

# VULNERABLE STATES, THREATENING MIGRANTS. THE PARADOXICAL END OF THE RIGHT TO ASYLUM.

Chiara Scissa\*

**Abstract.** *Vulnerability has been associated both to humans and non-humans to describe their internal or external exposure to risk and damage, assuming distinctive substantial and methodological characteristics. Whereas ethics and feminist studies explored the inherent and contextual vulnerability of individuals, development and peace and conflict scholarship generated precise sets of indicators and criteria to qualify vulnerable States and measure their level of fragility. This contribution explores a recent trend, where the European Union and its Member States claim to be vulnerable to the threat posed by irregular migrants to hide their unwillingness to manage migration. The current migration "crisis" at the EU-Belarus border seems to prove that such a political manipulation of vulnerability might lead to the paradoxical end of the right to asylum, where States are allowed to derogate from human rights law to protect their borders against irregular migrants.*

**Abstract.** La vulnerabilità viene associata sia all'essere umano che al non-umano al fine di descrivere l'esposizione interna o esterna a rischi e danni, assumendo caratteristiche sostanziali e metodologiche differenti. Mentre gli studi femministi ed etici hanno esplorato la vulnerabilità inerente e contestuale degli individui, la dottrina sullo sviluppo e gli studi su pace e conflitto hanno generato precisi set di indicatori e criteri per qualificare gli Stati vulnerabili e misurare il loro livello di fragilità. Questo contributo esplora una tendenza recente in cui l'Unione Europea e i suoi Stati Membri si dichiarano vulnerabili alle minacce poste da migranti irregolari per nascondere la mancanza di volontà di gestire la migrazione. L'attuale "crisi" migratoria al confine tra UE e Bielorussia sembra dimostrare che tale manipolazione politica della vulnerabilità possa portare alla paradossale fine del diritto di asilo tale per cui gli Stati potrebbero derogare dal diritto dei diritti umani per proteggere i propri confini dai migranti irregolari.

**SUMMARY:** **1.** Introduction. - **2.** Human vulnerability. - **3.** Vulnerability and the non-human. - **3.1.** The economic vulnerability of companies. - **3.2.** Climate and environmental vulnerability of territorial areas. - **4.** Precarious institutions and Vulnerable States. - **5.** EU Member States vulnerable to the threat of irregular immigration: The EU-Belarus case. - **6.** Conclusions.

## 1. Introduction.

«To adopt a word and use it means not only to take it, so to say, 'seriously' but also to make a choice, to situate it within a discourse, and – with reference to the legal, institutional, political and social contexts – within a field of forces, needs, interests, expectations, normative frameworks».<sup>1</sup>

What would happen if you heard an expression associating two concepts, which have never been associated before? For instance, what happened when you first found out about robots and their emotions?<sup>2</sup> How did you feel when you first read about the rights of rivers, trees and rocks?<sup>3</sup> I assume that some of you felt confused, others were eager to know more. Some others enquired about the implications of putting two opposed worlds together.

In this contribution, I bring an innovative example to the table, this one focusing on vulnerable States. As we will see, vulnerability has been widely explored in ancient and contemporary times as a quality inherent or contextual to human beings. However, vulnerability is a highly versatile concept, which has been applied also to non-human objects and entities. By analyzing the jurisprudence of the Court of Justice of the European Union (CJEU) on the matter, we will gather the main features, in terms of definition, methodology and criteria, at the core of the economic vulnerability of undertakings and the climate/environmental vulnerability of territorial areas within EU law. Finally, many fields of study – from development to peace and conflict studies, from security studies to international relations – focused on vulnerable or fragile States, namely those unable or unwilling to implement their core functions with regards to defend their borders and protect their own population. Recently, however, the Union and its Member States have been claiming their vulnerability to the threat of irregular immigration and reacted with restrictive and deterrence measures to safeguard their sovereignty. This new perspective comes with drastic repercussions for migrants and their rights. By illustrating the current migration “crisis” at the EU-Belarus border, this article argues that the EU’s political manipulation of vulnerability might lead to the paradoxical end of the right to asylum, where States are deemed vulnerable to the threat posed by migration flows and drastic human rights restrictions are justified to protect their borders from such an alleged menace.

## 2. Human vulnerability.

As accurately described by Marano, in the ancient Latin literature and philosophy, *vulnus* (name), *vulnerabilis* (adjective) and *vulnerare* (verb) were often used not only to refer to the physical wounds affecting the fragile human body, but they also defined defenseless animals and even address Jesus Christ.<sup>4</sup>

<sup>1</sup> PhD in Law at Sant’Anna School of Advanced Studies (Pisa, Italy). chiara.scissa@santannapisa.it My deepest gratitude to Prof. Francesca Biondi Dal Monte and Prof. Elena Vivaldi for their constant support.

T. Casadei, *La vulnerabilità in prospettiva critica*, in *Vulnerabilità. Analisi multidisciplinare di un concetto*, a cura di O. Giolo e B. Pastore, Carrocci Editore, 2018, p. 73. My translation from Italian.

<sup>2</sup> C. Schettini, *The Employment of Emotional AI in Healthcare*, in *The Yuan*, 18 January 2022, <https://www.the-yuan.com/213/The-Employment-of-Emotional-AI-in-Healthcare.html?fbclid=IwAR0ljz8dF9S-uoSbbyuz4QJUtsFmqOAB5wWGotWLFg7cwZ6-CbqPvzjepA>.

<sup>3</sup> Cyrus R. Vance Center for International Justice, Earth Law Center, International Rivers, *Rights of Rivers*, 2020, <https://3waryu2g9363hdvii1ci666p-wpengine.netdna-ssl.com/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf>; R. Nash, *Do Rocks Have Rights? Thoughts on Environmental Ethics*, in M. Mooney and F. Stuber (eds) *Small Comforts for Hard Times*, Columbia University Press, 1977.

<sup>4</sup> G. Marano, *Alle origini (terminologiche) della vulnerabilità: vulnerabilis, vulnus, vulnerare*, in *Vulnerabilità. Analisi multidisciplinare di un concetto*, op. cit., p. 14. Just to name a few, please see M.B. McCoy, *Wounded Heroes: Vulnerability as a Virtue in Ancient Greek Literature and Philosophy*, Oxford University Press, 2013; P. Acher, *Herodotus and the Vulnerability Ethic in Ancient Greece*, in *Arion. A Journal of Humanities and the Classics*, n.2.2012, pp. 55-99; S. Brill, *Violence and Vulnerability in Aeschylus’ Suppliants*, in W. Wians (ed.), *Logos and Muthos: Philosophical Essays in Greek*

More specifically, Latin scholars used *vulnus* also to describe the wounds affecting the human soul, especially when one's love or life had been damaged.<sup>5</sup>

In the Aeneid, the term *vulnera* was associated to damage caused to trees or rocks, while in Ovid the apparatus of the *res publica* (namely the Roman provinces) was also considered vulnerable.<sup>6</sup> In other words, in ancient times, vulnerability meant as fragility and exposition to danger could characterize the concrete flesh of human beings as much as animals, plants and lifeless objects, since all creatures, breathing or not, could be wounded, damaged, and broken. Interestingly, Marano suggests that, despite vulnerability permeated both the animated and inanimate world in the ancient literature and philosophical thought, the term was not found in Latin legal sources; a gap that, as we will see, has been filled over time<sup>7</sup>.

In our times, vulnerability has been investigated by many fields of study, ranging from philosophical to development studies, from law to climate science. Overall, although the concept has evolved since the I century B.C., it still commonly refers to the corporal fragility of the humankind, meaning the individual's organic propensity to disease and disability, and their inability to avoid an inescapable death.<sup>8</sup> Part of the feminist scholarship reflects upon the ontological dimension of vulnerability, common to each human being «whose autonomy or dignity or integrity are capable of being threatened».<sup>9</sup> Other approaches and underlying feminist theories of vulnerability have attempted to define the conditions of vulnerability of humans – being them single individuals, groups or communities. The leading law and society scholar Martha Albertson Fineman affirmed that vulnerability cannot be confined to particularly fragile groups or defenseless victims, as each human being is inevitably vulnerable to physical, psychological and emotional harm, despite our efforts to avoid pain and mitigate the impact of misery. Our limited capacity to shield us from suffering gives rise to our body's vulnerability.<sup>10</sup> An alternative scholarship discourages the universal application of ontological vulnerability, as it risks universalizing some targeted individual factors of vulnerability at the expense of other less detected factors, ultimately making them invisible. Selective labelling would risk discriminating against the people it once sought to protect. Accordingly, «[t]he blanket application of the notion vulnerable populations undermines respect for individual autonomy, thereby opening up its own set of potential harms»<sup>11</sup>. The taxonomy elaborated by McKenzie, Rogers and Dodds attempts to overcome these opposing scholarships by providing three different yet interconnected forms of vulnerability (inherent, situational and pathologic) affecting the individual, where both internal and external factors of vulnerability coexist. Since the end of the 20th century, vulnerability has been increasingly associated to migrants and international protection-seekers.

The increasing number of people on the move, in the aftermath of the fall of the USSR, the outbreak of the Yugoslavian war and the armed conflicts in Africa, drove the attention of scholars and of the international community to migrants in vulnerable situations, promoting *ad hoc* policies and legal frameworks to address compelling factors of migration and vulnerability.

*Literature*, State University of New York Press, 2009, pp. 161-80.

<sup>5</sup> G. Marano, *Alle origini (terminologiche) della vulnerabilità: vulnerabilis, vulnus, vulnerare*, op. cit., p. 22.

<sup>6</sup> Id. For further reference, please see, L. Bocciolini Palagi, *Vulnus alit venis et caeco carpitur igni (Verg. Aen. 4,2)*, in *Munus amicitiae. Scritti in memoria di Alessandro Ronconi*, parte I, Le Monnier, 1986, pp. 23-42.

<sup>7</sup> G. Marano, *Alle origini (terminologiche) della vulnerabilità: vulnerabilis, vulnus, vulnerare*, op. cit., p. 22. For further reference, please see, C. Di Giovine, *Il relegato e il nemico. Spunti di riflessione su alcune metafore in Ovidio, Trist. 3.11*, in *Rivista di filologia e di istruzione classica*, 2. 2006, pp. 165-76.

<sup>8</sup> B. S. Turner (ed.), *Vulnerability and Human Rights*, Pennsylvania, 2006, p. 29.

<sup>9</sup> W. Rogers, *Vulnerability and Bioethics*, in C. Mackenzie, W. Rogers, S. Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, Oxford University Press, 2014.

<sup>10</sup> M.A. Fineman, *The vulnerable subject and the responsive state*, in *Emory Law Journal*, n.2.2010, pp. 251–275.

<sup>11</sup> W. Rogers, *Vulnerability and Bioethics*, op. cit., p. 69.

According to OHCHR and the Global Migration Group, «migrants in vulnerable situations are thus persons who are unable effectively 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».<sup>12</sup> Their vulnerability may therefore arise in countries of origin, transit and destination, being a cause of migration or the result of precarious and unsafe conditions in the country of destination. The multiple forms of vulnerability that could be developed along the migration route are recognized in the 2016 New York Declaration on Migrants and Refugees as well as in the 2017 Draft Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations within Large and/or Mixed Movement. Both include border management and return among the policies and practices that create or exacerbate migrant insecurity. Objective 7 of the Global Compact for Safe, Orderly and Regular Migration encourages States to address and reduce vulnerability at each stage of migration. Recently, the Committee of Ministers of the Council of Europe adopted an Action Plan for the Protection of Vulnerable Persons in the Context of Migration and Asylum (2021-2025) defining them as «persons found to have special needs after individual evaluation of their situation and are entitled to call on States' obligation to provide special protection and assistance. [...] it is for the national authorities, based on national legislation and international obligations, to effectively identify on a case-by-case basis the vulnerabilities [...]».<sup>13</sup> Particularly relevant to the present discussion on vulnerability and migration is the interpretation given by the European Court of Human Rights (ECtHR) that has significantly contributed to shaping the collective conception of vulnerability. According to the interpretation of the judges in Strasbourg, vulnerability would characterize individuals not as such, contrary to the ontological vision, but as they are inserted in a disadvantageous social, institutional and historical context.<sup>14</sup> In 2011, the Court recognized the category of international protection-seekers as a vulnerable group, along with Gypsies, disabled people, HIV-ill, and minors. In the landmark case *M.S.S. v. Belgium and Greece*, concerning the transfer of an Afghan international protection-seeker from Belgium to Greece under the Dublin II Regulation, the ECtHR took into account the fact that the claimant was particularly vulnerable because he belonged to an underprivileged group and because of «everything he had been through during his migration and the traumatic experiences he was likely to have endured previously».<sup>15</sup> The condition of inherent vulnerability as an international protection-seeker is thus added to the harm caused by the Greek authorities in the reception camp. The severe deficiencies of the Greek asylum system – characterized by insufficient reception facilities, lack of access to the labour market and the excessive length of the examination of the international protection request – revealed the institutional context from which stemmed the vulnerability experienced by the Afghan man. In this case, the Court considered both the inherent vulnerability of international protection-seekers together with other factors, including the psychological damage associated with their precarious status in Greece, his total dependence on State institutions and the systemic deficiencies of the Greek asylum system. Unlike ancient times, where legal sources did not consider vulnerable factors, vulnerability is currently endorsed in legal and policy provisions, and it has been interpreted by judicial authorities both at the national and supranational level. Overall, however, these disciplines devoted little attention to vulnerability associated to inanimate objects or non-human

<sup>12</sup> OHCHR-Global Migration Group, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, 2018, <https://www.ohchr.org/en/issues/migration/pages/vulnerablesituations.aspx>

<sup>13</sup> Committee of Ministers of the Council of Europe, Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025), 1403rd meeting, CM(2021)67-final, 5 May 2021.

<sup>14</sup> L. Peroni, A. Timmer, *Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law*, op. cit., p. 1064.

<sup>15</sup> ECtHR, *M.S.S. v Belgium and Greece*, n. 30696/09, 21 January 2011, para. 232.

entities, although greatly used both by scientists, politicians, and the public.

### 3. Vulnerability and the non-human.

Beyond human beings, vulnerability can refer to objects, environments, human beings, physical or legal subjects, which proves its high flexibility and adaptability. It could, for instance, be used to determine the seismic risk of buildings in a particular area as well as to label those territories exposed to climate change, environmental degradation and disasters. Plants, animals and ecosystems may be vulnerable to climate change too, as well as to pollution, rising temperatures and ocean acidification. Vulnerability also defines the exposure of local authorities to mafia infiltration.<sup>16</sup> Nutritional vulnerability is measured as the probability of recording an increase in the rate of epidemics or mortality in relation to inadequate nutritional consumption. The following sections explore vulnerability associated to non-human objects, namely the economic vulnerability of undertakings, the environmental and climate vulnerability of territorial areas and the vulnerability of States in the context of EU law to gather some essential features of vulnerability when applied to non-human entities.

#### 3.1. The economic vulnerability of companies.

While individuals' economic vulnerability represents the loss of well-being that can result from both internal and external shocks - such as risk mismanagement, sudden exposure to risk, loss of resilience, lack of support and/or barrier removal actions by family networks, services and public institutions - companies' economic vulnerability in the context of EU competition law is measured in terms of the influence that other firms can have on the performance and profit of other companies in the same market.<sup>17</sup> Whereas the CJEU can play an active role in interpreting EU human rights law to evaluate the existence of a situation of human vulnerability by adopting a case-by-case analysis, in the market field the Court can only act as supervisor to ensure the proper functioning of the market. In order to safeguard the market's ability to self-regulate, the Court restricts the designation of vulnerable companies only to exceptional cases, where vulnerability can respectively figure as a determining factor for granting subsidies to fragile companies or for determining an abuse of dominant market position. As said, the CJEU qualifies a company as vulnerable in very few cases, for instance when its fragility in the market is due to a stagnant demand, under-utilization of capacity, job cuts, plant closures, uncompetitive low prices imposed by exporting producers in third countries that may jeopardize the natural competition of the market.<sup>18</sup> The CJEU can also use vulnerability to evaluate the abuse of dominant market position, which would make a company too strong to be "vulnerable" to natural competition.

In *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, for example, the Court considers the belonging to groups of companies operating throughout Europe and worldwide as a crucial element, along with the leading role that the Michelin group plays in the investment and research sector, as well as the special extent of its range of products.<sup>19</sup>

<sup>16</sup> M. Virgilio, *La vulnerabilità nelle fonti normative italiane e dell'Unione Europea: definizioni e contesti*, in *Vulnerabilità. Analisi multidisciplinare di un concetto*, op. cit., p. 161.

<sup>17</sup> G. Talamo, *Vulnerabilità ontologica e misurazione ex ante: un contributo dalla letteratura economica*, in *Vulnerabilità. Analisi multidisciplinare di un concetto*, op. cit., p. 221. Si veda, A. De Giuli, *Sul concetto di "vulnerabilità" secondo la Corte di Giustizia UE*, in *Diritto Penale e Uomo*, p. 11

<sup>18</sup> Please see, CJEU, *EXÉCUTIF RÉGIONAL WALLON and SA GLAVERBEL V COMMISSION of the EUROPEAN COMMUNITIES*, n. 62/87 and 72/87, 8 MARCH 1988, para 17.

<sup>19</sup> CJEU, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, n. 322/81, 9 November 1983, para. 55

In *Hoffmann-La Roche & Co. AG.*, the Court named the elements to be considered to assess whether a company is less dependent and vulnerable to competition: «[...] the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition are relevant factors, the first because it enables the competitive strength of the undertaking in question to be assessed, the second and third because they represent in themselves technical and commercial advantages and the fourth because it is the consequence of the existence of obstacles preventing new competitors from having access to the market».<sup>20</sup>

As briefly outlined, in the case of economic vulnerability of undertakings, EU Treaties bind the Court of Justice to simply safeguard the natural competition. Companies' vulnerability is therefore relevant to assess whether a company is disproportionately exposed to external shocks or if it abuses of dominant position in the market. To do so, the Court examines the internal and external potential factors of vulnerability according to a set of specific criteria to be restrictively interpreted so to guarantee the self-regulating nature of the market. Therefore, in this field, the CJEU cannot play a flexible role in interpreting and applying vulnerability to the subject involved.

In the framework of the covid-19 pandemic, the economies of the Union and its Member States have been extremely hit. In the attempt to support EU Member States to tackle the negative effects of the health crisis on their economy, the European Commission allowed the Member States to derogate from the EU discipline on State aid and to adopt *ad hoc* measures to help small and medium undertakings facing the correlated shocks. In this context, scholars attempted to identify the core determinants of the economic risk linked to covid-19. As suggested by Noy et al, those determinants are not only the virus itself but also the exposure to it, meant as the direct losses and damages experienced by undertakings following lockdown measures, and the vulnerability of certain economic sectors to it.<sup>21</sup> In this context, according to Ferri, vulnerability «is determined by a reduced liquidity arising from the decrease in demand due to the pandemic in combination with factors inherent in the way in which that sector is organised».<sup>22</sup> Also in this case, therefore, vulnerability can be easily detected through specifically targeted criteria set out at the Union level. Extraordinary measures and derogation to ordinary rules are outlined in a specific legal framework adopted by the Commission and followed by the Member States.

### 3.2. Climate and environmental vulnerability of territorial areas.

The Intergovernmental Panel on Climate Change (IPCC) defines vulnerability as «the propensity or predisposition to be adversely affected. Vulnerability encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt».<sup>23</sup> In other words, the report explains that a highly vulnerable system would be a system that is very sensitive even to modest changes in climate, where “sensitive” means potential for harmful effects, and for which the ability to adapt is severely constrained.<sup>24</sup> The

<sup>20</sup> CJEU, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*. n. 85/76, 13 February 1979, para 48. Please see also, K. Piątkowska, *Abuses of dominant position in the Commission's Guidance and the case-law of the Court of Justice and the General Court*, 2014, <http://www.repozytorium.uni.wroc.pl/Content/51970>; A. De Giuli, *Sul concetto di "vulnerabilità" secondo la Corte di Giustizia UE*, op. cit.

<sup>21</sup> I. Noy, N. Doan, B. Ferrarini, D. Park, *The economic risk from COVID-19 is not where COVID-19 is*, in VOX CEPR POLICY PORTAL, 1 May 2020, <https://voxeu.org/article/economic-risk-covid-19-not-where-covid-19>.

<sup>22</sup> D. Ferri, *The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis*, in *European Journal of Risk Regulation*, n. 20.2020, p. 4.

<sup>23</sup> IOM, *Migration, Environment and Climate Change: Evidence for Policy (MECLEP) Glossary*, 2015, p. 128, <https://publications.iom.int/books/migration-environment-and-climate-change-evidence-policy-meclep-glossary>.

<sup>24</sup> J. Adejuwon, C. Azar, W. Baethgen, C. Hope, R. Moss, N. Leary, R. Richels, J-P. van Ypersele, *Overview of Impacts*,

IPCC acknowledges the difficulty to distinguish between “key” and “dangerous” vulnerabilities to climate change. This type of vulnerability combines objective criteria – such as the scale, magnitude, timing and persistence of harm – as well as normative and subjective elements that, however, are influenced by the perception of risk, which depends on the cultural and social context.<sup>25</sup> The Fourth Assessment Report of the IPCC identifies seven criteria from the literature that may be used to identify key vulnerabilities: 1) magnitude of impacts, 2) timing of impacts, 3) persistence and reversibility of impacts, 4) likelihood (estimates of uncertainty) of impacts and vulnerabilities, and confidence in those estimates, 5) potential for adaptation, 6) distributional aspects of impacts and vulnerabilities, and 7) importance of the system(s) at risk. Referring to vulnerability to climate change is widely used both for animated subjects, such as humans and ecosystems, and for entities such as areas or entire countries exposed to its effects.

Pursuant to EU law, the CJEU relies upon two criteria for designating environmentally vulnerable areas: whether measures for the conservation of vulnerable species are into force and whether the soil of those areas are contaminated. According to Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, Member States shall designate vulnerable areas on their national territory and establish related action programs. In the context of environmental vulnerability, Member States enjoy wide discretion in identifying and managing the risk of water pollution. For its part, the Court has ruled that EU law can hardly provide a clear list of criteria to identify if and when nitrates can contribute to water pollution.<sup>26</sup> The CJEU can only require Member States’ full compliance with EU environmental law and, to that end, may request to the European Commission and to Non-Governmental Organizations the preparation of reports on the environmental impact of certain activities carried out by EU countries.

In December 2019, the European Commission launched its ambitious strategy to be the world’s first climate-neutral continent reaching by 2050. The European Green Deal presents the instruments to implement for this ecological transition to take place.<sup>27</sup> The Green Deal acknowledges that climate change will significantly impact some EU regions and communities more than others. Vulnerability is used to describe those «[...] most exposed to the harmful effects of climate change and environmental degradation», highlighting the need for a just energy transition to protect vulnerable households as well as micro-enterprises and transport users. In its new EU Strategy on Adaptation to Climate Change, the Commission interchangeably defines people, planet and prosperity as vulnerable to climate change, without clarifying that vulnerability of humans might conceptually and concretely differ from vulnerability of the planet and nations’ development.<sup>28</sup> It also does not refer to the criteria employed by the Court of Justice to assess the economic vulnerability of undertakings, thus substantiating the hypothesis that the Commission does not operate any distinction between human and non-human vulnerability and, consequently, does not treat them differently.

#### **4. Precarious institutions and vulnerable States.**

So far, we have explored different facets of vulnerability depending on the subject to which it refers.

---

*Adaptation, and Vulnerability to Climate Change*, IPCC report 2001, <https://www.ipcc.ch/report/ar3/wg2/chapter-1-overview-of-impacts-adaptation-and-vulnerability-to-climate-change/>.

<sup>25</sup> IPCC Fourth Assessment Report on Climate Change-Working Group II, Impacts, Adaptation and Vulnerability, Ch. 19.2, 2007, <https://www.ipcc.ch/report/ar4/wg2/>.

<sup>26</sup> TITJUR, *Boehringer Ingelheim Vetmedica GmbH and C.H. Boehringer Sohn v Council of the European Union and Commission of the European Communities*, n. T-125/96 and T-152/96, 1 December 1999 para 38.

<sup>27</sup> Communication, *A European Green Deal*, COM(2019) 640 final of 11 December 2019

<sup>28</sup> Communication, *Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change*, COM(2021) 82 final of 24 February 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0082&from=EN>.

We have seen that vulnerability applied to human beings requires a case-by-case analysis of both objective and subjective factors that might have an impact on the individual.

Exactly because each individual manifests different sources of vulnerability, at a different stage and intensity, human vulnerability cannot be confined in fixed definitions and criteria, as these would inevitably recognize some targeted factors of vulnerability and exclude others, thus exacerbating it rather than easing it. This is why a definition of vulnerability or vulnerable groups is absent from the relevant jurisprudence of the ECtHR and the CJEU and why scholars tend to agree that this is for the best.<sup>29</sup>

Conversely, the analysis of relevant CJEU judgments revealed that vulnerability associated to companies and territories is subject to specific criteria and requirements that must be met to qualify as vulnerable and benefit from favorable standards. Although the same term is used, therefore, it is possible to pinpoint essential differences between human and non-human vulnerability, since diverse approaches, theories and criteria are employed. Sometimes, however, the scholarship may make these boundaries blurrier.

In his sociological study on human rights, Brian S. Turner argues that human rights, such as the right to life or health, have emerged and evolved as a «protective juridical shield» to our organic, biological vulnerabilities that we alone are unable to cope with.<sup>30</sup> As Turner puts it «We need social support and legal protection precisely because we cannot successfully respond to our vulnerability by individual acts undertaken in isolation. We need collective arrangements, including human rights protection».<sup>31</sup> Hence, individuals have created social and political institutions to ensure human security and human rights protection. These institutions, however, would turn out to be imperfect themselves, inadequate and precarious just as much as the individual's life is, giving rise to the paradox that Turner calls «institutional precariousness».<sup>32</sup>

The social, political and legal institutions that human communities have established to counteract their ontological vulnerability are themselves fragile and exposed to corruption, self-interest and greed. Social institutions fail to manage social change, political institutions are unable to protect the interests of individuals, and human rights law needs to be continuously reviewed in light of its misapplication and failures.<sup>33</sup> Turner recognises, therefore, that human rights can be a double-edged sword. On the one hand, people need a State to respond to the various causes of human vulnerability but, on the other hand, the State and its institutions often constitute the very cause of violations of individual's human rights, generating cases of pathogenic vulnerability. The human rights violations perpetrated by failed States are an emblematic example of such a vicious circle of vulnerability.

Indeed, “vulnerable States” or “fragile States”, preferred by development experts as well as in peace and conflict studies as opposing to “failed States”, have flourished since the ‘80s as conflict-torn developing countries started to be seen as a menace to international security, peace and order. These political rather than legal concepts define States that cannot or do not want to provide for the basic needs of their populations and control their sovereign territory.

Quantitative and qualitative scholarship found causes of State's weakness in external aggression, war and civil conflicts, weak institutions, corruption, systemic violations of human rights, economic collapse, among others. For their degree of fragility, until mid-2000s, these States were allowed to reduce their compliance with its international law obligations and

<sup>29</sup> E. Diciotti, *La vulnerabilità nelle sentenze della Corte europea dei diritti dell'uomo*, in *Ars interpretandi*, n.2.2018; R. Chenal, *La definizione della nozione di vulnerabilità e la tutela dei diritti fondamentali*, in *Ars interpretandi*, n.2.2018; S. Zullo, *Definire e Comprendere la Vulnerabilità sul Piano Normativo: Dalla Teoria al Metodo Critico?*, in *La Vulnerabilità come Metodo*, a cura di A. Furia e S. Zullo, Carrocci Editore, 2020.

<sup>30</sup> B. S. Turner (ed.), *Vulnerability and Human Rights*, op. cit., p.29.

<sup>31</sup> Ivi., p. 10.

<sup>32</sup> Ivi., p.31.

<sup>33</sup> Ibidem.



deserved a distinctive type and level of international support by donors.<sup>34</sup>

Following the sociological perspective, some traditional features of vulnerability seem attachable also to fragile States. Indeed, internal and external factors can wound the “flesh and bones” of the State, meaning its population and territory.<sup>35</sup> Like individuals, States could be exposed to invasion, civil unrest, or misery. In my opinion, however, two elements allow to distinguish State’s vulnerability, as intended in the development, and peace and conflict circle, from human vulnerability, as meant in ethics and feminist philosophy.

First, even in case of external factors of vulnerability exceeding the control of the State, such as external aggression, it cannot neglect its due diligence to comply with international human rights law. As pointed out by Berkes, Eurasian fragile States whose territory is in part controlled by a *de facto* external regime – i.e. Azerbaijan, Georgia, Ukraine, and the Republic of Moldova –, had resorted to unilateral declarations to exclude the application of a signed human rights treaty to the region over which they lost control. Treaty monitoring bodies, however, rejected the admissibility of those territorial declarations and held that the State cannot arbitrarily and unilaterally renounce to its binding commitments. Therefore, such declarations do not have any legal effect.<sup>36</sup> Emblematically, in *Ilaşcu and Others v. Moldova and Russia*, concerning applicants detained by *de facto* authorities in the unrecognized Transnistrian region in Moldova, the ECtHR acknowledged for the first time that a fragile State continues to have positive human rights obligations over all its territory, even if beyond its effective control.<sup>37</sup>

Second, internal or external factors of vulnerability, if generated by or associated to the deliberate misconduct of the State, do not appear comparable to human vulnerability. Under Turner’s institutional precariousness, institutions are fragile because, in one way or another, they privilege their interest over individuals’. In development scholarship, a vulnerable or fragile State is unable or unwilling to protect its own population. In the first case, we’ve seen that States cannot simply “give up” their duties and must protect human rights within their whole territory, regardless of whether some areas are no longer under their control. In the second case, a State that intentionally ignores its duty to protect its own population is openly violating its international obligations. Justifying these wrongdoings would result in neglecting the State’s agency in these dynamics and its core responsibilities. Therefore, intentional misconduct perpetrated by the State or its institutions cannot, in my opinion, make them vulnerable as meant by the feminist scholarship. Although referring to the same concept, human vulnerability and State’s vulnerability are triggered by different factors and different approaches are endorsed to detect them. As in the case of non-human vulnerability, also State’s vulnerability is measured through a set of indicators, responds to specific criteria and methodology.

Vulnerable or fragile States have been widely explored in development, peace and conflict, diplomatic and security studies and have been particularly used in the political arena. Indexes, lists and indicators have been developed to map these countries and measure their level of fragility. As in the case of economic and climate vulnerability, quantitative elements and specific requirements are thus needed for a State to classify as vulnerable.

The US Agency for International Development (USAID) defines fragile States as those whose institutions lack political will or capacity to adequately fulfil its core functions, such as ensuring security and justice, respecting human rights, poverty reduction etc. Fragile States encompass “vulnerable States”, which are «unable or unwilling to adequately assure the provision of security and basic services [...] and where the legitimacy of the government is in question», and

<sup>34</sup> A. Berkes, *Compliance of Territorially Fragile States With International Human Rights Law*, in *Revue québécoise de droit international*, 2021, p. 13, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3864406](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864406)

<sup>35</sup> C. Mackenzie, W. Rogers, S. Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, *op. cit.*, p.6.

<sup>36</sup> A. Berkes, *Compliance of Territorially Fragile States With International Human Rights Law*, *op. cit.*, p. 6.

<sup>37</sup> ECtHR, *Ilaşcu and Others v Moldova and Russia*, n. 48787/99, 4 July 2001, para 331-335.

States in crisis, affected by conflict or unable or incapable of controlling their territory or providing basic necessities, or without legitimacy to do so».<sup>38</sup>

USAID developed a fragility assessment framework where a pattern of fragility consists of three components, namely relationships between the State and society, outcomes produced by those relationships, and effectiveness or legitimacy.

Each part has country-specific outcomes that interact with the others, exacerbating or reducing State's fragility.<sup>39</sup> The UK Department for International Development (DFID) endorses a broader definition, in which «fragile states are countries where the government cannot or will not deliver its basic functions to the majority of its people, including the poor».<sup>40</sup> Emblematic examples of fragile countries are those conflict-torn as well as those under dictatorship or autocracy «where human rights are routinely abused».<sup>41</sup> The OECD definition focuses on the protection of human rights and security: «States are fragile when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations».<sup>42</sup> In brief, State's fragility is determined by a number of political, social, economic and environmental indicators. Similarly, the World Bank list of fragile and conflict-affected situations classifies fragile States according to four criteria: «a) the weakest institutional and policy environment; or b) the presence of a UN peacekeeping operation reflecting a decision by the international community that a significant investment is needed to maintain peace and stability there; or c) flight across borders of 2,000 or more per 100,000 population, who are internationally regarded as refugees in need of international protection, as this signals a major political or security crisis; or d) those that are not in medium- or high-intensity conflict, as such countries have gone beyond fragility».<sup>43</sup> Interestingly, the World Bank includes forced migration as a symptom of State's failure in complying to its basic responsibilities. The presence of refugees and internally-displaced persons (IDPs) is also relevant for the Fragile States Index developed by The Fund for Peace, where it «measures the pressure upon states caused by the forced displacement of large communities as a result of social, political, environmental or other causes, measuring displacement within countries, as well as refugee flows into others».<sup>44</sup> At the same time, however, DFID specified that «minor failures on human rights» are not enough to qualify a State as fragile, otherwise «[...] almost every country in the world would qualify as fragile. [...] the fragile states approach points to the problems of a particularly vulnerable subset of states».

This last passage is extremely relevant, as it stresses that State's fragility depends on an intertwined set of factors and that minor failures in complying with human rights are not enough to qualify as such. In other words, State's vulnerability cannot stem from one single factor, especially when this is occasional and manageable.

<sup>38</sup> USAID, *Fragile States Strategy*, 2005, [https://www.oecd.org/dac/conflict-fragility-resilience/docs/38368714.pdf](https://gsdrc.org/document-library/fragile-states-strategy/#:~:text=USAID's%20fragile%20states%20strategy%20was,need%20for%20greater%20contextual%20understanding.&text=Identification%20of%20priorities%20that%20reflect,reform%20and%20capacity%20of%20institutions; OECD-DAC, <i>Principles for Good International Engagement in Fragile States & Situations</i>, 2007, <a href=).

<sup>39</sup> Ivi, p. 3.

<sup>40</sup> DFID, *Global Issues: Fragile States*, 2010.

<sup>41</sup> DFID, *Eliminating World Poverty: Building Our Common Future*, 2009, p. 69, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229029/7656.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229029/7656.pdf).

<sup>42</sup> OECD-DAC, *Principles for Good International Engagement in Fragile States & Situations*, op. cit.

<sup>43</sup> World Bank, *Classification of Fragility and Conflict Situations for World Bank Group Engagement*, 2021, p. 2 <https://www.worldbank.org/en/topic/fragilityconflictviolence/brief/harmonized-list-of-fragile-situations>

<sup>44</sup> Index available at <https://fragilestatesindex.org/indicators/s2/>

It is my opinion, however, that Western leaders and mass media have over time manipulated the notion of vulnerability and unreflectively overlapped the different definitions, approaches and implications respectively at the core of human vulnerability in philosophical studies and of State's vulnerability in development studies. In this regard, Butler refers to the political manipulation of vulnerability by those who hold power and do not want to lose it: «In those instances, it is their privilege which has become 'vulnerable' to being undone by increasing demands for equality and freedom».<sup>45</sup>

The precarious life felt by ontologically vulnerable individuals has been transposed to the precarious power held by States' elites.

The fear stemming from such a vulnerability leads State's power-holders to defend their dominant position against destabilizing threats. According to Butler, the violent reaction of the at-the-time US president George W. Bush in the aftermath of the collapse of the Twin Towers in New York, is an emblematic attempt to hide his country's «unbearable vulnerability» behind military aggression.<sup>46</sup> Similarly, during the 2002 consultations on the Draft Treaty establishing a Constitution for Europe, the issue of EU interstate solidarity was discussed in the context of migration inflows: «It is important, therefore, that we are able to offer assistance to Member States which, because of their geographical position, are particularly vulnerable to the threat of illegal immigration».<sup>47</sup> In this statement, irregular migration is clearly depicted as a threat to the security of States that, in light of their particular vulnerability, required solidarity and assistance from other Members. This statement illustrates that vulnerability, as intended in the philosophical debate, has been politically manipulated and applied to States. As a result, it connotes a radical shift from protecting vulnerable individuals to protecting the vulnerable State from threatening migrants.

Over the last decades, European leaders, fuelled by mass media, have explicitly or implicitly claimed their State's exposure to "unprecedented" and "massive" migration flows or even to migration "crises", which threatened not only their asylum system, but also the sovereignty of their nation and the integrity of their borders.<sup>48</sup>

Akin to the US, EU Member States reacted to the threat posed by irregular migration through deterrence and restrictive measures, this giving rise to the misperception that the State could be unable to manage migration flows. In other words, as fragile States cannot meet their basic responsibilities because exposed to factors of vulnerability, EU Member States claim their incapacity to manage migration because exposed to mass inflows.

<sup>45</sup> J. Butler, *Precarious Life: The Powers of Mourning and Violence*, Routledge, New York, 2004, p. xi. Ivi, she mentions, for instance, the vulnerability of paternalistic institutions, which could be contested and dismantled, or the alleged vulnerability of colonial nations and their supposed right to attack and subjugate the colonies to defend themselves. Other concrete examples may include the fear felt by native workers in industrialized countries to lose their jobs because of the availability of cheaper workers coming from developing countries or the vulnerability felt by a white community in California to the arrival of black people.

<sup>46</sup> Ivi, p. xi. See also, W. Tommasi, *Relazioni, dipendenza e vulnerabilità*, in *Vulnerabilità. Analisi multidisciplinare di un concetto*, op. cit., p. 106.

<sup>47</sup> WD 022 - WG X - Comments by Baroness Scotland of Asthal and Mr Antti Peltomäki on the Working document 05, *Possible ways for the Working Group*, 20 November 2002, [http://europeanconvention.europa.eu/EN/doc\\_wg/doc\\_wg2352.html?lang=EN](http://europeanconvention.europa.eu/EN/doc_wg/doc_wg2352.html?lang=EN), p. 11.

<sup>48</sup> OHCHR, Press release: *Legal changes and climate of hatred threaten migrants' rights in Italy, say UN experts*, 21 November 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23908&LangID=E>; Council of Europe Speech at the Seminar on the fight against racism, xenophobia, homophobia and transphobia, 25 July 2016, <https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/-/speech-at-the-seminar-on-the-fight-against-racism-xenophobia-homophobia-and-transphobia>; Visegrad Group, *Joint Statement on Migration*, 15 February 2016, <https://www.visegradgroup.eu/calendar/2016/joint-statement-on>.

The façade of vulnerability hides, however, the State's unwillingness to manage migration. As noted by Morawa, «[...] alleged vulnerability is sometimes nothing but a disguise of the fact that a state is in reality unwilling to change its practices in light of its human rights obligations [...]».<sup>49</sup>

Emblematically, the Visegrad group (the Czech Republic, Hungary, Slovakia, and Poland) declared that «[...] uncontrolled mixed migration movements are a threat to the EU and Member States security. Concerned with the safety of our citizens, we agree that it is a threat that cannot be underestimated», urging for the protection of the Union's external borders and to stem the migratory flow.<sup>50</sup>

After launching the New Pact on Migration and Asylum, six EU Member States called for continuing «exploring the possibility of establishing of regional disembarkation platforms outside the EU».<sup>51</sup> In the following pages, I refer to the dramatic situation involving migrants stranded at the EU-Belarus border as emblematic example of State's alleged vulnerability to migration threats. It illustrates how the political manipulation of vulnerability by the Union and its Member States to a few thousand irregular migrants is exposing the latter to tragic violations of their human rights and might lead to the paradoxical end of the right to asylum.

## **5. EU Member States vulnerable to the threat of irregular immigration: The EU-Belarus case.**

The relationship between the EU and Belarus has progressively deteriorated in 2020 when the former reacted to the fraudulent elections that took place in Belarus by imposing economic and financial sanctions as well as with visa restrictions. In summer 2021, the EU institutions accused the Belarussian government of instrumentalizing migrants to destabilize the Union as part of a strategy of hybrid attacks. As noted, «Minsk and Moscow know that one of Europe's biggest vulnerabilities is its visceral reaction to migration. This vulnerability, which was clear during the 2015 refugee crisis when the bloc was bitterly divided over giving security and shelter to refugees fleeing the war in Syria, has not been addressed».<sup>52</sup>

In October 2021, twelve Member States – including Belarus' EU neighboring countries, Poland, Lithuania and Latvia – stated that «[...] all our external borders must be protected with maximum level of security. At the same time, our migration and asylum policy must be abuse-resistant».<sup>53</sup> To that end, they call for enhanced border management. In particular, with reference to reform of the Schengen Border Code proposed by the Commission in June 2021, the signatories encourage the Commission to include the possibility for the Member States to erect physical barriers for border control to effectively «prevent any threat to the Member States' internal security, public policy, public health and international relations» as provided by Recital 6.<sup>54</sup> In their opinion, «physical barrier appears to be an effective border protection measure that serves the interest of whole EU, not just Member States of first arrival», and their use should be

<sup>49</sup> A.H.E. Morawa, *Vulnerability as a Concept of International Human Rights Law*, in *Journal of International Relations and Development*, n. 6.2003) p. 148.

<sup>50</sup> Visegrad Group, *Joint Statement of V4 Interior Ministers on the Establishment of the Migration Crisis Response Mechanism*, 21 November 2016, <https://www.visegradgroup.eu/calendar/2016/joint-statement-of-v4>.

<sup>51</sup> Non-paper, *Joint Position of Poland, Hungary, Slovakia, Czech Republic, Estonia, and Slovenia on the New Pact on Migration and Asylum*, <https://www.visegradgroup.eu/download.php?docID=457>

<sup>52</sup> J. Dempsey, *Lukashenko Uses Migrants to Exploit Europe's Vulnerability*, 9 November 2021, <https://carnegieeurope.eu/strategieurope/85735>

<sup>53</sup> Joint letter, *Adaptation of the EU legal framework to new realities*, 7 October 2021 signed by Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Slovak Republic, 7 October 2021, [https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter\\_Adaptation-of-EU-legal-framework-20211007.pdf?utm\\_source=POLITICO.EU&utm\\_campaign=78aac25596-](https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf?utm_source=POLITICO.EU&utm_campaign=78aac25596-EMAIL_CAMPAIGN_2021_10_08_04_59&utm_medium=email&utm_term=0_10959edeb5-78aac25596-190537903)

[EMAIL\\_CAMPAIGN\\_2021\\_10\\_08\\_04\\_59&utm\\_medium=email&utm\\_term=0\\_10959edeb5-78aac25596-190537903](https://www.politico.eu/wp-content/uploads/2021/10/07/Joint-letter_Adaptation-of-EU-legal-framework-20211007.pdf?utm_source=POLITICO.EU&utm_campaign=78aac25596-EMAIL_CAMPAIGN_2021_10_08_04_59&utm_medium=email&utm_term=0_10959edeb5-78aac25596-190537903)

<sup>54</sup> Communication, *A strategy towards a fully functioning and resilient Schengen area*, COM(2021) 277 final of 2 June 2021.

funded by the EU.<sup>55</sup>

The Union reported that, in 2021, the number of international protection claims increased up to a total of 10.769, meaning an increase of 414% for Latvia, 1050% for Lithuania and 493% for Poland compared to 2020, in addition to more than 15.000 migrants reportedly stranded in Belarus.<sup>56</sup> The majority came from conflict-torn countries, such as Iraq, Syria and Afghanistan. All three Member States declared the state of emergency and introduced emergency measures in their national immigration and asylum legislation.

There is a common *file rouge* characterizing the choice made by the three Member States in response to the Belarussian move. First, they all (unlawfully) limited the exercise of the right to asylum and resorted to illegal push-backs.

They imposed the rejection of all international protection claims of those who irregularly crossed, or attempted to cross, their border, banning the right to appeal. This practice has been condemned by the ECtHR multiple times. In *M.A. and Others v. Lithuania*, concerning the prohibition to entry the Lithuanian territory and the automatic expulsion of international protection-seekers back to Belarus, the Court found Lithuania responsible for violating Article 3 of the European Convention on Human Rights (ECHR). In *M.K. and Others v Poland*, the ECtHR concluded that Belarus does not offer an adequate asylum and reception system.<sup>57</sup> Automatically expelling groups of migrants without an individual evaluation of their protection claim was found to be in violation of Article 4 Protocol 4 ECHR and Article 3 ECHR. The Court also concluded that the Polish Government had violated their right to an effective remedy under Article 13 ECHR and Article 34 ECHR; the latter because Poland did not implement the interim measures ordered by the Court in relation to the prohibition of the expulsion of third-country nationals to Belarus. Second, they all resorted to an indiscriminate use of force to deter arrivals. UNHCR expressed its deep concern regarding the unrestricted use of force that Latvia accorded to its police forces and border authorities, without limiting its use to a measure of last resort and only when justified, necessary and proportionate to the intended purpose, potentially leading to violations of the right to life and the prohibition of torture, inhuman and degrading treatment under the ECHR and the EU Charter. Third, all affected Member States used any other possible means to deter arrivals, from enforcing automatic detention to denying medical operators to provide first aid assistance to stranded migrants. Still, systematic push-backs and automatic returns to Belarus persist in disregard of EU and international asylum law, as repeatedly stated by the ECtHR and UNHCR, and of international human rights standards and customary norms, as pointed out by the UN.<sup>58</sup>

The three Member States considered to be particularly exposed to unprecedented inflows of unwanted migrants, representing a threat to their national security and integrity. As a result, I argue that they felt vulnerable to the risks posed by irregular migration and resorted to aggressive, human rights-breaching national measures.<sup>59</sup> The derogation to human rights and asylum law was thus perceived as justified on the grounds that they allegedly could not, or did not want to, accept them, confirming Morawa's thought.

<sup>55</sup> Joint letter, *Adaptation of the EU legal framework to new realities*, op. cit.

<sup>56</sup> See, Council of the European Union, Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, n. 14692/21, 25 January 2022; Joint Communication, *responding to state-sponsored instrumentalisation of migrants at the EU external border*, JOIN(2021) 32 final of 23 November 2021 p. 2.

<sup>57</sup> Ivi, para. 172-173.

<sup>58</sup> OHCHR, *Comment by UN High Commissioner for Human Rights Michelle Bachelet on the Belarus-Poland border situation*, 10 November 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27791&LangID=E>

<sup>59</sup> Reuters, *Polish PM draws link between London attack and EU migrant policy*, 23 March 2017, <https://www.reuters.com/article/us-europe-migrants-poland-idUSKBN16U0TO>, where Polish Prime Minister Beata Szydło declared: «I hear in Europe very often: do not connect the migration policy with terrorism, but it is impossible not to connect them».

In addition, the Commission disseminated its, still pending, Council Decision proposal to implement emergency, temporary and exceptional measures to the benefit of Lithuania, Latvia and Poland in order to provide them with support in managing the “crisis” caused by the facilitation of irregular migration by the Belarussian regime.<sup>60</sup> Under the proposed Decision, the three Member States may 1) derogate from ordinary asylum procedures, insofar as they are allowed to extend the registration of international protection claims, apply the border procedure to all international protection-seekers, including children, and expanding the deadline within which to take a decision their admission in their territory; and 2) derogate from ordinary reception procedures. Lithuania, Latvia and Poland could provide different material reception conditions, provided that people’s essential needs are nevertheless met. However, the Seimas Ombudsman found severe violations of international and EU human rights standards in the Lithuanian camps, where restrictions on migrants’ freedom lasted for 40 days without adequate material reception conditions, including insufficient food, hygiene and healthcare, weather-appropriate clothing, footwear and the right to privacy; which equals to inhuman or degrading treatment.<sup>61</sup>

Together with the proposed Council’s decision, the Commission launched what has been called a «new asylum mini-package».<sup>62</sup> This consists of a proposal for a Regulation for addressing situation of instrumentalisation in the field of migration and asylum (hereinafter, instrumentalization Regulation) and a proposal to amend the Schengen Border Code. The measures contained in the former are the same as appear in the Council Decision proposal of December 2021, thus formalizing the contradictory and human rights non-compliance character of the actions proposed. More into detail, the Commission states that the objective is to support the Member State facing a situation of instrumentalisation of migrants by creating a specific emergency migration and asylum management procedure, which would be added to the two emergency mechanisms in case of migration crisis and force majeure proposed in the framework of the New Pact. The Commission is therefore outlining an ordinary asylum and migration management mechanism and three extraordinary procedures «where the EU is under attack», in which derogation and enhanced interstate solidarity are required.<sup>63</sup>

One could wonder the need of setting out three different mechanisms to respond to the same malfunctioning of one or more asylum systems by leveraging the same solutions. According to the proposed Regulation, a situation of instrumentalisation of migrants «may arise where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security».

Not only has the Commission failed to uphold the respect for migrant’s rights in the regulation proposal, but it may be inconsistent with EU norms inasmuch as it attempts to make permanent the temporary provisions it proposed in December 2021 by virtue of Article 78.3 TFEU and which are still pending.<sup>64</sup>

<sup>60</sup> Commission, *Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland*, COM(2021) 752 final of 1 December 2021.

<sup>61</sup> Seimas Ombudsmen’s Office of the Republic of Lithuania, *Report on ensuring human rights and freedoms in places of temporary accommodation of foreigners having crossed the border of the Republic of Lithuania with the Republic of Belarus*, 7 October 2021, [http://hrmi.lt/wp-content/uploads/2021/10/E5339-Ataskaita\\_Migrantai\\_2021\\_RED\\_EN-1-2.pdf](http://hrmi.lt/wp-content/uploads/2021/10/E5339-Ataskaita_Migrantai_2021_RED_EN-1-2.pdf)

<sup>62</sup> ECRE, *Editorial: Asylum Mini-Package: Derogations Through the Backdoor*, 21 January 2022, <https://ecre.org/asylum-mini-package-derogations-through-the-backdoor/>

<sup>63</sup> Communication, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum*, COM(2021) 890 final of 14 December 2021, p. 3.

<sup>64</sup> ECRE, *Editorial: Asylum Mini-Package: Derogations Through the Backdoor*, *op cit.*

As for the Schengen Border Code revision proposal, the Commission endorses the same definition of migrant instrumentalization, enables the Member States to limit the number of border crossing points and requires them to intensify border surveillance, including with the help of the European Commission, to deal with this increasing threat, responding to those Member States that asked for clearer emergency guidelines.<sup>65</sup>

Meanwhile, Ursula Von Der Leyen declared that the Commission aims to «ensure that migrants can be safely returned to their country of origin, with the support of their national authorities», while making no reference to migrants' evident need to international protection arisen in Belarus because of the inhuman and degrading treatment they have been exposed to.<sup>66</sup>

What is happening at the EU-Belarus border is, in my opinion, the prelude of a paradoxical change, where States are allowed to permanently and easily derogate to human rights standards to protect their borders from their irregular arrival.<sup>67</sup> What emerges from this brief analysis of national and EU measures is a clear intention to safeguard the Member States in open disregard of State's international and EU obligations in the field of human rights. The Member States and the Commission seem to forget that the national interest must necessarily be balanced by the full respect of the human rights of migrants, as recently recalled by the ECtHR in *M.A. v. Denmark*. The State-centric vision of the Commission is evident in its own communications, where it reiterates that the Member States have been “forced” to adopt such emergency measures and it justifies their unlawful conduct in light of the ultimate aim of protecting their national security and territorial integrity.<sup>68</sup> Despite the objective increase in arrivals in these three countries, it is hard to believe that just over 10.000 people could jeopardize the stability of the asylum system of three developed Member States as well as constitute a real threat to their national sovereignty. The Union's myope justification to its Member States' grave human rights violations also passes through the statements of Ylva Johansson, EU Commissioner for Home Affairs. Enquired about the responsibilities of Poland in «destroying the phones of people, beating them up, dividing families, pushing back refugees», she replied that Poland was not to blame.<sup>69</sup> In her interview, the EU Commissioner links the tragedy happening at the border Belarus with the vulnerability of the EU: «I think we are vulnerable in two aspects. First, the lack of an agreement to deal with migration helps the narrative of migration being something toxic and difficult. And that is really what a regime like the Lukashenko regime are using. [...] the lack of an agreement makes us more vulnerable than we need to be».<sup>70</sup>

The Union's alleged vulnerability, according to Johansson, would rest in the absence of a coherent migration and asylum policy, exposing its Member States to migrant's instrumentalization.

<sup>65</sup> Communication, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders*, COM(2021) 891 final of 14 December 2021.

<sup>66</sup> European Commission, *Press release: Statement by President von der Leyen on the situation at the border between Poland and Belarus*, 8 November 2021, [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_5867](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5867)

<sup>67</sup> This conclusion could be equally inferred by analyzing the situation of migrants detained in Libya. Please see, L. Rodi, *Revocare il memorandum Italia-Libia*. *L'appello della società civile*, in *Altraeconomia*, 2 Febbraio 2022, [https://altreconomia.it/revocare-immediatamente-il-memorandum-italia-libia-lappello-della-societa-civile-a-governo-unhcr-e-oim/?utm\\_source=sendinblue&utm\\_campaign=Newsletter\\_22022\\_Appello\\_Memorandum\\_ItaliaLibia&utm\\_medium=email](https://altreconomia.it/revocare-immediatamente-il-memorandum-italia-libia-lappello-della-societa-civile-a-governo-unhcr-e-oim/?utm_source=sendinblue&utm_campaign=Newsletter_22022_Appello_Memorandum_ItaliaLibia&utm_medium=email)

<sup>68</sup> COM(2021) 752 final of 1 December 2021, *op. cit.*, p. 4,5,14.

<sup>69</sup> Euronews, *Ylva Johansson "It's not really a migration crisis. It's a geopolitical crisis."*, 23 November 2021, <https://www.euronews.com/2021/11/23/ylva-johansson-it-s-not-really-a-migration-crisis-it-s-a-geopolitical-crisis>. She declared «No, I think it's important to understand who started all this, who is the one to blame as the Lukashenko. He's the one luring people into a very, very dangerous situation. So this is important to remember, but it's also important to remember that we are not Lukashenko, we are the European Union. Of course, we need to comply with other standards, and that's why I've been calling on the Polish government to be more transparent».

<sup>70</sup> *Id.*

In light of this gap, the Union reacted sharply, deploying existing and proposed measures to tackle this threat. In my view, this statement cannot be accepted. Although the New Pact on Migration and Asylum is under legislative scrutiny, the EU Treaties and the Common European Asylum System provide legal provisions concerning asylum and migration management, migrants' reception, transfer and protection procedures, as well as instruments to apply in the context of emergencies. The scope of the Temporary Protection Directive is to provide immediate protection and basic assistance to mass migrant movements at the border. Not only the Commission has not attempted to activate this instrument, but it aims to repeal it under the New Pact. Additionally, although the three affected Member States declared to be subject to unprecedented migration flows, the Commission did not opt for a mandatory relocation mechanism of international protection-seekers from Lithuania, Latvia and Poland to the rest of the EU, as occurred during the 2015 "refugee crisis" when Italy alone had to face the arrival of more than 116.000 third country-nationals. As the influx of 10.000 people in three Member States seems sufficient to call it a "migration crisis", to derogate from ordinary asylum norms, and to set out specific management mechanisms, the Commission should have called for EU Member States' solidarity through a swift and mandatory relocation process. The political division on migration and the lack of interstate solidarity cannot therefore justify the tragedy still ongoing at the external border.

## **6. Conclusions.**

This contribution focused on States allegedly vulnerable to the threat posed by irregular migration and the grave repercussions for migrants' rights. We have seen that vulnerability is a flexible concept that has been used since ancient times both to describe human and non-human fragility. Vulnerability has been widely explored in bioethics and feminist literature as a quality inherent or contextual to human beings which cannot be crystallized in fixed definitions or criteria (section 1). Conversely, the economic vulnerability of companies (section 2) and the climate/environmental vulnerability of territorial areas (section 3) showed that non-human vulnerability is based on specific quantitative requirements and criteria. The analysis continued by analyzing vulnerability associated to States in the development, peace and conflict literature. In my view, internal and external factors of States' vulnerability, unwilling or unable to give effect to their core functions, can hardly be compared to the inherent and contextual vulnerability of individuals. States must always comply with their human rights obligations, even in case of aggression or conflict, and must be held responsible for their deliberate active or omissive misconduct. Although sharing the same concept, the four kinds of vulnerability examined in this contribution (i.e., individual vulnerability, economic vulnerability of undertakings, climate/environmental vulnerability of territories, vulnerability of States) differ in terms of definition, underlying theories and approaches, methodology, and nature of vulnerability factors.

Recently, however, Western leaders have manipulated vulnerability by unreflectively overlapping its features and implications respectively at the core of human vulnerability in philosophical studies and of State's vulnerability in development studies. In this regard, the EU stands out as emblematic example where vulnerability has been politically exploited by States' power-holders who fear to lose it in the face of destabilizing threats.

Akin to the US after 9/11, EU Member States reacted to the threat posed by irregular migration through aggressive and restrictive measures, this giving rise to the misperception that the State could be unable to manage migration "crises". I sought to demonstrate, however, that the presumption of State's vulnerability in the context of migration hides, in reality, the State's unwillingness to manage migration.



The dramatic situation involving migrants stranded at the EU-Belarus border illustrates the severe implications for migrants' life and rights of implying the State's vulnerability to migration threats. The emergency measures adopted at the national and EU level to tackle the "migration threat" were found to be unlawful by the ECtHR and raised severe concerns by UNHCR and NGOs.

The systematic push-backs to Belarus, the denial to exercise the right to asylum, the deliberate omission in providing aid, assistance and healthcare to people stranded at the border, automatic detention, and the legalized use of indiscriminate force are unlawful practices that undermine the whole EU project, based on democratic values and human rights-oriented objectives. The whole spectrum of human rights – the right to life, to dignity and integrity, to health and to family unit, among others –, is gravely threatened by this aggressive approach to migration.

It is therefore clear that the qualification of a State as vulnerable to irregular migration has to be handled carefully as it would entail a serious risk of a short-circuit in the EU migration and asylum policy, where unjustified compression of human rights would be justified to respond to pure national exigences, as the EU-Belarus case-study revealed. In this context, State's vulnerability to migration would not only harm third country-nationals, but also the other Member States. The Common European Asylum System can indeed properly function only if each national asylum system harmoniously coordinates with the others and if each country fulfils its obligations. Rejecting international protection-seekers implies a greater burden and responsibility upon other Union's States – in the EU-Belarus case, for instance, Germany has been accepting international protection-seekers originally entered in Poland – in violation of the principle of solidarity on which the EU migration and asylum policy must be based, pursuant to Article 67.2 and 80 TFEU.

What we are witnessing at the EU-Belarus border, and at the EU policy level in general, might be the prelude of the paradoxical shift from protecting vulnerable individuals to protecting vulnerable States from threatening migrants. Brought further, this new perspective could put a dramatic end to the EU right to asylum.