly, the court fails to address how systemic power imbalances between State and migrants who are illegal or whose legal status is uncertain profoundly affect recognition and protection of migrants' freedoms and rights, being conducive to the over-spilling effect of worsening victimising environments and potential. In this way, it establishes a threshold of recognisability which forecloses the reality of undocumented migrants, disregarding their position of vulnerability and disadvantage in the web of power relations that renders them susceptible to victimisation or to be more precise, applying selective sensitivity to their disadvantage, rendering it normatively salient in certain cases and being oblivious to it in others.

In cases involving migrant women, jurisprudential developments in the ambit of the ECtHR with respect to illegal migrant workers in gendered labour activities have gained scholarly attention and praise

(Mantouvalou 2013). In situations of gender-based violence, both the IACtHR and the ECtHR have recognised how women find themselves in a situation of vulnerability and have demanded higher standards of accountability from States. Stedman (2013) posits that both Courts have developed jurisprudence enhancing States' positive obligations to protect women's rights, bringing to the fore a progressive tendency of interpretation that appears to be in many aspects convergent. An important development of case-law on gender-based violence has led to holding States accountable for failure to take steps to prevent a violation from happening, or failure to duly investigate a violation that took place.

In *González et al. (Cotton) vs. Mexico*[86], the IACtHR ascribed State responsibility for actions perpetrated by private actors on the commission of violence against women in Ciudad Juárez, Mexico. According to Tiroch (2010), in this important case the Court engages into an extensive account of the contextual link of discrimination and gender-based violence. Tiroch concludes that positive obligations are not circumscribed to cases involving gender, but creativity in human rights interpretation can be a useful tool, carrying out gender-sensitive reasoning in consonance with societal evolution. Interestingly, in the *Cotton* Case, the IACtHR has explicitly made reference to an ECtHR's precedent therein, namely *Angelova and Iliev v. Bulgaria*[87], adopting its premise of the vigorous and impartial investigation required to strengthen minorities' confidence that the authorities will protect them from racist violent acts and thus considering not only the account of gender but also of race[88].

[86] *González et al. (Cotton) vs. Mexico*, Judgment on Preliminary Objections, Merits, Reparations, and Costs. (IACtHR), 16 Nov 2009.

[87] *Angelova and Iliev v. Bulgaria*, appl. 55523/00, Fifth Section (ECtHR), 26 Jul 2007.

[88] Expansive interpretation not only of concepts such as sexual violence, domestic violence and rape law, but also of provisions contained within the Conventions, combining different grounds for determining rights violations reveal a willingness by the Courts to consider gender-based violence as a particularly perverse sort of violence that contributes to overall impunity (for example, *Fernandez Ortega and Others v. Mexico*, Judgment on Preliminary Objections, Merits, Reparations, and Costs, 30 Aug 2010). By asserting that certain cases of extreme physical violence against women involving rape may be recognised as amounting to torture (for instance, *Aydin v. Turkey*, Judgment - IACtHR,

In certain cases, the ECtHR has displayed sensitivity to gendered forms of victimisation such as situations of vulnerability deriving from being trafficked and exploited for the purposes of sex work. In *Rantsev v. Cyprus and Russia*[89], Oxana Rantseva, Russian national, entered Cyrpus with an 'artist visa' to work in a cabaret. This artist visa scheme has been denounced as a gateway to allow for traffickers to smuggle women into Cyprus for the purposes of forced labour in the sex industry. Evidence showed that Ms. Rantseva had attempted to flee and go back to Russia. Following the request of her employer, the cabaret manager, the police refused to detain Ms Rantseva and declare her illegal status, asking her employer to collect her. She was then taken to the apartment of another employee by her employer. In the next morning, she was found dead with injuries consistent with falling from the balcony. By taking into account the vulnerability of victims of trafficking, as set out in the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), the Court held both Cyprus and Russia accountable for the human rights violations suffered by Ms. Rantseva.[90] Notably, the Court ruled on positive obligations arising in situations of trafficking, demanding that States, regardless of being a country of origin, transit or destination, undertake full and effective investigation to identify the occurrence of the phenomenon. In an excerpt from the judgment, the Court acknowledges the insidious and dehumanising nature of trafficking and correlated exploitation:

> The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere… It implies close surveillance of the activities of victims,

25 Sep 1997), the progressive tendency adopted by the Courts becomes evident, as the gravity and gender-specific oppression to which women are subjected in different contexts is highlighted.

89 *Rantsev v. Cyprus and Russia*, appl.25965/04, First Section Judgment (ECtHR), 7 Jan 2010.

90 The Court found that Cyrpus had violated Ms Rantseva's right to life (Article 2) by not pursuing a serious investigation; her right not to suffer torture or degrading and inhuman treatment (Article 3); her right to be free from slavery (Article 4); and finally her right to liberty (Article 5).

> whose movements are often circumscribed …It involves the use of violence and threats against victims, who live and work under poor conditions… [91]

However, in other cases, the persistent dangers of essentialising and stigmatising are not as critically addressed by the ECtHR. In *Siliadin v France*, a Togolese 15-year old girl who was lured into France by her employer under the false promise that she would be able to work and study ended up becoming an undocumented migrant domestic worker and was recognised by the ECtHR as a victim of servitude. In *C.N. v United Kingdom*[92], the applicant was a Ugandan woman who worked under exploitative conditions as a live-in carer. Similar to the reasoning in *Siliadin*, the Strasbourg Court recognised C.N.'s vulnerability, linking her vulnerable situation to subtler forms of coercion and control enabled by her undocumented status. In these cases, underlying power inequalities between workers and employers were, to some extent, identified and teased out by reference to irregular status as source of aggravated vulnerability. Moreover, in addition to their recognition as victims on the grounds of their right not to be subjected to servitude, the Court declared failure of the State to conduct proper investigations, imposing the duty to provide monetary compensation. In both sentences, the Court attempts to address victimising structures by setting out the need to consider domestic servitude as a specific criminal offense in order to afford effective protection to victims. Furthermore, a concern with the gendered nature of servitude and slavery can be found in the Court's assertion that contemporary slaves are migrant women who are domestic workers[93].

Intriguingly, in both cases the offenders were compatriots: in *C.N. v. UK*, P.S. was a relative who helped her get into the country and was in control of all of the wages she earned; in *Siliadin*, Mrs D. was a French national of Togolese origin who had promised her both employment and education opportunities in

91 *Rantsev v. Cyprus and Russia*, appl.25965/04, First Section Judgment (ECtHR), 7 Jan 2010, Paragraph 281.

92 *C.N. v the United Kingdom*, appl. 4239/08, Fourth Section Judgment (ECHR), 13 Fev 2013.

93 *Siliadin v France*, appl. 73316/01, Judgment (ECtHR) 2005, Paragraph 88.

France, but did not fulfill her promise, making her work in the house she shared with Mr. D. and months later 'lending' her to another couple [94], Mr. and Mrs. B, to perform years of unpaid labour under abusive conditions that, according to the ECtHR's ruling, amounted to servitude. In both cases, the applicants' passports were withheld by the offenders. The "innocence" of these victims with respect to their irregularity was demonstrated by the fact that someone else was in control, rendering them blameless for their illegal status. Moreover, offenders are characterised as sharing a national background with the victims, partially embodying the mythical foreign aura of the ideal offender. Although the national background of Mr. and Mrs. B were not informed, the judgment mentioned that Siliadin's father had consented to the work arrangement at their house and that, when she escaped, the applicant went back in obedience to her paternal uncle's advice[95].

## Framing the 'vulnerable migrant other'

Jo Doezema (Tiroch 2010) points out how Western discourses on trafficking may construct traffickers as evil foreign villains (p. 38). Although the harmful nature of the actions perpetrated by both offenders is undeniable, merely stating the need for State positive obligations to have adequate criminal provisions seems to strike a chord, albeit imperfectly, with Spivak's critique of 'white men saving brown women from brown men' (Spivak 1993, p. 92), as the understanding of harm in these cases is narrowly circumscribed within the reach of the colonial eyesight, producing the vulnerable victim as a subject in her subaltern position of weak, and exploitable insofar as her illegal status was not a direct result of her own actions, but of an evil offender, whose recurrent portrayal forms the ideal offender and shores up crimmigration practices and racist assumptions.

[94] 'Prêter', the French verb for 'to lend', was used with quotation marks in the description of this fact of the ECtHR's original judgment (Paragraph12).

[95] *Siliadin v. France*, appl. 73316/01, Second Section Judgment (ECtHR), 26 Jul 2005, Paragraph 34.

Stigmatising may also occur by means of essentialising migrant women, as the process of identifying vulnerability does not seem to follow clear guidelines and it is not consistently applied across all cases. For instance, in *R.H. vs Sweden*, a Somali asylum-seeker whose asylum application had been rejected, claimed she had fled a forced marriage and was at risk of sexual assault if deported. Despite recognising the widespread nature of violence against women in Somalia, the Court based its decision on evidentiary inconsistencies, arguing that the victim's statements were contradictory and inferring that she had 'access to both family support and a male protection network'[96], which thwarted her claim that she was vulnerable. By dismissing her vulnerability and deciding that deportation did not constitute a violation of her right not to suffer inhuman and degrading treatment, the Court regrettably disregarded underlying patriarchal elements that aggravated rather than mitigated her vulnerability, not to mention that it corroborated gender stereotypes which associate female vulnerability with male protection.

In another case cherished for its intersectional approach (Yoshida 2013), involving a Nigerian sex worker legally resident in Spain who was repeatedly a victim of physical and verbal abuse by police officers, the Court recognised the 'specific vulnerability of the applicant, inherent to her capacity of African woman exercising prostitution.[97]' Although the accumulation of different grounds of discrimination was identified, referring to her vulnerability as 'inherent to her identity as an African female prostitute' harbors deterministic assumptions about gender, race and line of work which might have hindered transformative responses. Despite the Court's awareness of intersecting systems of power, this awareness did not seem to have much impact in shaping additional State duties besides financial compensation to the victim.

96 *R.H v. Sweden*, appl. 4601/14, Fifth Section Judgment (ECHR), 10 Sep 2015, Paragraph 72. Admittedly, the expression 'male protection network' was used by the applicant; it is notwithstanding regretful that the Court uncritically adopted it, especially under a reasoning that utterly disregarded the applicant's account of the facts.

97 *B.S. v. Spain*, appl. 47159/08, Section III Judgment (ECtHR), 24 Jul 2012, Paragraph 62.

Although these cases may be seen as important advancements on protecting vulnerable migrant women (Mantouvalou 2013), a deeper critique of the power mechanisms underlying these contexts of vulnerability and subsequent victimisation can only be achieved by critically deconstructing references to women, or minority women undertaking precarious forms of labour as monolithic categories. The ideal victim, who is imagined as the helpless woman in need of protection (Christie 1986), can reinforce stigmatising patriarchal notions and block agency-fostering alternatives. In this regard, the racial element also plays a role in widespread depictions of victims 'deserving' of compassion, corroborating assumptions of passivity[98]. A narrow conceptualisation of vulnerability which stigmatises and essentialises victims as weak, helpless and disempowered may lead to strictly paternalistic and insufficiently progressive responses to deal with wider structures of power in which victimisation takes place. Thus, the ECtHR might engage in paternalistic decision-making when adjudicating cases which involve migrant applicants, missing the opportunity to challenge essentialistic assumptions about applicants and incorporate a more nuanced understanding of vulnerability into legal reasoning. As discussed in Chapter 2, Butler (2016) warns about the risks of reifying groups as 'vulnerable' in human rights discourse, perpetuating their position of powerlessness and lack of agency, while States and international institutions maintain all of the power to protect and advocate for their needs.

On essentialising migrants, Achiume (2019) defines economic migrants as a category viewed across the globe 'with suspicion, occasionally with pity, and increasingly with hostility' (p. 1512) [99]. A hierarchy of vulnerability in human rights discourse begins by framing categories of migrants within the

[98] Walklate (2011) warns that a politics of pity may privilege victim-targeted services that focus on the trauma of victimisation rather than concentrating, for instance, on the victim's ability to actively partake in the resolution of her personal experience of victimhood.

[99] I will use economic, irregular, illegal and undocumented interchangeably, even though all of these designations mean migrants of precarious legal status. Many illegal migrants have been asylum-seekers but their applications were denied; other lawful migrants who overstay their visas also become illegal; I exclude from my analysis economic migrants who are economically privileged and due to their class, have a very different experience of migrating, often calling themselves "expatriates".

agency/vulnerability continuum. Refugees are seen as being forced to migrate because they did not have any other choice; their vulnerability is recognised inasmuch as they are deprived of any sense of agency. By contrast, the same rationale would not apply to economic migrants. Economic migrants are seen as choosing to migrate.

Although agency is a positive value for citizens, the agency of migrants is seen as a threat to the security of citizens. Dismissing the vulnerability of migrants implies denying that their disadvantage is shaped as the privilege of citizens is upheld. In this way, this strategic form of ignorance or dismissal buttresses the reproduction of neocolonial inequalities and hinders the redistribution of resources and opportunities between Global South and Global North nationals, by normalising entrenched privileges and disadvantages. More than a matter of distribution, this juridical omission reinforces patterns of human rights victimisation which disproportionately affect Global South migrants. I am thinking here about forms of inhuman treatment while migrants are detained, deported, or suffering forms of exploitation and abuse, and even avoidable deaths in the Mediterranean, which would not exist if legal and political arrangements were different, that is, if precarity and the unequal distribution of privileges and disadvantages were not naturalised in juridical and political discourse.

In this context, the ECtHR refers to a vulnerable group that it had previously recognised as vulnerable, namely asylum-seekers, and uses their vulnerability as a standard for comparison. The Grand Chamber judgment on the case of *Khlaifia v. Italy* reaffirmed the vulnerability of asylum-seekers as an argument to deny the vulnerability of economic migrants[100], highlighting the differences, rather than similarities, between those groups. The fact that the applicants were adult men, contrasting their subjectivity to that of children and women was also underscored as an important factor to disavowing their vulnerability.

[100] The judgment made explicit references to the landmark case of *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011, the landmark case which recognised asylum-seekers as a vulnerable group, as I will further discuss in Chapter 5.

The agency or invulnerability of economic migrants was measured against the vulnerability of asylum-seekers; thus, the vulnerability of economic migrants was obfuscated and discarded as a relevant element for decision-making. Other factors, such as age, gender and health were also identified in this assessment. The perceived sense that they were not as vulnerable as migrant children or asylum-seekers shows how the Court conceptualises vulnerability and agency as mutually exclusive. A hierarchy of vulnerability is then created by measuring the vulnerability of one group against the vulnerability of the other, as though watertight compartments, even though the legal and political roots of their vulnerability are intrinsically interconnected. When human rights courts frame a hierarchy of vulnerability in these terms, this allows for dehumanising migratory policies and laws to be carried out by States with the seal of approval of a respected institution which carries the authority and legitimacy to have the final say regarding the interpretation of international human rights State obligations in the region.

Rather than imposing higher standards of human rights protection for all migrants, only certain groups made intelligible within the ECtHR's normative frames of recognition. I suggest that these blind spots abide by the reproduction of strategic ignorance in the interests of neoliberal, neocolonial and patriarchal modes of relationality, where only exceptional cases are afforded special treatment. In practice, structural harms are left unchallenged and dehumanising situations which States have the power to prevent or mitigate are only framed as inhuman treatment for certain categories of migrants deemed vulnerable. Framing a hierarchy of vulnerability and victimisation may legally and symbolically define whose suffering matters the most, that is, whose human rights' breaches are less permissible or tolerable.

Even when migrant applicants are recognised as vulnerable by the ECtHR, which happens in exceptional circumstances (e.g. children, detainees, ill migrants), beyond recognition, little is achieved to address the root causes of vulnerability and victimisation. I suggest that human rights legal discourse, as produced by the ECtHR, can create or aggravate the situation of precariousness of migrants from the Global South. Furthermore, it perpetuates a legal architecture of individual disadvantage in relation to European

citizens insofar as human rights protections are concerned. I also contend that the discursive construction of 'vulnerable' subjects in ways which do not enable freedom from their subaltern position and conversely create a language which relegates them to perennial subjugation, is a form of what Gayatri Spivak calls 'epistemic violence' (1988). As Spivak explains, '[t]he narrow epistemic violence of imperialism gives us an imperfect allegory of the general violence that is the possibility of an episteme' (p. 28).

Narrow frames of recognition in which one's vulnerability is recognised by measuring it against another's can be a form of epistemic violence of human rights discourse both by denying recognition, as in the case of *Khlaifia v. Italy*, and by recognising the 'other' through confinement into a subordinate category. The ECtHR's framing of the 'vulnerable migrant other' is concretised in two ways: first, by establishment of an exceptional category; and secondly, under the condition that the migrant subject lacks agency and voice. Displays of autonomy, such as insurgency against precarity through political resistance (as seen above in *Khlaifia v. Italy*), contradict the archetype of the weak, frail and helpless migrant, whose vulnerability is readily recognised. Instead, the agentic migrant falls into the category of dangerous other, hence the opposite of 'vulnerable', an individual who does not deserve to be saved or helped, but only blamed for any attacks on her human dignity and detained or punished by attempting to free herself from her neocolonial fate. The economic, or more generally the irregular migrant, is constructed along the lines of the latter, and the narrow categories of vulnerability in human rights legal discourse are set out as rule-confirming exceptions.

## Conclusions

In this chapter, I have suggested that vulnerable groups are recognised by human rights courts in opposition to other groups whose vulnerability is dismissed, for instance, by constructing the vulnerability of asylum-seeking children in opposition to the implicit 'invulnerability' of adult economic migrants in the case-law of the ECtHR. This practice follows the vulnerability/agency binary, in which vulnerability and agency are seen as mutually exclusive. Vulnerability is often conceptualised on the basis of problematic assumptions

of inherent group-vulnerability that deny agency to those considered 'vulnerable'. Moreover, vulnerability in contexts of migration is identified in the case-law of human rights courts according to different (and at times intersecting) axes such as gender, age, health and migratory status (legal/illegal; refugee/economic migrant). Consequently, seemingly isolated categories and segmented juridical remedies can emerge in the case law of human rights courts. This is enabled by the legal framework of individual human rights and court adjudication on a case-by-case basis.

However, framing individual categories of vulnerable groups prevents us from seeing the wider picture, that is, how State immigration laws sustain the systematic exclusion, disadvantage and even criminalisation of human mobility across - and permanence within - the borders of the State. The segmented and individualistic judicial approach hinders more careful consideration of the pervasiveness of vulnerability across different contexts and temporalities. To imagine ways of enacting structural change, I propose that juridical interpretation consider linkages and relations among contexts of vulnerability in migration, for example by looking more carefully into the role of immigration laws and policies which sustain unequal power relations enabling violence or exploitation which disproportionately victimise Global South migrants across different but interlocking systems of oppression, such as migrant domestic workers and their vulnerability to exploitation by employers or detained migrants and State officials. This entails looking more carefully into the role of law and policies in sustaining these unequal power relations. Beyond individual cases, enacting change of deeper impact requires a systematic reading of the ensemble of intersecting contexts of victimisation, which point to patterns of harmful relationships in society.

Particularly, I contended that selective exclusions take place due to the binary structure of vulnerability reasoning, which re-inscribes the agency/vulnerability opposition into categories relating to migration, age, gender and health. Within these narrow frames of recognition with respect to vulnerability, I demonstrated that juridical frameworks operate by opposing vulnerability to agency and vulnerability is made intelligible through ableist, racialised and classed terms. In this way, these exclusions both mirror and

are intrinsically intertwined with wider power relations, such as normalised harms deriving from neocolonial relations and patriarchy. To avoid condoning power structures which enable dispossession, violence and relations of exploitation and oppression which exist as colonial legacy, understanding agency and vulnerability as complexly related rather than oppositional terms is an avenue for the ECtHR to foster a more emancipatory human rights agenda.

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# Chapter 5 - Framing 'vulnerability' through the lens of human rights judges: an unsettling and unsettled concept

## Introduction

The increasing use of the concept of vulnerability in the legal reasoning of human rights courts has arguably been an attempt to respond in a more context-sensitive way to applicants who are recognised as vulnerable by entitling them to receive 'special protection' from States (Peroni and Timmer 2013). As I discussed in Chapter 2, many theories put forward that the concept of vulnerability can engender the critical rethinking of society's ethico-normative responsibilities and enable legal and political responses which are more attuned to the reality of socio-material interdependence (Butler et al., 2016; Fineman and Grear, 2013; Fineman, 2008; Gilson, 2013; Mackenzie et al., 2013; Turner, 2006). Vulnerability can be conceptualised as a shared human condition stemming from embodiment, which serves as a heuristic to rethinking legal and political subjectivity and state responsibility (Fineman 2008, 2013, 2019). As Jennifer Nedelsky explains, 'it is in part our embodiment that makes us inevitably and obviously dependent on others' (Nedelsky, 2011, p. 163). Yet, it is useful to understand how vulnerability is differently allocated by virtue of legal, political and sociocultural factors (Butler and Athanasiou 2013), as it allows us to think of how precarity is normalised by norms, relations and institutions that are neither inevitable nor unchangeable. Vulnerability in resistance, for example, can serve as grounds for reimagining ethical responses to vulnerable populations, contesting legal and political arrangements which render certain groups disproportionately susceptible to dispossession or violence (Butler 2016).

Through which methods, processes and relations do legal practitioners fine-tune their sensitivity to contexts of vulnerability? In other words, how do judges and lawyers define which contexts are worthy of increased juridical attention for the purposes of applying international human rights law? In this chapter, I problematise processes of recognition of vulnerable applicants by human rights courts, particularly the ECtHR, by looking into the ways judges engage with the concept of vulnerability in judicial practice.

I examine judges' justifications for framing groups as vulnerable, or conversely, for dismissing their vulnerability in concrete cases. I attempt to map judicial frames of recognition within relations of power and affect, critically examining not only rationality, cognition and legal doctrines and knowledge, but also analysing the roles of empathy and other emotions. I suggest that the unfolding of juridical relations, such as the judge-applicant relation, shape human rights courts' power to frame vulnerability in the language of law and human rights.

As discussed in Chapter 2, the increasing use of 'vulnerability reasoning' in the ECtHR and the IACtHR refers to the embedding of vulnerability in human rights interpretations (Beloff and Clérico 2016; Peroni and Timmer 2013). The Strasbourg Court has a priority policy in processing applications including a category of 'urgent cases concerning vulnerable applicants', which includes persons deprived of liberty, situations of 'particular risk to life or health of the applicant' and 'other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue' (The European Court of Human Rights' Priority Policy 2017). In consonance with this priority policy, ECtHR judges assess whether or not particular applications should take precedence in relation to other applications [101]. This policy shows the Court's willingness to emphasise vulnerability as a decisive factor in prioritising among cases, determining the order of cases to be adjudicated. But as I have discussed in Chapter 4, the ECtHR's interpretive use of vulnerability goes beyond the initial analysis of urgency and priority of an application.

The ECtHR fine-tunes its interpretation when judges are persuaded that the alleged victim is a member of a particularly vulnerable group. Thus, rather than treating all applicants equally, the court may distinguish cases on the basis of vulnerability in legal analysis, on admissibility and merits. Recognising vulnerability means elucidating what 'special protection' means in a particular case. If incorporating vulnerability into legal reasoning implies more context-sensitivity (Peroni and Timmer 2013),

[101] Rule 39 of the ECtHR's Rules of the Court.

more ethical responses ensue with respect to reimagining a framework of human rights and corresponding State duties. Yet, not everybody is sensitive to context in the same way, or sensitive to the same contexts. Context-sensitivity can relate to how one understands a particular context historically, but it can also refer to how one feels and what one has learned about situations or groups through embodied experiences of group membership or external sources of information and knowledge. Arguably, if legal practitioners disagree over whether or not an alleged victim is vulnerable, arguments for modifying previous standards of interpretation, such as thresholds to reach what is considered 'inhuman treatment', will not be equally persuasive to all. Moreover, reductive understandings of vulnerability as inherent to certain groups, and not others narrows down the range of possibilities to look into how State practices and laws may reinforce patterns of victimisation and exclusion.

Beyond objective and rational cognition, human rights courts' decision-making processes are enabled by the unfolding of intra-court relations (for example, the relationship between judge and victim), that reflect and affect wider modes of relationality and the distribution of duties and rights, as well as of disadvantages and privileges in society (for example, the migrant/citizen spectrum of relations). These relations are regulated by legal and sociocultural norms which dictate how bodies can coexist and interact, directly affecting one another (for instance, norms that impose marriage as the family unity or norms that establish criminal sanctions for immigration offences), as well as to what these bodies are entitled, indirectly affecting one another (for example, property ownership implies that everybody is prohibited from entering a property unless the owner authorizes it; welfare entitlements to citizens imply that non-citizens are not entitled social security resources) in a particular society. Hence, these relations are structured by normative frameworks, namely laws, policies and sociocultural norms, which sustain disadvantages and privileges.

Taking a closer look at the juridical relations underlying the evolution of human rights jurisprudence on 'vulnerable groups', I suggest that processes of recognising vulnerability entail

affective encounters and relations between judges and applicants. I examine here how judges navigate these relations and norms to recognise and frame 'others', negotiating vulnerability and agency while delineating the scope of human rights of others and what that requires and entails in terms of State obligations. Given that traditional modes of legal interpretation do not always account for juridical relations as relations that are (albeit imperfectly) bilateral, where differently situated subjects, namely judges and victims, affect and are affected at the same time, my aim is to critically examine how power and affect are inter-related factors. To do so, I look at how vulnerability intersubjectively emerges within and across bodies and is translated into modes of interpretation and reasoning. I argue that by examining how judges negotiate vulnerability and agency in processes and relations of recognising vulnerable others, we can better understand how juridical norms and structures enable the framing of vulnerable bodies. Moreover, this analysis sheds light on structures of vulnerability and how juridical processes of recognition imply and entail the conferral of privileges and disadvantages, tackling or perpetuating hegemonic power relations.

## An unsettled concept: the power to frame and to affect

The concept of vulnerability and how to best engage with it was seen by the majority of respondents as taking shape according to the specific context in a concrete case. Rather than having a univocal meaning, vulnerability takes shape according to how judges understand and identify contexts, subjects and groups in relation to narratives of vulnerability and victimisation. Aiden (Judge, ECtHR) confirms that the absence of a clear legal definition does not hinder judges in Strasbourg from applying the concept in judicial decision-making:

> [M]y impression is that this concept [vulnerability] is not really defined. And it is true, we use it in a number of ways, both from, in a substantive way and in a procedural way.

Olivia (Judge, ECtHR) also emphasises the context-variant nature of vulnerability. In our interview, Olivia remarks, 'vulnerability always depends very much on the situation', or 'the context', which, in her view,

poses a major challenge to judges and to those impacted by the ECtHR's decisions, as it undermines predictability. Yet, both Aiden and Olivia tolerate the lack of a definition and lack of predictability deriving from the use of the concept of vulnerability by the Strasbourg court. Their uncommitted and ambiguous accounts of the concept and its implications are a priori highly unusual in a court environment, given that legal certainty is held as an important value.

Within legal discourse, concepts tend to be delimited by stricter boundaries. In that respect, interviewees seem to confirm the conclusion that vulnerability in the interpretation of human rights courts might indeed be a fluid and relatively unsettled notion in the praxis of the courts, subject to being revisited at each new concrete case. In order to apply the concept of vulnerability in legal interpretation, vulnerability must first be recognised within individual narratives of human rights victimisation. But how do relations through which vulnerability is recognised or not unfold within human rights courts and how malleable are their juridical frames of recognition? Given that the lack of a clear definition of vulnerability presents significant opportunities and challenges to human rights decision-making processes, I began all of my interviews by asking my interviewees to try and define it in their own terms. To answer my question, many judges resorted to comparisons and metaphors.

When I asked Liam (Judge, ECtHR) to elaborate on the concept of vulnerability, he quickly replied that I could call it vulnerability, but to him, the word came from biology, where the skin is less resistant and more breakable, later extending to disciplines such as psychology and law. Whereas Liam traced back the origins of the concept of vulnerability to biology, other judges drew different comparisons. Michael (Judge, ECtHR), made an interesting link to a concurring opinion in a famous case decided by the U.S. Supreme Court, implying that albeit difficult to define, vulnerability can be easily spotted by a judge:

> Pornography: I can't define it, but 'I know it when I see it'[102]. And it's a famous expression I know it when I see it, I can't define it… And it is often used also in other contexts. It is maybe a bit like this: I cannot define it, but in a file, there may be elements that make me think: okay, this is the vulnerable person. It's the person who is unable to fully take care of himself or herself. [He or she] is dependent on others for various reasons. It can be for health reasons, for mental reasons, for fear reasons, for… power reasons, and so on and so forth. (Michael, Judge, ECtHR)

Michael's explanation does not seem to account for how judges disagree on who should be recognised as vulnerable. His description seems to presuppose that judges can identify elements and decide whether or not a person is vulnerable in a straightforward manner. By stressing: 'I know it when I see it', Michael compares recognising a vulnerable applicant to the arguably simple action of identifying a film genre. Similarly, Noah (Judge, ECtHR) speaks of identifying vulnerability as the elephant in the room:

> I don't think we have any case which even attempts to give a definition of a vulnerable person or a vulnerable group. We seem to proceed by the principle that everyone knows what an elephant looks like and therefore when you see an elephant, you recognise it, you don't have to try and define it. …
>
> [I]t's always a question of the Court recognising the elephant when it sees. It doesn't come to the conclusion that the person is a vulnerable person by some logical process. I mean the process has to be inferred and then you say: why is the person vulnerable? Because, I've said it, he is either a minor, or he is incapable of looking after himself, incapable of protecting his rights, what else? The court doesn't go about in this process. As soon as it sees a vulnerable person or a vulnerable category, well of course it is a vulnerable person or a vulnerable category.
>
> (Noah, Judge, ECtHR)

Despite Michael and Noah describing the process of recognising vulnerability as a seemingly intuitive task for judges, their comparisons and metaphors fail to account for the underlying complexities and controversies concerning who is recognised or even recognisable as vulnerable before the ECtHR. Their

[102] This is a reference to Justice Potter Stewart's concurring opinion in *Jacobellis v Ohio,* U.S. Supreme Court (378 U.S. 184, 197), 1964 (Stewart, J. - concurring).

responses indicate that the complexity of determining a vulnerable applicant can be underestimated by legal practitioners. In the same vein, the seriousness of the implications of recognising someone's vulnerability might also be underplayed, as Santiago (Judge, IACtHR) notes in his explanation of the role of vulnerability in cases processed before the IACtHR:

> Oh, yes! They put in the mushroom, a way of making the case more important, the claim more important… To put in the mushroom in the plate, so that one can see it better… Yes, because if you don't put in the narrative of vulnerability, the case misses out a lot.

In the same way adding a mushroom would make a plate more alluring, Judge Santiago asserts that vulnerability can be purposefully highlighted so that the case stands out. These metaphors and comparisons seem to imply that processes of recognising vulnerability are relatively uncontroversial, immediate and obvious. However, these responses do not explain how vulnerability might be more or less consensual among judges in some cases and spur more disagreement in other cases. In other words, these responses tell a simplified story about the judicial praxis of vulnerability which does not address the question of why not all judges recognise vulnerability in the same cases. Moreover, I suggest that there is a presumption of 'universality' and 'neutrality' in the manner which these metaphors and comparisons are used to explain the act of recognising vulnerability. Similar to the notion of 'vulnerability reasoning' (Peroni and Timmer 2013), conceptualising processes of recognition as easy and unproblematic imply that recognising vulnerability is part of rational, objective and neutral processes of cognition. This conceptualisation also suggests that sensitivity to context might ensue naturally from applying legal expertise, as if recognising someone as vulnerable were a simple act of cognition. However, as I have illustrated in Chapter 5 the same context of vulnerability can be recognised by certain judges while it is dismissed by others.

## Recognising vulnerable migrants and the role of feelings

The ECtHR Grand Chamber judgment in *M.S.S. v Belgium and Greece* has been widely cited in subsequent judgments to support the claim that asylum-seekers are a vulnerable group. The case of M.S.S. concerned an Afghan asylum-seeker who received threats against his life by the Taliban and fled to Europe. He first arrived in Greece, later applying for asylum in Belgium[103]. Back in Greece, he was detained twice under appalling conditions[104], which was examined by the ECtHR's Grand Chamber as follows:

> [T]he Court must take into account that the applicant, being an asylum- seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously… [I]n the light of the available information on the conditions at the holding centre next to Athens International Airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable.
>
> It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum- seeker [105].

Shortly after being released from detention, he was left homeless in the streets of Greece with no resources or support of any kind. About his time in the streets of Greece, the applicant described his situation, as recounted in the judgment in the following terms:

[103] Following the Dublin regulation, Belgium sent M.S.S. to Greece, the first-entry country in the European Schengen Area, so that his asylum claim could be examined there.

[104] With respect to the periods of detention to which the applicant was subject in Greece, an illustration of the reportedly appalling conditions of the detention facilities in Athens was lack of access to water fountains, which forced detainees to drink water from the toilets.

[105] *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.Paragraphs 232 and 233.

> With no means of subsistence, he, like many other Afghan asylum- seekers, had lived in a park in the middle of Athens for many months. He spent his days looking for food. Occasionally he received material aid from the local people and the Church. He had no access to any sanitary facilities. At night he lived in permanent fear of being attacked and robbed. He submitted that the resulting situation of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3.[106]

In its reasoning, the Court considered that the applicant was particularly vulnerable due to the specific events he had been through as a migrant, as well as traumas that 'he was likely to have endured previously'. Note how the wording of the judgment suggests an imaginative effort of the hardships and traumas that what must have existed, rather than drawing from the particular facts. Moreover, it implies that the majority of judges, and thereby the Court, believes the applicant's statements about his feelings, namely his 'permanent fear' and his vulnerable status deriving from both material and psychological reasons. Imagining someone else's trauma in a particular situation and validating their feelings as credible demonstrate that beyond rational arguments, assessing the persuasiveness of narratives of vulnerability required other affective responses from judges, such as feelings of empathy or trust. In *M.S.S. v. Belgium and Greece*, the applicant, recognised both as vulnerable and as a victim by the Court, was affected by violence, deprivation and precariousness while migrating and even before becoming a migrant.

As the Afghan, Greek and Belgium States failed to duly protect and enforce his human rights, the applicant M.S.S. was able to convince judges not only of the deprivation and precariousness he had endured, but also that his individual feelings should be factored into the Court's vulnerability reasoning. In this sense, judges' interpretation of the applicant's feelings while migrating and even in the period preceding his migratory journey were relevant in the ultimate recognition of his vulnerability. This reasoning goes beyond the situation of vulnerability pertaining to Afghan asylum-seekers who migrate to Europe or asylum-seekers

106 *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011, Paragraph 238.

in general, but it considers how the applicant, M.S.S., mobilises his particular experience of vulnerability as an argument to make his case more compelling. Because of the applicant's vulnerable status, the temporal threshold to be met for the Court to find a violation of the right not to be subjected to inhuman and degrading treatment was lowered relatively to previous cases. Although he had spent a total period of less than two weeks in detention, much less time than the three months spent by the applicant in *A.A. v Greece*[107], for example, the Court relied on vulnerability reasoning to find a violation of Article 3. Furthermore, the same line of reasoning gave rise to a change in the Court's prior jurisprudential position, expanding the scope of States' positive obligations to encompass socioeconomic rights.

The Court ruled in favour of the applicant, recognising that he was particularly vulnerable and also a human rights victim of the right not to suffer inhuman and degrading treatment or punishment. Vulnerability reasoning played an important role in the Court's innovative reasoning. The Court acknowledged the vulnerability of asylum-seekers especially in the Greek context, or 'the particular state of insecurity and vulnerability in which asylum-seekers are known to live in Greece'[108]. Moreover, the Court recognised that 'the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker', in which it established asylum-seekers as a recognised vulnerable group[109]. The Court acknowledged that not only the structural conditions of detention on the applicant's dignity, but also the feelings of arbitrariness, inferiority and anxiety constituted inhuman and degrading treatment, hence confirming the applicant's status as a human rights victim.

As discussed in the thesis Introduction, *M.S.S. v Belgium and Greece* instantiates how vulnerability reasoning has changed the case-law of ECtHR. The following excerpt from the judgment in a subsequent

107 *A.A. v. Greece*, app. 12186/08, First Section Judgment (ECtHR), 22 Oct 2010, Paragraphs 57-65.

108 *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011, Paragraph 259.

109 *Ibid.*, Paragraph 233.

case clarifies how this case represented a transformation in the Court's case-law concerning the human rights of asylum-seekers:

> With *M.S.S. v. Belgium and Greece*… the Court initiated a change in its case-law. After noting that … the obligation to provide decent material conditions to impoverished asylum-seekers had entered into positive law, the Court held that, in determining whether the threshold of severity required by Article 3 had been attained, particular importance had to be attached to the applicant's status as an asylum-seeker. Accordingly, he belonged to a particularly underprivileged and vulnerable population group in need of special protection. It noted the existence of a broad consensus at the international and European level concerning this need for special protection. (V.M. v Belgium and Greece, Second Section Judgment, Para. [136])

*M.S.S v. Belgium and Greece* was widely praised and subsequently cited in many judgments, signaling an interpretive shift in the European court's case-law on asylum-seekers (Dembour 2015). As expected, this landmark case was well-known by all judges I interviewed. To my surprise, many interviewees contested the ECtHR's recognition of asylum-seekers as a vulnerable group, arguing that the Separate Opinion written by judge Andras Sajó in the case of *M.S.S. v. Belgium and Greece* merited further reflection[110]. On the one hand, legal scholars focus on the recognition of asylum-seekers as a vulnerable group deserving of special protection as a major step forward in enhancing human rights interpretation, applauding the ECtHR for moving towards greater social justice by explicitly addressing the vulnerability implied in this particular migratory context (Dembour 2015; Peroni and Timmer 2013). On the other hand, the interviews I conducted five years after the Grand Chamber's ruling on *M.S.S. v. Belgium and Greece* indicate that many judges disagree with the recognition of asylum-seekers as a vulnerable group. Even though all judges acknowledge the legacy of *M.S.S.* to the Court's case-law, many dispute its merits and accuracy. It follows that even in

[110] Partly Concurring and Partly Dissenting Opinion of Judge Andras Sajó.

contexts where the Court has expressly recognised a group as vulnerable, the concept of vulnerability might still remain unsettled and the object of controversies.

A dissenting voice in *M.S.S. v. Belgium and Greece*, Judge Sajó disagrees with the majority's understanding that 'the applicant, as an asylum-seeker, is a member of a particularly underprivileged and vulnerable population group in need of special protection'. In his separate opinion, Judge Sajó does not recognise asylum-seekers as a vulnerable group, elaborating on his reasons for disagreeing with the Grand Chamber's majority. Judge Sajó interprets 'particularly vulnerable groups in society' in the Court's jurisprudence as requiring two criteria. First, historically, 'vulnerable groups' must have been subjected to discrimination, such as persons living with mental disabilities and the Roma. Second, all members must form a 'homogenous' group of people who suffer historical prejudice and social exclusion, thus 'deserving' special protection, as the following excerpt further clarifies:

> To my mind, although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group, in the sense in which the jurisprudence of the Court uses the term (as in the case of persons with mental disabilities, for example), where all members of the group, due to their adverse social categorisation, deserve special protection…
>
> Asylum-seekers differ to some extent from the above-identified 'particularly vulnerable groups'. They are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified, and consequently treated, as a group. (…) Asylum-seekers are far from being homogeneous, if such a group exists at all [111].

I suggest that the reasoning imprinted in Judge Sajó's Separate Opinion rests upon juridical hierarchies of vulnerability whereby the vulnerability of groups is used as measuring stick to assess the vulnerability of others. This is operationalised by contrasting the vulnerability of reified categories of vulnerable groups

111 Partly Concurring and Partly Dissenting Opinion of Judge Andras Sajó in *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.

(persons with mental disability, unaccompanied minors, victims of torture) to the vulnerability claimed by asylum-seekers. By comparing these groups to exclude one of them from recognition, one group is deemed more vulnerable than the other, which is used to dismiss the vulnerability of the latter. In this analysis of vulnerability, asylum-seekers' vulnerability is framed as contextual and heterogenous, rather than a more permanent characteristic (for example, historically consolidated discrimination) that accompanies 'homogenous' groups. We can perhaps contest the pertinence of ascribing these characteristics on the basis of perceived temporalities of vulnerability or how dissimilar the internal composition of these assemblages may be. However, for the purposes of understanding how the recognition of vulnerable groups is operationalised, it might suffice to note the antagonistic logic of dismissing the vulnerability of asylum-seekers while upholding the vulnerability of other groups such as persons with mental disability, unaccompanied minors or victims of torture.

As I have argued in Chapter 4, human rights courts often recognise vulnerable groups by resorting to vulnerability in opposition to agency, using this binary as a frame of reference to decide whether an individual applicant is vulnerable or not. In addition to mentioning particularly vulnerable groups established by European regulation ('victims of torture and unaccompanied minors'), an important part of Judge Sajó's reasoning in his Separate Opinion relies on the possibility of competing claims for State resources by different vulnerable groups, namely 'the mentally disabled' and other groups 'whose members are subject to social prejudice'. According to this rationale, persons with mental health disorders are in a more difficult situation than asylum-seekers due to the historical discrimination they suffer. Following the logic of comparing among categories of vulnerable groups, this line of reasoning implicitly reproduces the vulnerability/agency binary, by opposing paradigmatic 'vulnerable groups' as measuring stick to disavow the vulnerability of another group, namely asylum-seekers.

However, Judge Sajó also concedes that asylum-seekers are at least 'somewhat vulnerable' due to several factors among which the challenges they faced before arriving in Europe, the challenges they face

in an unknown country and, above all, uncertainty about their future. Note how uncertainty is yet another affective criterion, given that it has at its root a feeling ascribed to asylum-seekers based on deductive reasoning, rather than a fact that has transpired. Judge Sajó further deduced what it must feel like to be in the same situation, claiming that:

> Waiting and hoping endlessly for a final official decision on a fundamental existential issue in legal uncertainty caused by official neglect arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, and therefore it may be characterised as degrading.

The Grand Chamber judgment in the case of *M.S.S. v. Belgium and Greece* brings to the fore the role of feelings or emotions of the alleged victim (who after the judgment juridically gained victim status), namely feelings of anguish, inferiority and fear to buttress the relevance of vulnerability in legal reasoning. On his Separate Opinion[112], Judge Sajó also recognises the applicant's vulnerability by affirming that these feelings, which were caused by legal uncertainty and State 'neglect', are 'capable of breaking an individual's moral and physical resistance'. The threshold of severity is hence met since 'individual resistance', as he puts it, is about to break. Both in the majority opinion and Judge Sajó's Separate Opinion, displays of sensitivity to individual and structural contexts seem to involve a complex entanglement of rational and emotional reasons which lend weight to the suffering of alleged victims. I suggest that this context-sensitivity in legal reasoning consists in ethical responses to perceived vulnerability, which then become juridical responses. As I discussed in Chapter 2, liberal law's conceptualisation of the legal subject as rational, unencumbered and independent is premised upon certain binaries such as agency/vulnerability and reason/emotion. Considering feelings and emotions as relevant to legal interpretation, as these judgments and interviews show, is an example of disrupting the reason/emotion binary.

[112] Partly Concurring and Partly Dissenting Opinion of Judge Andras Sajó in *M.S.S. v Belgium and Greece*, appl. 30696/09, Grand Chamber (GC) Judgment (ECtHR), 21 Jan 2011.

If reason or rationality can be conceptualised as universal and the cornerstone of legal reasoning, emotions and feelings are often relegated to the realm of undesirable biases or hindrances to sound reasoning that should be sidestepped in legal interpretation. Perhaps due to the exceptional character ascribed to vulnerability in the interpretation of human rights courts, unusual or exceptional elements in legal reasoning, such as feelings and emotions, might be deemed more acceptable as well. But differently from recognising colors or shapes in objects, recognising vulnerability in persons or groups entails fine-tuning juridical sensitivity to complex subjective experiences, individual particularities and power structures that allow subjects to act and be acted upon. And as I have attempted to show, vulnerability remains an unsettled concept not only in abstract, but even after it has been recognised in particular contexts or attached to situated bodies in the jurisprudence of the Court. Therefore, even if some judges become 'sensitive' to particular contexts, like the situation of asylum-seekers, not all share the same sensitivity towards a particular context or group.

Liam (Judge, ECtHR) explains that vulnerability has to do with 'instinct' and that the power of human rights language is closely linked to the capacity to mobilise 'emotions, like empathy'. Interestingly, Liam says that 'empathy is important for the breakthrough, to change the categorisation'. Liam refers to empathy as an element in thinking about vulnerability while interpreting a case, as though a force propelling changes in the perception of groups, disrupting previous forms of categorisation and embedding forms of suffering as human rights violation. Liam gives two examples to support this explanation. First, Liam links mobilising empathy towards the feelings of the enslaved as propelling movements for the abolition of slavery, ultimately resulting in the consecration of the human right not to be held in slavery or servitude in international human rights law. Another example Liam mentions is the recognition of the Roma minority as a vulnerable group in the jurisprudence of the ECtHR, with the corresponding application of the prohibition of discrimination by the Strasbourg Court. The jurisprudential 'breakthrough' was a major

change in the way the Roma minority was framed from the landmark case of *D.H. v Czech Republic*[113] onwards, which was seen as a step towards recognising the particular vulnerability of this minority group and enforcing higher standards of accountability on States to guarantee their protection. According to Liam, 'seeing the suffering of children' in that case played an important role to achieve this result.

In the next section, I will discuss judges' emotional responses to vulnerability, particularly empathy, examining how it is brought to the fore as relevant in interviewees' narratives about context-sensitivity in judicial decision-making. By contrast, I will also discuss how other kinds of emotions (which also respond to narratives of vulnerability in court cases), such as fear and distrust, might appear in justifications for denying vulnerability to applicants, who are thereby conceived as invulnerable or untrustworthy.

## An unsettling concept: empathy and affective relations

The power of human rights courts' judges derives from two main sources: firstly, their legal expertise and secondly, their institutional role as ultimate decision-makers in court proceedings. Judges are entrusted with the privilege to authoritatively issue votes and decisions which directly affect alleged victims and States. Moreover, their actions indirectly affect people from entire regions through the impact of court judgments, separate opinions and advisory opinions. The judicial role implies not only agency as self-determination, but the agentic capacity of a third party - hence external to the relationship - who has the power to decide over fundamental rights and liberties of other individuals, as well as State obligations. This power to decide over the lives and rights of others includes framing those who are entitled to claim the vulnerable label and those who are not. However, the reality of human interdependence entails that we act upon the world as we are acted upon, that is, agency and

[113] *D.H. and Others v. the Czech Republic*, appl. 57325/00, GC Judgment (ECtHR), 13 Nov 2007.

vulnerability are intrinsically intertwined as we interact with others (Butler, 2016). Based on this premise, I suggest that judicial responsiveness to vulnerability cannot be reduced to an impartial exercise of agency in the sense of acting upon others (litigating parties and societies affected by court rulings), but a set of complex relations whereby judges act while they are being acted upon at the same time.

Impartiality, neutrality and reason are upheld as values that are equally distributed, understood and practiced by reasonable human beings (Nedelsky 2011). These values underlie legal reasoning and presuppose to some extent disembodiment and invulnerability. However, vulnerability reasoning seems to elicit affective responses, such as emotions, which bring to the fore embodiment as a key factor in processes of recognising vulnerable applicants. Beyond consideration for the feelings of applicants, as detailed in the illustrative case of *M.S.S. v. Belgium and Greece*, Liam (Judge, ECtHR) and other judges whom I interviewed justify the use of vulnerability in human rights judgments by highlighting the role of empathy in legal interpretation. As Pedwell notes, 'empathy is perhaps most commonly articulated as the affective act of seeing from another's perspective and imaginatively experiencing her or his thoughts, emotions and predicaments' (2014, p. 6). If a judge exercises empathy towards vulnerable subjects, this is an affective act; it is agentic, but also presupposes that the judge allows herself or himself to be affected or sensitised. One particular case elicited diametrically opposite empathic reactions from two interviewees: while Olivia (Judge, ECtHR) showed empathy for the applicants and considered their vulnerability an important factor in her judgment of the case, her peer Layla was distrustful of their alleged vulnerability.

Scholars consider the judgment of *Tarakhel v Switzerland*[114] a major development in the Court's case-law concerning asylum-seeking minors (Dembour 2015). The judgment concerned a family of Afghan asylum-seekers with six children where vulnerability reasoning played an important role for the legal

[114] *Tarakhel v. Switzerland*, app. 29217/12, GC Judgment (ECtHR), 4 Nov 2014.

outcome of the case. Tarakhel and his family entered Europe by crossing Italian borders, before passing through Austria and reaching Switzerland. I interviewed two judges who felt very strongly about the case and firmly disagreed on whether the applicants should be considered vulnerable in the eyes of the court. In my interview, I asked Olivia (Judge, ECtHR) if vulnerability reasoning, assessment or perception had been factored into the way she handled *Tarakhel v. Switzerland*. According to Olivia, this had been a difficult case because it had touched her personally. Her response unveiled emotions such as empathy, indignation and resolve, bringing to the fore a personal experience:

> Yes, certainly, I mean, I don't have six children, I have two children, but imagine you have two children and they have other children, you're in a completely different country and then they split your family, I mean, it's horrible. (…) *Tarakhel* came as an inadmissibility on my desk and I said, no way! And then it ended up in the Grand Chamber. (Judge Olivia, ECtHR)

Olivia made it clear that her experience of parenthood helped her understand the vulnerability of a parent with children in a case she had to judge. Emotional remarks such as 'it's horrible' or 'I said, no way!' also indicated how she felt personally affected, as well as believed in being empathetic as a means to recognising vulnerability as well as interpreting a case involving a vulnerable migrant. Olivia's epistemic standpoint signaled that beyond performing her judicial role, she also felt the weight of her own personal experience of parenthood on her interpretation of the case. By contrast, Layla (Judge, ECtHR) asserted that the vulnerability of Tarakhel and his family was not credible, as it appeared to be exaggerated, given that they seemed resourceful and that they were able to 'fend for themselves':

> For me, they seemed quite resourceful, they had traveled from Afghanistan to Italy and from Italy they had gone to Austria and back to Italy, I think, and then to Switzerland. But they had managed to, uh, get tickets to the journeys through Europe, they had managed to apparently find food and housing during this process on their own accord, so in that situation, I was not so convinced that they may be as vulnerable as maybe the majority [was convinced that they were], because they seemed quite resourceful, and the risk that they would be in insalubrious conditions in Italy when going back there … when they had fended for themselves while traveling through Italy just seemed to me a bit exaggerated. (Layla, Judge, ECtHR)

My follow-up question to Layla was whether the involvement of minors in the case had any weight in her perception of vulnerability. She answered that it played a role for her colleagues, in the majority, but as far as she was concerned: 'no, no, no, no, no'. Layla further insisted on resourcefulness as key element to neutralize the vulnerability argument:

> I think that they would have been resourceful enough, maybe, I'm guessing they would have been able to fend for themselves, the question was never asked: do you have any money? Do these people have any resources? The question was never asked by the Court, there was no interest from our side in finding out the resourcefulness of that family.

Layla was convinced that Tarakhel and his family were not vulnerable. She was emphatic – by repeatedly saying 'no' - in stating that she was unfazed by the fact that the case involved asylum-seekers who were minors and focused on elements that, to her, discredited their vulnerability. She relied on circumstantial suspicion – rather than evidence-based confirmation — that they had resources and could fend for themselves, given that they had managed to travel through different European countries. Interestingly, resourcefulness is placed as the opposite of vulnerability. The ability to 'fend for [one]self' and having resources is interpreted as incompatible with vulnerability.

By contrast, Olivia explained that the fact that the vulnerability of Tarakhel and his family of six children resonated with her personal experience and led her to evaluate the case differently. From Tarakhel, considered to be a landmark case for the vulnerability of asylum-seekers who are minors, the Court has developed important case-law. However, even if the ECtHR can be said to recognise their vulnerability as a group, Layla's adamant disbelief points, again, to how unsettled the content of vulnerability in this context still is and the underlying tensions and disagreements that may exist behind what many regard as jurisprudential evolution or innovation. These examples also show how unsettling narratives of vulnerability can be, eliciting strong emotions that work in tandem with the application of legal expertise in interpreting concrete cases.

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These examples also show how unsettling narratives of vulnerability can be, eliciting strong emotions that work in tandem with the application of legal expertise in interpreting concrete cases. My findings suggest that vulnerability's recognition by judges either affirm or disavow the role played by their own feelings and emotions in decision -making. In other words, their attempts to explain why an applicant or a group should be deemed vulnerable and in need of special protection are informed by justifications that involve what I call affective reasoning. Indeed, I found that interviewees' narratives about vulnerability's presence in human rights interpretation differ to a great extent from traditional explanations grounded in legal basis or rational argumentation. I find this important, particularly with respect to judges, insofar as it problematises guiding principles of due process in a court setting, namely judicial impartiality and neutrality.

With respect to 'conventional judging', Rosemary Hunter et al. underscore that 'the judge is expected to display a particular form of detached impartiality, participating actively only when a decision, ruling or order is required by the parties' . It follows that affective manifestations such as emotions or feelings are often associated with bias and irrationality. Conversely, for decades feminists have challenged impartiality and neutrality as liberal legal myths that should be questioned (Lacey 2004). For instance, Nedelsky describes 'the gut feelings that are starting points of decision making… [as] affective somatic markers' which are influenced by culture, education and experience (Nedelsky 1996, p. 106 ). In her relational theory of autonomy and law, Nedelsky explains that the 'dominant conception of rights' in liberal legal and political theory relies upon a rational and disembodied agent, due to the fact that 'our bodies pose a tacit threat to the dominant image of autonomy as independence, as being unilaterally in control of our lives' (Nedelsky 2011, pp. 162-163). Given law's longstanding resistance to incorporating embodied vulnerability and interdependence as relevant premises, empathy or other emotions have been relegated to second place in legal theory and practice. Mindful of that, I suggest that my interviews reveal under-explored aspects of judicial practice, namely how judges navigate their feelings of empathy and either face or disavowal their own vulnerability when dealing with applicants they consider vulnerable.

Judges offer justifications for recognising vulnerable subjects and victims which draw largely on affective elements such as empathy or emotions. Nedelsky (2011) suggests that incorporating affect into legal analysis brings to the fore embodied differences that are implicitly ignored by strict use of legal methods of interpretation. Affective reasoning brings to light how emotions, feelings and personal experience inform the epistemic standpoint of a judge. For a subject who knows (or bears knowledge), 'unwilled empathy', 'accumulated indignation' or 'disorientation of undefined affective intensity' can be affective avenues to 'engender forms of knowing' which transform the self (Pedwell, 2017, p. 149). Empathy and affective intensity remind us of the most basic relational implication of embodiment in theories about vulnerability, namely the human capacity to both affect as well as to be affected at the same time (Butler 2016).

However, it is vital to note how, similar to the particular ways in which vulnerability takes shape and is felt in different bodies, as structures of vulnerability are built through norms and institutions which confer privileges and disadvantages, empathy is also felt in particular ways. Some people, including judges, might feel more empathy towards particular groups, such as migrants, or rather empathize with European authorities and border control agents, as illustrated by the case of *Khlaifia v Italy* in the previous chapter. An important caveat is that the empathizer-empathised also expresses a power relation. Although I argue that the judge-applicant relation implies some degree of horizontality, that is, reciprocity in affecting and being affected (though in different degrees), judges are the ones whose empathy and other forms of affective reasoning influence decision-making and, insofar as the juridical relation is concerned, it does not work both ways.

Judges play a fundamental role in the evolution of the law. They exercise their decision-making power not only by applying, but arguably by making, the law in hard cases concerning marginalised populations. Judges' affective reasoning through engagement with empathy or emotions influences the juridical framing of vulnerable subjectivities, with ramifications in the ascription of individual human rights and State duties. Recognising vulnerability occurs within affective relations, but it also constitutes an act of power with ramifications in the international human rights legal framework. To better understand the workings of power and affect in these juridical relations, I suggest we look deeper into the uneven ways in which affective reasoning might be exercised by distinct judges.

Replying to the question of why there is so much dissent regarding who is and who is not recognised as vulnerable in the ECtHR's case law, particularly regarding migrants, Olivia (Judge, ECtHR) makes reference to feelings of empathy and fear:

> I think it's a question of perception and whether a judge can imagine him or herself in that situation and yeah, I think that is the reason. People feel very strongly about migrants, I mean, the court is like society, some judges feel threatened by this huge mass of refugees.

Olivia's statement unveils certain characteristics which accompany the vulnerable/invulnerable classification of migrants: vulnerable individuals are seen as weak, helpless and morally blameless, thus more readily and easily identified as victims (Christie, 1986), whereas 'invulnerable' migrants are framed as global dangerous 'others' (Aas, 2010). Referring to migration in Europe as a 'crisis', a 'politically sensitive issue' and discussing how authorities may at times rely on 'security considerations' to make their case, Michael (Judge, ECtHR) weighs the vulnerability of economic migrants in the case of *Khlaifia v. Italy* against the vulnerability of authorities:

> They are not vulnerable in all the contexts when they are at Lampedusa… but assuming that they are, for certain things, vulnerable… on the other hand, you have this big problem because the authorities are also vulnerable, because they were not capable of dealing with so many people at the same time.

In the Grand Chamber judgment of *Khlaifia v. Italy*[115], the argument of alleged difficulties of European States' in managing the vulnerability of their borders prevails over the claimed vulnerability of applicants (which went against the Chamber judgment's line of reasoning). Butler (2016) argues that 'resistance to vulnerability' occurs '[w]hen we oppose "vulnerability" as a political term, [and] it is usually because we would like to see ourselves as agentic' (p. 23), a feature of 'a form of thinking that models itself on mastery' (p. 25). In the same vein, Erinn Gilson (2011) suggests that (willful) ignorance about vulnerability reflects one's desire to reinforce one's own subjectivity as invulnerable or as a sovereign master, which thereby limits the terrain of recognisable vulnerability to a space or subject with which one dis-identifies. In other words, if we tend to resist uncomfortable feelings that come with being affected, and we eschew our own vulnerability to reaffirm our sense of agency, arguably this mechanism could at times hinder our ability to recognise others as vulnerable (Butler 2016; Gilson 2011). To illustrate, a 'mass of refugees', as Olivia (Judge, ECtHR) describes, might also feel like a menace and 'people feel strongly about migrants'. It seems harder to mobilise empathy towards a group that is imagined as a dangerous threat. Vulnerability might be

115 *Khlaifia v Italy*, appl. 16483/12, GC Judgment (ECtHR), 15 Dec 2016.

less recognisable for this reason: we are less likely to recognise the vulnerability of those who we believe may threaten us, and render us vulnerable. Asylum-seekers, despite disagreements among judges, have nonetheless gained status as a vulnerable group in the ECtHR's case-law, with due consideration to their feelings, challenges and suffering.

However, perceptions of economic migrants as threats to the security of citizens even in peaceful demonstrations obfuscate their vulnerability, even in concerted acts of resistance in which, as Butler elaborates (2016), embodied vulnerability is laid bare and exposed precisely to resist. This is exemplified by Judge Dedov's arguments in the case of *Khlaifia v Italy*, as discussed in Chapter 4. In the context of South/North migration, national security arguments translate to the preservation of the security of citizens against dangerous 'ideal offenders' (Christie 1986), as if it were a zero-sum game. This reveals another facet of opposing vulnerability to agency in human rights courts, namely the agency of those who are in a position of power in relation to those who are in a position to be affected by this power. Focusing on how judges and applicants affect one another and are affected at the same time leads us to think about mutual exchanges, blurred lines and horizontality within this relation; however, if we shift the focus to how these relations are actually vertically structured as power relations, we can understand how recognising vulnerability is also a top-down act of power within juridical relations, whereby judges have the last say in what is framed as relevant or not in the juridical discourse of the Court.

Moreover, beyond feeling empathy or, conversely, distrust about the applicant's vulnerability, we should further explore the possibilities and limitations of judicial empathy in cases where vulnerability is recognised, challenging how this affective reasoning might bring about change, improvement or setbacks in the interpretation of the human rights of 'vulnerable groups'. To illustrate, Ava (Judge, ECtHR) details a stressful period in her past to demonstrate how she understood the predicament of asylum-seekers as a vulnerable group. Ava shares her own experience, as she migrated to the U.S. to study Law in the past, and how vulnerable she felt when her country of national origin was undergoing war and political instability,

provoking insecurity for expatriate students like her, who depended on a regular visa to pursue their studies and live abroad.

> Again… it depends on what we are talking about in the case. Asylum-seekers as a group, they could also be vulnerable if this is that kind of a case. They have a State, but they cannot go back to the State, it's a big vulnerability. If you have never been in that situation, you cannot understand. I am coming from ['State of Origin'], I was, during the war in [State of Origin] studying in the United States, okay? I could never go back to [State of Origin] to extend my Visa status, why? Because it was 90 per cent possibility that they would not extend my visa status, because it was war in [State of Origin]. Although I had full stipend and I was studying at [University], so it was like, [number] years I didn't go back home to get a visa, I went to Canada, so if you didn't go through that process, it's difficult for you to understand what that means, to start driving from [State in the U.S.] when you're a student and you don't have money you rent a car, the cheapest, you have to be there at four o'clock because if you're coming there after four o'clock you won't be able to come in front of the line to be accepted that day.
>
> So basically, you have to sleep in front of the U.S. Embassy to be able to extend your visa, you see? It's a great vulnerability. You have to put yourself into that position. When the person is coming as asylum seeker, he left there everything, all his property, all his family, all his friends, maybe he is not speaking the language, education, maybe he is a professor of [his native] language what can he do with that in a new country? He has to start the whole life from the beginning.
>
> (Ava, Judge, ECtHR)

Ava implies that her own experience puts her in a better position than others who have not lived through a similar experience of precarious migratory status to understand what the vulnerability of asylum-seekers entails. She contends that her personal experience allows her to empathize with asylum-seeking applicants and have a deeper understanding of this 'big vulnerability' than those who have not been through similar experiences. Nonetheless, an important caveat is that the position of self-placed proximity by 'putting [oneself] in that position' can be a double-edged sword. When asked if one's own lived experiences of vulnerability might help one to identify vulnerability in a court case, Ava replies that 'they may help', however, 'they could also cloud your eyes, because you might be too sensitive to certain things, you see?'. Ava seems to carry with her precisely this duality in her speech.

The arising concern is that judges might become too certain of their own empathetic capacity to challenge or go beyond the narrow lens of their personal experience of pain and suffering. In other words, one must be wary of the extent to which feeling empathy towards an applicant may lead judges to conflate a court case with their lived experience of vulnerability. Does the feeling of empathy connected to personal experience give the illusion of proximity and deeper understanding? Although Ava (Judge, ECtHR) argues that her own experience enhances her understanding of the vulnerability of asylum-seekers in Europe, relying on personal memory to summon empathy arguably has limitations. As Ava notes, she was a student on a full stipend pursuing a Law degree in a prestigious university in the U.S., which implies many privileges, such as knowledge of the language, socioeconomic status, and endorsement by a well-respected academic institution.

Ava's account, which chimes with the idea of empathy as imagining oneself in another's position, was recurrent in judges' responses. Critical theories of empathy warn about the ethical dangers and inaccuracy pitfalls imbued in the idea of 'entering another's subjective and psychic world' (Pedwell 2014, p. 7). This connects to the idea of speaking for others (Alcoff 1991) - or in a judicial setting, deciding for others - rather than speaking to and with others in order to fully understand and act for and upon others in ways that take into account their agency and subjective experience, as I will further discuss in Chapter 6. However, I suggest that judicial empathy is relevant insofar as it shifts, if only momentarily and imaginatively, a judge's epistemic position in relation to the presumed victim. Judges hold the position of knowers and deciders, playing an occupational and institutional role that implies power and invulnerability. If a judge allows herself to feel empathy, the power relation between judge and applicant is subverted. By summoning lived memories or by effort of the imagination, a judge who tries to be empathetic is reminded of her own vulnerability, which, as Gilson (2011) suggests, might be one of the key elements to exercise epistemic vulnerability and start tackling rather than reproducing oppressive power relations.

With respect to the capacity of a judge to empathize, Benjamin (Judge, IACtHR) shows a critical stance attuned to the geopolitical realities of power, privilege and class struggle. Benjamin explains how the Inter-American Court and its European counterpart are inserted in different regional contexts, which required from judges 'different degrees of sensitivity'. Picking up on his answer, I prompted Benjamin to clarify what he meant by sensitivity, asking if perhaps emotions were important and made a difference when discussing human rights. Benjamin quickly replies that the difference lies on 'one's capacity to put oneself in the position of another', to which I tentatively asked if he referred to empathy. Benjamin nods:

> Well, of course, empathy. It depends on the degree of prejudices of class, race, racism of a person… Because, of course, evidently, one cannot deny that we are middle class people, that we have a middle class education, that we went to university and that…our vulnerable sectors are sectors that are very marginalised, very excluded, from which the question that it is difficult to put oneself in the situation of another must be understood.
>
> We have a series of prejudices, nobody is the product of an incubator. In public school… Well, I always went to public school, I never went to an elitist school, but one has prejudices from society, no? And to achieve empathy, one has to make an effort to overcome classist, racist, sexist prejudices.
>
> (Benjamin, Judge, IACtHR)

Although Benjamin underscores the role played by one's prejudices and biases, he concomitantly distances himself from the 'we' (which seems to refer to judges) by counter-posing his public school background to the fact that he never went to an 'elitist school'. Implicitly, he places himself in a slightly better position to 'achieve empathy'[116] than his peers of the legal profession who hold an elitist degree, associating an elitist education to socioeconomic privilege. Furthermore, Benjamin conceptualises empathy as a goal, rather than an emotion, which entails an effort to dismantle one's prejudices.

116 'Lograr empatia'.

As Benjamin (Judge, IACtHR) speaks in terms such as ‘to achieve’ and ‘to dismantle’, the task at hand seems less daunting and murky than what the reality of judicial decision-making in human rights cases implies. Benjamin adds that the role of human rights in the effort to overcome such prejudices is to denormalise these situations ‘that are normalised and very bad’. This assertion chimes with the idea that vulnerability in human rights litigation can bring about transformation in society by uncovering victimising events within structural patterns and demanding that States proactively tackle the perpetuation of these harms. By enlarging frames of recognition (Butler 2009), new vulnerable groups are included and the IACtHR sets out interpretive standards for human rights law which help denaturalise harms, making invisible harms visible. To Benjamin, empathy plays a role in the process of recognising vulnerable applicants, a concrete way through which human rights courts dismantle normalised harms. However, as vulnerability emerges within and across bodies that act upon others while being acted upon at the same time, empathy might depend on emotional responses that might require more than efforts to ‘achieve empathy’ and overcome deep-rooted classist, racist, sexist or ableist prejudices. Epistemic ignorance (Gilson 2011), even if strategic and willful, may still be a difficult blind spot to illuminate through traditional forms of liberal legal reasoning, which abide by binary categorisations and underplay the entanglements of vulnerability and agency and reason and emotion.

Back to Strasbourg, Liam (Judge, ECtHR) offers a more explicitly detached perspective. He clarifies that in his opinion, judges’ emotions might only at times be relevant, emphasising the need to take into account the way society reacts empathetically or not when judging a case. Rather than conceiving of empathy as subjectively felt (or the capacity to feel, engage and be somewhat permeable to what others feel), he sees empathy as a ‘social fact’. Note how the factual nature Liam ascribes to empathy refutes the value of his own emotions. Defining empathy as a fact in this case reduces it to an object to be apprehended by a subject, rather than a feeling which is elicited or summoned in the context of a relationship. Liam indicates that empathy is not captured through an embodied and affective connection formed between judges and applicants, whose experience and suffering they purport to imaginatively understand as if they

were ‘walking in their shoes’, as per the common conception of empathy. Conversely, Liam describes empathy as an emotion felt by members of society, which is captured by judges through what he calls an ‘intellectual incorporation’. In this sense, Liam suggests he perceives empathy in others, and discards his own feelings, as if his own feelings were not relevant to the judicial task. His position is unsurprisingly coherent with the image of judges as neutral and impartial. Yet, this perspective alienates judges from society’s politics of empathy, as if they were somehow immune to the embodied and affective ways their own feelings of empathy play a role in recognising subjects as vulnerable.

Liam’s explanation of how vulnerability is recognised differs from the accounts offered by his peers, Ava and Olivia. Ava and Olivia explain that they feel empathy since their previous lived experiences taught them how it feels to be in a situation of vulnerability, a feeling that is relived or remembered, albeit briefly, when they recognise the applicant’s position of vulnerability. Meanwhile, Liam portrays the task of identifying vulnerability through empathy primarily as an intellectual endeavor. Implicitly, he alludes to perception of empathy as a skill reliant upon rationality and affective distance, as though it were, in his words, a ‘fact’, hence objectively ascertainable. By doing this, he does not recognise his own partaking in European society, as a European judge in a position of great power to either affirm or dismiss what he calls society’s empathic reaction. Liam’s detached epistemic standpoint suggests impermeability to affect, as it presupposes that the judge or lawyer disavows the premise of sharing or connecting to the vulnerable subject on an affective level. However, his personal disengagement is accompanied by a confirmation of the relevance of vulnerability’s affective impact on others, particularly society, and on the jurisprudence of human rights courts.

Even when given the opportunity, that is, when I explicitly ask them about emotions or cases that had personally affected them, both Liam (Judge, ECtHR) and Benjamin (Judge, IACtHR) choose not to talk about the potential role played by their own feelings or empathic reactions. Liam even rejects the idea that judges have to make use of their own affective capacities to grasp and apply vulnerability. Instead, he

reduces the task of assessing affective reactions, or in his words 'public emotions' in the public sphere to rational perception. In a way, he is only able to explain how he recognises vulnerability by disavowing his own affective and embodied reactions, distancing himself from an acknowledgment of his own vulnerability. Benjamin speaks about degrees of sensitivity and putting oneself in another person's position, but confines the task of recognising the vulnerable to a matter of making an effort to overcome accumulated prejudices. This explanation strips empathy from its affective content in relation to Liam and Benjamin to reduce it to a seemingly simple process of rationally identifying one's pre-conceptions and biases and moving past them. In sum, they both acknowledge the importance of empathy, though disavow vulnerability's affective impact on their own embodied and personal experiences, almost conveying a purposeful invulnerability.

This brings into question the capacity of judges who disavow their own vulnerability to recognise when it is present in the narratives of others. As Nedelsky suggests, 'if the judges to whom we entrust the ongoing definition and enforcement of rights misunderstand the role of affect in judgment, they will not be able to do an optimal job' (2011, p. 166). Nedelsky connects affect to embodiment and suggests that '[i]f the very nature of reason entails a basic connection to the body and to affect, then an image of the rational agent that leaves out these dimensions must be inadequate' (ibid.). The notion of empathy (and the term itself) figures prominently in the justification of many interviewees for recognising vulnerability in case. This shows how judges engage with vulnerability in a way that disrupts the mind/body or reason/emotion binary.

I contend that affect does not only indicate epistemic proximity between a judge and the victim, through empathy, compassion and solidarity, but it can also suggest epistemic distance, by means of detachment, distrust, disbelief. On one side, vulnerability was associated with empathy, suggesting synchronic connection, feeling or understanding from the interviewee in relation to a vulnerable subject or group, as exemplified by the responses of interviewees Ava (Judge, ECtHR) and Olivia (Judge, ECtHR).

Conversely, recognising vulnerability can also be associated with emotional detachment, which became clear when Liam denied the relevance of his own feelings or emotions and framed empathy as a fact to be intellectually apprehended, rather than understood affectively. Benjamin also framed the challenge of recognising vulnerability as one of achieving empathy by overcoming one's prejudices.

A concern for gender diversity in the judicial composition of benches has brought about some changes in the judicial composition of human rights courts, though judicial roles are still predominantly occupied by men. As of September 2018, in the case of the Strasbourg Court, 16 of the 45 judges in office are women, whereas in the San Jose Court, only one of the seven judges sitting in office is a woman. Accordingly, most of the judges I interviewed in both courts were male judges. However, I noticed that the female judges, as in the examples above, showed less discomfort and were more forthcoming about the affective impact they felt when dealing with cases involving (allegedly) vulnerable applicants, as well as when speaking generally about their work. By contrast, the male judges I interviewed seemed more reluctant or hesitant to speak about affect, feelings and subjective experiences. They seemed more keen to shift the conversation back to the legal comfort zone of objectivity, neatly arranged categories, mechanisms and criteria for decision-making. When discussing empathy and vulnerability, I suggest that gender might have played a role in the different degrees of epistemic proximity or distance of interviewed judges, as they recounted their thought processes and legal reasoning for cases involving vulnerable subjects.

Drawing on the work of care ethicists such as Carol Gilligan (1993) and Nel Noddings (1995), Daryl Koehn (1998) examines what she calls 'female ethics', a deliberate counterpoint to traditional male ethics, with androcentric standards, for instance, principled and universalistic ethical reasoning under a right-trump-right logic. Koehn suggests that whilst men model relations according to rules and conventions that 'work well for a men's club but that do not work at all for relations with children, the very old, or the especially vulnerable', conversely, 'women treat situations and human character as fluid, paying attention to parties' feelings and struggling to find some resolution of dilemmas acceptable to all parties' (Koehn

1998, p. 2). It is noteworthy that theoretical developments about vulnerability and ethics in the past decades have found breeding ground in feminist writings by female theorists, as I discussed in Chapter 2.

Gender roles that are taught and learnt in patriarchal societies often assign care roles (such as child-rearing or taking care of the elderly in the private domestic sphere) to women. Judges and other decision-makers in the public sphere have historically been an occupation carried out by men, and the gender imbalance in courts, including international courts is an issue that exists up until this day. I do not mean to suggest that women are more attentive to feelings or emotions by virtue of an innate inclination or inherent aptitude in comparison to men. What I suggest is that more transparency about the way female judges speak about their feelings and subjective experiences can indicate more awareness about the ways objectivity and subjectivity, as well as the affective and the rational, play a role in thought processes and consequently, decision-making.

Rather than essentialising men and women on the basis of gender, the fact that female judges were more aware and open about affective motivations and their potential relevance in recognising vulnerability might indicate that non-hegemonic groups can potentially bring innovations in how to approach and adjudicate cases. By non-hegemonic groups, I mean groups that have historically been excluded from decision-making spheres in law and politics, such as international courts. Therefore, my findings indicate that gender diversity on the bench (and, extending the same logic across different axes, racial, ethnic and other kinds of diversity), might contribute to reshaping law and ethics in relation to the rights and duties pertaining to marginalised populations. However, as I underscored earlier, I do not suggest that acknowledging that feelings, emotions and empathy have a role to play in recognising vulnerability automatically signifies better ethical reasoning. But as Diana Meyers argues:

> empathetic engagement with stories told by victims of human rights abuse plays a vital part in promoting understanding of and commitment to human rights norms and that no other moral power can replace empathy in this role (Meyers 2016, p. 142).

If empathy is construed as a fact or goal to be achieved from a detached or restrictively disengaged standpoint, chances are that pieces will remain missing from our puzzle of uncovering affective pathways that make vulnerability salient in human rights courts.

I suggest judges might engage or resist engagement with vulnerability in affective and embodied ways. The findings also indicate that judges' recognition of vulnerable groups depends on how they position themselves epistemically in relation to applicants. Rational and affective elements are factored into how far or close a judge's epistemic position is in relation to an applicant. Of course, judges' epistemic standpoints are not frames that remain static throughout the process of recognising vulnerability and subsequent decision making. Yet, these frames of reference help us make sense of how vulnerability takes concrete shapes in individual judges' mindsets, in either wider or narrower ways - in which the narrowest would signify dismissing it altogether. On the one hand, relying upon empathy, for instance, might entail ambivalence and conflation of experiences, losing sight of the vulnerable subject's experience, or narrowly framing it. On the other hand, affect might often be too quickly dismissed or disavowed. This acceptance or refusal can either disrupt or reinforce the traditional archetype of judge as impartial, neutral and virtually invulnerable. More importantly, it has implications on how narrow or wide judicial frames of recognition can be in cases involving applicants who claim to be vulnerable. This affective framework enables the exploration of the complexities and challenges of human rights courts' practice which would otherwise be foreclosed by the boundaries of traditional and strictly technical, legal and rational hermeneutical tools. Furthermore, it allows for a more critical and nuanced understanding of power relations embedded within a human rights court setting.

Judges may indicate that their capacity to feel empathy is decisive to understanding the vulnerability of an applicant, drawing on personal experiences, for example, of parenthood or migration. I contend that this creates a position of epistemic proximity in relation to victims - albeit top-down and one-sided - and an openness to accepting, believing and responding to the applicant's

vulnerability. Judges may also convey distrust and disbelief with respect to vulnerable applicants or vulnerable groups, showing more empathy towards the State. I suggest this implies a position of epistemic distance in relation to certain victims. This position is better understood as they express scepticism or indignation, affective reactions which influence on their epistemic position in relation to applicants and thereby, on how they interpret and recognise vulnerability in concrete cases.

If human rights courts adopt a cherry-picking approach steered by public sympathy, vulnerability can only get us so far in terms of combating abominable structures that enable systematic human rights violations against migrants. In this regard, an underlying politics of empathy, or rather a politics of pity (Walklate 2011) may place the spotlight on some types of victims to the detriment of others, even if they are all subjected to harmful practices which should be tackled and addressed by States. Within a vulnerability analysis, it follows that certain migrants might be considered 'victimological others' (Walklate 2007) , in that this particular focus renders only certain vulnerable migrants more visible to the detriment of others, a visibility which is dependent upon their capacity to elicit public sympathy. The problem that arises is twofold: first, certain individuals are excluded from being considered as vulnerable even though the same structures and relations which sustain disadvantage or subjugation exist, though not capable of attracting the same amount of compassion or sympathy; secondly, the structural patterns that engender these victimisations, which may perpetuate systemic forms of harm, remain virtually unchallenged, as only small concessions to certain kinds of vulnerable groups are put forward. Thus, it seems like discrepancies in recognising vulnerability might implicitly entail condoning the juridical invisibility of certain groups. In addition to perpetuating selective inequality, wider social and cultural frameworks supporting oppressive power dynamics towards migrants remain untouched.

## Conclusions

This chapter's aim was to explore the underlying dynamics of vulnerability's emerging relevance in the case-law of human rights courts, focusing on the ECtHR as case study. I argued that the creation of legal

knowledge through the recognition of a vulnerable group, even when established in the case-law of a court, remains subject to controversy. As a result, jurisprudential progress with respect to vulnerable groups depends on the unsettled concept of vulnerability. Judges respond differently to the vulnerability of applicants in concrete cases. As I will attempt to show in the next sections, while some judges recognise vulnerability as an individual act of framing, associated with technique, expertise and rational cognition, others seem to conceptualise as deriving from an effort to connect and relate to alleged victims, understanding contexts by demonstrating empathy. This may be conditioned by the extent to which they are able to recognise their own vulnerability when exercising their unilateral power in relation to vulnerable victims. Political bias against migrants, for instance, can make a judge less empathic or compassionate towards a refugee. By contrast, a personal experience of being a migrant can make a judge feel more empathy towards an asylum-seeker. My empirical findings point to the intrinsic connection between the rational and the affective in human rights judicial decision-making. Judges' responses to vulnerability can be understood through their affective reactions, which signal either pathways or obstacles to recognition of subjects as vulnerable.

As the innovative reasoning set out in *M.S.S. v. Belgium and Greece* and *Tarakhel v. Switzerland* confirms, judges' opinions about vulnerable groups may signify juridical innovation in a human rights court. The relationship between knowledge and vulnerability in this context can be examined by dissecting the power dimensions present in a concrete case. The first kind of power relation involves the State and presumed victim, who are the litigating parties. The second consists in the triangular relationship State-Court-applicant, in which the applicant seeks the Court as subsidiary authority, given the failure of the State to protect her human rights. Within the Court-applicant relationship lies the third type of power relation, which is configured between judges and presumed victim. These unequal power relations are premised on a narrative of victimhood, felt and lived by the applicant or victim. This narrative is translated to the language of law by lawyers and climbs, at each step of the judicial proceedings, until it reaches the judges. In this chapter, I examined judges' perspectives about vulnerability in their day-to-day practice. Judges'

explanatory accounts for recognising vulnerability have a common denominator of particular interest to my analysis: the relevance of empathy. Broadly speaking, affective forms of knowing the applicant 'other' can play a role in how vulnerability is shaped not only in personal but also in courts' narratives of victimisation.

However, judges may reject or accept how they are affected by vulnerability. Drawing on this affective framework, I focused on judges sitting on the bench rather than examining the ECtHR as an impersonal institution. In this analysis, 'vulnerable' becomes less of a unilateral label ascribed by the Court and more of a relational aspect of how human beings, be it judges, lawyers or victims, mutually interact to produce, reproduce and construct frames of reference, power and knowledge about experiences and contexts of vulnerability. Following this logic, I explored how subjective sources of knowledge, that is, personal experience and biases, are implicitly accessed and navigated by judges and lawyers when they justify why and how they apply the concept of vulnerability in their legal practice. In conclusion, I suggest judges either accept or willfully ignore and reject the ways they are affected by narratives of vulnerability and human rights violations.

Essentialising certain bodies as vulnerable and not others can reproduce, rather than tackle, socio-material inequalities and reinforce forms of victimisation that disproportionately affect members of 'vulnerable populations' (Butler 2016). Within this logic, I suggest that forms of ignorance about vulnerability might become entrenched in legal human rights language. Judges' acts of recognising an applicant as vulnerable involve ethical and emotional responses. Their position of privilege, that is, their ability to frame 'vulnerability', and who is entitled to embody the 'vulnerable' and the 'victim' in legally binding decisions is informed not only by what they know, but also by forms of strategic or epistemic ignorance which become hidden between the lines or left unframed by dismissals and denials.

Whereas traditional legal interpretation presupposes judges and lawyers' capacity to affect vulnerable subjects by exercising their preassigned institutional roles, little is said about how legal practitioners are affected by vulnerable applicants' stories. As the emotional and the rational are imbricated

rather than in opposition to each other, my findings indicates that vulnerability emerges in judicial interpretation in ways that are not always predictable, as affect permeates and circulates through bodies, forming reasons that are grounded on both rational as well as emotional responses. I argue that attending to empathy, emotions and feelings within legal understandings of fairness, equality and human rights paves the way for a fuller account of judicial decision making. In this way, I conceptualise vulnerability within juridical relation as an unsettled concept, which is mobilised affectively and adds persuasive weight to certain arguments in legal reasoning. As thinking about vulnerability elicits unsettling reactions in judges, such as emotions of empathy or fear, juridical power can be seen not only as a top-down act of power whereby judges recognise and frame vulnerable bodies, but the result of more complex processes and relations where conflicting notions of vulnerability and agency are structured, tackled and reproduced. Context-sensitivity may depend on subjective understandings of vulnerability; at times, they might be reductive.

# Chapter 6 - Translating 'vulnerability' into legal language: human rights lawyers and affective translation

## Introduction

Whereas the previous chapter explored judicial discourse, especially in the European context, in this chapter, I focus primarily on interviews conducted with lawyers who work in the Inter-American system of human rights protection. The discursive use of vulnerability by lawyers can underscore the particular relevance or urgency of a context whereby victimisation occurs. My findings shed light on the complex decision-making processes of the Inter-American system of human rights protection, which is comprised of many phases. In each of these phases, narratives of victimisation, which often include contexts of vulnerability, are constructed and passed on, starting from victim to lawyer. As a first step, the victim's legal representative listens to the victim's account and drafts a legal petition. Provided that domestic remedies have been exhausted, this petition is then lodged by the victim's lawyer before the the Inter-American Commission on Human Rights ('Commission'). This legal claim is then analysed by a string of lawyers of the Commission. By the time the claim reaches the judges of the Inter-American Court of Human Rights ('IACtHR' or 'Court'), the victim's narrative has been read, interpreted and passed on from one legal practitioner to another multiple times.

As human rights courts serve as ethico-normative mediators of the state-individual relationship, their functioning also involves power relations. Hence, I suggest that courts' act of framing encompasses a series of other actions performed by legal practitioners, such as feeling, listening, translating, speaking and resisting. To do so, lawyers must navigate the agency/vulnerability spectrum to formulate new arguments for enhancing the protection of those they perceive as vulnerable. These intra-court power relations in international human rights litigation contingently reshape 'vulnerable subjectivities' and I argue that they might have a disruptive effect on the dichotomy vulnerability vs agency. Drawing on interviews with lawyers, I suggest that the juridical recognition of vulnerability involves complex relations between lawyers

and alleged victims, whereby they affect and are affected at the same time. Beyond individualised accounts of victims in situations of vulnerability, the lawyer-applicant relation indicates that resistance can be mobilised and engaged within and through relationships that (re)produce and advance juridical knowledge. I contend that examining lawyers' experience and translation of vulnerability allows us to explore the possibilities and limitations of ethically responding to vulnerability through juridical discourse.

The power to frame who is 'particularly vulnerable' and thereby deserving of special treatment has juridical consequences for recognising victims and the scope of their rights, as well as corresponding State duties. Moreover, examining human right courts' frames of recognition regarding vulnerability can be a starting point to better understand power relations underlying the practice of international law. More concretely, making sense of how legal practitioners engage with narratives of vulnerability provides us with a glimpse into the powerful ways law can be used to transform oppressive structures or to further oppress individuals. International human rights courts are often the last resort for victims, given that the legal requirement to lodge a claim is to have exhausted all domestic remedies. The cornerstone of an analysis of legal power lies on the fact that while victims, especially those in contexts of vulnerability, need the law, they often do not speak the language of law.

As discussed in the Introduction, Anna Grear conceives of international human rights law's power to frame the 'human' as an 'inescapable exercise of epistemic closure', in which one draws attention to selected features at the expense of others (2012, pp. 17-18). Abiding by a logic whereby some aspects are highlighted to the detriment of others, the act of framing produces a concomitant invisibility or concealed existence of competing aspects. Through a reductive lens, the act of framing subjects as vulnerable may be construed as a top-down act of power by courts or judges, whose votes and decisions ultimately shape the jurisprudential fate of courts. This perspective would also imply that judges are the agents who exercise acts of power and those seeking recognition as victims are the passive recipients or objects. It would follow that lawyers, similarly to judges - though to a lower degree - would also be agents in the relationship they

build with applicants, as their active role presupposes the ability and knowledge to shape, influence, and delimit the boundaries of the legal narrative on concrete cases. From a more relational viewpoint, I bring to the fore how subjects who are recognisable as vulnerable - applicants and presumed victims – also exercise agency by affecting legal practitioners. Adopting this approach, a human rights court's act of framing may be construed not as a top-down act of power but as the result of intersubjective relations formed between lawyers and victims, exercised prior or in tandem with decision-making processes. I argue that the evolution of juridical frames occurs through and within relations and processes between lawyers and presumed victims, whereby both recognised and recogniser affectively negotiate power, agency and vulnerability.

I interviewed lawyers who perform different roles within the Inter-American system, namely legal representatives for victims, lawyers within the Commission and lawyers within the Court. Mindful of how a narrative of vulnerability climbs up in judicial proceedings, lawyers' capacity to recognise a subject as vulnerable is tested prior to, and often as a pre-requisite of, the corresponding capacity of judges. Differently from judges, lawyers might interact and meet alleged victims in person, entering into unmediated relationships with applicants. Similarly to how empathy figured prominently in the previous chapter, here I explore more closely the role of emotions, broadly speaking, in the interpretive activity of lawyers. I draw here on Megan Boler's conception of emotions as resonating 'with cognitive accounts… that understand emotions and cognition as inextricably linked' (Boler 1999, p. 19). My emphasis is neither on categorising nor analysing interviewees' emotions. Rather, I underscore how emotions might arise in conjunction with juridical frames, and how they may carry a potentially disruptive power within juridical practices of interpretation. To investigate how bodies are recognised as vulnerable or not within the Inter-American juridical system, I look into how legal practitioners describe their encounters with alleged victims, focusing not only on how they are able to affect the lives of applicants whom they perceive as vulnerable, but also how they are affected at the same time (Butler, Gambetti and Sabsay 2016).

Judith Butler posits that 'vulnerability must be perceived and recognised in order to come into play in an ethical encounter' (Butler 2006, p. 43). On theorising how emotions move and circulate within and across bodies and objects, Sarah Ahmed (2014) describes an encounter as a body being affected by another body. The immediacy of an encounter is however mediated by 'histories' which come before the very arrival of the subject we perceive, conditioning our perceptions of bodies as 'dangerous' (or, in the cases I analyse, 'vulnerable'), to which Ahmed concludes that '[t]here is nothing more mediated than immediacy' (2014, p. 212). On the micro-level of lawyer-victim encounters, I suggest that lawyers are affected by narratives of vulnerability not only on a rational, but also on an emotional level, which I call vulnerability's affective persuasion. This persuasiveness can play a role in how alleged victims' claims unfold in the Inter-American system, as lawyers push the boundaries of interpretation of human rights law.

I develop my argument in a twofold manner. Firstly, I suggest that alleged victims' narratives of vulnerability might be compelling by virtue of their power to affect lawyers not only rationally, but also on an emotional level, providing them with a reason to translate these narratives into legal discourse. Carolyn Pedwell (2014) applies the concept of 'affective translation' to how empathy travels across borders, producing and reproducing affect, which can reinforce dominant and oppressive structures or contrariwise promote change and build alternative social justice frameworks. Secondly, I contend that when lawyers affectively translate this vulnerability into a legal claim before international human rights institutions, they might exercise resistance and solidarity in an attempt to bring about justice to individuals and, from a wider perspective, to wider claims for social justice. I draw on Butler's (2016) conceptualisation of resistance in vulnerability, applying it beyond the political to reach the legal sphere, weaving a critique about juridical receptiveness and responsiveness to vulnerability. This approach to the framing of subjects as vulnerable lays bare deeper layers of the processes by which vulnerability emerges as a relevant to bring about changes or innovations in human rights interpretation. By examining these layers, I argue that agency and vulnerability not only coexist, but are mutually reinforcing and interpenetrating concepts which are crucial to how the juridical power to frame is exercised and shaped in legal practice.

## Beyond legal categories: on being affected

Presumed victims' legal representatives listen to their narratives of victimisation, which might encompass contexts of vulnerability, and craft a new narrative to fit the mold of what is considered acceptable within the legal and institutional human rights framework in the form of legal petitions or briefs. These applications are then read by Commission lawyers, who verify admissibility requirements and pass the case on to the Commissioners. There are seven Commissioners - in symmetry to the seven judges of the Court - who analyse the merits of the case and, depending on their conclusions, invite the State to submit their arguments of defense. Upon analysis of the victim's claim and the State's response, the Commission issues recommendations accordingly. If parties cannot reach an amicable agreement or if the State fails to fulfill obligations set out by the Commission, the case may be referred to the Court. Court lawyers then get acquainted with the legal narrative of the case and assist the seven judges of the Court in analysing and drafting decisions and judgments. Lawyers in the Inter-American system hence play a pivotal role at every step of the judicial process. It stands to reason that victims need lawyers precisely to bridge the gap between their demands for justice arising from their experiences of victimisation and the legal and institutional resources available in the Inter-American system of human rights protection.

The Commission is the gatekeeper of cases that go to the Court. Procedurally, the only way to litigate before the IACtHR is by filing an individual petition before the Commission. According to Amelia, a senior lawyer who has worked for over twenty years at the Commission, the Commission and the Court are horizontal organs with complementary roles. Amelia explains that 'the Commission can play a role that is quasi-juridical in the case system, quasi-political in other contexts'. To differentiate both institutions within the Inter-American system, she explains that 'the Commission has the context' and a wide range of

institutional mechanisms[117]. Meanwhile, 'the Court gives us the opportunity to refine, to define, to make more specific, particular, differentiated the standards through very specific cases and jurisdictional rulings'. Although Court lawyers and Commission lawyers alike concede that the concept of vulnerability is fluid and there is no proper definition, they bring to the fore the importance of wider categories or areas of expertise to deal with specific types of vulnerability. For instance, Isabella describes the practical approach of the Commission to vulnerable groups by the creation of nine institutional Rapporteurships, such as Rapporteurships focusing on women, children, migrants, detainees and afro-descendants. She concedes that most of these Rapporteurships focus on groups which can be characterised as vulnerable[118]. Similarly, Emma, a senior lawyer at the Court, explains how specialisations of Court lawyers correspond to some extent to the Commission's Rapporteurships. However, Court lawyers' areas of expertise might differ, such as 'indigenous rights and gender', which do not have a matching Rapporteurship at the Commission. Circumscribing vulnerability into categories or areas or expertise is hence the method used by legal (and political) institutions in the Inter-American system to operationalize vulnerability and manage the ways they address different situations.

Commission lawyers exercise a power that is often underestimated due to the invisibility of its juridical ramifications: the power to dismiss cases. Although arguably the ultimate decision about a Court case lies in the hands of judges, Commission lawyers are in charge of admissibility of cases. Dismissed cases will not even reach the Court and the merits of the case might never be addressed for procedural issues, for example. Legal frameworks are equipped with norms and rules that might not be flexible. For instance, alleged victims might not be able to seek justice before the Inter-American system because they took too long to come forward, in which case Commission lawyers have to enforce temporal limitations

[117] For example, precautionary measures, thematic Rapporteurships, country visits, press comuniques and hearings.

[118] The exception is the Rapporteurship on freedom of expression, which focuses on rights, rather than on groups.

established in the rules of procedure to deny processing the victim's application on the grounds of admissibility. On legal categories of vulnerability, Diego, a lawyer responsible for pre-admissibility at the Commission, highlights the connection of vulnerable groups and the 'per saltum' procedure[119], which allows certain cases to be given priority in assessment regardless of time of submission. As the interviewed progresses, he reveals that vulnerability in his practice transcends per saltum categories and takes different meanings and unexpected shapes in his interactions with applicants. Diego describes how difficult it can be to explain the limitations of his role as Commission lawyer to (prospective) applicants. Diego shares examples which reveal how processes of dealing with alleged victims might affect lawyers on a personal and sometimes intimately uncomfortable way, creating ambivalences in his role:

> I remember this situation: there was this person, she came all the way from Chile just to see us... I don't know how she got the money. I mean, I could perceive some kind of behavior that might be related to mental disability. So I spent two hours with this woman trying to understand this case and it was very hard to. She only brought this case full of papers and she put it on the table and said help me… I couldn't do much. I was like: 'Sorry I cannot help you in the way you want to. I can give you the formats, I can tell you what it says in this box, what you can check, I can help you organise your documents, maybe, I can do that for you, but I'm not your lawyer', because she was telling me: 'You're my lawyer'. [In reply:] 'I'm not [your] lawyer, I cannot represent you here.'

Diego says that 'the biggest challenge in [his] work on a daily basis' is to know when and where to sway from the regular course of action and neither compromise the independence of the Commission nor the parties' rights and interests:

119 'Per saltum" is set out on Art. 29, item 2, which deals with the initial processing of cases, in the Rules of Procedure of the Commission. Similar to the ECtHR, this procedure allows for certain cases to 'jump the queue' or to be examined outside the chronological order of submission, meaning that they are prioritised and examined first. These exceptional cases include time-sensitive matters, such as when the presumed victim is in death row or suffering from a terminal disease and also elderly individuals and children.

> I don't draw the same line every time. I know when I have to go to further, and when I'm not. When I'm required, when I'm legally required by the Convention to go deeper and when I'm not supposed to.

Diego's discussion touches upon constraints imposed by the law and the legal requirements of his occupational role as a Commission lawyer. He also mentions one last case in which he exceeded the diligence required by a regular case because he was convinced that the individual was in a situation of extreme vulnerability. The situation involved an HIV-positive prospective applicant whose socioeconomic rights, inter alia, the right to adequate housing and the right to work, were constantly curtailed by actions and policies which, to Diego, were clearly discriminatory. However, Diego's attempts at creative lines of legal reasoning were not enough to convince his peers and move the case to the stage of admissibility assessment. In both cases, Diego refers to the frames of recognition embedded in law as though they are boundaries which limit his power to act. Despite the premise that individuals recognised as vulnerable merit special treatment, Diego exemplifies how human rights legal practice also imposes limitations on the power of lawyers and institutions.

Lawyers must navigate frames of recognition and translate them into legally viable courses of action within legal institutions. Clearly, the emotional impact of dealing with these cases might be compelling or persuasive in some instances, whereas in other times it may become a spillover effect which does not end up changing the course of legal proceedings. In the case of Diego, he felt he should do everything within his mandated power to support the prospective applicants, though he admittedly failed to do so due to the limitations of law. The residual emotional debris of an encounter with an alleged victim is exemplified by his ongoing phone relationship with an Uruguayan individual who did not even pass the pre-admissibility stage to be granted the applicant label. According to Diego, it was the recognition of how vulnerable this person was which led him to spend more time and effort trying to build a case for him, albeit unsuccessfully. In another example, when asked if she feels empathy towards the person filing a petition in these moments, Martina (Lawyer, Commission) explains how she opens herself up to what she calls a

'relationship' every time she drafts a case. By doing so, Martina feels a direct attachment to victims, even without necessarily becoming personally acquainted to them or even when the victims are already deceased:

> Of course… if you ask me, I develop a very close relationship with my victims. Even if they don't exist anymore [referring to dead victims]. But the relationship is there.

Martina asserts that a personal rapport, albeit one-sided, is built. Although unilateral, her commitment to a relationship is forged in the present - victims to whom she feels attached might never even meet her. Martina also talks about the moment where lawyers take on a case and decide to draft a petition on behalf of the presumed victim to file before the IACtHR. In this phase, an applicant can be identified as vulnerable by the Commission lawyer drafting the case even if this was not specified in her initial petition. The ensuing imperative that falls upon the Commission lawyer is to accurately depict the corresponding context of vulnerability. Martina explains how important it is to strike a balance when managing her feelings towards victims, especially those in situations of vulnerability. She even reveals that the embodied and sensorial separation between her and the victim is blurred in her own dreams, showing how intense the affective overspilling effects of her legal practice can be.

> [W]hen you start working in these issues… you realise that they are really hard, and you get involved in all these cases knowing all these single details of what happened to all these victims. I started dreaming about these cases and these things happening to me. But then you grow a thicker skin and you deal with it. And then you need to have, from time to time, reality checks so that your skin is not too thick.

Similar to Martina's and Diego's accounts, other legal practitioners report affective reactions to vulnerability as being at times visceral and uncomfortable. Like Martina, Diego refers to encounters with prospective applicants as 'relationships'. Diego mentions another case that illustrates the emotional labour which is often entailed by this work:

> So I have this petitioner who calls me every week because his father got murdered even though the Convention was not even applicable for this country, for Uruguay. It's a petition we have rejected a long time ago but he is still … fighting for reconsideration… Yeah, sometimes I pick up the phone,

> I know his number now by heart, so sometimes it's hard to deal with the expectations of what people think we can provide… They know the lawyers, we know their cases, they sit with us and… that creates a relationship maybe not healthy for the victims, because they see us as their protectors, and I think we assume that position sometimes as well.

Erinn Gilson explains that 'the impetus for ignorance is an attempt to avoid what might unsettle us, when we ignore we are necessarily avoiding our own vulnerability' (2011, p. 319). In that way, Martina refers to her attempts to control the extent to which she is affected by vulnerability. Although human rights lawyers like Martina might be in a position of socioeconomic privilege in relation to many victims, they are exposed to heart-wrenching narratives of vulnerability and victimisation on a regular basis. Gilson posits that there is a difference between practicing invulnerability as willful ignorance, which grounds oppression, and 'a knowingly undertaken refusal of vulnerability through which one seeks to protect the self' (2011, p. 321). In that way, Gilson argues that knowing ignorance and refusal of vulnerability can also be understood as a form of resistance, in that '[t]he closure of the self is not constitutive but selective and strategic; one does not ignore and deny vulnerability per se, but refuses the experience of vulnerability in particular cases' (2011, p. 323).

Lawyers can practice invulnerability by actively ignoring aspects of their existence which are uncomfortable or inconvenient, creating a mode of resistance. However, one's refusal to confront one's vulnerability has consequences when one has the power to name and ascribe legal relevance to the perception of someone else's 'vulnerability'. Lawyers begin by performatively enacting a presumed invulnerability (Gilson 2011), deriving from their knowledge-bearing status and occupational position of power, which implies agency and the capacity to affect the lives of victims by empowering them to navigate the legal system. However, this performative invulnerability can be disrupted when lawyers are emotionally affected by the vulnerability of the applicant.

I suggest that when lawyers are reminded of their own vulnerability, that is, their interdependence to the social and material infrastructure (Grear 2013; Butler 2016), they are forced to navigate within the

agency/vulnerability spectrum. Within their comfort zone, legal practitioners exercise occupational agency by engaging with victims in juridical processes and encounters. However, they seem to enter a discomfort zone when they are affected by narratives of vulnerability. Being affected by vulnerability can be understood as an openness to being vulnerable (albeit momentarily, indirectly and mediated by legal language and judicial procedure), and a permeability to the 'other'.

This is not to say that everybody is affected in the same way and with the same intensity, nor does it mean that being affected paves the way for universal ethico-normative responses. What I want to suggest here is that perceiving certain applicants as vulnerable and creating a relational bond with them may produce a shift in the power dynamics between lawyers and applicants. When privileged subjects relinquish their presumed invulnerability - even if only contingently, within the temporality of an encounter or a juridical 'relationship'- the power imbalance can be disrupted. Momentarily, the lawyer is not the only subject who affects, or the knowledge-bearer in a position of privilege who charitably bestows her expertise on the applicant. By the same token, the applicant is not presumed to be an empty vessel of ignorance, who can only be affected by others and victimised, eternally confined to the stereotype of passive disempowerment and helplessness.

Displacing and rearranging agency and vulnerability as organising elements of the lawyer-victim relationship involves an interplay between empowerment and disempowerment for both parties. In what concerns human rights law, legal empowerment is closely related to effectively accessing justice when one's rights have been violated. From a broader perspective of the lawyer-victim relationship, the concept of power can be linked to how individuals feel empowered, not only being affected by systems of power in place, but also as historic agents who can affect others as historical agents. Through this relational lens, in the following section I examine the extent to which legal practice allows for victims to have their contexts of vulnerability recognised, their voices heard or even to exercise a more proactive role in judicial proceedings.

Interviewees seem to rely not only on rational, but on emotional responses to assess the meaning of vulnerability in concrete cases, being affected in ways that they cannot fully predict or control. In this vein, Claudia Aradau posits that '[e]motional responses are viewed as important sources of human values and ethics and as a proper basis for political action'; moreover, she claims that 'to feminists and postmodernists, emotions can ground new ways of radical politics, providing a bond for communities and creating solidarity' (Aradau 2004, pp. 256-257). As I have suggested in the Introduction, particularly when thinking about transformation and change in international human rights law, the political and the legal are intimately connected. I suggest the ways vulnerability is affectively mobilised within and through the bodies of lawyers and applicants conditions ethical responsiveness and juridical framings. I also contend that vulnerability can operate as an epistemic trigger, whereby lawyers are mobilised by emotions and reasons within relations with alleged victims, while at the same time mobilising their power and knowledge to respond to those they perceive as vulnerable.

## Affectively translating, resisting and transforming

Similar to the judges discussed in the previous chapter, my findings show that lawyers neither rely on the same methods to recognise vulnerability nor do they engage with the concept in their practice uniformly. In this regard, Mateo, a Colombian lawyer who has represented victims before the Inter-American system for over a decade, explains that the concept of vulnerability 'has been a major line of argumentation in every case' but the challenge which common lawyers for victims face is that the concept 'is not yet as developed as one would like, it is sort of a field where a few experts know about a few categories that should be protected'. Liliana Dolis, founder and coordinator of *Movimiento de Mujeres Dominico-Haitiana* (MUDHA), an organisation that fights for the rights of Dominican-Haitian women in the Dominican Republic, also affirms that there is a 'certain vulnerability' in the situation of many of her clients, including children, women and migrants who are in a 'very critical situation… and who in certain ways do not know their rights to be able to defend them'.

Inability to obtain an effective remedy from the State is what drives many human rights victims to seek the mechanisms available within the Inter-American system. Although any individual can file an application to the Commission reporting she was a victim of a human rights violation, Isabella (Lawyer, Commission), explains that if applicants have legal representation, their odds of having a petition deemed admissible are considerably higher. Victimised individuals often depend on attorneys in their quest to access justice. When speaking to alleged victims, Mateo (Lawyer for victims) utilises didactic cardboard sheets, with headings such as 'criminal law' or 'civil law' to explain the possibilities and limitations of the legal system. He illustrates the kinds of interactions that might happen between him and a client:

> And they would ask me questions like: 'Can I come to these hearings?' or 'Can I speak?' and you have to tell them: 'No, you cannot, it's only your lawyer… Tell me what you would like to say there', and then I voice it in terms that are legally appropriate at that context… I actually have all these cardboards all ready with relevant information, so I tell them: 'Listen, first of all, this judicial proceeding is a means to find the truth of what happened. So right now, the mere denial by the State that this was a human rights violation against your family needs to be countered in a way that is not merely voicing it in a radio station or the press. You need institutional ways to find this, to do this.' So I explain to them how to do that in one such claim.

Legal representatives have the power to speak for victims within juridical proceedings. Moreover, lawyers who represent victims listen to their stories and translate their narratives of victimisation into legal briefs. This power to filter an experience of victimisation and vulnerability into legal language shows their participation in the power to frame, which Anna Grear ultimately ascribes to international human rights law. By filtering, I mean choosing which facts to frame as juridically relevant and how to frame them in legal language, carrying argumentative weight, or persuasiveness.

Chiming with the idea of translating the victim's narrative into legal discourse, the practice of lawyers offers a quintessential example of Linda Alcoff's (1991) argument that when someone is speaking for others, they are 'engaging in the act of representing the other's needs, goals, situation, and in fact, who they are' (1991, p. 9). Alcoff warns, however, that 'the practice of privileged persons speaking for or on

behalf of less privileged persons actually resulted (in many cases) in increasing or reinforcing oppression of the group spoken for' (1991, p. 7). Given that legal representatives are often the first ones to frame victims' narratives into juridically intelligible claims, misunderstandings or gaps in comprehension may prove problematic, delineating the boundaries of possibilities for ethical transformation. This is especially troublesome when contexts of vulnerability are left unchallenged, or selectively framed, producing a ratchet effect that, as I attempted to illustrate in Chapters 4 and 5, culminates in selectivity in human rights courts' frames of recognition.

Lawyers occupy a position of power and privilege by navigating the realm of legal expertise and, more importantly, representing the interests of others and enabling others to access justice. There are many dangers of misrepresenting the other's claims and needs or bringing about harmful albeit unintended consequences by virtue of the speaker's epistemic position and the context of the speech. Despite that, Alcoff also asks whether refraining from speaking for less privileged others means 'abandoning [one's] political responsibility to speak out against oppression' (p. 8). Drawing on the work of Gayatri Spivak (1988), Alcoff posits that 'we should strive to create wherever possible the condition for dialogue and the practice of speaking with and to rather than speaking for others' (p. 23). Spivak adds the caveat that the privileged subject should not assume dialogue as a straightforward possibility, which could risk deepening rather than disrupting oppressive power relations. This framework is helpful for analysing the human rights lawyer-victim relationship, mindful of Alcoff's suggestion that 'anyone who speaks for others should do so out of a concrete analysis of the particular power relations and discursive effects involved' (p. 24).

To human rights lawyers, listening to the victim's speech can be the difference between helping individuals resist against systems of oppression or contributing to entrench normalised harms into human rights law. About this sensitivity to victims' needs, Natalia Perez (Lawyer for Victims) warns that legal practitioners should ensure that the judicial battle does not end up 'revictimising' victims by imposing further harms during lengthy court proceedings that do not cater for their needs or adequately deal with

their experiences of trauma. An example of revictimisation is allowing the 'vulnerable' label to confine applicants to a position of disadvantage and victimhood (Sofia, Lawyer, Court), disregarding their voices and thereby not allowing them to play the role of protagonists in their own juridical claim (Valentina, Lawyer for Victims). As Alcoff argues, 'ignoring the subaltern's or oppressed person's speech' risks reinforcing imperialism (1991, p. 23). Although a postcolonial power dynamic may be more visible in cases involving European lawyers and judges and migrants from the Global South in the ECtHR, one must be wary of the multidimensional power gap between lawyer and presumed victims, which often include class, race, gender, sexual orientation, ethnicity, language, among other intersectional dimensions. When asked how he interacted with applicants or presumed victims in contexts of vulnerability, Mateo (Lawyer for victims) states that victims may have little knowledge of how to navigate the legal system:

> I think in certain contexts, human rights victims are illiterate, they don't know how to read, they have no schooling at all, so you have to tell this to them in ways that make sense… Sometimes with victims you have to focus on the bigger picture, which is that of what you are seeking and that which you are willing to do. [If] you are going to achieve justice, you can't just say 'this is a big injustice and I am outraged'.

Different educational backgrounds can be another element which potentially widens the power gap in the lawyer-victim relationship. Nevertheless, assuming that lack of formal education or legal knowledge precludes presumed victims from actively participating in the construction of the legal claim can also be harmfully patronising. The embodied knowledge of the person who has experienced victimhood is the starting point to making any claim for justice, regardless of extant legal frames of recognition. Although a concern of whether or not existing legal frames of recognition will fit the situation is valid, perhaps cases involving presumed victims who are inserted within contexts of vulnerability can be useful precisely for forcing narrow frames to break and be fine-tuned and enlarged. In this vein, Butler argues that it is the very 'collapsibility' of normative frames of recognition that allow them to be reshaped and reproduced (Butler 2009, p. 8). Speaking to and with applicants means giving room to a relational exchange of knowledge,

affect and power. As a result, applicants become agents whose actions matter, rather than objects of State oppression or victims to be rescued by human rights lawyers and judges.

Valentina (Lawyer, CEJIL) says that building trust is one of the challenges of her relationship with clients, especially in contexts of vulnerability, such as indigenous communities. She gave as an example her relationship to the indigenous communities of Honduras. Valentina represented the family of Berta Cáceres, a human rights defender who fought for indigenous rights in Honduras (and was herself a member of the Lencas community) and was assassinated in 2016. Valentina reflects upon common challenges in her legal practice:

> Although in theory it is very easy to see that they are at risk and they must be protected, in practice there are very big problems when implementing protective measures. You are faced with indigenous communities that are truly isolated, without electricity, without internet access…

As Valentina (Lawyer for victims) and Perez (Lawyer for victims) point out, poverty and difficulties of access to infrastructure and communication are pressing issues insofar as victims do not have the time or the money to remain fully engaged. The wider the power gap between lawyer and client, the smaller the chance that the victim actively participates in building her case, and that she will transcend her stereotypical role as victim to exercise agency in the legal process. It is reasonable to assume that this power imbalance can pose challenges in the relationship. If the victim participates less in circumscribing the scope of the legal claim, chances are that the lawyer is more likely to misrepresent her particular needs and interests. Conversely, Valentina puts forward that active participation of victims in the process can have an empowering effect for them.

I suggest that in these situations of active participation victims can see themselves not only as being affected, but as having the power to affect and transform not only their own lives, but the lives of others. Victims' vulnerability is thus recognised as they gain juridical recognition as vulnerable applicants and victims; through the exact same processes, they also exercise historical agency by reclaiming authorship

over their own narrative of victimisation, which has ramifications and spillover effects on the evolution of international human rights jurisprudence.

Perez (Lawyer for victims) enthusiastically shares an experience in which she feels her client was empowered by how the legal process unfolded. Nino Colman is a Colombian migrant who was detained and tortured by Mexican authorities, as well as sentenced to 60 years of reclusion in a process that, according to Perez, was ripe with 'irregularities and inconsistencies'. Perez says that the victim of torture, Nino, from the outset wanted his case to reach the Mexican Supreme Court. Perez remarks: 'I found it curious, no? This Nino, dreams a lot.' When Nino's case reached the Supreme Court, Perez said she felt moved and happy with the achievement, filled with 'many hopes'.

Although tensions can arise between individual victims' interests and strategic litigation goals of changing wider structures of vulnerability, a different scenario may take place where the victim's interests are aligned with those of others and she is empowered by actively and meaningfully participating in the judicial process. In a way, this engagement allows victims to subvert the disempowerment connected to their victimhood and negotiate her agency and vulnerability while navigating judicial proceedings. Awareness of the over-spilling effects of litigation to wider structures and groups can be a mechanism that connects individual victims to collective struggles in scenarios of shared vulnerability. Perez's account sheds light on how complex and fluid the identities of victims may be, and how vulnerability may take different shapes at distinct times, including fostering empowerment and agency:

> We identified that many victims managed to overcome this affectation or this vulnerability that generated the violation at a certain moment. In Mexico, particularly, it may be that many victims end up becoming human rights defenders, including victims or mothers of victims who even study Law, no? So not only do they become defenders, but also lawyers, human rights specialists, specifically… [T]hese individuals who generally had a moment of vulnerability are also people who eventually overcome this moment, from being defenders of their own causes, to defenders of other causes which are not their own. And I believe that this is a factor that to some extent ruptures vulnerability that might have been perceived in the victim. (Natalia Perez, Lawyer for Victims)

When asked about her power as a human rights lawyer, Perez also states that victims and their families may be threatened, suffer attacks, persecution, which 'increases the vulnerability, at this point not only from the violation itself'. There are indeed risks arising from participating in international human rights litigation, including victims who suffer retaliations or revictimisation. Jenny Reyes, legal director at *Movimiento de Mujeres Dominico-Haitiana* (MUDHA), points out that the last expert witness who spoke in favour of her organisation in judicial proceedings had her birth certificate taken away by the Dominican State as a consequence of her action. This is an example of the personal risks which participating in international litigation might entail. Individuals can sometimes suffer retaliation by the State, as evidenced by the situation of vulnerability of human rights defenders in many countries in Latin America. These examples show how vulnerability might travel within and across bodies (Pedwell 2014), not only persuading others of the relevance to resist the status quo, but also distributing certain risks for participants in movements of solidarity and resistance.

Notwithstanding the risks, the epistemic position of lawyers, when closer to applicants, seems to broaden the possibilities of empowering affective translation in that subjects recognised as vulnerable can speak to and with their legal representatives. In that way, they can exercise their roles as victims, and as subjects whose recognition as vulnerable does not mean they are reduced to the negative stereotypes of passiveness and weakness. Rather, they can advance a type of historical agency through international litigation, resisting in and through their own vulnerability and the legal tools and proceedings that give their voices impact and new meaning. The challenge of speaking to and with victims was present in the experience of Jackson, who worked as legal representative in the case of *Peasant Community of Santa*

*Barbara v Peru*[120]. The case involves the forced disappearance[121] and subsequent murder of fifteen people from the Andean Quechua-speaking community of Santa Barbara, half of them who were children between the ages of eight months and six years old, by Peruvian State agents in 1991.The Peruvian army invaded the community, burned down their houses, stole their cattle, kidnapped the victims and placed them inside a hole in a mine, subsequently killing them. Jackson recalls that when the case was assigned to him, he went to Peru to meet with his clients, namely, the families of those who had been violently 'disappeared'[122]. Despite the challenges of taking on a case that had already been at the Commission for approximately a decade, Jackson (former Lawyer for Victims) reveals how encountering his Peruvian clients in a situation of extreme precariousness motivated him to come up with a new juridical request:

> I had to basically arrive for a long weekend, sit down with each one of them and ask them about the most painful moment of their lives and then leave and then try to bring their perspective to the Inter-American Court. Some of the victims had died during the course of the proceedings… it was challenging…
>
> But when I got there, something that stuck with me about what they wanted is that all of them had lost their lifestyle as well as their family members. They were all involved in a sort of semi-nomadic farming lifestyle when the forced disappearances happened, and their field houses had been burnt, and their livestock had all been killed and robbed. And all of them were consonant with asking for their livestock to be returned so they could go back to the way of life they had before.

120 Case of *Peasant Community of Santa Barbara v. Peru*, Judgment on Preliminary Objections, Merits, Reparations, and Costs (IACtHR), 1 September, 2015.

121 According to Art. II of the Inter-American Convention on Forced Disappearance of Persons of 1994, forced disappearance consists in "the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

122 *Peasant Community of Santa Barbara v. Peru*, Judgment on Preliminary Objections, Merits, Reparations, and Costs (IACtHR), 1 September, 2015.

By using a mixture of legal arguments drawn from cases about indigenous peoples and massacres involving destruction of houses, Jackson came up with a novel argument and claim on the grounds that his clients had been usurped of their way of life. He then made a request to the Court that their alpacas be returned to them, which the Court granted. Jackson shares how the victims' desire to have their alpacas, llamas and sheep back was 'something that stuck' with him. Jackson speaks about what 'stuck with him' from these encounters with victims. Sarah Ahmed describes the '"doing" of emotions" as 'bound up with the sticky relation between signs and on bodies to materialize the surfaces and boundaries that are lived as world' (Ahmed 2014, p. 191). In this way, words that stick would indicate how the power of language can bring alignment of certain bodies through emotions. Jackson's experience of speaking to victims face to face and understanding their context of vulnerability compelled him to come up with a new argument based on victims' specific needs. Jackson ended up designing a creative legal novelty in the legal claim to the Court, namely, the context-specific reparation measure of providing them with alpacas.

Butler (2016) posits that 'vulnerability can be an incipient and enduring moment of resistance' (p. 25). The immediacy of Jackson's encounter with the Peruvian victims did not hinder more enduring juridical effects, both for the victims in that particular case and enlarging the notion of possible legal remedies to be requested by victims in subsequent cases. What 'stuck' of that encounter helped Jackson address the specific situation of precariousness of the Peruvian shepherds, and their socioeconomic needs in the rural areas where they live, translating these needs to the legal claim. In that way, I suggest this emotional encounter influenced the way Jackson recognised their vulnerability and framed it into the language of law. Despite the various challenges posed by relationships that are often epistemically unequal, I suggest that the concept of affective translation explains 'how power circulates through feeling and how politically salient ways of being and knowing are produced through affective relations and discourses' (Pedwell and Whitehead 2012, p. 116). Affectively translating vulnerability into legal discourse can break through the predictability of clear-cut categories and objective legal reasoning, bringing about juridical novelties.

Certain lawyers utilise the metaphor of translation to speak about their role in relation to victims in contexts of vulnerability. Matías (Court lawyer) explains that vulnerability in his practice involves decoding vulnerability and how and why a human rights violation occurs, translating it into the legal discourse with a views to transforming the situation:

> From a wider lens, if one decodes…[or] unveils what is the situation of vulnerability, one can even determine not only how a violation occurred, or why it occurred, but also think about non repetition guarantees. Let's say, that an individual case before the Court is translated into reparation measures, but beyond the concrete case before the Court, it is translated into public policies of the State. So … if one manages to translate what the situation of vulnerability is, one determines more clearly how to revert it, how to tackle it, how to stop it, how to transform it.

The framework of translation seems fitting insofar as initially they position themselves as knowledge-bearers - of legal knowledge - in relation to victims. Reyes (Lawyer for victims) describes how the international ripple effects of the case of *Niñas Yean y Bosico* fills her with pride. In this case, the Court ruled against the Dominican State for failing to provide education for children of Haitian descent after stripping them of their birth certificates. In the *Niñas Yean and Bosico* judgment, the Court recognises the vulnerable situation of people of Haitian origin in Dominican territory [123]. Similarly, in *Nadege Dorzema*[124], it recognised the situation of special vulnerability of Haitian migrants, noting that violations against the rights of migrants often remain in impunity due to cultural factors, power structures and legal arrangements that hinder access to justice. This became the landmark case to deal with issues of nationality and statelessness in the jurisprudence of the Court. Reyes explains:

> Yes, we are proud. Because the judgment in *Yean and Bosico*, well… when I speak, it sounds pretentious, because we, in our humble capacity prepared and worked hard on it. It is a situation

123 *Girls Yean and Bosico v. Dominican Republic*, Judgment on Preliminary Objections, Merits, Reparations, and Costs. (IACtHR), 8 Sep 2005, Paragraph 168.

124 *Nadege Dorzema et al. v. Dominican Republic*, Judgment on Preliminary Objections, Merits, Reparations, and Costs (IACtHR), 24 October 2012.

> where we feel very proud… A hundred years can go by, and as a landmark case, they will have to mention this case even when we cease to exist. So, we have – how do I say this? – a legacy, in which we worked, that cost us a lot, but [something] changed.

Although the Court has struggled to enforce its judgments against the Dominican Republic, these decisions have been meaningful for the evolution of movements of resistance against structural racism and xenophobia in the Dominican Republic. Reyes recounts that after telling the Court what was happening in the Dominican Republic, in another case, the Court addressed the situation of 'structural discrimination' a concept that is not used by many people to understand what is happening in the country.

Legal discourse is permeated by affective motivations which begin with the narrative of the victim and how she communicates her story to the lawyer. Recognition of vulnerability is a relational act of power which involves legal practitioners and victims. Applicants who are deemed vulnerable can exercise their agency insofar as a logic of resistance underlies a claim for recognition of vulnerability and victimisation. On the other side of the coin, human rights lawyers exercise their agency by engaging in their legal practice. Inasmuch as lawyers feel compelled to translate the plight of vulnerable subjects into legal claims, their power is restricted by limitations imposed by the law. Pedwell and Whitehead (2012) posit that affect transcends reductive simplifications, e.g., emotion, focusing on a 'material intensity' that has the capacity to conduce power beyond normative forms of regulation to spur creative transformation in relationships. Following this logic, I suggest an affective impact of great intensity can shift the position of power of lawyers in relation to applicants, disrupting the lawyer-applicant power relation. The lawyer's role refers to fully exercising agency and acting autonomously, rather than being affected and forced to navigate feelings and situations which go beyond her control. This inversion in the power relation also applies to the epistemic positioning of the parties.

Can the affective imprint of an individual account of victimisation be sufficiently compelling to lead legal practitioners to revisit legal categories and solutions and create out-of-the-box arguments? I suggest that the affective persuasion of claims made by subjects who are perceived as vulnerable may

explain why lawyers become convinced that a person should be conferred special treatment. The epistemic position of the lawyer in relation to the applicant changes when the former is affected by the latter, subverting the initial power imbalance. This affective bond enables lawyers to resist alongside applicants by denouncing injustices which have not elicited satisfactory legal response from the concerned State(s). The affective persuasion of applicants' narratives of vulnerability is translated into juridical language by lawyers and used to convince other lawyers and ultimately to persuade judges that human rights law should be applied differently or in a more context-sensitive way due to the nuances and complexities of the case. The applicant affectively persuades the lawyer and the lawyer amplifies the voice of the applicant in juridical discourse by exercising the power to frame vulnerability.

It is only by teasing out the individual circumstances of victimisation and addressing the victim's needs that a narrative of vulnerability finds its potency. That is, to understand how harmful wider structures of vulnerability can be, human rights courts scrutinise individual accounts of individuals who are recognised or recognisable as vulnerable. I propose the existence of a relational logic underlying the lawyer-applicant and the judge-applicant relationships, which gives room to effectively create convincing arguments in juridical narratives. The operation of affective persuasion arguably requires individualised (or individualizable) narratives of victimhood and vulnerability in order to affect decision-makers. The affective mechanisms of persuasion in narratives of vulnerability might not always work to the storyteller's benefit; however, as I attempted to illustrate, it can be a powerful tool to convince legal practitioners of the need of incremental or additional State duties in a case, transforming the scope of what it means to violate a human rights or breach someone's human dignity by the elaboration of more context-specific and nuanced legal claims. This line of reasoning allows for deeper scrutiny into why the victim is in a vulnerable state, how vulnerability plays a relevant role to ascertain the extent of the human rights violation and what special duties or obligations arise to the State by virtue of these conditions.

Although victims or their families might not initially be driven by the desire to bring about structural change, lawyers reveal that in some cases the feeling of participating in the fight for a common cause can be empowering for some victims, to the point that certain victims even end up becoming human rights advocates and lawyers. I argue that subverting the epistemic position of applicants from passive subjects - i.e., vulnerable individuals or victims who are associated with stereotypes such as weakness, inferiority or disadvantage - to active participants and co-constructors of knowledge can be empowering insofar as it enables relational autonomy. When victims exercise meaningful engagement in human rights litigation, a collective form of resistance emerges, which encompasses those involved in the case, but whose impact goes beyond litigation to reach all of those who are affected by the structural vulnerability being tackled. This resistance differs from political demonstrations, in which exposing the vulnerability of bodies and standing side by side work as an act of collective resistance (Butler 2016). The resisting individual who resorts to the Inter-American system of human rights protection transforms her vulnerable status into historical agency through legal battle.

In that way, international human rights law's power to frame is shared by all of those who actively participate in the decision-making process, enabling the transformation of contexts of vulnerability. Beyond the conventional top-down or bottom-up approaches for social change, this international juridical form of resistance can have an outside-inward impact, as international law exerts external pressure upon governments to change domestic laws and policies. Juridical resistance is underpinned by relational autonomy (Nedelsky 2011), as resisting individuals are recognised, labelled and concomitantly claim recognition and act towards transformation, as they participate in reshaping what it means to be vulnerable, who can be a victim and the scope of human rights and correlated duties to be fulfilled by States. Beyond seeking individual resilience and compensation, victims can feel empowered by spearheading what might become a legal precedent. The power to frame in international human rights law empowers individuals by making their bodies, their suffering and their voices intelligible, engendering legal and political ramifications. The ever-evolving language of human rights law can subsequently be used by resistance

movements, as new norms of recognition find support and traction through domestic and international networks of solidarity and activism.

## Conclusions

Affective translations are mediated by affective exchanges that happen in the lawyer-applicant relationship. The affective dimension of vulnerability, as it is recognised, considered and translated, allows for subversions in the power relation between lawyers and applicants. Furthermore, translating contexts of vulnerability into legal narratives and claims can be decisive to transform individual situations of victimisation, for example, imposing that States be held accountable for reparations to victims. It also points towards transformations on a structural level, incrementing social justice standards to demand increased duties from States, namely heightening the threshold of acceptability of both action and omission in contexts of vulnerability. With deeper relational ties, lawyers might even share and partake in a joint undertaking alongside victims which goes beyond translating their claims to being affected by the client's vulnerability and jointly acting towards transformation.

Adopting this broader understanding of vulnerability beyond its negative understanding, I contend that human rights lawyers and applicants can share the experience of litigating together and jointly performing resistance against scenarios of oppression and social injustice. International institutions such as human rights courts and networks of solidarity can be empowering to individuals who live in precarious conditions and at high risk of being victims of various human rights violations, raising the stakes by multiplying the effects of legal outcomes across regional borders. This vulnerability in resistance seems to be an effort which binds together lawyers and applicants through the circulation and mobilisation of reasons, emotions and narratives. Consequently, power is felt and exchanged, emotions are understood and translated and agency and vulnerability are interwoven elements in the activities of legal practitioners and those who seek their support. If this power relation is disrupted and lawyer and applicant engage in dialogue, speaking to and with each other in the joint pursuit of knowing and framing the victimising event and its

circumstances, then alternative possibilities to responding to contexts of vulnerability beyond existing remedies can be better explored. As a result, this relationship can determine the extent to which legal mechanisms are capable of responding to scenarios of vulnerability in narrower or more creative ways, seeking to tackle structural mechanisms of violence, exploitation and oppression.

In this context, I explored how the power relation between lawyer and victim is created, subverted and mediated by a lawyer's degree of affective and epistemic openness or foreclosure to vulnerability's persuasiveness. Similar to how judges' accept or disavow their own vulnerability when adjudicating cases involving applicants who are deemed vulnerable, in this chapter I examined lawyers' accounts of their relationships with victims. By the same token, I focused on the feelings of empowerment or disempowerment which interviewees' share in their responses and analyse how they position themselves epistemically in relation to applicants by resorting to ideas of agency, vulnerability and resistance. My overriding argument is that the power to frame lies not only on those who are in charge of recognising vulnerability and victimhood, but it is distributed - albeit unevenly - in the dynamic interplay between applicants and legal practitioners. Moreover, this power to frame is conditioned by how vulnerability and agency are negotiated by the parties in concrete relationships, in the same way that this power also conditions the scope of shared resistance and derived vulnerability that these relationships can potentially produce.

As I examined interviewees' accounts about how they recognised vulnerability, I witnessed a plurality of meanings in the conceptual frameworks of legal practitioners. Evidently, fixed categories in international human rights law such as 'vulnerable groups', which operate on the surface are more salient and visible to the external gaze. Nevertheless, I attempted to problematise the assumption that power relations remain static within human rights litigation, that is, that all the power remains with States and institutions to the detriment of populations deemed vulnerable. Instead, I suggested we focus on how power can move along affective lines across the relationships which shape and frame the recognition of

vulnerability and victimhood in human rights legal discourse, namely the relationships that emerge from the moment prospective applicants start engaging with legal practitioners to seek justice before an international human rights court.

# Chapter 7 – (Re)framing 'vulnerability' within juridical relations

## Introduction

According to Peroni and Timmer (2013) and Beloff and Clérico (2016), the recognition of 'vulnerable groups' by the ECtHR and the IACtHR leads to interpretation that is more attuned to substantive equality and social justice concerns. But as I have attempted to show in the thesis, both legal reasoning and juridical ramifications of human rights courts' decisions leave something to be desired insofar as these principles are concerned. If social justice entails both recognition and redistribution (Fraser 2005), some may put into question whether or not human rights courts are (or should be) required to foster a social justice and substantive equality agenda. For instance, it could be argued that redistributive issues exceed the scope of the courts' jurisdiction, which is exercised on a case-by-case basis. However, it is within human rights courts' purview to impose on States the obligation to prevent the perpetuation of patterns of human rights violations. Indeed, State responsibility for addressing human rights violations encompasses both ceasing ongoing violations and providing guarantees of non-repetition. Imposing positive obligations on States and condemning State omission in cases where it should have prevented the occurrence of a violation but it failed to do so is hence reasonable, because State power to mobilise societal resources is unparalleled.

Similarly, human rights courts' responsibility to respond to vulnerability not only in individual cases, but also on a structural level, can be better understood under a social justice framework. To fulfill their roles in holding States accountable, I have suggested in the thesis that human rights courts must address structures of vulnerability and experiences of victimisation which directly bear relevance to the overall goal of addressing social injustice. Within decision-making processes, human rights courts address how certain populations are disproportionately disadvantaged by the unequal distribution of infrastructure, resources and power, which has been translated into juridical language through the emergence of 'vulnerable groups' in their case-law. Although the emergence of the concept of vulnerability in human rights courts' legal reasoning has arguably worked in favour of inclusivity (by enlarging the scope of State accountability when

applicants are considered to be members of a vulnerable group), in the thesis I have attempted to show that human rights courts' power to frame vulnerability also entails their power to reproduce injustices by mis-framing (Fraser 2005).

I have contended that mis-framing can occur by conceptualising vulnerability as the opposite of agency. By doing so, courts may arguably fail to recognise certain applicants as vulnerable by adopting narratives that emphasise agency and efface vulnerability. As instantiated by the recognition of migrant vulnerable groups, the ECtHR adopts a narrative that implicitly considers economic migrants as virtually invulnerable, emphasising their 'choice' and agency in crossing borders illegally. States respond to the danger of agentic migrant 'others' by containing and detaining, while showing empathy, compassion or pity towards others who, in stark contrast with those whose agency is conflated with danger (to citizens), are perceived as vulnerable migrants. Mis-framing thus happens when vulnerability is framed within narrow frames: firstly, as an unchangeable trait of certain groups or individuals; secondly, only in its negative connotation of susceptibility to harm (Gilson 2014); thirdly, as an unfortunate disadvantage of a few, who are exceptions to the norm (those who are implicitly conceptualised as 'invulnerable'). Under these narrow frames, responsibility for what is perceived as 'vulnerability' (in its negative sense of disadvantage) is implicitly placed on the vulnerable subject, rather than on societal norms (including State laws and policies) that allocate disadvantage and privilege unequally among people within or across territories. By disadvantage and privilege, I mean precarity (Butler 2009), or the unequal assignment of conditions to live and die with human dignity, which is enabled by political decisions and legal architectures in neoliberal and postcolonial societies.

As I have discussed in Chapter 2, Butler (2016) understands vulnerability as involving the exposure of bodies to being affected, while at the same time affecting and eliciting ethical responsiveness from others. In contrast to Butler's relational approach, scholars often refer to the concept of vulnerability in human rights courts as an interpretive tool or heuristic to be deployed by legal practitioners (Timmer and Peroni,

2013). By transposing Butler's relational conceptualisation of vulnerability from the realm of politics and philosophy into juridical analysis, I have argued that legal practitioners affect the lives of applicants they consider (or not) vulnerable and are, in turn, affected by these applicants' lived experiences in contexts of vulnerability. The implication of my argument is that legal experts and scholars should conceptualise vulnerability as a phenomenon that emerges intersubjectively between legal practitioners and presumed victims in human rights courts' decision-making processes. Borrowing the concept of 'affective translation' (Pedwell 2014) from cultural studies, I have contended that when legal practitioners engage with the concept of vulnerability, reasons and emotions travel between their bodies which influence legal reasoning and decision-making. In my analysis, lawyers and judges work as affective translators of presumed victims' claims about vulnerability by listening, feeling and ethically responding within the discretionary ambit of their occupational roles.

Drawing on this interdisciplinary framework, I suggest that legal practitioners should conceptualise vulnerability in human rights courts in a twofold way: firstly, as a specific juridical claim for recognition made by certain applicants asking for enhanced State accountability and secondly, as an ethical trigger for lawyers and judges to respond to this claim by applying the law differently than they would if vulnerability was not raised as conceptually relevant in the case. On an individual level, a juridical claim of vulnerability exposes how State practices or omissions disproportionately and unjustly render the applicant more vulnerable than others to human rights violations. However, judges and lawyers should also consider the applicant's vulnerability claim as a call to action to ethically address structural contexts of vulnerability, that is, systemic and disproportionate risks that negatively affect not only the applicant's enjoyment of human rights, but also specific communities or populations that are similarly rendered vulnerable. Therefore, vulnerability can become an ethical trigger when legal practitioners are rationally and emotionally affected by applicants who expose and challenge the context of vulnerability in which they are inserted. On the one hand, applicants may expose their vulnerability when they contextualise how their human rights were violated by a State, laying bare structural inequalities. On the other hand, applicants'

vulnerability claims can also become acts of resistance. Resistance emerges as they denounce contextual injustices that they have suffered by resorting to human rights courts in order to hold States accountable. By performing vulnerability in resistance (Butler 2016), applicants seek ethical responsiveness from legal practitioners, which can ultimately result in a court ruling in their favour.

Vulnerability claims can affect and motivate lawyers and judges to revisit and refine the scope of ethical obligations owed by States in relation to the human rights of applicants in contexts of dispossession, oppression or violence. Victims' attorneys and court lawyers can assist applicants in translating contexts and experiences of vulnerability into arguments. In the same vein, judges may consider the ethical weight of arguments about vulnerability that are sufficiently compelling to persuade them to decide a case differently than they would adjudicate otherwise. Judges should also acknowledge the relevance of affective persuasiveness in vulnerability claims and revisit the principles of impartiality and neutrality in adjudication. To do so, they must problematise the premise that an ideal judge is an invulnerable subject who is completely neutral and impartial, since this is incompatible with the reality of socially embedded human beings whose intersubjective relations entail not only affecting, but also being affected by others. Relatedly, it is important that judges clarify how being affected by vulnerability claims may trigger emotions and the extent to which their affective responses might help shape their opinions and decisions. Identifying how emotions like empathy inform judges' ability to recognise applicants as vulnerable can shed light on why certain judges might disagree from their peers in framing certain structures of vulnerability as juridically relevant and not others. This range of emotions includes how compelled they might feel to consider a claim for juridical inclusiveness of a 'vulnerable group' and whether or not they will decide in favour of strengthening States' legal framework of human rights obligations toward this particular group.

Legal practitioners should strive for increased transparency about how their emotions and reasons are ethically triggered when articulating arguments and reaching decisions over a juridical claim of

vulnerability. Notwithstanding, lawyers and judges have to consider the potential limitations of relying on their feelings of empathy to recognise or disavow vulnerability claims. Inequalities across socioeconomic status, national background, race, gender and other axes of social differentiation can create an epistemic gap between lawyers and judges' lived experiences and the lives of applicants from marginalised populations. This gap might make it difficult for legal practitioners to relate and empathise with applicants' vulnerability claims. As affective translators, lawyers and judges occupy an epistemic position of privilege, which conditions the extent to which they are able to feel and mobilise emotions about applicants' lived experiences of vulnerability. Therefore, legal practitioners should be wary of the possible blind spots that may accompany their position of power, which might lead them to selectively recognise and respond to applicants from populations at higher risk of suffering human rights violations due to structural and power asymmetries in society.

Instead of a tool to be purposefully deployed, theorists and practitioners in the human rights movement should conceptualise vulnerability in regional courts as an emerging response to applicants' pleadings for recognition, which entails not only developing skills and expertise, but also listening and being affected. By relinquishing the idea of control and the sense of invulnerable agency which structurally accompany experts' position of power, lawyers, judges, academics and others within the human rights movement can more consciously apply and create juridical knowledge about vulnerability through affective openness, persuasiveness, mutuality and exchange with individual victims. In this way, they can revisit the extant legal framework to incorporate higher standards of State accountability, particularly in relation to marginalised populations whose rights are systematically and disproportionately violated. Lawyers and judges' expertise and blind spots set limits to how far human rights courts' jurisprudence can be reimagined toward emancipatory horizons by mobilising the concept of vulnerability. Human rights scholars and activists can assist judges and lawyers to fulfil this ethical role through constructive criticism and recommendations, while aware that they also occupy an epistemic position of privilege and thereby have their own blind spots and limitations.

In the thesis, I have focused on the intertwinements of vulnerability and postcolonial subjects from the Global South. While citizens of Global North States exercise their human rights and receive higher standards of protection in instances where these rights are under threat (as constitutional or legal entitlements), by contrast, Global South foreigners who cross the borders with uncertain migratory status face slimmer odds of being presented with similar levels of protection to their human rights. In fact, as I discussed in the Introduction, foreigners are often conceptualised as normalised threats to citizens' entitlements in the postcolonial (mal)distribution or infrastructure, opportunities and enforceable human rights. This occurs when vulnerability is used as a synonym for weakness or frailty, as if it were more or less an immutable characteristic. I argue that foreclosing the possibility of even considering law's role in enacting change in the face of a context of vulnerability represents a missed opportunity to problematise the root causes of vulnerability in social, cultural and political dimensions. Doing so also hinders our ability to rethink power asymmetries lead to exploitative, violent or oppressive relations.

Rather than focusing solely on the relationship between the parties of the case, that is, the presumed victim and the State, I have shifted attention to the relationship between human rights courts and presumed victims. As these courts are standard-setting institutions in the human rights field of knowledge, I put forward that they should also be held accountable to the highest possible standards. I have argued that analysing how juridical power relations unfold provides us with a better understanding of the processes underlying human rights courts' normative and discursive-material power to frame vulnerability and victimisation. Legal practice with respect to the treatment of 'vulnerable groups' reveals how human rights court proxies, namely judges and lawyers, exercise the power to frame not only by applying legal expertise, but also through the complex intertwinement of affect and reason in legal reasoning, whereby structures of agency and vulnerability are imprinted in the language of law and rights.

## Summary of key findings

In the thesis, I have illustrated possibilities and limitations of the juridical praxis of vulnerability in human rights interpretation to propel changes in human rights legal knowledge. Particularly regarding migrants across the axes of gender, age and health, I highlighted the selective ascription of vulnerability to certain applicants and groups could entail inclusion, but at the same time, hide exclusionary mechanisms with respect to the recognition of marginalised populations and redistribution of resources to rectify violence, oppression and other forms of human rights violations that disproportionately affect certain groups and populations. One form of exclusion is to conceptualise vulnerability as a fixed characteristic of certain groups, which incurs in juridical practices of essentialising and losing sight of wider structures.

I have argued that recognising only certain migrant groups as vulnerable, such as migrant children, seriously ill migrants and migrant women from postcolonial States, might reinforce essentialism and allow for the systematic 'othering' and victimisation of migrants through crimmigratory laws and policies. I also contended that excluding migrant applicants from recognition of their vulnerable status in their claims of victimisation occurs both by recognising certain migrants as vulnerable and not others (selectivity), but that recognition and essentialising specific migrant groups as vulnerable, in association with characteristics such as weakness or helplessness can also limit human rights courts' ability to hold States accountable to the fullest extent possible, resulting in a form of victim-blaming, for example, attributing the predicament of economic migrants dying in the Mediterranean as their own fault for 'choosing' to cross the ocean in search of better opportunities (and, relatedly, more security).

The thesis has attempted to show how vulnerability in human rights interpretation is often structured across different binary axes which reduced vulnerability as the opposite of agency. In this way, men were seen as agentic in relation to women; adults, when compared to children; 'healthy' subjects as opposed to extremely ill subjects and citizens in relation to migrants. The case-law of the courts, despite its advancements, still fails to disrupt these harmful binaries, highlighting the vulnerable as weak, exceptional

and worthy of pity or compassion (if 'deserving'), in opposition to the liberal legal subject, who is strong, agentic and the norm. The vulnerability of those who have the privilege of not being victimised or at high risk of being victimised, and in need of juridical labels such as vulnerability in their claims before human rights courts, remains invisible.

Citizens of Global North States, whose security and human rights are protected by constitutional architectures, infrastructure and resources (much of which was obtained and accummulated through colonial forms of exploitation), do not need to confront their vulnerability and precariousness, as there are legal and political mechanisms, as well as socioeconomic structures set in place to prevent them from feeling vulnerable in the same way as Global South migrants crossing the border with no resources might feel. In this context, human rights jurisprudence advances while still turning a blind eye to how Global North States continue to detain refugees and asylum-seekers, and restrict the rights of migrants when they cross their borders, even when their wellbeing and lives are imperiled or when relations of violence and dehumanising forms of treatment and exploitation against migrants ensue.

I argued in the thesis that, besides traditional legal reasoning, the juridical framing of vulnerability into specific vulnerable groups relies on sociocultural stereotypes surrounding the ideal victim (weakness, frailty, helplessness). Moreover, I showed how empathy and other affective responses that rely on subjective experience and knowledge influence processes of identifying and recognising vulnerable applicants and groups by legal practitioners. I illustrated how these affective encounters between judges and applicants, and lawyers and victims may influence how vulnerability is translated into juridical language. I argued that vulnerability is not a fixed characteristic, but a force that is mobilised within and across bodies in these power relations, whereby legal practitioners, in their agentic and privileged position as knowers, often reinforced their own sense of agency, while shaping the vulnerable 'Other', or found themselves in a discomfort zone when dealing with negative feelings produced by engaging with narratives of vulnerability and victimisation.

In Chapter 4, I examined how power relations shape structures of vulnerability within legal discourse. To do so, I showed how framing vulnerability relied on setting persons, groups and categories apart within an agency/vulnerability binary, rather than a spectrum. I highlighted how this differentiating premise, whereby agency figures in opposition to vulnerability, consists in a structuring mechanism of how the power to frame is relationally exercised in legal language. To do so, I illustrated certain characteristics which are used to describe the agentic and vulnerable subjects.

To illustrate, 'vulnerable subjects' were identified (or refused to be recognised as such) as weak, passive, powerless and lacking resources. By contrast, assumptions of strength, autonomy, 'resourcefulness' and 'ability to fend for themselves' were cited as signaling agency and the denial of vulnerability. This dualistic way of categorising applicants as vulnerable (or invulnerable) moved away from attempts to analyse the structural context of vulnerability within which the applicant was inserted (slow violence). Instead, it relied on fixed characteristics, which were assumed from intersecting categories such as migration status, age and gender. Women, children and asylum-seekers and refugees were framed as vulnerable, whereas adult men who were economic migrants represented the epitome of agentic subjects, whose vulnerability could not be inferred. I suggested that, as a result of how vulnerability is structured across these categories of gender, age and migration status, a hierarchy of vulnerability and victimisation arose from court judgments. My analysis was twofold. First, I contended that the incorporation of vulnerability into human rights courts' legal reasoning created not only spotlights, but also blind spots with respect to social injustice and inequalities. Secondly, I suggested that this selectivity in framing vulnerable groups might actually reinforce the juridical exclusion of populations who already face socioeconomic or political marginalisation.

In Chapter 5, I argued that recognising vulnerability cannot be reduced to a unilateral, top-down labeling act by courts. These processes of recognition rather entail affective encounters between judges and applicants. In other words, they occur within mediated relationships that are created

between decision-makers and presumed victims. This provides a framework to critically understand the role of empathy and other feelings in shaping human rights courts' epistemic power to frame who is vulnerable and who is not. Although, for some, recognition may imply an unproblematic process - flowing naturally and intuitively, as some judges suggest when placed adjacent to the idea of framing - a more critical analysis of the possibilities and limitations emerges when processes of recognition are dissected within intra-court relationships. As my examination of interviews and judgments illustrates, affective forms of knowing or framing the applicant as the 'Other' can affect how vulnerability is shaped. Reference to 'empathy' or correlated ideas in interviews shows that political or affective biases can play a role in the juridical framing of 'vulnerability' in human rights interpretation.

Indeed, the affective dimension is salient in judges' narratives even though its presence can pose challenges, since assumptions about legal expertise and especially the ethical duties of judges imply impartiality and rationality. Judges may thereby reject or accept the extent to which they are affected by vulnerability. I have concluded that, to enhance our understanding of how vulnerability is mobilised by juridical discourse, more relevance must be placed on the ways in which the affective and the rational are entangled rather than in opposition to one another. The permeability of vulnerability's affective persuasion allows us to rethink legal interpretation as a dialogical co-construction of, firstly, power relations and secondly, subjectivities. Hence, it moves away from a narrow approach to the role of judges and lawyers as technicians who apply legal expertise as though insulated from the politics of affect and epistemic position. I also challenge the extent to which top-down empathy can be a reliable tool for interpretation, focusing on the example of Global South migrant applicants who are under the control of Global North receiving states, amidst a trend of 'crimmigration' in which legal and political arrangements render them more dependent on these states, under their control, for example, in detention facilities.

In Chapter 6, I argued that the power to frame is the result of processes involving different actors and narratives, which culminate in the prevailing legal narrative, namely the judgment. I also contended

that the power to frame lies not only on those who are charged with recognising vulnerability and victimhood, but it is distributed - albeit unevenly - in the dynamic interplay between applicants and legal practitioners. Moreover, this power to frame is conditioned by how vulnerability and agency are negotiated by lawyers and judges in their juridical construction of 'vulnerable' subjectivities. To sustain my argument, I put forward a narrative of juridical recognition of a subject as vulnerable which relies on affective exchanges between applicants and lawyers, in a process of affective translation (Pedwell 2012). In the same way, this power to frame also conditions how permeable the juridical is to political forms of 'vulnerability in resistance' (Butler 2016), where political exposure of vulnerability is taken into account as having ethical persuasion, leading lawyers to work harder and propose creative and innovative arguments in defense of applicants who they perceive as 'vulnerable'.

Furthermore, I explored how legal categories and principles are important guidelines. In this way, 'vulnerable groups' established as categories in the Inter-American system, through the case-law and/or Rapporteurships, function as a springboard upon which to rethink ethical responsibilities of the state towards those who are subsumed under those categories. They also serve as limitations, given that lawyers might be more directly affected by being closer to victims and applicants than judges but their decision-making power, in so far as the power to frame 'vulnerability' is concerned, is weaker than the power of judges – whose law-making role and authoritative opinion is institutionally enabled. I have suggested that the affective nature of juridical relationships, especially in the form of empathy, informs processes of framing 'vulnerability'. Although 'framing' seems to indicate that the 'framer' maintains all the power, action and agency over the 'framed' subject, I argued that there is analytical relevance in thinking about these processes relationally. What I mean is that courts (and legal practitioners as court proxies) not only have the power to frame (or dismiss) someone's narrative of vulnerability and victimisation by applying their legal expertise, but that legal practitioners who speak and act on behalf of courts are also affected by these narratives

## Navigating the agency/vulnerability continuum within juridical relations

The thesis has examined the juridical recognition of groups as vulnerable and its procedural and substantial implications in the ambit of human rights courts, including the production and reproduction of the legal illegibility of deep-rooted contexts of vulnerability. Notably, I have argued that selective recognition brings about selective inclusion of voices, experiences and narratives of victimisation from those politically labelled as 'vulnerable populations'. By the same token, the juridical inclusion of 'vulnerable groups' with corresponding special protection measures has invited questions as to the kinds of selective exclusion which might take place at the same time. I have contended that blind spots are embedded in human rights courts' normative frames of recognition, thus in the evolution of human rights legal knowledge.

As I have suggested, one source of blind spots is the epistemic position of international courts (and legal practitioners, as court proxies), which might present limitations. I further argued that selective exclusion operates through modes of relationality which unfold via juridical and discursive practices of legal actors, namely judges, lawyers and victims' legal representatives. Legal practitioners are responsible for translating narratives of 'vulnerability' into juridical language. As recognising vulnerability in the situation of others might unsettle one's own sense of being an agentic subject (Gilson 2011), resistance to recognising certain kinds of vulnerability emerge (Butler 2016). For example, in my Methodology chapter, I discussed how a female judge whom I interviewed at the ECtHR was adamant in refusing the vulnerability of women as a vulnerable group (and her own, as well as mine), but less critical of the ways 'women from rural areas in Afghanistan' were labelled as 'vulnerable'.

The thesis has illustrated how 'vulnerability' is often conceptualised in legal practice as a more or less fixed characteristic. Indeed, juridical categorisation of people into 'vulnerable groups' implies selection of those who should be given 'special protection' as an exception to the rule. I have also tried to show that even though stereotypes and notions of vulnerability as inherent or immanent to certain groups underlie legal practitioners' processes of recognition, judges may reach diametrically opposite conclusions. In

Chapter 4, I mapped interviewees' explanations of why certain migrant groups or applicants are or are not 'vulnerable'. I also showed that judges interpret the meaning of vulnerability differently, presenting disparate opinions regarding those who are (or not) entitled to the vulnerable label and what kinds of vulnerability are more salient and recognisable within human rights courts' decision-making processes.

I argued that vulnerability is not only an unsettled concept in juridical language, but also unsettling insofar as applicants' claims of vulnerability might trigger judges' sensitivity to responding in rational and emotional ways to narratives of victimisation. I discussed how interviewees recounted feeling (or repudiating) empathy, or 'putting oneself in another person's shoes, when justifying why certain court rulings have enlarged the scope of the State obligations towards the human rights of 'vulnerable groups', for example, in cases of alleged torture or inhuman and degrading treatment or punishment.

As my interviews reveal, judges and lawyers report recognising subjects as vulnerable if they are perceived as having certain characteristics, such as passivity, weakness and lack of resources. I highlighted that assembling these characteristics into groups implied a categorisation abiding, for example, by gender, age, disability and race. I also suggested that processes of recognition are not only a rational, but an affective exercise, that is, a relationship between legal practitioners and applicants and groups who are framed as vulnerable. The purportedly universal claims of human rights courts are, after all, targeted to a much broader audience. There are serious normative implications of stating that under the exact same circumstances, States can be held accountable for violating one person's human rights but the same would not apply to another person due to group-based characteristics. The consequences of 'vulnerability reasoning' affect our understanding of what a human rights violation requires to be considered as such and who can claim victim status and legal remedies.

Despite the various challenges posed by relationships that are epistemically unequal, I brought forward the concept of 'affective translation' (Pedwell 2014) as fitting and justifying 'how power circulates through feeling and how politically salient ways of being and knowing are produced through affective

relations and discourses' (Pedwell and Whitehead 2012, p. 116). In the same vein, I argued that affectively translating vulnerability into legal discourse can break through the predictability of clear-cut categories and objective legal reasoning, bringing about juridical novelties. I concluded that vulnerability's weight may tip the scales of judicial assessment in deciding who gets to be considered as a victim of a human rights violation and even how to frame the very definition of what it means to be human.

In contrast with a strict and disembodied notion of judicial impartiality, interviewees recounted feeling empathy or trust (or lack thereof) towards applicants. These emotions were incorporated into legal reasoning, what I called 'affective reasoning', showing how judges interpret situations of vulnerability differently than uniformly applying the same legal standards to everyone. By emphasising the relational bond created between judges and applicants, I argued that vulnerability acts as a mediating concept through which the tension between the imperatives of, on the one hand, judicial impartiality, and on the other hand, affectively responding to perceived vulnerability, is negotiated, or reconciled. Both imperatives are ethical duties. Although judicial impartiality is a well-known principle underlying a judge's role, the ethical and normative requirements when responding to vulnerability were analysed in a twofold manner: first, by a descriptive and critical account of legal language in my interviews with legal practitioners and judgments; second, by drawing on feminist and other critical theories of vulnerability.

Throughout the thesis, I suggested that problematising the agency/vulnerability dichotomy in legal language could potentially reveal certain blind spots underlying vulnerability reasoning by human rights courts. I contended that a more complex understanding of vulnerability, as put forward by feminist and critical scholarship on vulnerability paved the way for disrupting this binary understanding of persons and victims. As I argued in Chapter 6, the binary differentiation between vulnerable and agentic is reductive, relying vastly on stereotypes relating to gender, age, and migration status. I illustrated how vulnerability tends to be made intelligible in gendered, ableist, racialised and classed terms, which falls short of the

promise of delivering 'special protection' to those who are most in need of it because of the blind spots inherent to vulnerability's processes of recognition.

I further contended that, by categorising groups as either vulnerable or agentic (invulnerable), the process of recognition fails to capture intersectional contexts. This indicates the courts' limitations in their ability to recognise all of those who are subject to contexts of slow violence (Nixon). Instead, selective recognition leads to juridical exclusion of certain applicants who are already socially excluded, disadvantaged and marginalised and, on top of this, are deemed unworthy of 'special protection' due to fixed characteristics, rather than a context-sensitive reading of their situation. Furthermore, I point out how selective exclusion operates on a deeper level, even when certain groups are recognised as vulnerable. Even when vulnerability is recognised as relevant factor in a case, 'special protection' can be conferred to the applicant through legal remedies that target the individual event of victimisation – for example, through monetary reparations - which fall short of transformative or emancipatory solutions to oppressive structures such as crimmigration (Stumpf 2006).

Navigating 'vulnerability's conceptual ambivalence has allowed me to identify, challenge and disrupt binaries, such as agency/vulnerability, which fail to capture the realities of those who are most in need of human rights law. Moreover, I have suggested that 'vulnerability' can work as an epistemic trigger. The thesis has attempted to show that the concept of 'vulnerability' elicits various and even contrasting ethical responses, as my interviews with judges and lawyers have revealed. I have analysed the epistemic premises, epistemologies and 'bodies of knowledge' that are tapped into and brought to the fore when discussing the phenomenon of 'vulnerability reasoning'. The promise and pitfalls of using 'vulnerability' as heuristic for ethical reasoning in human rights law are examined through my analysis.

In the same way human rights discourse is more powerful and salient when a violation occurs, human rights courts have utilised 'vulnerability' by mainly resorting to its negative sense – associating it with harm and victimhood. However, I have analysed vulnerability's power not only in its negative

connotation of susceptibility to harm, but also in the opportunities it creates for more context-sensitive and relational legal reasoning. The salience of 'vulnerability' as epistemic trigger for ethical reasoning seems to lie, first, in the negative aspect, which in the language of human rights would translate into the risk of victimisation. However, 'vulnerability' triggers different kinds of response, such as the persuasion for change, which might be pursued and succeed by interpreting State duties more expansively, for instance, by establishing a stronger obligation to provide housing, food and protection for asylum-seekers by virtue of their particular state of vulnerability.

Both the European and the Inter-American human rights courts rely on legal instruments whose fundamental premise is a universal framework of human rights which apply to all human beings, just by virtue of being human. As I described in Chapter 4, the potential impact of their decisions goes beyond the regional reach of State Parties to their respective human rights conventions, which integrate the international human rights legal framework. Their judgments affect populations who are disenfranchised and dispossessed, often enduring violence, oppression and marginalisation. In scenarios of slow rather than spectacular violence (Nixon 2009), rethinking the role of vulnerability in legal interpretation and digging deeper into individual narratives of victimisation can shed light on human rights courts' blind spots to these harmful relations.

## Thesis contribution, limitations and areas for further research

The thesis has attempted to formulate distinctive insights on issues relating to agency, power and vulnerability, and to enhance our understanding about concepts, themes and narratives pertaining to vulnerability and human rights victimisation stemming from judicial practice in two of the most prominent transnational human rights courts in the world. The purpose of this research was threefold: first, to explore the extent to which human rights law can withstand a vulnerability-underpinned relational critique; secondly, to advance a more relational understanding of vulnerability; and third, to evaluate the entanglements of this relational approach to ethical, legal and social justice considerations concerning

human rights victimisation. To do so, this thesis explored the potentiality and at the same time challenged the limits of a convergence between on the one hand, human rights courts' practice, which abide by a liberal and individualistic framework, and on the other hand, a socio-legal analysis informed by feminist, postcolonial and critical theories.

The relational approach put forward by vulnerability theorists challenges law's over-emphasis on autonomy, agency and self-sufficiency of individuals, and proposes that ethical obligations be rethought considering, as starting point, human interdependence. Although relational critiques may vary, their commonality lies on critiquing legal subjectivity as narrow and detached from the reality of human dependence on socio-material infrastructure (Grear 2013). Given the unequal access and distribution of, among other things, resources, privileges and opportunities, technologies, capabilities, vulnerability theories aim to shed light on pre-existing inequalities and social injustice to propose ethical solutions.

My critique is twofold. First, inspired by these theories, I consider interdependence as the starting point for rethinking ethical obligations in human rights law. I interrogate the extent to which harmful inequalities are identified and contested in human rights courts' 'vulnerability reasoning'. By inequalities I mean power asymmetries that entrench disadvantages in institutions and norms across time, which then become hidden under the cloak of the authority and legitimacy societies endow these institutions and norms. By harmful, I refer to the quality of trumping of stymying the individual ability to fully exercise fundamental freedoms and human rights. Particularly, I refer to the imperial legacy of maldistribution of resources, infrastructure and socioeconomic opportunities which buttress human security. A political economy which sustains the unequal allocation of human security, makes 'vulnerability' an issue for certain parcels of the population, and not of others.

I suggest that systems, institutions and norms, such as the international legal principle of state sovereignty, are set in place to perpetuate privilege, opportunities and security for some, while rendering others disproportionately deprived of the same relationships which are required for human beings to live

livable lives. In this scenario, I contend that Global South migrants who are caught within crimmigratory frameworks are more exposed to risk and violence. There is a large number of people who are caught within this particular framework which enables systematic patterns of human rights violations which encompasses torture, inhuman and degrading treatment, servitude or slavery. The relational aspect of paying attention to structural violence (though not limiting my analysis to structures) also helps identify the ratchet effects of a political economy and networks of relationships which sustain these forms of violence – especially violence which is not recognised as a human rights violation, when somebody is claiming to be a victim.

Second, my relational critique departs from conceptualising 'vulnerability' as a universal characteristic which is shared by all of us (Fineman 2009) to analysing it as a phenomenon which is influenced by law, politics and sociocultural understandings of our ethical obligations towards those considered 'vulnerable'. As a relational act of framing, I understand 'vulnerability' to be neither inherent to all human beings nor an empty concept which could embody any meaning; rather, I see it as a phenomenon that demonstrates - albeit imperfectly, much like human nature – the emerging need for ethical rethinking in human rights law. By hinging on a multidisciplinary concept with less rigid boundaries, 'vulnerability' in human rights courts becomes permeable to a political realm of discussion with respect to ongoing debates about morality and ethics in times of perceived 'crisis', such as the 'refugee crisis'.

This research hopes to have contributed to extant scholarly literature on vulnerability and human rights, victimology and socio-legal studies by adding an empirically grounded relational layer to the practice of human rights. Particularly, I have unpacked tensions that arise and are negotiated among legal practitioners in the process of framing 'vulnerable' subjectivities and corresponding human rights and State duties. In other words, the thesis has sought to flesh out a critical account of the processes by which legal practitioners frame 'vulnerability'. Relying upon feminist theories on vulnerability and ethics, I have problematised the European and the Inter-American human rights courts' power to frame or dismiss 'vulnerability' in the language of law and human rights.

In this endeavor, I have analysed the ethico-normative implications of mobilising 'vulnerability' within legal discourse, particularly in so far as it involves the conferral of "special protection" to certain applicants and not others. I argued that 'vulnerability' is selectively recognised in the case-law of the courts. To deepen the critique, I examined how power asymmetries and a politics of affect, belonging and othering shape modes of relationality that underlie human rights courts' selectivity. I suggest selective framing entails the reproduction of hierarchies of vulnerability which, on the one hand, fosters the juridical inclusion of certain subjects by enforcing their human rights, but on the other hand, juridically excludes other subjects by dismissing their vulnerability and failing to address wider structures of oppression, such as crimmigration frameworks.

Addressing the scarcity of interview-based research pertaining the legal practice of international courts, my qualitative interviews bring novel and relevant data, which sheds light on the gap between legal theory and practice. The original contribution of my thesis derives precisely of this deeper incursion into the legal culture and praxis of human rights courts. I attempt to go beyond the commonly deployed doctrinal and jurisprudential methods to critique case-law. To do so, I critically engaged not only with court judgments, but also with legal practitioners' narratives about the relevance of the concept of vulnerability within the scope of their work. As I elaborated in previous chapters, my relational critique draws on ethical theories about vulnerability.

One question that I found myself asking is if judicial impartiality and objectivity are important principles to assess issues of fairness and justice in court proceedings, the opposite should also be asked. If judges cannot have personal and emotional ties to litigating parties, for instance, familial ties or friendships, complete detachment from victims' lives and realities can arguably taint proceedings. Why would caring too much about the lives of those involved taint judicial proceedings, while not having a reason to care at all be considered as fair and as just? The ties that connect us to others in an increasingly divisive world politically can arguably have consequences in the way law is applied. The reason why empathy is constantly

referred to as an important factor in decision-making is clear: we all deserve humane treatment, even (or especially) by human rights courts, when we are claiming that we have suffered a human rights violation.

I did not set myself the task to engage in a deep analysis of the psychosocial dimension lawyers and judges' feelings with respect to cases involving applicants who might be considered 'vulnerable'. However, my findings have illustrated how hierarchies of vulnerability are accepted or disavowed according to feelings of empathy, or trust, which go beyond the technical application of the law to the facts. These hierarchies of vulnerability are translated into quasi-legal categories in the case law, for example, asylum-seekers as a vulnerable group (in *M.S.S. v. Belgium and Greece*, ECtHR), which are also used to dismiss vulnerability claims by other groups, such as economic migrants who are male adults, exemplified by the case of *Khlaifia*. Compounded forms of vulnerability, as in *Papoushvili*, are less controversial among judges. Although it was within the scope of my research to ascertain which emotions or feelings vulnerability elicited in interviewees, I found relevant to stress how most of my interviewees expressed forms of affective responses, such as empathy or distrust in relation to the vulnerability of the alleged victim, and those responses propped up justifications for recognising or denying their vulnerability. Based on my findings, I suggested that mechanisms for avowing or disavowing vulnerability were influenced by affective responses.

I contended that ultimately, relationships involving feeling, speaking, translating and resisting vulnerability in international human rights litigation contingently reshape the distribution of power, disrupting the vulnerability versus agency dichotomy. Beyond individualised accounts of victims in situations of vulnerability, the lawyer-applicant relation indicates that a politics of affect (and 'othering') can be mobilised within and through relationships that (re)produce legal knowledge in international human rights courts. Similar to how judges accept or disavow their own vulnerability when adjudicating cases involving applicants who are deemed vulnerable, I examined lawyers' accounts of their relationships with

victims. Drawing on these narratives, I focused on how interviewees position themselves epistemically in relation to applicants by resorting to ideas of agency, vulnerability and resistance.

I also explored how power relations between lawyers and victims are created, subverted and mediated by a lawyer's epistemic vulnerability (Gilson 2011). Drawing on the idea that epistemic vulnerability consists in degree of openness or foreclosure to vulnerability's affective persuasiveness, I then suggested that legal practitioners inhabit this epistemic space whereby their sense of their own agency influences their ability to recognise the vulnerability of an applicant or victim. 'Vulnerability' acquires juridical recognition when one opens oneself epistemically, overcoming the need to reinforce one's own agency as the invulnerable 'knower'. Erinn Gilson (2011) refers to this openness as epistemic vulnerability. Epistemic vulnerability hence speaks to this affective permeability of the 'other's vulnerable state, which can be believed, understood, and negotiated in and across bodies. These processes dictate the possibilities and limitations of juridical intelligibility, which can be measured by how wide or narrow courts' frames of recognition are. These processes can also operate selectively with respect to different groups, as an intersectional reading of the case-law on migration has illustrated.

An important factor is the extent to which juridical actors, who are exposed to these narratives and are responsible for translating and filtering them into legal language, are aware of the ways they are affected, a process over which they do not have control, but to which they are vulnerable, influences how they fulfill their role as legal practitioners, an ethical responsibility which is often associated with exercising agency – rationally applying technical legal knowledge – but not primarily linked with the idea of vulnerability. Beyond technical expertise, there is still much to be researched and learned about the complex entanglements between affect, power and being affected in legal praxis. There is also potential for further research in better understanding the evolution of international human rights legal knowledge through case-law, treaties and other sources. As this thesis argues, power structures of decision-making spheres, such as courts, might skew the politics of visibility and invisibility of vulnerability and victimisation.

The thesis has not addressed victims' experiential narratives of vulnerability, which is arguably the greatest limitation of my work. For issues of feasibility and ethical concerns pertaining interviewing victims, I chose to concentrate on vulnerability's manifestations in juridical language and how it traveled within and across the bodies of legal practitioners. However, this would be a field ripe of possibilities for further research. Exploring legal practitioners' narratives about vulnerability and fundamental rights in other international courts or focusing on domestic tribunals, such as constitutional courts, would be interesting avenues to pursue similar lines of inquiry on the complexities of vulnerability, agency, and issues of power and affect in juridical relations. Further empirical exploration could continue the investigation of how the migrant 'other' is shaped under a logic of illegality, that is, how the legal architecture is built to frame and punish particular types of subjectivity, while showing compassion towards exceptional forms of 'vulnerable' migrants on the basis of categories such as gender, race, age and disability. Analysing juridical idiosyncrasies of how other vulnerable groups are framed within international human rights courts would also be a worthwhile endeavor.

Other limitations of my thesis relate to the object of my analysis, namely international judicial institutions. As I pointed out in the Introduction, States are not monoliths of will and power, but complex entities with manifold tensions among institutions and actors that speak and act on their behalf. Yet, human rights courts' litigation format opposes individuals applicants to States, which was the model I also adopted to a great extent in my analysis. Due to my emphasis on applicants and processes of labelling them as vulnerable and victims, I decided not to problematise their opposing parties, namely States. Hence, I did not examine intrastate complexities which might illuminate a more nuanced understanding of the ways presumed victims might live, fight, resist and suffer within the borders of States they seek to hold accountable. However, in these concluding remarks, I cannot shy away from acknowledging that the human rights framework in itself is problematic and limited. International human rights law's neutral language of universality often hides how historical power struggles have artificially normalised unequal power relations in contemporary geopolitics. Mindful that conservative voices have insidiously coopted human rights

discourse, further research should be mindful of the need to resist and contest dominant narratives which continually frame subjectivities, rights and relationships within deep-rooted genealogies of colonialism, racism and patriarchy.

## Selectively recognising vulnerable subjects

The European and the Inter-American human rights courts rule on whether or not a violation of a universal human rights has taken place by handling individual cases involving 'vulnerable groups' differently than other cases. By assigning 'vulnerability', courts can shed light on systematic patterns of human rights violations which are enabled by State laws, policies and institutions, which I have understood herein as 'slow violence'(Nixon 2009). The example that was salient throughout the thesis was the slow violence of crimmigration (Stumpf 2006), which allows for, inter alia, detaining foreigners who were not convicted of crimes, dispossession, ill treatment, and avoidable deaths. However, I have attempted to show that legal language within human rights courts operates through selectivity, given that only certain groups who are affected by harmful crimmigration practices are perceived and labelled as 'vulnerable'.

Selective recognition of vulnerable migrants by the ECtHR and the IACtHR points to two conclusions. First, these courts maintain their reputation of looking after those human beings thought to be the most vulnerable (those who fit Nils Christie's 'ideal victim' archetype), in consonance with public emotions of sympathy towards refugees and those who seek asylum, migrant children or victims of trafficking, whilst 'non-ideal', 'non-vulnerable' or 'deviant victims' whose vulnerability is not recognisable are juridically excluded from the material reparations that such recognition may entail (Miers 1990, p. 221). This exclusion operates not only on a material level, but also on a symbolic and legal level, as non-ideal vulnerable victims might not be recognised and labelled as victims. Secondly, the Courts at times fail to address how systemic power imbalances between State and migrants who are illegal or whose legal status is unstable profoundly affect recognition and protection of migrants' freedoms and rights, being conducive to vulnerabilities with the over-spilling effect of worsening victimising environments.

In this way, human rights courts establish a threshold of recognisability which disregards the position of vulnerability and disadvantage of undocumented migrants in the web of power relations that renders them susceptible to victimisation. To be more precise, selective sensitivity is applied to migrants' disadvantage and Courts may render vulnerability normatively salient in certain cases while oblivious to it in others. Under a vulnerability analysis, it follows that certain migrants might be considered 'victimological others' (Walklate 2011), in that this particular focus renders only certain vulnerable migrants more visible to the detriment of others, a visibility which is dependent upon their capacity to elicit public sympathy. Another kind of exclusion was highlighted throughout the thesis: the exclusion by recognition itself. This suggestion goes to the heart of Christie's idea that the victim must have just enough power to be recognised as a victim but not so much as to undermine the credibility of her victim status. The symbolic power of the embedded archetypical victim in the societal imaginary implies a hierarchy of victimisation which places groups of individuals as deserving of the victim label and others as unworthy of being categorised as victims (Carrabine *et al.* 2014, p. 117). The hierarchy of victimisation shows how the suffering of some victims may be overlooked whereas the plight of others may be recognisable. An 'ideal migrant victim' further reveals the essentialising and exclusionary logic of labeling victims by setting the criteria for those who 'merit' the victim label and those who do not.

Despite *a priori* suspicions that may be elicited of migrants as ideal offenders (Christie 1986), certain migrant groups that are recognised as vulnerable by the courts have taken a step towards becoming closer to the ideal victim, in that their suffering has become cognizable and their claims for victim status have been increasingly successful. The rise of certain migrant groups demonstrates that some have gained sufficient power to be heard, but not enough to threaten prevalent interests of dominant classes. Nonetheless, both the power to be a victim and the power of being a victim indicate less than ideal power imbalances in society, in that empowered individuals rely upon eliciting compassion and sympathy to gain access to justice and fight oppression, a mechanism that might selectively include some to the detriment of others. Similar to patriarchy as the dominant structure against which domestic violence laws came about,

the colonial legacy underlying legal and institutional arrangements that naturalise forms of victimisation connected to migratory fluxes and impelled by global neoliberal inequalities can be identified as hegemonic interests.

One must be wary that legal reforms and progressive judicial judgments may be palliative measures that empower only a small portion of those affected by violence and marginalisation to be recognised as victims, perpetuating and reproducing, rather than dismantling oppressive power structures of exclusion and subordination. Moreover, being recognised as a victim still remains a far cry from overcoming such structures and advancing progressive pathways towards social justice and equality. Notwithstanding, vulnerability reasoning still offers promise as critical and interpretive tool, disrupting, to some extent, ideal notions of victim and offender. Victims are constructed through the interpretation of victimising events, which take place in a specific place in a particular time; vulnerability spreads throughout different periods and geographies, revealing wider contextual structures. Rather than abandoning concepts such as vulnerability I suggest we take note of the ways human rights discourse unveils how vulnerability and victimisation feed into each other across time, often intersecting, either in mutual reinforcement or instead in clashing antagonism, sustaining and breaking conceptual boundaries in law and politics. This requires going beyond ideal archetypes and into the force field where individuals are entrenched in power struggles, resisting and at times even surviving; it also entails critiquing hidden agendas underneath a politics of pity and contesting the unwitting creation of victimological others.

## Critiquing human rights courts' power to frame the 'vulnerable'

As I have discussed, the harm of selectively recognising vulnerability is illustrated by cases involving migrants from the Middle East and Africa who cross the Mediterranean to reach Europe. The legal and political arrangements which sustain a migratory system that results in ill treatment and avoidable deaths across the board are only recognised as violence, victimisation and vulnerability to certain categories of persons, rather than to all who are subjected to its nefarious consequences. As seen in *Khlaifia,* legal

standards on which groups are vulnerable can determine rather ill treatment reaches the threshold of 'inhuman treatment'. This case instantiates the power to frame vulnerability and the unsettled and unsettling nature of this concept. The applicants of this case, who were economic migrants, were considered vulnerable by the Section Chamber but not by the Grand Chamber. Consequently, the Grand Chamber judgment changed the understanding of the facts endured by *Khlaifia* and other Tunisian migrants as not reaching the threshold of inhuman treatment. Hence, economic migrants who are adult males are subjected to the same state practices which would be ruled as amounting to inhuman treatment for "vulnerable groups" are afforded no legal remedy by the Strasbourg court. Thus, state practices such as detaining migrants at the border are normalised, or in other words, embedded in the human rights legal system as legitimate practices.

As an example, I have argued that the case of *Khlaifia* illustrates the slow violence underlying systemic patterns of human rights violations through law and politics, which is aggravated by the juridical myopia of selective recognition. In this case, selective recognition and the ensuing hierarchy of vulnerability produce another kind of violence: epistemic violence (Spivak 1993). I argue that epistemic violence is exercised through willful ignorance of how certain forms of slow violence affect certain groups, creating blind spots in human rights interpretation. Epistemic violence allows for the perpetuation of slow violence, and both forms of violence are more or less hidden due to the limitations that exist in the processes underlying 'vulnerability reasoning' in human rights interpretation. The reductive ways in which 'vulnerability' is conceptualised by courts frame vulnerability as immutable characteristic. Consequently, international courts' rulings which subscribe to this narrow conceptualisation miss the opportunity to address how vulnerability is intrinsically connected to power asymmetries. Gender, race and class are categories that can be used in ahistorical and de-contextualised ways, but in fact, vulnerability connected to these axes of discrimination are deep-rooted in structures that are supported by the legal and political apparatus of States, from patriarchy, to neocolonialism and neoliberalism. Selectively recognising only certain groups and individuals as vulnerable when sources of inequality remain unchallenged make us lose

sight of the bigger picture and thus, courts miss the opportunity to hold States accountable for sustaining oppression, participating in the normalisation of harms.

The thesis has illustrated how epistemic ignorance (Gilson 2011) and over-reliance on stereotypical assumptions regarding groups can result in asymmetric recognition of individuals who are subjected to politico-legal arrangements which protect the security of some to the detriment of others. The cost of this selective juridical categorisation is the systematic exclusion of those whose security is already less protected, increasing the risks of subjecting them to the most abhorrent human rights violations. As illustrated in the thesis, these violations include inhuman treatment, servitude or slavery - and avoidable deaths, as instantiated by those who risk dying while crossing oceans to arrive at their destinations, showing to what lengths they were willing to go. My premise has been that Global South migrants who attempt to reach the borders of Global North countries – namely, Europe and the United States – are justified to do so as an exercise of resistance against the maldistribution of infrastructure, opportunities and human security in postcolonial geopolitics. In this vein, their mobility is an exercise of freedom to which states erect political and legal hindrances in the name of 'state sovereignty'.

The IACtHR and the ECtHR have developed legal tools and doctrines to keep states in check and enhance state accountability in cases where they have failed to do protect and respect human rights. This failure to ensure human rights for all people is of great concern when it is systematic, for instance, when states fail to protect and enforce the rights of minority groups – Roma, indigenous populations and other groups who have historically suffered discrimination, for example. This failure is also of grave concern if the legal and political apparatus of states enables systematic human rights violations against populations, which are thereby rendered vulnerable, as illustrated by increasingly oppressive 'crimmigration' in Global North states. Not only does law, in this context, exclude migrants from the same standards of human rights protections as citizens in the receiving states, but it also creates mechanisms which create a whole range of other risks and vulnerabilities, such as the risk of suffering inhuman and degrading treatment.

This failure to ensure human rights to all people becomes of even greater concern when human rights courts fail to address it as a failure. What I suggest here is that, in the context of the ECtHR, this harm-enabling state apparatus which targets Global South migrants, predicated on sovereignty, is condoned by the jurisprudence of the court. However, affect is mobilised politically and it infiltrates in the various stages of judicial decision-making in the form of empathy, sympathy, compassion, or other affective responses – the urge to respond to that vulnerability and find answers in more actions and obligations for states to fulfill. Processes of framing 'vulnerability' and the way legal frames of recognition operate to create hierarchies of vulnerability where a politics of affect becomes enmeshed in judicial responses. Consequently, it might enable a more 'humane' approach to shaping state obligations, prioritising those perceived as 'the most vulnerable', and widening the scope of state accountability. However, the flipside of this is that conferring 'special protection' as exceptional treatment to only a subgroup of migrants (for example, asylum-seeking children) makes us lose sight of these wider structures of law and politics which are systematically excluding migrants and rendering them vulnerable to violence, oppression, virtually 'disposable' and 'ungrievable' (Butler 2004) - adult males who are economic migrants.

In the same way we owe our extant frames of knowledge about ethics, morality and human rights to those who came before us, we must recognise our fallibility and ignorance which derives from the very reality of pervasive inequalities of power, hidden harms and subjugated knowledge that coexists in the shadows of what is regarded as mainstream projects of thought. Trusting that generations to come will prove us wrong on many counts and deepen the critical power which we presently have to shed light on our epistemic blind spots is part of the academic endeavor. Perhaps law and politics and their institutions should rethink their decision-making mechanisms to allow our fallibility to be course-corrected, remedying of procedural and substantive injustices that are embedded in our ways of 'delivering justice', social, individual, collective, transnational and transhistorical.

Beyond the potential global reach of their judgments and opinions, these impacts are maximised by the presumed universality of their normative and moral assertions. In this way, their power to frame what human rights mean and entail can be reproduced in other regional or national jurisdictions as universal lessons of morality on what constitutes or not inhuman treatment or a human rights violation. In other words, they can set up standards for 'bad' treatment by States that do not meet the threshold of "inhuman" and legitimize state practices as in consonance with human rights law. The hierarchy of vulnerability imbued in the jurisprudence also sets distinct intensities and ranges of vulnerability, justifying different kinds of special protection afforded to each vulnerable group, as established in the case-law.

Given the possible harms of stereotyping and stigmatising, one could pose a challenge to the courts' practice of establishing 'vulnerable groups' in their case-law. Rather than vulnerable groups, should human rights courts take into consideration contexts of vulnerability? Arguably, identifying contexts could prevent essentialising, that is, the peril of assuming that certain groups possess inherent characteristics which render them vulnerable. However, my interviews indicated that the power of 'vulnerability' in human rights interpretation lies on its function of persuading lawyers and judges to be more sensitive to certain contexts of inequality and heighten standards of protection in relation to "vulnerable groups'. This indicates the weight of affective responses to 'vulnerable groups' or individual applicants in their decision-making process.

Rather than proposing solutions to address blind spots and selectivity embedded in 'vulnerability reasoning', I conclude by calling upon scholars and practitioners to momentarily shift the focus from the progress that has been achieved to consider the extant limitations of juridical responses to vulnerability. I argue that these limitations of their ethico-normative assessments to our own ignorance, and what we can learn from embracing its presence. More importantly, this thesis has identified that the construction of 'vulnerability' within the juridical frames of human rights courts is influenced by larger sociocultural and political frames. As one interviewee, Olivia (Judge, ECtHR) observed, certain judges feel threatened by

immigrants. Judges, as well as legal practitioners, are first and foremost people who live in the societies upon which they regulate State-individual relations within the boundaries of the international and regional human rights framework. Therefore, they cannot be insulated from the political polarisation regarding issues of migration, citizenship and ensuing conferral of privileges, disadvantages and entitlements.

Since 2015, when the so-called 'refugee crisis' began in Europe, political polarisation has increased. This scenario was accompanied by novel political and legal arrangements to restrain, detain, exclude and punish irregular migrants through 'crimmigration' measures. Stereotypical and stigmatising notions of migrants as 'others' and as 'threats' are implicitly assumed in judgments where emphasis is only given to agency and vulnerability is disavowed, creating a hierarchy of vulnerability. Through vulnerability reasoning, the ECtHR can promote the social inclusion of migrant groups that are socioeconomically and politically marginalised, demanding higher standards of accountability from European states, for example, the obligation not to repatriate them, that is, the duty not to exclude them from their territory.

However, as I have illustrated, by recognising the vulnerability of refugee children or ill migrants and not of other groups, the creation hierarchy of vulnerability works as diversion tactics from the root causes of migrant vulnerability, i.e., crimmigration measures and othering of migrants. In that way, I have argued that a court bias against migrants can be operationalised through the case-law of the ECtHR. A hierarchy of vulnerability creates a hierarchy of humanity whereby those who fare better in a politics of affect, othering and pity are those who are seen as passive, dependent and harmless while those with agency, mobility and willful spirits are seen as threats. Although those who are perceived as vulnerable within the vulnerability/agency dichotomy are provided higher standards of care and duties by States, what the legal praxis of the ECtHR with respect to vulnerability fails to consider is the framework of legal and political violence of crimmigration which systematically excludes, detains and curtails the freedom and mobility of migrants, and subjecting their lives patterns of exploitation, abuse and precarity. In other words, the root

causes of maldistribution, mis-recognition and socioeconomic and political exclusion of groups, remain untouched.

## Final remarks

As long as exclusionary selectivity is endorsed by the ECtHR, which is entrusted, like the IACtHR, with the implicit role of asserting what constitutes the 'human' and the 'inhuman', human rights jurisprudence will be used to de-legitimize decolonising movements of resistance and perpetuate social relationships and institutions which de-humanise migrants in the most insidious ways. It seems like enhancing juridical frames of recognition requires tackling the fact that international human rights case-law with respect to 'vulnerable groups' might be an epistemic terrain which evolves unevenly, leaving many - if not most - of those affected by legal and political violence behind. I suggest this occurs because vulnerability is often recognised in human rights courts in opposition to agency.

In the case of migrants, the ECtHR teases out a selective hierarchy of those who are more vulnerable and those whose vulnerability is virtually dismissed ('invulnerable'). In this way, vulnerability reasoning in the ECtHR sidesteps sources of systematic harms against the human rights of migrants, engaging in strategies of 'othering' them through empathy/compassion, by recognition as vulnerable, or fear and mistrust, when they are recognised as agentic. Legal structures and relationships which sustain unjust inequalities and enable contexts whereby Global South migrants' human rights disproportionately violated are left unchallenged. A more complex understanding of the vulnerability/agency spectrum can pave the way for more ethical and normative responsiveness to vulnerability, determining and remedying the root causes of disadvantage, rather than selectively recognising palliative measures which leave structural violence untouched. This can pave the way for more emancipatory avenues in responding to vulnerability in resistance, rather than resisting vulnerability as a rule and making exceptions by selectively framing groups as vulnerable.

Ultimately, reframing vulnerability through the lens of human rights courts will demand an effort of rethinking their role and their responsibility, especially their power to frame. As human rights courts hold States accountable for violating human rights through actions or omissions, scholars, activists and third parties in the human rights movement should hold human rights courts accountable for their discursive actions and omissions. This is of particular importance given the immense impact of their rulings, which purport to define the 'human', and the 'inhuman' through hierarchies of vulnerability. Biases which exist within human rights courts are a reflex of the relationships, translations and affective circuits which operate intersubjectively and politically, reflecting wider socio-cultural and political struggles and shaping moral and ethical imperatives in contexts of vulnerability. Human rights discourse is still a powerful argument for political and legal debates around the world and holding human rights courts accountable necessarily requires acknowledging their potential for epistemic violence.

I suggest a deeper understanding of how power, legal knowledge and human rights practice are intertwined in affective ways can help uncover, reimagine and reshape the ways human rights courts engage with vulnerable subjects, remedying potential harms hidden in unchallenged power relations and foster better ethico-normative solutions and relationships between courts, States and victims in contexts of vulnerability. Beyond reflexivity, I contend that intensifying efforts to reconceptualise human rights and vulnerability under feminist and postcolonial critiques, Third World approaches and other critical frameworks might help us re-imagine novel forms of interpretation and reasoning and contribute to a deeper understanding of affective relations of power that unfold within juridical processes. Going beyond constraints found in liberal Cartesian characterisations or strictly rational and pragmatic value assessments, feminist-informed interdisciplinary approaches thrive by virtue of their deep-seated belief that a more profound theoretical engagement can be reached by problematising conceptual perceptions, premised upon a mutually enriching dialogue between theory and practice. Contrasting with traditional theories' method of theorising by neatly arranging static elements into watertight compartments in a coherent manner, feminists seemingly understand that the complexity of devising human rights theories resembles the

difficulty of capturing how the light goes through a stained glass window: one must sensitively perceive the fickleness, delicacy and dynamic intertwinement of all the variables that shape this unique aesthetic experience; conversely, attempting to dissect the situation into individual static elements certainly leads to a sweeping object-distorting failure.

## Appendices

### Appendix I.A. - Interview Schedule Model (European Court of Human Rights)

The questions will be divided into four thematic blocks. It is expected that follow-up questions will arise during the course of the interview. Some of the possible questions are the following:

**1. Recognition of vulnerable groups**

In your opinion, what does it mean to be vulnerable? How would you recognise a vulnerable person and a vulnerable group?

Regarding this process of recognition, are there objective criteria? Does compassion or any other feeling or emotion play any role in the recognition of a vulnerable person? In specific cases: how vulnerable was this applicant? Did you agree with the Court's decision? Why (not)?

**2. Vulnerability and human rights violations**

Would you say being vulnerable is good, bad or neither good nor bad? Is there a relationship between being vulnerable and becoming a human rights victim ? What about persons who are vulnerable for different reasons, such as gender, race and migration?

Do the underlying meanings of rights, such as the right not to be tortured or the right not to be enslaved, change with the recognition of vulnerability?

**3. State responses to vulnerability**

What are the roles played by States and national law, particularly criminal and immigration laws?

Do you think the State's human rights duties ought to change if it is dealing with non-citizens? The European Court recognises asylum-seekers and refugees as vulnerable whereas the Inter-American Court recognises undocumented migrants as vulnerable. Why do you think this is?

**4. Future prospects for human rights courts**

How will / should the court address new vulnerable groups who have not been recognised as vulnerable yet?

**Appendix I.B. Interview Schedule Model (Inter-American Court of Human Rights)**

The questions will be divided into four thematic blocks. It is expected that follow-up questions will arise during the course of the interview. The topics that will be addressed and some of the possible questions are the following:

**1. El concepto de vulnerabilidad.**

En qué consiste el concepto de vulnerabilidad? Cuál es el rol de las cortes de derechos humanos con relación a la vulnerabilidad de los migrantes?

"Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State." (Advisory Opinion - 18/03)

**2. Vulnerabilidad y victimización.** Respecto a la relación entre vulnerabilidad, victimización y derechos humanos, cuáles son las conexiones, promesas y desafíos?

"Taking into account the context of the case, the arguments of the parties, and the preceding chapters, an analysis has been made of various situations of vulnerability of the Haitian victims, owing to their condition as irregular migrants (...), derived specifically from the violence used and the treatment of the survivors and the deceased. (Judgment, Nadege Dorzema v Dominican Republic)

**3. Reconocimiento de tipos diferentes de víctimas vulnerables.**

Cuáles vulnerabilidades son reconocidas o reconocibles en el contexto de las cortes de derechos humanos? Cómo las múltiples y diferentes vulnerabilidades se relacionan con las violaciones a los derechos humanos de las víctimas?

"[t]his Court considers that the State, when establishing the requirements for the late registration of births, should take into account the particularly vulnerable situation of Dominican children of Haitian descent, para 239 (Yean and Bosico Girls v. Dominican Republic)

**4. Perspectivas de futuro.** Cuáles son los desafíos clave que la Corte Interamericana tendrá para avanzar los derechos humanos de las personas y grupos vulnerables? El ascenso de nuevos grupos vulnerables es posible o probable? En ese contexto, la interpretación de las cortes tenderá a acercarse o alejarse una de la otra?

**Appendix II.A. Participant Information Sheet (English)**

**PARTICIPANT INFORMATION SHEET**

**Title: 'Vulnerability and Human Rights Courts'**

Thank you so much for taking the time to read this information sheet and consider participating in this research project! You have been chosen for your expertise and experience working in cases before the **European Court of Human Rights or the Inter- American Court of Human Rights**.

**The research**: This research is part of a doctoral programme in Criminology and it is being funded by the European Commission. Its aim is to better understand the process by which human rights courts recognise vulnerable applicants as victims of human rights violations by the State. Emphasis will be given to intersecting contexts of migration, gender and racial discrimination.

**Your participation:** Should you agree to participate, you will be interviewed for approximately **45 minutes** about your opinions and experience in working with the **European Court of Human Rights in cases involving** vulnerable applicants**.** I will use an audio recorder for the sole purpose of allowing me to be fully present during the interview and transcribe our dialogue later. The recording will not be used for any purpose other than for this research. If you would prefer our interview not to be recorded, I will be happy to take notes instead.

**Interview questions:** I will ask questions pertaining to your experience and viewpoints on human rights and vulnerable applicants, including details of particular cases with which you have been involved. Before we start, I will provide you with the main questions, so that you can see them first. Not all questions are formulated beforehand as some questions might arise during the course of our conversation. You may decline to answer any question you wish.

**Your consent and rights:** Participation is **strictly voluntary**. Should you decide to participate, please sign the corresponding consent form. You may at any time and without any consequences withdraw your participation from this research.

**Ethical approval:** This research project has been approved by the Research Ethics Advisory Group of the School of Social Policy, Sociology and Social Research (SSPSSR) of the University of Kent.

**Confidentiality and data protection**: To ensure anonymity, I will pseudonymize all data resulting from your interview, unless otherwise requested by the Respondent. I will make sure to store this data responsibly, especially audio recordings and transcripts and I will erase your interview from the recording device within a reasonable timeframe. All other data will be stored on a password-protected computer for a period of up until 18 months after the interview.

**Contact and complaints:** Participants may contact me at any time to ask pertinent questions about the research. My contact details are provided in the Consent Form. In the event participants wish to lodge a complaint, they may contact a member of my supervisory team: Dr. Carolyn Pedwell (e-mail address XXX) or Dr. Marian Duggan (e-mail address XXX).

**Research results:** I hope to achieve research results that will shed progressive light on the practice of human rights courts and contribute to participants' reflections on their work with vulnerable applicants. Results of this research are expected to be published in my Ph.D. thesis, as part of my joint doctoral degree at the University of Kent and the University of Hamburg. In addition to that,

other academic publications as well as book chapters are envisaged. If you are interested in receiving the final findings, please provide me with your contact details.

**Thank you for considering being part of this research project!** If you want to participate, please keep a copy of this information sheet for your convenience and proceed to signing the Consent Form.

Best Wishes,

**Carolina Y. Furusho, Ph.D.(c), LL.M., BCL.**

University of Kent & Universität Hamburg

Contact Info (Email/ phone number) Websites

**Appendix II.B. Participant Information Sheet (Spanish)**

**Título: Vulnerabilidad y Cortes de Derechos Humanos**

**¡Muchas gracias** por leer esta hoja de información y considerar su participación en este proyecto de investigación! Usted ha sido invitado a participar por sus conocimientos y experiencia al trabajar con casos ante la Corte Inter-Americana de Derechos Humanos.

**Sobre la Investigación**: Este proyecto es parte de un programa doctoral en Criminología, lo cual es financiado por la Comisión Europea. Su objetivo es profundizar la comprensión sobre el proceso por medio del cual las Cortes de derechos humanos reconocen personas vulnerables como víctimas de violaciones de derechos humanos por el Estado. El enfoque dado será una convergencia de contextos entre migración, género y discriminación racial.

**Tópicos de la Entrevista:** Las preguntas serán relacionadas a su experiencia y puntos de vista sobre los derechos humanos y personas vulnerables, incluyendo detalles acerca de casos particulares en los cuales intercedió. Antes de empezar, se le entregará una hoja con los tópicos principales de la entrevista. Algunas interrogantes surgirán durante el curso de la conversación. Usted se puede negar a contestar cualquier pregunta que considere inadecuada.

**Su participación:** Si está de acuerdo en participar, se le entrevistará por aproximadamente **1 hora** sobre sus opiniones y experiencia. La entrevista será audio-grabada, previa su autorización y transcrita posteriormente. La grabación no será utilizada para ningún propósito sino únicamente para fines de esta investigación.

**Confidencialidad y protección de datos:** Se preservará la confidencialidad de su identidad y se utilizarán los datos con propósitos profesionales, utilizando seudónimos o números para identificar cada uno de los participantes y manteniendo toda la información en archivos seguros.

**Consentimiento y derechos:** Su participación es **voluntaria y anónima**. Si decidiere participar, por favour se le solicita firmar la correspondiente hoja de consentimiento informado. Puede suspender su participación en cualquier momento y sin ninguna consecuencia.

**Aprobación Ética:** Esta investigación fue aprobada por el *Research Ethics Advisory Group of the School of Social Policy, Sociology and Social Research (SSPSSR)* de la Universidade de Kent.

**Riesgos y Beneficios:** Para los participantes, este estudio no representa ningún riesgo o exposición. Los resultados de esta investigación podrán contribuir tanto para las reflexiones académicas, como las de los participantes en su práctica.

**Contacto y quejas:** Si tiene comentarios o preocupaciones sobre la conducción de esta investigación, puede contactarse con su servidora o con los tutores del presente trabajo: Dr. Carolyn Pedwell (e-mail address XXX) o Dr. Marian Duggan (e-mail address XXX).

**Resultados de la Investigación:** Los resultados de esta investigación serán empleados en mi tesis doctoral de las universidades de Kent y Hamburgo, para su presentación en conferencias y publicación en revistas científicas o libros. En cada una de estas instancias se velará por mantener la estricta confidencialidad y privacidad de los participantes.

**¡Muchas gracias** por considerar participar de esta investigación! Si decidiere participar, por favour, guardar una copia de esta hoja de información para su conveniencia y firmar la hoja de consentimiento informado.

Saludos Cordiales,

**Carolina Y. Furusho, Ph.D.(c), LL.M., BCL.**

University of Kent & Universität Hamburg

Contact Info (e-mail address and phone number)/ Websites

**Appendix III.A. Consent Form (English)**

**Title of project:** Vulnerability and Human Rights Courts

**Name of investigator:** Carolina Yoko Furusho

**Participant Identification Number/Pseudonym for this project:** ☐

**Please initial box**

1. I confirm I have read and understand the information sheet dated _____ for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily. ☐

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason. Request for withdrawal can be sent through e-mail to XXX or by calling XXX (UK phone number). ☐

3. I understand that my responses might be anonymised if requested before, during or at any point after the interview. ☐

4. I **agree** to take part in the above research project. ☐

| | | |
|---|---|---|
| _____ | _____ | _____ |
| Name of participant | Date | |
| **Carolina Yoko Furusho** | _____ | _____ |
| Lead researcher | Date | Signature |

\Copies: *When completed: 1 for participant; 1 for researcher site file; 1 (original) to be kept in main file*

**Appendix III.B. Consent Form (Spanish)**

**Título del proyecto:** Vulnerabilidad y Cortes de Derechos Humanos

**Investigadora:** Carolina Yoko Furusho

**Número de Identificación del Participante / Seudónimo** ☐

1. Confirmo que **leí y comprendí la hoja de información** (***Participant Information sheet***) para este proyecto de investigación. Tuve la oportunidad de considerar la información, hacer las consultas pertinentes y recibir respuestas de manera satisfactoria. ☐

2. Comprendo que mi participación es **voluntaria** y que puedo suspender mi participación en cualquier momento y sin que tenga que ofrecer cualquier razón. El pedido de suspensión puede ser enviado por correo electrónico a XXX o por teléfono al número XXX (celular de Reino Unido). ☐

3. Comprendo que mis respuestas serán anónimas. ☐

4. Estoy **de acuerdo** en participar de esta investigación. ☐

| | | |
|---|---|---|
| Nombre del Participante | Fecha | Firma |
| **Carolina Yoko Furusho** | | |
| Investigadora Principal | Fecha | Firma |

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