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Especially Vulnerable Categories in the Context of European Migration and Asylum: Theoretical Regulatory Challenges[1]

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Abstract

While vulnerability and migration are boundary concepts, they have been employed as if they were somewhat neutral and univocal. Based on the umbrella theory of the vulnerability turn, the specialist doctrine has focused its critical analyses on the legal-political dimensions of the different vulnerable subjects and groups. However, migrant vulnerability has a unique impact on the regulatory field of asylum, especially given its ambiguity and lack of legislative harmonisation across EU Member States. A review of the mechanisms for identifying and protecting migrant vulnerability can provide regulatory evidence regarding the different phases of the Common European Asylum System, which in turn can lead to proposals for its reform. This study will analyse the complex and questionable use of the category of 'vulnerable migrant' in the main international instruments of legal protection when applied to asylum seekers. It will then present a critical comparative analysis of the national and EU asylum framework.

Keywords: *Migrants; asylum seekers; vulnerability; categories; Member States*

Introduction

Vulnerability is a biased concept with the potential to create 'stereotypes' about, and categories between, people who are considered to be vulnerable, and also those who do not seem to be vulnerable but could be (Timmer 2011; Arnardottir, 2017: 150, 166 and 169). Both the detractors (Bossuy 2015, Flegar 2017) and the staunchest defenders of this term (Fineman 2008; 2017: 134-135) have expressed some reluctance to its frivolous theoretical use and reuse, especially taking into account what is at stake in legal terms for identification and protection purposes (Luna 2009; Mackenzie 2014, Peroni, Timmer 2018: 1056-1059). This category-based perspective or group approach has been questioned and labelled as exclusive, rigid, superficial, excessively simple, and vague. In contrast, the concept of universal vulnerability (Fineman 2008; Turner 2016: 25-26) has been described by its detractors as 'excessively inclusive and dangerous' and as categorically essentialist, under the premise of universalising

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or translating a *de facto* situation into a *de jure* one without providing sufficient grounds for special protection.

Over the past decade, the specialist doctrine has focused its analyses on the legal-political dimensions of the umbrella term *vulnerability turn* (Besson 2014; Cole 2015: 260-262). This has unveiled numerous shortfalls in establishing its legal nature, despite the substantive differences between the approaches used (Caicedo 2018, Cardona 2004, Wisner et al, 2014). Briefly, universal vulnerability is regarded to be 'durable, situational and variable' as opposed to the group approach ('witty, operative and pathogenic'), to the detriment of the analytical, relational, or even intersectional perspective (Morondo 2015: 485).

This somewhat convoluted and 'labyrinthine' theoretical approach to vulnerability and the so-called 'categorical fetishism' (Freedman 2018: 11-12) may have an important influence on the legal framework for immigration and asylum (ECRE 2017: 16), and also may play a leading role in jurisprudential development. After all, it is not always possible to critically review the real scope of vulnerability in asylum procedure in the constrained ECtHR case law under Article 3 ECHR (degrading or inhuman treatment) and Article 5 ECHR (deprivation of liberty).[3] In attempting to interpret and determine what 'vulnerable' means (La Barbera 2019), other situations that deserve 'special protection' may sometimes be excluded.[4]

This paper will review the different stages of the development and adaptation of the 'vulnerable migrant category' in three parallel sections: the international system of protection of human rights; the Common European Asylum System (hereinafter, CEAS); and their impact on the different EU Member States. This will involve reflecting on the limitations of the 'vulnerable' category in the European immigration and asylum framework to assess whether it helps to identify what 'vulnerability' means for asylum seekers and refugees; and whether the legal accommodation of this concept provides a better understanding of the requirements for asylum seekers to be defined as vulnerable.

The category of 'vulnerable migrant' according to international human rights protection standards

Traditionally, both international law and doctrine have differentiated between two categories of migrants, namely, immigrants and refugees, based on their 'vulnerability level'. In the scope of this dual category, the vulnerability of refugees and asylum seekers rests on their reasons for leaving their country of origin, which is why it has been questioned to what extent economic or voluntary migrants are vulnerable or even whether they are vulnerable at all when comparing the two categories. This distinction has been reflected in the international UN protection system regarding the special needs of all people travelling in a vulnerable situation. Therefore, when reviewing the foundation of generational theories of rights, their regulatory and even historical emphasis is neither proportional to, nor representative of, the two categories in the specific applicable international protection mechanisms (Bustamante, 2002: 340, La Spina, 2016: 183).

[3] Among others, *MSS v. Belgium and Greece* (GS), no. 30696/09, ECHR 2011, *Muckhadzhiyeva v. Belgium* No. 41442109, ECHR 2010, *AB v. France* no. 11593/12 TEDH 2016; *Elmi and Abubakar v. Malta* nos. 25794/13 and 28251/13, ECHR 2016. *A.M. v. France* no. 245382/12 ECHR 2016, *Mahmundi v. Greece* 14902/10 ECHR 2016, R.C. v. France 68264/14 ECHR 2016, *R.M. v. France* 33201/11 ECHR 2016.

[4] *Khlaifia et al. v. Italy* (GS), no. 16483/12, ECHR 2016, paras. 11-19 and 143 and *AME v. the Netherlands*, no. 51428/10, ECHR 2015 and *Ilias and Ahmed v. Hungary,* no. 47827/15, ECHR 2017.

There is growing consensus on considering vulnerability to be the most common factor associated with the abuse and violation of migrants' rights. The first time that an attempt was made to construct the category of 'vulnerable migrant' (or 'migrant in a vulnerable situation') in equal terms was in the Global Compact for Safe, Orderly and Regular Migration. Specifically, it referred to the fact that 'migrants and refugees may face many common challenges and similar vulnerabilities' and noted that both groups may require international protection of human rights at various points in their journey: in transit, upon arrival at their destination, and/or while making a living in a new country'.[5]

Despite this need for inclusive protection, there are only a few specific references to vulnerability linked to migration at the international level (Nifosi-Sutton: 2017, Chapman and Carbonetti 2011). The United Nations Convention on the Rights of the Child[6] is a notable example. Its Preamble recognises minors as being intrinsically vulnerable due to their age: 'The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth' and establishes the right of a child temporarily deprived of their family environment to 'special protection and assistance provided by the State.' Likewise, specific references to minors who are migrant and asylum seekers[7] can be easily found in guidelines and soft law instruments.

Similarly, the Convention on the Rights of Persons with Disabilities (CRPD[8]) asserted the need to guarantee the protection of persons with disabilities who are at risk (including armed conflict, humanitarian emergencies and natural disasters). The CRPD also invited States Parties to recognise that these subjects have the right to freedom of movement and of choice of their own place of residence and nationality on an equal basis with others. As Bernardini (2018) pointed out, the questionable lack of empirical reliability and the issue of credibility minimise the risk of vulnerability for people with disabilities regarding personal mobility precisely within the legal sphere. This is the case even in soft law, which acknowledges that it

[5] UN Human rights Council. *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations*: Report of the United Nations High Commissioner for Human rights, 24 February 2017, (A/HRC/34/31 p.5). www.refworld.org/docid/58b010f34.html . New York Declaration for Refugees and Migrants (United Nations General Assembly of 13 September 2017- Resolution AS/71/ paras. 77-78) and UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, Objective 7: Address and reduce vulnerabilities in migration, paragraph 23, f). Resolution 73/195, UN Doc. A/RES73/195, 11 January 2019, UN General Assembly, Report of the United Nations High Commissioner. Part II. Global compact on refugees. UN Doc. A/73/12 (Part II) (2018).

[6] Committee on the Rights of the Child, general comment No. 6 (2005), Treatment of unaccompanied children and children separated from their family outside their country of origin. For example, the need for special procedural safeguards for unaccompanied children in asylum procedures was highlighted in the guidance from the Committee on the Rights of the Child (CRC), which called for appropriate measures to be taken under Article 22 (1) of the UN Convention on the Rights of the Child, A/RES/44/25 of 20 November 1989, 'to take into account the special vulnerability of unaccompanied and separated children', as well as for a child-sensitive assessment of their protection needs.

[7] For example, Conclusion No. 105 (LVII) - 2006 of the UNHCR Executive Committee, which stated that, 'while forcibly displaced men and boys also face protection problems, women and girls may be exposed to particular protection problems related to their gender, their cultural and socio-economic position and their legal status, which mean they may be less likely than men and boys to be able to exercise their rights and therefore that specific action in favour of women and girls may be necessary to ensure they can enjoy protection and assistance on an equal basis with men and boys'.

[8] Article 18 of the Convention on the Rights of the Persons with Disabilities (CRPD), A/RES/61/106 of 24 January 2007 called upon States Parties to recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Article 11 specifically addresses the protection of persons with disabilities in situations of risk, including armed conflict, humanitarian emergencies and natural disasters. The Preamble of the CRPD expressly mentions of 'women and girls with disabilities are often at greater risk… of violence,… abuse… or exploitation'.

is necessary to provide care for migrants (more often refugees) with disabilities, among others,[9] but does not accord them legal status as such.

In parallel, the main international convention on refugees does not mention sex or gender,[10] or the specific needs or vulnerabilities of refugee women. This is hardly surprising, given its well-known shortfalls in the provisions for the emerging category of environmental refugees, which has recently been proposed not only within other regional protection systems but also by the Human Rights Committee itself.[11] However, it is not a neglected or forgotten issue; on the contrary, the United Nations High Commissioner for Refugees (UNHCR) has a wide corpus of guidelines for managing specific groups of refugees who are differentiated by sex, age or disability, and recommends giving special treatment to these groups to address their particular vulnerabilities. For example, along the lines of this operational or functional perspective, the UNHCR has published several guidelines on the protection of women, victims of sexual violence, and victims of trafficking[12] but also regarding LGBTI asylum seeker population.[13] This has not been ignored by the Committee on the Elimination of Discrimination Against Women with respect to women and girls in contexts of forced migration (Flegar and Iedema 2019). These guidelines assume that there is a congenital type of vulnerability in these particular groups, and emphasise the need for additional protection,

[9] Among others, the document of Department of Economic and Social Affairs Disability United Nations *Refugees and migrants with disabilities*, see https://www.un.org/development/desa/disabilities/refugees_migrants_with_disabilities.html. UNHCR, *Unmet needs and diminished opportunities: disability, displacement and humanitarian healthcare* (2011) UNHCR, *Need to Know Guidance on Working with Persons with Disabilities in Forced Displacement* (2011) UNHCR, *Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR* (2010).

[10] Protection standards were set at the European regional level in the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which established significant provisions regarding the protection of migrant women, refugees and asylum seekers. It required States Parties to guarantee that gender-based violence against women can be recognised as a form of persecution within the meaning of the 1951 Refugee Convention. The 2005 Council of Europe Convention on Action against Trafficking in Human Beings required States Parties to adopt a gender equality approach in the fight against people trafficking (Articles 1§1, 5§3, 6§d and 17). Victims of trafficking must be ensured fair and efficient asylum proceedings, as well as access to a number of rights in terms of assistance, protection and compensation (Articles 10 to 16).

[11] Apart from national experiences, these include regional instruments that have been approved in America, Africa and the European Union which have pointed towards more open-minded directions such as those outlined in the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. The situations of 'generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order' were expressly mentioned. In 1969 the Organisation of African Unity, which resulted in the current African Union, adopted the *Convention Governing the Specific Aspects of Refugee Problems in Africa*. The first paragraph of Article 2 of this Convention notes that 'the grant of asylum to refugees is a peaceful and humanitarian act', an expression that is repeated in the fourth and fifth paragraphs. Regarding the need for protection and the non-refoulement of environmental refugees, a new avenue was opened by the recent decision of the Human Rights Committee, case *Ioane Teitiota v. New Zeland*, of 7 January 2020, CCPR/C/127/D/2728/2016.

[12] UNHCR. Guidelines on the Protection of Refugee Women, UNHCR, Geneva, 1991. UNHCR. Sexual Violence against Refugees: Guidelines on Prevention and Response. UNHCR, Geneva, 1995. UNHCR. Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced People: Guidelines for Prevention and Response. UNHCR, Geneva, 2003. UNHCR. Guidelines on International Protection: The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked. UNHCR, Geneva, 2006.

[13] See UNHCR. Ensuring Protection to LGBTI Persons of Concern. Keynote Address by Volker Turk, Director of International Protection, 2012.UNHCR. Guidelines on International Protection No.9. Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Regugees, 2012. UNHCR. Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees, 2015. UNHCR. Guidance note on refugee claims relating to sexual orientation and gender identity, 2018. UNHCR. Protection Policy and Legal Advice Section Division of International Protection Services, Geneva, 2019. Yogyakarta Principles on the Application of International Human Rights Law to Issues of Sexual Orientation and Gender Identity, 2007; Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles (Yogyakarta Principles plus 10), 10 November 2017.

even if it is not a perfect solution for this manifest form of vulnerability. Ultimately, the underlying reasons that justify the protection of vulnerability, as Freedman (2018: 12) argued, particularly promote 'essentialism, stigmatisation and paternalism,' denying any capacity for agency or resilience among these actors.

This normative evidence referring to various specific risk situations related to migration in a broad sense calls for a well-needed intersectional reading of the basic international instruments. Especially considering that the Convention relating to the Status of Refugees does not identify refugees as vulnerable groups or require national authorities to pay appropriate attention or give proper treatment to some groups that may be more vulnerable than others.[14] For this reason, the controversial legal configuration of migrant vulnerability as a category *per se* (without any additions) is still striking. Particularly bearing in mind that one of the most remarkable components of this definition of a migrant as a vulnerable category is that vulnerability in itself is not something inherent in racial characteristics, a country, or a certain ethnic origin, or in the underdeveloped conditions of the region or country of origin. This circumstance also explains the ever-so-slight reference to vulnerability in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[15] Migrant workers and their families are qualified as being vulnerable not so much due to the distance from their country of origin, but rather to the difficulties, they face in the country where they work or want to settle, without prejudice to forced return or the violation of the principle of non-refoulement (Jimena 2015). In other words, international migrants are not regarded as having a pre-acquired vulnerable status; their legal status is not a cause, but is rather a result, of their vulnerable status, and therefore it is maintained regardless of whether they had appropriate documentation when they entered a country.

This has happened because of the implementation of the migration project and state control, whereby vulnerability is specified at the place of arrival and then assessed through social relations with other individuals - other newcomers, those already settled and the host society. The legal system plays a decisive role in this process, but the socioeconomic structure of the host country, social networks, and the social perception of the potentially vulnerable person play an essential part (Baumgärtel 2020). Therefore, any signs of vulnerability determined by special circumstances that occur upon arrival must be observed. These include dependence on a certain administrative status for access to rights, which accounts for the causes of vulnerability. This should not be confused with the reasons for the migration phenomenon itself, which generally stem from a complex combination of endogenous and exogenous causes exacerbated by the law and openly questioned in the jurisprudence of the Strasbourg Court.[16] Endogenous causes include the existence of a history of discrimination and a situation of past and present disadvantage for the individual or group to resist, respond or re-adapt to threats. As Morondo and Barrère (2011) recalled, this involves a complex interaction of

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[14] Convention relating to the Status of Refugees Geneva, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. An exception was the Resolution adopted by the General Assembly of the International Law Commission on 10 December 2014, Resolution A/ RES/69/119 of 10 December 2014. Article 15 is entitled 'Vulnerable persons' and refers to 'Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion'.

[15] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, Doc. A/RES/45/158.

[16] To name a few examples: *DH and others v. Czech Republic* (GS), no. 57325/00, ECHR 2007; *MSS v. Belgium and Greece* (GS), no. 30696/09, ECHR 2011 and *TM and CM v. Republic of Moldova*, no. 26608/11, ECHR 2014.

diverse systems of dominance and subordination that affect groups and individuals (religion, race, immigrant status, class, sex, functional diversity, age), and creates dynamics of inequality, exclusion, marginalisation, and discrimination. Exogenous causes refer to whether the subject of rights must face external factors such as a financial crisis unaided (La Spina 2016), or whether humanitarian action in rescue operations is criminalised (Mitsilegas et al. 2020). In these cases, a situation of vulnerability is likely to lead to exclusion, a point of no return or a starting point, due to their limited 'ability to escape' (Mezzadra and Nielson 2014).

The international standards of categorical protection mentioned above have contributed to the protection of the so-called especially vulnerable groups, but they have also indirectly promoted group membership approaches. However, group membership may leave out some more heterogeneous categories, such as vulnerable migrants who do not meet the two requirements, either singly or cumulatively (women, boys and girls, people with disabilities and LGBTI population). This means that there is a failure to explore all the possible situations or forms of existing migratory control (Suárez 2013: 59).

The vulnerability of migrants or asylum seekers/refugees within the European immigration and asylum framework

A retrospective review of the legal framework for immigration and asylum shows numerous conceptual inconsistencies regarding vulnerability. These references to vulnerability can be easily found in different legal instruments, all of which have a significant impact on the legal definition of asylum. As indicated by Ippolito (2018: 464-467), a selective collective conceptualisation of asylum seekers is used through a variety of vulnerability models similar to the scheme adopted for migrants in the Return Directive.[17] Specifically, the umbrella term of vulnerable people includes: unaccompanied minors, people with disabilities, elderly people, pregnant women, single mothers with children and people who have been subjected to torture, rape and other serious forms of physical, mental and sexual violence.

While the European Union is presented as a receptive scenario for the legal articulation of vulnerability on the European agenda, its future scope is ambiguous and plays out differently for migrants and asylum seekers/refugees. For example, the regulation of the European Border Surveillance System (EUROSUR)[18] introduced an obligation to consider the special needs of all people who are in a 'vulnerable situation', or in need of special assistance due to being in distress at sea, and directed the competent national authorities to provide them with appropriate assistance.[19] In different terms, Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims also refers to situational vulnerability related to minors, as it explicitly considers that 'children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings.' Therefore, they are deemed to be particularly vulnerable groups *per se* in contrast to other factors, including gender, pregnancy, health status and disability, which could be taken into account merely to

[17] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJEU L 348, 24 December 2008, p. 98 and ff.

[18] Regulation of the European Parliament and of the Council (EU) 2013/1052 establishing the European Border Surveillance System (Eurosur), OJEU L 295, 6 November 2016, p. 11 and ff.

[19] Article 2 para. 4 Regulation of the European Parliament and of the EU Council 2014/515 establishing, as part of the Internal Security Fund, the instrument of financial aid for external borders and visas and repealing Decision No. 574/2007/CE, OJEU L 50, 20 May 2014, p. 143 and ff.

assess the vulnerability of the victim.[20] And, for unaccompanied migrant children at the border and in transit, according to the current Proposal for a Screening Regulation[21] and the main goals of the New Pact on Migration and Asylum of 2020.[22]

Upon the entry into force of Treaty of Lisbon in December 2009, the asylum legislation shifted from setting minimum standards to creating a common system that included uniform statutes and special procedures (Peers et al 2015; Maiani 2017; Goig Martínez 2017). Since then, both the instruments of the so-called CEAS package and the current reform proposal[23] have viewed vulnerability substantively. Different adaptation and modulation phases in progress have been undertaken into different regulatory milestones (Brandl and Czech 2015).

(1) In the first phase of the CEAS, vulnerability was not extensively regulated. Neither the 2005 Asylum Procedures Directive [24] nor the Dublin II Regulation[25] contained specific provisions or procedural consequences for situations of vulnerability, with the exception of unaccompanied minors. Consequently, the perspective on vulnerability was strictly based on the vulnerable group and individual. The 2003 Reception Directive[26] alluded to the specific situation and foresaw special material conditions and health care. However, in the absence of a definition of special needs and a more detailed specification of what such an individual assessment should entail and when it should take place, the 'guarantee' provided for in Article 17.1 was insufficient. In fact, the European Commission itself identified some deficiencies in the treatment of special needs, while it was an object of greater concern in the terms of reception (De Bauche 2008: 103).

The identification of special needs not only influences access to appropriate treatment but could also affect the quality of the decision-making process regarding the application for asylum, especially with reference to traumatised people.[27] People with disabilities were not included as a category of vulnerable group within the causes of persecution in origin, which is in stark contrast to the possibilities provided for in the 2006 Convention on Persons with

[20] Directive 2011/36 of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, OJEU, 15 April 2011, L 101, p. 1 and ff.

[21] Proposal for a regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. COM/2020/612 final.

[22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum. Brussels 23 September 2020 COM (2020) 609 final, p. 12.

[23] With the aim of moving 'Towards a sustainable and fair Common European Asylum System', on 4 May 2016, the European Commission presented a first package of proposals for the reform of the CEAS. See the Communication from the Commission to the European Parliament and the Council, Brussels 6 April 2016, COM(2016) 197 final. However, in September 2020, the Commission launched the last package of reform proposals, namely the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum. Brussels 23 September 2020 COM (2020) 609 final.

[24] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJEU, 13 December 2006, L 326/13. Correction of errors, OJUE, L 236/35, 31 August 2006.

[25] Council regulation (EC) No. 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJEU, 25 February 2003, L 50.

[26] Council Directive 2003/9 / EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States, OJEU, 6 February 2003, L 31. Minors, unaccompanied minors, disabled people, the elderly, pregnant women, single parents with minor children, and people who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence are mentioned as vulnerable people. Article 17 (1) and Article 17 (2) of the 2003 Reception Conditions Directive.

[27] European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast), COM (2008) 815, 3 December 2008, Explanatory memorandum, 6.

Disabilities (Conte 2017). This would only take place at a later stage within the scope of Directive 2011/95.[28]

(2) In the second phase of the CEAS, the regulatory framework converged with and was fed by the interpretive work of the ECtHR jurisprudence. This brought to light a number of cases of vulnerability that exceeded the scope of those explicitly stated. As a result, some regulatory provisions such as the Dublin III Regulation[29] incorporated fragmented versions of the different types of vulnerability and their derivations, which remained diffuse. These included vulnerable asylum seekers, applicants in need of special procedural safeguards, and vulnerable protection applicants with special reception needs. Article 21 of Directive 2013/33 compiled a list labelled by Rigo (among others) as a legal classification (2019: 851); and Whereas 29 of Directive 2013/32 made reference to applicants for international protection with special needs of procedural guarantees but without mentioning their vulnerability. Yet vulnerability is defined in both Directives by characteristics that are inherent in, or acquired from, those derived from experiences suffered by the subject in migratory contexts. The terminological ambiguity around the notion of vulnerability in the CEAS translates into potentially superfluous concepts (such as 'special reception needs', which are not clearly differentiated from vulnerability upon reception) and into possible variations in the scope of the protected categories.

As shown in an ECRE diagram (2017: 16) or EASO report (2021:18), not all categories were symmetrically included, even though they were stages of the same procedure. In some cases, it could be a long way from being considered to be a continuum, since those who started an application examination with special procedural guarantees would not match those who required special reception needs because they were vulnerable in the reception phase. For example, in an ad absurdum interpretation, unaccompanied minors, single parents with minors, and victims of female genital mutilation are not deemed to be asylum applicants with special reception needs on grounds of gender, sexual orientation or identity, and are left out of special procedural guarantees. In any event, since both lists provide non-exhaustive enumerations of categories, this should not create a conceptual problem *per se*, especially since the same early assessment, mechanism could be used to determine special reception and procedural needs under the provisions of both Directives.

The recast Directive on asylum procedures[30] specifically defines the 'applicant in need of special procedural guarantees,' which is tantamount to reducing the applicant's eligibility for

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[28] Directive 2011/95 / EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJEU L 337/9, 20 December 2011.

[29] Regulation (EU) No 604/2013 of the European Parliament And Of The Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJEU L 180, 29 June 2013. See Whereas (13): 'In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of the Member States in the application of this Regulation. When assessing the best interests of the child, Member States should, in particular, take due account of the child's welfare and social development, the safety aspects and the child's point of view according to their age and maturity, including its origin and its environment. In addition, specific procedural guarantees will be established for unaccompanied minors given their special vulnerability.' See Articles 6, 16, 31 and 32 on the special needs of minors and information regarding the health of dependent people.

[30] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, on common procedures for granting and withdrawing international protection (recast), *OJ L 180, 29 March 2013*.

the rights and subjecting them to the obligations of the Directive due to individual circumstances. The Directive does not include an exhaustive list of asylum seekers who allegedly need special procedural guarantees. Nevertheless, it provides indications as to the need for such guarantees in relation to age, sex, sexual orientation, gender identity, disability, serious illnesses, mental disorders or as a consequence of torture, rape, or other serious forms of psychological, physical, or sexual violence. Thus, it indirectly creates a narrower subcategory that distinguishes people whose needs stem from torture, rape, or other serious forms of psychological, physical, or sexual violence, and who may be subject to discretionary treatment in relation to special procedures.

Finally, these semantic deficits are also reproduced in several provisions in the Reception Directive (2013/33) related to the guarantees available for vulnerable people. They introduce the separate concept of 'applicant with special reception needs,' defined as 'a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.' However, other provisions, such as Article 11, refer to a separate category, namely 'detention of vulnerable persons and of applicants with special reception needs', which generates more conceptual confusion.

(3) In the third phase of the CEAS ongoing reform*,* the legal treatment of vulnerable groups became a priority area, but at the same time, the concept of vulnerability played a lesser role and was nearly rendered void. Priority was given to the specific situation of 'persons with special needs' and a list of vulnerable applicants were removed,[31] regardless of whether the recipients of those needs belong to vulnerable categories. In addition, great importance was placed on standardising and facilitating the harmonisation of CEAS directives, with an allusion to an 'applicant in need of special procedural guarantees', although the European Parliament and the Council have expressed different linguistic preferences regarding the use of 'particular' 'special' or 'specific', contained in the Commission's proposal.[32] Therefore, even if there was no substantial difference, anyone who needed a high level of special guarantees to benefit from the rights and fulfil the obligations laid down by the law was automatically considered an applicant with special reception needs, regardless of whether they were vulnerable or not.

In contrast, some qualitative changes were suggested, including the pending proposal to expressly add to the list of vulnerable categories other variables such as post-traumatic stress disorder, LGBTI, apostates and religious minorities, non-believers, etc. (ECRE 2017). There is a clear intention to move towards less inconsistent or relative concepts that could prevent the operation of the protection obligations of the States Parties to the Convention. In this

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[31] See the Proposal for a Directive on the conditions for reception of applicants for international protection in the Union (COM (2016) 465 final), Art. 21; Proposal for a regulation establishing a common procedure for international protection in the Union (COM(2016) 467 final), Arts. 19-22; Proposal for a regulation on qualification COM (2016) 466 final) Art. 22.4; Proposal for a regulation establishing a Union Resettlement Framework (COM (2016) 468 final); without prejudice to the proposed Dublin IV Regulation COM (2016) 270 final, the European Agency for Asylum Support COM (2016) 217 final and a reform of the EURODAC system COM (2016) 272 final.

[32] For instance, European Parliament, Report on the proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), A80186 / 2017, 10 May 2017. Amendment 34 - Article 2, paragraph 13, Amendment 111 - Art. 21, paragraph 1. European Parliament, Amendments to the draft report on the proposal for a Regulation of the European Parliament and of the Council establishing a uniform procedure for international protection in the Union, PE597.506, 26 June 2017. Amendments 240 and 802-803. Council of the European Union, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 7004/17, 8 March 2017.

way, there is some room for manoeuvre in connection with looking after specific needs resulting from examining applications or the possible flaws in the CEAS.

Along the same lines related to procedural amendments, the 2016 package reform and the new legislative reform[33] tried to harmonise the different phases of the process, one of the aspects with the greatest number of disparities and inconsistencies. Specifically, the Commission's proposal for a Regulation on asylum procedures reinforced the existing safeguards by allocating various roles to the different authorities participating in the asylum process. The authorities responsible for receiving and registering the applications were entrusted with the task of detecting and reporting on any initial signs of vulnerability that may require special guarantees, whereas the decision-making institutions were required to complete the assessment of the need for special guarantees. Meanwhile, a clear obligation was introduced regarding reception conditions for the decision-making institutions to systematically evaluate the need for special procedural guarantees and for the other institutions to start the identification process as soon as an application is submitted. In fact, the latest proposal for the Reception Directive[34] set a deadline for Member States to appoint a guardian/representative for an unaccompanied minor but required them to provisionally assign a person to assist them until a guardian/representative is appointed.

The asylum seeker/refugee vulnerable category: special reception needs or special guarantees from a comparative perspective

Until the future of the CEAS reform is resolved, there is still a risk of inconsistency between the categories of asylum seekers/refugees who need special procedural and reception guarantees, especially in their practical implementation. Both the ECRE (2017) and the annual EASO reports showed a severe lack of legislative harmonisation on the definition of 'vulnerable group' and 'vulnerable subject' that is valid for all Member States. This lack of a consistent definition has led to a form of 'vulnerability shopping', and subsequently to a fragmented protection of the different categories of special vulnerability included in each country's regulatory corpus. In fact, despite the non-exhaustive list contained in the different Directives, the predominant approach for being included in or excluded from the 'vulnerable' category is based on a type of vulnerability that is objectively inherent in or characteristic of a subject; with the exception of Greece, where there is more openness to investigate contextual or situational vulnerabilities.

Most of the situations of special vulnerability that have been covered show a cumulative diversity of factors that cause vulnerability: age, gender, sexual orientation, and type of

[33] See the Proposal for a Regulation establishing controls on third-country nationals at external borders, COM(2020) 612 final. Art. 9 establishes the rules concerning the health check and the identification of third-country national with vulnerabilities and special reception and procedural needs at the external borders; Whereas 27 provides a list of "individuals with vulnerabilities"; Proposal for a Regulation on asylum and migration management COM (2020) 610 final, Art. 47 concerning the relocation of vulnerable persons following search and rescue operations; Proposal for a Regulation on the common procedure on international protection COM(2020) 611 final, art. 41.9 b) concerning the border procedure; Proposal for a Regulation addressing situations of crisis and force majeure in the area of migration and asylum COM(2020) 613 final, concerning the rights of the child and the special need of vulnerable person. There are also others that are revised and amended versions of existing proposals, such as the EURODAC Regulation COM(2020) 614 final.

[34] See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) - Conditional confirmation of the final compromise text with a view to an agreement, Council Document 10009/18 of 18 June 2018. Proposal for a Directive of the European Parliament and of the Council establishing standards for the reception of applicants for international protection (recast) - State of play and guidance for future work, Council Document 5458/19 of 21 January 2019.

violence suffered. They all focus on easily stereotyped homogeneous groups, despite the confluence of one or more situations upon their arrival, in transit, and in origin. Therefore, the heterogeneous nature of migrant vulnerability continues to be the most neglected aspect, as it depends on the migration control context of each Member State.

Looking at the regulatory definitions in detail, vulnerable groups of asylum seekers in most countries are consistent with the provisions in the Reception Conditions Directive and its recast. Several examples can be found that have been marked by context. In Belgium, the law of 21 November 2017, which amended the Immigration Law, and Article 36.1 of the Reception Law, which came into force in March 2018,[35] provided a non-exhaustive list of people who can be considered vulnerable, but it was adapted to include examples of additional vulnerabilities within the meaning of Directive 2013/33/EU. However, like most other countries, it failed to mention sexual orientation and gender identity as inherent characteristics. The exceptions to this are Croatia and Cyprus, which have established special needs for reception and special procedural guarantees (ECRE 2017: 26).

Even the countries that have made an innovative selection that has gone beyond the classic groups, such as Greece, have not included a series of group types within their provisions: lack of legal capacity, female genital mutilation, mental disorders, elderly people, pregnant women, and single-parent families with minor children. In fact, Greek legislation establishes parallel definitions of vulnerability in different legal frameworks that regulate reception and identification procedures for newcomers , on the one hand, and asylum seekers, on the other, who are subject to a more restrictive definition. For example, Law 4540/2018, which transposed the recast Directive on reception conditions, applies the categories of vulnerable groups provided in the context of reception and identification in the asylum process[36]. Moreover, the definition of vulnerable groups in section 8 of Article 14 of Greek Law 4375/2016[37] includes people with post-traumatic stress disorders and, in particular, survivors of shipwrecks, mainly because they have specific procedural consequences and are more contested at institutional and jurisprudential level.[38]

In this vein, countries such as Italy, Portugal, Poland, Norway, Switzerland, Hungary, Romania, Bulgaria, and France have chosen not to expressly include certain restricted categories, namely, applicants who lack legal capacity, survivors and relatives of shipwreck victims, victims of female genital mutilation and rape victims (La Spina 2020: 96). Consequently, there is a certain discretion being used in practice, except with regard to victims of torture (ECRE 2017: 29 and ff.). Ireland is the country that has failed to consider the greatest number of situations of special vulnerability: people with physical or mental disability,

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[35] Arrêté royal du 2 septembre 2018 fixant le régime et les règles de fonctionnement applicables aux structures d'accueil et les modalités relatives à l'inspection des locaux Décret ministériel du 21 septembre 2018 établissant le règlement intérieur des structures d'accueil. Arrêté royal déterminant le régime et les règles de fonctionnement applicables aux structures d'accueil et les modalités de contrôle des chambres Royal Decree https: //bit.ly/2BZbL3F

[36] Law No. 4540/2018, which transposes Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection (recast, L 180/96 / 29.6 .2013) and other provisions, 22 May 2018 <https://bit.ly/2KCbDx6> and Ministerial Decision no. 10645 CO4 (2301 2018).

[37] Law No. 4375/2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, 3 April 2016 <www.refworld.org/docid/573ad4cb4.html> Accessed 7 July 2019.

[38] On the prohibition of collective expulsions, see, among others, several judgments of the ECHR Conka v. Belgium 5 February 2002 no. 51564/99, Hirsi Jamaa and others v. Italy 23 February 2012, n. 27765/0, Sharifi and Others v. Italy and Greece 21 October 2014, no. 16643/09, N.D. N.T. v. Spain 3 October 2017 and 13 February 2020 nos. 8675/15 and 8697/15.

people with lack of legal capacity, survivors, and relatives of victims of shipwrecks, victims of female genital mutilation, people with mental disorders and serious illness and victims of human trafficking.

Beyond strictly terminological issues, the way in which the direct association between vulnerability and the meeting of special needs is addressed in each Member State is even more controversial than the definition or 'classification' of 'vulnerable' subjects. This is a complex and risky determination; not all vulnerable asylum seekers have special needs, because some are easier to identify than others. Broadly speaking, it is possible to differentiate between those that opt for formal identification mechanisms, those that choose informal mechanisms, those that refer the question of competence to the regional level, and those which, when faced with non-regulation, define vulnerability using mechanisms that are 'below the law.'

As noted by the ECRE country reports (2017/2019), while several States have chosen to adopt a relatively formal identification mechanism, they have largely opted to not turn the list into a law and rather use 'a concept for the internal identification of vulnerable groups.' For example, the 2016 German Asylum Law[39] does not require federal states to convey personal information about an applicant's vulnerabilities to the BAMF (German Office for Migration and Refugees), but it gives them the power to establish such vulnerabilities, as there is no systematic identification of special needs. The only requirement is that the BAMF must carry out the interview 'properly' and provide 'adequate support' to applicants who need special procedural guarantees throughout the proceedings. From a practical perspective, this translates into the use of 'special agents' (*Sonderbeauftragte*) who are responsible for the interviews and decisions on the applications of asylum seekers with special needs.[40]

The situation is similar in Malta with the VAAP and in France, where there is a formal identification procedure that entails a questionnaire administered by the French Office for Immigration and Integration (OFII) which is used as a basis for an interview when applicants register their application with the Prefecture. All information collected by the OFII about an applicant's special needs is subsequently sent to the French Office for the Protection of Refugees and Stateless Persons (OFPRA). The ECRE report (2017: 26 and ff.) noted that, while asylum seekers may notify the OFII of special needs and provide medical certificates upon registration of their application, people living in camps or in large cities such as Paris, Lyon, or Marseille face considerable difficulties in having their vulnerability properly assessed.

There are also some regulatory provisions for vulnerable groups of asylum seekers in Belgium, but no formal mechanism has been implemented for identifying procedural needs. Officials from the Immigration Office use a registration form to indicate whether a person is a child, an elderly woman, a pregnant woman, a single woman, a member of the LGTBI community, a victim of human trafficking, a victim of physical, sexual, or psychological violence, whether

[39] Section 8 (1b) German Asylum Law Die Übersetzung berücksichtigt die Änderung (en) des Gesetzes durch Artikel 2 des Gesetzes vom 11. März 2016 (BGBl. I S. 394).

[40] According to EAS0 2018 and ECRE 2017 reports, the BAMF employs the following number of special agents and related personnel for these groups: 376 for unaccompanied children, 125 for victims of gender-based persecution, 74 for traumatised persons and victims of torture, and 79 for victims of human trafficking.

a person has children and whether has medical or psychological problems.[41] Subsequently, the applicant is referred to the Vulnerability Unit, where specifically trained officials conduct the interviews. However, in practice, as FEDASIL reported, the Immigration Office overlooks the less visible vulnerabilities.[42]

Although some countries such as Spain choose a mixed or hybrid model that involves collaborating with NGOs, there are only formal protocols for the identification of certain vulnerable categories,[43] namely, unaccompanied minors and victims of human trafficking. However, this does not mean that they use special guarantees in the proceedings (Barrio et al. 2019). NGOs also contribute to vulnerability assessment in practice, more specifically in the enclaves of Ceuta and Melilla, through an early identification mechanism. Unfortunately, their limited resources, the frequent overcrowding of facilities, and people's short stays often prevent them from performing their task effectively.

To conclude, Bulgaria is the exception to this classification, as it does not have a systematic procedure to identify the special needs of applicants for international protection. While the Standards of Practice for Sexual and Gender Violence in theory ensure that these special needs must be systematically detected, this does not happen in practice; however, there is an ongoing review of the Standard Operating Procedures to include more categories of vulnerable people. For example, Standard Operating Procedures have been developed for the treatment of unaccompanied children, but these were not adopted in July 2017 due to objections from the Bulgarian Ministry of Employment and Social Policy (EASO 2021).

A highly recurrent legislative mechanism for defining and integrating vulnerability in rapidly identifying special needs is the regional or federal referral of the reception management process. This is the case in Austria, where reception conditions apply at the federal state level, and therefore the definition of vulnerable groups is limited to the Basic Assistance Law of each federal province. For example, the Basic Assistance Laws of Lower Austria, Salzburg, Tyrol, Voralberg, Burgenland, Carinthia and Upper Austria classify the following groups as vulnerable: elderly people, disabled people, pregnant women, single-parent families, children, victims of torture, rape, or other forms of serious psychological, physical, or sexual violence, and victims of human trafficking. By contrast, in Vienna no reference is made to vulnerable groups (ECRE 2017).

Although several of the categories provided for in the EU list are not included and there is an internal dispersion effect, as observed by EASO (2021) and ECRE (2017), the determination of the special needs of applicants is informal in practice. Either the asylum seeker mentions it

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[41] See FEDASIL report, *Personnes vulnérables avec bessoins d'accueil spécifiques, detention, identification, prize en charge*, Brussels, 2018. FEDASIL subsidised 5 projects aimed at improving the capacity of the reception network with regard to the reception and care of people with psychological/psychiatric illnesses. In addition, see the implementation of the Inter-Federal Action Plan against discrimination and violence against LGBTI people, focused on preventing and combating discrimination and violence against people based on sexual orientation, gender identity, gender expression or intersexuality or disorders of the conditions of sexual development.

[42] According to the 2017 ECRE report, the Belgian Immigration Office has a 'Vulnerability Unit' made up of 6 staff members who are responsible for examining all applicants at the time of registration to determine their potential vulnerability. In addition, the CGRS has two vulnerability-oriented units to provide support to protection officials who handle cases of applicants with special procedural needs: the 'Gender Unit' and the 'Juvenile Unit.' The 'Psychology Unit' was eliminated in 2015. It assisted protection agents in cases where psychological problems may have influenced the processing or the evaluation of the application.

[43] Ministry of Health, Social Services and Equality*, Comprehensive Plan to Combat Trafficking in Women and Girls for Sexual Exploitation,* 2015-2018, available at: https: //bit.ly/2E3Moks. Framework Protocol for the Protection of Victims of Human Trafficking, 2011, available at: https: //url2.cl/Y6ZqD.

upon arrival at the Initial Reception Centre (EAST), or an official may classify applicants as victims of trafficking if this is suspected during the interview. Following an amendment to the Austrian Asylum Law, applicants are required to submit any available medical or other evidence for assessment of their special needs.[44]

To conclude, some States have not provided a definition of vulnerable people in their national legislation. One of them is Sweden, which uses below-the-law operational mechanisms. For instance, there are rules or circulars issued by certain competent agencies or management administrations such as the Migration Agency concerning the reception of vulnerable asylum seekers, mainly children, women, disabled people, elderly people, people with mental disorders or serious diseases, and people who are vulnerable to harassment or exploitation due to their sexual orientation or gender identity (ECRE 2017).

In the Netherlands, specific regulatory provisions are only made for a vulnerable category: unaccompanied minors. However, in practice, after the FMMU medical examination, the Immigration and Naturalisation Service (IND) initiates the procedure in which the second step of the vulnerability assessment is carried out. This medical examination is only available on specific 'pathways' of the Dutch asylum procedure. Applicants subject to the Dublin Regulation (pathway 1) who come from a 'safe country of origin' or who are protected in another EU Member State (pathway 2) do not undergo examination by the FMMU.[45] The IND has issued working instructions for its employees on how to determine vulnerability during this procedure, which includes a non-exhaustive list of indicative points to be used to conclude that the asylum seeker is a vulnerable person. This list is divided into several categories, including physical issues (pregnancy, blindness, disability) and psychological issues (trauma, depression, confusion), for example.

Final remarks

Far from being exceptional, situations of short- and long-term vulnerability in global migration scenarios are becoming increasingly more frequent. They demand an analysis of how migrants face and/or are compelled to overcome a series of barriers, restrictions, and forms of discrimination in asserting their rights and having them upheld based on vulnerability categories. From this perspective, migrant vulnerability is marginal, since neither European nor national legislators have gone beyond selecting some cases, only granting an 'intrinsic' vulnerable status to asylum seekers in aggravated circumstances.

The introduction of vulnerability in the legal sphere poses important challenges in trying to re-signify and strengthen protection standards. The regulatory framework is a fertile ground for the confluence of categories and subcategories of possible situations that deserve special protection, at least on an illustrative basis. The desire to bring legal security to the regulations that refer to migrant vulnerability as a direct or indirect category requires reordering those properties that characterise the vulnerable group or subject (the result of history, of state control, references to international documents).

[44] Bundesgesetz über die Gewährung von Asyl, Asylgesetz 2005 – AsylG 2005, BGBl. I Nr. 100/2005, Federal Law Gazette I No. 100/2005 modified on 9 March 2019, Federal Law Gazette I No. 56/2018

[45] According to EASO reports 2018 and 2019, in September 2018, the Netherlands Secretary of State for Justice and Security introduced a series of amendments to the 2000 Implementation Guidelines of the Immigration Act, including a clarification on how to deal with the future expressions of sexual orientation of LGBTI people in their countries of origin.

Therefore, in the face of the latent confusion in the semantics of vulnerability, considering the evidence provided at national and European level, it is necessary to explain the meaning of the relationships between the Law and social change systematised by Wróbleweski (1993) that affect the legal categorisation of vulnerable subjects.

Firstly, the impact of social change on the Law involves adapting legal norms to social changes. Legal concepts may remain formally unchanged, but their function may change through the ways in which the law is interpreted and applied. At this time this seems to be the most productive emerging avenue for the migrant *vulnerability turn*, but that view of mixed migratory flows and the aggravated vulnerability component have not been offered a single legal accommodation.

Secondly, there is an influence of legal change on social change, both in the process of its creation and once it has been created. The regulatory sphere plays an important role, but its practical scope of action should not be overstated. The European Asylum Support Office (OEAA) and United Nations agencies, by proximity, undertake the commitment to contribute to a better identification of vulnerable applicants in asylum processes and to provide them with suitable support. For the time being, a positive interpretation can be made of how the notion of 'vulnerability' has been integrated into the European Union's asylum system. However, while it recognises the increasing risks faced by some asylum seekers and refugees, there is also a danger that the action framework called upon to protect such groups may be reduced by adopting these 'vulnerability' categories.

And thirdly, as noted by Wróbleweski, the Law can be an 'obstacle' to social change, as some legal rules are not adapted to social evolution or reflect particular interests; therefore, by serving certain interests, they may hinder the identification of more complex relational and contextual forms of vulnerability. In this way, vulnerability may be simplified and treated as a one-dimensional concept, and not as a 'stratified concept'.

It is worth asking whether one should argue for rejecting the 'vulnerable' category if taken to the two highly criticised extremes (essentialism and stigmatisation); or whether disregarding the notion of 'vulnerability' and rendering it invisible may result in a breach of the actual commitment to fulfil international obligations. In the face of the legislative proposal negotiation associated with the New European Pact on Immigration and Asylum, the latter option is emerging as the only coherent and non-discriminatory way to guarantee the protection of all refugees and asylum seekers in situations of special vulnerability as a long-term durable solution, and not through empathy or compassion.

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