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Conceptualizing "Vulnerability" in the European Legal Space: Mixed Migration Flows and Human Trafficking as a Test

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The article discusses the role of "vulnerability" in the legal and political discourse of today's Europe as a dual-mode dispositive. On the one hand, "vulnerability" allows the legal formalism to incorporate the precarious subjects that the traditional language of "rights" risks to exclude. Compared with the human rights language, "vulnerability" better articulates the relationship between legal categories and rapidly changing social and ecological landscapes. The "vulnerability language" captures intersectionality. On the other hand, however, through examples taken from the EU normative production on irregular and mixed migrations, with a focus on refugee "screening" and reception and on managing identification and referral procedures of persons victims of human trafficking, this article shows that the assignment of an individual to a "vulnerable group" has the effect not only of expanding and intensifying their protection under normative human rights regimes, but also of accentuating some risks already inherent in human rights discourse, namely paternalism and essentialism. Paradoxically, a possible outcome can be fragmentation of rights protection frameworks, and exclusion. Vulnerable migrants may have to face additional challenges stemming from their inability (coupled with objective difficulty) to decodify communications and instructions concerning their status. Divergent ways of conceiving vulnerability, depending on subjective assessments, public policy standards, the legal framework, and the political agenda on welfare, contribute to neutralizing the potentially emancipatory impact of the vulnerability language.

Keywords: vulnerability, human trafficking, human rights, mixed migration flows, refugee protection

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THE "VULNERABILITY TURN"

In the last 20 years, vulnerability has been the subject of research and analysis in several fields, stemming from the seminal contributions of Butler (2004), Turner (2006), and Fineman (2008, 2018). "Ontological vulnerability" has been proposed as a heuristic device (Fineman, 2018, p. 20) that allows us to dismantle the myth of the Liberal Subject as an autonomous, free, and independent human actor, fully capable of choosing and pursuing his (more likely than her) best interest. Instead, the Vulnerable Subject is dependent and constantly exposed to harm generated by endogenous (infancy, aging, illness, among others) and exogenous causes (from natural disasters to loss of employment) that operate rather unpredictably, as there are innumerable circumstances that may influence individual and societal trajectories. Ontological vulnerability is not only a universal

feature of the human condition, but also a particular, situated characteristic of any person, the product of a unique interdependence dynamic proper to a given socio-ecological-technological context. Indeed, the concept of vulnerability is deeply anchored in the principles of equality and human dignity (Pastore, 2021, pp. 35–39). It rejects a uniform application of legal precepts to individuals irrespective of their specific predicament, in particular irrespective of the patterns of distribution of social power. Situational vulnerability assumes that no individual experiences and faces the same harms and that single persons have developed different forms and amount of "resilience" *vis-à-vis* threats. Significantly, a crucial implication in Fineman's conceptualization of vulnerability is that it draws attention to the role of the state. A "responsive state" is endowed with the task of addressing the ontological (and therefore universal—*rectius*: universally shared) and individual vulnerability of human beings. The task of the state is therefore to avert preventable harms and mobilize all available resources, namely the social, economic and cultural assets incorporated into civil society institutions, to mitigate the risk incumbent over its population.

In Fineman's discourse, vulnerability is instrumental in infusing elements of the welfare state into the American legal and political fabric and in overcoming the purely anti-discrimination policy approach based on group identity (race, ethnicity, gender, etc.) that the US legislation has prioritized. Indeed, one possible consequence of this approach is the segmentation of the public into competing "minorities," their stigmatization, and eventually the reproduction of the same social compartmentalization and social barriers it was supposed to transcend. However, the vulnerability language also works well in countries where the active role of the state in promoting substantive equality and tackling social constraints based on a universalist welfare approach is not taboo. A preference for the vulnerable may be useful to orient welfare policies and help decide cases where competing values need to be balanced (Pariotti, 2019, pp. 62–64). "Positive obligations" of the state can emerge with respect to cases involving vulnerable persons, grounded in the principle of equality, and geared toward removing obstacles to the flourishing of their potentialities.

"Fuzzy Law"

The "vulnerability turn" is welcome. The realization of the factual reality of human fragility and the relational and socially construed nature of our precarious identities does away with the abstract universalistic individualism, famously criticized since Marx's *On the Jewish Question*. It also rejects superhomistic or transhumanist hypotheses that look at human vulnerability as a flaw that needs to be transcended or, more likely, driven to extinction. A vulnerability approach ethically supports the cause of human life, as Jonas eloquently stated: "[a]n imperative responding to the new type of human action and addressed to the new type of agency that operates it might run thus: 'Act so that the effects of your action are compatible with the permanence of genuine human life'" (Jonas, 1985, p. 11).

However, risk can hardly be avoided, making the "vulnerability turn" controversial. It is susceptible to instrumentalization, to the detriment of the very persons it is called to protect, creating new fractures and unwanted exclusionary effects (Hruschka and Leboeuf, 2019, p. 3). The normative and specifically legal use of vulnerability balances on the knife edge between the two facets of the concept, the "ontological" and the "situational," both of which present pitfalls when it comes to their operationalization. In other words, the vulnerability discourse requires a taxonomy (Mackenzie et al., 2014, pp. 7–10) that is qualitative (which vulnerability?) and quantitative (what quantum of vulnerability?). On the ontological side ("all humans are equally vulnerable"), a qualitative and quantitative characterization is necessary to accommodate individual instances of dependency and needs, but this entails the construction of "vulnerable groups," reintroducing an essentialist tone into the picture. On the situational side ("some humans are vulnerable due to an uneven challenge-resilience balance"), categories and degrees of vulnerability are introduced to characterize individuals or groups to segment and prioritize protective measures that may reflect subjective or contingent criteria. It may be argued that there are numerous vulnerability policies and operationalizations of such policies. This poses a further challenge to the individuals who are the supposed beneficiaries of such policies. By introducing the "fuzzy" (vague, adaptable, non-deterministic) notion of vulnerability, legal systems try to meet the needs and fragilities of human beings but also disclose and make tangible their own fuzziness (Delmas-Marty, 1998, pp. 76–92; Perez, 2015), vulnerability and precariousness. And maybe it is on this "institutional vulnerability" that we should draw attention.

VULNERABILITY TRAJECTORIES IN MIXED MIGRATION FLOWS: THE CASE OF THE EU ASYLUM SYSTEM

Mixed flows of migrants (UNHCR, 2016, Glossary; Sharpe, 2018, pp. 116–121) can be an excellent exploratory field to extrapolate the semantics of vulnerability and the ambiguous role it plays in profiling and segmenting migrants into potentially exclusionary sets, and in unmasking these same dispositives of exclusion.

As previously discussed, despite the ontological character of vulnerability, it seems inevitable to associate it with a taxonomy that creates types and degrees of vulnerability and then, grounded on such determinations, to articulate and regulate patterns of institutional responses.

Vulnerability as a fact is the source of specific normative regimes. International human rights instruments and a large part of national social legislation can be viewed as based on the conceptualization of some collectives as "vulnerable" due to their history of discrimination. This is the case of many international human rights instruments: the International Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and its Protocols, and the Convention on the Rights of Persons with Disabilities. A similar rationale supports international provisions on aliens, stateless persons, and on persons deprived

of liberty, who are exposed to torture, inhuman treatment, and enforced disappearances.

It is also the case of migrants, especially international migrants. They are vulnerable due to the fact that they are on the move. This is clearly stated in the Preamble of the UN Convention on migrant workers, which is premised on "the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may face due to their presence in the State of employment." On its side, the 2018 UN Global Compact on Migration, "intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance."

However, migrants are "particularly vulnerable" when additional subjective characteristics or situations intersect their condition. "Special needs" emerge in relation to age, gender, disability, and so on. The "well-founded fear of persecution," the risk of "serious harm" to life or personal integrity, or their exposure to other human rights violations upon return to their state of origin grant migrants the status of refugees or beneficiaries of subsidiary protection under the EU system or make them eligible for other forms of asylum and humanitarian protection based on national standards.

Categorical Vulnerability

The mixed-flow human landscape is not reduced solely to refugees and economic migrants. States have agreed to protect other categories of people, based on specific regimes introduced by international instruments. Individuals in distress at sea must be assisted, according to art. 98 of the Convention on the Law of the Sea. The anti-trafficking Protocol to the Palermo Convention provides for the protection of victims of trafficking in human beings; and the Protocol on the smuggling of migrants (supplementing the Convention on organized crime) in Art. 16 acknowledges that persons who are the object of smuggling are entitled to a measure of protection, especially against violence. Moreover, national legislations can create additional categories endowed with special protection rights. Irrespective of pushing and pulling factors and subjective motivations for migrating, mixed migrations have prompted the enactment of a complex legal setting whereby states have to discharge intertwined, overlapping, and even potentially conflicting obligations. Indeed, in this domain many national and international legal regimes interplay (Sharpe, 2018, p. 121). Accordingly, entangled layers or spheres of vulnerability need to be carefully verified by state officers and soon, in the European space, also by the EU Agency for Asylum—EUAA—recently established (with Regulation (EU) 2021/2303) to replace the European Asylum Support Office—EASO.

Therefore, a form of inherent and legally certified vulnerability is associated with the status of a protected person (refugee, victim of trafficking, etc.). In this connection, a reference to "vulnerability" is redundant since, at this stage, the task is exactly that of determining whether the factual elements of the legal notions of refugee, child, person with disability, individual in distress, etc. are met. A victim of human trafficking, for example, according to the Palermo Protocol is not an unqualified "vulnerable person"; it is precisely a trafficked person, normatively characterized as a person in need of protection. In the same vein, a migrant woman is not *per se* a vulnerable person, and nevertheless she is entitled to some specific rights (for example, protection from domestic violence, as per the Council of Europe Istanbul Convention) that a legal instrument has expressly carved to suit women. The use of vulnerability language in this context is misleading and can unnecessarily add a patronizing and paternalistic flavor to the status determination procedure (although, if the notion of ontological vulnerability is well understood, in no way does it detract from the agency and active role of migrants). It can be observed that in the cases of refugees and victims of trafficking, a vulnerability assessment is still necessary, because the normative qualification of the status incorporates elements such as "fear of persecution" or "abuse of power or a position of vulnerability." Similarly, the notion of torture or inhuman treatment should also be assessed in light of the personal characteristics of the victim, namely physical or psychological vulnerability. However, these assessments consider the historical situations that constitute the factual source of the legal provisions. What must be determined in these cases is not the *vulnerability* of the individuals concerned, but their condition as *victims* of material abuse—persecution, exploitation, torture. It is not their exposure to harm and potential abuse, but their actual (past or current) experience of a human rights violation that the law qualifies as worth a response in the form of "positive obligations" of the state: prosecution, reparations, protection measures.

This is also acknowledged in the EU Qualification Directive 2011/95, whose Art. 20 provides that, in dealing with refugees and persons eligible for subsidiary protection, states

> "shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, people with mental disorders, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence." (Art. 20.3).

Note that the same article, in the next paragraph, specifies that vulnerability screening only applies *after* the evaluation of the situation that gives access to protected status has been accomplished ("Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation"). The same is reiterated in the proposed Qualification Regulation, submitted by the European Commission in 2016 and confirmed in 2020 in the framework of the new Asylum and Migration Package. Therefore, the consideration of the particularly vulnerable predicament of an applicant is subsequent to the recognition that there was indeed an act of persecution taking the form, for example, of disproportional or discriminatory punishment or consisting of "acts of gender-specific or child-specific nature" (cf. Qualification Directive 2011, Art. 9, unchanged under the proposed Regulation on

Qualification). In other words, subjective vulnerability is taken into account to characterize, beyond a certain threshold, the persecutory nature of an act, that is, the presence of a legal element of refugee status. Analogous considerations apply to the ascertainment of the reasons for persecution, namely, the person's belonging to a particular social group. Being a member of a vulnerable social group in the state of origin is a constitutive element of the refugee status.

When the European Court of Human Rights (HCtHR) consistently recognizes refugees as constituting a "vulnerable group," as most famously occurred in *MSS v. Belgium and Greece* (2011), it may conflate two lines of reasoning: on the one hand, the ontological vulnerability of individuals that led to their victimization and forced them to flee the country of origin; on the other, the recognition of the situation of particular precariousness they live in the host country compared to the condition of citizens (Costello and Hancox, 2016, p. 443), i.e. their situational vulnerability.

Situational Vulnerability: Assessing Special Needs

Instead, a proper vulnerability assessment is performed when, within a group of persons, differentiation is made based on the *risk* of (additional) victimization. In mixed flows, less resilient individuals, detected through a case-by-case screening and independently of any prior legal characterization—or based on vague open-ended criteria—are offered additional support during the status determination procedure and in the reception phase.

To perform the screening and detect the special vulnerability of categorically vulnerable persons in the field of mixed migrations, international and national agencies have elaborated a variety of manuals and guidelines that operationalize the synthetic and generic indications of legal sources.

In EU countries, legal provisions have transposed the EU directives of the Common European Asylum System, namely the directives on Asylum Procedure (2013/32) and on Reception (2013/33). They segment the broad category of third-country nationals or stateless people seeking international protection (and thus inherently "vulnerable") according to their situational status as "particularly vulnerable" or presenting "special needs" or deserving "special procedural guarantees."

For example, the Asylum Procedure directive (2013/32) acknowledges (Art. 31.7) that among applicants there may be "vulnerable persons" as defined by the Reception Directive, that is, persons

> "such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation" (Reception directive 2013, Art. 21)

Vulnerable applicants, along with those whose application for international protection looks well founded, are entitled to be prioritized in the regular examination procedure and avoid the accelerated and border procedures (Procedure Directive, art. 31.8), which are supposed to apply only to "bold" asylum seekers.

The Procedure Directive also introduces another category, that of applicants in need of "special procedural guarantees,"

> "due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence." (Recital 29; see also Art. 24).

States should identify them and provide them

> "with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection." (Recital 29; see also Art. 24).

The Asylum Procedure Regulation proposed by the Commission in 2016 (COM(2016) 467 final) and amended in 2020 (COM(2020) 611 final) maintains the same language but emphasizes the importance of a rapid screening of procedural special needs, insisting that

> "[i]t is necessary to systematically assess whether an individual applicant is in need of special procedural guarantees and identify those applicants as early as possible from the moment an application is made and before a decision is taken." (Recital 15, second part).

Accordingly,

> "[t]o ensure that the identification of applicants in need of special procedural guarantees takes place as early as possible, the personnel of the authorities responsible for receiving and registering applications should be adequately trained to detect signs of vulnerability signs and they should receive appropriate instructions for that purpose." (Recital 16; see also Arts. 19, 20)

In these provisions, people in need of support are not categorized, rather they are indirectly singled out using criteria such as age, gender, health conditions, etc., that leave both a certain margin of maneuver to states when transposing the directive, as largely documented (AIDA, 2017, pp. 41–52), and some discretion to state officers tasked with the assessment process. By the way, there is some inconsistency between the categories of vulnerable persons and the criteria to identify persons in need of special support. For example, the sexual orientation criterion does not seem to have a correspondence in any of the categories listed in Art. 21 of the Reception Directive.

The Reception Directive, parallel to the Asylum Procedure Directive, in addition to referring to an open-ended list of vulnerable categories, also identifies a sub-cluster, that of persons with "special reception needs," who nevertheless must also be "vulnerable persons" (Reception Directive 2013, Arts. 2.k and 22) (In all these instruments, special prominence is given to children,

especially unaccompanied children. Given the general scope of this paper, we will not elaborate specifically on this, nor will we address the application of UN human rights instruments, such as the Protocol to the Convention on the rights of the child on the sale of children, child prostitution and child pornography).

Eclipse of Vulnerability?

Admittedly, the use of the vulnerability lens has not dramatically improved the way people in critical humanitarian situations were assisted in the course of the so-called refugee crisis in the years 2015–2016. Furthermore, the vulnerability language has been partially abandoned in the subsequent EU legislation. Indeed, the proposed Asylum Procedure Regulation 2016, including as amended in 2020, and the proposed Reception Condition Directive 2016, removed all references to "vulnerable persons," and used the seemingly more precise notion of persons with "special procedural" or "special reception needs," respectively. The Migration and Refugee Package maintains terminology that refers to vulnerability in the newly proposed Screening Regulation. The new instrument regards the screening that takes place "at the external borders of the Member States" and integrates the Schengen Border Code. In particular, it concerns

> "all third-country nationals who have crossed the external border in an unauthorized manner, [. . .] those who have applied for international protection during border checks without fulfilling entry conditions, as well as those disembarked after a search and rescue operation, before they are referred to the appropriate procedure" (Screening Regulation Proposal, Art. 1).

The screening, which must be carried out within 5 days (or ten, in exceptional circumstances of mass arrivals), regards all irregular third-country migrants, including those who, unlike asylum seekers, do not belong to legally qualified vulnerable groups. Consistently, Art. 9.2 of the proposed Screening Regulation requires state authorities to check any "situation of vulnerability" of the migrant person, adding a reference to victims of torture, along with those who have special procedural or reception needs (as asylum seekers). The position of minors is also mentioned and emphasis is placed on physical and mental health conditions.

The other blocs of the 2020 Migration and Refugee Package, namely the amendments to the 2016 Asylum Procedure Regulation, extensively expand the recourse to "special procedures," meant to be faster and carried out in a "pre-entry phase," that is, at the EU external border or in transit zones and before the applicant has properly entered the territory of the EU member state. Apart from the strange suggested idea that screening and status determination procedures take place in some extraterritorial location (Campese, 2021), what is crucial in this design is that it creates a *de facto* two-track system that pre-screens applicants for international protection based on "objective and easy-to-use criteria" (as stated in the explanatory memorandum of the amended proposal for the Asylum Procedure Regulation), namely the geographic provenance of the asylum seeker. In fact, applicants coming from a state the EU or the concerned member state has designated as "safe," or individuals whose state of origin has been designated as "safe," are assessed with an accelerate procedure that can also take place at the border and is expected to end with a rejection and contextual return order. The 2020 Package added another case: the special procedure is also applicable in the case the applicant is a national of

> "a third country for which the proportion of decisions by the determining authority granting international protection is, according to the latest available yearly Union-wide average Eurostat data, 20% or lower."

These presumptions can be rebutted, but the overall impression is that the accelerated procedure is reserved for "abusive" applications and leads to rejection and the issuing of a return order. The pre-entry screening procedure and the detection of special procedural needs are therefore critical to avoid being channeled in the wrong route of applicants who not only have a low chance of having their asylum claims accepted, but are also likely to endure forms of detention during the procedure and being swiftly returned to a safe third country even before properly "entering" the EU.

In this context, it can be argued that the segmentation of the (legally and ontologically) vulnerable population of migrants and refugees into the many clusters of people with "special needs" that the combined EU and state provisions identify, is likely to constitute in itself an additional obstacle and a source of vulnerability for the affected population. Any individual who does not fit the ideal type of a "genuine" refugee carved out by law and the practice of status determination officers (crucially, of the officers who first interview irregular migrants for "screening" purposes) can be denied protection measures and be associated with the group of those who abused the law or absconded and remained undetected after entering a member state. Rejected applicants join the number of non-removed and undetected migrants who live undocumented in the EU, in itself a distinct group of people in a vulnerable situation and entitled to fundamental rights (FRA, 2011, p. 3). In addition, and because of their prior rejection, they are negatively stigmatized and specifically penalized, should they reapply for protection. Fixation on stereotyped features of vulnerability (being a woman, possibly pregnant, showing unequivocal signs of distress, etc.) indirectly suggested by the legislation can even induce some individuals to deliberately undergo abusive treatments that can provide them with such "stigmas" for the purpose of passing the vulnerability test (Freedman, 2019, p. 8).

In fact, in the general approach of the EU to mixed flows, the phenomenon is clearly perceived as a threat to an orderly and "strong" migration governance, and more broadly, a security threat to Europe—with little consideration of possible "threats" to third countries stemming from the securitization policies adopted in Europe (Pastore and Roman, 2020, pp. 142–145). The 2020 New Pact on Refugees and Migration characterizes mixed flows as another not-welcome "complexity." The Explanatory Memoranda to the 2020 Commission's legislative proposals stress that, compared to the years 2015–2016, recent trends have shown a decrease in arrivals of third country nationals "with clear international protection needs." Furthermore, while the

number of irregular arrivals has dropped, claims for international protection have increased in the EU area, evidence that refugee provisions are being abused by migrants with little chance of being recognized as "deserving" protection. The New Pact reiterates the need to establish a "seamless migration and asylum process" and "close the loopholes" in border control, status determination, return and reception processes, with the aim of reducing the number of irregular migrants in the EU area. Irregular migrants are perceived as posing a disproportionate social and political challenge that can only be faced by enhancing solidarity. However, the solidarity required is between EU member states, which must act shoulder to shoulder to disentangle mixed flows, including agreeing to designate as "safe third countries" all Balkan states, Turkey, and possibly more neighboring states, encouraged to participate in the securitization of EU external borders. Fortunately, the document also has a remarkable chapter on expanding legal pathways to Europe, although still within the framework of a chapter on regional and international partnerships, which in the past has not been particularly successful, and where the issue of readmission agreements and arrangements figures prominently among the key actions. Plans to attract skilled and talented migrants (another layer of the New Pact) do not seem designed to prioritize vulnerability, while the final part on the integration and inclusion of legally resident migrants and EU citizens with migrant background is announcing a forthcoming 2021–2024 (then corrected in 2021–2027) Action Plan, significantly established within the Portfolio "Promoting our European way of life."

The situation is even more intricate if to the general picture sketched above we add, based on the general legal provisions of the EU framework, the peculiarities of the legislation and political priorities of any single member state of the EU, and the special regimes that have been introduced to face some particular crisis situations. In particular, the 2016 EU-Turkey deal created an *ad hoc* legal platform to regulate migrant flows between the EU and Turkey in connection with massive Syrian refugee movements. The agreement was substantially aimed at deterring any flow toward Greece and the EU (Schoenhuber, 2018, pp. 654–656), thus imposing an adaptation of the refugee status determination procedure and vulnerability test grounded, in particular, on the strong presumption that Turkey is a "third safe country." The terrible reception conditions of Syrian refugees on Greek islands who have waited months and years for their status determination have been widely documented (Amnesty International, 2017). The resistance of the Greek appeals committees to the implementation of the deal, and therefore to the automatic return of asylum seekers to Turkey, was defeated *via* a swift reform of the composition of the committees (Gkliati, 2017, pp. 115–121). Eventually, the new commissions aligned their decisions with the objectives of the EU-Turkey deal. In fall 2021, the "refugee crisis" induced by irresponsible Belarus autocracy on the borders with Poland and Lithuania was met with another *ad hoc* response from the concerned states and the EU (EU Commission, 2021). The adopted measures, however, blatantly neglected the human dignity of the trafficked or smuggled Middle East and other migrants (HRW, 2021). The recent crisis with Belarus is even more disturbing considering that the Belarus-Poland border was also poorly managed in the past and the European Court of Human Rights, discussing a case of *refoulement* of 13 Russian minors by Polish authorities, ascertained the existence of "a systemic practice of misrepresenting the statements given by asylum seekers in the official notes drafted by the officers of the Border Guard serving at the border checkpoints between Poland and Belarus" (*M.K. v. Poland*, 2020).

It must be highlighted that what is at stake in most cases is not the punctual respect, at any single moment of the procedures, of human rights entitlements or humanitarian standards, including refugee protection law. The observance of EU and state provisions in this domain is supervised by the judiciary in its national and international articulations and by ombuds institutions, including the national mechanisms to prevent torture and inhuman treatments established under the additional Protocol to the Convention against torture. The newly proposed EU instruments also foresee the involvement of the EU Fundamental Rights Agency (FRA) to monitor, jointly with a national independent mechanism, the implementation of the Screening Regulation (Art. 6 of the Proposal); the FRA, along with the EUAA and the Guard Coast Agency, will also provide guidance and technical support throughout the procedure. Accordingly, core fundamental rights are not necessarily compromised and, in case of violation, can be vindicated. Nevertheless, the pledge to take charge of the most vulnerable can be confounded if from one stage of the proceeding to another, at T_1, T_2, etc. throughout the trajectory, the changing needs and vulnerabilities of the person are forgotten, neglected, or simply denied (Blondel, 2021, p. 52). At any stage, the output may be impeccable or reasonably fair given the circumstances, but the overall result may well fail to effectively protect the vulnerable persons.

A CONSTRUCTIVIST VIEW ON VULNERABILITY: OPERATIVE GUIDELINES AND JURISPRUDENCE

How do we make sense of human vulnerability, then, where both the ontological and situational versions of the notion are apparently so prone to adjustments and fragmentations in the normative framework? The previous analysis has shown that governments and other agencies lament their own "institutional vulnerability," that is, an inherent or contingent capacity gap that should be acknowledged in connection with wicked and intractable problems. The notion of institutional vulnerability does not fit Grear's conceptualization of "embodied vulnerability" (Grear, 2010, pp. 201–202), which strictly concerns human or other living natural subjects. However, it may be useful in conveying the idea that institutions such as the EU and member states can instrumentalize the precariousness of individuals for their political purposes and play their own "vulnerability" *vis-à-vis* phenomena that they are ostensibly unwilling or unable to withstand in all their components. This section aims to show that an effective strategy directed at protecting vulnerable persons

requires interinstitutional and interagency cooperation and an adaptive attitude in key actors.

Navigating Vulnerability in Human Trafficking

Independent bodies, public actors, and the judiciary have a considerable margin of maneuver to actively use the language of vulnerability and promote the cause of those living in most precarious predicaments, skillfully navigating the fuzzy legal scenario they themselves have contributed to create. Some examples can be taken from a particularly interesting domain, namely that of the protection of victims of trafficking in human beings. This area is especially relevant for reflection on vulnerability, for many reasons.

First, contrasting human trafficking and smuggling is claimed to be a top priority for states and the EU. Although the two Protocols on trafficking and smuggling have been described as instruments of transnational judicial and police cooperation, the associated practice of implementation has gradually incorporated a sheer attention to the protection needs of victims, also due to the influence of the Warsaw Convention. The EU Directive 2011/36 on Trafficking has a significant component aimed at protecting victims. Therefore, one may expect to find some advanced provisions in this domain, building on existing state obligations in terms of investigative, law enforcement, and adjudicative actions.

Secondly and more interestingly, unlike in the case of refugees, the emergence of vulnerability in the case of trafficked persons does not necessarily rely on the cooperation of the concerned people. Vulnerable people, in this case, are either unaware of their vulnerability or no longer *vulnerable* to the risk of being trafficked, being, in fact, already *victims* of traffickers, and therefore unwilling or unable to ask for help. In mixed migrations, in order to detect individuals victim of human trafficking or at risk of being trafficked, state officers, humanitarian staff, and police officers, among others, need to take positive steps and engage in proactive tactics, with the support of expert personnel, and over a reasonable time span.

Third, trafficking and smuggling are situations that can easily overlap, as they materialize and unfold over the same routes and involve the same material and social scenarios (Gallagher, 2010, pp. 51–53). This entails, among other things, that fine-tuned indicators and standards have to be used, at different moments and over a certain span of time, to detect the most severe situations, protect the victims or potential victims, and repress the crime.

Fourth, the vulnerable situations that illustrate the predicament of trafficked individuals are extremely diverse, ranging from prostitution to slavery and labor exploitation in virtually any economic sector. There is therefore a large space for intersectionality, whereby characteristics such as gender, age, ethnicity, economic condition, cultural background, disability, etc. may characterize exploitation and vulnerability in multiple ways.

Against this background, two movements can be of interest for the development of a normative framework. On the one hand, the production of guidelines, guidance documents, manuals, and training formats that operationalize the legal norms and principles, but also contribute to the crystallization of good and innovative practices that may fill some gaps in responding to evolving patterns of vulnerability. On the other hand, the widespread use of a vulnerability language in the judicial case law, both at the domestic and regional/international scale. Independent courts have in fact the chance to double-check the legitimacy and viability of the arrangements proposed by legislators against the comprehensive constitutional system and the international obligations of a state, an operation that may often reconfigure the normative fabric.

Trafficking in human persons is defined in Art. 3 of the Palermo Protocol as:

> "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."

Regarding the "position of vulnerability" referred to in the quoted article of the Protocol, a definition is given by the EU Anti-trafficking Directive 2011/36, of which Art. 2.2 reads:

> "[a] position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved."

Guidelines and the use of vulnerability indicators are necessary tools to detect the recurrence of the mentioned factual elements and identify the needs of people victims of trafficking. As noted above, trafficked persons are not likely to report their status until the situation of coercion is not removed and may even lack a clear awareness of the abuse they are suffering. While a proper understanding and reconstruction of the comprehensive experience of abuse and exploitation requires time and the support of specialized anti-trafficking personnel, the task of *prima facie* identifying potential victims of human trafficking is attributed to border management staff and more generally to those who have first contacted irregular migrants (although trafficking in human beings does not necessarily entail any crossing of international borders). It is quite unlikely that a pre-entry screening of irregular migrants would properly detect victims of trafficking (Kane, 2021), apart from obvious cases of persons rescued while in the hands of their abusers. Fortunately, status determination commissions have the capacity—and have indeed been encouraged in this sense—not only to receive asylum seekers' claims, but also to detect hidden signals that may reveal an applicant's current exploitation or vulnerability to be trafficked in the future. Skilled officers in detention facilities for migrants, social workers and humanitarian operators at different moments of the complex trajectories that irregular migrants undertake in

reception systems may also "fill the gaps" in the treatment of vulnerable migrants. Nonetheless, one would wonder whether the emphasis put on early, pre-entry detection of trafficked people is meant to mitigate the latter's "embodied vulnerability" or to cure a perceived "institutional vulnerability" to migration.

In 2006, the UNHCR published its Guidelines on International Protection No. 7, on the application of the Refugee Convention to victims of trafficking and persons at risk of being trafficked (UNHCR, 2019, pp. 133–144). The Guidelines not only clarify that victims or potential victims of human trafficking are eligible for refugee status, but also provide specific guidance on how the determinants of refugee status intersect the condition of trafficked persons and which procedural guarantees apply. Some countries have further elaborated on this document and transposed it into a practical tool for the early detection and referral of vulnerable people to the most convenient service. This is the case of Italy, where in 2021 the UNHCR and the National Commission for the Right to Asylum (CNDA) jointly produced a new comprehensive Guidelines document directed at the status determination commissions and other public and private entities involved in work with victims of trafficking (UNHCR Italy CNDA, 2021). The most important parts of this document, apart from the detailed description of actors and procedures of the asylum and anti-trafficking systems, are, firstly, the updated list of general and specific indicators that experts in trafficking may use to formally identify victims and orient them toward services; secondly, clear indications on how to establish local cooperation platforms between the asylum and the anti-trafficking systems open to other key stakeholders, namely police authorities, local administrations, and the courts (Giammarinaro and Nicodemi, 2021a). Establishing such inter-agency platforms is crucial to early detection in a proper, formal and professionally appropriate way of the needs of trafficked persons and to make sense of the obligation to protect the most vulnerable migrants (Giammarinaro, 2018, pp. 131–132).

In the broader EU context, EASO/AUAA has elaborated a series of practical tools on how to handle cases involving vulnerable persons (EUAA, 2022), including a Tool for Identification of Persons with Special Needs (IPSN) that accompanies step-by-step a social worker or another operator in identifying the relevant vulnerabilities of an individual. In January 2022, two more instruments, a Special Needs and Vulnerability Assessment Tool, and a Referral Toolkit, were announced as forthcoming. Trafficking-related issues are likely to be included in such materials.

Guidance in all dimensions of the anti-trafficking work is provided by the Council of Europe Group of Experts on Action against Trafficking (GRETA); while at the global level, along with the UNODC (the UN office supervising the Palermo Convention and its Protocols), it is worth mentioning the Special Rapporteur on trafficking in human beings established by the Human Rights Council. The mandate of this Special Rapporteur includes in particular the implementation of the Recommended Principles and Guidelines on Human Rights and Human Trafficking adopted by the UN Economic and Social Council (ECOSOC) in 2002.

In the US, it is worth recalling that in 2014, the New York-based Vera Institute of Justice produced a Guidelines document for the US Department of Justice to assist social service providers in administering the Trafficking Victim Identification Tool (TVIT)—an extensive questionnaire aimed at detecting victims of trafficking in the US (Vera Institute of Justice, 2014).

The practice of status determination committees and other bodies working on the identification of vulnerable persons in the field of human trafficking may also have a significant impact in litigations. In 2021, the Italian Supreme Court (Court of Cassation) stated that a protection status—in the form of the so-called humanitarian protection or constitutional asylum (Art. 5.6, legislative decree 286/1998)—can be granted to individuals who, although not admitting to be victims of human trafficking, still fit the indicators of trafficking that the UNHCR-CNDA Guidelines have elaborated (Court of Cassation, Section II, order 27 January 2021, No. 1750). In another judgment, the Court went even further, admitting that asylum (humanitarian protection) shall also be granted to a Nigerian woman who, although failing to meet all the trafficking indicators, namely because it could not be inferred that she was forced to prostitution, was nevertheless exercising prostitution to economically survive. In fact, she had "no real or acceptable alternative but to submit to the abuse," as "survival prostitution cannot be considered an activity based on consent" (Court of Cassation, Section I, judgment 27 October 2021, No. 30402) (Nicodemi, 2021). While welcoming the decision, Nicodemi (2021) noticed that a proper recognition in courts of the relevance of vulnerability indicators developed in connection with trafficked people should entail granting the (potential) victim the status of refugee, rather than the residual measure of humanitarian protection, that only entitles to a 6-month renewable permit to stay. Alternatively, the Court could have acknowledged that the existence of a presumption of vulnerability to trafficking, although not explicitly disclosed by the individual, should prevent any repatriation or expulsion and grant her a special protection status, if the risk of coercion into forms of exploitation is still existent in the state of origin.

These last considerations, alongside an analysis of the case of "survival prostitution," may reveal an additional line of reasoning. It may be approved that courts try to extend the protection of the law to situations of non-qualified vulnerability, that is, to grant a residence permit to migrants who, for "structural" socioeconomic reasons and due to the situational vulnerability they are experiencing, do not formally meet all the legal criteria to qualify for a typical protection measure, but are facing humanitarian challenges. However, this approach may look dangerously like a moralistic kind of (partial) restorative justice, through which the legal system tries to amend the wrong it committed against vulnerable individuals by failing to recognize their fundamental rights in a timely and adequate manner. Moreover, the reparation it pays is largely symbolic: a permit to stay some more time in the country that has contributed, with its poor management of mixed flows of migrants, to the victimization of the poor. It looks paradoxical that the "humanitarian" response to survival prostitution is a permit to stay that, lacking any other social measures of support, simply allows the perpetuation of survival prostitution.

In the last 20 years, the ECtHR has used the notion of vulnerability widely. Extensive research has been done on this jurisprudence (*ex multi*: Peroni and Timmer, 2013; Besson, 2014; Burgorgue-Larsen, 2014; Ruet, 2015; Chenal, 2018; Diciotti, 2018; Timmer, 2018; Gribomont, 2019).

In the Strasbourg case law, detainees, children, victims of domestic violence, ethnic or linguistic minorities, namely Roma people, persons with psychosocial or other disabilities, persons with HIV/Aids, gender minorities, have been characterized over the years as "vulnerable" or "particularly vulnerable" collectives or individuals. Human rights defenders have also emerged as a distinct group in this regard. Economic poverty and dependence on state allowances have recently been considered, at least embryonically, as sources of vulnerability (Nifosi-Sutton, 2019, pp. 241–242). From this characterization descend some positive obligations for the concerned state, namely the duty to remove the general or specific causes of vulnerability, ascertain via a sound procedure the causes of the wrongdoing, and provide victims with a remedy. In the proportionality test, in which human rights are weighed against legitimate values such as national security, public order, protection of health or morals, or the rights and freedoms of others, vulnerability must be taken into account.

Trafficking in human beings has been addressed by the Court as a form of slavery or forced labor, prohibited under Art. 4 of the European Convention (Giammarinaro and Nicodemi, 2021b, pp. 52–58), occasionally also in connection with Art. 3 (torture and inhuman treatment). The first and still among the most significant pronouncements is *Rantsev v. Russia and Cyprus*. More recently, *S.M. v. Croatia* (2020), *V.C.L. and A.N. v. the United Kingdom* (2021), *Chowdury and Others v. Greece* (2017), *T.I and Others v. Greece* (2019), and *Zoletic and Others v. Azerbaijan* (2021) have been particularly relevant.

In all these instances, the Court dives deep into the peculiarities of the individual situations, adopting a situated assessment of the vulnerability at stake. In all cases, the emphasis is on the duty of the state to take into account the special predicament of the applicant in dealing with the substantive and procedural layers of the case. After enunciating the vulnerability characteristics of the applicants, the Court strikes a balance between the lack of alternatives to harsh forms of exploitation—be it in prostitution, labor, or drug-related illegal activities—of the applicants and the due diligence of the state. An interesting and innovative aspect of the use of the vulnerability paradigm in this context is that it is increasingly more common that the Court criticizes and stigmatizes the lack of accuracy that respondent states demonstrate in addressing the problems, including the judicial peripeties, of marginalized persons, laborers, children exploited in petty crime, child prostitutes, and victims of human trafficking. In dealing with single, specific cases, the Court provides a broader picture of an increasingly unequal and economically polarized society.

CONCLUSIONS

This paper has followed the trajectory of the notion of vulnerability, from the skies of ethics and legal theory to the trenches of the EU external borders, where arguably the vulnerability paradigm could play a prominent heuristic and transformative role. The conclusion is mixed. As an analytical tool likely to guide legal and professional practice in some of the most sensitive territories for the respect of dignity and human rights—mixed flows management and human trafficking—, the concept of vulnerability has proven to be still inconsistent and vague. At times it is even ambiguous, as it may conceal much more concrete struggles for survival and power. Vulnerability is a trump card that people on the move can play, under some conditions, to gain priority, avoid bureaucratic burdens, and receive more attention from public authorities. However, those who are most likely to claim vulnerability are not necessarily vulnerable people. For a vulnerable person, this move may be too risky. If the card fails, they may lose their status and be relegated to those who abuse the rules. Vulnerability as a legal dispositive is also prone to be manipulated—and this raises my concern—by the state agencies mandated to protect vulnerable individuals, as it may justify restrictions and segmentations in the access to welfare resources, perpetuating stereotypes, defensive xenophobic attitudes toward migrants, and neo-colonial reflexes. The cherry-picking of refugees and trafficked persons may contradict the inclusive and human rights-oriented claims associated to the idea of embracing vulnerability.

Vulnerability is a weak dispositive. Apparently, all screening, identification, reception, referral, adjudication, and reparation mechanisms revolve around the Vulnerable Subject, who has overthrown the Liberal and Autonomous one as the rights-holder. In fact, vulnerability is the key for the inclusion of "aliens" in the social body of EU member states. However, the definition of what a vulnerable person is depends on the multilayered legal practice of states and the EU. At the end of the day, a vulnerable person is the one the state wishes to include and integrate. Our societies need to engage and absorb newcomers. It is a sign of vitality and strength. It is also a symptom of vulnerability—we have seen that the two dimensions are not mutually exclusive. The move of the state toward migrants, refugees, people in distress and precarious humanity is underway, although inconsistently and in forms that the legal discourse struggles to handle. Indeed, despite the human rights rhetoric placing the (vulnerable) individual with their dignity and entitlements at the center of the scene, still, in the European societies, the collective—institutions, associations, professions, civil society organizations—has a role to play. The operational concept of vulnerability tells more of the welfare system's scope and efficiency in a state than of the inherent subjectivity of the individuals. It reflects its political and socioeconomic priorities and biases. Ultimately, a vulnerable subject is still a person, that is, a body and a knot in a social network. There are obligations in their regard that must be fulfilled, namely positive obligations that require responsive institutions and an active state. To meet the needs of vulnerable persons, a purely defensive attitude is useless. The states and the EU have to develop a pro-active drive toward innovation and transformation.

The vulnerability language, in this sense, reflects the potential evolution of the welfare state. Here, however, lies the ambiguity of this language, or perhaps its smartness. It apparently assigns vulnerable people with the task of steering—through passivity and "resilience"—the necessary transformations that European

societies have to undergo, not to disclose that the driving force in recognizing and operationalizing vulnerability is still the collective, the institutional networks of solidarity, the good old welfare state. Something that the neoliberal mantra cannot admit.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

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