RETHINKING THE COMMON EUROPEAN ASYLUM SYSTEM

THROUGH VULNERABILITY ANALYSIS

1. Introduction:

To date, the Common European Asylum System (CEAS) has failed to offer a comprehensive and coherent refugee protection regime. Subsequent reforms have not addressed its fundamental flaws. I posit that, **unless we engage in a fundamental rethink of the CEAS, the current third phase of reform - and future reform – will not produce a CEAS that is 'fit for purpose'** (COM92017) 820 final, 7.12.2017). It will not establish a stable and future-proof asylum framework' (COM92017) 820 final).

The basic question is what is the CEAS for? Here we touch on the root of the problem with the CEAS. the **This system should first and foremost be about protection. Yet the CEAS is a product of *fortress Europe*. The CEAS was conceived as a migration control system with a protection dimension.** The many shortcomings of the Dublin system - problems that existed from its inception - are testament both to the CEAS' unfitting purpose and to the EU and the Member States' inability to critically assess and overhaul the CEAS. For example, the recast Dublin IV proposal fails to reform the failing Dublin System (Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, 2016/0133(COD), Brussels, 4.5.2016).

Paradoxically**, the CEAS and more broadly the EU and EU law are founded on values and principles that support the development of a system that puts protection at its core and bring CEAS actors together to achieve this purpose.** The Commission has stressed that **the CEAS must be built on 'strong and foundations and clear values'** (COM92017) 820 final).

One critical value and principle is **solidarity** (COM92017) 820 final). **However, if the CEAS is to develop into a protection-oriented system that upholds the EU's values and principles -, it is imperative that the EU and its Member States engage in a '*critical normative project*'.** In this regard, I posit that **vulnerability analysis offers a potent device to investigate the CEAS and transform it into a system that is fit for purpose.**

2. **Vulnerability analysis must be distinguished from the language of vulnerability that is deployed in migration policies:**

Migration policies routinely identify vulnerable groups of migrants. The construction of such groups is highly problematic for a number of reasons:

- **First, it creates an arbitrary binary between the vulnerable and the *invulnerable*.** In doing so, it upholds the liberal theory's fictional *invulnerable* subject, thereby ignoring a fundamental human reality => vulnerability comes with being human. This, in turn, yields distorted versions of human vulnerability and thus human life. Indeed, the construction of vulnerable groups

  For example, EU directives identify vulnerable migrant populations (e.g. 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'). Are we to assume, for example, that young adult male migrants are *invulnerable*?

- **Secondly**, **because vulnerability is seen as a deviation from the 'norm' – *invulnerability* -, it is exclusively associated with negative connotations such as harm and suffering.** The **construction of vulnerable groups obfuscates the generative dimension of human vulnerability**. One consequence is that **persons cast vulnerable are stereotyped and stigmatised as well as objectified and silenced**. For example, Atak, Nakache, Guild and Crépeau observe that **'the term "vulnerability" too often serves to portray migrants in a negative light, as helpless victims'** (Atak *et al*. 2018) Significantly, **because vulnerability is understood as victimisation and passivity**, so-called **vulnerable persons are exposed to paternalistic reponses**.

More recently, the label vulnerable has been attached to migratory situations rather than migrants (2016 New York Declaration for Refugees and Migrants). However, this approach replicates the drawbacks of the vulnerable group approach. Those migrants deemed in a vulnerable situation are themselves deemed vulnerable. Besides, the notion of vulnerable situation is equally arbitrary. Typically, the New York Declaration focuses on 'large movements' of migrants and only envisages vulnerable situations within this specific migratory framework. Because it 'almost exclusively deals with the situation of migrants prior

to their arrival in the country of destination', it glosses over the pull factors of migration and destination countries' responsibilities.

- **Thirdly,** the **vulnerable group approach is not the protective device that it purports to be. The language of vulnerability is deployed - or not - to serve migration policy objectives and for this reason cannot guarantee protection.** <u>Tellingly</u>, the image of the vulnerable migrant does not dislodge the construction of the migrant as a problem and a threat; rather it participates in the securitisation of migration and migrants. Mainwaring observes that '[[i]n the Mediterranean, migrants are rendered victims (…); however, once ashore on EU territory, they quickly become risky, securitized bodies, possible villains' (Mainwaring 2016). Revealingly, the depiction of migrants as the victims of ruthless smugglers conceals their vulnerability to EU and Member States' policies. **This instrumentalisation of the language of vulnerability in migration policies is further apparent in its deployment as a mere rhetorical tool.** For example, the Returns Directive identifies vulnerable persons, there are very few provisions dealing with any special requirements applicable to these persons and they are not far-reaching. **Importantly, migration policy objectives can also frustrate the deployment of the language of vulnerability**. <u>For instance</u>, in December 2016, the Coordinator for the EU-Turkey Statement recommended that Greece reconsider the exclusion of vulnerable asylum seekers from transfers to Turkey under the fast-track border procedure.

3. **Vulnerability analysis:**

Vulnerability analysis is best described as a **'*critical normative project*'** (Grear 2013). It offers a **powerful device to investigate the 'systems of power and privilege that interact to produce the webs of advantages and disadvantages' in which we are located with a view to responding to our vulnerability** (Fineman 2008). Significantly, **the counterpoint to vulnerability is not invulnerability'**; **vulnerability analysis seeks to build resilience**. **Resilience is 'the critical but incomplete remedy to vulnerability'** (Fineman 2015). Although nothing can completely mitigate vulnerability, **resilience is what provides individuals with the means and ability to recover from harm, setbacks and the misfortunes that affect [their] life'** (Fineman 2015).**'**

Vulnerability analysis recognises **vulnerability** for what it is - the *'primal* **human condition'** (Fineman 2015). **Vulnerability is** indeed**:**

- **<u>Universal and constant</u>:** It **arises from 'our embodiment which carries with it the ever present possibility of harm, injury and misfortune from mildly adverse to catastrophically devastating events whether accidental, intentional or otherwise'** (Fineman 2008). **Our vulnerability further arises from our condition as embedded beings** (Grear 2013). We are all vulnerable to the actions of others as well as institutions.

- **=> Vulnerability is thus <u>shared</u>.**

- **<u>Particular</u>:** we 'have different forms of embodiment and also are differently situated within webs of economic and institutional relationships' (Fineman 2010-11). **We therefore experience vulnerability in different ways**.

- **<u>Generative</u>: we are both vulnerable to the actions of others and inescapably dependent on others**. <u>**Thus,**</u> **vulnerability 'presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach out to others, form relationships, and build institutions'** (Fineman 2012).
  - ⇨ The generative dimension of vulnerability allows us to **reclaim dependency as something positive**. It mainstreams our dependency on others and on institutions.

This theorisation of vulnerability has far-reaching consequences for our responses to vulnerability:

- **It redefines our relationship with institutions.** Vulnerability analysis recognises that institutions are instrumental in shaping both our vulnerability and resilience through the mobilisation and distribution - or not - of resilience-building resources. **Fineman argues that this calls for a responsive state** (Fineman 2010-11). However, I concur with Grear that we need a **fuller theorisation of vulnerability analysis that recognises that the state is embedded within a 'complex uneven globalised world'** (Grear 2013). **The state is only one actor among many.** These actors' responsiveness to our vulnerability depends on their positioning within the plethora of processes, systems and institutional relationships that form the fabric of our globalised world. **All these**

> actors' responsiveness must also account for their vulnerability as human constructions.

- **The shared and generative dimensions of vulnerability have a critical role to play in achieving greater inclusiveness in the mobilisation and distribution of resilience-building resources in our *uneven globalised world*.**

   ⇨ **Our shared vulnerability enables us to relate to 'others' as fellow (vulnerable) beings and therefore strengthens our emotional identification with 'others'** (Carens 1996). It fosters mutual understanding and yields what Radhakrishnan describes as 'a deeply ethical impulse' that enables us 'to envision cooperations and solidarities across the divide and the asymmetry' of our globalised world (Radhakrishnan 2003).

   ⇨ **The generative dimension of vulnerability also supports greater inclusiveness in the mobilisation and distribution of resilience-building resources because it sheds a positive light on our dependency on others**.

4. Vulnerability and CEAS:

Vulnerability analysis transforms the CEAS into a system that is concerned with resilience-building, that is the resilience of all CEAS actors. These include EU and non-EU actors.

<u>Who are the CEAS actors?</u>

- Importantly, they **must include persons in need of international protection**. At the moment, they are the passive subjects of the CEAS (e.g. the Dublin system is essentially coercive vis-à-vis asylum seekers; they have no agency, no choice).

- The EU and its Member States.

- Third countries and their communities.

Because it is fundamentally critical, vulnerability analysis prompts and supports a rethink of the CEAS. Importantly, **fuller vulnerability analysis firmly locates the CEAS within our uneven globalised world so that it does not remain a self-centred, self-serving system.**

Vulnerability analysis promotes inclusiveness in the mobilisation and distribution of resilience-building resources (e.g. protection for those in need; support for those who provide protection) because:

- It recognises CEAS actors' universal and thus shared vulnerability. As such it promotes emotional identification with 'others' (Carens 1996); and

- The generative dimension of vulnerability enables CEAS actors to reclaim dependency on other human beings and on institutions as something positive.

  ⇨ **Vulnerability analysis redefines relationships between all CEAS actors.**

Significantly, vulnerability analysis enables the CEAS to live up to the values and principles that are supposed to underpin it and the EU as a whole. The key value-principle is **solidarity** Solidarity has been recognised as 'a dynamic and contextual meta-principle of a constitutional rank (Moreno-Lax 2017). **How the CEAS understands solidarity determines its ability – or lack of ability – to uphold other key principles such as fair sharing of responsibility and true partnership**.

Solidarity has a tri-dimensional nature (Moreno-Lax 2017):

- **Vertical:** institutions (including states)-persons solidarity.

- **Horizontal:** inter- institutional solidarity.

- **Systemic:** the whole system must foster solidarity.

Each facet of solidarity has an internal and external dimension.

To date, the CEAS has failed to uphold the value-principle of solidarity. For example, Moreno-Lax refers to the EU-Turkey deal as an example of 'external non-solidarity' (Moreno-Lax 2017). The Dublin system provides an example of internal and external non-solidarity. **Yet both the internal and external dimensions of solidarity are enshrined in the Treaties**. See e.g.:

Article 80 TFEU

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Article 21 TEU

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity,

the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Article 3(5)

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

What would solidarity look like in a CEAS transformed by vulnerability analysis?

I will sketch out what solidarity look like in a CEAS transformed by vulnerability analysis solidarity look like in a CEAS transformed by vulnerability analysis.

- **Internal and external vertical solidarity:** the CEAS must first and foremost attend to refugee protection needs, whether located within or outside the EU territory.

- **Internal and external horizontal solidarity:** the CEAS must foster inter-institutional solidarity with a view to addressing protection needs. Solidarity must extend to non-EU institutional actors (e.g. third countries).

- **Internal and external systemic solidarity:** solidarity must be fostered so that the CEAS can achieve its protection purpose as well as serve international protection regimes.

5. Concluding remarks:

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- I advocate fuller vulnerability analysis, but I do not advocate complacency. **Caution must always be exercised when using the concept of vulnerability**. This is because vulnerability the state and other institutions possess the power 'to exploit and thwart its meaning and significance' (Butler 2004). However, in my view, **because vulnerability analysis is fundamentally critical, it can 'maintain an ongoing reflexivity concerning the employment of the notion of vulnerability'** (Grear 2011).

- **The proposed transformation of the CEAS through vulnerability analysis could be considered unrealistic on account of its being overly idealistic**. It is **certainly the case that the proposed endeavour has an idealistic aspect**. However, I posit that **this must**

not be perceived as a flaw. Rather, **an *idealistic* perspective is precisely what we need if we are to overhaul the CEAS**. Indeed, **some degree of idealism compels us to concede that our institutions and practices may not be all that they should be** (Carens 1996). In other words, **it compels us to be critical**. It follows that **the degree of idealism that comes with fuller vulnerability analysis can prevent CEAS reform from perpetuating this system's shortcomings.**