Vulnerability on Trial: Human Rights Courts' Approaches to the Protection of Migrant Children's Rights

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Although vulnerability does not have an express legal basis in international human rights law, human rights courts, and particularly the European Court of Human Rights (ECtHR), have increasingly drawn on this concept in their jurisprudence. The ECtHR has developed an important line of cases concerning migrant children, which it considers as particularly vulnerable to physical and mental harm during the migratory process. The Inter-American Court of Human Rights (IACtHR) also anchored this notion in an influential advisory opinion on the rights of migrant children. This article critically examines this case-law against the existing scholarship on vulnerability and the legal framework on human rights protection. It argues that the concept of vulnerability, when complemented by considerations of best interests of the child, can operate as a magnifying glass for State obligations, exposing a greater duty of protection and care vis-à-vis migrant children. It suggests that the human rights courts should deploy a more substantial approach to migrant children's rights based on the concept of vulnerability and on the principle of best interests of the child. Above all, this approach would foster stronger protection of these children's rights in the long term. In addition, if effectively applied, it would allow the human rights courts to avoid stigmatising the most exposed individuals in the ongoing global migration crisis.

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I. INTRODUCTION

According to the United Nations High Commissioner for Refugees (UNHCR), the number of displaced people worldwide is currently at the highest level ever recorded.[1] Alarmingly, it is reported that more than one in five migrants arriving in Europe in 2015 were children.[2] They are commonly considered to be particularly exposed to the risk of physical and mental abuse during the migratory process.[3]

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[1] *Global Trends Forced Displacement in 2015,* UNHCR (June 20, 2016), *available at* https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf; *Over one million sea arrivals reach Europe in 2015*, UNHCR (Dec. 30, 2015), *available at* http://www.unhcr.org/5683d0b56.html.

[2] *Data Brief: Migration of Children to Europe*, IOM and UNICEF (Nov. 30, 2015), *available at* http://www.iom.int/sites/default/files/press_release/file/IOM-UNICEF-Data-Brief-Refugee-and-Migrant-Crisis-in-Europe-30.11.15.pdf. *See also Uprooted. The growing crisis for refugee and migrant children*, UNICEF (Sept. 15, 2016), *available at* https://www.unicef.org/publications/files/Uprooted_growing_crisis_for_refugee_and_migrant_children.pdf, at 7 (estimating that in 2016 nearly one in every 200 children in the world was a child refugee and that the number of child refugees under the UNHCR's mandate between 2005 and 2015 has more than doubled).

[3] *Id.*; *see also*, *The refugee crisis in Europe: the UK's role in protecting the rights of unaccompanied and separated children*, UNICEF (June 16, 2016), *available at* http://www.unicef.org.uk/Latest/Publications/The-refugee-crisis-in-Europe; *Neither safe nor sound: Unaccompanied children on the coastline of the English Channel and the North Sea*, UNICEF (June 16, 2016), *available at* http://www.unicef.org.uk/Latest/Publications/Neither-Safe-Nor-Sound/.

This is especially concerning in relation to unaccompanied or separated migrant children due to the lack of adult supervision.[4] Unaccompanied children are those individuals below the age of 18 years[5] "who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so".[6] Separated children are those who "have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives".[7]

However, even children migrating with their parents or caregivers are not automatically sheltered from these risks. For instance, they may be exposed to harm when placed with their families in reception and detention centres that are not adapted to receive families.[8] Accordingly, migrant children, accompanied or not, can be vulnerable in relation to the context and external environment in which they are placed. Therefore, this article focuses on both accompanied and unaccompanied or separated migrant children, as they may be equally vulnerable.

Vulnerability is commonly understood as the state of being "exposed to the possibility of being attacked or harmed, either physically or emotionally".[9] For Turner, harm is a central element as "vulnerability defines our humanity"[10] of embodied creatures who are subjected to suffering.[11] However, as deftly suggested by Grear, "vulnerability need not be conceived as a monolithic concept"[12] and can allow for nuances and different degrees of complexity. Vulnerability is therefore universal and particular at the same time: it is universal insofar as it is based on the embodiment of human beings who by their very

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[4] *Unaccompanied refugee and migrant children in urgent need of protection*, UNICEF (May 6, 2016), *available at* http://www.unicef.org.uk/Media-centre/Press-releases/Unaccompanied-refugee-and-migrant-children-in-urgent-need-of-protection-warns-UNICEF/; *Asylum applications considered to be unaccompanied minors – 2015*, EUROSTAT (Aug. 25, 2016), *available at* http://ec.europa.eu/eurostat/web/products-datasets/-/tps00194 (exposing that 95,000 asylum applications were lodged by unaccompanied or separated children in Europe in 2015).

[5] *See* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 1 ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier").

[6] Committee on the Rights of the Child, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ¶ 7, CRC/GC/2005/6 (May 17, 2005).

[7] *Id.* ¶ 8.

[8] Muskhadzhiyeva and others v. Belgium, App. No. 41442/07, ¶ 61 (EUR. CT. H.R., Jan. 19, 2010) (emphasising the situation of extreme stress of the mother who were unable to protect her children while in detention). *See also* MARIE-BENEDICTE DEMBOUR, WHEN HUMANS BECOME MIGRANTS. STUDY OF THE EUROPEAN COURT OF HUMAN RIGHTS WITH AN INTER-AMERICAN COUNTERPOINT (2015) at 394 (for a critical and insightful analysis of the ECtHR's decision in the case of Muskhadzhiyeva and others v Belgium).

[9] OXFORD ENGLISH DICTIONARY (2017), *sub verbo "vulnerable, adj."*, *available at* http://www.oxforddictionaries.com/definition/english/vulnerable.

[10] BRYAN TURNER, VULNERABILITY AND HUMAN RIGHTS (2006) at 1 (also presenting vulnerability as the common basis of human rights).

[11] *Id.* at 27 (discussing both physical and psychological dimensions of vulnerability based on suffering).

[12] ANNA GREAR, REDIRECTING HUMAN RIGHTS. FACING THE CHALLENGES OF CORPORATE LEGAL HUMANITY (2010) at 128.

nature are capable of being harmed; it is also particular since it relates to the different contexts in which human beings can be protected from harm.[13] As pointed out by Turner, vulnerability is our common universal shared characteristic which nevertheless "forces us into social dependency and social connectedness"[14] as we seek protection from harm.

This protection is provided by different institutions, which include the State, the family, or the community.[15] In this regard, Fineman's definition of vulnerability as "the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between the state and its institutions and the individual"[16] is markedly accurate. Precisely, this relationship between States and individuals is at the core of the development of human rights in international law.[17] States are required to protect the vulnerable individual from harm in international human rights law.[18] However, the use of the concept of vulnerability has been heavily criticised by scholars who pointed out the dangers of allowing for paternalistic and stigmatising views of groups of individuals to permeate the mainstream culture, focusing on State assistance and not on building resilience.[19]

The European Court of Human Rights (ECtHR) has deployed its own conception of vulnerability insofar as migrant children are concerned.[20] Across the Atlantic, the Inter-

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[13] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 268-9 (2010-2011).

[14] TURNER, *supra* n10 at 10.

[15] *Id.* at 28 (arguing that the creation of institutions such as family, religion, rituals, political institutions, serve the purpose of reducing vulnerability and providing security).

[16] Fineman, *supra* note 13 at 255.

[17] OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2014) at 13 (explaining that "human rights have a logic of their own [as] they have originated in domestic constitutional documents [and as] they regulate the relationships between the State and individuals under their jurisdiction, rather than simply relationships between States").

[18] *See* in particular the rules on prohibition of torture, inhuman and degrading treatment or punishment (art. 7 of the International Covenant on Civil and Political Rights; art. 3 of the European Convention on Human Rights; art. 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

[19] *See* Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth* 23 TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW 307 at 315 (2014) (arguing that "[t]he conception of vulnerability as belonging only to certain groups or "populations" of people is pernicious, and distorts the nature and effects of legal and social problems. It can actually serve to worsen the position of those "populations" it seeks to protect."); Sylvie Da Lomba, *Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights* 21 EUROPEAN JOURNAL OF HEALTH LAW 339 at 345 (2014) (arguing that group vulnerability can lead to stigmatisation of populations and to paternalistic approaches); Lourdes Peroni & Alexandra Timmer, *Vulnerable groups: The promise of an Emerging Concept in European Human Rights Convention Law* 11 INT J CONST LAW 1056 at 1070 (2013) (arguing that the ECtHR's reasoning in relation to the concept of vulnerability "risks reinforcing the vulnerability of certain groups by essentializing, stigmatizing, and paternalizing them").

[20] This article has undertaken a comprehensive analysis of ECtHR's decisions to date which involved migrant children (unaccompanied, separated or migrating with family members) and which at the same time explicitly referred to the concept of vulnerability. *See* Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. No. 13178/03 (EUR. CT. H.R., Oct. 12, 2006); Muskhadzhiyeva and others v. Belgium, *supra* note 8; Rahimi v. Greece, App. No. 8687/08 (EUR. CT. H.R., Apr. 5, 2011); Kanagaratnam and others v. Belgium, App. No. 15297/09 (EUR. CT. H.R., Dec. 13, 2011); Popov v. France, App. Nos. 39472/07 and 39474/07 (EUR. CT.

American Court of Human Rights (IACtHR) anchored this notion in an influential 2014 advisory opinion on the rights of migrant children.[21] Both courts recognise the vulnerability of migrant children in the wider context of migration, taking into account the multiple risks to which they are particularly exposed,[22] and acknowledging the implications of the principle of best interests of the child.[23]

This article focuses primarily on the analysis of the jurisprudence of the ECtHR,[24] using examples from the IACtHR's jurisprudence[25] as a comparative element supplementing the study. It argues that the concept of vulnerability, when complemented by considerations of best interests of the child, can operate as a magnifying glass for State obligations, exposing a greater duty of protection and care vis-à-vis migrant children. If both human rights courts apply this concept effectively in its future cases, it could achieve a substantive step-change in the protection of migrant children's rights with long-term positive effects. In order to verify this argument, the article critically examines the use of vulnerability by the ECtHR and the IACtHR against the existing legal and theoretical frameworks of human rights protection and evaluates the implications for the effective protection of migrant children's rights.

The analysis proceeds in four consecutive steps. Firstly, the article examines the nature of the concept of vulnerability against the background of the ECtHR's jurisprudence on the protection of migrant children's rights. Secondly, the article evaluates the relationship between vulnerability and the principle of best interest of the child, assessing its advantages and limits. Thirdly, the article evaluates the implications of the concept of vulnerability for State obligations, considering whether it necessitates modifications of the nature or degree of these obligations in this area. Finally, the article draws conclusions on the effectiveness of the use of the concept of vulnerability vis-à-vis the dangers inherent to the

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H.R., Jan. 19, 2012); Tarahkel v. Switzerland App. No. 29217/12 (EUR. CT. H.R., Nov. 4, 2014); Abdullahi Elmi and Aweys Abubakar v. Malta, App. No. 25794/13 and 28151/13 (EUR. CT. H.R., Nov. 22, 2016).

[21] Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection, Advisory Opinion OC-21/14, INTER-AM. CT. H.R. (ser. A) No.21 (Aug. 19, 2014).

[22] *Id.* ¶ 90 (emphasising the risks of sexual exploitation); Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, *supra* note 20 ¶ 56 (condemning the "legal void" for the protection of minors held in detention centres).

[23] Advisory Opinion OC-21/14, *supra* note 21 ¶ 103 (proposing an evaluation of the best interest of the child after examination of migrant children's vulnerability); Rahimi v. Greece, *supra* note 20 ¶ 109 (emphasising the importance of the principle of best interest of the child).

[24] The selection of ECtHR decisions observed the following criteria: in the field of articles 3 and 5 ECHR, all decisions involved migrant children (unaccompanied, separated or migrating with family members) and at the same time explicitly referred to the concept of vulnerability. In the field of article 8 ECHR, all decisions related to migrant children but not always explicitly referred to the concept of vulnerability (which allowed for the argument to be put forward that the ECtHR still has to improve the use of vulnerability in this area – *see infra* at section III.A). Decisions of the ECtHR relating to children (nationals) in general were also used as a point of comparison (*see infra* at section IV).

[25] There are fewer IACtHR decisions relating to migrant children specifically. The Advisory Opinion OC-21/14, *supra* note 21 is the main reference in this regard. Decisions relating to children (including nationals) were used as a point of comparison insofar as they referred to the concept of vulnerability.

stigmatisation of the most underprivileged individuals in the current context of the global migration crisis.

II. THE COMPOSITE NATURE OF THE CONCEPT OF VULNERABILITY

A. Group Dimension

The ECtHR tends to emphasise the group dimension of the concept of vulnerability[26] and not its individual and universal aspects.[27] For instance, it has used this concept in a variety of situations relating to groups of people such as ethnic minorities,[28] asylum-seekers,[29] and the mentally ill.[30] The ECtHR referred to vulnerability for the first time in the context of the protection of minority rights, namely when it designated the Roma minority as vulnerable in *Chapman v the United Kingdom*.[31]

Nonetheless, if the foundation of vulnerability can be situated in the embodied nature of all human beings,[32] who by their physical constitution are subjected to the possibility of harm and depend upon one another,[33] not only a few groups of people should be

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[26] *See* Peroni & Timmer, *supra* note 19 at 1056 (arguing that the ECtHR has deployed the concept of group vulnerability).

[27] *See* Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 18, 22 (Martha Albertson Fineman & Anna Grear eds., 2013) (affirming that "[h]uman vulnerability arises in the first place from our embodiement, which carries with it the imminent or ever-present possibility of harm, injury, and misfortune"); Turner, supra note 10 at 25-6 (arguing that every human being can be considered as vulnerable).

[28] *See* D.H. and others v. the Czech Republic, App. No. 57325/00, ¶ 182 (Nov. 13, 2007), (about the vulnerability of Roma minorities).

[29] *See* M.S.S. v Belgium and Greece, App. No. 30696/09, ¶ 251 (Jan. 21, 2011) (on the vulnerability of asylum-seekers). *See* DEMBOUR, *supra* note 8 at 403 (for a critical analysis of M.S.S. v Belgium and Greece). The ECtHR has subsequently confirmed the vulnerability of adult asylum seekers. *See* Aden Ahmed v. Malta, App. No. 55352/12, ¶ 97 (July 23, 2013); Mahamed Jama v. Malta, App. No. 10290/13, ¶ 100 (Nov. 26, 2015).

[30] *See* Raffray Taddei v. France, App. No. 36435/07, ¶ 63 (Dec. 21, 2010) (emphasising the vulnerability of the applicant, a prisoner suffering from a number of medical conditions including anorexia); Bamouhammad v. Belgium, App. No. 47687/13, ¶ 121 (Nov. 17, 2015)(providing that prisoners with mental health issues are more vulnerable than ordinary prisoners).

[31] Chapman v. the United Kingdom, App. No. 27238/95, ¶ 96 (Jan. 18, 2001) (affirming that the recognition of their vulnerability led to the imposition upon the State of an obligation to take into account "special considerations" in relation to their specific needs and different lifestyle insofar as policy-making and decision-making processes relating to them are concerned).

[32] *See* Fineman, *supra* note 27 at 22; TURNER, *supra* note 10 at 25-6; GREAR, *supra* n12 at 137.

[33] *See* TURNER, *supra* note 10 at 26 (arguing that "[h]uman beings are ontologically vulnerable and insecure, and their natural environment, doubtful. In order to protect themselves from the uncertainties of the everyday world, they must build social institutions").

considered as vulnerable. Vulnerability therefore has a universal reach[34] and the concept should be applied to all human beings. However, as affirmed by Fineman, "while human vulnerability is universal, constant, and complex, it is also particular. While all human beings stand in a position of constant vulnerability, we are individually positioned differently."[35] Some individuals may be better sheltered from harm as they may receive protection from their families, communities and State, whereas other individuals may not receive the same degree of protection.[36] The assertion that some groups of people can be more vulnerable than others can only be accepted as a starting point. The analysis of the context, in which the individuals evolve, and their particularities vis-à-vis the groups to which they belong should also be taken into account.

In the case of the protection of migrant children's rights, vulnerability encompasses aspects linked to the fragile nature of all human beings and it equally relates to the belonging to one or more social groups. The ECtHR has emphasised that migrant children are in an extremely vulnerable situation as they are not only minors, but also aliens in an irregular situation in a foreign country who may not even be accompanied by an adult.[37] This is certainly a positive step towards a more holistic approach to risks inherent in child migration.

Additionally, the ECtHR should arguably also consider gender aspects, as unaccompanied or separated girls are generally considered to be more vulnerable to sexual exploitation and abuses when migrating on their own.[38] Disability is another important concern and should be taken into account by the Court, as migrant children with disabilities are more frequently exposed to abuse, exploitation and neglect.[39] Trauma, stress and mental health issues are also a consideration to be taken into account.[40] These are all elements that in their combination lead to a situation of extreme vulnerability.

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[34] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 YALE J. L. & FEMINISM 1, 17 (2008) (affirming that "[v]ulnerability is universal and, as such, transcends historic categories of impermissible discrimination").

[35] Fineman, *supra* note 13 at 268-9.

[36] *See* TURNER, *supra* note 10 at 25 (about the dependency upon institutions and their precariousness).

[37] *See* for instance, Rahimi v. Greece, *supra* note 20, ¶ 87; Popov v. France, *supra* note 20, ¶ 91; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, supra* note 20, ¶ 103.

[38] *See Exploring child migrant vulnerabilities and those of children left-behind*, International Labour Organization (ILO) (Oct. 1, 2010), *available at* http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=14313 at 9 (Arguing that girls are especially susceptible to sexual abuse during the migratory process).

[39] *See* Reilly, *Disabilities among refugees and conflict-affected populations,* 35 FORCED MIGRATION REVIEW 8 (2010).

[40] The ECtHR takes into account the stress and anxiety that detention causes in migrant children which may be considered as inhuman or degrading treatment under article 3 ECHR. *See*, *e.g.*, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, *supra* note 20, ¶ 58; Tarakhel v. Switzerland, *supra* note 20, ¶ 99; *see also* Mina Fazel et. al., *Mental Health of Displaced and Refugee Children Resettled in High-Income Countries: Risk and Protective Factors,* 379 LANCET 266, 279 (2012) (explaining that "evidence lends support to the idea of spirals of loss drawing attention to the way many challenges affect refugees at all stages of their journeys").

Accordingly, it is submitted that we can speak of a composite form of vulnerability[41] whenever two or more of these elements are present at the same time.[42] However, composite vulnerability should not be understood as cumulative in nature. In other words, it should emphatically not be misused and misunderstood as a simple tick-box exercise, with individuals who do not meet the requisite number of criteria being excluded from protection.[43] On the contrary, composite vulnerability should allow for a particularised view of migrant children's concrete situations.

In comparison, although the IACtHR strongly relates to identifiable groups of individuals, it also takes into account their particular situation within the group, and the relationship with individuals and institutions outside the group. For instance, in the case of the *Sawhoyamaxa Indigenous Community v Paraguay*,[44] the IACtHR recognised the vulnerability of certain indigenous communities, notably when its members were not legally registered in State's official records.[45] However, it is interesting to note that the IACtHR emphasised the existence of especially vulnerable groups within this indigenous community while assessing "the actual risk and vulnerability situation to which the members of the Sawhoyamaxa Community are exposed, especially children, pregnant women and the elderly".[46] It follows that in that case, certain categories of people were deemed to experience an additional aspect of vulnerability, as they not only belonged to the indigenous community and were therefore socially and economically excluded, but they were also children, pregnant women, or elderly.

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[41] The term compounded vulnerability has also been used by scholars in a broader context relating to other groups of people and not only migrant children. *See* Alexandra Timmer, *A Quiet Revolution: Vulnerability in the European Court of Human, in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 147, 161 (Martha Albertson Fineman & Ana Grear eds., 2013); Ulrik Brandl & Philip Czech, *General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?, in* PROTECTING VULNERABLE GROUPS. THE EUROPEAN HUMAN RIGHTS FRAMEWORK 247, 251 (Francesca Ippolito & Sara Iglesias Sanchez eds., 2015).

[42] For the purposes of comparison, it is interesting to note that the Human Rights Committee has also recognised the "special vulnerability of certain categories of person, including in particular children" which should be taken into account by States while ensuring that individuals have accessible and effective remedies: *see* Human Rights Comm., *General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, ¶ 15, HRI/GEN/1/Rev.7 (May 12, 2004).

[43] *See notably* Aoife O'Higgins, *Vulnerability and Agency: Beyond an Irreconcilable Dichotomy for Social Service Providers Working with Young Refugees in the UK, in* INDEPENDENT CHILD MIGRATION – INSIGHTS INTO AGENCY, VULNERABILITY, AND STRUCTURE 79, 85 (Aida Orgocka & Christina Clark-Kazak eds., 2012) (finding that "where young people did not conform to expectations of vulnerability deemed appropriate for a refugee child, they risked being denied the support they needed").

[44] Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 146 (Mar. 29, 2006).

[45] *Id.*, at ¶¶ 189-91.

[46] *Id.*, at ¶ 159.

Furthermore, in the case of the *Girls Yean and Bosico v Dominican Republic*,[47] the IACtHR specifically considered that "the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group".[48] The composite nature of the victims' vulnerability is apparent in this case, as they were not only children but also girls, and were discriminated in relation to their origins (Dominicans of Haitian descent). In its Advisory Opinion OC-21, the IACtHR emphasised the "situation of additional vulnerability"[49] in which migrant children often find themselves, entailing an "increased risk of violation of their rights."[50]

Therefore, any finding of group vulnerability must be complemented by a close contextual analysis of the situation of the individuals vis-à-vis their place in the different social groups. The next section examines how regional human rights courts have undertaken this type of analysis in their jurisprudence.

B. Contextual Analysis

Despite maintaining a group dimension for its understanding of the concept of vulnerability, the ECtHR takes into account the particular aspects of the situation of individual migrant children. In doing so, it thus undertakes a contextual analysis of their cases.[51] In this regard, a helpful general analytical framework has been proposed by Peroni and Timmer.[52] They suggest that the concept of vulnerability as exposed by the ECtHR is "relational, particular and harm-based."[53] This framework can serve as a basis for verifying how vulnerability is applied to the specific context of the protection of migrant children's rights in three main ways.

Firstly, Peroni and Timmer contend that vulnerability can be seen as relational insofar as it is "shaped by social, historical, and institutional forces".[54] The individual is therefore placed in a context, the one of relationships within his or her group. In the case of migrant children's vulnerability, this aspect can be seen in the treatment of the vulnerability of the

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[47] Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, INTER-AM. CT. H.R. (ser. C) No. 130 (Sept. 8, 2005) (relating to the denial of nationality to Dominicans of Haitian descent by the Dominican authorities).

[48] *Id.*, at ¶ 134.

[49] Advisory Opinion OC-21/14, *supra* note 21, ¶ 71.

[50] *Id.*

[51] This is the case in all decisions involving migrant children in which the ECtHR explicitly referred to the concept of vulnerability. *See* Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, *supra* note 20, ¶ 103; Muskhadzhiyeva and others v. Belgium, *supra* note 8, ¶ 63; Popov v. France, *supra* note 20, ¶ 102; Tarahkel v. Switzerland, *supra* note 20, ¶¶ 116-22; Rahimi v. Greece, *supra* note 20, ¶ 87; Abdullahi Elmi and Aweys Abubakar v. Malta, *supra* note 20, ¶ 113; Kanagaratnam and others v. Belgium, *supra* note 20, ¶¶ 64-8.

[52] *See* Peroni & Timmer, *supra* note 19.

[53] *Id.,* at 1064.

[54] *Id.*.

child as an axiom by the ECtHR.[55] Children are considered as automatically vulnerable in their relationship with adults. The same type of approach has been taken by the IACtHR.[56] This is also the perception of the Committee on the Rights of the Child ("the Committee").[57] Therefore, the ECtHR, the IACtHR, and the Committee all acknowledge that children are *per se* more vulnerable to the effects of the abuses of their rights than adults.[58]

However, it is submitted that this position should be nuanced, as children do not constitute a homogeneous group. Research demonstrates that children's cognitive development evolves with age and so does their capacity to adapt and to become more resilient to external factors.[59] Moreover, if taken out of context, this aspect of the

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[55] *See* Popov v. France, *supra* note 20, ¶ 91 (affirming that "it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant").

[56] *See* Sawhoyamaxa Indigenous Community v Paraguay, *supra* note 44, ¶ 159 (indicating the risks incurred by certain categories of indigenous populations, and in particular their children).

[57] *See* Committee on the Rights of the Child, *General Comment No 6*, *supra* note 6, ¶ 4 (arguing that these children are particularly vulnerable); Committee on the Rights of the Child, *General Comment No 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia)*, ¶ 21, CRC/C/GC/8 (May 15, 2006) (emphasising the vulnerability of children in general); Committee on the Rights of the Child, *General Comment No 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, ¶ 54, CRC/C/GC/14 (Jan. 14, 2013) (stressing that "[t]he fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests"); Committee on the Rights of the Child, *General Comment No 15: The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, ¶ 8, CRC/C/GC/15 (Jan. 14, 2013) (arguing that discrimination a significant factor contributing to children's vulnerability); Committee on the Rights of the Child, *General Comment No 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights*, ¶ 31, CRC/C/GC/16 (Jan. 14, 2013) (emphasising that "children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage"); Committee on the Rights of the Child, *Draft General Comment on the Implementation of the Rights of the Child During Adolescence*, ¶ 2, CRC/C/GC/20 (Apr. 22, 2016) (emphasising the significant vulnerability of children at that period of their lives). *See also* Kristen Sandberg, *The Convention on the Rights of the Child and the Vulnerability of Children*, 84 NORDIC JOURNAL OF INTERNATIONAL LAW 221, 222 (2015) (explaining that "using society's institutions to build resilience is one of the main ideas of the vulnerability theory, which should not lead to paternalism but rather might add to the understanding and application of the Convention, with the potential to strengthen its implementation").

[58] *See* Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors,* 26 B.C. THIRD WORLD L.J. 131, 139 (2006) (arguing that taking into account the unique situation of vulnerability of unaccompanied minors, "by not distinguishing unaccompanied minors from adults, the law gives no consideration to children's unique difficulties in satisfying the same legal standards"); John Tobin, *Understanding Children's Rights: A Vision beyond Vulnerability,* 84 NORDIC J INT'L L. 155, 166 (2015) (arguing that children have "special vulnerabilities, which accord with the lived experiences of children, provide a basis for the special rights which children enjoy under the CRC").

[59] *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development during Childhood Through Early Adulthood,* 101 PROC NATL ACAD SCI U S A 8174, 8178 (2004) (finding that children's brains develop in a specific pattern and growth has a consequence for behaviour and neurodevelopmental disorders); Rachel Keen, *The Development of Problem Solving in Young Children: A Critical Cognitive Skill,* 62 ANNU REV PSYCHOL. 1, 7 (2011) (discussing children's skills according to their age and stage of cognitive development); Mina Fazel & Alan Stein, *The mental health of refugee children,* 87 ARCH. DIS. CHILD. 366, 367 (2002) (affirming that "traumatic events can have an effect on a child's emotional, cognitive, and moral development because they influence the child's self-perceptions and expectations of others").

recognition of vulnerability can be highly problematic. It may indeed reinforce the assumption that all children are not fully capable beings and excessively emphasise their dependency on adults. In this regard, recognition of vulnerability should not exclude agency.[60] In addition, migrant children's vulnerability also relates to other aspects such as their condition as migrants, gender, disability, and mental health. Accordingly, all these elements should be taken into consideration when migrant children are concerned.

Secondly, the concept of vulnerability is arguably particular, insofar as the "vulnerability is shaped by specific group-based experiences".[61] The ECtHR takes into account the particular experiences that migrant children may have had within their vulnerable group. A case in point is *Popov v France*, which concerned the detention of a couple from Kazakhstan who were facing deportation with their two children aged five months and three years, respectively.[62] The ECtHR affirmed that the migrant children concerned had been in a situation of particular vulnerability, heightened by the conditions of detention.[63]

Likewise, in *Abdullahi Elmi and Aweys Abubakar v Malta*, the ECtHR held that the applicants who were aged sixteen and seventeen years old "were particularly vulnerable because of everything they had been through during their migration and the traumatic experiences they were likely to have endured previously."[64] Furthermore, it admitted that they "were even more vulnerable than any other adult asylum seeker detained at the time because of their age."[65] By doing so, the ECtHR maintains its axiomatic view that children are *per se* more vulnerable than adults but also takes into consideration the risks related to the migratory context.[66] Accordingly, this approach allows for a more *in concreto* analysis of the situation of the migrant children which can outweigh the negative effects of the use of the concept of vulnerability.

Thirdly, it is posited that the concept can be seen as harm-based. The ECtHR situates harm—including physical, mental and sexual abuse, social disadvantage and material deprivation—at the centre of its understanding of vulnerability.[67] Harm is therefore assessed in light of the relevant context and potential external risk. For instance, in relation

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[60] Agency is defined by O'Higgins as "young people's ability to participate meaningfully in the construction of their daily lives, including their capacity to cope, their ability to adapt, and their resilience": O'Higgins, *supra* note 43, at 81.

[61] Peroni & Timmer, *supra* note 19, at 1064. Material deprivation of unaccompanied children has also been considered by the ECtHR (Rahimi v. Greece, *supra* note 20, ¶ 87).

[62] Popov v. France, *supra* note 20.

[63] *Id.*, at ¶ 102.

[64] Abdullahi Elmi and Aweys Abubakar v. Malta, *supra* note 20, ¶ 113.

[65] *Id.*

[66] Conversely, in its decision Mahamed Jama v. Malta the ECtHR considered that the applicant who was found to be an adult following age determination proceedings "was not more vulnerable than any other adult asylum seeker detained at the time" even though she "was particularly vulnerable because of everything she had been through during her migration and the traumatic experiences she was likely to have endured previously": Mahamed Jama v. Malta, *supra* note 29, ¶ 100.

[67] Peroni &Timmer, *supra* note 19, at 1064.

to the situation of migrant children, the external risk of harm appears to be at the heart of the development of ECtHR's jurisprudence.

Accordingly, in *Musknadzhiyeva and others v Belgium*, the ECtHR concluded that the detention of four children aged respectively seven months, three years and a half, five years, and seven years in a closed detention centre primarily designed for adults was unlawful, despite the fact that they were not separated from their mother.[68] The conditions of their detention were deemed detrimental for their mental health.[69] Likewise, in *V.M. and others v Belgium*, the ECtHR took into account the possibility of harm due to the situation of vulnerability of the applicants, a family of Roma origin with five children (including a baby and a handicapped child).[70] The ECtHR found a violation of article 3 ECHR (prohibition of torture, inhuman and degrading treatment) in relation to the deplorable conditions in which they were forced to live between their removal from the detention centre and their expulsion to Serbia.[71] Similarly, in *Tarakhel v Switzerland*, the ECtHR emphasised the lack of sufficient assurances that, if returned to Italy, the applicants' family, which included six minor children, would be taken care of in a manner adapted to the age of the children.[72]

The IACtHR has adopted a similar approach in its advisory opinion OC-21.[73] It clearly emphasised the risks of harm to which migrant children are exposed while migrating and directly referred to General Comment No. 6 of the Committee on the Rights of the Child.[74] In particular, these risks relate to threats to their life, freedom, security or personal integrity.[75] The contextual analysis of their situation allows for a better understanding of their harm-based vulnerability.

Academic scholarship has drawn attention to the potential dangers posed by the concept of vulnerability.[76] If not assessed adequately, it can give way to adverse outcomes. On the one hand, it can lead to the stigmatisation of the already vulnerable groups.[77] On the other hand, it may lead to the over-generalisation of the topic, one that presumes all members of a group are equally vulnerable. However, in the specific context of the protection of migrant children's rights, judicial recognition of their vulnerability can

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[68] Muskhadzhiyeva and others v. Belgium, *supra* note 8, ¶¶ 59-63.

[69] *Id.*

[70] V.M. and others v. Belgium, App. No. 60125/11 (EUR. CT. H.R., July 7, 2015).

[71] *Id.* ¶ 138.

[72] Tarakhel v. Switzerland, *supra* note 20, ¶ 121.

[73] Advisory Opinion OC-21/14, *supra* note 21, ¶ 90 (particularly referring to risks of harm incurred by unaccompanied or separated migrant children).

[74] Committee on the Rights of the Child, General comment No 6, *supra* note 6, ¶ 23 (outlining the risks of harm that migrant children incur while on the move).

[75] Advisory Opinion OC-21/14, *supra* note 21, ¶ 90.

[76] *See supra* note 19

[77] *See* Peroni & Timmer, *supra* note 19, at 1070 (arguing that the ECtHR's reasoning in relation to the concept of vulnerability "risks reinforcing the vulnerability of certain groups by essentializing, stigmatizing, and paternalizing them").

arguably lead to improved consideration of their specific needs. By identifying the particularities of these children's situation, courts can avoid the stigmatising them as a vulnerable group. In addition, if their vulnerabilities relate to a particular situation and are not seen as inherent to their condition of children, harm can be more easily prevented. For instance, physical and psychological harm can be avoided if States agree that unaccompanied minors and families with children should not be placed in detention facilities that are not adapted to receive them.

Accordingly, if regional human right courts are able to take into account the particularities of the situation of migrant children,[78] it is possible to argue that the use of the concept of vulnerability can have a positive impact for the protection of their fundamental rights. The ECtHR takes into account the different elements relating to the migrant children's personal history and state of physical and mental health, the environment in which they develop, and the risk of abuses while on the move and once in the country of destination.[79] By doing so, it imposes a multi-layered analysis of the vulnerability according to these different elements. However, these layers should not be understood as cumulative. Composite vulnerability should not be misused and transformed into an exclusion tool.

On the contrary, composite vulnerability should be used as a tool to include a wider range of migrant children into protection and to inform better decision-making. By situating the vulnerability into the specific context of migrant children's experiences, the ECtHR is directing its jurisprudence towards a more inclusive framework of protection of migrant children's rights. This is highly encouraging,[80] especially given that the ECtHR's jurisprudence can have persuasive authority and lead into a form of judicial dialogue with domestic courts.[81] For instance, it is interesting to note the recent UK Upper Tribunal's

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[78] *See* Wouter Vandenhole & Julie Ryngaert, *Mainstreaming Children's Rights in Migration Litigation: Muskhadzhiyeva and others v Belgium*, *in* DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGEMENTS OF THE ECHR 68, 72 (Eva Brems ed., 2013) (arguing that three factors determine vulnerability – personal, environmental and risk - and that the degree of vulnerability and agency depends on the interaction between these different factors).

[79] *See notably* Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, supra* note 20; Muskhadzhiyeva and others v. Belgium, *supra* note 8; Popov v. France, *supra* note 20; Abdullahi Elmi and Aweys Abubakar v. Malta*, supra* note 20.

[80] *But see* Marc Bossuyt, *Is the European Court of Human Rights on a Slippery Slope?, in* THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS. TUNING CRITICISM INTO STRENGTH 27, 30 (Spyridon Flogaitis, Tom Zwart & Julie Fraser eds., 2013) (expressing strong criticism about the ECtHR's jurisprudence recognising the vulnerability of asylum seekers).

[81] *See* McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights,* 20 OXFORD J. LEGAL STUD. 499, 515 (2000) (for a critical evaluation of meaning and significance of the citation of judgements from other jurisdictions by domestic courts in the field of the protection of constitutional rights); MICHAL BOBEK, COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS (2013) (analysing cross-border judicial dialogue in Europe); Antonios Tzanakopoulos, *Judicial Dialogue as a Means of Interpretation, in* THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE 72, 72 (Helmut Philipp Aust & Georg Nolte eds., 2016) (arguing that international law requires domestic jurisdictions to engage in a sort of judicial dialogue by considering decisions of other jurisdictions); Frédéric Sudre, *À propos du 'dialogue des juges' et du contrôle de conventionnalité, in*

decision ordering the family reunification of three Syrian minors and one Syrian mentally disabled adult who were living in an improvised refugee camp (also known as "the jungle") in Calais, France.[82] The resemblance with the general line of ECtHR's jurisprudence related to composite vulnerability of migrant children is remarkable. The UK Upper Tribunal's decision emphasised the applicants' "special, indeed unique, situation because of their ages, their vulnerability, their psychologically traumatised condition, the acute and ever present dangers to which they are exposed in 'the jungle', [and] the mental disability of [one of the applicants]."[83] Based on their vulnerability and considerations of the best interests of the children, the judges decided that to refuse the admission of the applicants to the UK would disproportionately interfere with their right to respect for family life under article 8 ECHR.[84] The Upper Tribunal thus took into account the specific situation of the applicants while expressly acknowledging their group vulnerability. Although this decision was later overturned on appeal,[85] the Court of Appeal similarly recognised the importance of the vulnerability inherent in the situation of unaccompanied migrant children.[86]

Overall, the official acknowledgment of the composite vulnerability of migrant children contributes to the promotion of awareness about the necessity to protect their rights adequately. Specific consideration of the principle of best interest of the child can further reinforce the necessity of protection, as will be shown in the next section.

III. THE RELATIONSHIP BETWEEN VULNERABILITY AND BEST INTEREST OF THE CHILD

A. Complementarity

According to article 3 of the Convention on the Rights of the Child (CRC), the best interests of the child shall be a primary consideration in all actions concerning children.[87]

LES DYNAMIQUES DU DROIT EUROPÉEN EN DÉBUT DE SIÈCLE : ÉTUDES EN L'HONNEUR DE JEAN-CLAUDE GAUTRON 207, 210 (Joël Andriantsimbazovina et al., eds., 2004) (discussing the existence of a judicial dialogue in relation to the application of the ECHR by domestic courts).

82 The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v. Secretary of State for the Home Department [2015] 6 JR 15405.

83 *Id.*, at ¶ 6.

84 *Id.*, at ¶ 58.

85 Secretary of State for the Home Department v. ZAT & Ors (Syria) [2016] WLR (D) 452; [2016] EWCA Civ 810.

86 *Id.*, at ¶ 84 (per Lord Justice Beatson) (affirming that "the need for expedition in cases involving particularly vulnerable persons such as unaccompanied children is recognised … Delay to family reunification may in itself be an interference with rights under ECHR Article 8").

87 Convention on the Rights of the Child, *supra* note 5, art. 3. The best interest principle is also provided by article 24(2) of the Charter of Fundamental Rights of the EU. The Court of Justice of the European Union (CJEU) considers the CRC when applying general principles of EU law. *See* Case C-540/03 European Parliament v Council, 2006 E.C.R. I-05769, ¶ 37.

This principle provides a normative framework for the definition and interpretation of the rights of the child.[88] The ECtHR tends to combine the concept of vulnerability with the principle of the best interests of the child while deciding on issues relating to the protection of migrant children's rights. The principle of best interests of the child can indeed be a valuable complement to the concept of vulnerability.

It is commonly accepted that it is in the child's best interest, for instance, to acquire a nationality and have her birth registered,[89] receive adequate education,[90] have her application for family reunification dealt with by States "in a positive, human and expeditious manner",[91] not be arbitrarily separated from her parents or carers,[92] or to receive adequate protection against all forms of physical and mental violence or abuse.[93] These considerations also apply to unaccompanied or separated migrant children,[94] including in relation to conditions of reception, treatment and access to basic rights in countries of transit and destination.[95] The best interest of the child principle creates therefore an additional layer of protection, complementing the general protection offered by regional human rights treaties.[96]

By way of an illustrative example, in *Rahimi v Greece*, the ECtHR acknowledged the situation of extreme vulnerability of the applicant, an unaccompanied migrant boy from Afghanistan who was detained for two days upon arrival in Greece and subsequently abandoned to live on the streets.[97] The Court found a violation of article 3 ECHR in relation to the deplorable conditions of his detention and the lack of care by public

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[88] Committee on the Rights of the Child, General Comment No 14, *supra* note 57, ¶ 6 (recognising that the child's best interests is a threefold concept: a substantive right, an interpretative legal principle, and a rule of procedure).

[89] Convention on the Rights of the Child, *supra* note 5, art. 7.

[90] *Id.* art. 28.

[91] *Id.* art. 10.

[92] *Id.* art. 9.

[93] *Id.* arts. 19, 32, 34-6.

[94] Committee on the Rights of the Child, General Comment No 6, *supra* note 6, ¶¶ 7-8.

[95] *See Guidelines on Formal Determination of the Best Interests of the Child*, UNHCR (May 2008), *available at* http://www.unhcr.org/4566b16b2.pdf, at 14 (defining the term best interest as broadly describing the well-being of a child); *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, UNHCR (Jan. 2004), *available at* http://www.unhcr.org/4098b3172.html, at 16 (considering the principle of best interest of the child as "the basic standard for guiding decisions and actions taken to help children, whether by national or international organizations, courts of law, administrative authorities, or legislative bodies").

[96] *See* JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 173 (2006) (affirming that the consideration of best interests of the child constitute a complementary ground of protection vis-à-vis the Refugee Convention); Jason M. Pobjoy, *The Best Interests of the Child Principle as an Independent Source of International Protection* 64 ICLQ 327, 344 (2015) (arguing that the best interest principle may give rise to an independent protection status in international law); *see also*, in the context of deportation of foreigners, Üner v. The Netherlands App. No. 46410/99, ¶ 58 (EUR. CT. H.R., Oct. 18, 2006) (affirming that consideration should be given to "the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled").

[97] Rahimi v. Greece, *supra* note 20, ¶¶ 86-7.

authorities, notably in light of his vulnerability.[98] However, the Court's finding of violation of article 5(1) ECHR[99] was particularly based on the Greek authorities' absence of consideration of the best interest of the child applicant.[100] Taking into account the vulnerability of the applicant, the ECtHR indicated that the Greek authorities could not be deemed to have acted in good faith[101] as they did not consider the child's best interests while deciding on his detention.[102] In *Kanagaratnam and others v Belgium*,[103] a decision relating to the conditions of detention of a mother and three children of Sri Lankan Tamil origins who had claimed asylum in Belgium, the ECtHR recognised the vulnerability of the children and also emphasised the importance of the best interest of the child principle.[104] It is submitted that by referring and drawing upon both the concept of vulnerability and the principle of best interest of the child the ECtHR advances the complementarity of the two notions.

This approach is certainly not without its flaws, and several of these deficiencies ought to be highlighted. Firstly, the ECtHR did not go as far as imposing a ban on detention of migrant children,[105] whereas evidence demonstrates its negative effects for their long-term psychological health.[106] Secondly, in *Rahimi*, the ECtHR has imported the principle of best interest of the child from the realm of the CRC, but did not provide a comprehensive definition of its scope or the specific obligations required from States.[107] Finally, although

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[98] *Id.*, at ¶ 95.

[99] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Dec. 3, 1953) (hereinafter "ECHR"), art. 5(1)(f) ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.").

[100] Rahimi v. Greece, *supra* note 20, ¶ 109.

[101] The ECtHR has established that detention of a foreigner is not arbitrary only insofar as it meets the four conditions established in Saadi v. the United Kingdom, App. No. 13229/03, ¶ 74 (Jan. 29, 2008) ("[t]o avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'; and the length of the detention should not exceed that reasonably required for the purpose pursued"). The same conditions also apply for detention for the purpose of removal (*Id.*, at ¶ 73).

[102] Rahimi v. Greece, *supra* note 20, ¶ 109.

[103] Kanagaratnam and others v. Belgium, *supra* note 20.

[104] *Id.*, at ¶ 67.

[105] *See* DEMBOUR, *supra* note 8 at 394 (affirming that "a blanket condemnation of children's detention when the said children are not 'unaccompanied' is conspicuous by its absence").

[106] *See* Michael Dudley et al., *Children and Young People in Immigration Detention,* 25 CURR OPIN PSYCHIATRY 285 (2012); MARY BOSWORTH, INSIDE IMMIGRATION DETENTION (2014) at 199; Aamer Sultan & Kevin O'Sullivan, *Psychological disturbances in asylum seekers held in long term detention: a participant-observer account,* 175 MED J AUST 593 (2001); Ann Lorek et al., *The mental and physical health difficulties of children held within a British immigration detention center: A pilot study,* 33 CHILD ABUSE & NEGLECT 573 (2009); Louise Newman & Zachary Steel, *The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention*, 17 CHILD ADOLESC. PSYCHIATR. CLIN. N. AM. 665 (2008).

[107] Rahimi v. Greece, *supra* note 20, ¶ 33.

it expressly cited article 3 CRC in the abovementioned decisions,[108] the ECtHR failed to refer to the Committee on the Rights of the Child's General Comment No. 6, which specifically relates to the treatment of unaccompanied and separated children outside their country of origin.[109] In doing so, the ECtHR has overlooked the definition of the determination of best interest adopted by the Committee,[110] possibly in an attempt to avoid being bound by the Committee's stronger child-centred views on detention of migrant children.[111] This dissociation from the Committee on the Rights of the Child's position on detention is confirmed by the ECtHR's ruling in *Abdullahi Elmi and Aweys Abubakar v Malta*.[112] In this decision, the ECtHR did finally explicitly refer to the General Comment No. 6,[113] but it did not in fact use the principle of best interests in its assessment of the lawfulness and non-arbitrariness of the detention of the applicants.[114] By contrast, the IACtHR's approach is closer to the one adopted by the Committee on the Rights of the Child in its General Comment No. 6 regarding detention and the best interests of the child. This can be seen in the fact that, in addition to citing the General Comment in its Advisory Opinion No. 21, the IACtHR has also directly drawn upon it.[115]

In relation to article 8 ECHR (right to respect for private and family life), the ECtHR's recourse to the concept of vulnerability is comparatively less well developed than the one in the field of articles 3 and 5 ECHR. In contrast, the references to the child's best interests are quite significant.[116] For example, the ECtHR takes into account several factors, including age, rupture of family life, ties to the host country, immigration control and considerations of public order to determine whether it is in the child's best interests not to be removed.[117] Accordingly, achieving a fair balance between competing interests of

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[108] *Id.*, at ¶ 108; Kanagaratnam and others v. Belgium, *supra* note 20, ¶ 67.

[109] Committee on the Rights of the Child, General Comment No 6, *supra* note 6.

[110] *Id.*, at ¶ 20 (affirming that "a determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques").

[111] *Id.* ¶ 61 (affirming that "detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof").

[112] Abdullahi Elmi and Aweys Abubakar v. Malta, *supra* note 20.

[113] *Id.*, at ¶ 56.

[114] *Id.*, at ¶¶ 139-48. The applicants were detained for eight months after having claimed asylum while their age was determined by the competent authorities. The ECtHR found that there was a violation of article 5(1) ECHR after considering the four conditions established in Saadi v. the United Kingdom, *supra* note 101. However, it did not explicitly consider the best interests of the child while assessing the authorities' good faith and the length of detention imposed on the applicants.

[115] *See* Advisory Opinion OC-21/14, *supra* note 21, ¶ 155.

[116] *See* Nunez v. Norway, App. No. 55597/09, ¶¶ 78-84 (June 28, 2011) (analysing the considerations relating to the children's best interest regarding the fair balance test under article 8 ECHR).

[117] *See Id.*, at ¶ 70; Rodrigues da Silva and Hoogkamer v. The Netherlands, App. No. 50435/99, ¶ 39 (Jan. 31, 2006); Ajayi and Others v. the United Kingdom, App. No. 27663/95, ¶ 2 (June 22, 1999); Solomon v. The Netherlands, App. No. 44328/98, ¶ 1 (Sept. 5, 2000).

States and individuals is at the centre of its jurisprudence.[118] On the one hand, States have the right to control the entry of non-nationals into their territories and family reunion is not automatically guaranteed under article 8 ECHR.[119] On the other hand, the particular circumstances of the case and the child's best interests have been taken into account by the Court.[120] Still, these particular circumstances could and should also include the migrant children's vulnerability. The ECtHR should expressly build this notion into its evaluation of the specific circumstances of each case involving migrant children.

Comparatively, the IACtHR proposes a clearer double-layered test to determine the nature and scope of special measures for the protection of migrant children required from States. Firstly, it requires the domestic authorities to evaluate different factors that may result in the recognition of vulnerability. Secondly, it expects these authorities to analyse whether these measures were taken in the best interests of the children.[121] The sole test of best interests would not suffice to determine the nature and the extent of the measures necessary for the protection of the migrant children. For instance, the IACtHR suggested that unaccompanied or separated migrant girls are particularly vulnerable due to higher risks of sexual exploitation and abuses.[122] In this sense, domestic authorities should first take into account their particular situation of vulnerability and then consider what would be in their best interests in order to adopt the most appropriated measures.[123]

Drawing upon the abovementioned examples, it appears that the ECtHR tends to rely upon the concept of vulnerability to emphasise the need for special measures of protection of migrant children. This is particularly prominent in the context of articles 3 and 5 ECHR. In addition, the principle of best interests of the child complements and reinforces the request for special measures, notably in the ambit of article 3 ECHR. By referring to the principle of best interests of the child, the ECtHR locates these special measures within a broader regulatory framework, making it easier to determine whether a substantive right has been violated or not by domestic authorities. In contrast, the IACtHR, embraces a more comprehensive child rights-based approach emphasising considerations of welfare of migrant children.

It is submitted that the complementary use of the concept of vulnerability and the principle of best interests of the child should be welcomed as it can pave the way towards

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[118] *See* Nunez v. Norway *supra* note 116, ¶¶ 78-84. *See also* Ciara Smyth, *The Best Interests of the Child in the Expulsion and First-Entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?,* 17 EUR J MIGR LAW 70, 103 (2015) (affirming that "the Court does not generally ground its reasoning in a rights-based approach").

[119] Abdulaziz, Cabales and Balkandali v. the United Kingdom, App. No.s 9214/80, 9473/81, 9474/81, ¶ 67 (May 28, 1985).

[120] *See* Nunez v. Norway, *supra* note 116, ¶ 70; Rodrigues da Silva and Hoogkamer v. The Netherlands, supra note 117, ¶ 39.

[121] Advisory Opinion OC-21/14, *supra* note 21 ¶ 103.

[122] *Id.*, at ¶ 102.

[123] *Id.*, at ¶ 103.

a more robust and effective implementation of special measures of protection and assistance for migrant children.[124] The assessment of the vulnerability of the situation of these children coupled with the consideration of their best interests as a guiding principle could require, for instance, that States provide more adequate assistance to unaccompanied migrant children while in makeshift camps,[125] or while placed in offshore detention facilities.[126] However, this complementarity should not be undermined by the instrumentalization of the principle of best interests of the child, as will be exposed in the next section.

B. Instrumentalization

The analysis of the ECtHR jurisprudence demonstrates that the principle of best interests of the child can be a powerful tool in finding breaches of protected rights. For instance, this was the approach adopted by the ECtHR in *Rahimi v Greece*.[127] It was the procedural flaw in the appreciation of the best interest of the child by the Greek authorities that reinforced the finding of violation of article 5(1) ECHR in this decision, not the sole fact of detention of a vulnerable migrant child.[128] Conversely, in *Kanagaratnam and others v Belgium*,[129] a decision relating to the detention in a closed detention centre of a mother and three children of Sri Lankan Tamil origins who had claimed asylum in Belgium, the ECtHR found a breach of article 5(1) ECHR insofar as the children were concerned.[130] The vulnerability of the children was paramount for the Court in reaching its verdict.[131] Without further developing its arguments, the ECtHR simply referred[132] to a passage in its previous ruling in *Mubilanzila Mayeke and Kaniki Mitunga v Belgium* where the situation of extreme vulnerability of unaccompanied migrant children was explicitly acknowledged.[133] The ECtHR then applied the same findings to situations of detention of children, this time

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[124] *See* Jane McAdam, *Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection,* 14 INT'L J. CHILDREN'S RTS 251, 251 (2006) (arguing that "the best interests of the child, reflecting an absolute principle of international law, are highly relevant in determining whether or not a child needs international protection").

[125] *See* Committee on the Rights of the Child, *Concluding observations regarding France*, ¶ 75, CRC/C/FRA/CO/5 (Jan. 29, 2016) (expressing concern about "the precarious situation of children and their families in refugee camps in the northern part of the State party, such as in Calais and in Grande-Synthe").

[126] Committee on the Rights of the Child, *Concluding observations regarding Australia*, ¶ 31, CRC/C/AUS/CO/4 (May 29, 2012) (expressing concerns about the "inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations").

[127] Rahimi v. Greece, *supra* note 20, ¶ 109.

[128] *Id.*

[129] Kanagaratnam and others v. Belgium, *supra* note 20103.

[130] *Id.*, at ¶¶ 86-8.

[131] *Id.*

[132] *Id.*, at ¶ 86.

[133] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, supra* note 20, ¶ 103.

accompanied by their parents, referring to its decision in *Muskhadzhiyeva and others v Belgium*,[134] and finding a violation of article 5(1).[135]

Conceivably, the principle of best interests of the child was less prominent in *Kanagaratnam* as in that case, the detention had lasted for approximately four months in a closed detention centre which had already been judged to be inappropriate for the needs of children.[136] Taking into account their vulnerability, the Court considered that by placing the children (despite being accompanied by their mother) in such a closed centre, the Belgian authorities had exposed them to feelings of anxiety and inferiority and had, in full knowledge of the facts, risked compromising their development.[137] The ECtHR could therefore find a violation of articles 3 and 5(1) ECHR without overly relying on the application of the principle of best interests of the child.[138] The same approach was visible in *Abdullahi Elmi and Aweys Abubakar v Malta* where the detention of the applicants for the purpose of determining their age lasted for eight months.[139] Despite explicitly referring to article 3 CRC[140] and to the Committee on the Rights of the Child's General Comment No. 6,[141] the ECtHR did not in fact make use of the principle of best interests of the child when finding violations of articles 3 and 5(1) ECHR.[142] By contrast, in *Rahimi* the detention had lasted only for two days and the ECtHR relied heavily on the best interests principle in order to legitimate the overall finding of violation of article 5(1) ECHR.[143]

Therefore, the principle of best interests appears to be instrumentalized by the ECtHR, which will use it only when convenient for finding of violations of the Convention. This approach, in addition to suffering from unnecessary pragmatism and inconsistency, is not without further risks. For instance, in a hypothetical situation similar to the one in *Rahimi*,[144] if the State authorities proved that they had taken this principle into account in assessing the situation of a migrant child, the detention would not *per se* be contrary to the ECHR. In this case, the State would still need to satisfy the general test of detention as a measure of last resort, [145] but the principle of best interests would be satisfied. Despite

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[134] Muskhadzhiyeva and others v. Belgium, *supra* note 8, ¶ 61.

[135] *See also* Vandenhole & Ryngaert, *supra* note 77 at 68 (for a comprehensive commentary of this decision).

[136] Kanagaratnam and others v. Belgium, *supra* note 20, ¶¶ 37-9; Muskhadzhiyeva and others v. Belgium, *supra* note 8, ¶ 59-63 (affirming that this same detention centre was not an appropriate venue for detention of children).

[137] Kanagaratnam and others v. Belgium, *supra* note 20, ¶ 68.

[138] *Id.*, at ¶¶ 68-9 (violation of art. 3 ECHR) and ¶¶ 86-8 (violation of art. 5(1) ECHR).

[139] Abdullahi Elmi and Aweys Abubakar v. Malta, *supra* note 20, ¶¶ 139-48.

[140] *Id.*, at ¶ 41.

[141] *Id.*, at ¶ 56.

[142] *Id.*, at ¶¶ 113-5 and 146-8.

[143] Rahimi v. Greece, *supra* note 20, ¶¶ 107-8.

[144] *Id.*

[145] Popov v. France, *supra* note 20, ¶ 119 (establishing that detention should be seen as a measure of last resort for which no alternative is available). In this sense, the ECtHR's approach is similar to the one of the Court of Justice of the European Union (CJEU) according to which immigration detention should be used as a last resort measure only. *See* Case C-61/11/PPU, Hassen El Dridi, alias Soufi Karim, 2011 E.C.R. I-

these risks, the recognition of migrant children's composite vulnerability, when combined with the assessment of their best interests, could pave the way towards the imposition of greater obligations of care and protection upon States, which is the subject of the following section.

IV. TOWARDS THE IMPOSITION OF ENHANCED STATE OBLIGATIONS?

A. ECtHR: Emphasis on Positive Obligations

The recognition of vulnerability of migrant children and the use of the principle of best interests can be accompanied by the identification of an important duty owed by States to provide care and protection to these children.[146] It is important to understand whether by doing so human rights courts are contributing to the creation of new categories of obligations to be imposed upon States. If this is not the case, it is crucial to investigate whether existing State obligations are being interpreted in an enhanced manner, and converted into a sort of super-obligations.

The ECtHR puts forward a distinction between negative and positive obligations,[147] which overlaps to some degree with the tripartite distinction of obligations to respect, protect and fulfil human rights found in the academic literature.[148] Negative obligations entail that States should refrain from interfering in the exercise of rights, whereas positive obligations mean that States should adopt all measures necessary to safeguard the effective respect of rights.[149]

3015, ¶ 34; Case C-329/11, Alexandre Achughbabian v. Prefet du Val-de-Marne, 2011 E.C.R. I-12695, ¶¶ 36-7; Case C-601/15/PPU, J.N. v. Staatssecretaris van Veiligheid en Justitie, 2016, OJ C 38. *See also* Ana Beduschi, *Detention of Undocumented Immigrants and the Judicial Impact of the CJEU's Decisions in France,* 26 INT'L J. REFUGEE L. 333 (2014) (evaluating the impact of the decisions El Dridi and Achughbabian vis-à-vis the requirement of use of detention as a last resort measure in the French legal system).

146 *See* Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, supra* note 20, ¶ 55.

147 *See* ALASTAIR R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 141 (2004); Frédéric Sudre, *Les obligations positives dans la jurisprudence européenne des droits de l'homme,* RTDH 363 (1995).

148 *See* Asbjørn Eide, *The Right to Adequate Food as a Human Right*, Report of the United Nations Special Rapporteur on the Right to Food, E/CN.4/ Sub.2/1987/23 (1987) (proposing a tripartite typology of State obligations in relation to respect, protection and fulfilment of human rights); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND US FOREIGN POLICY 52 (1980) (proposing the following typology of duties owed by States in relation to human rights: to avoid depriving individuals of rights, to protect individuals from deprivation, to aid the deprived); DE SCHUTTER, *supra* note 17 at 280 (for a detailed summary of the different typologies of State obligations in international human rights law); Rolf Künnemann, *A Coherent Approach to Human Rights* ,17 HUM. RIGHTS QUART. 323, 328 (1995) (arguing that States have the obligation to respect, protect and fulfil the existential status of human beings, or "how human beings are entitled to live in relation to the State under these human rights"); Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food (Art. 11),* ¶ 15, E/C.12/1999/5 (May 12, 1999).

149 Airey v. Ireland, App. No. 6289/73, ¶ 32 (Oct. 9, 1979); Marckx v. Belgium, App. No. 6833/74, ¶ 31, (June 13, 1979); Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human*

Positive obligations applicable to situations involving migrant children are similar to those already in place regarding any individual falling within the jurisdiction of a State party to the ECHR.[150] There are no new positive obligations created specifically in the context of the protection of migrant children's rights. The same positive obligations are applicable to cases involving any other categories of individuals, and this is particularly apparent in relation to articles 3,[151] 5,[152] and 8 ECHR.[153]

An area of key interest relates to the application of article 3 ECHR to the situation of migrant children. For this provision to be applicable, ill-treatment must attain a minimum level of severity in order to fall within the scope of article 3 ECHR.[154] Interestingly, in decisions relating to migrant children, the ECtHR tends to use the vulnerability concept to analyse the requirement of minimum level of severity.[155] This approach has been criticised on the basis that it purportedly leads to the lowering of the threshold of

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Rights. A guide to the implementation of the European Convention on Human Rights, 7 COUNCIL OF EUROPE HUMAN RIGHTS HANDBOOKS NO 7 (2007).

[150] *See* Vaughan Lowe & Christopher Staker, *Jurisdiction, in* INTERNATIONAL LAW 335, 338 (Malcolm D. Evans ed., 2006); Bruno Simma &Andreas Th. Müller, *Exercise and Limits of Jurisdiction, in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 134, 135 (James Crawford & Martti Koskenniemi eds., 2012); Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg,* 23 EUR. J. INT'L L. 121, 132 (2012).

[151] Positive obligation to take all measures necessary to protect children from ill-treatment: *see* A. v. The United Kingdom, App. Nos. 100/1997/884/1096, ¶ 24 (Sept. 23, 1998) (finding that the UK domestic law failed to provide adequate protection to a child beaten by his stepfather when the beating constituted inhuman or degrading punishment and was known of the authorities); Z. and others v. The United Kingdom, App. No. 29392/95, ¶¶ 74-5 (May 10, 2001) (finding a violation of article 3 ECHR insofar as the State failed to take measures necessary to place vulnerable children into the Child Protection Register). Procedural positive obligation to investigate cases of ill-treatment: *see* E. and others v. The United Kingdom, App. No. 33218/96, ¶ 100, (Nov. 26, 2002) (finding that local authorities failed to protect children from an abusive stepfather and emphasising the lack of investigation, communication and cooperation by the relevant authorities).

[152] *See* Kurt v. Turkey, App. No. 24276/94, ¶ 124, (May 25, 1998) (affirming that States have the obligation to record details about the detention as "[a]rticle 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since").

[153] *See notably* X. and Y. v. The Netherlands, App. No. 8978/80, ¶ 30 (Mar. 26, 1985) (finding a violation of article 8 ECHR insofar as the Dutch legislation imposed a procedural obstacle for the prosecution of the perpetrator of sexual assault against a 16 year old mentally-ill girl, who were unable to represent herself and who could not be represented by anyone else, including her parent, according to the Dutch legislation); Maire v. Portugal, App. No. 48206/99, ¶ 72 (June 26, 2003) (reaffirming that "the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Convention on the Rights of the Child of 20 November 1989"); Hansen v. Turkey, App. No. 36141/97, ¶ 97, (Sept. 23, 2003) (emphasising that "the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action" also in the context of international abduction of children).

[154] *See* Ireland v. The United Kingdom, App. No. 5310/71, ¶ 162, (January 18, 1978) (establishing that he assessment of this minimum level of severity is relative and "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."); Tyrer v. The United Kingdom, App. No. 5856/72, ¶ 29, (Apr. 25, 1978); Soering v. The United Kingdom, App. No. 14038/88, ¶ 100, (July 7, 1989).

[155] Rahimi v. Greece, *supra* note 20, ¶ 86.

application of article 3 ECHR, and does so in an inconsistent manner.[156] On its face, the argument is appealing. However, it fails to convince for three main reasons.

Firstly, as affirmed by the well-established ECtHR's jurisprudence, all circumstances should be taken into account by the Court when deciding whether the level of severity of a treatment or punishment is of such relevance as to fall within the scope of article 3 ECHR.[157] The mention of "all circumstances" explicitly includes the potential victim's age,[158] and also should naturally include her particular situation of vulnerability.

Secondly, it is clear that the assertion according to which all situations of vulnerability would automatically lead to the application of article 3 ECHR is erroneous. Fortunately, this is not the ECtHR's position. Indeed, the ECtHR's methodology relates rather to *in concreto* examination of all circumstances relating to the potential victim's situation. In addition, it acknowledges the existence of composite vulnerability, recognising that several factors leading to vulnerability can exist at the same time and that it is precisely the confluence of these elements that gives rise to a specific form of vulnerability.[159]

Thirdly, the argument that the ECtHR incorrectly emphasises the protection of social rights of specific categories of individuals[160] cannot be accepted. Already in its seminal decision *Airey v Ireland*, the ECtHR highlighted that whilst the Convention sets forth what are essentially civil and political rights, many of these rights have implications of a social or economic nature. It concluded with the famous holding that there is no water-tight division separating these two categories of rights.[161] Since then the ECtHR has confirmed this holistic approach on many occasions.[162] As the ECHR applies to everyone within the jurisdiction of a State party,[163] nothing would justify using a different approach in relation to foreign individuals. In addition, in *Rahimi*, the patent failure of the State to provide material support for the applicant was in clear breach with domestic legislation which

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156 *See* Bossuyt, *supra* note 80 at 29-31 (arguing that the ECtHR has lowered the threshold of application of article 3 ECHR when the case relates to asylum seekers).

157 *See* Ireland v. The United Kingdom, *supra* note 154, ¶ 162; Tyrer v. The United Kingdom, *supra* note 1544, ¶ 29; Soering v. The United Kingdom, *supra* note 1544, ¶ 100.

158 *Id.*.

159 *See supra* at section II.

160 *See* Bossuyt, *supra* note 80 at 32 (arguing that in its decisions M.S.S. v. Belgium and Greece and Rahimi v. Greece the ECtHR transformed the prohibition of torture, inhuman and degrading treatment or punishment which is a civil right that must be respected regardless of the available resources into a social right requiring considerable expenditure).

161 Airey v. Ireland, *supra* note 1494, ¶ 26.

162 *See* Lopez Ostra v. Spain, App. No. 16798/90 (Dec. 9, 1994) (about the pollution caused by a water treatment plant which was close to the applicant's home); Öneryıldız v. Turkey, App. No. 48939/99 (Nov. 30, 2004) (about the State obligation to inform the inhabitants of a slum near a rubbish tip about the risks of living there); Budayeva and others v. Russia, App. No.s 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, (Mar. 20, 2008) (in the context of a mudslide which killed and injured the habitants of a village in Russia and the positive obligations of the State to take all appropriated measures to protect their lives).

163 ECHR, *supra* note 99, art. 1; *see also supra* note 150.

explicitly required the State to provide care and appoint a legal guardian to all unaccompanied migrant children within its jurisdiction.[164]

Essentially, there is nothing intrinsically new in the ECtHR's approach to the application of article 3 ECHR to cases relating to migrant children. The Court is just applying its well-established jurisprudence to a novel situation which, sadly, occurs with ever greater frequency in light of the ongoing migration crisis in Europe. Therefore, the ECtHR has not created new obligations for States in this case.

Similarly, in the domain of article 8 ECHR, considerations of the children's best interest have always been a central element in decisions relating to nationals as opposed to foreign individuals. This is the case in decisions relating to parental authority and placement of children in foster care,[165] determination of paternity,[166] and adoption.[167]

Accordingly, the main impact of the recognition of the migrant children's vulnerability and application of the principle of best interests is the degree of the obligations imposed upon States by the ECtHR. The recognition of vulnerability operates as a magnifying glass,[168] exposing a greater duty to protect and care owed by States in relation to the vulnerable individuals. In relation to the protection of migrant children's rights, State authorities have a significant obligation to take the best interest of the child into account.[169] However, this does not imply the creation of new obligations to be imposed upon States. In contrast, new obligations could be expected from States in the Inter-American system.

B. IACtHR: Potential for Innovation

Comparatively, in the Inter-American context, the IACtHR is generally more prone to innovation and willing to impose a wider variety of obligations upon States.[170]

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[164] Article 19(1) and (2)(a) of the Presidential Decree 220/2007 on the transposition into the Greek legislation of the Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in Member States.

[165] *See* Palau-Martinez v. France, App. No. 64927/01, ¶ 42 (Dec. 16, 2003) (emphasising the necessity for State authorities to take into account children's "real interests" while deciding on parental authority and custody issues).

[166] *See* Mikulić v. Croatia, App. No. 53176/99, ¶ 65 (Feb. 7, 2002) (affirming that "in determining an application to have paternity established, the courts are required to have regard to the basic principle of the child's interests").

[167] *See* Fretté v. France, App. No. 36515/97, ¶ 42 (Feb. 26, 2002) (considering that the right to adopt is limited by considerations of best interests of the child); Chbihi Loudoudi and Others v. Belgium, App. No. 52265/10, ¶ 97 (Dec. 16, 2014) (affirming that the best interest of the child is a component of the right to respect of family life and should be paramount to decisions of the domestic courts relating to adoption of children under the Islamic system of Kafala).

[168] *See* Peroni & Timmer, *supra* note 19 at 1079.

[169] *See supra* at section III.

[170] *See* LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS. CASE LAW AND COMMENTARY 224 (2011) (arguing that the IACtHR's approach to reparations is innovative and forward looking); Ana Beduschi, *The Contribution of the Inter-American Court of*

For instance, the Inter-American Court has imposed novel responsibilities upon States in relation to their obligation to identify non-national children who require international protection within their jurisdiction.[171] For instance, it held that States should provide training for professionals performing initial assessments in age and gender sensitive related interviewing techniques.[172] Similarly, the IACtHR has imposed the obligation to guarantee that the administrative or judicial proceedings concerning the rights of migrant children are adapted to their needs and are accessible to them.[173] It based the justification for such an obligation on the necessity to ensure that the best interests of the child is a paramount consideration in all the decisions adopted.[174] Importantly, this obligation may entail significant changes to domestic laws and policies. It implies, for example, that decisions on migratory matters involving migrant children should not be delegated to non-specialised officials[175] and that special attention should be paid to migrant children's non-verbal forms of communication.[176]

The IACtHR's leeway in imposing such a variety of obligations upon States can be explained by the general mandate given to it by articles 1(1)[177] and 2[178] of the American Convention on Human Rights (ACHR). Indeed, the IACtHR interprets these provisions as the basis for a general obligation of States to adapt their domestic legislation to the ACHR.[179]

The recognition of migrant children's vulnerability[180] is equally crucial for the determination of the nature and degree of State obligations in the Inter-American system. For instance, the IACtHR clearly established in its influential Advisory Opinion no 21 that

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Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges, 34 REFUGEE SURVEY QUARTERLY 45, 63-5 (2015) (arguing that the IACtHR is at the forefront of an innovative approach to reparations in the field of the protection of irregular immigrants' rights).

[171] *Id.*, operative ¶ 3.

[172] *Id.*, at ¶ 85.

[173] Advisory Opinion OC-21/14, *supra* note 21 at operative ¶ 4.

[174] *Id.*

[175] *Id.*, at ¶ 121.

[176] *Id.*, at ¶ 122.

[177] American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M 673 (1970), art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

[178] *Id.* art. 2 ("Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.").

[179] Advisory Opinion OC-21/14, *supra* note 21, ¶ 65. *See* Laurens Lavrysen, *Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights*, 2 INT. AM. & EUR. HUM. RTS. J. 95, 96-7 (2014) (discussing the wide array of positive obligations recognised by the IACtHR).

[180] Advisory Opinion OC-21/14, *supra* note 21, ¶ 71 (emphasising the situation of additional vulnerability of migrant children).

> States must accord priority to a human rights-based approach, from a crosscut perspective that takes into consideration the rights of the child and, in particular, the protection and comprehensive development of the child, which should have priority over any consideration of nationality or migratory status, in order to ensure the full exercise of their rights.[181]

Certainly, these obligations were introduced by the IACtHR in an advisory opinion, a non-binding interpretation of the law.[182] Nevertheless, the Advisory Opinion OC-21 is definitely noteworthy. It comprehensively illustrates the IACtHR's general views on the topic and forms the basis for the development of its decisions in the future.

V. CONCLUSION

The ECtHR's understanding of the concept of vulnerability in cases relating to migrant children, although not exempt from criticisms, can contribute to the strengthening of the protection of their rights. By developing a contextual analysis of their composite vulnerability, the ECtHR has avoided the risk of excessive stigmatisation of this category of individuals.[183] We should welcome the Court's emphasis on the complementarity between vulnerability and the principle of best interests of the child, given that it reinforces the need for special measures of protection.[184]

Yet, the example of its Inter-American counterpart demonstrates that the European Court could indeed do more.[185] It took the ECtHR until 2016[186] to directly refer to the Committee on the Rights of the Child's General Comment No. 6[187] while integrating the principle of best interests from article 3 CRC. Nonetheless, even the 2016 reference was not dispositive as the principle of best interests was not even applied in the case in question.[188]

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[181] *Id.*, at operative ¶ 2.

[182] Hugh Thirlway, *Advisory Opinions, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, 1 (Rüdiger Wolfrum ed., 2008) ("An advisory opinion is a judicial opinion, most frequently given by a standing international tribunal on a legal question which is frequently, but need not be, related to a current international dispute. In the case of standing tribunals, their statutes provide for such opinions to be given at the request of a defined class of international bodies rather than of States. An essential characteristic of advisory opinions is, as the term implies, that they constitute advice, ie they do not legally bind either the requesting entity or any other body or State to take any specific action pursuant to the opinion. In general, there may be, at most, an obligation on the requesting entity to regulate its conduct or its affairs taking due account of the view of the legal situation expressed in the opinion").

[183] *See supra* at section II.

[184] *See supra* at section III.A.

[185] *Id.*

[186] Abdullahi Elmi and Aweys Abubakar v. Malta, *supra* note 20, ¶ 56.

[187] Committee on the Rights of the Child, General Comment No 6, *supra* note 6.

[188] *See supra* at section III.B.

Hence, the ECtHR is considerably instrumental in its use of this principle. If, on the contrary, the ECtHR allowed the Committee on the Rights of the Child's child-centred views on the justifications of migrant children detention[189] to robustly penetrate the realm of the ECHR, that would bring the much-needed consistency to the understanding of the principle of best interests in the specific context of ECHR rights and liberties.

Despite its diffident approach in terms of detention, the ECtHR's recognition of migrant children's composite vulnerability and consideration of their best interests have contributed to the imposition of enhanced obligations upon States.[190] The Court's approach is the most visible in relation to the existing positive obligations. Unlike the IACtHR, the ECtHR does not create new obligations in the field of the protection of migrant children's rights.[191] The European Court's recognition of vulnerability only operates as a magnifying glass, exposing a greater duty to protect and care imposed upon States, which is further reinforced by the application of the principle of best interests of the child.[192]

On balance, both the identification of their composite vulnerability, and recourse to the principle of best interests, embrace and foster the need for further protection of migrant children's rights. In view of the current global migration crisis, and the growing number of unaccompanied or separated migrant children, a more substantial child-oriented approach to international migration is certainly needed. The ECtHR's jurisprudence is slowly evolving in this direction. Notwithstanding, this process will still require a great dose of persistence and determination.

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[189] Committee on the Rights of the Child, General Comment No 6, *supra* note 6, ¶ 20.

[190] *See supra* at section IV.A.

[191] *Id.*

[192] *Id.*