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*Protection or (re)production
of vulnerability?
The Temporary Protection
Directive and displacement
from Ukraine*

Anna Kirby
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Protection or (re)production of vulnerability? The Temporary Protection Directive and displacement from Ukraine

Anna Kirby*

1. Introduction

After walking for 12 hours to catch a bus across Ukraine's external border, in the immediate aftermath of Russia's invasion, medical student Dr. Jessica Orakpo was told "Only Ukrainians. That's all. If you are Black, you should walk."¹ When complaining about their treatment at arrival facilities in Hungary, Roma refugees were instructed "if you don't like it, go back to Ukraine."² These examples highlight the standard of treatment experienced by non-white Third Country Nationals (TCNs) and Roma individuals fleeing the conflict in Ukraine into the territory of the European Union (EU). Blatantly, these statements are grounded in disregard for fundamental human rights and dignity. Yet, the EU's response to Ukrainian refugees has been widely celebrated, "In an immensely challenging context, the use of the Temporary Protection Directive (TPD) has been a success."³ How can these two realities coexist? Can the TPD truly be said to be a success in light of the experiences faced by the most vulnerable individuals?

More than thirteen million people were forcibly displaced from their homes in Ukraine following Russia's full-scale invasion on 24 February 2022,⁴ eight million of whom fled beyond the country's borders.⁵ This act marked a major escalation in a nearly decade-long conflict between the Russian Federation, alongside Russian backed separatists, and Ukraine, elevating the situation to a territory-wide international armed conflict. The scale of displacement is both the fastest and largest in Europe since World War II, meaning that the immediate consequences of the invasion reverberated into neighbouring countries and

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¹ Mlaba, Khanyi. 'African Students Faced Racism Fleeing Ukraine — But Where Are They Now?' (*Global Citizen*, 19 December 2022) <<https://www.globalcitizen.org/en/content/africans-in-ukraine-does-the-world-still-care/>> accessed 20/2/2024

² ÁTLÁTSZÓ. 'Roma refugees from Transcarpathia face segregation and humiliation in Hungary.' (*ÁTLÁTSZÓ*, 16 November 2022) <<https://english.atlatszo.hu/2022/11/16/roma-refugees-from-transcarpathia-face-segregation-and-humiliation-in-hungary/>> accessed 20/2/2024

³ ECRE. 'Joint Statement: Extend the Current Temporary Protection Regime for Displacement from Ukraine until 2025.' (19 May 2023) <<https://ecre.org/joint-statement-extend-the-current-temporary-protection-regime-for-displacement-from-ukraine-until-2025/>> accessed 20/2/2024

⁴ UNHCR, 'UNHCR: One year after the Russian invasion, insecurity clouds return intentions of displaced Ukrainians.' (*UNHCR*, 23 February 2023) <<https://www.unhcr.org/news/press/2023/2/63f78c0a4/unhcr-year-russian-invasion-insecurity-clouds-return-intentions-displaced.html>> accessed 20/8/2024.

⁵ UNHCR, 'Ukraine Emergency.' (*UNHCR*, 2023). <<https://www.unrefugees.org/emergencies/ukraine/>> accessed 20/2/2024

further across the continent.⁶ Within a week, more than one million people had crossed the borders into Poland, Romania, Moldova, Hungary, Russia, Slovakia, and Belarus.⁷ Alongside a notable outpouring of public support for Ukraine and its people in the form of mass demonstrations,⁸ volunteering and donations,⁹ States presented various ad hoc solutions to the influx of refugees.¹⁰ While these national schemes, combined with visa-free entry for Ukrainians, offered a relatively generous level of immediate protection, the resulting fragmented framework was problematic from the perspective of harmonisation within the Common European Asylum System (CEAS).

Accordingly, on 4 March 2022 the EU adopted Council Implementing Decision (CID) 2022/382, ‘activating’ the TPD for the first time since its inception in 2001. Building on lessons learned from the ad hoc response to Kosovars forcibly displaced in the breakdown of the former Yugoslavia, the TPD was developed proactively as a mechanism ready to be utilised in the event of a mass influx of migrants into the territory of the EU. Centred around stability and support, the Directive represented a significant shift from the temporary protection of the previous decade, which instead prioritised return.¹¹ Yet, the TPD had never before been operationalised, leading legal scholars to question whether the instrument had become obsolete.¹² In fact, the European Commission itself demonstrated scepticism over the Directive’s contemporary utility, proposing in the 2020 Pact on Migration and Asylum that the temporary protection regime be repealed and replaced with a new ‘immediate protection status.’¹³ In this sense, the activation of the TPD was surprising, not least because of the fact that its substance stands in stark contrast to the EU’s standard “deterrence paradigm”¹⁴ approach to mass irregular migration. Unprecedented in terms of both scope of protection and the speed with which the Council unanimously adopted the implementing decision, the

⁶ UN Ukraine, “The war has caused the fastest and largest displacement of people in Europe since World War II.” (*UN Ukraine*, 24 March 2022) <<https://ukraine.un.org/en/175836-war-has-caused-fastest-and-largest-displacement-people-europe-world-war-ii>> accessed 20/2/2024

⁷ Schengen Visa News, “Timeline of Ukrainian Refugees Reaching EU Countries Amid Russian Invasion.” (*Schengen Visa News*, 24 March 2022). <<https://www.schengenvisainfo.com/news/timeline-of-ukrainian-refugees-reaching-eu-countries-amid-russian-invasion/>> accessed 20/2/2024.

⁸ Agence, France-Presse. ‘Tens of thousands join rallies around the world in support of Ukraine’ (*The Guardian*, 6 March 2022). <<https://www.theguardian.com/world/2022/mar/06/tens-of-thousands-join-rallies-around-the-world-in-support-of-ukraine>> accessed 20/2/2024.

⁹ Legraien, Léa. ‘A year since Russia’s invasion: How charities set up to support Ukrainians are faring.’ (*Civil Society*, 24 February 2023). <<https://www.civilsociety.co.uk/news/a-year-since-russia-invasion-how-charities-set-up-to-support-ukrainians-are-faring.html>> accessed 20/2/2024.

¹⁰ Carrera, S., Ineli-Ciger, M., Vosyliute, L., & Brumat, L. (2023). ‘The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy.’ In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 2–58). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/8/2023, 7.

¹¹ van Selm, Joanne. ‘Temporary Protection for Ukrainians: Learning the Lessons of the 1990s.’ In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 366–383). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/8/2023, 375.

¹² Ineli-Ciger, Meltem. ‘Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe.’ (2016) *European Journal of Migration and Law* 18 1–33.

¹³ Carrera et al. (n10), 15.

¹⁴ Gammeltoft-Hansen, T., & Tan, N. F. ‘The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy.’ (2017) *Journal on Migration and Human Security*, 5(1), 28–56.

actuation of the dormant directive raises questions over why it has never been utilised before, particularly in response to the 2015-16 'refugee crisis.'¹⁵

The TPD is intended to serve a dual-function: to provide immediate temporary protection for mass influxes of refugees, and to create a responsibility sharing mechanism across member states. Ultimately, its objective is to alleviate financial and administrative pressure on national asylum systems while ensuring a minimum standard of protection for displaced persons. As a consequence of the Dublin Regulations, Member States (MS) at the external borders of the EU experience disproportionate pressure due to migration. The TPD aims to "promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons,"¹⁶ the CID allowing for the intra-EU mobility of beneficiaries in order to achieve this.

As of April 2023, 4 million people from Ukraine benefited from the temporary protection mechanism.¹⁷ However, not all persons fleeing the conflict are eligible for protection. The CID leaves wide discretion for MS regarding protection of non-Ukrainian nationals, leaving many vulnerable groups in a vulnerable limbo between conflict and protection. As many of the initial State-specific ad hoc responses extended some sort of protection to all persons fleeing the conflict, regardless of nationality, it is concerning that this window of discretion has resulted in a regressive implementation by some MS in relation to personal scope of application. Moreover, there have been numerous reports of discriminatory practices at the external border,¹⁸ suggesting that the double standards observed in the wider EU asylum system have trickled through into the TP regime.

1.1. Research Problem

Given its humanitarian objective, it is to be expected that the TPD offers a sufficient level of protection to a wide range of people. Due to a combination of factors, individuals belonging to minority groups are often considered to be the most vulnerable in society.¹⁹ For example, across Europe, the Roma population experience multifaceted vulnerability stemming from a

¹⁵ e.g. Reilly, Rachael & Flynn, Michael. 'The Ukraine Crisis Double Standards: Has Europe's Response to Refugees Changed?' *Global Detention Project* (2 March 2022).

¹⁶ TPD Preamble 8.

¹⁷ European Council. 'Infographic - Refugees from Ukraine in the EU.' (21 April 2023).

¹⁸ see Bayoumi, Moustafa. 'They are 'civilised 'and 'look like us': the racist coverage of Ukraine.' (*The Guardian*, 2 March 2022) <<https://www.theguardian.com/commentisfree/2022/mar/02/civilised-european-look-like-us-racist-coverage-ukraine>> accessed 20/2/2024; Tondo, Lorenzo. 'Embraced or pushed back: on the Polish border, sadly, not all refugees are welcome.' (*The Guardian*, 4 March 2022) <<https://www.theguardian.com/global-development/commentisfree/2022/mar/04/embraced-or-pushed-back-on-the-polish-border-sadly-not-all-refugees-are-welcome>> accessed 20/2/2024; Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to Flee: Pattern of Blocking, Delaying Non-Ukrainians.' (*Human Rights Watch*, 4 March 2022) <<https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee>> accessed 20/2/2024.

¹⁹ This is a common conclusion across disciplines: e.g. medical research (see Jenkins, Willysha, Courtney Jacks, and Katherine Tyrlik. "Examining the intersection of life expectancy and social vulnerability by locality." (2022) *North Carolina Medical Journal* 83, no. 5: 322-326.); environmental science (Phuong, T.T., et al., 'Livelihood vulnerability to climate change: Indexes and insights from two ethnic minority communities in Central Vietnam.' (2023) *Environmental Challenges*, 10, p.100666.) to sociology (Pittman, D.M., Riedy Rush, C., Hurley, K.B. and Minges, M.L., 'Double jeopardy: Intimate partner violence vulnerability among emerging adult women through lenses of race and sexual orientation.' (2022) *Journal of American college health*, 70(1), pp.265-273.).

history of entrenched antigypsyism.²⁰ Prior to the invasion, Roma were characterised as the most vulnerable minority group in Ukraine, many of whom are undocumented and potentially stateless.²¹ Non-white TCNs residing in Ukraine also experience complex vulnerability due to longstanding racial prejudices²² and insecure immigration status.²³ As the most vulnerable individuals, the minimum standards enshrined in the TPD should extend at least some sort of protection aiming to mitigate such vulnerability. However, treatment of both groups at the borders indicate that this is not the case – in fact it can be concluded that many individuals have been left in an even more vulnerable position.

Alongside this substantive issue is a more conceptual problem relating to ‘vulnerability’ itself. Despite lacking a clear definition, vulnerability has gained increasing prominence across disciplines, in both scholarship and practice. The concept recognises that certain groups are more susceptible to harm and require enhanced protection. While EU directives and the European Court of Human Rights (ECtHR) have explicitly acknowledged the importance of recognising vulnerabilities and providing tailored protection, across the board there is inconsistency in conceptualising and identifying vulnerability, and implementing corresponding safeguards.

1.2. Research Objectives

The objective of this paper is two-fold: to critically analyse the sufficiency of protection under the TPD in relation to the most vulnerable individuals displaced from Ukraine, and to explore whether vulnerability is conceptually useful in completing this task.

Building on evidence of differential treatment of refugees, the following study will demonstrate how the trend of securitised asylum policy within the EU - focusing particularly on Hungary - intersects with the implementation of the TPD in such a way that it creates increased vulnerability for certain groups, rather than protecting vulnerable people as it is intended to do. Through analysis of the TPD regime, with regard to the historical context, negotiation process and implementation, this research seeks to explore the pitfalls inherent in allowing Member States discretion when it comes to personal scope of protection. By linking existing literature on security and vulnerability, from a critical constructivist perspective, this research aims to build a theoretical argument exposing the inherent contradictions of migration policy that aims to address vulnerability through increased securitisation. It is expected that problems identified within this case study are indicative of wider issues within EU asylum policy and as such, this analysis provides valuable lessons for future policymaking. However, this study is grounded in the assumption that migration policy should be

²⁰ Commissioner for Human Rights, *The human rights of Roma and Travellers in Europe* (2012) Council of Europe publications. <<https://rm.coe.int/the-human-rights-of-roma-and-travellers-in-europe/168079b434>> accessed 20/2/2024.

²¹Bocheva, Halyna. ‘Roma in Ukraine - A Time for Action: Priorities and Pathways for an Effective Integration Policy.’ (*Minority Rights Group Europe*, May 2019) < https://minorityrights.org/wp-content/uploads/2019/05/MRG_Rep_Ukraine_EN_Apr19.pdf> accessed 20/2/2024.

²² Cénat, JM, et al. ‘War in Ukraine and Racism: The Physical and Mental Health of Refugees of Color Matters.’ (2022) *International Journal of Public Health*. <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9091168/>> accessed 20/2/2024.

²³ Baumgärtel, M. *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge: Cambridge University Press, 2019).

humanitarian centric - a stance that is not necessarily shared by EU heads of state - thus the conclusions reached in this research can be considered as more ideational in nature than practical.

Due to its long dormant status, academic literature on the TPD from the last decade tends to focus on the reasons behind non-activation and its contemporary (ir)relevancy.²⁴ Since the Russian invasion and subsequent activation of the TPD, the research that has emerged primarily centres on questioning why the EU made the decision to activate the mechanism now, but not in response to comparable situations of mass migration in the past. The common conclusion of this research is that this action demonstrates a system of “unequal solidarity” that privileges persons fleeing Ukraine over other groups of refugees.²⁵ Regarding the implementation of the TPD by MS, academic literature is still relatively sparse,²⁶ despite substantial country specific data being available.²⁷ Of this scholarship, a critical perspective is somewhat lacking, particularly one that departs from a positivist analysis. Reasons postulated for this unequal solidarity vary: while some authors cite geopolitical motives;²⁸ others explicitly argue that racism is manifest in this decision.²⁹ This debate is central to the existing literature. Skordas maintains that “Concerns of discrimination or institutional racism in the implementation of the EU system of temporary protection are overblown,” thus the activation of the TPD was simply pragmatic.³⁰ On the other hand, Carrera et al suggest that this unequal solidarity is indicative of wider racial discrimination in the EU migration system, and as such requires scrutiny.³¹ The stance taken in this paper is that while the activation of the TPD should be celebrated for facilitating the immediate protection of so many - it was indeed the best option available to the EU for the situation at hand - discriminatory practices within the

²⁴ Gluns, Danielle. & Wessels, Janna. ‘Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current “Refugee Crisis”.’ (2017) *Refugee Survey Quarterly*, 36, 57–83.; Ineli-Ciger, Meltem. (n12).

²⁵ Carrera et al (n10).

²⁶ see Bakhtina, Krystyna. “The Temporary Protection Directive: The Analysis of the Dutch Case,” (2022) *Amsterdam Law Forum* 14, no. 3 [1]-[10] for the Netherlands; Koren, L., and Lalić Novak, G. “‘We are With You, Ukraine’ – Analysis of the Administrative Capacities in the Implementation of Temporary Protection in Croatia.’ (2022) *Migracijske i etničke teme*, 38(1), 52-54. for Croatia; Jauhiainen, Jussi & Erbsen, Heidi ‘Multilevel governance in the temporal protection and integration of Ukrainians within the European Union: the case of Estonia.’ (2023) *Journal of European Integration*, 45:3, 413-430. for Estonia.

²⁷ see EUAA, ‘Temporary protection for displaced persons from Ukraine.’ <<https://whoiswho.euaa.europa.eu/temporary-protection>> accessed 20/2/2024.

²⁸ Karageorgiou, Eleni. & Noll, Gregor. “Receiving Ukrainian Refugees in the EU: A Case of Solidarity?” (2023). In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 400-419). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

²⁹ Kostakopoulou, Dora. “Temporary Protection and EU Solidarity: Reflecting on European Racism.” (2023) In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 383-400). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

³⁰ Skordas, Achilles. “Temporary Protection and European Racism.” (2023). In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 419-431). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

³¹ Carrera et al (n10).

implementation of the directive itself point to a broader structural issue that demands further attention.

Theory based analysis of the TPD and its implementation is virtually non-existent. Despite vast literature respectively on securitisation of migration in the EU³², and vulnerability of migrants,³³ the nexus between the two remains to a large extent unexplored. Scholarship on the relationship between vulnerability and securitisation tends to focus on the vulnerability of the state as opposed to that of the individual.³⁴ Recent critique on the double standards illuminated by the TPD touches on securitisation practices in MS, but without explicitly referring to critical theory.³⁵ Therefore this paper seeks to fill the aforementioned lacuna in research with a theory driven critical analysis of the TPD in the context of securitisation of migration in the EU. Not only does this research aim to bring a theoretical perspective to the issue, going further than simply exposing the gaps in protection or contrasting the opposing frameworks, but it is argued that this analysis is crucial in shedding light on the reasons behind these gaps and differential practices. Shifting the focus of discussion to the vulnerability - and security - of the individuals at the centre of this, rather than the state, is both the ultimate goal of this research and the proposed policy consideration.

1.3. Research Questions and Structure

The main research question this paper is seeking to answer is as follows: Does the concept of vulnerability provide a useful tool to critically analyse the TPD regime? Section 2 outlines the theoretical framework through which the TPD will be assessed, focusing on vulnerability and security from a constructivist approach. Section 3 explores the subquestion: How does vulnerability function as a legal concept in international and European law? This section aims to understand the legal implications and applications of vulnerability, while also discussing its flaws.

The next subquestion, answered in Section 4, is: How does the change in scope of the TPD from the Commission's initial proposal to the final Council Implementing Decision interact with specific vulnerabilities of Ukrainian refugees? This section aims to provide historical context and chronological analysis of the TPD timeline, to interrogate the interplay between legal and political motivations, and how this ultimately impacts access to protection for vulnerable groups fleeing Ukraine.

The discussion in Section 5 addresses several subquestions: How can critical IR theories help to illuminate why certain groups have been excluded from protection? How does securitisation of migration in Hungary intersect with the implementation of the TPD? Does the TPD sufficiently protect vulnerable persons or produce more vulnerability? Here the

³² see Léonard, Sarah. & Kaunert, Christian. "De-centring the Securitisation of Asylum and Migration in the European Union: Securitisation, Vulnerability and the Role of Turkey." (2022) *Geopolitics* VOL. 27, NO. 3, 729–751.

³³ see Mendola, D. & Pera, A. 'Vulnerability of refugees: Some reflections on definitions and measurement practices.' (2022) *International Migration*, 60, 108– 121.

³⁴ e.g. Léonard & Kaunert (n32); Mendes, C. et al. "Climate change, vulnerability and securitization." (2020) *Rev. Bras. Polít. Int.* 63 (1)

³⁵ Carrera et al. (n10).

nexus and reciprocity between security and vulnerability will be presented in a theoretical argument, which will then be demonstrated through the analysis of Hungary's implementation of the TPD, against the context of Hungary's regime of securitisation.

Section 6 considers two additional functions of vulnerability. The first explores the potential of vulnerability as a legal concept for achieving substantive equality, seeking to answer the subquestion: "Can vulnerability provide a useful tool to build a legal argument exposing the gaps in protection and an avenue to pursue legal remedy?" Secondly, in answering "What lessons can be learnt from this interdisciplinary analysis in relation to the wider EU asylum system?" a more conceptual argument is made about vulnerability as a tool for reframing migration policy.

Section 7 will conclude by summarising the findings and implications of each subquestion.

1.4. Methodology

Conducting interdisciplinary research can be difficult and even problematic due to differences in research objectives, methodologies and writing styles.³⁶ This paper seeks to combine a legal and political science analysis, not for superfluous reasons but because it is deemed necessary to fully understand the application of the TPD in practice and the motivations behind the observed regressive implementation of the TPD, so that resultant research findings can meaningfully and positively inform future policy making.

This research uses both descriptive and qualitative text analysis approaches, taking elements from critical content analysis. The former relates to description of the relevant legal frameworks. Critical content analysis is a flexible method that allows qualitative analysis of various types of text - in this case secondary sources - in such a way that emphasises the power relations behind social practices.³⁷ For the purposes of this study, this technique is chosen because of its theory-driven and reflexive nature, requiring a deeper examination of the historical and social context surrounding the activation of the TPD. Applying this method 'demands more than the simple application of surface-level understandings of a theoretical frame,'³⁸ which is necessary in this case because it allows for a more comprehensive understanding of the social and institutional processes that intersect with the implementation of the TPD.

Within Section 5, the chosen theoretical framework of security and vulnerability from a critical constructivist perspective enables the link between existing securitisation practices in the EU and the gaps in protection within the TPD regime to be exposed. Using Balzacq's more

³⁶ Leboeuf, Luc. 'Lost in translation? The Promises and Challenges of Integrating Empirical Knowledge on Migrants' Vulnerabilities into Legal Reasoning.' (2022) *German Law Journal*, 23, 976-991.

³⁷ Johnson, H.L., Mathis, J.B., & Short, K.G. 'Critical Content Analysis as a Research Methodology.' in *Critical Content Analysis of Children's and Young Adult Literature* (eds) Johnson, H.L., Mathis, J.B., & Short, K.G. (New York Routledge, 2016).

³⁸ Utt, J., & Short, K. 'Critical Content Analysis: A Flexible Method for Thinking with Theory.' (2018) *Understanding and Dismantling Privilege*, 8(2), 1 - 7.

recent conceptualisation of securitisation theory,³⁹ which encapsulates a range of non-discursive and discursive practices, this study aims to highlight the predictability of this differential protection within the current political climate in Hungary, serving as an example of deeply entrenched securitised logic. Looking at the wider context of securitisation within Hungary's migration system from a practice-oriented approach, focusing on the 'mentalities of government' rather than merely in relation to speech acts, means that limitations associated with only analysing fully securitised issues can be overcome. This way also incorporates acts that are more implicit or where it is more difficult to demonstrate audience acceptance.⁴⁰

Hungary was chosen as a case study for a number of reasons. It is argued that there is a clear securitisation of migration, and that there is evidence to suggest that this is driven by xenophobic ideology as well as populist motives, rather than legitimate security concerns.⁴¹ In fact, at present, its rebellious reputation within the EU is under scrutiny as it is next in line to take the seat of presidency of the Council next year, prompting calls for the state to be suspended from this role.⁴² Within the context of the TPD, Hungary directly borders Ukraine and took in a large proportion of those displaced, therefore the practices of securitisation that are most apparent at the border can be analysed. Furthermore, Hungary played a key role in the limiting of scope of the TPD from proposal to final implementing decision, and also enacted a regressive scope of protection from its own initial national response to its implementation of the TPD. By focusing on a context in which extreme securitisation is demonstrable, it is possible to analyse the extent to which this affects the sufficiency of protection afforded by the TPD. Given its increasing prominence in academia and practice, and its clear humanitarian foundations, vulnerability is utilised as a heuristic tool to carry out this analysis, which in effect also seeks to demonstrate the conceptual utility of vulnerability. The Roma population and non-white TCNs are chosen as the subject of analysis within the context of Hungary's implementation of the TPD, because of the intersectional vulnerability they experience as already marginalised groups on the move, alongside not falling within the mandatory scope of protection. Linking the case-study to a broader theoretical argument allows for implications to be drawn about EU migration policy and for more general recommendations to be made.

Finally, it is important to acknowledge the limitations of this research. Practical considerations and language barriers mean that certain information was not accessible. Moreover, due to this limited sample of analysis, the conclusions reached are made in part on the basis of inferences and generalisations. Finally, as this analysis focuses on vulnerability of non-white TCNs and Roma persons, it is necessary to acknowledge my position as a white western woman. The experiences of these individuals both as migrants and as marginalised

³⁹ Balzacq, T., Léonard, S., & Ruzicka, J. 'Securitization 'revisited: theory and cases.' (2016) *International Relations*, 30(4), 494–531.; Balzacq, T. 'Securitisation Theory: Past, Present and Future.' (2019) *Polity* 51:2, 331–348.

⁴⁰ Jaroszewicz, Marta & Grzymski, Jan. 'Securitization in the Shadow of Armed Conflict.' (2023) *Communist and Post-Communist Studies*, Vol. 56, Number 1, 262.

⁴¹ Szalai, András & Göbl, Gabriella. 'Securitizing Migration in Contemporary Hungary.' (2015) *Centre for EU Enlargement Studies*, 2.

⁴² Alemanno, Alberto. 'Suspending Hungary's EU presidency isn't a sanction — it's a precaution.' (*Politico*, 7 June 2023) <<https://www.politico.eu/article/suspend-hungary-eu-presidency-sanction-precaution/>> accessed 20/2/2024.

groups is something that I cannot speak to personally, and it is my aim in this research to stay clear of making assumptions or perpetuating neocolonial dynamics through the marginalisation of non-dominant epistemologies. This research would have greatly benefited from first person interviews with those involved, however this was not practically viable.

1.5. A Note on Terminology

Whether or not persons fleeing Ukraine are refugees in legal terms is an issue to be assessed on an individual basis, and something that has likely not been explored extensively due to the alternative protection conferred by the TPD. Nevertheless, Hugo Storey asserts that generally speaking, people fleeing the conflict in Ukraine most likely come under the definition of refugee set out in the Geneva Convention 1951.⁴³ For the purposes of this paper, the word refugee will be used in a general sense to refer to individuals fleeing Ukraine, without inferring that they are recognised as such under international law.

2. Theoretical Framework

Owing to its many conceptualisations, *vulnerability* will be utilised in several different ways throughout this research. Primarily, it will be utilised as a metric to assess the adequacy of protection offered by the TPD. Providing minimum standards of immediate protection to mass influxes of people is central to the directive's objectives, thus it is logical to assume that at the very least, the most vulnerable will receive adequate protection. The concept of *security* is presented as a lens through which to examine the process that led to the activation and ongoing implementation of the TPD by member states. *Constructivism* provides a critical lens of analysis in scrutinising the reasons behind gaps in protection left by the TPD, how both vulnerability and security are socially constructed concepts that can be utilised to bolster particular political discourses. While the theories discussed in this study gained prominence in the field of international relations, they are increasingly prevalent in legal scholarship and hence lend themselves well to an interdisciplinary research.⁴⁴ Employed in this context to analyse the (in)adequacy of the TPD as a legal framework - a mechanism created, like all international legal instruments, as the product of political will - these theories provide an original perspective that would be entirely lacking from a legal doctrinal analysis, or indeed from an analysis based on traditional rationalist IR theory.⁴⁵

2.1. Vulnerability

Vulnerability is a condition inherent to all humans; life and everything within it is conditioned by vulnerability. Ubiquitous across disciplines, the concept possesses varying definitions and resulting functions. The Oxford Dictionary defines vulnerability as "the quality or state of

⁴³ Storey, Hugo. 'Are Those Fleeing Ukraine Refugees?' (2023) In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 101-116).

European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

⁴⁴ Karber, Phillip. "'Constructivism" as a Method in International Law.' Proceedings of the Annual Meeting (American Society of International Law, 2000). Vol. 94. 189-192.

⁴⁵ see Novelli, Douglas, H. 'Rationalism in International Relations: Concepts, Theoretical Limits and Criticism.' (2018) *Revista InterAção* v. 9, n.1.

being exposed to the possibility of being attacked or [harmed](#), either physically or [emotionally](#).”⁴⁶ Scientifically, vulnerability is defined as “The sensitivity, resilience, and capacity of a system to adapt to stress or perturbation,”⁴⁷ and “a position of relative disadvantage, which requires a person to trust and depend upon others.”⁴⁸ Several features of the concept can be identified. Firstly, vulnerability encompasses both exposure to harm and (lack of) coping abilities. Furthermore, it is relational: individuals who are vulnerable require specific assistance from others.

Following from this is the idea that to mitigate vulnerability is to pursue equality. Naturally, this notion gained academic prevalence within critical theory relating to social injustice. Credited with first proposing the theory, Martha Fineman posits vulnerability as a universal human condition that needs to be addressed by the state.⁴⁹ Acknowledging that certain individuals or groups possess characteristics that render them vulnerable, or more vulnerable than others, vulnerability provides a tool through which to pursue justice. Grounded in an ethics of care, the concept becomes a moral justification for creating - or demanding - legal and policy approaches to address social disadvantages and achieve equality:⁵⁰ in this sense vulnerability is “lingua franca of global and international justice.”⁵¹

Being both a universal human quality, and a context or situational condition, there is no one set of fixed factors that render an individual vulnerable. The increasing invocation of vulnerability within domestic and international law will be discussed in detail in Section 3. Generally, or at least has been the case in practice, a group characteristic approach is taken when determining if an individual is vulnerable. For example, in *MSS*,⁵² the ECtHR held that all asylum seekers are vulnerable as a result of their experience. Although an arguably positive development, this statement by the Court embodies various concerns with the concept of vulnerability that have been presented in academic literature. To proclaim all asylum seekers as vulnerable rests on the assumption of one homogenous group, and risks the implication of lack of resilience or agency. An intersectional perspective, that seeks to capture the complexity of individuals lived experiences, is relevant here. Tracing back to black feminist roots, Kimberlé Crenshaw⁵³ theorised the concept of intersectionality to critically interrogate how power, through intersecting patterns of oppression and domination, affects individuals

⁴⁶ ‘Vulnerability.’ *English Oxford Living Dictionaries* (2023).

<<https://en.oxforddictionaries.com/definition/vulnerability>> accessed 20/2/2024.

⁴⁷ ‘Vulnerability.’ in *The Oxford Dictionary of Environment and Conservation* (Oxford University Press, 2007)

<<https://www.oxfordreference.com/display/10.1093/acref/9780198609957.001.0001/acref-9780198609957-e-8754>> accessed 20/2/2024.

⁴⁸ ‘Vulnerability.’ in *The Oxford Concise Medical Dictionary* (Oxford University Press, 2010)

<<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803120303277;jsessionid=31F54172453452ED2582EC1317254D6E>> accessed 20/2/2024.

⁴⁹ Fineman, Martha. ‘The Vulnerable Subject: Anchoring Equality in the Human Condition.’ (2008) 20(1) YALE J.L. & FEMINISM 1–23.

⁵⁰ Leboeuf (n36), 981.

⁵¹ Cole, A. ‘All of Us Are Vulnerable, but Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies.’ (2016) *Critical Horizons* 17:2. 269–277, 263.

⁵² *M.S.S. v Belgium and Greece* (2011) (Application no. 30696/09).

⁵³ see Crenshaw, Kimberlé. “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color.” (1991) *Stanford Law Review*, vol. 43, no. 6, 1241–99.

who experience marginalisation on multiple levels due to complex layered identities.⁵⁴ This allows a move beyond looking at power relations through one-dimensional categorisations, which lead to the establishment of homogeneous groups, essentialised dichotomies such as man/woman, masculine/feminine, strong/vulnerable, thus capturing differences in “individual lives, social practices, institutional arrangements, and cultural ideologies and the outcomes of these interactions in terms of power.”⁵⁵

Applying this theoretical grounding to the category of migrant emphasises that certain individuals are more vulnerable than others, such as women, ethnic minorities or stateless persons, who are also one the move. Moreover, an intersectional analysis helps to avoid common issues and risks associated with labelling a given group category as vulnerable, such as essentialism, stigmatisation and paternalism.⁵⁶ By acknowledging that possessing certain identities carries with it greater susceptibility to marginalisation while also examining “the institutional practices that produce the identities and inequalities in the first place,”⁵⁷ vulnerability in this context can act as a critical tool, to expose how vulnerabilities may be produced and reinforced through the application of legal frameworks.

Feminist contributions further develop the notion of vulnerability as a critical tool by emphasising the positive elements of the concept. Gilson posits vulnerability not only as “a shared basic condition, but also a condition of potential,”⁵⁸ meaning that while it denotes a state of susceptibility to harm, it also represents an opportunity to foster social-connectedness and empathy. This conceptual reframing demonstrates the flawed assumption that vulnerability is necessarily a negative or irregular state to be resolved and remedied, and that vulnerable people must lack the resilience or agency to do so themselves.

2.2. Security

Security may be seen as opposing in nature to vulnerability – to be in a state of security is to be protected from the possibility of attacks/harms. Yet the concepts are also interlinked, as described by Anthony Burke, “security is imagined on the basis of a bounded and vulnerable identity in perpetual opposition to an outside—an Other—whose character and claims threaten its integrity and safety.”⁵⁹ Both security and vulnerability are relational concepts whose legitimacy is grounded in the existence, and construction, of the other. Following this logic, and assuming that vulnerability is a negative state, security may be presented a legitimate paradigm through which to address vulnerability- to pursue a condition of ‘invulnerability’ and restore control over the environment that is said to be threatening. ‘Protection,’ in the humanitarian sense of migration policy, could in theory be synonymous

⁵⁴ Kuran, C.H.A, et al. ‘Vulnerability and vulnerable groups from an intersectionality perspective.’ (2020) *International Journal of Disaster Risk Reduction* 50, 101826.

⁵⁵ Davis, K. ‘Intersectionality as buzzword: a sociology of science perspective on what makes a feminist theory successful.’ (2008) *Feminist Theory*. 9 (1) 67–85, 68.

⁵⁶ Peroni, L. & Timmer, A. ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law.’ (2013) 11:4 *International Journal of Constitutional Law*, 1056.

⁵⁷ Fineman, Martha. ‘The Vulnerable Subject and the Responsive State.’ (2010) 60 *Emory Law Journal*, 251.

⁵⁸ Gilson, Erinn. ‘Beyond Bounded Selves and Places: The Relational Making of Vulnerability and Security.’ (2018) *Journal of the British Society for Phenomenology*, 49:3, 229-242.

⁵⁹ Burke, A. ‘Metaterror.’ (2009) *International Relations*, 23(1), 61–67, 4.

with security as a means for addressing vulnerability. However, in order to do so effectively, it must be made clear what and who is being ‘secured.’

The concept of security has evolved along with the changing international landscape and ever-expanding pervasiveness of the international human rights regime. During the World Wars, conceptual ideas about security were understandably tied to practical notions of national security from military threats. As the geopolitical landscape split into Eastern and Western power blocs, threats were reframed not only as physical but ideological, representing one side of the freedom/tyranny binary.⁶⁰ This outward looking state-centric security dominated modern mainstream security studies.

With the breakdown of the Soviet Union, and the “end of history, as proclaimed by Fukuyama in 1992, there was no more “sustained global challenge to the liberal, market-oriented vision of a free society.”⁶¹ The world, and States’ order within it, came to be defined by human rights. As a result, national security strategy became grounded in protecting the liberal ideal of human rights, democracy and freedom. Defending this national identity and culture becomes integral to the survival of society, and entails non-military actions such as processes that strengthen ‘us’ versus ‘them’.⁶² Contemporary security threats are thus presented by an ‘enemy’ unwilling to share the liberal worldview, epitomised by the post 9/11 dominant narrative of jihadi terrorism as the primary threat to the security of the international community.⁶³ Within this state-centric security paradigm, individual rights were often overlooked through the realist assumption that protection of the state by nature also protects its citizens.⁶⁴ Yet, this premise collapses in light of vast evidence of human rights violations within states, as well as being challenged by existential threats such as those posed by climate change.⁶⁵

Human security emerged in response to this, striving to make individuals the referent object of security, rather than the state. Broadly, this may be understood as aiming to achieve both “freedom from want” and “freedom from need,” clearly linked to aforementioned notions of vulnerability by bringing social inequality into the security discourse.⁶⁶ While this approach to human security has become widely accepted, there is still no agreed upon definition. Hence, security must be understood as a “historically shifting set of social and political practices, not an objective condition or fixed set of perceptions.”⁶⁷ This ambiguity is positive in the sense that it allows for transformation of the concept within security studies and public

⁶⁰ Jackson, Will. ‘Securitisation as depoliticisation: depoliticisation as pacification.’ (2013) *Socialist Studies / Études socialistes* 9 (2) Winter 146-166, 147.

⁶¹ UK Cabinet Office. National Security Strategy of the United Kingdom:Update 2009 - Security for the Next Generation. (London: HMSO, 2009), 5.

⁶² Ünal Eriş, Ö. & Öner, S. ‘Securitisation of Migration and the Rising Influence of Populist Radical Right Parties in European Politics.’ (2021) *Ankara Avrupa Çalışmaları Dergisi*, 20 (1), 161-193, 164.

⁶³ Jackson (n60), 150.

⁶⁴ Liotta, P.H. & Owen, T. ‘Why Human Security?’ (2006) *The Whitehead Journal of Diplomacy and International Relations* 37, 40.

⁶⁵ Chmutina, Ksenia et al. ‘From pity to fear: security as a mechanism for (re)production of vulnerability.’ (2023) *Loughborough University*. <<https://hdl.handle.net/2134/21534045.v1>> accessed 20/2/2024.

⁶⁶ Liotta & Owen (n64), 40.

⁶⁷ Krause, K. & Williams, M. ‘Security and “Security Studies”: Conceptual Evolution and Historical Transformation.’ in A. Ghaciu & W. C. Wohlforth, *The Oxford Handbook of International Security* (Oxford University Press, 2018), 24.

understanding, such as the emergence of human security as a vehicle to promote human rights. Nevertheless, the lack of clarity also means that security can be utilised normatively to forward certain political aims. Where human security appears ostensibly to be conducive to the promotion of human rights, the actors and motivating factors behind the security discourse must be acknowledged; a broad view of human security can be dangerous in that it converts legal human rights obligations into mere policy considerations.⁶⁸

Interestingly, the utility of the concept of vulnerability has been questioned for the same reasons: the risk of a fuzzy conceptualisation is that human rights, and the frameworks intended to protect them, could be substituted with a vague charity.⁶⁹ Despite its purported universal application, it is argued that the human security model still operates very much within the framework of liberal humanitarianism, what has always been at the core of imperialistic logic.⁷⁰ Reminiscent of the 'white man's burden,' the human security paradigm has been criticised for focusing on the physical existence of people rather than access to political rights, with the implication that vulnerable individuals are denied political autonomy, requiring the protection and aid of the State. In this respect, there is the concern that pursuing human security may counterproductively represent a site for the production and regulation of identity in the form of oppressive biopolitics. As security is regularly used to describe the desired normative state of a given object, this also applies to individuals: vulnerability is perceived as an exception to this state, thus to be secured means to become 'the norm', 'the acceptable', 'the deserving'.⁷¹ Applied to migration, this highlights that those deemed to represent a threat to security are those who are deemed to threaten the liberal status quo. Vulnerability is presented simultaneously as a reason to assist and protect certain individuals, and as a means through which to control others; protection is conditional on conforming to certain characteristics rather than grounded in true respect for human rights.

Acknowledging its conceptual and methodological criticisms,⁷² human security nevertheless presents an "imperfect yet effective approach" to the various underlying threats of mass migration as experienced by migrants themselves.⁷³ With the individual at the centre, "Human security is well suited to analyse people-on-the-move's vulnerabilities and to problematise the role of border(ing)s as a source of vulnerability and insecurity, when they are often framed as the opposite - as sources of protection and security."⁷⁴

2.3. A Constructivist Perspective

Vulnerability and security are socially constructed concepts that when utilised in different contexts can serve equally as tools of justice and oppression. Critiquing these concepts while

⁶⁸ Howard-Hassmann, R. E. 'Human Security: Undermining Human Rights?' (2012) *Human Rights Quarterly*, Vol 34 No. 1 88-112.

⁶⁹ Carlier, Jean-Yves. 'Des droits de l'homme vulnérable à la vulnérabilité des droits de l'homme, la fragilité des équilibres.' (2017) *Revue interdisciplinaire d'études juridiques* 79: 175-204.

⁷⁰ Chmutina et al. (n65).

⁷¹ Bankoff, G., & Hilhorst, D. *Why vulnerability still matters: The politics of disaster risk creation*. (Routledge, 2022).

⁷² see Suhrke, A. 'Human Security and the Interests of States.' (1999) *Security Dialogue* 30(3): 265-276.; Paris, R. 'Human Security. Paradigm Shift or Hot Air?' (2001) *International Security* 26(2): 87-102.

⁷³ Fontana, I. 'The human (in)security trap: how European border(ing) practices condemn migrants to vulnerability.' (2022) *International Politics* 59, 465-484.

⁷⁴ Ibid., 467-468.

still accepting the illusion of their integrity is ultimately ineffective; a constructivist analysis enables the use of this theoretical framework to show how practices that increase security may further vulnerability, rather than mitigating it. Critical constructivism adds a critical element to constructivist thought by not only acknowledging that knowledge is subjective, but by contextualising knowledge production within social and cultural environments, actively searching out alternative discourses and non-hegemonic epistemologies. In this way it works to expose and extricate elitist assumptions within existing knowledge and provide a referent for cultural reform through including previously marginalised knowledge within mainstream discourse.⁷⁵

2.3.1. Securitisation Theory

To understand how security is both the problem and solution in relation to vulnerability of migrants within the framework of the TPD, the constructed nature of security must be understood. From the perspective of national security, migration is often seen as the problem: a threat to the vulnerable state, justified by a number of legitimate concerns such as public safety, economic considerations, or simply deferring to the principle of sovereignty. Alternatively, from a human security perspective, migration often presents a solution for the vulnerable individual fleeing a situation of insecurity, such as conflict, environmental degradation, or individual persecution. These two seemingly contradicting perspectives on the same phenomenon highlight the subjective nature of security. Viewed in this way, it is a zero sum game: protect the security of the state at the expense of migrants, or vice versa. How any given individual or actor views the issue of migration becomes dependent on how they understand security, “while a shared understanding of a threat exists, the meanings attributed to it may vary.”⁷⁶

Securitisation theory stems from the constructivist assertion that knowledge is constructed through a series of intersubjective interactions, meaning that each person’s perspective on the world, their truth, is entirely unique to them as a result of their experience. Applied to the notion of security, proponents of this theory contend that security issues do not exist objectively, but as a product of social construction.⁷⁷ Early contributions to constructivist thought came from within the fields of sociology and philosophy, predominantly centred around the evolution of intersubjective understandings shaped by ideas, but the field has expanded to focus on the role of practice.⁷⁸ In international relations, constructivism emerged as a framework to study how social structures work to enable and constrain actors in their choices and consequent patterns of behaviour, thus shaping world politics.⁷⁹ Critical constructivism developed in response to the criticism of mainstream constructivist theory as

⁷⁵ Taylor, P. ‘Mythmaking and mythbreaking in the mathematics classroom.’ (1996) *Educational Studies in Mathematics* 31, 151-173.

⁷⁶ Chmutina et al. (n65).

⁷⁷ Buzan, B., Waever, O & de Wilde, J. *Security: A new framework for analysis*. (Boulder, 1998).

⁷⁸ Brunnée, J., & Toope, S. Constructivism and International Law. In J. Dunoff & M. Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (pp. 119-145). (Cambridge: Cambridge University Press, 2012).

⁷⁹ Ruggie, John Gerard. ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge.’ (1998) *International Organization* 52, no. 4, 855–85, 875.

being “too focused on a narrative of liberal progress and too committed to agency, ignoring the structures of power that inhibit challenges to the status quo.”⁸⁰

Against this background, securitisation theory derives from social constructivism, which “positions the analysis in the broader spectrum of constructivism, emphasizing the role of discursive and nondiscursive practices, power relations, and intersubjective meanings in forming an understanding of security,” outside of the traditional military security paradigm.⁸¹ Securitisation is “the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics,” meaning that extraordinary measures may be introduced as a response.⁸² In the original iteration of the theory, Buzan et al. submit that successful securitisation begins with a speech act, wherein a certain phenomenon is named as an existential threat, and that this is then accepted by a relevant audience, thus becoming a “self-referential practice” whereby something becomes a security issue simply because it is labelled one.⁸³ This act creates a dichotomy between the referent object and the existential threat, from which the object needs to be protected.⁸⁴ It is important to note that this referent object can relate to any normative whole: acts of securitisation may be performed within the human security paradigm as well as traditional national security.

Crick posits that while the grammar of security is important, it must also be reinforced by external factors such as context, power and legitimacy.⁸⁵ These sociological elements are crucial to identifying where an issue has been securitised and importantly why, and how, this is possible. Balzacq asserts that securitisation goes further than discourse to a set of practices, referring to Foucault’s *dispositif*.⁸⁶ The *dispositif* is the range of constantly evolving components of state apparatus that emerge in strategic response to “an urgent need” and is useful in analysing how problems and solutions can be mutually reinforcing.⁸⁷ Securitisation represents a specific mode of action within the security *dispositif*, aiming to establish the social perception of threat; identifying securitising practices can assist in explaining why certain policies are preferred as solutions, and the power relations that lie behind them.⁸⁸ However, its unstable nature means that the *dispositif* can produce unintended consequences.

Securitisation becomes dangerous when it is used to further particular political motives, as it means that the securitised issue is prioritised, placed “above politics,” and is effectively immune from scrutiny.⁸⁹ In this way, actors can perform acts within a sort of crisis politics, framing “manifestations of structural problems as singular, episodic crises in order to

⁸⁰ Sinclair, A. *International Relations Theory and International Law: A Critical Approach*. (Cambridge: Cambridge University Press, 2010).

⁸¹ Jaroszewicz & Gryzmski (n40), 3.

⁸² Buzan et al. (n77), 23.

⁸³ Ibid., 21.

⁸⁴ Herschinger, E. ‘Hell Is the Other’: Conceptualising Hegemony and Identity through Discourse Theory.’ (2012) *Millennium*, 41(1), 65–90.

⁸⁵ Crick, E. ‘Security and the drug control *dispositif*: Analysing the construction of drugs as an existential threat to humankind and the nation state.’ (2018) The University of Bristol, 34.

⁸⁶ Balzacq (2011) (n39), 17.

⁸⁷ Balzacq (2019) (n39), 340.

⁸⁸ Balzacq (2019) (n39), 16.

⁸⁹ Buzan et al. (n77), 23.

preclude rigorous discussion about how to transform the historical power dynamics that enable such problems, and manufacture consent for their actions,"⁹⁰ this allows for threat and risks to be managed in way that preserves status quo rather than challenges it.⁹¹ As the success of securitisation requires a politically relevant audience, "the entire process reifies the legitimacy of the nation-state, enabling a set of actors to engage in discourse about a constructed problem and legitimise their depiction of social reality by defining the rules and bounds of intervention to manage said problem."⁹²

In many contexts, explicit speech or discourse is not always prominent or even present in the securitisation process.⁹³ It is argued that within the current case, "acts of bureaucratic structures or networks linked to security practices and their specific technologies may play a more active role in securitization processes than securitizing speech acts."⁹⁴ By confining securitisation to language, the concept of security gains significance solely from constructions of danger and threat, and not through practices of technocratic governance. Employing the more contemporary understanding of securitisation theory extends to encompass 'mentalities of government' that constitute 'regimes of practices,' incorporating discursive and non-discursive modes of knowledge production.⁹⁵

Securitisation theory has not been without its criticisms and has undergone various reconfigurations, however it remains useful in illuminating how powerful elites relocate issues of social injustice beyond normal politics or public debate.⁹⁶ The subject of securitisation is simultaneously depoliticised, in the sense of public disengagement in the political process, and politicised, through rendering it susceptible to individual political motives.

2.3.2. Vulnerabilisation

Taking the concept of vulnerability as it was previously explained, there are both positive and negative elements. Being recognised as vulnerable can be both an advantage and disadvantage; like security, vulnerability is subjective and relative, and thus it is susceptible to instrumentalisation in forwarding any given agenda.

Labelling an individual or group as vulnerable, even with good intentions, does not acknowledge the structural factors and conditions that may have created or led to this position. While these structural factors are not necessarily the result of conscious or purposeful action, and may relate to natural processes, some scholars argue that persons

⁹⁰ Herman, Edward & Chomsky, Noam. *Manufacturing Consent: The Political Economy of the Mass Media*. (Pantheon Books, 1988).

⁹¹ Chmutina et al. (n65).

⁹² Ibid.

⁹³ Bigo, D. 'When Two Become One: Internal and External Securitizations in Europe', in Kelstrup, M. and Williams, M. C., (eds.) *International Relations Theory and the Politics of European Integration: Power, Security and Community*. (London: Routledge, 2000), 171–204, 194.

⁹⁴ Huysmans, Jef. *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. New International Relations Series. (London, UK: Routledge, 2006).

⁹⁵ Jaroszewicz & Grzymiski, 'Technocracy Revisited: the Polish Security Dispositif and Ukrainian Migration to Poland.' (2021) *Journal of Contemporary European Research*, Vol 17. no 2., 262.

⁹⁶ Williams, Michael C. 'Words, Images, Enemies: Securitization and International Politics.' (2003) *International Studies Quarterly* 47, no. 4, 511–31.

facing systemic oppression are vulnerabilised, referring to "a relational process in which vulnerability is produced and reproduced over time between social groups within the active production of their lived environments."⁹⁷ Vulnerabilisation theory means to politicise the process that has led to a state of vulnerability, to question what dominant power dynamics and patterns of domination work to create and sustain this condition.⁹⁸

From this perspective, it is argued that it is insufficient and ultimately ineffective, to address vulnerability without regard to the historical and social context, as the causes of vulnerability are often structural. This theory also highlights the way in which vulnerabilised populations can be subject to securitisation. Foucault argues that the security dispositif comprises biopolitical processes that create "new groupings of populations and the generative construction of various apparatuses for management and control."⁹⁹ The categorisation of a group or individual as vulnerable by a managerial class, without interrogation of how they came to be there, renders them a subject requiring of help, thus justifying intervention and management to remove them from the state of perceived vulnerability and into a state of security, normality. This becomes particularly pertinent when this population is constructed as a potential threat.¹⁰⁰ Once defined as a vulnerable other, this oppositional dynamic lays the foundations for the application of other dichotomised identities such as helpful/helpless, strong/weak, deserving/undeserving. Providing help or protection to these 'vulnerable' populations may be construed as an act of favour or charity available only to those who fit the right description, rather than grounded in moral or legal considerations.

While not dismissing vulnerability as a helpful concept, it is important to be aware of the way in which it is situated within a given context. Just as the human security paradigm, it is not the concept of vulnerability that is problematic per se, but the way in which it is constructed, instrumentalised and perceived.

3. Vulnerability as a Legal Concept

The concept of vulnerability has become relatively commonplace in multiple layers of the international legal system. Lebeouf posits that legal conceptualisations seek to establish categories, essential for lawyers to identify and apply rules.¹⁰¹ Invocation of strict legal categories can be both limiting and dangerous. Referred to as "categorical fetishism,"¹⁰² this risks essentialising those who ostensibly fall into these categories, and dismissing those who do not. In this sense, it may be considered positive that vulnerability has not been clearly defined in international law, despite being increasingly present within various legal fields. However, the intrinsic quality of legal categories is assessed as much in terms of internal

⁹⁷ Taylor, M. *The Political Ecology of Climate Change Adaptation: Livelihoods, Agrarian Change and the Conflicts of Development*. (United Kingdom: Taylor & Francis, 2014).

⁹⁸ Chmutina et al. (n65).

⁹⁹ Foucault. (1988) *Technologies of the Self: A Seminar with Michel Foucault*. Amherst: University of Massachusetts Press.

¹⁰⁰ Chmutina et. al. (n65), 549.

¹⁰¹ Lebeouf (n36).

¹⁰² Crawley, Heaven & Skleparis, Dimitris. 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Nourishing in Europe's "Migration Crisis,"' (2018) 48 JEMS 48.

coherence and consistency as their validity in reflecting realities in practice,¹⁰³ and as such the lack of conceptual clarity leads to issues.

3.1. Identifying Vulnerability and State Obligations

Emerging alongside the international development agenda, which places social protection at the top of the global policy agenda,¹⁰⁴ references to vulnerability in some shape or form can be identified in disaster law,¹⁰⁵ environmental law,¹⁰⁶ economic law¹⁰⁷ and migration law.¹⁰⁸ A common feature in these invocations of vulnerability is the entanglement with human rights law, on both an international and European level. Even though the concept is not explicitly mentioned in core human rights conventions, it does feature in some specialised instruments.¹⁰⁹ Furthermore it is acknowledged and implied through the application of international human rights law (IHRL) that certain groups require enhanced protection: illustrated through the many conventions that apply to a specific category of people such as children, women, and migrant workers. Providing additional guidance on the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights (CESCR) identifies a number of groups that are considered to be in need of special protection, including inter alia: migrants, asylum seekers, the Roma and ethnic minorities.¹¹⁰ Moreover, virtually universal in terms of State parties, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) specifically aims to eliminate all forms of racial discrimination. Building on the given definition of vulnerability as a condition of relative disadvantage resulting in susceptibility to risk, such that that the subject or situation finds its own defence difficult, the aforementioned provisions represent the first proposed function of vulnerability within law. This function entails identifying certain groups that require additional protection, thus creating an obligation for the State to provide this.

At the European level, regional human rights instruments contain similar provisions that create additional obligations with regard to particular groups. Furthermore, as detailed in the next section, the ECtHR has explicitly invoked the concept in relation to inter alia protection of

¹⁰³ Leboeuf (n36).

¹⁰⁴ Engström, V. 'The IMF and Protection of Vulnerable Groups.' (2020) *Nordic Journal of International Law*, 89(2), 209-243.

¹⁰⁵ see O'Donnell, Thérèse. 'Vulnerability and the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters.' (2019) *CLQ* vol 68, 573-610.

¹⁰⁶ see Longo, M., Lorubbio, V. 'Ecosystem Vulnerability. New Semantics for International Law.' (2023) *Int J Semiot Law*. 36, 1611-1628.

¹⁰⁷ see Engström, (n104).

¹⁰⁸ see Krivenko, Ekaterina Yahyaoui. 'Reassessing the Relationship between Equality and Vulnerability in relation to Refugees and Asylum Seekers in the ECtHR: The MSS Case 10 Years On.' (2022) *International Journal of Refugee Law*, Vol 34, No 2, 192-214.

¹⁰⁹ Such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN GA Res. 45/158 (18 December 1990), preamble; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, UN GA Res. 54/263 (25 May 2000), preamble, and Articles 8-10; and the International Convention for the Protection of All Persons from Enforced Disappearance, UN GA Res. 61/177 (20 December 2006), Article 7.

¹¹⁰ Chapman, A.R. & Carbonetti, B. 'Human Rights Protection for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights.' (2011) 33:3 *Human Rights Quarterly*, 682-732.

Roma people, persons with mental disabilities, people living with HIV, and asylum seekers.¹¹¹ Acknowledging the uniqueness of individual lived experience, the legal concept of vulnerability is layered and allows for the consideration of different degrees of vulnerability.¹¹² This means that even within these vulnerable groups, some individuals or sub-groups are deemed to require enhanced protection. A clear example of this is specifically relating to asylum seekers, held by the ECtHR in *M.S.S.* to be a “particularly underprivileged and vulnerable population group in need of special protection.”¹¹³ Under secondary EU legislation, certain asylum seekers are recognised as possessing additional procedural or reception needs due to particular vulnerability. Both the Asylum Procedure Directive (APD) and recast Reception Conditions Directive (RCD) impose obligations on MS with regard to asylum seekers who have been identified as vulnerable on the basis of non-exhaustive lists of personal characteristics, such as being a minor or a victim of torture. Provisions in the APD require authorities to make adjustments in relation to applicants “in need of special procedural guarantees,” which is defined as someone “whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances.”¹¹⁴ Employing different terminology, the RCD sets out specific considerations that must be taken for “vulnerable persons” and “applicants with special reception needs.” The latter term is defined as a vulnerable person, as set out in the non-exhaustive list in Article 21, who “is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.”¹¹⁵ It follows that it is not sufficient to simply be ‘vulnerable’ by belonging to one of the categories listed to benefit from these provisions, but that this vulnerability must adversely affect the individual’s ability to participate effectively in the procedure, or comply with relevant obligations.¹¹⁶ Vulnerability, in order to be operationalised in these cases must thus be based on individualised assessments, meaning that not only the vulnerability of a particular group is identified but also the degree of vulnerability is assessed against the individual’s particular circumstances.¹¹⁷

The disparity in language used to denote vulnerability across the instruments, and the lack of clear definition for each term, even within a particular piece of legislation, means that the overall picture of application by MS is less than coherent. Definitional inconsistencies are further compounded by the lack of a standard identification mechanism, resulting in national asylum processes that differ substantially.¹¹⁸ Furthermore, the greater the window of discretion, the greater the susceptibility to prejudice. Applied arbitrarily, the concept of vulnerability can operate to further increase stratification within the already marginalised

¹¹¹ Peroni & Timmer. (n56).

¹¹² Mackenzie, C. & Rogers, W. & Dodds, S. ‘Introduction: What is Vulnerability Theory and Why Does It Matter for Moral Theory?’, in C. Mackenzie, W. Rogers, and S. Dodds (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, New York, 2014), 1–29, 19.

¹¹³ *M.S.S.* (n52) para 251.

¹¹⁴ Asylum Procedure Directive, Article 2(d).

¹¹⁵ Reception Conditions Directive, Article 2(k).

¹¹⁶ Januleviciene, Lyra. ‘Vulnerable persons in EU asylum legislation: central feature or necessity on the outskirts?’ in ed Tsourdi, Evangelia. & De Bruycker, Philippe. *Research Handbook on EU Migration and Asylum Law* (Edward Elgar, 2022) 225-243.

¹¹⁷ Engström (n104).

¹¹⁸ Januleviciene (2022) (n116).

categories of migrants.¹¹⁹ In Greece, vulnerability assessments were used in ‘hotspot’ areas between 2016 and 2019 to determine which asylum seekers were able to be returned to Turkey under the EU-Turkey Agreement, and which should be exempt due to their vulnerability. This assessment was never fully standardised and functioned similarly to an asylum eligibility interview, yet the focus was often on physical medical vulnerability which risked missing less tangible vulnerability factors.¹²⁰

3.2. The Caselaw of the European Court of Human Rights

Peroni and Timmer argue that the aforementioned specialised human rights instruments arose from the need to protect marginalised groups that do not fit the liberal archetype of the human rights subject.¹²¹ This subject is “rationalistic and quasi-disembodied... conceived of as invulnerable,” and as such those who do not conform to this fall outside the scope of the purportedly universal protection of IHRL.¹²² Human rights courts therefore have a role in addressing the constructed disadvantages of some groups- in aid of this task the ECtHR has utilised the concept of vulnerability. Unlike the dual requirement in the EU Directives of belonging to a vulnerable category *and* that this adversely affects the individual’s capacity to benefit from the provisions, the Strasbourg Court employs a group vulnerability approach. Whereby, on the surface at least, belonging to a group identified as vulnerable by the Court acts as a tool to guide individualised assessment human rights cases, by drawing attention to disadvantaged positions.¹²³

Up until roughly the last decade, the ECtHR rarely referred to vulnerability, at least in an explicit way.¹²⁴ In *Chapman*, the Court first used the concept of vulnerability in relation to the Roma population.¹²⁵ This case involved a Roma woman who was evicted from her own land after having stationed a caravan there without planning permission. The applicant alleged that this act violated her right to a private life under Article 8 of the European Convention of Human Rights (ECHR), as the “occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle.”¹²⁶ Although the Court held that in this instance the action pursued a legitimate aim, and therefore there had been no violation of Article 8, the judgement explicitly mentioned the “vulnerable position of Gypsies as a minority,” stating that some “special consideration” should be given to their specific needs and different lifestyles.¹²⁷ While the concept was not determinative in the proportionality assessment of the given case, it did set the foundations for the use of the group vulnerability concept. Proclaiming Roma to be a vulnerable group, the Court acknowledges the way that vulnerability can be constructed by societal, political and

¹¹⁹ Krivenko, (n108), 193.

¹²⁰ Aberg. Karin. ‘Detecting Vulnerability in Greek Hotspots.’ (*EU Migration Law Blog*, 29 June 2022) <<https://eumigrationlawblog.eu/detecting-vulnerability-in-greek-hotspots/>> accessed 20/2/2024.

¹²¹ Peroni & Timmer (n56), 1061.

¹²² Grear, Anna. *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan London, 2010), 132–133.

¹²³ Leboeuf (n36).

¹²⁴ Krivenko (n108), 200.

¹²⁵ *Chapman v. The United Kingdom* (2001) (Application no. 27238/95)

¹²⁶ *Chapman* (n125), para 73.

¹²⁷ *Ibid.*, para 96.

institutional circumstances, such as legal frameworks being formulated and/or implemented in a way that doesn't take account of minority lifestyles.¹²⁸

Following *Chapman*, the concept did not feature much in the Court's jurisprudence until a string of cases affirming the vulnerability of the Roma population. In *DH and Others v Czech Republic*,¹²⁹ *Sampanis and others v Greece*,¹³⁰ and *Orsus and others v Croatia*,¹³¹ the Court found that Roma children were discriminated against in their enjoyment of the right to education. In all of these cases, pre-existing prejudices of the authorities and negative attitudes of non-Roma parents towards Roma children informed the Court's understanding of their vulnerability. The judgement in *Horváth and Kiss v Hungary*¹³² explicitly recognised prejudices to be a source of group vulnerability in relation to systematic misdiagnosis of mental disabilities in Roma children, resulting in them being placed in special schools. Negative social attitudes towards Roma were also deemed central to their vulnerability in *V.C. v Slovakia*,¹³³ finding that Roma women were at particular risk of forced sterilisation due to widespread beliefs about the relatively high birth rate among the Roma population and perceptions about disproportionate reliance on social benefits.

Historical prejudices leading to structural disadvantage and inequality also contributed to vulnerability being instrumental in the court's considerations in *Alojas Kiss v Hungary*.¹³⁴ Here, the Court extended the use of the concept to relate to people with mental disabilities, stating that individuals belonging to this group had been "historically subject to prejudice with lasting consequences, resulting in their social exclusion."¹³⁵ The same logic was applied in *Kijutin v Russia*,¹³⁶ a case concerning a man who had been denied a residence permit in Russia based on the fact that he was HIV positive. Referring to *Kiss*, the Court found that people living with HIV are a vulnerable group due to a "history of prejudice and stigmatisation."¹³⁷ Peroni and Timmer argue that these cases can be grouped together under one conceptualisation of vulnerability that centres on prejudice and stigma as indicators of group vulnerability, what they term "misrepresentation cases."¹³⁸

A second, interrelated, typology of cases where vulnerability has been invoked by the Court are those where vulnerability arises due to social disadvantages and material deprivation- "maldistribution cases."¹³⁹ In *Yordanova v Bulgaria*,¹⁴⁰ the Court held that there had been a violation of Article 8 in relation to a planned eviction of Roma inhabitants. Unlike the other cases involving the Roma population, the judgement referred to the applicant's status as a member of a socially disadvantaged group, rather than as a result of prejudice, even though

¹²⁸ Peroni & Timmer (n56), 1062.

¹²⁹ (2007) (Application no. 57325/00).

¹³⁰ (2012) (Application no. 59608/09).

¹³¹ (2010) (Application no. 15766/03).

¹³² (2013) (Application no. 11146/11).

¹³³ (2011) (Application no. 18968/07).

¹³⁴ (2010) (Application no. 38832/06).

¹³⁵ *Ibid.*, para 42.

¹³⁶ (2011) (Application no.2700/10).

¹³⁷ *Kiss* (n134), para 64.

¹³⁸ Peroni & Timmer, (n56), 1065.

¹³⁹ *Ibid.* 1067.

¹⁴⁰ (2012) (Application no. 25446/06)

the two are clearly linked.¹⁴¹ This was also the approach taken in *M.S.S.*, arguably the most widely celebrated recourse to the concept of vulnerability by the Strasbourg Court.¹⁴² Here, the applicant was an Afghan asylum seeker who had been returned by Belgium to Greece under the Dublin Regulations; the issue before Court concerned whether the return decision violated Article 2 (the right to life), Article 3 (prohibition of inhuman or degrading treatment or punishment) and/or Article 13 (the right to an effective remedy). In their assessment of the Article 3 claim, which was held to constitute a violation, the Court referred to the particular vulnerability of the applicant, “In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.”¹⁴³ Going further, the Court proclaims the vulnerability of asylum seekers generally, stating that it “attaches considerable importance to the applicant’s status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection.”¹⁴⁴ This conceptualisation of vulnerability derives from the individual experience and likelihood of trauma, thus is particular to the individual, but also the reality of material disadvantage faced by asylum seekers as a homogeneous group, as a result of systemic deficiencies.

Since then, there have been several cases where the concept has been invoked in relation to asylum seekers, detention conditions and living conditions. In both *Tarakhel*¹⁴⁵ and *VM v Belgium*,¹⁴⁶ the Court reaffirmed the vulnerability of asylum seekers as a group and found in favour of the applicants. However, as Krivenko argues, despite the group vulnerability concept being invoked in these cases, it was not instrumental in the applicants’ success: additional vulnerability factors such as age were present and determinative.¹⁴⁷ Though a quantitative analysis of ECtHR caselaw, it has been shown that post-*M.S.S.*, additional vulnerability factors are essential for a positive rights-affirming outcome.¹⁴⁸

3.3. Issues with the Concept of Vulnerability

With regard to the identification of vulnerability and resulting relation to state obligations, a coherent and consistent definition of vulnerability within this legal function would ensure that the concept is not diluted, that the special assistance stemming from a vulnerability ID goes to those who truly need it most. However, it is also important to note that the alternative ‘standard’ procedure available is often so lengthy and complex, meaning that all migrants are left in an unstable and vulnerable position. With the label of vulnerability carrying with it a higher standard of treatment, or less intensive procedures, it becomes a desirable status. For this reason migrants may strive to take on characteristics associated with perceived

¹⁴¹ Ibid., para 129.

¹⁴² Leboeuf (n36).

¹⁴³ *M.S.S.* (n52) para 232.

¹⁴⁴ Ibid., para 251.

¹⁴⁵ (2014) (Application no. 29217/12).

¹⁴⁶ (2015) (Application no. 60125/11).

¹⁴⁷ Krivenko (n108), 208.

¹⁴⁸ Ibid., 209.

expectations of vulnerability.¹⁴⁹ Welfens and Bekyol demonstrate how being considered vulnerable is essential in order to be resettled for Syrians under the ‘one-to-one’ mechanism of the EU-Turkey Agreement.¹⁵⁰ In some circumstances this leads to a sort of “vulnerability competition”, where individuals must compete against others to present as the most vulnerable in order to gain access to resettlement programmes.¹⁵¹ Krivenko submits that while this performance of vulnerability may be seen as a form of exercising agency through a “strategic submission to dominant scripts,” this action is of little utility for those who are most vulnerable.¹⁵² Especially given the potentially narrow criteria considered in identifying vulnerability, those whose ability to perform is compromised are at risk of not appearing vulnerable in the way that is expected. As Leboeuf suggests, the intended beneficiaries of aid stemming from being labelled as vulnerable may feel “estranged” from these categories, particularly if they are not involved in their definition.¹⁵³ In some cases new vulnerabilities may be created where they did not previously exist, for example women intentionally getting pregnant in order to access certain services and receive preferential treatment.¹⁵⁴ Instead of functioning as a tool to achieve more substantive equality for asylum seekers, in this respect it can produce further inequality and artificial dichotomies between migrants who are ‘deserving’ of protection and those who are not.

The ECtHR’s recourse to the concept of vulnerability has been generally welcomed, in particularly the judgment in *M.S.S.*, as progressive in terms of achieving substantive equality.¹⁵⁵ However, the increased use of the concept has proved contentious, with some arguing that it in fact “operates to absolve decision makers of the need to consider the principle of equality.”¹⁵⁶ For the purposes of this paper, the interplay between vulnerability as a legal concept and equality is a central theme; hence, this question of whether the invocation of the vulnerability helps or hinders the pursuit of substantive equality is crucial. Differing from formal equality, which involves providing everyone with the same ‘one size fits all’ human rights protection, substantive equality recognises that all humans are different and as such experience many different barriers to full enjoyment of their human rights.¹⁵⁷ In order to achieve substantive equality, the individual’s circumstances must be taken into account in frameworks of protection. This entails consideration not only of the individual’s characteristics, but structural inequalities and intersectional discrimination. Stemming from IHRL, States are obliged to actively address structural causes of inequality, meaning going

¹⁴⁹ Mesarič, Andreja & Vacchelli, Elena. ‘Invoking Vulnerability: Practitioner Attitudes to Supporting Refugee and Migrant Women in London-Based Third Sector Organisations.’ (2021) 47 *Journal of Ethnic and Migration Studies* 3097, 3097–98.

¹⁵⁰ Welfens, Natalie. & Bekyol, Yasemin. ‘The Politics of Vulnerability in Refugee Admissions Under the EU-Turkey Statement Front.’ (2021) *Political Science Security Refugees and Conflict* Volume 3 - 2021

¹⁵¹ Nakueira, Sophie. ‘Unpacking Vulnerability: An Ethnographic Account of the Challenges of Implementing Resettlement Programmes in a Refugee Camp in Uganda.’ in Foblets, Marie-Claire & Leboeuf, Luc eds. *Humanitarian Admission to Europe: The Law Between Promises and Constraints* 241-270 (Hart, 2020).

¹⁵² Ibid. 211.

¹⁵³ Leboeuf (n36).

¹⁵⁴ Although it is acknowledged that the situation is often a lot more complex, in some situations it is clearly a strategic interest to become pregnant. Freedman, Jane. “The uses and abuses of «vulnerability» in EU asylum and refugee protection: Protecting women or reducing autonomy?” (2019) *Papeles del CEIC. International Journal on Collective Identity Research*, no. 1, 1-15.

¹⁵⁵ Baumgärtel (n23), 115.

¹⁵⁶ Krivenko (n108), 200.

¹⁵⁷ Fredman, Sandra. ‘Substantive Equality Revisited.’ (2016) 14 *International Journal of Constitutional Law* 712.

further than addressing known issues to actively investigating potential hidden causes of inequality.¹⁵⁸

The Court's use of the group vulnerability concept, at least ostensibly, reads as an affirmation of the principle of substantive equality, acknowledging that States should take structural inequalities into account. As asserted by Peroni and Timmer, the invocation of the concept introduces a necessary element of asymmetry into equality reasoning by creating special positive obligations, adding increased weight of harm in proportionality analyses, and narrowing the margin of appreciation.¹⁵⁹ However, the concept has been applied inconsistently, both in relation to which of the three aforementioned techniques is employed in a given case, and which cases it is invoked at all. As the Court has never defined their interpretation of the concept, it is unclear why some groups seem to fall outside of its scope. Moreover, despite substantial caselaw concerning the vulnerability of the Roma population, the Court has chosen not to invoke the concept in relation to other cases with Roma applicants, despite clear harm.¹⁶⁰

This incoherence and inconsistency, compounded by the open-endedness of the concept, prompt concerns of judicial activism in light of the seemingly new positive obligations it creates. Highlighted by Judge Sajo's dissenting opinion in *M.S.S.*: "There seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the state to provide shelter and other material services to satisfy the basic needs of the 'vulnerable,'" in going forward it is desirable that the Court provide clarification on the scope of the concept. Perhaps more concerning is the risk of arbitrary application generated by the opacity with which the concept has been used in the Court's judgments. Krivenko argues that this apparent subjectivity undermines the predictability and clarity on which the principle of the rule of law is grounded.

Quantitative analysis shows that recourse to vulnerability by the Court while also considering Article 14 (non-discrimination) has been limited thus far,¹⁶¹ and the need for additional vulnerability factors suggests that the purported potential of the concept to achieve substantial equality in human rights cases is still to be proven. In this way, the uniqueness of individuals' experiences are homogenised under one simplified umbrella of vulnerability that doesn't actually enhance human rights protection.¹⁶² Research performed on HUDOC, analysing all judgments until 31 August 2017, found 24 cases in which the applicants' vulnerability was directly addressed under Article 14 by the majority of the Court.¹⁶³ In all cases but three cases where the court referred to stereotypes in the judgment, they also

¹⁵⁸ see CEDAW, 'General Recommendation No 28' para 24. See also CEDAW, Report of the Committee on the Elimination of Discrimination against Women, UN doc A/59/38 (2004) annex 1, paras 10–11.

¹⁵⁹ Peroni & Timmer (n56), 1074–1081.

¹⁶⁰ *Ibid.* 1069.

¹⁶¹ Krivenko (n108), 201.

¹⁶² *Ibid.*, 210.

¹⁶³ Arnardóttir, Oddný Mjöll. 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) *Oslo Law Review* Volume 4, No. 3, 58.

referred to group vulnerability, emphasising the reliance on stereotypes within the Court's conception of the term.¹⁶⁴

Beyond the limited number of cases in which vulnerability has been explicitly invoked, the issue of inconsistency permeates migration caselaw generally. Stemming in part from the highly politicised nature of migration control and the opposing interests of different stakeholders, Baumgärtel argues that “dilemmatic adjudication” has become a defining feature of caselaw in European courts in this area.¹⁶⁵ “Permanently internally torn between these two mutually exclusive poles,”¹⁶⁶ the Court's rule “in a seemingly repetitive pendulum.”¹⁶⁷ This is problematic in terms of migrant rights because it leads to unpredictability for potential applicants and uncertainty for States in what exactly their obligations are, allowing scope for domestic institutions to implement narrow interpretations.¹⁶⁸ The role of supranational courts in the context of migration control is contentious, described as the “last bastion of sovereignty.”¹⁶⁹ Arguably the anxiety of overstepping its role often leads the Court to take a cautious approach. Criticised as being overly deferential to the interest of States, at the expense of the protection of fundamental rights of vulnerable migrants, Dembour characterises this as a “human rights reversal.”¹⁷⁰ Despite this ‘dilemmatic adjudication’ being a natural consequence of the balancing act between universalism and cultural relativism that pervades human rights law, Baumgärtel points to a lack of strategic adjudication in ECtHR caselaw as exacerbating the detrimental effects of such internal inconsistency, ultimately undermining migrant rights.¹⁷¹ This notion of strategy, and the potential role of vulnerability as a guiding concept within this, will be elaborated later in Section 6.1. However, it is worth noting at this stage that many of the issues with vulnerability as a legal concept stem from more general issues in the adjudication of migration law.

Nevertheless, the ‘fuzziness’ of vulnerability as a legal concept does not render it not fit for use. As outlined in the theoretical framework, the concept of vulnerability has “an intuitive and broad appeal.”¹⁷² The fact that it invokes an emotive response and is argued to be the basis for human interaction¹⁷³ means that it could have the potential to steer decisions in a way that is positive in terms of affirming fundamental rights for migrants. Acknowledging its flaws, and ideally with clarification by the Court, vulnerability could provide a useful legal tool for progressing toward substantive equality in relation to migrants and asylum seekers. With regard to the concept as it appears in EU Directives and in ECtHR caselaw, it appears that both

¹⁶⁴ Ibid., (2017), 58.

¹⁶⁵ Baumgärtel (n23).

¹⁶⁶ Ibid.

¹⁶⁷ Dembour, Marie-Bénédicte. *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*. (Oxford University Press, 2015), 20.

¹⁶⁸ Baumgärtel (n23).

¹⁶⁹ Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008), 169.

¹⁷⁰ Dembour (n167).

¹⁷¹ Baumgärtel (n23)

¹⁷² Timmer, A., Baumgärtel, M., Kotzé, L., & Slingenberg, L. ‘The potential and pitfalls of the vulnerability concept for human rights.’ (2021) *Netherlands Quarterly of Human Rights*, 39(3), 190–197.

¹⁷³ Drichel, Simone. ‘Introduction: Reframing Vulnerability: “so obviously the problem...”?’ (2013) *SubStance* #132, Vol. 42, no. 3.

the universal and particular elements of vulnerability are integral to its operationalisation. This is true also for the Article 14 cases in which the Court *has* invoked vulnerability, facilitating stricter review and limiting the margin of appreciation of states in the treatment of groups that have vulnerable characteristics. Arnardóttir describes the approach as ‘identity plus’ approach, allowing more nuanced distinctions to be made between groups that take into account the historic and social context.¹⁷⁴ Being at its core a humanitarian concept, it is argued that it can be a welcome consideration in EU asylum law and policy, which with ever increasing securitisation appears to have lost sight of the humans it is intended to protect.

4. The Temporary Protection Directive

4.1. The Directive, Proposal and Council Implementing Decision

Deconstructing the historical and negotiation timeline is important in locating the source of differential treatment of refugees both within the TPD regime and CEAS in general.

4.1.1. Historical Context

As previously mentioned, the TPD was a mechanism pre-existing in the EU’s arsenal at the time of the Russian invasion. However, since its creation in 2001, it had never before been activated. Acknowledging the flaws in the ad hoc response to the mass influx of Kosovars into the EU following the breakdown of the former Yugoslavia, the TPD was formulated proactively as a mechanism ready to provide stability and support in the event of a mass influx of migrants into the territory.¹⁷⁵ The scope and substance of the Directive represented a shift from the temporary protection schemes of the previous decade. Created as a form of limited protection, they instead prioritised return, offering a much lower standard than that conferred by refugee status, which was scarce due to the narrow definition.¹⁷⁶ Becoming the standard approach in some states, these limited protection frameworks enabled a stratified system of humanitarian protection depending on the country of origin, with attitudes generally hostile towards asylum seekers.¹⁷⁷ The Humanitarian Evacuation Programme that was enacted to assist North Macedonia manage the number of Kosovar arrivals demonstrated the importance of solidarity in situations of mass influx.¹⁷⁸

4.1.2. Objectives and Substance of TPD

Created with this in mind, the TPD was the first piece of EU asylum legislation to be agreed upon, clearly grounded in both humanitarian and pragmatic rationale. This translated into the TPD’s dual-function: (i) to provide immediate protection for mass influxes of people into the territory of the EU, for a temporary period of time and (ii) to create a responsibility sharing mechanism across MS. Its objective is to alleviate financial and administrative pressure on national asylum systems while ensuring minimum standards of protection for displaced persons across MS. In terms of substantive rights, the Directive contains provisions obliging

¹⁷⁴ Arnardóttir (n163).

¹⁷⁵ van Selm (n11), 375.

¹⁷⁶ van Selm (n11), 371.

¹⁷⁷ Gibney, Matthew J. ‘Kosovo and beyond: popular and unpopular refugees.’ (1999) *Forced Migration Review* 5.

¹⁷⁸ van Selm (n11), 374.

MS to adopt necessary measures to provide beneficiaries with residence permits (Article 8), access to the labour market (Article 12), suitable accommodation (Article 13(1)), education for those under 18 (Article 16), and access to social welfare and healthcare where necessary (Article 13(2),(4)), for the duration of temporary protection as set out in the CID. MS are entitled to introduce higher standards of protection than those set out in the Directive, and must act with “due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement.”¹⁷⁹

As a consequence of the Dublin Regulations, MS at the external borders of the EU experience disproportionate pressure due to migration. Often this leads to a ‘crisis’ situation, as domestic asylum systems become overwhelmed. The TPD aims to “promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons.”¹⁸⁰ On paper, the activation of the Directive allows the focus to be directed at the individuals themselves rather than on administrative bureaucracy. Temporary protection frameworks have in the past been hailed as the solution for so called crises of solidarity within the CEAS, while still providing adequate protection.¹⁸¹

4.1.3. Reasons for Activation

Despite this, the TPD had never before been activated and a proposal had been made for its replacement with an ‘immediate protection status’ by the European Commission in the 2020 Migration Pact.¹⁸² Against this context of scepticism, the decision to trigger the TPD was unexpected, particularly in light of the EU’s standard border approach to mass influxes of migration, characterised by push-backs,¹⁸³ deportations¹⁸⁴ and “fatal-passiveness.”¹⁸⁵ Making this comparison necessitates a discussion on the possible reasons behind this decision.

Even without official membership there are very high levels of political, economic and social integration between Ukraine and the EU. Aside from the physical threat of the conflict spilling over into Union territory, the motives for the attack being so clearly grounded in a revival of East/West value clashes mean that the invasion may well be seen as an attack on the EU, going some way in explaining the unprecedented response. In lieu of military retaliation, the rapid and open response of the EU to such high levels of displaced persons was undeniably a symbolic move of power against Russia and solidarity with Ukraine, in defence of fundamental EU values. Although this line of argument is not without critique, which will be discussed in Section 5. Furthermore, considering the tactics employed by Belarusian dictator Alexander Lukashenko in preceding months, instrumentalising migrants to destabilise EU

¹⁷⁹ TPD, Article 3(2).

¹⁸⁰ TPD, Preamble 8.

¹⁸¹ Fontana, (n73), 481.

¹⁸² Carrera et al. (n10), 15.

¹⁸³ The Left, ‘The Black Book of Pushbacks - Volumes I & II.’ (18 December 2020). . <<https://left.eu/issues/publications/black-book-of-pushbacks-volumes-i-ii/#:~:text=Compiled%20by%20>> accessed 20/9/2024.

¹⁸⁴ De Genova, Nicholas. & Peutz, Nathalie (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010).

¹⁸⁵ Heller, Charles et al., ‘It’s an Act of Murder’: How Europe Outsources Suffering as Migrants Drown. ’(*New York Times*, 26 December 2018). <<https://www.nytimes.com/interactive/2018/12/26/opinion/europe-migrant-crisis-mediterranean-libya.html>> accessed 20/2/2024.

migration systems by putting pressure on its Eastern,¹⁸⁶ it is not unreasonable to posit that this was part of Putin's strategy in this case. Thus, the activation of the long dormant TPD, ensuring a generous framework of protection and by way of unanimous vote, likely also came as a surprise to Russia.

Nevertheless, the decision to implement the temporary protection regime was arguably primarily a pragmatic response. In the hours and days following Russia's invasion on February 23rd, vast portions of the Ukrainian population were forced from their homes, many displaced internally, but the majority across the external borders.¹⁸⁷ As of February 24th 2022, martial law has prohibited most adult men aged 18 to 60 from leaving Ukraine, meaning that the majority of those fleeing Ukraine are women and children. According to a study conducted by the EUAA in partnership with the OECD, 83% of adult respondents who had fled Ukraine into the EU+ area between 11 April 2022 and 15 August 2022 were female with a mean age of 38.¹⁸⁸ This is in contrast with the 'usual' demographic of asylum seekers, of which the largest group is young males.¹⁸⁹

Faced with millions of people entering the territory of the Union into neighbouring Poland, Hungary, Slovakia and Romania, the situation demanded an approach that would meet the specific protection needs of vulnerable migrants while not overwhelming the national asylum systems of the States through which they had entered. According to the Dublin Regulations, which were heralded as "the untouchable cornerstone of the CEAS when responding to the 2015/16 refugees crisis,"¹⁹⁰ the general rule is that where a TCN seeking international protection has entered the territory of the EU irregularly, the MS into which the applicant entered will be responsible for examining the application.¹⁹¹ This issue was somewhat bypassed by the fact that Ukrainians could enter the Schengen Area legally without a visa, meaning that those crossing the border were not doing so irregularly. However, in the absence of a harmonised approach or guidance on which framework of protection to apply, MS adopted their own ad hoc solutions to deal with the influx of people. These responses were generally relatively generous, especially Hungary, considering the government's anti-immigration rhetoric. Yet, as a direct consequence of these closed border policies, these States

¹⁸⁶ Weisner & Courbon, 'Activation of the temporary protection directive: Renaissance or tight-rope act for the EU asylum system?' (*Polis 180*, 18 March 2022). <<https://polis180.org/polisblog/2022/03/18/activation-of-the-temporary-protection-directive-renaissance-or-tight-rope-act-for-the-eu-asylum-system/>> accessed 20/2/2024.

¹⁸⁷ UNHCR 'Ukraine Emergency.' (*UNHCR*, 2023). <<https://www.unrefugees.org/emergencies/ukraine/>> accessed 20/2/2024.

¹⁸⁸ EUAA, IOM, OECD. 'Forced displacement from and within Ukraine: Profiles, experiences, and aspirations of affected populations.' (2022) <https://euaa.europa.eu/sites/default/files/publications/2022-11/2022_11_09_Forced_Displacement_Ukraine_Joint_Report_EUAA_IOM_OECD_0.pdf> accessed 20/2/2024.

¹⁸⁹ EUAA, 'Asylum Report 2022.' <<https://euaa.europa.eu/asylum-report-2022>> accessed 20/2/2024.

¹⁹⁰ Carrera, Sergio & Cortinovis, Roberto. 'The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy One Step Forward, Three Steps Back on Equal Solidarity.' (2023). In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 499-526).

European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

¹⁹¹ Dublin Regulation III, Article 13(1).

have poorly functioning or virtually non-existent domestic asylum systems, meaning that the pressure was heightened even further.¹⁹²

4.1.4. The Commission's Proposal

In order to be 'triggered', there must be a confirmation of the existence of a mass influx situation, defined as "*arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.*"¹⁹³ The notion of 'mass influx' has given rise to substantial academic debate over the years of non-implementation. In this case it was confirmed by the Commission's Proposal, based on data gathered by UNHCR.¹⁹⁴ Maintaining the TPD to be the most appropriate instrument for the situation,¹⁹⁵ the proposal emphasises the right of beneficiaries to choose which MS they receive protection in, removing Article 11 of the Directive which essentially mimics the Dublin Regulations, allowing people to join their family and friends across the EU.¹⁹⁶ Initially, the personal scope of the TPD was proposed to include Ukrainian nationals displaced outside Ukraine as of 24 February 2022, TCNs who are "unable to return in safe and durable conditions to their country or region of origin", and long-term residents in Ukraine, as well as their family members.¹⁹⁷ It was left to the discretion of MS whether to extend TP to people holding refugee status or awaiting asylum decisions.¹⁹⁸ TCNs who were 'studying or working in Ukraine on a short term basis' were excluded from the scope, but it was explicitly stated that they should be admitted on humanitarian grounds, without the requirement for travel documents.¹⁹⁹

4.1.5. The Council Implementing Decision

In a move of unprecedented cooperation, the proposal was unanimously approved by all EU MS on 3 March 2022 and formally adopted in the CID of March 4th. The final text of the decision differed considerably from the proposal in terms of personal scope. Following a trend of "malpractice" within migration policy in recent years, the revisions were agreed on as a compromise for consensus, despite the text of the directive explicitly stating that a qualified majority is sufficient.²⁰⁰ Responding urgently in a move of solidarity towards Ukraine seems to have overpowered the need to retain the greater scope of protection enshrined in the proposal; according to European Home Affairs Commissioner Ylva Johansson, "the unanimous

¹⁹² Nagy, Boldizsár. 'About-face or Camouflage? Hungary and the Refugees from Ukraine.' (2023). In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 148-163). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

¹⁹³ TPD, Article 2(d).

¹⁹⁴ Carrera et al (n10), 20.

¹⁹⁵ Commission Proposal Preamble (14)

¹⁹⁶ Ibid.

¹⁹⁷ Commission Proposal, Article 2(1).

¹⁹⁸ Ibid. Preamble (11).

¹⁹⁹ Ibid. Preamble (12)

²⁰⁰ Carrera et al (n10), 19.

decision on the ultimate product was more important than adopting the original proposal via a so-called qualified majority.”²⁰¹

The text of the final implementing decision leaves a much wider margin of discretion for MS in deciding the personal scope of protection. MS must give TP to Ukrainian nationals, stateless persons and TCNs who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022, and their family members, who fled the country on or after that date as a result of Russia’s invasion.²⁰² With respect to stateless persons or TCNs without international or equivalent national protection, MS must extend TP, or adequate national protection, if they can prove that they were legally resident in Ukraine prior to the invasion *and* are “unable to return in safe and durable conditions to their country or region of origin.”²⁰³ For all other individuals legally residing in Ukraine who cannot return in safe and durable conditions, MS may *choose* to extend TP.²⁰⁴

4.1.5. Stateless Persons and TCNs

From the text of the Decision, it follows that legal residence in Ukraine is a prerequisite for receiving any protection, meaning that undocumented individuals are excluded from even the optional provisions. Regarding stateless persons and TCNs, the need to fulfil a number of conditions in order to benefit from TP *or* adequate national protection results in a narrow scope of application. Stemming from State obligations under the UN Charters on Statelessness, Ukraine implemented a Statelessness Determination Procedure in 2020, becoming operational in May 2021.²⁰⁵ Successful applicants receive a form of temporary protection which entitles them to a temporary residence permit and a travel document; after two years they can apply for a permanent residence permit.²⁰⁶ Due to the short period of time between this procedure becoming active, and the invasion in February 2022, it is unlikely that any beneficiaries of the SDP had yet obtained a permanent residence permit. The stateless persons travel document is considered as a form of ‘equivalent national protection,’ meaning that individuals who fled Ukraine in possession of this travel document are eligible for protection.²⁰⁷ However, there are obstacles to protection for those who attempt the cross the border with only a temporary residence permit, due to the requirement for legal residency on the basis of a permanent residence permit, despite the Council encouraging MS to take into account relevant documents such as this as evidence of equivalent national protection.²⁰⁸ A temporary residence permit may indeed be the basis for protection under Article 2(3) CID, this provision is optional for MS. Individuals who have not yet been recognised as stateless under the SDP are excluded from protection due to the fact that they have neither a travel

²⁰¹ Barigazzi, Jacopo. ‘EU hails ‘historic’ deal to protect Ukrainian refugees.’ (*Politico*, 3 March 2022) <<https://www.politico.eu/article/eu-ministers-historical-deal-protect-ukraine-refugees/>> accessed 20/2/2024.

²⁰² CID Article 2(1).

²⁰³ CID Article 2(2).

²⁰⁴ CID Article 2(3)

²⁰⁵ ‘Ukraine,’ Statelessness Index.

<<https://index.statelessness.eu/country/ukraine#:~:text=dedicated%20stateless%20status,-,A%20statelessness%20determination%20procedure%20was%20introduced%20in%20Ukrainian%20law%20in,line%20with%20the%201954%20Convention.>> accessed 20/2/2024

²⁰⁶ Ibid.

²⁰⁷ Commission Operational Guidelines, Brussels, 2.3.2022 C (2022) 1404, 3.

²⁰⁸ CID Preamble 12.

document or a residence permit. Considering that out of an estimated 35,000 stateless people living in Ukraine, only 664 individuals had been officially recognised as such under the SDP by the end of 2022, the vast majority of stateless individuals have no documentation to prove their status.²⁰⁹ Compounded by a lack of resources and often intersecting marginalisation,²¹⁰ the discretion left to MS in extending the TPD or adequate national protection to stateless persons unless they fulfil a very narrow criteria, results in concerning gaps in protection. Similarly, TCNs who resided in Ukraine on the basis of a temporary residence permit, such as students, face the same potential issues.

As per Article 7 of the Directive, MS may extend the application of the TP regime to any person displaced from Ukraine due to the conflict, irrespective of what is set out in the Council Decision. While MS may make use of this provision, or even grant alternative national protection, there is no obligation to do so. This inevitably leads to inconsistent approaches across states and leaves the potential for discriminatory practices.

4.1.6. MS Implementation

As a framework of minimum harmonisation, MS can implement higher standards of protection if they so wish. However, the fact that there is no obligation to provide TP to non-Ukrainian nationals means that the overall levels of protection in relation to all people forcibly displaced from Ukraine is likely to be lower than the relatively generous rights attached to the TPD. Neither “adequate protection under their national law” or “safe and durable conditions” are defined in the CID, leaving a significant margin of discretion in their application by individual MS. Published in the Operational guidelines, the Commission stipulated that ‘adequate protection’ need not be equivalent or “identical” to the benefits conferred by the TPD, but that they MS must respect the Charter of fundamental rights of the European Union and the spirit of the Directive, when implementing the Decision.²¹¹ On the meaning of “safe and durable conditions,” the Commission guidelines assert it is a concept *sui generis* that should be read in light of Article 2(c) and Article 6(2) of the TPD. Providing some further detail, the Commission states that ‘safe’ refers to situations of obvious risk for the safety of the person concerned, while ‘durable’ means that the TCN should be able to enjoy active rights in their country of origin, enabling access to basic needs and a possibility for reintegration. The return decision should be made on the basis of general country information, but the individual concerned should also provide prima facie evidence supporting their (in)ability to return; MS must give due consideration to the needs of vulnerable individuals. Although these guidelines give some clarity on how the concept should be applied by MS, they are not legally binding. Individual assessments on the basis of fuzzy

²⁰⁹ Nash, C. ‘Op-ed: Why Europe Needs to Address the Protection Needs of Stateless Refugees Fleeing Ukraine.’ *European Council on Refugees and Exiles* (8 April 2022).

²¹⁰ Ibid.

²¹¹ Commission Communication on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (2022/C 126 I/01).

concepts such as this are highly susceptible to discrimination, differential application across MS, and risk undermining compliance with the right to seek asylum.²¹²

4.1.7. Potential Issues

Formulated in a strikingly different political climate when EU harmonisation and the CEAS was in its infancy, it is to be expected that MS will have different ideas about what standards of protection should be conferred by such an instrument in the present day. According to Politico, it was primarily the Visegrad states that expressed reservations to the initial proposal.²¹³ Moreover, both Polish and Hungarian authorities chose not to activate the inter-state solidarity regime under Chapter VI TPD.²¹⁴ Included in the CID is a provision emphasising the right of MS to exclude persons from TP where there are reasonable grounds for regarding that person as a danger to the security or community of the host MS.²¹⁵ Hence it may be concluded that MS retain a wide remit with regard to the sovereign right of managing immigration inside one's own territory, where legitimately required. If the basis for excluding an individual from TP, which they would otherwise be entitled to, is arbitrary or not for legitimate security reasons, then there would be a clear case of discrimination.²¹⁶ However, for stateless persons and TCNs who did not benefit from international protection in Ukraine, in respect of whom TP is not mandatory, the reasons for not extending protection may indeed be arbitrary or not grounded in legitimate security reasons, even if not necessarily explicitly. As it is permitted by the CID, MS may choose to exclude this category of persons from the regime and are not obliged to provide their rationale for this.

As previously discussed, the requirement for 'safe and durable conditions' for return only limits arbitrary decisions to a certain extent, and the option for alternative adequate protection legitimises the non-application of the TPD in lieu of potentially lower standards of protection. Moreover, this provision grants a significant role to border agencies in determining eligibility through these examinations. The Commission has also published guidelines aiming to assist MS on the external border with Ukraine in facilitating 'flexibility' when conducting external border controls under the Schengen Borders Code.²¹⁷ Listed in these guidelines are a number of criteria that should be taken into account when deciding whether or not to perform border checks, these include: the nationality of the traveller; the residence status in Ukraine of TCNs not holding Ukrainian citizenship; the vulnerability and age of travellers; the existence of a biometric passport or valid identity document. These multiple levels of discretion result in the risk that non-Ukrainian nationals residing in Ukraine will be disproportionately subject to these border checks, even if on a national level the MS has extended TP to all TCNs. Especially concerning is the prominent role assigned to Frontex,

²¹² Carrera et al. (n10), 27.

²¹³ Barigazzi, (n201).

²¹⁴ Carrera et al (n10), 20.

²¹⁵ CID, Article 18.

²¹⁶ Based on Article 14 ECHR.

²¹⁷ Guidelines (n207).

considered to be the central securitising agent in EU migration policy²¹⁸ and implicated in human rights violations at the borders.²¹⁹

Whether or not there may be grounding for legal disputes relating to differential treatment within the TPD regime is difficult to prove: it most likely will not explicitly be tied to racial or ethnic reasons, and the issue of citizen/non-citizen discrimination in relation to migration control is still contentious.²²⁰ Under Article 29 TPD, individuals excluded from TP by MS have the right to mount a legal challenge. This includes those excluded on Article 28 grounds,²²¹ and individuals excluded from family reunification. While the wording of the provision leaves it unclear as to whether this right extends to any person who has been denied TP by a MS, Kerber maintains that it does.²²² What this right to “mount a legal challenge” entails is also open to debate. Despite being limited to some extent by human rights obligations regarding the right to an effective remedy,²²³ the vague substance and scope of Article 29 grants yet more discretion to MS. This leaves the options for appealing a decision of exclusion from TP unclear, especially for those whose exclusion may have been influenced by entrenched prejudices in the MS authority making the decision. In the absence of a domestic remedy, human rights courts may provide an alternative route.

It must be noted that individuals who are fleeing Ukraine but fall out-with the scope of the TPD are still able to seek protection through alternative routes. Persons seeking international protection in the EU may be eligible for refugee,²²⁴ or subsidiary, protection.²²⁵ Minimum standards regarding the scope of application and substantive rights provided under these frameworks are harmonised across the CEAS. Moreover, Article 3(b) of the Schengen Borders Code states that border controls must be exercised without prejudice to refugees and people seeking international protection. While it is conceivable and legitimate for MS to conduct border checks for non-Ukrainian TCNs, this cannot result in violations of IHRL or exclusion

²¹⁸ Gkliati, Mariana. ‘Frontex Assisting in the Ukrainian Displacement – A Welcoming Committee at Racialised Passage?’ (2023) In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 281-283).

European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

²¹⁹ Statewatch, ‘Frontex investigations: what changes in the EU border agency’s accountability?’ (30 March 2021) <<https://www.statewatch.org/analyses/2021/frontex-investigations-what-changes-in-the-eu-border-agency-s-accountability/>> accessed 20/2/2024.

²²⁰ However, Article 14 also has open category of “any other status”, which the ECtHR has recognised to include immigration status (*Hode and Abdi v UK* (2013) (Application no. 22341/09) & *Bah v UK* (2011) (Application no 56328/07)).

²²¹ Article 28 TPD allows MS to exclude from the TPD individuals who have 1(a)(i) committed an international crime; (ii) committed “a serious non-political crime outside the Member State of reception prior to his or her admission”; (iii) been found guilty of acts contrary to the purposes and principles of the United Nations or 1(b) “there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State.”

²²² Kerber. ‘The Temporary Protection Directive.’ (2002) *European Journal of Migration and Law*, 4(2), 193–214.

²²³ EU Charter of Fundamental Rights, Article 47.

²²⁴ Refugee status is determined by criteria set out in the 1951 Geneva Convention Relating to the Status of Refugees.

²²⁵ TCNs and stateless persons who do not satisfy the criteria for refugee status but would face real risk of suffering serious harm if returned to their country of origin are eligible for this form of protection under Directive 2011/95/EC (Recast Qualification Directive).

from any framework of international protection. At the very least, the *jus cogens* principle of non-refoulement²²⁶ should prevent anyone attempting to flee Ukraine being turned back at the border, with some scholars suggesting that there should be a *prima facie* presumption of refugee status.²²⁷

Under Chapter IV TPD, beneficiaries may also apply for asylum at any given time. Eligibility is decided on an individual basis, subject to rigorous national asylum administrative processes. This overly bureaucratised system is arguably a strategic move within the context of securitisation, which characterises much of the EU migration policy applicable to refugees coming from places other than Ukraine. Recent months have been fraught with visceral examples of the human cost of these policies,²²⁸ and much discussion surrounding the difference in approach towards people fleeing Ukraine.²²⁹

The two frameworks stand in stark contrast both regarding access to and scope of protection. Regarding access to EU territory, the fact that Ukrainian nationals already had visa free access to the territory can be seen as a clear geopolitical decision, therefore preferential treatment stemming from this is legitimate. However, those without visa-free access are subject to harsh bordering practices, manifesting in both physical and non-tangible obstacles to entering the Union, often facing active push-back techniques with harmful and even fatal consequences.²³⁰ The decision to remove Article 11 TPD from the final implementing decision, allowing beneficiaries the freedom to choose their country of destination and travel freely across MS borders, was justified in being a natural mechanism of responsibility sharing in light of the extensive Ukrainian diaspora already living across the EU.²³¹ Yet the relative ease with which this was decided calls into question the entire premise of the Dublin Scheme as the ‘cornerstone’ of the CEAS; freedom of choice for migrants having been held to be inherently negative and thus an impossibility in the past. Not only is the falsity of this claim exposed in the proclaimed success of the TPD, but questions are raised about the implications of why one

²²⁶ As enshrined in EU Charter (Article 19), the ECHR (Article 3), the Refugee Convention (Article 33), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), and customary international law, and pursuant the obligation to provide access to asylum under the EU Charter (Article 18), and the Universal Declaration of Human Rights (Article 14).

²²⁷ Gkliati (n218), 292.

²²⁸ see: Walawalker, Aaron et al. ‘Horror beyond words’: how Channel distress calls were ‘ignored’ 19 times before 2021 disaster,’ (*The Guardian*, 29 April 2023) <<https://www.theguardian.com/uk-news/2023/apr/29/uk-coastguard-ignored-distress-calls-2021-channel-boat-disaster>> accessed 20/2/2024; Townsend, Mark. ‘Refugees seriously injured on razor-wire fence UK helped build to keep asylum seekers out of EU.’ (*The Guardian*, 27 May 2023) <<https://www.theguardian.com/uk-news/2023/may/27/refugees-hurt-dangerous-fence-uk-built-keep-asylum-seekers-out-of-eu-poland-belarus>> accessed 21/2/2024; Smith, Helena. ‘Greek government under fire after video shows ‘pushback’ of asylum seekers.’ (*The Guardian*, 19 May 2023) <<https://www.theguardian.com/world/2023/may/19/greek-government-under-fire-after-video-shows-pushback-of-asylum-seekers>> accessed 20/2/2024.; Smith, Helena. & Henley, Jon. ‘Greece shipwreck: up to 100 children were below deck, survivors say.’ (*The Guardian*, 15 June 2023) <<https://www.theguardian.com/world/2023/jun/15/greece-refugee-shipwreck-rescuers-scour-sea-for-survivors>> accessed 20/2/2024.

²²⁹ Siddiqui, Usaid. ‘Russia-Ukraine war exposed human rights ‘double standards’.’ (*Al Jazeera*, 28 March 2023) <<https://www.aljazeera.com/news/2023/3/28/ukraine-war-exacerbated-human-rights-double-standards-amnesty>> accessed 20/2/2024.

²³⁰ Cossé, Eva. ‘European Court Slams Greece Over Deadly Migrant Pushback.’ (*Human Rights Watch*, 8 July 2022) <<https://www.hrw.org/news/2022/07/08/european-court-slams-greece-over-deadly-migrant-pushback>> accessed 20/2/2024.

²³¹ Carrera et al. (n10), 40.

group is considered capable of making this choice while the other is not. This free choice is not unlimited: once a residence permit has been issued by one Member State under the TPD, it must expire and be withdrawn in accordance with 'the spirit of' Articles 15(6) and 26(4) TPD if the beneficiary subsequently moves to another MS and receives another temporary protection residence permit there. Nonetheless, any choice at all represents a remarkable departure from the 'standard' approach. Lastly, while the standard of protection conferred by the TPD is considerably higher than that for asylum seekers in relation to substantive rights, the text of the Directive is less prescriptive than that of the Reception Conditions Directive, thus allowing greater MS discretion in implementation.²³²

Ostensibly, the TPD is grounded in humanitarianism: from this perspective it may be regarded as a 'step in the right direction' for EU migration policy. Discrepancies between this framework and that relating to asylum seekers may be explained somewhat by the fact that with the CID, MS already recognised the need to provide protection to those fleeing Ukraine en masse, while this must be decided on the basis of an individualised assessment.²³³ However, for persons fleeing Ukraine who are not automatically covered by the TPD, this argument does not hold weight, as the reasons behind their displacement at least prima facie are the same as those who are included. These individuals are thus subject to the complex administrative requirements and lower protection standards of the standard asylum system, due to a difference in immigration status or nationality alone.

To clarify, it is not being argued that all instances of MS choosing not to extend temporary protection to all persons displaced from Ukraine is based on discriminatory reasoning grounded in securitisation logic. Instead, it is proposed that the broad discretion granted by the CID in applying the TPD leaves room for such discriminatory practices to exist within a legitimate framework, thus generally going without interrogation. Unequivocal evidence of securitisation of migration in the EU, specifically in the MS bordering Ukraine such as Hungary and Poland, coupled with the fact that these MS were the ones expressly pushing for the revisions in the TPD, strongly suggests that there is a connection between the two. It is asserted that securitisation influences the TPD both at the stage of negotiation and implementation in such a way that the regime itself becomes a part of the security dispositif through which securitisation practices are performed in respect of certain populations. Following this conclusion, the factors that often underlie securitisation of migration - such as right wing populism and xenophobia - become influential in the overall framework of protection offered by the TPD. This paper aims to highlight this interplay between securitisation and the TPD in such a way that the emphasises the plausibility of these factors as influential, ultimately undermining its humanitarian objective, rather than to conclusively

²³² Kienast, Julia et al. 'Preferential, Differential or Discriminatory? EU Protection Arrangements for Persons Displaced from Ukraine.' (2023), 384. In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 400-419). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

²³³ Ibid, 394.

demonstrate that the regime is rooted in racism. The statements made in this section will be substantiated in the case study set out in Section 5.

4.2. The Temporary Protection Directive and Vulnerable Populations

4.2.1. 'Vulnerability' in the Directive

Working on the theoretical assumption of vulnerability as a state of susceptibility to harm and relative disadvantage, that can be addressed through the human security paradigm, it is argued that in order to fulfil its humanitarian objectives, the TPD should act to mitigate vulnerability and promote human security. As a framework of minimum standards, it is logical to assume that the most vulnerable individuals are protected at least to some extent. A report by the UNHCR found that the main reasons individuals choose to remain in the EU rather than return to Ukraine are related to safety concerns, but is the EU approach providing an adequate alternative?²³⁴

On paper, the directive offers relatively high levels of protection to those included in the personal scope. Regarding specific vulnerable groups, the text of the TPD only contains provisions relating to unaccompanied minors: stating that MS must take necessary steps to ensure representation by a legal guardian or relevant organisation, and place them with a relative, foster family, reception centre or other responsible adult.²³⁵ Despite the vast majority of people fleeing Ukraine being women and children, the Directive is silent on the issue of gender and specific vulnerabilities that women may face. As asserted by Lashchuk, conflict is never gender neutral, as it concerns society as a whole which is itself gendered, thus any effective response must reflect this.²³⁶ Examples of issues that may heighten the vulnerability of women fleeing Ukraine are the risk of human trafficking and gender based violence - both while on the move and once residing within a MS²³⁷ - access to the labour market, and childcare considerations.²³⁸

From an intersectional perspective, women experiencing intersecting discrimination may be even more vulnerable as a result of displacement. This was recognised by the European Parliament, stating that: "special attention should be paid to the situation of women refugees experiencing intersecting discrimination, such as Roma women, Black women, stateless

²³⁴ UNHCR, 'Lives on hold: intentions and perspectives of refugees from Ukraine, Regional intentions report.' (UNHCR, September 2022) <<https://data.unhcr.org/en/documents/details/95767>> accessed 21/2/2024

²³⁵ TPD, Article 16.

²³⁶ Lashchuk, Iuliia. 'Time to Address the Absence of 'Gender 'in the Temporary Protection Directive and its Recent Implementation.' (2023), 303-313.

In S. Carrera & M. Ineli-Ciger (Eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (pp. 303-317). European University Institute (2023). <<https://cadmus.eui.eu/bitstream/handle/1814/75377/ASILE%20E-Book.pdf?sequence=7&isAllowed=y>> accessed 20/2/2024.

²³⁷ Bauer-Babef, Clara. 'Trafficking and sexual exploitation of Ukrainian refugees on the rise.' *Euractive* (30 November 2022) <<https://www.euractiv.com/section/europe-s-east/news/trafficking-and-sexual-exploitation-of-ukrainian-refugees-on-the-rise/>> accessed 20/2/2024.

²³⁸ Lashchuk (n236), 311.

women, women with disabilities, migrant women, racialised women and LGBTIQ+ people”.²³⁹ While the issue of gendered vulnerabilities within the TPD framework is highly important and demands further research in its own right, the focus of this study relates to the way in which the TPD interacts with securitisation in such a way that it produces and/or perpetuates vulnerabilities of certain groups. Gendered vulnerabilities may also be heightened, but it is argued that this is more so a result of the displacement itself and the lack of specific gender considerations in the TPD rather than as a result of securitisation.

As previously mentioned, vulnerability of the individual is listed in the Commission guidelines as a criterion to consider in relation to relaxation of the border checks.²⁴⁰ However, this is not a mandatory requirement and furthermore, the guidelines do not define vulnerability. Due to the conceptual incoherence resulting from the varied language used to denote vulnerability or special reception needs within other EU asylum directives, these provide little help in pointing to how this should be interpreted.

Even where vulnerability is not mentioned in the text, it can act as a heuristic tool to assess whether in practice there is sufficient protection. In this case, all persons potentially falling within the scope of the TPD can be considered vulnerable due to their experience as migrants fleeing conflict.²⁴¹ This stems from the threat of physical harm, forcing them to be displaced, and in turn the loss of access to their homes, livelihood and other essential facilities as a result. The psychological consequences of suffering this complex trauma further heighten vulnerability. Building on the earlier assertion about the importance of a gender reflective response, it is also crucial to consider other pre-existing societal injustices that groups face and how the TPD affects these people. Many individuals who face intersecting discrimination are not eligible for TP and are subject to the standard securitised approach.

Of particular interest in this research is the groups that do not fall within the mandatory scope of protection- TCNs and stateless persons who did not have international protection in Ukraine, and those who are undocumented - whose access and standard of protection is ultimately dependent on the will of the MS they are attempting to enter the EU through. Even if the MS extends TP to these groups on paper, they may be subject to further border checks and eligibility requirements, such as ID and residency documentation, and proof that they cannot return safely to their country of origin, as previously discussed. It is argued that certain groups are more likely to experience discriminatory practices at the border, due to the prejudices that often underlie securitisation. This is exemplified by numerous reported instances at the borders of discrimination faced by Roma individuals and non-white TCNs. These examples represent a microcosm of the wider asylum system, which manifests in a stratified system of protection. While vulnerability is one of the criteria that should be taken into account by MS border agencies when deciding whether or not to relax border checks, no

²³⁹ European Parliament resolution 2022/2633 (RSP) on the impact of the war against Ukraine on women (5 May 2022) <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0206_EN.html> accessed 20/2/2024.

²⁴⁰ Section 4.1.7

²⁴¹ see *M.S.S.* (n52).

thought is given to the vulnerability that may be created or reinforced as a result of the bifurcated TPD regime and its implementation.

4.2.2. The Roma Population

Accurate statistics relating to Roma living in Ukraine prior to Russia's invasion are not available, due to the fact that a large proportion of the population were undocumented or stateless.²⁴² Estimations suggest that there were between 200,000 and 400,000 Roma living across Ukraine before the war, primarily in the Transcarpathian, Odessa, Donetsk and Kharkiv Regions.²⁴³ Within this population there is a diverse range of cultural, linguistic and religious identities. However, the Roma population at large is considered the most vulnerable minority group in Ukraine as a result of social exclusion and discrimination, based on negative perceptions of them as one homogenous group.²⁴⁴ These prejudices are also partly responsible for the lack of reliable statistics and media representation of the lives of Romani individuals in Ukraine.²⁴⁵

Antigypsyism is defined by the European Commission against Racism and Intolerance (ECRI) as a "specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination".²⁴⁶ Throughout history, Roma people have faced persecution and marginalisation as a result of this ideology, and it continues to pervade society across Europe.²⁴⁷ Despite the legacy left by the atrocities of the Holocaust during which half a million Roma were killed, late Roma activist Nicolae Gheorghe stated "Nowadays, Roma people are facing multiple problems, some of which are more important for them than what happened during the war."²⁴⁸ Far from ending with the fall of the Third Reich, examples of contemporary discrimination and persecution of Roma are commonplace, demonstrating the truth of the claim that antigypsyism appears to be the last acceptable form of racism in Europe.²⁴⁹

²⁴² European Commission. 'International Roma Day: Statement by Vice-President Jourová, Commissioners Dalli and Várhelyi.' (7 April 2022). <https://neighbourhood-enlargement.ec.europa.eu/news/international-roma-day-statement-vice-president-jourova-commissioner-dalli-and-commissioner-varhelyi-2023-04-05_en> accessed 20/2/2024.

²⁴³ Mirga-Wójtowicz, Elżbieta, Talewicz, Joanna & Kołaczek, Małgorzata. 'Human Rights, needs and discrimination: The Situation of Roma refugees from Ukraine in Poland.' (UNHCR, 3 November 2022) <<https://data.unhcr.org/en/documents/details/96575>> accessed 20/8/2023.

²⁴⁴ Bocheva (n21).

²⁴⁵ Talewicz-Kwiatkowska, Joanna. 'Roma face racism and discrimination.' *Medico International* (6 April 2022) <<https://www.medico.de/en/roma-face-racism-and-discrimination-18589>> accessed 20/2/2024.

²⁴⁶ Council of Europe, ECRI General Policy Recommendation N°13 revised on combating antigypsyism and discrimination against Roma - adopted on 24 June 2011 and amended on 1 December 2020.

²⁴⁷ Rorke, Bernard. & Zhuravel, Anastasiia. 'Roma Rights Under Siege: Monitoring reports from one year of war in Ukraine.' (2023) *The European Roma Rights Centre*, 9.

²⁴⁸ Talewicz-Kwiatkowska, Joanna. 'Persecution and Prejudice Against Roma People in Poland after World War II.' (2019) *The Polish Review* 64, no. 2. 37-45.

²⁴⁹ Hutchison, Paul., Chihade, Raluca & Puiu, Andrei. 'Predictors of 'the last acceptable racism': Group threats and public attitudes toward Gypsies and Travellers.' (2018) *Journal of Applied Social Psychology* 48, no. 5: 237-247.

Roma in the EU

An estimated six million Roma live in the territory of the EU.²⁵⁰ A survey done by the FRA found that nearly half of EU-based Roma respondents had experienced hate-motivated harassment in the year preceding the survey, and 7% had been physically attacked.²⁵¹ This is particularly prominent in Central Eastern Europe, where far right populist parties increasingly dominate mainstream politics.²⁵² In countries bordering Ukraine, namely Hungary and Poland, antigypsyism is explicitly manifest in the mandate of the ruling parties.²⁵³ Aside from these acts of persecution, Roma communities face varied discrimination and exclusion resulting in material disadvantages and barriers to enjoyment of fundamental rights. As set out in section 3.3., under international and European human rights frameworks, MS have a positive obligation to ensure equality and non-discrimination. Statistics show that this is far from the reality, with lack of access to public services having a detrimental effect on the societal integration and overall wellbeing of Roma communities.²⁵⁴ In 2011, an EU Framework for national Roma integration strategies (NRIS) until 2020 was established to improve the situation of the Roma population in the EU, focusing on goal oriented access to education, employment, healthcare, and housing.²⁵⁵ This report outlined significant discrepancies between Roma and the general population: for example a ten year gap in life expectancy,²⁵⁶ lower employment rates,²⁵⁷ and much lower percentage of children completing primary school education.²⁵⁸ Both a cause and effect of exclusion, this systemic discrimination creates a vicious cycle whereby the common prejudices against Roma, such as the perception they are a societal burden, become self-reinforcing; Roma communities are systemically excluded from social welfare and access to public services, rendering them disadvantaged and feeding into the perception that they do not contribute to society.²⁵⁹

The success of the NRIS was limited. In 2020 when the framework ended, the European Commission found that 85 percent of Roma children were still likely to suffer from poverty,

²⁵⁰ European Parliamentary Research Service, 'Understanding EU action on Roma inclusion.' (April 2022) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690629/EPRS_BRI\(2021\)690629_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690629/EPRS_BRI(2021)690629_EN.pdf)> accessed 20/2/2024.

²⁵¹ FRA, 'Roma and Travellers in Six Countries.' (2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-travellers-six-countries_en.pdf> accessed 20/2/2024.

²⁵² Rodríguez-Aguilera, Cesáreo. 'The Rise of The Far Right in Europe.' (2014) *IEMed Yearbook*.

²⁵³ see Rorke, Bernard. 'Orbán steps up the ante and seeks a 'robust social mandate' for antigypsyism.' *ERRC* (14 February 2020); Talewicz-Kwiatkowska (n248).

²⁵⁴ COM (2011) 173 final Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions An EU Framework for National Roma Integration Strategies up to 2020 (Commission Communication (2011)). 7.

²⁵⁵ Ibid. 4.

²⁵⁶ Tudor, Marius. 'Closing the life expectancy gap of Roma in Europe.' *European Public Health Alliance* (10 December 2018) <<https://epha.org/closing-the-life-expectancy-gap-of-roma-in-europe/>> accessed 21/2/2024.

²⁵⁷ European Commission, Europa. 'Employment in Europe Report 2008.' <<https://www.yumpu.com/en/document/view/25118456/employment-in-europe-report-2008-european-commission-europa>> accessed 20/2/2024.

²⁵⁸ COM (n254), 5.

²⁵⁹ "Alliance against Antigypsyism: Antigypsyism – a reference paper on Antigypsyism," (*AntiGypsyism EU*, January 23, 2022) <www.antigypsyism.eu> accessed 20/2/2024.

compared to 20 percent of the total EU population.²⁶⁰ A new EU strategic framework was thus created, however the results will not be assessed until 2030.²⁶¹

Roma in Ukraine

Unfortunately, the situation faced by Roma across the EU is much the same in Ukraine. Prior to the war, there had been a rise in hate motivated attacks against Roma communities by far right groups.²⁶² Starting in April of 2018, five separate attacks perpetrated by extreme nationalist organisations occurred in different regions across the country. These attacks specifically targeted women and children, involving the vandalising of encampments, causing property damage, and violently attacking Roma families, forcing them to flee. In June of the same year, a 23 year old Roma man was killed and four others seriously injured in a violent assault on an encampment near Lviv.²⁶³ In the weeks following, a Roma woman was murdered in the Transcarpathian region, gardening attention from major European media outlets.²⁶⁴ Even as victims of these crimes, Roma people are subject to discriminatory practices and negligence by the police conducting investigations.²⁶⁵

In daily life, Roma communities experience issues relating to accessing housing, health-care, education and employment, primarily a result of a large proportion of the population being undocumented or unregistered. Roma activists estimate that as many as 30,000 Roma individuals leaving Ukraine prior to the war were undocumented,²⁶⁶ making it around 10-20 percent of the overall Roma population. Lacking any civil registration documents renders it virtually impossible for individuals to exercise their fundamental rights. Moreover, multiple factors including State succession, instances of being stripped of citizenship, changing citizenship laws and flows of migration, mean that high numbers of Roma people across Europe are stateless or at risk of statelessness.²⁶⁷ As encapsulated in the phrase famously coined by Hannah Arendt, “the right to have rights” derives from citizenship rather than by virtue of simply being human.²⁶⁸ This means that for stateless persons, protection for human rights usually guaranteed through citizenship is precarious, and varies between states,²⁶⁹ though it is limited to some extent by international law.²⁷⁰ Due to issues regarding data collection relating to lack of documentation, it is unclear how much of the Roma population living in Ukraine experienced statelessness. However, estimations place the number at around

²⁶⁰ COM (2019) 406 final Communication from the Commission to the European Parliament and the Council Report on the implementation of national Roma integration strategies (Commission Communication (2019)), .2

²⁶¹ COM (2020) 620 final Communication from the Commission to the European Parliament and the Council A Union of Equality: EU Roma strategic framework for equality, inclusion and participation. (Commission Communication (2020)), 4-5.

²⁶² Mirga-Wójtowicz et al. (n243).

²⁶³ Ibid., 7.

²⁶⁴ Ibid. 7.

²⁶⁵ Organization for Security and Co-operation in Europe. ‘Situation Assessment Report on Roma on Roma in Ukraine and the Impact of the Current Crisis.’ (2014), 18.

²⁶⁶ Popenko, Viola. ‘For displaced Roma, the conflict has exacerbated existing patterns of discrimination – and left them without an income.’ *Minority Rights*.

²⁶⁷ Sardelić, Julia. ‘The vulnerability of Roma minorities to statelessness in Europe.’ *Minority Rights*.

²⁶⁸ Gessen, Masha. “‘The Right to Have Rights’ and the Plight of the Stateless,” *The New Yorker*, (3 May 2018).

²⁶⁹ Edwards, A., Zúñiga, A., & Yayboke, E. ‘The State of Statelessness in Ukraine.’ *Center for Strategic and International Studies* (1 March 2023).

²⁷⁰ Such as the UN Conventions on Statelessness.

20 percent.²⁷¹ It must be noted that being undocumented is not the same as being stateless. While the former are normally recognised and recorded as citizens of a state, just lacking the necessary up to date documentation of this, the latter are not recognised by any state.²⁷² Undocumented persons are at risk of becoming stateless if they cannot obtain any verification of their registration in their state of citizenship.²⁷³

Although accurate contemporary data is scarce, available statistics from recent years emphasises the inadequacy of many Roma families' living situation. Stemming from isolation from the general population, Roma settlements are often overcrowded and have limited access to safe drinking - or even running - water, electricity, heating or waste disposal.²⁷⁴ Free healthcare, although legally required in Ukraine, is often of a lower quality and made inaccessible due to lack of education on its availability.²⁷⁵ In certain regions, it has been estimated that as much as 95 percent of the Roma population may be unemployed.²⁷⁶ Lack of personal identification documentation, lack of education and resulting levels of illiteracy represent the main barriers to employment, compounded by discrimination from employers.²⁷⁷ The precise number of Roma children who do not attend school is unknown, but enrolment in education is shown to be lower than that of the general population, and this trend is even more significant as children go onto secondary education.²⁷⁸ Roma women face even greater barriers to education and employment as a result of the persistence of conventional gender roles in the Roma community.²⁷⁹

Roma Refugees

Clearly, both in Ukraine and across the EU, the Roma population is vulnerable due to a long history of persecution and discrimination stemming from prejudices, resulting in social exclusion and disadvantage. As described in Chapter 3, this vulnerability has been recognised on numerous occasions by the ECtHR. Following the outset of war, Roma people fleeing Ukraine can be considered some of the most vulnerable individuals. By 8 April 2022, International Roma Day, the EC estimated that 100,000 Roma had fled Ukraine since Russia's

²⁷¹ Edwards et al. (n269).

²⁷² European Network on Statelessness. 'Stateless people and people at risk of statelessness forcibly displaced from Ukraine.' (*European Network on Statelessness*, 10 March 2022), <<https://www.statelessness.eu/updates/publications/stateless-people-and-people-risk-statelessness-forcibly-displaced-ukraine>> accessed 20/2/2024. 1.

²⁷³ Ibid.

²⁷⁴ Eredics, L. 'The situation of transcarpathian romani families fleeing from Ukraine to Hungary.' (2022) *Romaversitas Foundation* <https://romaversitas.hu/wp-content/uploads/2022/12/Transcarpathian_romani_families_EN_spread.pdf> accessed 20/2/2024, 16.

²⁷⁵ European Roma Rights Centre & Chiricli. 'Written Comments of the European Roma Rights Centre and Chiricli, Concerning Ukraine.' (2014), <http://www.errc.org/uploads/upload_en/file/ukraine-cescr-march-2014.pdf> accessed 20/2/2024, 8.

²⁷⁶ Bocheva (n21), 25.

²⁷⁷ Organization for Security and Co-operation in Europe. 'Situation Assessment Report On Roma in Ukraine and the Impact of the Current Crisis.' (OSCE, 2014), <<https://www.osce.org/files/f/documents/c/c/124494.pdf>> accessed 20/8/2023, 23. Bocheva (n21), 25.

²⁷⁸ OSCE Ibid, 23.

²⁷⁹ European Commission against Racism and Intolerance. 'European Commission against Racism and Intolerance Report on Ukraine.' (21 February 2012) <<https://rm.coe.int/fourth-report-on-ukraine/16808b5ca5>> accessed 20/2/2024, 37.

invasion.²⁸⁰ Many Roma also stayed inside the territory of Ukraine; the issues they experienced prior to the war only aggravated as IDPs.²⁸¹ Those who did choose to cross into the EU reported incidents of discrimination at the borders and on entry into neighbouring countries, raising questions about the sufficiency of the TPD as a framework of humanitarian protection.

As set out in Section 4.1.5, under the CID, stateless individuals are entitled to protection under the TPD only if they meet a number of conditions. Undocumented individuals are excluded from the regime altogether. Due to the prevalence of these statuses within the Roma population, the issues faced by stateless individuals, or those at risk of becoming stateless, are relevant in analysing the experience of Roma fleeing Ukraine.

4.2.3. Third Country Nationals

TCNs are defined as any person who is not a citizen of the European Union within the meaning of Art. 20(1) of the Treaty on the Functioning of the European Union (TFEU),²⁸² encompassing migrants who have arrived in EU both through regular and irregular means. While the precise numbers at the time of the invasion are unclear, it is estimated that around five million foreign nationals lived in Ukraine in 2020, when the most recent available data is from.²⁸³ Two thirds of this population were Russian nationals, followed by nationals of countries in Eastern Europe, Caucasus and Central Asia.²⁸⁴ Around 293,600 of these foreign nationals had a permanent residence status in Ukraine at the end of 2020, while 151,300 had a temporary residence permit on the basis of work or study.²⁸⁵ Approximately 76,500 international students resided in Ukraine,²⁸⁶ and 17,000 foreign nationals had an employment permit.²⁸⁷ These numbers likely differed at the beginning of 2022 and since the outbreak of the war, official Ukrainian websites containing such up-to-date information have been unavailable.²⁸⁸

Despite there being 602,337 border crossings by TCNs out of Ukraine as of 31 December, out of the almost 4 million persons who received protection under the TPD as of 31 December 2022, only 73,995 were TCNs.²⁸⁹ The largest proportion of TCNs fleeing Ukraine were

²⁸⁰ European Commission (n242).

²⁸¹ Rorke and Zhuravel (n247), 21.

²⁸² European Commission. 'Third Country National.' <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/third-country-national_en> accessed 20/2/2024.

²⁸³ IOM, 'Displacement and Cross-border movements of Third-Country Nationals from Ukraine to neighbouring countries and in Europe.' (24 February 2023), <https://dtm.iom.int/sites/g/files/tmzbd1461/files/reports/IOM_DTM_Displacement%20of%20TCNs%20from%20Ukraine_31-12-2022.pdf> accessed 21/2/2024, 5.

²⁸⁴ Ibid., 5.

²⁸⁵ Ibid., 5.

²⁸⁶ Erudera News, 'Ukraine Recorded a Significant Rise in International Student Numbers in 2019, the Largest Since 2011.' (*Erudera*, 31 March 2023) <<https://erudera.com/news/ukraine-recorded-a-significant-rise-in-international-student-numbers-in-2019-the-largest-since-2011/>> accessed 20/2/2024.

²⁸⁷ IOM (n283), 5.

²⁸⁸ Erudera, 'Ukraine International Student Statistics.' (*Erudera*, 2022).

<[https://www.google.com/search?client=safari&rls=en&q=Ukraine+International+Student+Statistics.'+Erudera+\(2022\).&ie=UTF-8&oe=UTF-8](https://www.google.com/search?client=safari&rls=en&q=Ukraine+International+Student+Statistics.)> accessed 20/2/2024.

²⁸⁹ IOM (n283), 9.

registered in Germany, followed by Portugal, and the Netherlands.²⁹⁰ Numerous reports of discriminatory treatment from TCNs attempting to cross the border, specifically non-white individuals, exposes the dual-vulnerability faced by these persons. Within Ukraine, people of colour reported being pushed to the back of lines, physically assaulted and told they cannot board busses.²⁹¹ The average time to cross borders is much longer than that of Ukrainian nationals,²⁹² and at the border many were denied on the basis of not possessing a Ukrainian passport. It has even been reported by some African students that animals were let onto trains before them.²⁹³ After walking for hours, faced with the trauma of being forcibly displaced from their homes, TCNs experienced blatant racism with statements from officials like, “If you are Black, you should walk”²⁹⁴ and “one foreigner can leave for every hundred Ukrainian.”²⁹⁵ Such discrimination was observed even from members of the public, such as taxi drivers charging higher rates for people of colour.²⁹⁶

The clear racial undertones of this discriminatory treatment are echoed by political and media rhetoric. Statements such as “this is a relatively civilized, relatively European — I have to choose those words carefully, too — city where you wouldn’t expect that or hope that it’s going to happen” from CBS correspondent Charlie D’Agata; “It’s very emotional for me because I see European people with blue eyes and blond hair ... being killed every day” from the former deputy prosecutor general of Ukraine through the BBC, and ““They seem so like us. That is what makes it so shocking. War is no longer something visited upon impoverished and remote populations. It can happen to anyone” from Daniel Hannan at the Telegraph, clearly emphasise the difference in perceptions of Ukrainian refugees as white Europeans, compared to other groups of refugees.²⁹⁷ Politicians such as Matteo Salvini, the leader of the Italian far right Party Lega, and Hungarian Prime Minister Viktor Orbán, have publicly declared their emphatic commitment to provide support to Ukrainians, despite maintaining a hard line anti-immigration stance in relation to the influx of refugees from other parts of the world over the previous decade.²⁹⁸

This language trivialises the conflict in other countries and trauma experienced by non-white, non-European individuals, furthermore alluding to the fact that many commentators believe that European (i.e. white) refugees are more deserving of dignity and protection than those

²⁹⁰ Ibid.

²⁹¹ Adams, C. et al. “‘Open the door or we die’: Africans report racism and hostility trying to flee Ukraine.” (*NBC News*, 1 March 2022). <<https://www.nbcnews.com/news/nbcblk/open-door-die-africans-report-racism-hostility-trying-flee-ukraine-rcna17953>> accessed 20/2/2024.

²⁹² Cénat et al. (n22).

²⁹³ Pietromarchi, Virginia. ‘More African students decry racism at Ukrainian borders.’ *Al Jazeera* (2 March 2022) <<https://www.aljazeera.com/news/2022/3/2/more-racism-at-ukrainian-borders>> accessed 20/2/2024.

²⁹⁴ Mlaba (n1).

²⁹⁵ Adams et al. (n291).

²⁹⁶ Coakley, Amanda. ‘People of colour struggle to escape Russian invasion of Ukraine.’ (*Al Jazeera*, 2 March 2022). <<https://www.aljazeera.com/news/2022/3/2/people-of-colour-struggle-to-escape-russian-invasion-of-ukraine>> accessed 20/2/2024.

²⁹⁷ Hellyer, H.A. ‘Coverage of Ukraine has exposed long-standing racist biases in Western media.’ (*The Washington Post*, 28 February 2022) <<https://www.washingtonpost.com/opinions/2022/02/28/ukraine-coverage-media-racist-biases/>> accessed 20/2/2024.

²⁹⁸ Logroscino, Adriana & Zapperi, Cesare. ‘Salvini prepara il viaggio al confine tra Polonia e Ucraina.’ (2 March 2022); Coakley, (n296).

from other countries.²⁹⁹ Moreover, such rhetoric emboldens the oppressors, carrying the implication that they can act largely in impunity as long as the “so-called civilised world is left alone.”³⁰⁰ While several explanations have been forwarded for the attitude shift, such as geographical proximity, and cultural and ethnical similarities,³⁰¹ the differential treatment of non-white TCNs and white Ukrainian nationals fleeing the same conflict is persuasive evidence of the fact that racism and xenophobia is at the root, even if not necessarily consciously. For this reason, both the discriminatory acts and public speech has been condemned by African leaders and the African Union,³⁰² as well as representatives from international organisations such as the Director General of the IOM.³⁰³ Tendayi Achiumi, the UN Special Rapporteur on contemporary forms of racism, called for states and international organisations “to ensure safe passage and life-saving protections for *all* people affected by the conflict.”³⁰⁴

Demonstrated by these examples, non-white TCNs fleeing Ukraine are having to deal with the trauma of war, forced migration, and racism, creating intersecting vulnerabilities that are compounded by their legal status as TCNs, which is legitimising discriminatory practice. Aribot et al refer to the term “interlocking systems of oppression” to describe these sources of trauma and corresponding vulnerability, a phrase that is regarded as the precursor to Crenshaw’s intersectionality theory.³⁰⁵ Alongside the Roma population, non-white TCNs can be considered a vulnerable population fleeing Ukraine due to the systemic racism they face, coupled with their status as refugees. The ECtHR has never explicitly invoked the group concept of vulnerability in relation to race. However, “race, colour, national or social origin” are listed as protected characteristics in Article 14 EHCR, thus discrimination or prejudicial action on the basis of these grounds could conceivably comprise group vulnerability.

The processes that exist within the EU security dispositif manifest in part as a form of institutional racism,³⁰⁶ meaning the way in which racial inequalities are (re)produced through

²⁹⁹ Cénat et al. (n22).

³⁰⁰ Hellyer (n297).

³⁰¹ Pettrachin, Andrea & Hadj Abdou, Leila. ‘Explaining the remarkable shift in European responses to refugees following Russia’s invasion of Ukraine.’ (*LSE*, 9 March 2022) <<https://blogs.lse.ac.uk/euoppblog/2022/03/09/explaining-the-remarkable-shift-in-european-responses-to-refugees-following-russias-invasion-of-ukraine/>> accessed 20/2/2024.

³⁰² Akinwotu, Emmanuel & Strzyżyńska, Weronika. ‘Nigeria condemns treatment of Africans trying to flee Ukraine’ (*The Guardian*, 28 February 2022) <<https://www.theguardian.com/world/2022/feb/28/nigeria-condemns-treatment-africans-trying-to-flee-ukraine-government-poland-discrimination>> accessed 20/2/2024; Brito, Renata. ‘Europe welcomes Ukrainian refugees — others, less so’ (*Ap News*, 28 February 2022) <<https://reliefweb.int/report/ukraine/ukraine-crisis-double-standards-has-europe-s-response-refugees-changed>> accessed 20/2/2024.

³⁰³ IOM, ‘Discrimination and Racism Against Third Country Nationals Fleeing Ukraine Must End: IOM Director General.’ (3 March 2022) <<https://www.iom.int/news/discrimination-and-racism-against-third-country-nationals-fleeing-ukraine-must-end-iom-director-general>> accessed 20/2/2024.

³⁰⁴ UN, ‘Ukraine: UN expert condemns racist threats, xenophobia at border.’ (3 March 2022) <<https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-condemns-racist-threats-xenophobia-border>> accessed 20/2/2024.

³⁰⁵ Aribot, Macire et al. “Black Minds Matter: Exploring the Double Trauma of Anti-Blackness and War on the Psycho-Political Well-Being of African and African-Descent Refugees from Ukraine,” (2022) *Young African Leaders Journal of Development*: Vol. 4, Article 2.

³⁰⁶ Orsini, Giacomo et al. ‘Institutional racism within the securitization of migration. The case of family reunification in Belgium.’ (2022) *Ethnic and Racial Studies*, 45:1, 153-172.

“laws, customs [and institutional] practices.”³⁰⁷ A system that includes exceptional laws towards non-nationals allows for racial considerations to play a part in judicial decisions relating to non-nationals.³⁰⁸ Are non-white TCNs protected by the TPD or does it operate as a source of institutional racism? As discussed in Section 4, TCNs who receive international protection or equivalent national protection are entitled to protection under the TPD.³⁰⁹ Additionally, TCNs who can prove that they were legally residing in Ukraine on the basis of a permanent residence permit *and* cannot return in safe and durable conditions to their country of origin, are also within the scope of protection, either under the TPD or adequate national protection.³¹⁰ This means that for TCNs who were legally residing in Ukraine on the basis of a temporary residence permit, or those awaiting asylum decisions, granting any protection at all is left to the MS to decide. The possibility that this margin of discretion leaves for the racist and xenophobic prejudices to influence the protection granted to individuals is concerning.

5. Security and Vulnerability

5.1. Hungary: A Case Study

5.1.1. Hungary's Securitised Asylum System

Over the past two decades, right-wing parties have gained increasing traction across Europe, amidst growing rates of migration, fuelled by the war on terror and the 2008 economic crises. Recent years have only seen an increase in these issues, and even higher numbers of migrants attempting to enter the territory of the EU+ has triggered a shift towards the far-right in government in Italy, Sweden, Finland and even Spain.³¹¹ Eastern European countries such as Hungary and Poland saw populist right-wing parties react quickly to public disillusionment in the existing political establishment of the and so called “crisis of democracy” of the 2000s.³¹² After leading the right-wing Fidesz-KDNP coalition to win the 2010 parliamentary election in Hungary by a landslide victory, Viktor Orbán has become the longest serving government leader in the EU.³¹³ As leader, Orbán created a new constitution that embodies his vision of an “illiberal democracy” through a regime of intolerance for cultures and religions deemed antithetical to traditional ‘European’ (Christian) values, increasingly characterised as “democratic backsliding.”³¹⁴ Fundamental to Orbán’s agenda is a hardline anti-migration stance, grounded in an ethnonationalist understanding of the “imagined community”³¹⁵ of the Hungarian state, necessarily entailing the exclusion of what is deemed to be Other. This

³⁰⁷ Jones, J. M. *Prejudice and Racism*. (Boston: Addison Wesley, 1972).

³⁰⁸ Orsini et al. (n306).

³⁰⁹ CID Article 2(1)(b).

³¹⁰ CID Article 2(2).

³¹¹ Rodríguez-Aguilera (2014).

³¹² Rodríguez-Aguilera (2014).

³¹³ Bayer Lili. 'How Orbán broke the EU — and got away with it.' (*Politico*, 24 September 2020)

<<https://www.politico.eu/article/how-viktor-orban-broke-the-eu-and-got-away-with-it-hungary-rule-of-law/>> accessed 20/2/2024.

³¹⁴ Tidey, Alice. 'Twelve years of Orban: How the EU has failed to rein in Hungary's democratic backsliding.' (*Euro News*, 4 April 2022) <<https://www.euronews.com/my-europe/2022/04/02/twelve-years-of-orban-how-the-eu-has-failed-to-rein-in-hungary-s-democratic-backsliding>> accessed 20/2/2024.

³¹⁵ 'Imagined Community.' *Oxford Reference*.

<<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095958187;jsessionid=D5F45166573DE8104FE424CD1888B0CE>> accessed 20/2/2024.

stoking of the narrative of one ethnically similar self versus the migrant other is demonstrated through Orbán's willingness to extend citizenship to ethnic Hungarians living abroad,³¹⁶ invoking a shared history of suffering and dominance after losing two-thirds of its former territory in the Treaty of Trianon after WWI.³¹⁷

Although not an issue specific to Hungary, or even Eastern European States, securitisation of migration in Hungary is particularly clear from the virtually complete shutdown of the asylum system, accompanied by the governments inflammatory anti-immigration discourse. Following the influx of migration in 2015 to the EU, Orbán's government successfully framed migration as a social and economic threat, emphasising the absolute religious and cultural incompatibility of these migrants with the Christian nation State.³¹⁸ Not only did this securitisation narrative justify the building of a physical "anti-migration" fence on the Southern border, it entailed the creation of a system of exclusive regulations that essentially blocked all irregular migration into Hungary.³¹⁹ In doing so, Orbán's government redrew social borders so as to exclude migrants who would "pollute" the supposed national identity, strengthening Hungary's image as the "righteous protector of Christian European civilisation."³²⁰

This initial securitisation occurred largely within the wider European securitisation discourse. However, Orbán's policies are increasingly splintering from fundamental EU norms. In September 2018, the European Parliament produced the Sargentini report outlining numerous violations of fundamental EU values by the Hungarian State, which lead to a vote to sanction the country.³²¹ The concerns contained in this report were echoed by numerous NGOs.³²² In 2019, Freedom House downgraded Hungary to "partly free" due to "sustained attacks on the country's democratic institutions," including increased restrictions over the opposition, NGOs, the courts and asylum seekers.³²³ Despite EU bodies mounting several successful court cases and imposing sanctions against Hungary, results have been limited due

³¹⁶ Ganczer, Mynika. 'Hungarians outside Hungary – the twisted story of dual citizenship in Central and Eastern Europe.' (*Verfassungsblog*, 8 October 2014) <<https://verfassungsblog.de/hungarians-outside-hungary-twisted-story-dual-citizenship-central-eastern-europe/>> accessed 20/2/2024.

³¹⁷ Greilinger, Gabriela. 'Orbán, ethnonationalism and xenophobia.' (*Social Europe*, 3 July 2023) <<https://www.socialeurope.eu/orban-ethnonationalism-and-xenophobia>> accessed 20/2/2024.

³¹⁸ 'Notable Quotes: Prime Minister Viktor Orbán.' (*The Orange Files*, 25 June 2018). <<https://theorangefiles.hu/notable-quotes-prime-minister-viktor-orban-by-subject/>> accessed 20/2/2024.

³¹⁹ Bajomi-Lázár, P. 'An anti-migration campaign and its impact on public opinion: The Hungarian case.' (2019) *European Journal of Communication*, 34(6), 619–628.; Glied, Viktor & Pap, Norbert & Reményi, Péter. 'Good and Bad migrants in Hungary. The populist story and the reality in Hungarian migration policy.' (2023) *Problemy Polityki Społecznej Studia i Dyskusje*. 59. 323–344.;

During the state of emergency declared during the COVID pandemic, even more restrictive rules on access to the asylum system were put in place (Hungarian Helsinki Committee, 'Hungary de facto removes itself from the common european asylum system (CEAS).' (12 August 2020) <<https://helsinki.hu/wp-content/uploads/new-Hungarian-asylum-system-HHC-Aug-2020.pdf>> accessed 20/2/2024.

³²⁰ Thorleifsson, C. 'Disposable strangers: far-right securitisation of forced migration in Hungary.' (2017) *Social Anthropology* 25: 318–334, 318.

³²¹ Köves, Nóra. 'The Sargentini Report – Its background and what it means for Hungary and for the EU.' *Heinrich Böll Stiftung* (19 September 2018) <<https://www.boell.de/en/2018/09/19/sargentini-report-its-background-and-what-it-means-hungary-and-eu>> accessed 20/2/2024.

³²² see Human Rights Watch. 'Hungary.' <<https://www.hrw.org/europe/central-asia/hungary>> accessed 20/2/2024.

³²³ Freedom House. 'Hungary: Freedom in the World 2020.' <<https://freedomhouse.org/country/hungary/freedom-world/2020>> accessed 20/2/2024.

to the fact that much of the damage was already done.³²⁴ Furthermore, as stated by the former Commission VP, because states are required to fulfil a number of conditions such as becoming a democracy before being granted membership status, once they acquire this the EU is ill-equipped to deal with challenges from within.³²⁵ This is arguably what has allowed Orbán's government to implement policies seen as 'democratic backsliding.' Nevertheless, the continued blocking of access to Hungary's territory and asylum procedure is in violation of the judgement in the infringement case *Commission v Hungary*, which held that Hungary had failed to fulfil its obligation to ensure effective access to asylum procedures in respect of TCNs wishing to access the country from the Serbian border.³²⁶ As a result, the Commission started a procedure under Article 260 TFEU, seeking financial sanctions against Hungary for non-compliance with the judgement.³²⁷

Denying all accusations contained in the Sargentini report, Orbán began a slanderous campaign against the EU which alleged its intervention was an attempt to push migration by the EU political elite.³²⁸ It is argued that the securitisation discourse changed in 2017 in response to the growing threat faced to the Hungarian political order by the EU.

Accompanying the narrative that immigration represents a threat to the ethnonationalist conception of 'Hungarian-ness', Orbán also claims a threat to political power by the supranational order of the EU, seeking to dominate Hungary against its will.³²⁹ In particular, the government frequently claims that George Soros, a Hungarian-American financier, is behind a greater conspiracy to encourage mass immigration into Europe in pursuit of capitalism without borders: the 'Soros plan'.³³⁰ A set of laws aiming to block the effects of the Soros plan were passed, including criminalising assistance to "illegal" migrants, justified by the constructed threat of this conspiracy theory.³³¹

Therefore, securitisation of migration in Hungary is grounded not only in an ethnonationalist ideology, but it is clearly part of Orbán's populist agenda. In both instances, the government has constructed an Other that is a threat to the security of the nation Self - either non-Christian and non-Hungarian migrants, or the corrupted political elites - redirecting public grievances and exploiting this for political gain.

5.1.2. Hungary's Implementation of TPD

Against this backdrop, Hungary's initial response to the influx of people fleeing over the border from Ukraine was surprising. On 24 February 2022, before the Council implementing decision that activated the TPD, Hungary adopted the Hungarian Temporary Protection (HTP)

³²⁴ Bayer (n313).

³²⁵ Ibid.

³²⁶ *European Commission v Hungary*. (17 December 2020). ECLI:EU:C:2020:1029

³²⁷ European Commission. 'Migration: Commission refers HUNGARY to the Court of Justice of the European Union over its failure to comply with Court judgment.' (12 November 2021)
<https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801> accessed 20/2/2024.

³²⁸ Greilinger (n317).

³²⁹ Greilinger (n317).

³³⁰ Ibid.

³³¹ Euro News. 'Hungary approves 'STOP Soros' bills, defying EU and rights groups.' (20 June 2018)
<<https://www.euronews.com/2018/06/20/hungary-approves-stop-soros-bills-defying-eu-and-rights-groups>> accessed 20/2/2024.

scheme. With the CID activating the TPD, on 8 March 2022 the HTP was repealed with retroactive effect.³³² Due to the differences in personal scope and substance of the two schemes, Hungary's implementation of the TPD had a regressive impact on the protection granted to people fleeing Ukraine, specifically stateless persons and TCNs. The HTP applied to Ukrainian citizens, regardless of the documents that they possessed, entering Hungary directly from Ukraine, and non-Ukrainian TCNs who stay lawfully in Ukraine and directly enter from Ukraine.³³³ Due to the 2017 visa agreement, in the first days after the invasion the borders were open to practically everyone, subject to individual checks.³³⁴ TCNs who usually require a visa to enter Hungary were to be refused entry and will have to return to Ukraine in order to appeal the decision.³³⁵ There were issues reported regarding people coming from Ukraine but through Romania, with all individuals being refused entry on the night of 2 March 2022. The following day the government stated that Ukrainian nationals are to be permitted entry, but reaffirming that TCNs who do not meet the entry requirements will not be allowed to cross the Romanian-Hungarian border, even if they can provide proof of their previous lawful stay in Ukraine.³³⁶ From the sources, it is unclear whether this required permanent legal residence or not.

After 8 March, subject to Government Decree No. 86/2022, TCNs and stateless persons who did not benefit from international protection or equivalent national protection in Ukraine before the invasion were no longer entitled to immediate protection, even if they could prove they legally resided in Ukraine and cannot return in safe and sustainable conditions to their country or region of origin.³³⁷ In fact, the new government decree explicitly states that individuals belonging to this category will be subject to the general asylum rules, in accordance with Article 2(2) of the CID. While Article 2(2) does grant MS the discretion to apply either the TPD or adequate national protection to this category of persons, it is questionable as to whether Hungary's national asylum rules amount to adequate protection. Due to the extensive securitisation of migration in Hungary, according to the general rules there is effectively no right to asylum. Applicants must first apply for asylum in the Hungarian embassy in Belgrade or Kyiv, before submitting a statement of intent, which takes two months to be processed. Only if this is approved can the applicant then travel to Hungary to ask for asylum.³³⁸ This stands in contradiction to Article 17(1) of the TPD, which states that, "Persons enjoying temporary protection must be able to lodge an application for asylum at any time." Furthermore, the retroactive effect of the new decree implementing the TPD into Hungarian law means that individuals who qualified for TP under the national protection scheme will no longer be eligible, unless they fit the narrower set of requirements. The gap in protection left by this change prompted the Commissioner for Human Right from the Council of Europe to

³³² Hungarian Helsinki Committee. 'War in Ukraine Protection Situation in Hungary.' (8 March 2022) <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/03/War-in-Ukraine_0803update.pdf> accessed 20/2/2024.

³³³ Hungarian Helsinki Committee (n311, 2022)

³³⁴ Nagy (n192), 148-158.

³³⁵ Hungarian Helsinki Committee. 'Information for non-Ukrainian citizens fleeing from Ukraine.' (15 April 2023) <https://helsinki.hu/en/https-helsinki-hu-en-wp-content-uploads-sites-2-2023-05-information_for_non-ukrainian_citizens_fleeing_ukraine_en_2023-pdf/> accessed 20/2/2024.

³³⁶ Hungarian Helsinki Committee (n311, 2022).

³³⁷ Ibid.

³³⁸ Hungarian Helsinki Committee (n299, 2020).

write to the Minister of the Interior of Hungary, urging the government “to pursue the establishment of an asylum system in line with the country’s international protection obligations, for the benefit of all persons fleeing Ukraine who do not fall under the scope of the temporary protection scheme in place and for everyone else who seeks the fair and thorough assessment of their eligibility for asylum in Hungary.”³³⁹

Those who enter Hungary without a biometric passport receive a temporary stay of residence (“ideiglenes tartózkodásra jogosító igazolás”) which allows the person to stay legally in Hungary for 30 days and some access to assistance, but not on the same scale of rights conferred under TP.³⁴⁰ TCNs and stateless persons who are excluded from TP can apply for a temporary residence permit from the National Directorate General for Aliens Policing, which allows them to stay in Hungary for 1-3 months.³⁴¹ However, individuals must have proof of legal residence in Ukraine in order to apply for this and unlike the TPD, this does not entitle holders to travel across EU borders.³⁴² Ukrainian citizens who arrived in Hungary prior to 24 February and thus do not qualify for TP, on application for TP will receive ‘tolerated’ status “befogadott,” allowing them to stay in Hungary and access some rights.³⁴³

Compared to other neighbouring countries, Hungary hosts a relatively low number of Ukrainian refugees, with approximately 31480 individuals recorded as benefitting from TP at the end of May 2023.³⁴⁴ This seems to be due to most people moving onto other EU countries.³⁴⁵

5.1.3. Impact on Roma and TCNs

Roma

Following the previous sections, access to protection under the TPD is limited due to lack of civil registration documents and (risk of becoming) statelessness. While entry from Ukraine is not generally a problem, protection for stateless and undocumented individuals in Hungary is very limited. Those who are recognised as stateless in Ukraine are eligible for TP in Hungary. However, persons without official recognition of statelessness, or who are undocumented, cannot apply even for the temporary residence permit. The only option left on paper is to apply for asylum, which as previously discussed, is not an option in reality.

³³⁹ Council of Europe. ‘Letter to the Minister of the Interior of Hungary.’ (10 June 2022) <<https://rm.coe.int/letter-mr-sandor-pinter-minister-of-the-interior-of-hungary-by-dunja-m/1680a6e578>> accessed 20/2/2024.

³⁴⁰ ECRE, ‘Information Sheet – Measures in response to the arrival of displaced people fleeing the war in Ukraine’ (31 March 2023). <<https://ecre.org/updated-information-sheet-measures-in-response-to-the-arrival-of-displaced-people-fleeing-the-war-in-ukraine-2/>> accessed 20/2/2024.

³⁴¹ Hungarian Helsinki Committee. ‘Information for people fleeing from Ukraine.’ (25 February 2022).

³⁴² Hungarian Helsinki Committee (n314, 2023).

³⁴³ ECRE (n319, 2023).

³⁴⁴ Eurostat. ‘Temporary protection for persons fleeing Ukraine - monthly statistics.’ (July 2023)

<https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics> accessed 20/2/2024.

³⁴⁵ Nagy (n192).

Ethnically-Hungarian Roma who resided in Ukraine could obtain Hungarian citizenship in 2011 due to the renewed laws.³⁴⁶ This renders these individuals in a state of limbo whereby they cannot claim asylum or access the resources offered to refugees since they have a Hungarian passport, but do not have a place to live or any established network in Hungary.³⁴⁷ Those who are not eligible for TP or the temporary residence permit may be granted humanitarian residence permits for 30 days, yet these do not confer any benefits and carry a great deal of uncertainty regarding lasting protection.

Both at the border and inside Hungary, many Roma people face discriminatory treatment and segregation. A Roma family who were attempting to join their extended family in Hungary were repeatedly denied entry at the border, told by officials that they had heard rumours of Roma who had already been accepted into the country abusing the social welfare system.³⁴⁸ This prejudice has been stoked by inflammatory statements from public officials such as Major Laszlo Helmecci of the border town Záhony, who insinuated that certain groups of Roma were “not real refugees but economic migrants.”³⁴⁹ In terms of daily life for Roma refugees once inside Hungary, this language clearly translates into forms of institutional discrimination in relation to accommodation and education. Many Roma are placed in re-opened inadequately functioning refugee shelters, located in rural areas and segregated from others who have fled Ukraine, meaning they are far away from employment or education opportunities.³⁵⁰ Romaversitas researchers reported that only one refugee shelter they visited did not completely segregate Roma refugees from others.³⁵¹ Lack of financial resources already creates obstacles for newly arrived refugees, but for Roma this is compounded by entrenched prejudices in Hungarian society even when they have sufficient finances.³⁵² Assistance for the specific plight of Roma refugees comes primarily from NGOs, the Hungarian government has seemingly ignored it.³⁵³ After complaining about the discrimination they face, Roma are told by officials that if they don't like it, they can “go back to Ukraine.”³⁵⁴

³⁴⁶ György, Eszter. 'Transcarpathian Roma: “Too Ukrainian for the Russians, too Hungarian for the Ukrainians, too Gypsy for the Hungarians”' *Politika*. <<https://www.refworld.org/docid/3ae6a823c.html>> accessed 20/2/2024.

³⁴⁷ Rutai, Lili. 'In Hungary, Ukraine's Roma Find Refuge From War But Not From Poverty.' (*RFERL*, 3 June 2023) <<https://www.rferl.org/a/hungary-transcarpathia-roma-ukraine-refugees/32443092.html>> accessed 20/2/2024.

³⁴⁸ Lee, Jonathan. 'Romani Family Denied Exit From Ukraine: Border Guards Accuse Roma Of “Wrongdoings” In Hungary' (*EERC News*, 29 March 2022) <http://www.errc.org/uploads/upload_en/file/5475_file1_roma-rights-under-siege-monitoring-report-of-war-in-ukraine.pdf> accessed 20/2/2024.

³⁴⁹ Partizán, 'Szavazóként magyarok, menekültként cigányok | Telepjáró #8', (12 March 2022). <<https://www.youtube.com/watch?v=bLH0uCiYi2I>> accessed 20/2/2024.

³⁵⁰ Anti-discrimination Centre. 'Hungary: discriminatory practices against Roma refugees from Ukraine.' (9 November 2022) <<https://adcmemorial.org/en/news/hungary-discriminatory-practices-against-roma-refugees-from-ukraine/#:~:text=In%20addition%20to%20the%20fact,that%20if%20they%20don%27t>> accessed 20/2/2024.

³⁵¹ For a detailed account see Romaversitas, 'Action Research: The Situation of Transcarpathian Romani Families Fleeing from Ukraine to Hungary' (November 2022).

³⁵² Rorke, (n247), 17.

³⁵³ *Ibid*.

³⁵⁴ ÁTLÁTSZÓ (n2)

TCNs

Like stateless individuals, TCNs who did not benefit from international protection or equivalent in Ukraine before the invasion, do not receive TP in Hungary, even if they had permanent legal residence there. Likewise, there is no real option to apply for asylum. For those TCNs who can prove they had legal residence in Ukraine, and are excluded from the TPD, there is the option of the temporary residence permit, but this only allows for a limited period of stay and access to rights.

According to official statistics, as of 31 December 2022, Hungary granted TP to only 215 TCNs.³⁵⁵ Aside from the aforementioned discrimination at the border, there has been no media reporting on the specific experiences of non-white TCNs in Hungary. However, from the relatively small numbers of TCNs who were granted TP it can be concluded that it is not easy to gain. Considering the backdrop of securitisation, explicitly grounded in ethnonationalism and xenophobia, it is not unfounded to assume that racial discrimination plays a part in the lack of protection offered to TCNs coming from Ukraine. Even for TCNs that are recognised refugees, and thus are eligible for protection, evidence from the past years demonstrates that they face many problems with integration in Hungary due to xenophobic rhetoric.³⁵⁶ In fact this prompted the UN Committee on the Elimination of Racial Discrimination to recommend that Hungary take all immediate measures to stop racist hate speech and incitement to violence against asylum seekers, refugees and migrants, citing particular concern over the racist and discriminatory statements made by public figures, who possess greater power to promote racial hatred.³⁵⁷

5.2. Security and Vulnerability: The Human Insecurity Trap

Unequivocally, there have been discriminatory practices at the EU's external borders and within MS. Is the system itself discriminatory and racist or are these isolated incidents? It is argued that securitisation is the driving factor behind this, and also behind the apparent 'attitude shift' regarding the EU response to people fleeing Ukraine, in comparison to other instances of mass influxes of migration. In the case of Hungary, this securitisation is explicitly grounded in ethnonationalism and xenophobia. When the TPD is implemented into such an environment, allowing such a great deal of discretion, it acts as a further instrument of securitisation. Utilising vulnerability as a tool to analyse the sufficiency of protection afforded by the TPD in relation to vulnerable individuals, it becomes clear that instead of extending protection to the most vulnerable individuals, namely the Roma population and non-white TCNs, the TPD as a tool of securitisation in fact further vulnerabilises these groups.

Fontana defines this process as the "human insecurity trap."³⁵⁸ Taking the definition of vulnerability as a state of insecurity, the human insecurity trap refers to the "Physical but also

³⁵⁵ IOM (n283), 9.

³⁵⁶ Council of Europe. 'Commissioner for Human Rights: Commission for Human Rights of the Council of Europe Dunja Mijatović; Report following her visit to Hungary from 4 to 8 February 2019.' (21 May 2019) <<http://bit.ly/2Temwbj>> accessed 20/2/2024.

³⁵⁷ CERD, 'Concluding observations on the combined eighteenth to twenty-fifth periodic reports of Hungary.' CERD/C/HUN/CO/18-25, (6 June 2019).

³⁵⁸ Fontana (n73).

psycho-social spaces where downward spiral of sustained insecurity is enacted through migrants' encouragers with a continuous series of barriers, border(ing)s, dysfunctional or uncaring norms and institutions."³⁵⁹ Dichotomies of hostility and protection, help and control, absence and presence of law, are often intentional acts of bordering enacted to pursue particular political motives.³⁶⁰ The objective of protecting internal security - both at State level and supranational level of the EU - is prioritised at the expense of vulnerable groups deemed to be beyond the borders. In fact, internal security of the Self is made conditional on the insecurity of the external Other. In this case, the existing security dispositif in Hungary creates a human insecurity trap, whereby vulnerable individuals are caught in a limbo between the conflict they are fleeing, and the hostility and lack of protection they face at the EU's external borders and within. As a result of the reservations made during the negotiation process, resulting in the narrowed personal scope, the TPD becomes an instrument of Hungary's security apparatus to be applied in line with Orbán's political agenda. This is particularly concerning when the political agenda in question is grounded in xenophobia and racism. The Hungarian government's apparent u-turn on the issue of migration becomes a clear indicator of the fact that migration was securitised and politicised, rather than presenting a legitimate security threat. Moreover, the treatment of Roma and non-white TCNs only serves to expose the Hungarian response to Ukrainian refugees as a 'camouflage' for its continued denial of solidarity with vulnerable individuals who do not conform to the perceived image of white Christian Hungarian-ness.³⁶¹

In order to demonstrate this theoretical argument, it is first necessary to explore the explanations put forward by actors to justify this differential treatment. It is posited that the discrimination experienced within the implementation of the TPD represents a microcosm of the double standards observed in the wider CEAS, and securitisation is the underlying driver of both. Therefore, it is relevant to analyse whether the reasons put forward for this unprecedented response in relation to Ukraine hold up when applied to the case of discrimination within the regime. Proximity, both geographically and societally, is often presented as an explanation for the activation of the TPD in this instance. References to Ukrainian refugees as "European people with blue eyes and blond hair being killed,"³⁶² "relatively civilised, relatively European,"³⁶³ and "real refugees"³⁶⁴ stands in stark contrast to the way that migrants coming to the EU are usually portrayed in the media: 'parasites' that are so irreconcilably different that they not only cannot integrate but represent a threat, whether that be socially, economically or even physically.³⁶⁵ This "wall of disinformation," manufactured by political elites and powerful actors, estranges migrants from society through

³⁵⁹ Ibid.

³⁶⁰ Aas, Katja Franko. & Gundhus, Helene O. I. 'Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life.' (2015) *The British Journal of Criminology*, Volume 55, Issue 1, 1–18, 2.

³⁶¹ Nagy (n192), 157.

³⁶² (David Sakvarelidze, Ukraine's Former Deputy Chief Prosecutor) in Bueno Lacy, Rodrigo & van Houtum, Henk. 'EUrope's Selective Dehumanisation: The Revival of Geographical Determinism as Rationalisation to Justify the Preferential Protection of Ukrainian Refugees in the EU.' (2023), 446.

³⁶³ Imraan Siddiqi, 'Civilized' (*Twitter*, 26 February 2022) in Bueno Lacy & Van Houtum. (n362), 448.

³⁶⁴ Serrao, Marc Felix. 'Willkommenskultur – aber richtig!' (*Neue Zürcher Zeitung*, 1 March 2022) <<https://www.nzz.ch/meinung/fluechtlinge-aus-der-ukraine-zeit-fuer-eine-neue-willkommenskultur-ld.1672134?reduced=true>> accessed 20/8/2023.

³⁶⁵ Bueno Lacy & van Houtum (n362), 458.

channelling public dissatisfaction towards them.³⁶⁶ Within crisis politics, narratives and practices of humanitarianism and bordering, human security and State security, are often intertwined; in this way discrimination in the form of exclusionary practices becomes not only normalised but essential in preserving the security of the State and its subjects within.³⁶⁷ Media plays a central role in the securitisation process, and can be seen as an extension of populist tactics in influencing public opinion. Within these frames of representation, migrants are either vulnerable victims with little agency, or hostile perpetrators: this binary is often defined along racial lines.³⁶⁸

In some cases, it is the vulnerability of particular groups that is used to present them as a threat.³⁶⁹ Vulnerability is a condition which can lead to a positive ethics of care, but at the same time it represents a state of disorder - something that “does not conform to our established understanding of things”³⁷⁰ and thus a threat to the status quo. Individuals are framed as an inconvenience or a threat, for example the construction of Roma communities as being a drain on social welfare systems,³⁷¹ or TCNs being blamed for the spread of COVID-19,³⁷² and are therefore othered from the norm of ‘deserving’ or ‘real’ refugee, justifying their exclusion. The prejudices that underly the vulnerability of these groups is instrumentalised in the self-sustaining cycle of othering, politicisation, and securitisation, rendering them stuck in a human insecurity trap that is itself a source of vulnerability. In this way, through purposeful policy migrants are forced to play a certain role which creates a “self-fulfilling prophecy characterised by hyperreality:” policies that are grounded in prejudice moulds reality, and this “hyperreality” is then used to shape and justify policy.³⁷³

Securitisation is a form of crisis politics, allowing the issue in question to be dealt with above “normal politics” in order to restore the “status quo.”³⁷⁴ Through this act the true motivations behind the securitisation move are concealed by the apparent need to act immediately. Within the context of the Russian invasion, a crisis of incontestable reality, the activation of the TPD was a legitimate pragmatic move to respond. Going back to the rationale of proximity, it cannot be denied that sharing a land border with Ukraine, alongside decades of social, financial and political integration, in some form legitimises the EU’s choice to activate the TPD when they never had before. Furthermore, the demographic of those fleeing Ukraine does differ to the average demographic of refugees from other countries: mostly women and

³⁶⁶ Philo, Greg et al. ‘The role of the press in the war on asylum’ (2013) 55 *Race & Class* 28-41.

³⁶⁷ Squire, Vicki. *The Production of Death and Vulnerability*. In *Europe’s Migration Crisis: Border Deaths and Human Dignity* (pp. 13-102). (Cambridge: Cambridge University Press, 2020).

³⁶⁸ Georgiou, Myria & Zaborowski, Rafal. ‘Media coverage of the “refugee crisis”: A cross-European perspective.’ (2017) <<https://rm.coe.int/1680706b00>> accessed 20/2/2024.

³⁶⁹ Chmutina et al. (n65).

³⁷⁰ Butler, Judith. *Frames of War: When is life grievable?* (2009), 9.

³⁷¹ See section 4.2.2.

³⁷² Balkan Insight. ‘Pandemic-Hit Hungary Harps on About ‘Migrant Crisis.’ (19 March 2020) <<https://balkaninsight.com/2020/03/19/pandemic-hit-hungary-harps-on-about-migrant-crisis/>> accessed 20/2/2024.

³⁷³ Bueno Lacy & van Houtum (n362), 469.

³⁷⁴ Jeandesboz, Julien & Pallister-Wilkins, Polly. ‘Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis.’ (2016) *Mediterranean Politics*, 318.

children as opposed to predominantly men, feeding into common gendered perceptions of what it means to be vulnerable and thus in need of protection.³⁷⁵

However, to accept these explanations is to accept the notion that some refugees are more deserving of protection than others, that humanitarian protection is something only available to those who fit the constructed image of what is a ‘real refugee.’ This image is often one that conforms to the western neoliberal standard, and as Bueno Lacy and van Houtum assert, these seemingly neutral and objective ‘geographical’ justifications are framed as common-sense, allowing overt discrimination to occur within the boundaries of a politically acceptable discourse, where racism and xenophobia exist out-with the discursive frame.³⁷⁶

Humanitarianism of is reduced to merely ensuring survival rather than dignity, becoming a form of “minimal biopolitics” that protects these vulnerable individuals in order to govern them in a way that is conducive to political aims.³⁷⁷

The TPD, although a seemingly neutral framework, when negotiated and implemented in a climate of securitisation, only perpetuates these narratives and practices that are used to justify the securitisation of migration in the first place. Notwithstanding the legitimate geopolitical motives of its activation and the merits of its implementation, the double standards that permeate the CEAS are not only perpetuated through the application of the TPD but furthermore concealed through its ostensible success. As Ralph Wilde posits, perhaps the exceptional responses across the EU towards Ukrainian refugees were only possible *because* they are exceptional; that actors are only giving support on the basis that it doesn’t set any precedent for future action, or even an avenue for Western leaders to be questioned about their own actions of the past.³⁷⁸

When analysed in the context of vulnerabilisation, it is clear that with regard to the most vulnerable individuals, the TPD regime in fact creates further vulnerabilities, that through securitisation justify and neutralise discriminatory practices, ultimately undermining fundamental values of the EU and moreover obligations under public international law.³⁷⁹

6. TPD and Operationalisation of Vulnerability

6.1. Vulnerability as a Legal Concept: Towards Substantive Equality?

The previous section demonstrates how vulnerability can serve as a useful tool to critically analyse the TPD regime from the perspective of the most vulnerable groups fleeing Ukraine. As discussed in Section 3, recent years have seen a sharp increase in the invocation of vulnerability by the ECtHR in cases where there has been harm against a particular group, heightened by a position of relative disadvantage due to prejudice or material deprivation.

³⁷⁵ see Freedman (154).

³⁷⁶ Bueno Lacy & van Houtum (n362), 477.

³⁷⁷ Squire (n367)

³⁷⁸ Wilde, Ralph. “Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting.” (*OpinioJuris*, 17 March 2022)

<<http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/>> accessed 20/2/2024.

³⁷⁹ Kostakopoulou (n29)

Whether or not the concept is helpful in achieving substantive equality is contentious. However, elements of its utilisation by the Court in cases involving various rights clearly introduce an asymmetry to the reasoning that is necessary for substantive equality.³⁸⁰ As it has been established, there have been numerous allegations of discrimination within the implementation of the TPD. This section aims to explore whether vulnerability as a legal concept could be useful in building a human rights case in relation to the experiences of discrimination by Roma and non-white TCNs.

Considered a principle of *jus cogens*,³⁸¹ the prohibition of discrimination demands that people in comparable or 'relatively similar' situations must be treated equally unless there are objective and reasonable justifications for differential treatment.³⁸² Enshrined in Article 14 ECHR, it acts as an accessory right that applies only in conjunction with other Convention rights. Although it has been argued in previous sections that prejudices, racism and xenophobia did influence the limited personal scope of the CID, through the reservations made by actors such as Hungary, it is difficult to conceive of a ruling deeming the TPD itself to be directly discriminatory as a legal framework. Individual instances of differential treatment explicitly enacted on the basis of race or ethnicity - for example non-white TCNs being denied entrance into the territory of an EU MS which in general permits the entry of TCNs - would undoubtedly constitute violations of the principle of non-discrimination. This could allow for legal challenges to be mounted in respect of Article 3 and/or Article 8.³⁸³ But- can the differential treatment of non-white TCNs and Roma persons, permitted by the gaps in protection left by the CID, be challenged on the basis of discrimination? This is arguably where the concept of vulnerability could play a role.

Firstly, it can be established that Ukrainian and non-Ukrainian nationals are in a comparable or 'relatively similar' situation. The visa-free access to the EU that Ukrainian nationals are entitled to is not in itself incompatible with the principle of non-discrimination, as it is encompassed in the legitimate aim of EU enlargement policy. However, visa required and visa-free TCNs (which Ukrainian nationals are) can be considered in relevantly similar situations in specific contexts, such as crossing the border, thus Article 14 applies.³⁸⁴ The fact that the TPD was activated relies on the assumption that everyone fleeing the conflict in Ukraine is *prima facie* in need of protection. Arguably this means that all persons should be regarded as being in a relevantly similar situation, regardless of their nationality, citizenship status or lack thereof. Hence, any differential treatment within this group on the basis of a recognised discrimination ground could amount to a violation of Article 14.

On several occasions the Court explicitly stated that nationality is indeed a suspect discrimination ground, requiring 'very weighty' or 'compelling' reasons for differential treatment on the basis of such to be justifiable.³⁸⁵ However, since then it has essentially

³⁸⁰ Peroni & Timmer (n56).

³⁸¹ Dembour (n167), 282-312.

³⁸² Kienast et al. (n232), 384.

³⁸³ Skordas (2023), 430.

³⁸⁴ Kienast et al. (n232), 385.

³⁸⁵ *Gaygusuz v Austria* 1996 (Application no. 17371/90) para, 42.; *Biao v Denmark* 2016 (Application no. 38590/10) para, 114 .

restricted this application to cases regarding legally residing aliens who have been denied social security benefits, with other cases of differential treatment on the basis of nationality deemed legitimate.³⁸⁶ In *Ponomaryovi v Ukraine*, the Court reiterated that preferential treatment of nationals of EU MS over other non-citizens may be justified on the basis that the Union has a “special legal order,” with its own citizenship.³⁸⁷ This seems to go against the General Recommendation made by CERD, stating that “among non-citizens, States parties may not discriminate against any particular nationality,”³⁸⁹ further stating that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”³⁹⁰

Differential treatment between certain categories of non-citizens is a widely accepted norm in the context of migration control, and the notion of EU citizenship as conferring preferential treatment for all EU citizens over TCNs, even in MS that they are not citizens, is legitimate. However, policies that have the effect “of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin” are contrary to the ICERD as they cannot be said to be legitimate or proportional.³⁹¹

The ICJ departed from this in 2021, taking a very narrow interpretation of the ICERD, holding that the term ‘national origin’ did not include ‘nationality’, and that distinctions between citizens and non-citizens did not necessarily violate ICERD. However, this has been widely criticised for the fact that nationality based discrimination is often a proxy for racial or ethnic discrimination, presented in a seemingly acceptable form.³⁹² There is no place for racial or ethnic discrimination among EU asylum policy, not least because it undermines the fundamental values that the EU was built upon, namely human dignity and equality. Under the TPD, MS have wide discretion in deciding whether to extend protection to non-Ukrainians, which in the context of securitisation may plausibly be driven by ethnonationalist ideology. Differential treatment by MS under this framework thus cannot be said to be reasonable and objective, nor in pursuit of a legitimate aim.

Therefore, there is a legal basis for discrimination on the grounds of nationality, but this is limited. It is proposed that the concept of vulnerability could add weight to the argument in respect of violations of the principle of non-discrimination. Whereas the listed discrimination grounds relate to “inherent personal characteristics or deeply held convictions or beliefs,”³⁹³ the Court has clarified that the ‘open-endedness’ of the provision means it has a wide range of application.³⁹⁴ Where the Court has invoked the concept of group vulnerability in its judgements relating to Article 14, it allows for a more multifaceted understanding of

³⁸⁶ Kienast et al. (n232)

³⁸⁷ *Ponomaryovi v Ukraine* 2011 (Application no. 5335/05) para, 54.

³⁸⁸ (*Qatar v. United Arab Emirates*) Preliminary Objections (Judgment) [2021] ICJ Reports

³⁸⁹ CERD, General Recommendation XI on non-citizens, 2003, para. 1.

³⁹⁰ CERD, General Recommendation XXX on discrimination against non-citizens, 2004.

³⁹¹ CERD (n289).

³⁹² Carrera et al. (n10), 42.

³⁹³ see *Carson v United Kingdom* (2010) (Application no. 421804/05).

³⁹⁴ *Biao v Denmark* (n385) para 89.

discrimination, one that can be said to incorporate an intersectional perspective that also take into account historical and social contexts.³⁹⁵ In the context of Roma individuals and non-white TCNs, this would allow the Court to consider not just the prejudices that render these groups vulnerable, but how these vulnerabilities form the basis for discriminatory treatment at the border and within MS. In past caselaw relating to discrimination on the basis of ethnicity/race, the Court has only raised group vulnerability in relation to Roma people. However, as the vulnerability arising from racial prejudice was demonstrated earlier, there is no reason why the group vulnerability concept could not also be invoked in relation to non-white TCNs. Furthermore, it is conceivable that both the universal and particular element of vulnerability - seemingly necessary for the concept to be operationalised - are fulfilled in relation to these individuals, as vulnerable migrants who also belong to vulnerable groups.

In making this argument in favour of vulnerability as a legal concept, its utility should not be overstated. For vulnerability to be a useful tool for building a legal argument in respect of Roma and non-white TCNs who experience discrimination in the implementation of the TPD, the pitfalls associated with the concept must be considered. Thus far, the positive impact of the concept in its own right for achieving substantive equality is unsubstantiated. Even where it is mentioned in the Operational Guidelines relating to border checks, the clear evidence of further vulnerabilisation of vulnerable individuals at the border demonstrates its inefficiency. At least in part, this is due to the incoherence of the concept- if a case was brought before the Court in this instance, it would provide an opportunity for clarification, that allows for the inclusion of non-mainstream, non-white epistemologies, through the lived experience of these vulnerable individuals.

As Baumgärtel posits, the Court may remain cautious to clarify the concept in order to refrain from overstepping their role in the complex context of migration control.³⁹⁶ However, he puts forward a compelling argument for how vulnerability can be used as a pillar of strategic adjudication, utilising a social-contextual conceptualisation of vulnerability. While the Court does not have any formal system of precedent, Lupu and Voeten demonstrate how de facto precedents are created through citation of 'vital' former judgements in order to legitimise decisions 'vis-a-vis external audiences.'³⁹⁷ Therefore, Baumgärtel proposes a 'migration agenda' within the Court chambers that provides guidance to judges on the principles and precedents whose vitality needs to be strengthened in order to promote outcomes that affirm the rights of vulnerable migrants. Guided by the notion of vulnerability, the Court would employ the concept as a counterbalance to the currently broad margin of appreciation.³⁹⁸ In the present context of the TPD, there are numerous potential applicants whose experiences provide an opportunity for this to be enacted. On a wider scale, even negative rulings in

³⁹⁵ Blaker Strand, Vibeke. & Ik Dahl, Ingunn. 'Responding to Disadvantage and Inequality through Law.' (2017) *Oslo Law Review* Vol. 4, No. 3 124-132, 126.

³⁹⁶ Baumgärtel (n23).

³⁹⁷ Lupu, Y., & Voeten, E. 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights.' (2012) *British Journal of Political Science*, 42(2), 413-439, 438.

³⁹⁸ Baumgärtel (n23).

individual cases can produce positive outcomes in terms of migrant rights, serving as “catalysts for change” by drawing public and political attention to the matter.³⁹⁹

6.2. Vulnerability as a Conceptual Tool in Reframing Migration Policy: Towards Equal Solidarity?

It is conceivable that vulnerability could prove useful in building a legal argument, but in light of the Court’s reluctance to undermine MS sovereignty in migration cases, probably unlikely. Furthermore, the option of individual redress in relation to human rights violations does little to challenge the double standards that the regime is built upon, symptomatic of the CEAS in general. Despite its success in terms of scope and speed of protection, as well as unprecedented consensus among MS, it can be concluded that the TPD does not represent a general paradigm shift for EU migration and asylum policy.⁴⁰⁰ The unique geopolitical circumstances surrounding the activation of the TPD seem unlikely that this will offer a blueprint for a more humanitarian centric CEAS, as the regime continues to operate in tandem with, and complementary to, the deterrence paradigm.⁴⁰¹ Taken together, the wide scope of immediate protection offered by the TPD, along with the rhetoric of welcoming and support from politicians, media and the general public, signify the perception of Ukrainians as vulnerable ‘deserving’ refugees. From a security perspective, Ukrainian refugees seem to be viewed as the referent object to be protected from the physical risk of conflict but also the precariousness of displacement: a human security approach. On the other hand, refugees from other parts of the world, also fleeing conflict and persecution, are presented as the threat to the vulnerable EU, condemned to a human insecurity trap. Simultaneously the activation of the TPD demonstrates the viability of a migration and asylum policy grounded in human security, while also exposing the reasons for why it is politically unviable.

Securitisation, driven by various political motives including racism and xenophobia, allows this two-tier system of unequal solidarity to prevail. Viewing vulnerability through a constructive lens help to expose the TPD regime as an apparatus of securitisation and production of vulnerability in an academic sense. Moreover, an appeal to vulnerability could encourage the change in perceptions necessary to redirect EU migration and asylum policy towards a human security paradigm, that does not distinguish between individuals in need of protection.⁴⁰² Vulnerability is a shared universal condition, the basis for social connectedness, and as such a “condition of potential.”⁴⁰³ Framed as a negative condition, vulnerability necessitates the pursuit of invulnerability, restoring control and order over the threat. This state of security is imagined on the basis of an outside Other, who must either be excluded or

³⁹⁹ Lobel, Jules. *Success without Victory: Lost Legal Battles and the Long Road to Justice in America*. (NYU Press, 2004).

⁴⁰⁰ Wilde (n378).

⁴⁰¹ Gammeltoft-Hansen, Thomas. & Hoffmann, Florian. ‘Mobility and legal infrastructure for Ukrainian refugees.’ (2022) *International Migration* 60: 213-216.

⁴⁰² UNDP, ‘Human Development Report 1994.’ <<https://www.undp.org/publications/human-development-report-1994#:~:text=July%207%2C%201994,global%20concerns%20of%20human%20security>> accessed 20/2/2024, 8.

⁴⁰³ Gilson, E. ‘Vulnerability, Ignorance, and Oppression.’ (2011) *Hypatia A Journal of Feminist Philosophy* 26(2):308 - 332, 209.

conform to the status quo.⁴⁰⁴ In this sense, vulnerability is already central to migration and asylum policy. However, conceptualised as the “openness to being affected and affecting in turn,”⁴⁰⁵ emphasising the power of empathy, vulnerability could encourage a shift in asylum policy towards a human security approach, which demands both substantive equality and equal solidarity.

Discussed briefly in Section 3.3, the fundamental rights of vulnerable migrants are often seen as an exception to the general State prerogative to control its own borders;⁴⁰⁶ while extant on paper they are unreliable and unstable in reality. Baumgärtel suggests that this is not merely an issue with implementation, but more deep rooted in society: linked to concerns around dependency, identity and cost.⁴⁰⁷ Securitisation can be seen as a mechanism through which these concerns are enacted, resulting in an absence of enforceable rights for vulnerable migrants. Yet this does not mean that human rights cannot be operationalised in these cases. Mann proposes that the answer lies in reconceptualising human rights as existential commitments, owed between individuals based on personal ethical principles.⁴⁰⁸ The aforementioned appeal to vulnerability as a shared condition is a way of enacting this: emphasising the existence of universal obligations reduce vulnerability of others, that exist outside of a formal legal framework.

Undoubtedly, this concluding argument is idealistic and aspirational. The motivations of governments and policy makers in creating exclusionary asylum policy will not be swayed by an appeal to the shared vulnerability of humankind. Yet, the securitisation of migration is also inherently populist and thus public opinion matters. The capacity of public support to extend help to those in need was clearly demonstrated in many cases in relation to Ukrainian refugees.⁴⁰⁹ Society plays an active role in the creation of human rights norms. Mobilising individuals as not just recipients, but protectors of human rights have the potential to dissolve the existing dichotomy between ‘deserving’ and ‘undeserving’ migrants. Academic exercises such as this, exposing the construction of (in)security and (in)vulnerability by dominant actors are important in advocating for this extension of empathy and humanity to all migrants.

7. Conclusion

This paper aimed to explore whether the TPD regime provides sufficient protection for vulnerable individuals, and if the concept of vulnerability provides a useful tool to critically analyse the TPD regime. Ultimately, it is concluded that with respect to the most vulnerable groups fleeing the conflict in Ukraine - Roma and non-white TCNs - the TPD not only fails to protect but creates further vulnerabilities.

⁴⁰⁴ Drichel (n173), 5-6.

⁴⁰⁵ Gilson (n402), 310.

⁴⁰⁶ Dembour (n167)

⁴⁰⁷ Baumgärtel (n23).

⁴⁰⁸ Mann, I. *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge Studies in International and Comparative Law). (Cambridge: Cambridge University Press, 2016), 54.

⁴⁰⁹ Carrera et al (n10), 6.

Migration is highly securitised within the EU, dealt with “above normal politics,” and thus the real motivations behind securitised migration policy remain opaque. Structural dynamics and patterns of domination can result in vulnerabilisation of certain groups, and law and policy can act to reinforce this state. This social-historical-contextual understanding of vulnerability is crucial in effectively addressing the harms associated with being in a vulnerable condition. Yet, the ‘solutions’ adopted to mitigate vulnerability are not always positive: vulnerabilisation of certain groups may be a prerequisite to their securitisation, rendered a population that can be managed - under the guise of humanitarianism - to maintain the ‘status quo’.

Vulnerability has emerged as a legal concept at the European level with two main functions. Firstly, the concept is mentioned several EU directives in regard to identifying individuals who require special assistance, on the basis of personal characteristics, thus creating an obligation on the State. However, the disparity in language across and within the various instruments, coupled with the lack of guidance in identification procedures, means that practice across MS is inconsistent. The second function presented is the invocation of the concept of group vulnerability by the ECtHR. In proclaiming a certain group to be vulnerable on the basis of existing societal prejudices, or social disadvantages, the Court uses the concept to guide the individualised assessment of whether a right has been violated. The Court has invoked the group vulnerability concept in relation to asylum seekers, and the Roma population, as well as others. While it has become more prevalent in the Court’s judgements, there is still incoherence relating to exactly when and how the concept is applied. Due to this ambiguity, the value the concept in achieving substantive equality remains contentious. Judgements that have found in favour of the vulnerable migrant suggest that in order for vulnerability to be influential, there must be both a finding of group vulnerability and additional individual vulnerability factors.

Turning to the scope and substance of the TPD regime - from Directive, to Proposal, to CID - in relation to vulnerable individuals, it was demonstrated that a few actors, including Hungary, influenced the regression in personal scope of protection. This restriction in the scope of beneficiaries means that MS are not obliged to extend TP to TCNs and stateless persons who did not benefit from international protection in Ukraine prior to the invasion. In respect of TCNs who resided in Ukraine on the basis of a temporary residence permit, stateless individuals who were not officially recognised as such, and undocumented individuals, the language of the CID leaves a high level of discretion to MS regarding what kind of protection to grant them. In the context of securitisation of migration, it is argued that these reservations, resulting in gaps in protection, were driven by the same underlying factors as the deterrence paradigm that characterises standard CEAS policy. Thus, it was no coincidence that these margins of discretion allow MS to perpetuate the same exclusionary logic, administered along racial and ethnic lines, under the seemingly neutral framework of the TPD. This is of particular concern in light of individuals falling within these categories that also experience intersecting marginalisation, namely Roma who are stateless or undocumented, and non-white TCNs.

In the case of Hungary, where securitisation of migration is justified on the basis of ethnonationalism and xenophobia as part of Orbán’s populist agenda, the dangers of this MS

discretion are exemplified. Exercising the discretion granted in the CID, Hungary does not extend TP to TCNs and stateless persons who did not benefit from international protection in Ukraine, instead subjecting them and all others falling outside the scope of the TPD to the usual asylum rules. However, due to the government's hardline anti-immigration stance, the asylum system is virtually non-existent. Numerous reports illustrate that Roma face multifaceted discrimination at the Ukrainian-Hungarian border, as well as in accessing rights once inside Hungary. As this stratified protection is legitimate under the TPD, discrimination on the basis of race or ethnicity seems to go un-interrogated or unseen. In Hungary, the TPD has become part of the securitisation dispositif, excluding those who do not conform to the constructed image of Hungarian national identity, thus excluding non-white TCNs and Roma-condemning them to a human insecurity trap. Implemented into the context of highly securitised migration policy, the TPD not only perpetuates the double standard of EU asylum policy, but conceals it.

To answer the central research question, vulnerability was utilised in three different ways throughout the paper, with varying levels of efficiency. As a heuristic tool vulnerability effectively enabled critical analysis of the scope of the TPD, illuminating the gaps in respect of the most vulnerable individuals. Through this exercise it was shown how the TPD regime in contributes to further vulnerability rather than sufficient protection, a conclusion that would arguably be lacking from an analysis that does not include a social constructivist conceptualisation of vulnerability. As a legal concept, Section 6.1 proposes that the ECtHR's group vulnerability concept could be useful in building a legal case for violation of the principle of non-discrimination in relation to discriminatory practices at the border experienced by Roma and non-white TCNs. However, due to the incoherence surrounding the concept and the ambiguity with which the Court employ it, it is unclear whether in reality this would be helpful. On a more general conceptual level, it was concluded in Section 6.2 that an appeal to the positive conditions of possibility generated by vulnerability could help to reframe migration and asylum policy, towards the human security paradigm. While this final point is broadly related to migration policy and vulnerable migrants, it could have implications for the TPD regime in so far as influencing the decision of how to deal with Ukrainian refugees once the TPD regime has ended.



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