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Author: Magdalena Półtorak

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European Agenda on Migration Towards Vulnerable Persons

MAGDALENA PÓŁTORAK¹

ORCID: [0000-0002-0712-6509](https://orcid.org/0000-0002-0712-6509)

University of Silesia in Katowice

The purpose of the paper is to analyse the European Agenda on Migration from the perspective of people who, for some reason, are susceptible to harm or have found themselves in a challenging situation (i.e. are “vulnerable”), and answer the question of whether the Agenda has taken notice of this issue in any way.

The analysis proceeds in five parts. It begins by outlining the complexity of vulnerability with particular emphasis on the role of the adopted perspective and the situation of migrants. Next, it describes the EAM objectives in terms of vulnerable persons. On the basis of several communications, proposals, working documents and reports that the EU has formulated since May 2015, the Agenda’s theoretical assumptions have been compared with their implementation in practice. Part four attempts to answer whether the influence of the COVID-19 pandemic on the situation of vulnerable migrants has been reflected in EU operational documents. The final part presents the New Pact on Migration and Asylum (as the latest achievement in the discussed area) with particular attention paid to vulnerable persons. The research was based predominantly on official EU documents, binding and non-binding, and the latest literature on the subject.

Key words: European Agenda on Migration, vulnerable persons, migrants in vulnerable situations, New Pact on Migration and Asylum

Introduction

The fifth anniversary of the European Agenda on Migration² (hereafter: EAM or Agenda) adoption provides an adequate opportunity to assess the EU “strategy” of dealing

¹ Contact: [magdalena.poltorak@us.edu.pl](mailto:magdalenapoltorak@us.edu.pl)

² *A European Agenda On Migration, Brussels*, 13.5.2015 COM(2015) 240 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf (Accessed: 14.09.2020).

with the refugee-migration crisis quite objectively³. Quite because the European Union faced many other problems at the same time, and some said that it has never experienced a similar situation before⁴ (i.e. Dinan et al. 2017, Barcik and Półtorak 2018; Luo 2019; Ferrera and Burelli 2019; Smith 2019; Martin et al. 2020). What is more, in 2017, the *White paper on the future of Europe and the way forward*⁵, setting out five possible scenarios for the development of the situation in the EU, was adopted. Nevertheless, hardly anyone believed that Brexit would become a fact, the crisis in Syria (and the Middle East) would escalate significantly, and that real actions would be taken to eradicate climate change and global warming. Even more so, probably no one anticipated that the world would have to face a global pandemic that COVID-19 turned out to be.

While it is evident that each crisis somehow affects individuals, the impact is particularly strong on those who are considered “weaker”. Moreover, if crises overlap, the realisation of the most fundamental human rights is questioned even more.

The purpose of the paper is to analyse the EAM (formally – the Communication of the European Commission⁶) from the perspective of people who, for some reason, are susceptible to harm or have found themselves in a challenging situation (i.e. are “vulnerable”) and answer the question of whether the Agenda has taken notice of this issue in any way. Still, given the current pandemic situation, it would be inexcusable to focus only on program objectives without considering their actual realisation, especially in such specific circumstances that dramatically impact vulnerable persons.

My analysis consists of five parts. I begin by outlining the complex nature of vulnerability with particular emphasis on the role of the adopted perspective and situation of migrants. Then I move on to analysis of the EAM objectives in terms of vulnerable persons. Further, on the basis on the EU operational documents, I check whether or not (and if so, how) the Agenda’s theoretical assumptions are reflected in practice. Next, I attempt to answer whether the influence of the COVID-19 pandemic on the situation of vulnerable migrants has been reflected in the EU *acquis*. Lastly, I present the general objectives towards vulnerable persons formulated in the *New Pact on Migration and Asylum* (as the EU latest achievement in discussed area).

My research is based predominantly on official EU documents, both binding and non-binding, as well as the latest literature on the subject. For the conducted analysis

³ Fascinating reflections on the dispute over immigration into Europe can be found in Harari (2018: 186–187), who proposes to look at this phenomenon as a highly conditional arrangement, and the need of focusing around these same conditions during discussions between supporters and opponents of mass border crossings.

⁴ However, one must remember the situation with the refugee crisis during the war in the former Yugoslavia.

⁵ *White paper on the future of Europe*, https://ec.europa.eu/commission/future-europe/white-paper-future-europe_en (Accessed: 14.09.2020).

⁶ The communications of the Commission are so-called atypical acts (not provided for by the Treaties), which generally present new policy programmes.

the legal-dogmatic method was crucial, however, to verify to what extent the theoretical assumptions of the EAM towards vulnerable persons were reflected in practice I have used the comparative method as well, compiling successive documents (such as communications, proposals, working documents and reports). The research sample consisted of more than twenty operational documents from 2015–2020, adopted by EU institutions to implement the objectives of the Agenda, in which the term “vulnerability” has appeared.

The complexity of vulnerability

Before analysing the content of the EAM, it is necessary to explore the concept of “vulnerability”. I will also explain why I have chosen to deal with it in the context of migration and the Agenda.

First of all, it is crucial to emphasise that “vulnerability” in general is an exceptionally nuanced phenomenon. Depending on the adopted research perspective, the context in which it is examined, and finally – the consequences that it entails, the vulnerability can be treated both as a kind of “blessing” (e.g. when it facilitates access to granting asylum procedures or solutions), and a “curse” (e.g. when it causes stigmatisation correlated with dependency, weakness etc.). This feature may also be a source of abuse, which I discuss later on in the article.

In the opinion of Constanin Hruschka and Luc Leboef (2019), there is no universal or clear-cut definition of “vulnerability” even though the terms “vulnerability” or “vulnerable persons” are used in legal instruments (including EU’s) – but this regulatory framework does not provide its precise definition. One can agree, however, that there is a consensus that being “vulnerable” means: being able to be easily physically, emotionally or mentally hurt, influenced or attacked (Cambridge Dictionary), weak and easily hurt physically or emotionally (Oxford Dictionary); someone who is vulnerable is weak or easy to hurt physically or mentally (Macmillan Dictionary). Moreover, it is commonly agreed that formulating more detailed definitions can be done by indicating specific groups of people or existing circumstances. For instance, in the majority of the EU documents, the term “vulnerable person” refers to minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, and persons who have been subjected to torture, rape or other severe forms of psychological, physical or sexual violence and victims of trafficking⁷. Nevertheless, as the term has its origin in the Latin term *vulnus* (which means “wound”) (Turner 2006), each of the definitions mentioned above seems to be correct, acceptable and fully reflect the essence of the concept. It should also be emphasised that the EU institutions have started using the term “vulnerable” in

⁷ EC Glossary, https://ec.europa.eu/home-affairs/e-library/glossary/vulnerable-person_enhttps://ec.europa.eu/home-affairs/e-library/glossary/vulnerable-person_en (Accessed: 14.09.2020).

a different context too – i.e. referring to border protection against incoming migrants (K. Aas and H.O.I. Gundhus 2015: 9–10).

Lourdes Perroni and Alexandra Timmer (2013: 1058) stress that there is some paradox in “vulnerability”, which is manifested primarily by the fact that this category is both universal and specific. On the one hand, as “embodied beings, we are all vulnerable, but we experience this vulnerability uniquely through our bodies. On the other hand, harm and suffering feature centrally in most accounts of vulnerability”. It should also be emphasised that harm may take various forms: bodily, moral, psychological, economic, institutional etc. As Martha Albertson Fineman has rightly remarked (2008–2009: 9), the experience of vulnerability “is greatly influenced by the quality and quantity of resources we possess or can command”.

Therefore, it can be observed that “vulnerability” does not function as a stand-alone feature and, being always contextual, cannot be determined *in abstracto*. In other words, under certain circumstances, it is a kind of “addition” to another feature or circumstances that can be quite easily demonstrated or proven. While adopting such an approach, however, one should bear in mind that creating a specific catalogue of vulnerable persons can result in favouring one group over another. Fineman (2004) objects to the use of the term “vulnerability” only with respect to individual groups. Instead, she proposes it should be perceived as a “universal, inevitable, enduring aspect of the human condition” and calls for the state’s proper role to respond to it. What is more, Perroni and Timmer proved (examining the ECtHR case law) that group vulnerability reasoning entails some risk of essentialism, stigmatisation, victimisation and paternalism that consequently leads to the misleading conclusion that these groups are the only, “true” and quintessential vulnerable subjects in human rights law whereas “normally” people are self-sufficient, independent, and autonomous (Perroni, Timmer 2013). This way inequality is legitimised.

Last but not least, crises show that for example migrants (in a broad sense⁸) “have learnt” how to “manifest” their vulnerability to facilitate getting help or increase the probability of being granted asylum. As demonstrated by Jane Freedman (2019: 2, 8–11) in the case of women it is for example: travelling alone, “intentional” pregnancy or placing women at the front and on the outside edges of the boat full of refugees while crossing the sea. Such situations, undoubtedly, indicate some gaps or weakness of the vulnerability determination system.

This proves there is a need for in-depth research to determine whether “vulnerability” is not abused and its purpose – not distorted. Nevertheless, as Magdalena

⁸ Since no universal and legal definition of “migrant” has been given, I refer here to any person outside a state of which they are a citizen or national, particularly forced migrants. However, it is essential to bear in mind problems with distinguishing between refugees and economic migrants, which in turn is important because of specific entitlements of refugees in international law. See i.e.: <https://edition.cnn.com/2019/10/09/africa/fake-refugees-kenya-intl/index.html>, <https://www.nbcnews.com/news/world/europe-grapples-distinction-between-refugees-economic-migrants-n965161> (Accessed: 6.11.2020).

Kmak shows (2015), implementation of asylum policy and control practices of the state's administration sometimes merely "force" migrants to adapt to the ideas of the "real" refugee and show they deserve protection, so both sides of the coin should be taken into account.

As for the rationale for my decision to examine vulnerability in the context of migration and EAM, I refer to ECtHR⁹, UNHCR¹⁰ and Lyra Jakuleviciene (2016), according to whom vulnerable persons can be perceived as a new sub-group of asylum seekers. She has based her assumption on the Stockholm Programme (2010), nevertheless – as it will be described briefly in the next part – EU "asylum packages" consequently follow this path. Secondly, the International Organisation on Migration (hereafter: IOM) has constructed the migrant vulnerability model that refers to

migrant or group of migrants exposed to or with experience of violence, exploitation or abuse within a migration context and with limited capability to avoid, resist, cope or recover, as a result of the unique interaction of individual, household/family, community and structural characteristics and conditions.

It explicitly "does not refer to refugees, asylum seekers or stateless persons, for whom specific protection regimes exist under international law", however, it can be applied to "victims of trafficking in persons and smuggled migrants, who also benefit from specific protection regimes under international and national law"¹¹. Furthermore, due to the frequent "overlapping" of these phenomena, the perspective suggested by the IOM seems to be appropriate for solutions such as the EAM as well. As for the framework of OHCHR and Global Migration Group (GMG) Principles and Guidelines (2017: 5), the concept of "migrants in vulnerable situations" has been developed, and it stands for the "persons who are unable virtually to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer's heightened duty of care". Finally, the concept of vulnerability in the European asylum procedures in the context of incoherent approaches to the protection of these asylum seekers in national asylum processes has been identified by European Council on Refugees and Exiles (ECRE 2017).

Thus, currently "vulnerability" seems to be "a useful notion of accounting for the varied but nonetheless concrete circumstances faced by migrants, asylum seekers and refugees" (Hruschka, Leboef 2019). Nevertheless, it should be made clear that, as OHCHR-GMG Principles and Guidelines (2017: 5–6) reads, "migrants are

⁹ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, 251 (2011). The assessment of European courts' interpretation of vulnerable migrants' rights, based on a combination of empirical research, interviews, and theoretical analysis was made by Moritz Baumgärtel (2019).

¹⁰ UNHCR *Resettlement Submission Categories*, <https://www.unhcr.org/558bff849.pdf> (Accessed: 6.11.2020)

¹¹ IOM, *The Determinants Of Migrant Vulnerability*, https://www.iom.int/sites/default/files/our_work/DMM/MPA/1-part1-thedomv.pdf (Accessed: 14.09.2020).

not inherently vulnerable”, but in their case, due to multiple and intersecting forms of discrimination, inequality and other factors, full enjoyment of human rights is limited. So, ensuring them access to appropriate protection always requires all involved actors’ awareness of possible circumstances and an individual assessment. In this regard I am going to investigate the EAM.

Vulnerable (persons) in the EAM

Before moving on to the EAM objectives towards vulnerable persons, it should be analysed what role vulnerability has principally played in the human rights context so far.

It is confusing and symptomatic that even when it comes to “human rights lawyers” it is likely that the correlation between these two concepts is slightly controversial and complicated. This is mostly because when considering whether human rights are so construed to protect the most vulnerable people, both (affirmative and negative) answers seem correct. As Anna Gear (2007) points out, on the one hand, the whole human rights system is founded on a concern for embodied vulnerability and the liberal legal subject has been imported into the human rights structure: archetypically, this is a rationalistic and quasi-disembodied subject. However, on the other hand, referring to feminist legal theory, she argues that the many groups that do not fit the liberal archetype, i.e.: women¹², dispossessed, people of colour, and (particularly!) asylum seekers “fall outside the scope of the purportedly universal protection of human rights” (Perroni, Timmer 2013: 1061). The conclusion is, therefore, that despite guarantees within the framework of the human rights protection system, they require at least theoretical frames of “additional” particular legal protection, and political tools (such as the EAM in the case of seeking-asylum migrants¹³) can provide an adequate solution to this paradoxical situation¹⁴.

The EAM is composed of the Introduction and three parts (Immediate actions, Four pillars to manage migration better and Moving Beyond), with the *clou* of the document (given a certain “vision” of EU action) being primarily Part III. Focusing only

¹² On the other hand, J. Freedman (2019: 1, 9) points out that whilst categorisation of women “*a priori* as <vulnerable> can increase the chances of protection within the EU asylum and refugee systems, the impact on those who are classified as vulnerable can be felt as forms of symbolic violence which reduce agency and autonomy”. A similar position is presented by E.C. Gilson, who argues that being “labelled” as “vulnerable” can suggest dependency, weakness, susceptibility to harm, and violability (Gilson 2016).

¹³ According to OGCHR-GMG (2017: 6–7), in the concept of “migrants in vulnerable situations” these situations can be associated with reasons for leaving the country of origin, or with situations that migrants encounter during their journey and at a destination and associated with a person’s identity, condition or circumstances.

¹⁴ Although the doctrine has also taken the opposite view, see i.e. K. Smith and L. Waite (2019) or H. Sözer (2020).

on the English-language version of the document¹⁵, references to vulnerable persons can be found in many places and contexts.

To begin with, it is legitimate to invoke part I “Immediate actions”, which was intended to be an answer “to the need for swift and determined action in response to the human tragedy in the whole of the Mediterranean”. Here it has been noticed that it is vulnerable migrants who in particular become victims of smuggling¹⁶ and human trafficking, so the EAM states that “[t]he criminal networks which exploit **vulnerable migrants**¹⁷ must be targeted”. However, the EAM at the same time emphasises that

migrant smuggling and trafficking are two diverse yet interlinked criminal activities perpetrated by criminal networks. The difference between the two is that in the former, migrants willingly engage in the irregular migration process by paying for the services of a smuggler in order to cross an international border, while in the latter they are the victims, coerced into severe exploitation which may or may not be linked to the crossing of a border. In reality, the two phenomena are not easy to disentangle¹⁸ as persons who voluntarily start their journeys are also **vulnerable to networks** of labour or sexual exploitation¹⁹.

The issue of vulnerable persons within the context of immediate actions was raised with reference to resettlement. The EAM provides that

the EU has a duty to contribute its share in helping displaced persons in clear need of international protection (...) Such **vulnerable people** cannot be left to resort to smugglers and traffickers’ criminal networks. There must be safe and legal ways for them to reach the EU²⁰.

¹⁵ Research on other language versions requires more in-depth analysis than just the literal layer of the document.

¹⁶ However, one should bear in mind that the stereotypical perception of the abuse of migrants by networks is mostly justified in the case of Libya and the Central Mediterranean route, meanwhile there is a voice in the doctrine with regard to Syrians that indicates “smuggling’s moral economy” and the conception of the “good smuggler” (Achilli 2018; Achilli, Abu Samra 2019). In turn, Anna Triandafyllidou (2018) explains the relationship between migration control policies and migrant smuggling and the social and moral nature of agent-customer transactions.

¹⁷ Emphasis added.

¹⁸ So, they need to be tackled in a consistent manner. It seems that raising awareness of the staff (in particular border guards, immigration officials etc.) is crucial here, to give the “status” of a vulnerable person in appropriate time. It is worth remembering that the EU has already defined minimum rules on the definition of crimes and penalties in human trafficking in the Directive 2011/36/EU.

¹⁹ Jane Freedman (2019: 4) points out the extremely tough situation of women in this context.

²⁰ According to Proposal COM/2016/0468 final term “vulnerable persons” to establish a Union Resettlement Framework means women and girls at risk; children and adolescents at risk, including unaccompanied children; survivors of violence and/or torture, including based on gender; persons with legal and/or physical protection needs; persons with medical needs or disabilities; or persons with socio-economic vulnerability. However, EC in Recommendation on enhancing legal pathways for persons in need of international protection of 2017 the “vulnerability” category refers only to “groups of migrants from Libya” (C(2017) 6504).

Nevertheless, as stressed above, particular attention should be paid to part III: pillars to manage migration and Europe's duty to protect: a strong common asylum policy.

In the framework of the coherent implementation of the Common European Asylum System (CEAS) working with the Member States and European Asylum Support Office (EASO), the Commission will give further guidance to improve standards on reception conditions and asylum procedures to provide the Member States with well-defined and simple quality indicators, and reinforcing the protection of the fundamental rights of asylum-seekers, paying particular attention to the needs of **vulnerable groups**, such as children. In order to look at the specific **vulnerabilities of children**, not only those having a migrant's background, the Commission will develop a comprehensive strategy to follow up on the Action Plan on Unaccompanied Minors (2011–2014) to cover missing and unaccompanied children.

First of all, it should be stressed that the escalation of the so-called migration-refugee crisis in 2015 revealed the need for in-depth CEAS reform. This resulted in the final adoption of seven proposals for: (1) a new Resettlement Framework, (2) a regulation to reform the Dublin system, (3) a regulation to amend EURODAC, (4) a regulation to establish the EU Agency for Asylum (replacing EASO), (5) a new regulation to replace the Asylum Procedure Directive, (6) a new regulation to replace the Qualification Directive and finally (7) proposed targeted modifications of the Reception Conditions Directive. The last three documents, in particular, deserve special attention on the part of vulnerable persons.

As Lyra Jakuleviciene (2016) pointed out, from the very beginning of the creation of CEAS, the EU has taken into account vulnerable persons' perspective. However, as the term "vulnerable" was in use *explicite* in the so-called second asylum package (ECRE 2017: 13–17), in the light of CEAS reform, the concept of vulnerability has slightly changed²¹.

It means that pursuant to Article 21 of Directive 2013/33/EU²²

The Member 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, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological,**

²¹ As stressed in the ECRE report (2017: 17) "The treatment of vulnerable groups in the EU has been one of the priority areas of the reform of the CEAS proposed by the Commission in 2016. Whereas many aspects of the 2016 Commission proposals have met with criticism from NGOs and the UNHCR, the changes proposed with respect to the position of applicants with special needs have been more positively received".

²² The in-force *Reception Directive* will serve here as an example, as it contains (among the existing second-asylum package documents) the broadest catalogue of vulnerable persons, reference to which is made in other EU documents. Emphasis added.

physical or sexual violence, such as victims of female genital mutilation²³, in the national law implementing this Directive”,

whereas the proposals for a new regulation (COM(2016) 467 final, and COM(2016) 466 final) and directive (COM(2016) 465 final) replace the term “vulnerable persons” respectively with “applicants in need of special procedural guarantees”, “persons with special needs”, “beneficiaries of international protection who have special needs”, and “applicants with special reception needs”. However, this does not change the fact that the categories of persons (with special needs) in principle²⁴ have remained unchanged (Póltorak 2018).

Constanin Hruschka and Luc Leboef (2019) stress that this approach represents a shift from a categorisation among refugees, migrants and asylum seekers (who is ‘vulnerable?’) to a procedural approach (how are vulnerabilities being addressed?), so “vulnerability” becomes a screening tool that allows for improved identification of the individual needs of asylum seekers, potential returnees and beneficiaries of international protection.

According to the ECRE report (2017), Member States seem to apply their own interpretation of the concept of “vulnerability”, which consequently leads to severe discrepancies among domestic legal regimes regarding who constitutes vulnerable asylum seekers. Kate Smith and Louise Waite (2019) go a step further and name it explicitly “states’ narrowing the protection space for refugees”. Finally, Hande Sözer (2020) noticed a recent shift from “forced migrants’ vulnerability” to (newly) “vulnerable forced migrants”, that in practice leads to provide humanitarian assistance only to segments of forced migrants (because ‘the vulnerable’ becomes an unevenly distributed label). Presumably, these inconsistencies could be reduced when cooperation between the Member States and European Asylum Support Office (EASO) is intensified²⁵.

Since the adoption of the EAM in May 2015, the Commission (as the EU executive) has formulated several communications, proposals, working documents and reports²⁶. This study’s volume excludes an in-depth analysis of all documents, so the article presents only selected ones. Nevertheless, this part of the research aims to compare the theoretical assumptions of the EAM towards vulnerable persons with actual EU activities over the last five years.

²³ Emphasis added.

²⁴ The Parliament’s position on the Reception Conditions Directive reform advocates for inclusion to the list of categories with specific reception needs: persons with post-traumatic stress disorder, LGBTI persons, non-believers, apostates and religious minorities among others (European Parliament 2017).

²⁵ At EASO official website one can find – among others – *Practical Guide on age assessment* and *Practical Guide on Family Tracing* and information that among agency activities are: thorough training, quality support and country of origin information. Based on: <https://easo.europa.eu/asylum-support-training/vulnerable-groups> (Accessed: 6.11.2020). However, the ECRE report (2017: 29–32) describes in details EASO *Operating Plans* (Greece and Italy) or *Support Plans* (Cyprus and Bulgaria).

²⁶ *European Agenda on Migration* – Legislative documents, https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en (Accessed: 20.09.2020).

As for the situation of vulnerable persons, it should be emphasised that the EU from the very beginning paid particular attention to **women** (including pregnant ones)²⁷ and **children** (in particular – unaccompanied minors) and this reference usually appeared collectively and in many different contexts, which I will present in chronological order.

In 2015 these two categories were distinguished with regard to migrant smuggling (COM(2015) 285 final), where the necessity of assistance and enhanced protection of women and children (as particularly vulnerable groups) was explicitly stressed. The second area was connected with the processes of identification, relocation and functioning of the hotspots in Greece, and here respectively: avoidance of coercion during fingerprinting (SWD(2015) 150 final), (their) prioritisation for relocation (COM(2015) 286 final, COM(2015) 450 final) and improving their reception conditions (COM(2015) 678 final).

The worsening situation in Syria in 2016 revealed the need of ensuring by the EU both: the basic assistance (such as food, water, shelter and education) for the most vulnerable people on-site, as well as humanitarian aid for refugees living in Turkey (according to the EU-Turkey Joint Action Plan), which should focus in particular on child protection, women's health, education in emergencies (also informal), cash transfers and non-food items (tents etc.). Simultaneously, the EC stressed the necessity for a strengthening of identification of the most vulnerable groups in hotspots (COM/2016/0231 final)²⁸. Again, attention was drawn here to smugglers and human trafficking connected with specific exposure of women and children (COM/2016/085 final). As for the relocation and resettlement, the EC stressed that "almost no Member State had reported any credible capacity", therefore, cooperation with EASO, Frontex and Europol is necessary to develop several tools (such as information leaflets, pre-departure information, matching tools etc.) for the sufficient identification of the most vulnerable cases (COM/2016/0165 final)²⁹.

Reference to women and minors (as vulnerable migrants) appeared in 2017 in the context of migration on the Central Mediterranean route. The key demands of the EU institutions were: strengthened anti-smuggling actions to provide actual protection and Assisted Voluntary Return opportunities, especially those who were forcibly displaced to areas where is no real governance, engage with the Libyan

²⁷ However, it should not surprise since links between gender, migration, violence and insecurity issues have already been shown in the studies many times (Marchand, 2008; Freedman, 2012; Freedman, Kivilcim and Ozgur Baklacioglu, 2017).

²⁸ J. Freedman (2019: 8) justifiably remarks that "since the EU-Turkey Agreement of March 2016, only those who are formally identified as vulnerable will be allowed to move from the islands on to the Greek mainland to have their asylum claim heard". As a consequence, being "labelled" as vulnerable is "hugely valuable in allowing an individual to escape from the geographical restriction and (...) to benefit from the better reception conditions on the Greek mainland".

²⁹ However, the main problem seems to be lack of staff working on identifying vulnerability and understanding the contextual and multilayered nature of vulnerability phenomenon itself. *Ibidem*.

authorities to ensure that the conditions in centres for migrants are improved and step up cooperation with IOM and UNHCR to ensure access to international protection (JOIN/2017/04 final). What is more, a separate *EC Communication on the protection of children in migration* emphasised that especially in Afghanistan and Syria there is a significant need for providing humanitarian assistance, quality education with equal access for girls and boys, and sensitisation to sexual or gender-based child abuse (COM/2017/0211 final). Also, it was stressed that although hotspots undoubtedly contributed to more effective identification of vulnerable cases, the reception conditions and capacity both in Greece and in Italy need permanent improvement (i.e. support of the Child Protection Officers etc.). Attention was drawn here to the situation in migrant detention centres in Libya too, and promote alternatives to detention including by creating dedicated accommodation for vulnerable persons, especially families with children (COM/2017/0558 final).

The implementation of the EAM in 2018 predominantly focused on help programmes for North Africa under the Asylum, Migration and Integration Fund (AMIF) (COM(2018) 250 final), that has played an essential role in improving asylum systems and strengthening reception capacity in the Member States, in particular when taking into consideration places and protection programmes adapted for unaccompanied minors (COM(2018) 464 final).

For example, since 2017, 14,600 children in Libya have received learning supplies (COM(2018) 798 final). At the same time, with regard to the Greek authorities the necessity for improving conditions in the hotspots, addressing the needs of vulnerable groups and unaccompanied minors was articulated (COM(2018) 301 final); however, it was underlined that the hotspot approach has been crucial in helping to stabilise the situation on the Greek islands, due to the action focused on improving living, qualified personnel and enhancing child protection (COM(2018) 798 final).

In 2019 the axis of the EU's activities was, among others, helping with voluntary returns and accelerating evacuations, in particular – minors. Simultaneously, owing to the EU Facility for Refugees in Turkey, over 410,000 students attending school received support (COM(2019) 126 final). Finally, concerning the Western Mediterranean route, Morocco (as a country of both transit and destination) received help for providing protection and access to legal assistance with a particular focus on the rights of unaccompanied minors (COM(2019) 481 final).

Apart from pointing to women and children, the documents implementing the EAM's objectives towards vulnerable persons have formulated other categories rather broadly. In other words, they generally referred to the vulnerable groups/asylum-seekers/refugees/persons/people in the context of: improving the availability and quality of reception centres on the Eastern Mediterranean route and cash transfers received within the implementation of the EU-Turkey statement (COM(2017) 669 final), preparation of operation manuals to improve the consistency in the definition of vulnerability and the EU support to Lebanon and Jordan (COM(2018) 250 final),

material and medical assistance in detention centres and in host communities in Libya, cooperation with Member States and the UNHCR for the purpose of evacuation (and swift resettlement) of the most vulnerable persons from Libya to Niger, migration management in North Africa (COM(2018) 301 final), successful resettlement programmes along the Central Mediterranean route and providing direct medical assistance to vulnerable migrants in Libya (COM(2018) 798 final), necessary support from programmes financed by the EU Emergency Trust Fund for Africa and the UNHCR Gathering and Departure Facility (COM(2019) 126 final, COM(2019) 481 final), covering the basic needs of the most vulnerable refugees and migrants in Bosnia and Herzegovina, supporting vulnerable people in Libya within Emergency Transit Mechanisms and finally – support to vulnerable communities and displaced populations in Sudan, Ethiopia, and the Great Lakes region (COM(2019) 481 final).

The above mentioned brief overview of selected EU actions under the EAM implementation, allows for making an observation that the problem of vulnerability was treated comprehensively and appeared in many different contexts, starting with migrant smuggling, the CEAS reform and enhancing legal avenues to Europe, through relocation, resettlement and returns, to such precise issues as: fingerprinting, hotspots, protection of children, humanitarian aid, AMIF and the *EU-Turkey statement*. Therefore, attention was drawn here to vulnerable persons' special needs, identification, cash transfers, basic support, and medical assistance. Finally, although the nomenclature under the proposed reform of the CEAS has changed from "vulnerable persons" to "applicants with special needs" (what seems to go hand in hand with the universally accepted conception of "migrants in vulnerable situations" and a more procedural approach), the EU still uses specific indications. As it was emphasised most frequently, they include: women and children (in particular – unaccompanied minors), disabled, elderly people, refugees (mainly – Syrian), asylum-seekers and (African) communities.

The protection of vulnerable migrants in the EU during the COVID-19 pandemic

There is no doubt that the most significant EU activity in implementing EAM was during the first three years. In 2019 and 2020, only three working documents were adopted, with the ones from 2020 only relating to the COVID-19 only. The purpose of this part of the paper is to check whether or not, in the face of a global pandemic, the EU has paid attention to vulnerable persons' particular needs.

In the middle of April 2020, the Commission adopted the *Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*³⁰. Although non-binding, this document is a fairly comprehensive

³⁰ 2020/C 126/02, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0417\(07\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0417(07)) (Accessed: 20.09.2020)

solution, and the indication of vulnerable persons appears here in relation to each “regulated” issue. Generally, its main purpose is to reconcile existing protection guarantees with the need to keep social distance. According to the provisions referring to asylum, the Commission recommends that even if face-to-face contact between the parties is hampered – applicants must be able to apply for protection, and “particular attention should be paid to the situation of **vulnerable persons**³¹, families and minors (including unaccompanied minors)”. Furthermore, the EC emphasises well-known universal recommendation on treating all applicants for international protection with dignity and being able to access and exercise their fundamental rights.

As for Dublin interviews, the Commission recommends where necessary and as far as possible to conduct it remotely or even omit it, if there is suspicion of COVID-19. However, in these circumstances, before a decision is taken, the applicant must have an opportunity to submit further relevant information and “Member States should prioritise the processing of cases concerning unaccompanied minors, other **vulnerable persons**, or family unity”.

In turn, as for material reception conditions, the Guidance stipulates that when it comes to newly-opened collective reception facilities (i.e. emergency shelters), Member States should ensure appropriate social distancing between applicants, as well as isolation of those at risk and paying “particular attention to **vulnerable groups**” (including persons with disabilities, elderly or residents with existing health concerns). Moreover, “**vulnerable groups** should also be given special protection, for example, during the delivery of food, pocket money payments etc.”. Finally, during the COVID-19 pandemic, national authorities should particularly take into consideration health (including mental health) of detained vulnerable applicants.

The EC Guidance refers to return procedures as well. Here, bearing in mind the necessity of preventing and limiting the spread of COVID-19 in Member States, health protection measures (such as social distancing and other precautionary measures) should be applied in a proportionate and non-discriminatory manner to all illegally staying third-country nationals “with particular attention paid to the situation and needs of **vulnerable people**”. As for detention or other appropriate facilities, Member States should respect “the right to family life in case of couples and families with children, as well as the situation of **vulnerable people**”.

The second document worth noting was the *European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP))*³². It says that the COVID-19 pandemic impacts all human beings; however, it is a particular threat to vulnerable groups and people in vulnerable situations and includes migrants in this category (par. 4). At the same time, it calls the Commission and the Member States to “prioritise aid and crisis-mitigation

³¹ Emphasis added.

³² 2020/2616 (RSP), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html (Accessed: 20.09.2020)

measures for the most **vulnerable citizens** (...) who all run the greatest risk of being infected with COVID-19 but also suffer the most from its economic effects” and stresses the importance to make aid available to victims of violence (par. 35).

This is how the EU’s assumptions towards vulnerable persons look “on paper”; in reality, their disadvantageous situation (which was foreseeable) was further compounded due to COVID-19. First of all, sufficient identification of vulnerability – something that is crucial for vulnerable persons, since it determines the further course of all procedures and actions – was often impossible due to restrictions, remote contact and staff shortages. However, even if it was done successfully, as Jessica Schulz (2020) noticed – subsequent decisions of the authorities thwarted it³³. The problem with identification proved to be particularly serious concerning unaccompanied minors – in this situation, every month is crucial since the age of 18 means the end of protection. As a consequence, children under 18 not identified in due time while staying in overcrowded centres with foreign adults, often become victims of violence (Schulz 2020).

Global lockdown made it very difficult (or sometimes actually impossible) to obtain a residence and work permit, which has proved to be particularly damaging for migrants-caregivers as well. In the reality of widespread isolation, the loss of work, hampered access to health care or displays of racism towards people who perform daily activities in favour of the so-called “highest risk” groups, carry a risk of “sick society”, especially when national health care systems prove to be inefficient (Marchetti 2020).

Furthermore, especially vulnerable migrants were significantly affected by issues such as: limited possibilities of undertaking treatment, staying in reception conditions that do not provide efficient health care, violence prevention and multiplied direct discrimination, fear of strangers and sometimes even hatred towards them³⁴. In the light of the above (and difficulties that during lockdown affected non-migrants as well), the implementation of the objectives concerning integration programs, language learning in the host country or remote education of children turned out to be “law in books” only.

Instead of conclusions: New Pact on Migration and Asylum towards vulnerable persons³⁵

Conducted research affords the conclusion that both in the EAM and in documents adopted for its implementation during the last five years, the vulnerable persons’ situation and needs have been explicitly included; however, the reality (as usual) follows

³³ I.e. identified vulnerable persons (including families and children) were forced to sleep in public spaces (parks, squares) in Athens.

³⁴ I.e. WHO, *Apart Together survey. Preliminary overview of refugees and migrants self-reported impact of COVID-19*, <https://www.who.int/publications/i/item/9789240017924> (Accessed: 28.12.2020).

³⁵ *A New Pact on Migration and Asylum*, COM(2020) 609 final, Brussels, 23.9.2020.

its own rules. Moreover, the situation of vulnerable persons (severe and complicated by definition) in 2020 was compounded by a pandemic. Nevertheless, simultaneously (and a little bit paradoxically as well) it seems that COVID-19 has contributed to vulnerable persons being treated more seriously.

After years of the functioning of the asylum and migration system in kind of “emergency mode”, in September 2020³⁶ the Commission proposed a *New Pact on Migration and Asylum* (hereafter: Pact)³⁷, which the EC head Ursula von der Leyen called a “European solution... to restore citizens’ confidence”³⁸. The New Pact basically builds on the 2016 reform by adding additional elements to ensure a balanced, common framework bringing together all aspects of asylum and migration policy. It is based on the balance between solidarity and responsibility.

This clearly political document has also proved not to be indifferent to the needs of vulnerable persons. In the framework of the new procedures to establish status swiftly on arrival in the case where securing necessary guarantees is unfeasible, the most vulnerable will be able to take advantage of the exemption from border procedures (par. 2.1)³⁹. A common framework for solidarity and responsibility-sharing includes taking into account the specific situation of particularly vulnerable groups, especially in the context (and necessity) of relocation (par. 2.2) and resettlement (par. 2.4). Nevertheless, it should be considerably stressed that the Pact – which, *nota bene*, is entirely consistent with the previously mentioned documents and the obligation under the *UN Convention on the Rights of the Child* – gives the needs of children in migration priority, regarding them as “particularly vulnerable”. It means that tailored processes should reflect the particular needs of children at every stage. Families with children under 12 and unaccompanied children should be exempt from border procedures. The definition of family will be enlarged (for family reunification by including siblings and families formed in transit countries). The Pact also gives priority to the relocation of unaccompanied children and appointing special representatives for them. The above is also followed by an assurance of receiving a higher financial contribution from the EU budget for the Member States that will participate in search and rescue operations of vulnerable persons (par. 2.4).

Reference to vulnerable persons has also appeared in the context supporting host countries and humanitarian evacuation of the most vulnerable from Libya (in the

³⁶ The publication of a *New Pact on Migration & Asylum*, announced by the von der Leyen Commission in December 2019, was postponed due to the COVID-19 emergency.

³⁷ Speech by Vice-President Schinas on the New Pact on Migration and Asylum, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1736 (Accessed: 25.09.2020).

³⁸ A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 (Accessed: 25.09.2020).

³⁹ Relevant information on countries’ mechanisms to identify vulnerable applicants in the case of exemption from border procedures was compiled by EASO (EASO 2020). By the way, it should be noted that a similar solution (however conditionally) has already been regulated in the recast Asylum Procedure Directive.

framework of Emergency Transit Mechanisms in Niger and Rwanda) (par. 6.2), as well as developing legal pathways to Europe and resettlement as a “tried and tested way to protect the most vulnerable refugees” (par. 6.6).

Summarising, there is no doubt that the Commission’s latest initiative is an expression of a well-thought out approach, makes the impression of consistency with the universal principles and guidelines referring to “migrants in vulnerable situations” and, unlike the proposed reform of the CEAS of 2016, treats the issue of migration and asylum comprehensively. What is more, in this regard the Pact (to some extent) resembles a global approach proposed in the UN New York Declaration for Refugees and Migrants of 2016 and the Global Compacts adopted as a result.

It is also clear that the Pact is an attempt to adopt all its components simultaneously and deserves special attention (since the Commission seems to conclude a lack of sufficient progress thereof in previous years). Bearing in mind, however, that now everything depends on the political will of particular authorities, one can only hope that the transposition of the *New Pact on Migration and Asylum* in Member States’ legal orders will be more coherent than before. It is difficult to deny the validity of Simon Behrman’s observation (2018: 57) that

[w]e are back to the same concerns that drove the development of international refugee law in the first half of the twentieth century. The refugee has become, even for those apparently most sympathetic to their plight, a problem to be managed, not a subject capable of seeking and demanding protection on their own terms.

Finally, as for using “vulnerability” with reference to the situation of migrants seeking asylum in the EU, it should be clearly emphasised that this approach is correct and may significantly improve access to the full exercise of human rights, provided that it is applied thoughtfully and only where justified, as not to lose its essence (empowering those susceptible to harm or in a challenging situation). Referring gently to Bhupinder Chimni’s findings (2004: 62) made on the Geneva Convention of 1951, it seems that “subjective perceptions of the State authorities” should be “substituted by the experiences of the refugee”, proved during an individual assessment, conducted according to the highest standards. Otherwise, any generalisations or “strategic” use of vulnerability by migrants itself, combined with the inconsistencies and gaps in the EU strategy for dealing with the migration and refugee crisis, can lead to the situation that a number of the potentially vulnerable persons will approach the number of all the others seeking refuge in the EU, making adopted solutions counter-effective. In this context, Moritz Baumgärtel’s (2019) statement that adequate protection of the rights of vulnerable migrants is a challenge for all actors involved: the courts, the legal representatives, European society at large, and European law itself, is fully justified.

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