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Intersectionality and refugee women

The shortcomings of the EU Pact
on Migration and Asylum from an
intersectional perspective



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Abstract

This contribution sheds an intersectional feminist perspective on the European Commission's (EC) *New Pact on Migration and Asylum*. By engaging with the definitory and conceptual unclarity as to who the Pact defines as "especially vulnerable groups" and according to which criteria, it critically examines some of the gendered and racialized notions about migrants embedded in and institutionalized through the Pact. By illustrating how the EC has little understanding of what being "vulnerable" means, what implications the uncritical adoption of this term can have and what consequences respective measures can have for migrants, this paper makes a relevant contribution to ongoing debates with regard to the EU's future migration and border politics.

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Abbreviations

EASO	European Asylum Support Office
EC	European Commission
EU	European Union
EURODAC	European Dactyloscopy
Europol	European Union Agency for Law Enforcement Cooperation
Frontex	European Border and Coast Guard Agency
FRA	Fundamental Rights Agency
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersexual
MSF	Médecins sans Frontières
SIS	Schengen Information System

Foreword

After the Taliban seized power in Afghanistan in August 2021, there has been a lot of talk in the EU about an emerging “wave of refugees”, an imminent “migration disaster” and an expected “refugee crisis”. This dehumanising political framing evoking images of fear is often presented as a matter of fact. “2015 must never be allowed to happen again”, goes the crude message and absurd assertion. However, the real disaster has been the failure of Western governments to rescue people from Afghanistan who deserve our protection.

It should not be too much to expect democratic politicians to refrain from spreading false information and disinformation, and to choose their words carefully to avoid polarisation and escalation. Even in 2015, we were dealing not with a “refugee crisis”, but with a crisis of European refugee policy. This semantic clarification makes a huge difference, both in how the events of that year are presented and how they are perceived. However, the EU refugee policy crisis rumbles on to this day, overshadowing many discourses and, due to its devastating hopelessness, eroding the very pillars of the European project.

In September 2020, the European Commission tabled its New Pact on Migration and Asylum. In practice, however, this long-awaited proposal will not remedy the shortcomings of the Common European Asylum System, and may even make them worse.

At the same time, women’s rights, gender equality and intersectional approaches have been quite prominent recently with regard to the EU policy agenda. In November 2020, the European Commission released its Action Plan on Gender Equality and Women’s Empowerment in External Action 2021-2025 (GAP III). The aim of this action plan is to address structural causes of gender inequality and gender-based discrimination, and to tackle all intersecting dimensions of discrimination, “paying specific attention for example to women with disabilities, migrant women, and discrimination based on age or sexual orientation”.

While it is mentioned in the New Pact on Asylum and Migration that vulnerable groups have to be especially protected, the question whether an intersectional approach is actually taken into consideration has not yet been intensively discussed. It was against this background that the Heinrich-Böll-Stiftung European Union commissioned this study. What is the definition of vulnerable groups applied in the Pact? Does this definition include an intersectional dimension? Which impacts could the measures suggested by the proposal have on vulnerable groups, with consideration to intersectional aspects? These are just a few of the questions addressed in this study.

We would like to thank Madita Standke-Erdmann for her incredible efforts and remarkable work. By addressing the shortcomings of the EU’s New Pact on Migration and Asylum from an intersectional perspective, she not only identifies the need for further exploration, but also points to the possible negative impacts of this lack of understanding. Through the example of the Pact, she explains the problems related to intersectionally-blind concepts that EU policy proposals are often based on. With this study, we hope to foster a much-needed debate on how we can, and why we should, include intersectional approaches in EU policy-making. The author makes it very clear: There is a lot of hard work ahead of us!

Brussels, November 2021

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1. Contextualizing the Pact

In September 2020, the European Commission's (EC) Vice President Margaritis Schinas presented the *New Pact on Migration and Asylum* to the public. Although initiated over a year before, the presentation coincided with what became one of the most horrendous humanitarian catastrophes seen in recent times at the European Union's (EU) external borders – the fires in Moria refugee camp on Lesbos. Symbolic of the EU's political inability to address multiple human rights violation issues at its external borders, the incident was followed by the usual inconclusive debates between Member States on how to resolve this recurring pressing issue. While saving the 'most vulnerable of the vulnerable'^[1] was presented as a heroic humanitarian gesture, critical voices quickly denounced this as a fig leaf for the EU's common reluctance to address the violent nature of the European border regime.

The EC framed the Pact as a direct and timely reaction to the fires in Moria. It drafted the Pact, a package of 10 documents, under Commissioner Johannsson's lead, in its strategic priority 'Promoting our European way of life'. It marks the preliminary end to a five-year-long blockade of any reform attempt of future EU migration politics, with critical implications for domestic and EU foreign policy. It promises 'faster, seamless migration processes and stronger governance of migration and borders policies'.^[2] Under this premise, it advocates a 'flexible solidarity', which provides member states with more leeway to decide on their own terms whether to support other Member States in their search and rescue or resettlement undertakings. It also proposes to establish so-called pre-entry screenings at the EU's external borders, i.e. outside EU-territory, comprising "vulnerability", health, security and identity checks, to outsource attending to third-country nationals whose chances for a positive decision on asylum or international protection are considered low or who may have attempted to cross borders without permission. Based on these screenings, it suggests a return sponsorship mechanism through which Member States can decide on whether and how much they choose to support the return of a person. The Pact addresses the following areas: border security and migration governance, reception (conditions) and resettlement, and access to international protection, as well as integration. Overall, the Pact promises to provide the EU's member states and those arriving at its borders a set of more time-efficient and streamlined procedures in cooperation with third-country partners.

Criticized for its strong technocratic focus on 'migration management',^[3] several civil society actors and activists have responded to the Pact with serious concerns about potentially far-reaching legal^[4], social and humanitarian repercussions for migrants. Particular concerns have been raised about whether the Pact acknowledges and addresses the various situational and inherent "vulnerabilities" migrants can face at borders and during migration. In a joint statement, organizations, such as Human Rights Watch and Amnesty International,^[5] identify two flaws on which the new Pact has been built, namely that a) the majority of migrants do not have a right to protection and b) asylum procedures can be undertaken in a quick and efficient way. Therefore, 'the Pact risks exacerbating the focus on externalisation, deterrence, containment and return', which paves the way to creating a

'two-class asylum system'.^[6] Essentially, these actors interpret the Pact as a means to justify a more rigorous mechanism to reduce the overall number of migrants seeking to reach the EU via migration routes on the African continent, in the Western Balkans and in Asia.

Despite the fact that the term "vulnerable groups"^[7] has become popular in migration and border politics, it remains unclear how the Pact defines these groups, and how it accounts for their protection, as well as how, or even if, it takes into consideration intersecting social positions on the grounds of gender, class or race, and respective resulting forms of discrimination.

The publication at hand aims to shed an intersectional perspective on if and how an intersectional dimension is incorporated in addressing so-called "vulnerable groups and individuals". That is, how far are social positions and their interrelations accounted for and how are they thought to be addressed in the Pact? This contribution will attend to these questions on a normative, policy, institutional and interactional level. To do so, the following documents are considered: *Communication on a New Pact on Migration and Asylum*^[8] and the *Screening Regulation: Proposal for a Regulation introducing a screening of third country nationals at the external borders*,^[9] as screenings have been flagged as particularly concerning with regards to their execution and consequences for individuals. It should be noted that further proposals for regulations of amendments to them are not included at this point. In addition, this paper does not claim to be exhaustive. Rather, it aims to shed light on some of the aspects and potential consequences the Pact may evoke.

2. Intersectionality as a political and academic perspective



Intersectional perspectives on society and embedded inequalities originate in anti-slavery struggles and date back to Sojourner Truth^[10], an Abolitionist famous for her speech "Ain't I a Woman?" at a women's rights convention in Ohio in 1851. More than a century later, feminist (legal) scholars such as Kimberlé Crenshaw^[11] and, later, Patricia Hill Collins^[12] introduced this analytical prism to the academic arena. In a ground-breaking achievement, these scholars began to shed light on intersecting forms of structural, racist, sexist and homophobic discrimination

against primarily, but not limited to, Black women and Women of Colour in the USA along the lines of race, class and gender, as well as immigrant status. Through activism, academia and, increasingly, policy, intersectional feminism undertakes the political project of highlighting and countering a myriad of social inequalities.

For policy and academia, the merits of an intersectional approach lie in its complexity. In other words, “intersectionality recognizes that to address complex inequities, a one-size-fits-all approach does not work”.^[13] It allows a perspective that accounts for intersecting social positions concerning race, class, gender, ethnicity, religion, age, (dis)ability, geography and migrant status, without prioritizing, (de)valuing and/or negotiating one position over or against another. Importantly, it rejects a woman/man binary and acknowledges the various expressions, positions and social constructions of gender. For example, cis-women and people identifying as LGBTI are at higher risk of encountering forms of gender-based violence^[14] and abuse during migration. This is likely to occur not only because of someone’s sexual orientation or gender, but also on the basis of race, religion or economic background. Therefore, the prism, through which narratives, structures and practices are refracted, uncovers and highlights their racist, sexist, classist, ableist and homophobic character.

An intersectionality-sensitive policy understands and acknowledges a variety of inequalities that can occur along the lines of the aforementioned intersecting social positions. Policy attentive to intersecting social positions and resulting forms of discrimination are “more inclusive of people’s different concerns and capable of challenging unequal power relations”^[15]. It also accounts for the ways in which structural aspects locate individuals and groups in certain (dis)advantageous positions, while at the same time refraining from (re)enforcing stereotypes about specific groups.^[16] Finally, intersectionality-sensitive policy requires a consideration of the wider context of power differentials in the patriarchal, capitalist, homophobic and racist systems^[17] in which the policy is embedded.

With regards to “vulnerable groups”, intersectional perspectives on policy inquire into how these groups are defined and addressed, as well as how such “vulnerabilities” come into place and whether “vulnerabilities” are acknowledged with respect to intersecting social positions that shape the experience and situations of migrants in the different contexts the Pact touches upon.

It should be noted that “vulnerability” as a concept, and its applicability to predefined groups in a forced migration context, has been debated in different ways and is highly contested. This analysis understands “vulnerability” as both inherent and situational. Accordingly, “vulnerability” is ‘inherent to the human condition [...] arising from our corporality’ as we are all ‘inherently vulnerable to hunger thirst, sleep deprivation, physical harm, emotional hostility, social isolation, and so forth’.^[18] Situational “vulnerability” can be ‘caused or exacerbated by the personal, social, political, economic or environmental situations of individuals or social groups’.^[19] That being said, it acknowledges that whether or not an individual or group is vulnerable depends on “socioeconomic status and geographical location”.^[20] For the purpose of this analysis, “vulnerability”, as well as other politically and academically contested concepts, will be flagged with double quotation

marks to avoid the risk of uncritically adopting, naturalizing and reproducing inherent and implied meaning, as well as structures of violence.

3. Approaching the Pact

3.1. Why intersectionality matters in EU migration and border politics

Before engaging with the Pact and its contents, a few words should be spent on the global political and historical context in which it was, and continues to be, developed. The EU remains a powerful economic and political international actor, which emerged and gained power before and during times of anti-colonial struggles in the “Global South”. Some of the countries formerly colonized by several of today’s EU member states, are nowadays considered ‘key third-partners’ in migration politics and in EU neighbourhood policy. This is of particular importance to the EU’s endeavours to further externalize its border regime into these regions under binding economic and political conditions, thus shifting legal and humanitarian responsibility to actors outside of EU territory. Although this contribution cannot sufficiently account for these complexities, it should be kept in mind that the European colonial past casts a long shadow over, for instance, its foreign policy action, so-called “development” and “economic relief” programmes, as well as military missions on the African continent or in the Middle East. While not limited to postcolonial entanglements, these policies have brought, and continue to bring, about gendered, classed and racialized inequalities, and reinforce a North-South divide on an economic, political, social and environmental level. Naturally, this also has implications for migration movements and the experience of migration, as well as the character of EU border politics.

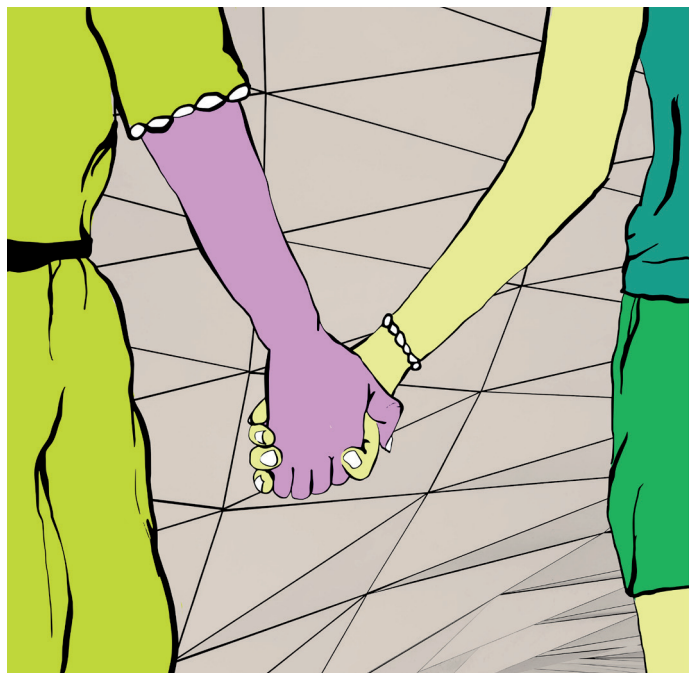
3.2. Normative level

This first section addresses what definition of migrants the Pact is based on. It looks at how “vulnerable groups” are defined and whether this includes an intersectional dimension.

The Pact understands migrants as two roughly categorisable groups. On the one hand, it addresses asylum seekers, refugees and those seeking international protection with ‘well-founded claims’^[21], referring to international frameworks and EU regulations. Under these categories, people are subsumed as legal migrants. Those who fall into this category are considered in a more differentiated manner concerning specific needs or “vulnerabilities”. On the other hand, the Pact utilizes the terms ‘illegal’ or ‘irregular’ migrants who either ‘do not have the right to stay’, are ‘unauthorized’, present ‘unfounded asylum applications’ or are considered a ‘security risk’ due to ‘criminal or suspicious behaviour’.^[22] In general, the Pact is based on a rather narrow definition of reasons why people migrate. It accounts for armed-, conflict- and persecution-related reasons, but does not incorporate structural, economic, environmental or other political aspects. This dichotomous framing coincides with the increasing trend to criminalize migration in EU migration policy and public discourse.

The Pact mostly works with the terms 'vulnerable groups', 'people with/showing vulnerabilities', 'with special needs' or 'the most vulnerable'.^[23] Although the documents do not explicitly mention it, the definitions of 'vulnerable groups' resemble that of Article 21 of Directive 2013/33/EU.^[24] The definition follows a primarily bodily understanding of "vulnerability", suggesting that people and their bodies are "vulnerable". The environment they find themselves in, or are exposed to, is barely understood as a potential source of rendering individuals "vulnerable". Therefore, inherent and situational "vulnerabilities" are rarely differentiated between and accounted for. The Pact mentions structural factors but limits and frames them as caused by smugglers, which exacerbate and cause the "vulnerability" of individuals. However, there is no coherence across the considered documents as to who and what constitutes these groups, who defines relevant criteria and on what basis.

Taken together, the Pact shows a number of ambiguities concerning the definition of migrants, "vulnerabilities" and potential exacerbating elements. The rough distinctions between "legal" and "illegal" migrants create a paradoxical dichotomy in the context of "vulnerability": either, people are considered "legal" and can be "vulnerable", or people are classified as 'illegal', resulting in little to no acknowledgement of potential "vulnerabilities". However, women, children, girls, the ill and the elderly are considered inherently "vulnerable", irrespective of their legal status, and are especially prioritized in moments of crisis. To illustrate some of the ambiguities across the documents, the *Communication on a New Pact on Migration and Asylum* speaks of 'children and the vulnerable', defining 'the vulnerable' as individuals at risk of human trafficking, 'sexual exploitation or other forms of gender-based violence'.^[25] It foregrounds women and girls as especially likely to be affected by these forms of violence. This is laudable since intersecting forms and expressions of gender-based violence at borders against women in a European border context remains largely unknown.^[26] However, a static definition of 'woman' is often linked and reduced to their role as mothers and primary caregivers to children, who are defined as below the age of 12. Even less information is given about other marginalized groups, such as people identifying as LGBTI. Although the document mentions individuals identifying as LGBTI as potentially more "vulnerable", the specificities of their "vulnerabilities" are not spelled out. On the other hand, the *Screening Regulation: Proposal for a Regulation introducing a screening of third country nationals at the external borders* lists age, sex, health (physical and mental), ability (especially physical) and single parenthood as indicators for 'vulnerability'.^[27] With the individuals identified as children, elderly, the ill and women, the rough definition of "vulnerable groups" follows a



classic scheme often found in international migration policy frameworks, entailing notions of the weak, needy and helpless migrant woman and children, or ill and elderly person.^[28] Yet, the definition stops there. In both documents, social positions are listed but are barely accounted for in their intersections. In addition, men or male migrants^[29] are not mentioned as a group exposed to particular “vulnerabilities” at all, although scholars and humanitarian actors have demonstrated that men face gender-specific insecurities and situations in a migration context.^[30] It also leaves little to no room to account for individual’s (dis)abilities and how they may intersect with other social relations and subject formations.^[31] Thus, the Pact does not move beyond these gendered understandings of “vulnerable” migrants and does not explicitly consider potential socioeconomic or political differences between and across groups, namely that individuals can but do not have to be “vulnerable”.^[32] What is also noticeable, although less surprising, is that there is no acknowledgement of an individual’s agency and for someone’s own account of their “vulnerability”.

In sum, the Pact applies “vulnerability” as a self-explanatory, largely undefined category that serves to distinguish between different groups. It mostly defines “vulnerability” based on physical traits, characteristics and abilities, barely acknowledging the insecurities which migration and border crossing can evoke, and produces a notion of unequivocal neediness and passivity with no room for agency. Although not explicitly mentioned, the documents implicitly characterize those who do not fall into any of these categories as “criminal”, “illegal” or “irregular”. This leads to a static understanding of “vulnerability” being inherent to stigmatized ‘pre-defined groups of people’^[33] that cannot accommodate for specific situations and individual cases. It can barely even account for the various ways in which different social positions and respective forms of discrimination can lead to or perpetuate inherent and/or situational “vulnerabilities” in a migration and border context and beyond. In addition, a narrow understanding of “vulnerability”, focusing specifically on bodily features, reduces “vulnerability” to a medical issue, which not only limits access to support infrastructure, but also reinforces a clear distinction between those “deserving” and “undeserving” of assistance. These ambiguities and problematic ascriptions are not resolved across any of the considered documents, but create hierarchies across groups of migrants according to their “vulnerability” and/or “(il)legality”.

3.3. Policy level

This next section looks at how far the *New Pact on Migration and Asylum* takes into consideration rules put into place to protect “vulnerable” groups, and whether there are similarities and/or differences in the policies towards different “vulnerable” groups.

The documents include multiple references to fundamental rights and international law, based on which the entire EU migration and asylum system is compelled to attend to “special needs of the vulnerable”.^[34] The Pact refers to the European Charter for Fundamental Rights^[35] when considering specific social positions on the grounds of which people can be discriminated against. However, no connection is made between forms of discrimination and “vulnerabilities” which could result thereof.

To illustrate, in the case of pre-entry screenings, authorities should 'ensure the respect for human dignity and should not discriminate against persons on grounds of sex, racial, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority'.^[36] However, this enumeration is separated and disconnected from 'individuals with vulnerabilities, such as pregnant women, elderly persons, single parent families, persons with an immediately identifiable physical or mental disability, persons visibly having suffered psychological or physical trauma and unaccompanied minors'.^[37] There is no link between the grounds on which people can be discriminated against and the groups considered "vulnerable". This shows a lack of acknowledgement that, in their intersections, these discriminations can, but do not have to, lead to and/or perpetuate vulnerable situations beyond the predefined groups listed above.

Children are one of the groups accounted for most explicitly in the Pact. Children are to be protected 'in their best interest ... providing effective alternatives to detention, promoting swift family reunification, and ensuring that the voice of child protection authorities is heard'.^[38] There seems to be some sensitivity to children's particular position in a migration context as children should 'have prompt and non-discriminatory access to education and early access to integration services', which is in line with EU regulations on child protection, as well as the Convention on the Rights of a Child.^[39] In addition, 'child protection authorities should also be closely involved in the screening wherever necessary to ensure that the best interests of the child are duly taken into account throughout the screening'.^[40]



At external borders, children below the age of 12 and their families are exempt from pre-entry screenings for third-country nationals. However, there remains a certain degree of vagueness towards how this exemption will be guaranteed. This age threshold contradicts the Convention on the Rights of a Child which all EU Member States have signed and ratified, in which individuals below the age of 18 years are considered minors.

The definition of family has been extended to siblings, which suggests an acknowledgment of the particular "vulnerable" situations unaccompanied minors and children can face.

However, the Pact is based on a definition that does not go beyond the nuclear family (i.e. mother, father and children). Exemption from screenings apply unless individuals are considered a "security threat". Still, it remains unclear what entails a "security threat" and how a child or minor could constitute one. This poses wider questions regarding reception and detention standards, which are regulated through

Directive 2013/33/EU.^[41] Although it is stated that for children 'effective alternatives to detention'^[42] should be sought, it does not prohibit detention in principle. This contradicts Article 37 (b) of the Convention on the Rights of a Child, as migration-related detention of children is prohibited.

As outlined in 3.1, inconsistencies and vagueness prevail across the Pact as to which (pre-defined) groups count as "vulnerable", how and why people become or are "vulnerable", and on what grounds these criteria apply. These ambiguities are not resolved with reference to existing EU legal provisions and regulations regarding fundamental rights. Ambiguities are found in ubiquity across most of the policies, directives and regulations that the Pact builds on. Apart from children, policies designed for protection barely differentiate between and across those defined as "vulnerable groups". People showing characteristics that the Pact identifies as in need of protection are subsumed under the term "vulnerable". Nevertheless, the categories are inflexible, create a notion of irrevocable neediness and leave no room for situational specificities. They do not consider forms of discrimination resulting from social positions, which could (re)produce or perpetuate "vulnerable" situations.

3.4. Institutional level

This section discusses whether agencies and institutions whose roles are strengthened by the Pact have mechanisms in place to ensure the protection of especially vulnerable groups, and whether these mechanisms take into consideration the intersectionality of different forms of discrimination.

The Pact strengthens the EU agencies and institutions European Border and Coast Guard Agency (Frontex), European Asylum Support Office (EASO), European Dactyloscopy (EURODAC), and the European Union Agency for Law Enforcement Cooperation (Europol). It allows these actors to invigorate mechanisms on return, deportation and cooperation with third-country partners as a building block for future EU migration politics. Critical to the amendments is the centralization, digitalization and harmonization of all identification systems available within the Schengen Information System (SIS), making all data accessible to any authorities at the level of EU or member state until 2023. This also entails a complete digitalization of the EU visa system by 2025. The degree of importance assigned to protecting "vulnerable groups" depends on the field of activities of each actor.

One year prior to publishing the Pact, the Council adopted the New European Border and Coast Guard Regulation,^[43] increasing the mandate of Frontex by 10,000 staff until 2027.^[44] To counter 'shortcomings in migration management', the Pact intends for Frontex to play a 'leading role' as an 'operational arm' in a 'common European system for return'^[45] in the future, and should be involved in all stages from search and rescue to return and resettlement processes. With reference to the Schengen Border Code,^[46] 'border control should be carried out without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.^[47] The Pact also introduces a monitoring mechanism to document violations of the rights of migrants at borders

and recommends for Member States to cooperate with the Fundamental Rights Agency (FRA). However, the non-binding recommendation to involve the FRA is unlikely to suffice in ensuring the protection of human rights.^[48]

The EC's communication document implicitly addresses the various media reports^[49] on human rights violations^[50] and pushbacks by Frontex in the Western Balkans and the Aegean Sea in a single paragraph, in vague wording and without clear indications on how such incidents should be avoided in the future. There is no indication that the Pact problematizes the violent grounds on which these incidents have taken place and the need to counter discrimination based on race, gender, ability, religion and other social positions. Search and rescue as, well as relocation and return sponsorship, are to be of major concern to Frontex. As much as this is emphasized, it remains unclear how the protection of "vulnerable groups" is granted and ensured. Indistinct language paired with a repeated reference to the so-called 'solidarity mechanism' leaves much room for interpretation and suggests that protection of "vulnerable groups" should be carried out based on pre-emption as illustrated by the following quote:

'The specific situation of search and rescue cases and particularly vulnerable groups should also be acknowledged, and the Commission will draw up a pool of projected solidarity measures, consisting mainly of relocations, indicated by Member States per year, based on the Commission's short-term projections for anticipated disembarkations on all routes as well as vulnerable groups projected to need relocation'.^[51]

In addition, as part of an improved "border management", Section 3 of New European Border and Coast Guard Regulation states 'mechanisms and procedures for the identification of vulnerable persons and unaccompanied minors, and for the identification of persons who are in need of international protection or wish to apply for such protection, the provision of information to such persons, and the referral of such persons' in one breath with the need to fend any form of terrorism and "security threats". This reflects the distinction between "vulnerable" individuals, on the one hand, and criminalized migrants on the other, as previously mentioned.

In contrast, and in profoundly clearer language, the Pact identifies smuggling as the main cause for putting migrants in distress at sea and on land. The Communication Document announces a new EU Action Plan against migrant smuggling for the years 2021-2025 to strengthen cooperation across organizations, agencies and institutions involved in border security in cooperation with countries of origin and transit. Here, the external borders take a prominent position through which a larger part of "migration management", including measures against smuggling, are to be transferred to third-country partners. Notably, little information is provided on how the Pact ensures the adherence of human rights, in general, and the protection of "vulnerable groups", specifically. This is imperative in light of the abundance of reports on torture, detention and other human rights violations in Libya,^[52] a country which the EU aims to extend its cooperation to ensure and implement border "security" and return sponsorships.

As for the strengthened role of identification and “migration management” systems, EASO and EURODAC, as well as the SIS systems, are to be given further competences. The harmonization of the latter has been proceeded with through regulations 2018/1860^[53], 2018/1861^[54] and 2018/1862^[55]. In the future, these technological identification mechanisms will work in combination with, amongst others, existent, but soon to be expanded, systems for the gathering of biometric data, including ‘palm prints, fingerprints, facial images and DNA concerning, for example, missing persons to confirm their identity’.^[56] Concerning “vulnerable groups”, the future SIS will be provided with the infrastructure for ‘competent authorities [who] will have the possibility of entering preventive alerts in the system to protect certain categories of vulnerable persons (missing persons, children at risk of abduction or potential victims of trafficking in human beings or gender-based violence)’.^[57] Again, this listing presents a slightly different account of who is considered a “vulnerable” person compared to other regulations and communication documents. It further strengthens the idea of pre-emptively identifying “vulnerable groups” with the help of generalized and predefined criteria. This mechanism does not only objectify migrants by reducing them to “categories”, but also reproduces static “vulnerability” categories that are gendered.

Another aspect crucial to the strengthening of EU agencies and institutions are forms of discriminations that academic studies have established as being inscribed into information and “migration management” systems. Scholars have extensively researched the problematic inscription of race and gender as an ‘Absent Presence’^[58] across border and identification procedures and technologies to identify so-called “security threats”. With the Pact in place, the extension of the competences and harmonization of various information systems (SIS, EURODAC, EASO, Europol) are likely to perpetuate and exacerbate already institutionalized gendered and racialized stereotypes about migrants, respective forms of discrimination and violent structures within the EU border regime. Despite repeated reference to the Charter of Fundamental Rights and other provisions, the documents considered for this paper show no awareness of the problematic intersecting forms of discrimination at work within these systems, which are constantly (re)inscribed onto the bodies of individual migrants.

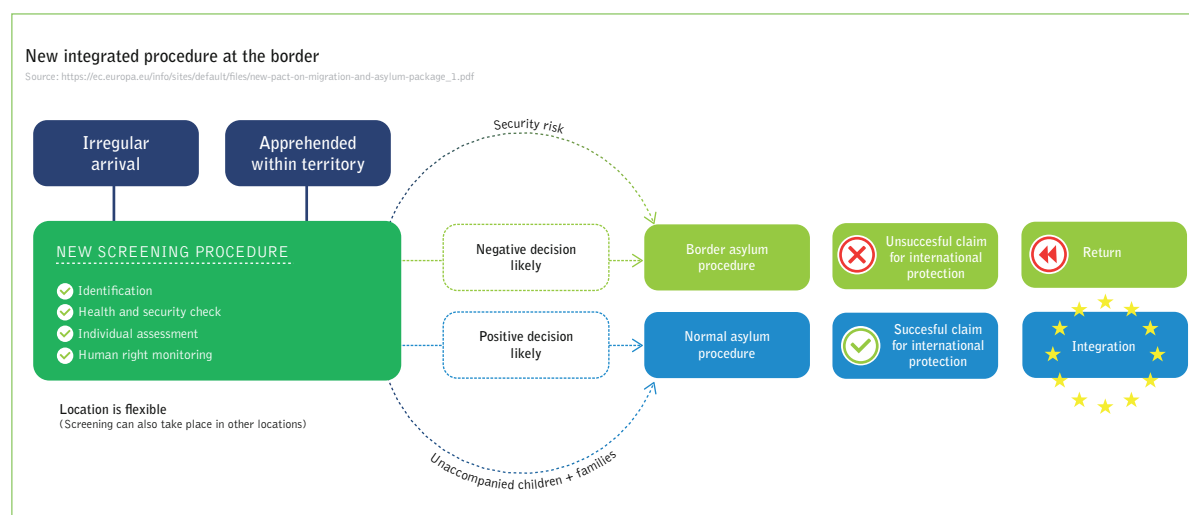
As outlined previously, a one-size-fits-all approach can hardly account for intersecting social positions on the grounds of which people are discriminated against. From an intersectional perspective, the use of generalized criteria, according to which “vulnerable” people are pre-emptively categorized, can hardly do justice to individual situations and, therefore, work against the holistic and comprehensive protection of people according to their specific and individual needs at borders and during migration. In fact, it is likely to exacerbate^[59] the situation of those who do not comply with predefined ‘vulnerability’ criteria,^[60] as shown in various academic studies.^[61]

3.5. Outlook

There are various levels at which the measures suggested in the Pact could have an impact on migrants, in general, and “vulnerable groups”, in particular. Due to the amount of measures suggested and their wide-ranging effects, the following section will particularly focus on pre-entry screenings, moments of *force majeure* and return sponsorship.

According to the *Proposal for a Screening Regulation*, ‘it is important to create a tool allowing for the identification, at the earliest stage possible, of persons who are unlikely to receive protection in the EU’ and should ‘lead to enhancing the synergies between external border controls, asylum and return procedures.’^[62] In other words, through pre-entry screenings based on predefined criteria with regards to “vulnerability”, health and security, the EU plans to significantly reduce the number of border crossings. There are a number of ambiguities and unclarities regarding the time, place, extent and concrete practice of these screenings, which which could result in potentially concerning constraints for migrants. As *Figure 1* shows, the screenings will apply to both so-called ‘irregular arrivals’ and people ‘apprehended within territory’ but ‘flexible in location’.

Figure 1: Factsheet: New Pact on Migration and Asylum^[63]



These screenings should be ‘carried out without prejudice to the rights of refugees and third-country nationals requesting international protection’ and should not take longer than five days and should be conducted ‘in proximity to the external border’.^[64] There is no indication of where screenings are to take place and how appropriate accommodation is to be provided. Recent studies have shown that women,^[65] for example, and people identifying as LGBTI, have little to no access to gender-sensitive infrastructure and hygiene facilities at borders. Although these studies establish that such provisions are of major importance to ensure humane living conditions, there is no explicit information given that gender-sensitive facilities will be provided during these screening processes. This may perpetuate and reproduce gendered insecurities, which the Pact is not prepared to address in its current state. It also remains unclear how the EC plans to guarantee standards, as screenings are to take

place outside of member state territory, being transferred to third-country 'key partners'. This is likely to pose unforeseeable administrative and humanitarian problems at a local level. Crucially, this not only applies to "vulnerable groups", as vaguely defined by the Pact, but to all migrants. There is a risk of shifting the previously heavily criticized hotspot approach to territories outside of the EU, which will reduce its accountability for upholding living standards. Placing responsibility and accountability outside of the EU is also likely to further narrow migration routes, which, as has been shown before, will further decrease access to support infrastructure. In addition, as borders are expected to be increasingly militarized over the next years, these developments are likely to perpetuate explicit and implicit forms of violence, with border technology based on artificial intelligence or biometric identification methods.

In an interview with the Centre for Humanitarian Action, Marie von Manteuffel from Médecins sans Frontières posits that

'speedy asylum procedures are based on the false assumptions that "vulnerability" and a respective individual need for protection can be assessed schematically and quickly. Many people treated by the organization are survivors of torture or sexualized violence from such countries which represent a particularly low quota of granted asylum applications (below 20%). This protection gap is likely to grow as such assessments are to be suspended, should local health authorities find no indication for vulnerability' (author's translation).^[66]

This assessment illustrates three problematic implications that are likely to unfold once pre-entry screenings are established. Firstly, it builds on the assumption that border checks are no more than an administrative procedure in which situations of individuals require no attention beyond the administrative scope. Secondly, the screenings will build on predefined criteria derived from statistics which (re)produce static and inflexible assumptions about gender, race, (in)ability and "vulnerability" inscribed into border information systems. Not only are these unable to account for individual's needs beyond predefined criteria but they risk discriminating against people on the grounds of their nationality and reduce the likelihood of receiving international protection or asylum. The screenings may also serve as a fig leaf to obscure violations of human rights and not provide for the safety of individuals who do not fall under the vaguely defined "vulnerability" criteria, but are considered "irregular", "illegal", and so on. Thirdly, there is a risk of local authorities, organizations and member states interpreting the guidelines for the implementation of screenings according to national or local criteria, which can result in uncoordinated administrative processes. Fourthly, and perhaps most importantly, it divides individuals arriving at the EU's borders into groups of "vulnerable" and "non-vulnerable", implying hierarchies of "(un)deservingness" and, consequently, providing legitimacy for rejecting individuals and their needs at borders.

Concerning the exemption from pre-entry screenings, the Pact states that 'special attention to the needs of the most vulnerable would include a general exemption from the border procedures where the necessary guarantees cannot be secured'.^[67] Again, vague wording leaves interpretative leeway on how the protection and exemption of individuals is to be

determined and practiced. Although children and their families are specifically exempt from these procedures, it is unclear how detention and detention-like situations shall be avoided for children older than 12. This leaves room for interpretation whether any child could be detained if they are understood to pose a "security threat". Detention of minors can cause severe psychological and physical stress and harm, as well as trauma, and is prohibited under international law. In addition, the definition of "security threat" is left open for interpretation and feeds into the notion of migration as a criminalized act.

Another issue raised by the Pact suggests that screenings for health issues, identity, security and "vulnerability" should be followed up by an additional "examination for the need for international protection".^[68] It is well-known that migration, border checks and remaining in transit can pose extreme moments of stress to individuals. It is therefore unclear why individuals applying for international protection should undergo an additional examination process to prove their need for protection. This implies a notion of criminalization which the Pact, in other sections, attempts to counter.

The documents considered for this contribution also emphasize potential mechanisms in moments of *force majeure*, namely events beyond the EU's sphere of influence. Should such a case occur, the EU should 'bring together all existing crisis management tools and set out the key institutional, operational and financial measures and protocols which must be in place to ensure preparedness both at EU and national level'.^[69] Consequently, this could initially leave it open to Member States to interpret moments of crisis according to their national criteria and could allow Member States to derogate from recommended procedural rules. In these situations, the Pact requires for the regulation of *non-refoulement* to be upheld. However, with regards to a Member States flexibility to act, it can judge the situation according to its means, specifically whether a particular situation counts as a form of crisis or not, and under which circumstances people are considered "vulnerable". In light of recent reports about human rights violations, as well as national and EU border agencies breaking with EU law, this necessarily poses questions of how human rights and the protection of individuals is to be guaranteed in a moment of crisis.

The proposed strengthened returns and return sponsorships are largely linked to the newly introduced "solidarity mechanism", in which Member States can decide on their own account whether to support other Member States in their asylum procedures. The Pact states 'Member States can focus on nationalities where they see a better chance of effecting returns'.^[70] This *à la carte* solidarity is based on the implied discrimination against certain nationalities, to whom the specific Member State can refuse to support individuals. This could imply that individuals who would have a right to international protection cannot initiate such a procedure, as they would be likely to be rejected.

With return sponsorships, the Pact not only builds on EU internal "solidarity", but explicitly establishes the need for further cooperation with third countries. Coming back to the aforementioned historical and political postcolonial context, the Pact lauds the EU's financial investments in African countries from which 'vulnerable displaced people'^[71] are said to have benefited already. However, it neglects the problematic influence and ramifications

these investments have had in terms of growing economic dependency in a global capitalist and neoliberal system, which are linked to reasons for migration, as well as the growing numbers of migrations due to the looming climate crisis and related conflicts over resources. This not only considers the EU as a global actor, but also concerns bilateral agreements between, for example, former colonial power Italy and Libya regarding financial and training support for the Libyan coastguard to prevent migrants from crossing the Mediterranean to Italy. In addition, a further uncritical and largely unquestioned cooperation with states which have been declared “safe third-countries” by Member States will not reduce the dangers of persecution for people identifying as LGBTI and other various ways in which people face forms of discrimination and obstacles due to their social positions.

In its current state, measures implemented according to the Pact will lead to the further externalisation of responsibility for migration, and is likely to blur the lines for the EU’s accountability for the provision of human rights in third countries, further reducing the numbers of border crossings according to predefined, yet vague, “vulnerability” criteria. Should pre-entry screenings and returns be performed at external borders, it is unlikely that intersecting forms of discrimination can be accounted for.

4. Conclusions

This discussion has looked at if and how the EU’s *New Pact on Migration and Asylum* incorporates an intersectional dimension in addressing so-called “vulnerable groups and individuals”, how far social positions and their interrelations are accounted for, and how they are thought to be addressed. Various aspects have identified the need for further exploration.

Firstly, this short contribution has demonstrated that the Pact does not incorporate an intersectional dimension at a normative, policy or institutional level, as well as within newly suggested measures and procedures. This lack of understanding is tied to a dichotomous understanding of “legal” and “illegal” migrants, as well as prevalent vagueness about what causes “vulnerability” and who is considered “vulnerable”, under what conditions, and by what means. The construction of “vulnerable groups” versus “irregular” or “illegal” migrants creates silences about who is not included in these definitions. In line with not mentioning male migrants or men at all, inflexible and static understandings of commonly defined “vulnerable groups” such as women, children, the ill and elderly reproduce gendered, racialized and ableist stereotypes, which leave no room for people’s agency and the adaptation to individual situations and needs. In addition, “vulnerability” is largely reduced to a physical characteristic and medical issue, reducing gendered groups of migrants, such as women and children, to an ascribed ontological “vulnerability”.^[72]

Social positions such as race, ethnicity, class, gender or sexual orientation are merely acknowledged as grounds on which discrimination should not occur during border practices. However, no link is established between the intersections of social positions and respective

predefined “vulnerability” criteria. Furthermore, it reinforces a clear, yet highly problematic, gendered and racialized distinction between those “deserving” and “undeserving” of assistance. This paradoxical, and largely exclusionary, understanding of who counts as “vulnerable”, paired with categories inscribed onto people’s bodies, runs through all the documents considered.

These categories are not just rhetorical formulations. They are likely to have a significant procedural and practical effect at borders, in policy and at an institutional level during application processes for asylum and international protection, as well as during the newly designed pre-entry screenings and return sponsorships. It is likely to reduce numbers of border crossings before individuals step foot onto EU territory. This needs to be reflected upon in light of a proclaimed increase in cooperation with EU neighbourhood countries.

Secondly, and directly linked, the Pact follows the main interest of establishing an efficient and effective migration and “border management”. Within this framework, the protection of “vulnerable groups” is negotiated against pre-entry screenings of individuals, reception and resettlement procedures on the grounds of “EU security concerns”. As there remains remarkable ambiguity about the location and exact practice of screenings and return sponsorships, there exists a risk of local authorities, organizations and Member States interpreting the guidelines for the implementation of pre-entry screenings according to national or local criteria, potentially causing uncoordinated administrative procedures.

Thirdly, it is especially worrisome that with the strengthening of EU migration agencies and border security actors, such as Frontex, EASO or EURODAC, the externalization of the EU’s border regime will further progress. As described above, it is likely that these developments will further (re)produce forms of discrimination and violence, as it will be increasingly complicated to hold actors accountable for human rights violations or systemic discriminatory behaviour.

Finally, there is no sign of understanding that the EU’s border itself comprises complex, dynamic and frequently violent processes, which positions migrants in an environment that can render them “vulnerable”. Thus, the Pact cannot account for reducing the (re)production of gendered, racialized and classed inequalities, as these are inherent to the EU’s migration and border regime, which the Pact is part and parcel to. This increasingly hostile environment for mirrors the EU’s struggle to orchestrate a humane and just migration and asylum policy in the face of an increasingly closed-off, externalised and frequently violent border regime.

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