VULNER

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Humanitarianism and Juridification at Play:
'Vulnerability' as an Emerging Legal and Bureaucratic Concept in the Field of Asylum and Migration

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VULNER Research Report 1

About this Publication

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VULNER

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Humanitarianism and Juridification at Play:
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EXECUTIVE SUMMARY

This research report has been published as part of the EU Horizon 2020 VULNER research project (www.vulner.eu). The VULNER research project is an international research initiative, the objective of which is to reach a more profound understanding of migrants' experiences of vulnerability when applying for asylum and other humanitarian protection statuses, and how they could best be addressed. It therefore makes use of a twofold analysis, which studies existing protection mechanisms for refugees, migrants and asylum seekers who are labelled as 'vulnerable' and compares these with their own experiences on the ground.

This introductory report contextualises the seven VULNER country reports and their own detailed and elaborate findings and conceptualisations. It should be read in conjunction with these country reports, which present the **intermediate research results of the VULNER project**, based on the first research phase. The first phase consisted in analysing the legal and bureaucratic vulnerability assessment tools and processes developed by state authorities and, when relevant in the domestic context, international aid agencies. The countries under study are located in Europe (Belgium, Germany, Italy and Norway), Africa (Uganda), the Middle East (Lebanon) and North America (Canada).

The report first introduces the **common overall theoretical and methodological framework of the VULNER project** which served as a basis for the VULNER country reports' own findings and conceptualisations that reflect domestic specificities. The report shows that 'vulnerability' acquires different meanings depending on whether it is used as an analytical tool to study human experiences from an empirical perspective or as a legal and bureaucratic tool to tailor state intervention to people's needs. It also shows that 'vulnerability' is not a neutral concept. The term conveys implicit ideological meanings and conceptions of equality, which contribute to both shaping and justifying the exclusionary effects inherent in relying on 'vulnerability' assessments to select the individuals who will receive specific advantages.

This observation raises various conceptual challenges, which resurface when designing and implementing vulnerability assessment tools and processes to tailor state intervention to various bureaucratic contexts – from targeting aid programmes to the most vulnerable refugees hosted in developing countries to adapting the reception conditions and asylum procedures to the needs of the most vulnerable asylum seekers.

The report also identifies the **main threads and findings common to the various VULNER country reports**. These common threads and findings relate to the vulnerability assessment tools and processes that have been developed in each country under study: How are vulnerabilities identified? What are the criteria, and which are the groups that benefit from particular attention? For what purposes are vulnerabilities identified? What are the concrete consequences of being labelled as 'vulnerable'? The report examines these while showing how, taken together, the VULNER country reports illustrate the multiple challenges of relying on vulnerability assessments to tailor asylum and migration policies to the specific protection needs of the most vulnerable protection seekers. These challenges all involve striking a balance between systematic and standardised bureaucratic practices, and the flexibility required to address actual experiences of 'vulnerabilities', which are contextual and socially embedded.

The common findings highlight the **risks of excessive reliance on standardised 'vulnerability' checks, which fail to engage comprehensively with people's actual life challenges**. Vulnerability assessments that are performed based on predefined criteria present major advantages in identifying immediate practical needs resulting from some personal characteristics (such as age, gender, severe health issues, etc.). But state actors on the ground commonly emphasise that these criteria should not lead to definitive consequences, which deprive the actors of the flexibility required to act in accordance with the specific needs of each individual they are responsible for. The findings from the VULNER country reports generally warn against developing 'sanitised' vulnerability assessments, which fail to account for the actual position of protection seekers and the complex ways in which their life challenges intersect.

ABBREVIATIONS

EU	European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

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INTRODUCTION: Ubiquitous 'Vulnerabilities'

'Vulnerability'[1] is a term widely used nowadays, from psychotherapists' calls to embrace our own vulnerabilities in order to better deal with everyday life difficulties and improve our individual well-being (Brown, 2015) to feminist theories of gender equality and the quest for a just society that cares for its weakest members (Held, 2005; Fineman, 2008; Tronto, 2009).

The policy field of asylum and migration has not escaped the trend. In public discourse, it has become common to emphasise the need to establish specific protection mechanisms for migrants and refugees who are deemed particularly vulnerable, such as children, victims of human trafficking and gender-based violence, and gender and sexual minorities. In Europe, this tendency has been illustrated once again by policy debates and reactions to the COVID-19 pandemic, such as the EU Commission's action plan to relocate unaccompanied minors living in unsanitary conditions on Greek islands to other EU member states (European Commission, 2020; Odink, 2020), and the Resolution by the European Parliament calling on the European Commission and member states to consider the impact of the measures adopted to combat the pandemic on groups and people in vulnerable situations (Resolution 020/2616, RSP, at 4).

The numerous and wide uses of 'vulnerability' raise the issue of how to identify and address situations and positions of vulnerability. In aid programmes developed at the UN and EU levels to support refugees hosted in the Global South, there seems to be an overall consensus on the need to target situations of vulnerability that prevent people and groups from coping with their life challenges and from leading a self-reliant existence as independent individuals (OHCHR and GMG, 2017; COM(2016) 234 final). But much uncertainty remains regarding how to identify these vulnerabilities and address them; the exercise entails the risk of developing state practices that rely on stereotyped understandings of the vulnerabilities experienced by migrants and refugees, and that ultimately fail to address their major life challenges in appropriate ways.

These uncertainties become even more pronounced when vulnerability assessments are performed as part of asylum procedures and other relevant procedures aimed at offering protection to migrants in a particularly vulnerable position (such as unaccompanied minors or victims of human trafficking). In such cases, vulnerability assessments have various direct and indirect consequences for decision-making on applications for a residence permit, which can have wider and more profound implications for individuals than decisions on the allocation of humanitarian aid, and which have become particularly divisive from a political viewpoint.

In the EU, the trend of mobilising vulnerability assessments as part of asylum and migration policies is exemplified by the legal obligation to adapt asylum procedures and reception conditions to the special needs of 'vulnerable' asylum seekers,[2] the plans to include a vulnerability assessment as part of a new border screening procedure (COM(2020) 612 final; Jakuleviciene, 2020), and the development of resettlement programmes that benefit the most vulnerable refugees (COM(2016) 468 final; Welfens, Engler, Garnier, Endres de Oliveira and Kleist, 2019; Brekke, Paasche, Espegren and Sandvik, 2021).

1 When referred to as a concept, 'vulnerability' is used in quotation marks throughout this report, to underline the diversity of sometimes conflicting understandings that hide behind this seemingly self-explanatory notion.
2 Dir. 2013/32/EU, recital 39, art. 2(d), 15(2)(a) and 31(7)(b); Dir. 2013/33/EU, art. 21 and 22.

The VULNER project therefore aims to reach a deeper understanding of the experiences of vulnerability of refugees and other migrants seeking protection (hereafter referred to as 'protection seekers'[3]) and to identify strategies for how these can best be addressed. We aim to do so in a way that accounts for the lived dimensions of the legal and bureaucratic categories and labels that are mobilised by diverse actors to support varying and at times diverging claims on resources and a quest for social recognition in what may sometimes amount to a 'vulnerability competition'. We also seek to contribute to broader critical thinking about the promises, challenges and pitfalls of relying on 'vulnerability' as one of the policy concepts that guide state interventions regarding protection seekers.

The first VULNER country reports present the interim research results that have been achieved during the first year of the VULNER project (the project will run for two more years). These findings give a multifaceted understanding of the variety of state regulations and practices[4] through which the 'vulnerabilities' of protection seekers are assessed and addressed in each of the countries under study: Belgium, Germany, Italy, Norway, Uganda, Lebanon, and Canada. These results are based on legal analyses of the relevant domestic legal and bureaucratic frameworks (domestic legislation, administrative guidelines and case law), supplemented by semi-directed and in-depth interviews (216 in total) with decision-makers in charge of implementing legal and bureaucratic norms in individual cases (social and aid workers responsible for living conditions, public servants in charge of deciding on asylum applications and applications for other relevant protection statuses, and judges).[5]

This introductory report seeks first to contextualise the VULNER country reports and their detailed findings and conceptualisations. To this end, the first part situates the VULNER project's common focus on 'vulnerability' within ongoing policy developments at the UN level, and within legal developments in the case law of the European Court of Human Rights ('ECtHR') and in EU law. It unpacks the concept of 'vulnerability' by showing how that notion has come to permeate the policy and legal discourse on asylum and migration. It also highlights the tensions that have emerged, as 'vulnerability' evolved from the empirical and analytical sphere, where it serves as conceptual tool to diagnose complex, multifaceted and constantly evolving human experiences, to the legal and policy sphere, where it becomes a tool for deciding on how state resources should be allocated (such as social assistance or the granting of a residence permit).

The second part shows how the VULNER country reports contribute to that debate, and highlights their main common threads. It introduces the analytical and geographical scope of the VULNER project, including what we mean by 'protection seekers' and why we have opted to extend the analytical scope of our research beyond the asylum procedure. It also presents the common research questions that were addressed by the VULNER country reports, which give a comprehensive overview of existing legal and bureaucratic vulnerability assessment tools and processes that are implemented in more or less formalised ways in each of the countries under study. The last part presents the main findings of the VULNER country reports. These findings relate to the practical challenges met by decision-makers on the ground when assessing vulnerabilities, as a result of the socially embedded nature of vulnerabilities.

3 For further explanation on this choice of words and on the scope of the study, see below Part 2, Section 1.1.
4 And, when relevant in the domestic context, the internal regulations of aid agencies.
5 With the exception of the report from the Canadian VULNER team, as COVID-19 related restrictions prevented the Canadian team from conducting interviews in Canada.

PART 1: 'Vulnerability', a Travelling Concept

'Vulnerability' is a 'travelling concept', that is, a concept which travels across scientific disciplines in which it receives different meanings and functions (Bal, 2002), and across policy fields in which it faces diverse implementation challenges. The first part of the report focusses on clarifying the various manifestations, functions and meanings of 'vulnerability' in the policy and legal fields of asylum and migration, as well as on identifying the main issues that have accompanied the travel of 'vulnerability' from empirical and analytical studies into policy discourse and law.

The first section shows how 'vulnerability' has evolved from the UN policy discourse on aid and development into that on asylum and migration, contributing to its 'humanitarianisation'. The latter term is to be understood as the increasing reliance on humanitarian concepts at UN level in attempts to steer state action towards migrants and refugees, and not as the increasing human rights protection of migrants and refugees in actual asylum and migration policies worldwide. Based on an overview of legal developments in EU law and in the case law of the ECtHR, which have been increasingly permeated by references to 'vulnerability' since the 2010s, the second section identifies the main legal functions of 'vulnerability'. The third section underlines the tensions that have emerged as a result of these developments and that have the overall effect of turning 'vulnerability' into a tool of selection and resource allocation.

1. 'Vulnerability' and the Humanitarianisation of the UN Policy Discourse on Asylum and Migration

There is a long-standing tendency to design, implement and evaluate UN aid and development policies with reference to their benefits for 'vulnerable' groups and individuals.[6] 'Vulnerability' is commonly mobilised to analyse and assess concrete aid needs on the ground and to decide on how aid resources should be allocated as part of humanitarian interventions programmes sponsored by the international community.

In this context, 'vulnerability' serves to identify and overcome obstacles to self-reliance, so that aid recipients can be empowered to lead their own independent lives and are not destined to remain dependent on international aid (IOM, 2019; OHCHR and GMG, 2017; see also, at EU level: COM (2016) 234 final). The concept also serves to support the development of aid programmes that acknowledge the agency of aid recipients and their ability to adapt and develop resilience and coping strategies when put in a position to do so, and that move beyond a focus on victimhood that conceives of aid recipients as passive actors.[7]

6 See, for example, the 2030 UN Agenda for Sustainable Development (UN General Assembly Resolution 70/1, 2015 at para. 23) and the UN Guiding Principles on Extreme Poverty and Human Rights (UN Human Rights Council Resolution 21/11).
7 Whether that objective is met in practice remains an open question, as the 'vulnerability' label has also been criticized for nurturing collective representations of weakness and passivity (Freedman, 2019).

In line with the decision of the UN Human Rights Council to link the UN policy agenda on migration with its development objectives (UN Human Rights Council Resolution 35/17), the 2016 New York Declaration for Refugees and Migrants and the 2018 UN Global Compacts for migration and on refugees make a straightforward connection between the UN agenda on aid and development on the one hand, and the one on asylum and migration on the other (Guild, Basaran and Allinson, 2019 at 45). This translates into extensive references to the 'vulnerabilities' of migrants and refugees, which are regarded as a cross-cutting issue that states must address.

More specifically, the Global Compact for Migration requests that states address the 'vulnerabilities' of migrants in the implementation of its objectives, including by enhancing legal pathways (Objective 5), preventing smuggling and human trafficking (Objectives 9, b and 10, e), coordinating the management of borders (Objective 11, a) and providing access to basic services (Objective 15, b). It also asks states to 'review relevant policies and practices to ensure they do not create or unintentionally increase vulnerabilities of migrants' (Objective 7). The Global Compact on Refugees similarly calls on states to address the specific needs of vulnerable refugees, paying particular attention to age, gender and disabilities (Paras. 59-60).

The Global Compacts therefore make a straightforward connection between the UN policy discourse on aid and development and that on asylum and migration. This connection is not entirely new. Prior to the adoption of the UN Global Compacts, the UN had already mobilised 'vulnerability' in the design and implementation of its responses to refugee movements. The UN agencies active in the field of refugee protection – the UNHCR and the UNRWA – have long been using 'vulnerability' as a tool to guide their aid programmes for the refugee populations under their respective mandates. But this targets mainly the protection needs in refugee camps, which are predominantly located in first countries of asylum in the global South. It does not concern the broader management of secondary refugee movements seeking to reach the global North.[8] In other words, 'vulnerability' has mainly been used to guide UN humanitarian interventions geared towards refugees stranded in camps in close proximity to conflict zones, and has thus remained more closely connected to aid and development policies than to migration policies, which pursue the broader objective of managing and controlling mobility.

By contrast, the UN Global Compacts make an even more systematic and ambitious connection between 'vulnerability' and migration policies, calling for states to act in ways that 'reduce vulnerabilities in migration' (Objective 7 of the Global Compact on Migration). In the Global Compacts, 'vulnerability' not only serves as a conceptual tool for developing and implementing humanitarian aid programmes for refugees and migrants; it also becomes one of the objectives to be considered by states when implementing and developing their own migration policies, in pursuit of the overall objective of controlling and managing migrant movements (Atak, Nakache, Guild and Crépeau, 2018; Crépeau 2018).

Such an extension of the humanitarian concept of 'vulnerability' to the UN policy discourse on asylum and migration is not without additional challenges, since the objective of addressing the 'vulnerabilities' of migrants and refugees is then in tension with the sovereign prerogative of states to control their borders. This tension in turn gives rise to numerous questions and uncertainties when it comes to identifying

8 With the exception of UNHCR resettlement programmes, which benefit the most vulnerable refugees who have specific protection needs that cannot be addressed in the first country of asylum if they cannot achieve self-reliance there, and who will thus be given legal access to partner countries with adequate reception capacities (see UNHCR Resettlement Handbook, 2011; Welfens and Pisarevskaya, 2020).

suitable strategies at the implementation stage: Which of the 'vulnerabilities' of asylum seekers and migrants require state action? What state action is being mandated? To what extent must it be accommodated in and reconciled with other relevant policy objectives, such as border control? To put it simply: how can one care for the vulnerable when developing and implementing a policy that has an inherent control dimension?

In Europe, where EU policy documents reflect the trends at UN level and increasingly emphasise the protection needs of 'vulnerable' migrants, refugees and asylum seekers, these uncertainties have resulted in much skepticism among stakeholders.9 'Vulnerability' is often perceived as a 'buzzword' allowing policy-makers to justify and communicate on certain policy choices, rather than as a coherent policy approach that guides these choices from the outset (Hruschka and Leboeuf, 2019). It is one of those fuzzy notions that generate broad acceptance precisely because their vagueness allows them to be mobilised in varying ways depending on the political agenda.

Yet, the increasing success and use of 'vulnerability' in UN and EU policy discourse reflects legal developments, where 'vulnerability' increasingly shapes states' obligations towards migrants and refugees.10 In Europe, in particular, the ECtHR has been at the forefront of invoking 'vulnerability' in legal reasoning, even before the concept started to engulf the policy discourse on asylum and migration. Under EU law, 'vulnerability' has likewise long been part of the common European asylum system, as well as a central guiding principle in the Human Trafficking Directive. The ensuing juridification of 'vulnerability' and its consequences are further explored in the next section, with a focus on EU law and on ECtHR case law.

2. The Juridification of 'Vulnerability'

'Juridification' is understood here in the sense it received in Habermas' ethics of communication. It refers to the process through which human interactions are regulated through law and the legal system (Habermas, 1984; Loick, 2019), with the overall result that policy notions and empirical realities become encapsulated in legal concepts and categories that can be operationalised in more or less similar ways by the various state actors involved.

The juridification of 'vulnerability' is ongoing in Europe, and may never reach completion. Today, 'vulnerability' cannot be considered as a fully fledged, legally binding concept that can shape the content of legal obligations in definite ways. It has nonetheless become one of these flexible legal concepts that shape legal reasoning in various direct and indirect ways, which are explored below on the basis of an analysis of legal commentaries, the ECtHR case law and the relevant provisions of EU law. This section shows that 'vulnerability' has acquired two main legal functions: it serves as a more or less explicit tool of judicial interpretation that judges consider when deciding on the specific case at hand (2.1.), and it provides a more or less explicit ground for additional obligations to certain groups of migrants and refugees as identified in the relevant legislative instruments (2.2.).

9 In the EU New Pact on Asylum and Migration COM(2020) 609 final, for example, explicit references to 'vulnerability' serve to justify the planned adoption of specific protection measures towards vulnerable migrants and refugees, with a strong emphasis on children (pt. 2.4.), as well as the strengthening of EU's external borders through the deepening of integrated border management processes and greater reliance on Frontex's border vulnerability assessment tools (pt. 2.3.).
10 There is no strict causal relationship between policy and legal developments; while some legal developments are the result of ongoing policy trends, these trends are often nurtured (and sometimes even triggered) by legal developments.

2.1. 'Vulnerability' as a Tool of Judicial Interpretation

To human rights lawyers, calling for state obligations to individuals and groups in vulnerable positions might seem like reinventing the wheel. Their protection can be viewed as belonging to the core of human rights law, the fundamental purpose of which is to empower those in a position of weakness by giving them the legal means to exercise their basic rights.

Yet, as is widely noted in the legal literature, 'vulnerability' increasingly plays an explicit role in the interpretation of human rights law provisions by the ECtHR (Association Henri Capitant, 2020; Baumgärtel, 2020; Ippolito, 2020; Heri, 2020; Flegard and Iedema, 2019; Neven, 2018; Carlier, 2017; Arnardóttir, 2017; Nifosi Sutton, 2017; Al Tamini, 2016; Blondel, 2015; Ippolito and Iglesia-Sanchez, 2015; Ruet, 2015; Zimmermann, 2015; Besson, 2014; Peroni and Timmer, 2013; Sijniensky, 2013; Truscan, 2013; Chardin, 2011). 'Vulnerability' has become one of the conceptual tools that guide legal reasoning when implementing human rights provisions in specific cases.

In ECtHR case law, 'vulnerability' serves mainly as a contextualising tool that gives due consideration to the structural disadvantages suffered by some individuals and groups. While there is still much uncertainty regarding the concrete legal consequences of a position of 'vulnerability', arguments have been put forward in favour of 'positive obligations'[11] of states to adopt additional and specific protective measures. As noted by Ippolito:

> [Vulnerability] implies a recognition […] of privileges and the distribution of resources, not only with the aim of correcting imbalances which affect vulnerable persons (groups and individuals) disproportionately, *but serves also for tailoring upon social constructions positive obligations* – both procedural and substantial. (Ippolito, 2020, p. 48, our emphasis)

Arguments in favour of 'positive obligations' to 'vulnerable' persons and groups first appeared in relation to non-discrimination cases, where 'vulnerability' has been used to support legal arguments in favour of affirmative action (Peroni and Timmer, 2013). These arguments have been recognised by the ECtHR in cases involving Roma people, for example, and regarding access to education and housing.[12] But 'vulnerability' has also been mobilised in a completely different legal context, when evaluating whether the treatment some asylum applicants were subjected to meets the severity threshold to qualify as a violation of human rights law provisions (e.g., due to its arbitrary and/or inhumane and degrading nature), such as in the case law related to the deprivation of liberty (Turkovic, 2021).[13]

11 The dividing line is not always clear between a positive obligation to act in a way that guarantees effective enjoyment of a right, and a negative obligation to refrain from interference in the enjoyment of a right. This distinction is often used in law, however, in an attempt to better qualify the extent of state obligations and judicial control, which are usually lower when positive obligations and a duty to adopt certain policy measures are at stake (Mowbray, 2004; Akandji-Kombé, 2007; Klatt, 2011).

12 See, for example, App. 57325/00 D.H. and Others v. The Czech Republic ECHR GC 13 November 2007; App. 27238/95 Chapman v. the UK ECHR GC 18 January 2001. In non-discrimination cases, 'vulnerability' has also been used to support the finding of discrimination beyond the specific situation of historically disadvantaged ethnic groups, in order to include other disadvantaged positions (see, e.g., a case involving a female migrant sex worker: App. 47159/08 B.S. v. Spain ECHR 24 July 2012). For a deeper analysis of this line of cases, see Peroni and Timmer, 2013.

13 See, for example, App. 13178/03 Mubilanzila v. Belgium ECHR 12 October 2006 and App. 8687/08 Rahimi v. Greece ECHR 5 April 2011 – detention of a minor child; App. 36760/06 Stanev v. Bulgaria ECHR GC 17 January 2012 – detention of a mentally disabled individual; App. 36037/17 R.R. and Others v. Hungary ECHR 2 March 2021 – detention of migrants and asylum seekers.

In those cases, it has become common for the ECtHR to explicitly or implicitly assess the 'vulnerability' of the applicant and to give due consideration to the specific protection needs of those whose personal and intrinsic characteristics (such as their age, gender, health, etc.) put them in a position of particular weakness. Additional obligations and judicial scrutiny are then not only justified by the disadvantaged position of a group or individual within a given society, but also because their personal characteristics make them more dependent on the state and more likely to be subjected to a higher degree of state control and coercion.

It is this second use of 'vulnerability' that most often manifests itself in asylum and migration cases, where it has long been used as an implicit part of the individual assessment required when trying to determine whether the principle of *non-refoulement* is being complied with in deportation cases (Battjes, 2009; Smet, 2013). But reliance on 'vulnerability' as an interpretative concept has become particularly noteworthy (and controversial) following the landmark ruling *M.S.S. v. Belgium and Greece*.[14] In that ruling, the ECtHR held that, given his vulnerable position as an asylum seeker, the applicant, an Afghan national who was left to live on the streets in Greece without any kind of state support or assistance suffered inhuman and degrading treatment, in violation of article 3 ECHR. 'Vulnerability' was then used as an explicit criterion that justified lowering the threshold of article 3 ECHR, which generally does not protect against material deprivation in such a way that it requires states to set in place adequate reception conditions for asylum seekers.

Such use of 'vulnerability' has led to controversies, as it also calls into question the distinction, under international human rights law, between civil and political rights as guaranteed by the ECHR, and socio-political rights, including the right to social assistance, that are protected under other human rights instruments such as the European Social Charter (Bossuyt, 2012). It was, nevertheless, confirmed in later cases, where the ECtHR also relied on an assessment of the 'vulnerabilities' of asylum seekers to evaluate whether adequate reception conditions were in place.[15]

This line of ECtHR rulings concerns the transfer of asylum seekers, in accordance with the Dublin Regulation, between EU member states and/or states associated with the Schengen area, often back to the state of first entry on European territory. It prompted, in turn, additional jurisprudential developments at the EU and national levels, in the case law of the CJEU and of the national courts of EU member states.[16] It also sustained calls, in the legal literature, to further develop the case law in a way that gives due consideration to 'migratory vulnerability', understood as a position of weakness resulting from a 'cluster of objective, socially induced, and temporary characteristics' related to the migrant condition (Baumgärtel, 2020 at 22).

14 App. 30696/09 M.S.S. v. Belgium and Greece ECHR GC 21 January 2011.

15 See, for example, App. 29217/12 Tarakhel v. Switzerland ECHR GC 4 November 2014; App. 47287/15 Ilias et Ahmed v. Hungary ECHR GC 21 November 2019; App. 28820/13, 75547/13 and 13114/15 N.H. and others v. France ECHR 2 July 2020; App. 36037/17 R.R. and others v. Hungary ECHR 2 March 2021. In these cases, the ECtHR also emphasises that 'vulnerability' is but one of the factors being taken into consideration, and that state responsibility to provide for basic needs mainly results from the circumstance that the applicants are 'wholly dependent on State support [and] found […] [themselves] faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity' (R.R. v. Hungary at para. 50).

16 At present, 'vulnerability' is often mobilised by domestic judges in their everyday review of the implementation of the Dublin Regulation. At the EU level, see the Commission Recommendation (EU) 2016/2256 of 8 December 2016 and the CJEU Case C-578/16 PPU C.K., 16 February 2017, EU:C:2017:127, both of which require EU member states to implement the Dublin Regulation in a way that considers specific vulnerabilities that may militate against the transfer of certain asylum seekers; at the national level see, for example, the case law of Belgian courts: Council for Aliens Law Litigation, Belgium, General Assembly, Ruling no. 205.104, 8 June 2018) or of other safe-third-country agreements such as the EU–Turkey Statement (Council of State, Greece, Rulings nos. 2347/2017 and 2348/2017, 22 September 2017).

From that perspective, 'vulnerability' remains an open-ended and flexible notion that allows judges to tailor the legal reasoning to the specific circumstances of the case at hand. The concept refines the requirement that individual assessments identify whether the ill treatment received is serious enough to qualify as inhuman and degrading treatment as established under article 3 ECHR. This allows judges to be more sensitive to the additional challenges faced by some individuals as a result of their (relatively more) disadvantaged positions.

It is not uncommon for judges to rely on such fuzzy yet flexible notions that evolve over time and depend on broader developments in society as a whole. When it comes to 'vulnerability', however, an additional step has been made under EU law by enshrining it in the relevant legislative instruments, as is further explored in the next sub-section.

2.2. 'Vulnerability' as an Obligation to Address Special Needs

'Vulnerability' has come to permeate EU directives and regulations on asylum and migration in multiple ways, as a consequence of different phases and legislative and jurisprudential developments that are not always related to each other. Some of these legal developments result from the aforementioned case law of the ECtHR, whereas others result from cross-fertilisation with other instruments of international law, such as the UN Palermo Protocol on Human Trafficking,[17] or with policy documents and practices from UN organisations, such as the UNHCR Guidelines on Resettlement. The overall outcome is increasing reliance on 'vulnerability' in various dimensions of EU legislative instruments in the field of asylum and migration.

Most of the legislative instruments of the Common European Asylum System now require EU member states to take into account the special needs of vulnerable asylum seekers.[18] The requirement to take into consideration the specific situation of 'vulnerable' asylum seekers can be traced back to the first version of the EU Directives on asylum procedures and reception conditions.[19] It went relatively unnoticed at the time, given the lack of clear legal criteria regarding the concrete actions required of EU member states to address these vulnerabilities.

But in 2013, following the recast of these Directives, the requirement to implement them in a way that is appropriate to the (relatively more) vulnerable profile of some asylum seekers was further refined. A more specific obligation to assess and address the 'special reception needs' and the 'special procedural needs' of vulnerable asylum seekers was introduced, prompting debate among EU member states' administrations (Fedasil, 2016) and within legal commentaries on how to identify these 'special needs' and address them. One of the main stumbling blocks has been the open-ended definitions of 'vulnerability' provided in these directives, which list some personal characteristics to be taken into consideration (e.g., age, gender and health), but do not offer an exhaustive or definitive set of criteria (Costello and Hancox, 2016; Jakuleviciene, 2016; Pétin, 2016; Brandl and Czech, 2015; De Bauche, 2012).[20]

17 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), UN GA Res. 55/25 of 15 November 2000.
18 Dir. 2013/32/EU, recital 39 and art. 2(d), 15(2)(a), 31(7)(b); Dir. 2013/33/EU, art. 21 and 22; Dir. 2011/95/EU, art. 20(3).
19 Dir. 2003/9/EC, art. 17(1); Dir. 2005/85/EC, art. 13(a).
20 Dir. 2013/32/EU, recital 39, art. 2(d), 15(2)(a), 31(7)(b); Dir. 2013/33/EU, art. 21 and 22.

Second, 'vulnerability' has also been used in EU instruments regulating the rights of migrants other than refugees who may nonetheless have specific needs as a result of their 'vulnerable' position. For example, the EU Return Directive requires EU member states to take these specific needs into consideration when implementing return procedures.[21] The EU Directive on Human Trafficking requires a vulnerability assessment to identify the victims of human trafficking and to determine if they were abused and taken advantage of.[22]

What all of these directives have in common is that they follow a *category-based approach* to 'vulnerability', as they focus on personal characteristics (such as being a minor, a pregnant woman, a victim of torture and violence, etc.) that may give rise to specific needs that must be addressed.[23] These categories are listed by way of example, and not in an exhaustive way. The list of examples can vary slightly, depending on the instrument in question. The Reception Conditions Directive offers the most elaborate exemplative list, which includes:

minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation (Dir. 2013/33/EU, art. 21).

The legislative approach at the EU level is thus similar to the one used in the 1951 Geneva Refugee Convention to define the grounds for persecution to be taken into consideration when determining refugee status. These include race, religion, nationality, political opinions and belonging to a 'particular social group'. The 'particular social group' criterion is not exhaustively defined in the Convention; in fact, it was intentionally left open enough to be able to take the social context into account, and so that protection can be guaranteed in the face of persecution motivated by grounds that were not foreseen when the Convention was drafted (Hathaway, 2021).

The focus in the EU Directives on asylum is on identifying some 'special needs' that must be addressed and taken into consideration when implementing the legal framework, for example through procedural accommodations in the examination of the asylum application, or through the provision of additional services at the reception centres (such as access to health care, education, etc.).[24] The approach is more practically oriented than the one developed under ECtHR case law, where 'vulnerability' is mobilised to guide legal reasoning in a way that considers socially disadvantaged positions.

21 Dir. 2008/115/EC, art. 3(9).
22 Dir. 2011/36/EU, recital 12 and art. 2(2).
23 The EU Directive on Human Trafficking takes a slightly different approach to 'vulnerability', which it defines with a focus on the position of the person concerned: 'A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved' (Dir. 2011/36/EU, art. 2, 2). But the Directive's recitals hint at particular categories of vulnerability, such as age or gender (Dir. 2011/36/EU, recital 12: 'particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability').
24 The proposed recast of the EU Reception Conditions Directive confirms this trend. It refers to 'applicants with special reception needs' instead of 'vulnerable persons'. Applicants with special reception needs are defined in the exact same way as 'vulnerable persons'. See COM(2016) 465 final, art. 2(13) and Slingenberg, 2021.

To put it simply, there are two different legal approaches to 'vulnerability', that depend on the legal context in which this concept is being mobilised. One originates from the case law. It reflects the leeway that judges have when applying the law to individual cases, in a way that considers socially disadvantaged positions. The other approach originates from legislative provisions. It reflects the will of the legislators to establish (relatively) clear legal definitions and categories, which can be operationalised in (relatively) certain ways by state actors on the ground.

Both legal approaches have their respective (dis)advantages. On the one hand, a flexible approach may be implemented in very different ways depending on the decision-maker in charge, ultimately endangering legal certainty and turning obligations that derive from human rights law into mere moral commitments. As noted by Carlier, excessive reliance on an unclear understanding of 'vulnerability' might 'replace human rights with a vague charity, and weaken [their effects]' (Carlier, 2017). On the other hand, a focus on some predefined categories may fail to account for the socially embedded nature of experiences of vulnerability and to allow decision-makers the leeway needed to address people's actual needs. The diversity in legal functions and approaches to 'vulnerability' thus reflects the broader conceptual difficulties that arise when turning an analytical concept into one with concrete legal and bureaucratic effects. These difficulties are further highlighted in the next section.

3. 'Vulnerability' from an Analytical Concept to a Tool for Resource Allocation

'Vulnerability' has long and often been used as an analytical framework in empirical research on migration to highlight the specific challenges encountered by migrants, refugees and asylum seekers within host societies (Aysa Lastra and Cachon, 2015; Cunnif Gilson, 2015; Ciobanu, Fokkema and Nedelcu, 2017; Busetta, Mendola, Wilson and Cetorelli, 2021) or during the migration process (Kuschminder and Triandafyllidou, 2019; Paasche, Skilbrei and Plambech, 2018; IOM, 2017; ICRC, 2016). In these studies, 'vulnerability' is conceptualised as a fluid notion that allows researchers to depict the complexities of human experiences and to deepen and elaborate the overall finding that 'vulnerabilities' are unevenly allocated through a 'natural and social lottery' (Cortina and Conill, 2016) that comprises, inter alia, corporeal conditions and social inequalities.

This body of literature allows us to understand how the experiences of 'vulnerability' encountered by migrants and refugees are continuously shaped in social interactions and are ever-evolving, multi-dimensional and context-specific. There is a multi-layered continuum of 'vulnerabilities', as everyone is affected by 'vulnerabilities' of some kind in different ways, depending on their resources and intersecting social identities. 'Vulnerabilities' cannot be isolated from the situation within which they arise, nor from the specificities of the situations of the persons concerned, including their resources and abilities to develop resilience and coping strategies.

But as encapsulated in law and in bureaucratic categories, 'vulnerability' changes in function and in nature. It becomes limited to some 'vulnerabilities' in particular, which are prized over others: if everyone can claim the 'vulnerability' label, then it has no particular legal and bureaucratic effects and it cannot play a role in identifying those who will benefit from favoured treatment. Like any other tool of selection, 'vulnerability' then acquires implied exclusionary effects, as some people will not be entitled to claim the 'vulnerability' label and the corresponding advantages.

This selective aspect of 'vulnerability' generates multiple tensions at operational level, as migrants, asylum seekers and refugees are required to assert their vulnerabilities in ways that conform to the bureaucratic discourse and categories. This generates, in turn, a 'vulnerability competition', in which the most vulnerable may lack the resources to take part successfully. Such phenomenon has already been documented empirically in the context of the implementation of resettlement programmes, which aim at selecting the most vulnerable refugees living in camps in the global South in order to send them to the global North (Jansen, 2008; Nakueira, 2019 and 2020), and in overcrowded camps on the Greek islands (Howden and Kodalak, 2018).

Current legal and policy documents at EU and UN levels show that these tensions are currently being channelled through an overall focus on some vulnerable groups, who are defined depending on their age, health condition and gender – a trend which, as shown by all VULNER country reports, also exists at domestic level in all the countries under study. The focus on these groups is consistent with the conceptual foundations of 'vulnerability', which has mainly been theorised and developed in the 'ethics of care' (Held, 2005; Tronto, 2009; Tong and Williams, 2018), which is traditionally associated with 'feminist ethics' (Norlock, 2019).[25] This relationship between 'vulnerability' and feminist theories of justice and equality helps establish a strong connection between 'vulnerability' and a particular vision of a 'just society' that takes gendered roles, experiences and perspectives into consideration, and that supports the weakest members of the society who need caring. This translates into a strong focus on the specific protection needs of children, the elderly, people with serious health conditions and victims of gender and sexual violence.

But the focus on these groups is not unchallenged. It has generated criticism for overlooking the vulnerabilities faced by men, who, in some contexts, may be particularly 'vulnerable' (Sözer, 2019; Kofman, 2018). In their VULNER report on Lebanon, El Daif, Shuayb and Maalouf similarly argue that existing 'vulnerability' categories as developed and implemented by international aid organisations do not fully account for the specificities of the Lebanese context, where refugee men are at higher risk of being ill-treated because security forces consider them a security threat.

These criticisms should obviously not be misread as opposing vulnerable groups to each other, nor as questioning the vulnerabilities faced by women and children. Rather, they serve as a useful reminder that bureaucratic categories of 'vulnerabilities' have been constructed mainly in the Western context and that, as argued by Turner, they are thus not centred solely on migrants' own understandings and knowledge of their needs (Turner, 2019). They show that 'vulnerability' remains an ambiguous concept, which is being seized by various actors and groups to support at times opposing claims.

In the face of these ambiguities, we posit a need to maintain the connection between 'vulnerability' as a tool of selection and the experiences of 'vulnerabilities' on the ground. The next section explains how the VULNER project aims to generate scientific knowledge that will allow us to do so, and why we started with an inductive approach that sought to identify the various understandings of 'vulnerability' that have been developed in the domestic legal frameworks of the countries under study. It also presents the main interim findings that have been reached through that approach.

25 This label is contested by some of the main figures in this school of thought, such as Virginia Held (Held, 2006).

PART 2: The First Stage of the VULNER Project: An Inductive Approach to 'Vulnerability' as an Emerging Legal and Bureaucratic Concept

In the face of the uncertainties relating to the legal nature, exact meanings and bureaucratic implications of 'vulnerability', the first step of the VULNER project involved mapping and analysing the diversity of domestic approaches to identifying, assessing and addressing the 'vulnerabilities' of protection seekers. The objective was to take stock of and analyse existing regulations and practices at the domestic level, as well as to identify common issues that have arisen and solutions that have been adopted to address the overall conceptual tensions mentioned above.

In so doing, the first VULNER country reports aim to contribute to ongoing debates on 'vulnerability', while moving beyond the study of global and EU legal and policy developments, by analysing how they influence domestic laws and practices on the ground. This is especially necessary as 'vulnerability' has not been exhaustively defined at the global and EU levels and thus leaves ample room for interpretation at the national level. As a result, we can anticipate a high degree of 'vernacularisation', that is, transformation of the emerging global and EU norms as they undergo local legal and social dynamics in the course of their implementation in national law and in the practices of local actors (Levitt and Merry, 2009).[26]

The first section delineates the analytical and geographical scope of the VULNER project. It explains why we opted for an analytical focus on procedures to address the protection needs of migrants, and sets out the rationale behind the selection of the countries under study. The second section presents the overall common methodological approach that was used in the VULNER country reports. The third section introduces the main intermediate findings that cut across all reports and that allow us to better grasp the main legal and bureaucratic functions of 'vulnerability' on the ground and the common challenges of implementation.

1. The Analytical and Geographical Scope of the VULNER Project

After clarifying what we mean by 'protection seekers' and why we have opted to extend the overall scope of our research beyond the asylum procedure (1), we briefly describe the pragmatic considerations and the search for a diversity of bureaucratic traditions and approaches in addressing 'vulnerabilities' that prompted the selection of the countries under study (2).

1.1. An Analytical Focus on 'Protection'

The overall analytical scope of the VULNER project comprises asylum seekers and other migrants seeking protection, i.e., those who are 'outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them' (UNHCR, 2017). In line with the EMN Glossary, we understand 'protection' as 'a concept that encompasses all activities aimed at obtain-

26 A legal study conducted among EU member states by ECRE, an NGO advocating for the rights of refugees, shows that the requirement to address the specific needs of vulnerable asylum seekers, which is established in the EU Directives on reception conditions and on the asylum procedure, has been implemented in very different ways (ECRE, 2017).

ing full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law' (EMN Glossary, 2020). For the sake of clarity, we use the term 'protection seekers' to encompass within a single notion both asylum seekers and other migrants seeking protection.

The notion of 'protection seeker' was developed by Noll (1997). It has the advantage of not limiting the research scope to the existing legal categories of 'refugees' and 'asylum seekers', which may not cover each and every situation where a need for 'protection' arises, such as when migrants fall prey to human traffickers or are unaccompanied minors but do not qualify for asylum. This way, we avoid falling into the trap of 'categorical fetishism' (Crawley and Skleparis, 2017), which would blind us to protection needs and experiences of vulnerability that do not constitute grounds for granting refugee status but have nonetheless been addressed by states through regulations and practices other than those resulting from the 1951 Refugee Convention.

Moreover, an exclusive focus on asylum seekers and refugees would not reflect current policy developments that posit 'vulnerability' as one of the policy concepts that should guide state responses to migrant movements that are not categorised as refugee movements. This tendency is well illustrated by Objective 7 of the UN Global Compact on Migration, which mandates addressing and reducing 'vulnerabilities' in migration more broadly, and by the UN Palermo Protocol on Human Trafficking, which seeks to prevent abuses of migrants in a position of 'vulnerability', irrespective of whether or not they qualify for asylum.[27]

The overall analytical focus on 'protection seekers' thus leaves room for the VULNER country reports to consider domestic specificities and the varying extents to which 'vulnerability' is being mobilised as a guiding legal and policy concept to address migrant movements - while keeping an overall focus on forced migration.[28]

1.2. A Geographical Focus on 7 Receiving Countries Located in the Global North and in the Global South

The countries under study[29] are located at different points of the main South–North migration routes, allowing our project to encompass a wide range of strategies and approaches to 'vulnerabilities' in asylum and migration. They have developed different strategies to identify 'vulnerable' protection seekers, which depend on broader legal factors such as their institutional structure (federal states vs. unitary states) and whether they are bound by additional obligations under EU law, as well as on whether they are dependent on international aid to provide assistance to refugees.

27 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ('Palermo Protocol'), UN GA Res 55/25 of 15 November 2000, art. 3(a).
28 Forced migration is understood here in line with the definition in the IOM glossary as 'a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes' (IOM, 2019), and with the understanding that the reasons to migrate often rest on numerous complex and intertwined factors.
29 Belgium, Germany, Italy, Norway, Uganda, Lebanon and Canada.

Lebanon and Uganda are located next to conflict zones, and have long been faced with protracted refugee situations.[30] They follow different legal strategies in addressing these movements: Lebanon is not a party to the 1951 Refugee Convention and does not grant any kind of legal status to protection seekers (Janmyr, 2016; Lebanese report, p. 25). Uganda, by contrast, has a fully fledged refugee status determination procedure and system that is often considered a model by the international community (Lomo, 2000; Uganda report, p. 14). In these countries, 'vulnerability' assessments mainly pursue the objective of tailoring the humanitarian aid programmes that are funded by the international community.

Canada and the European countries (Belgium, Germany, Norway and, to a lesser extent, Italy) are further along the migration route, and experience secondary refugee movements of varying sizes, depending on their geographical location and attractiveness to migrants. Because of Canada's geographical position, its borders are less susceptible to spontaneous and irregular crossings than the borders of most European countries. It has nonetheless developed an affirmative and proactive humanitarian policy towards protection seekers through active involvement in UNHCR-run resettlement programmes that rest on 'vulnerability' assessments to identify and select those who will be eligible for resettlement (Hyndman, Reynolds, Yousuf, Purkey, Demoz and Sherell, 2021).[31]

Among European countries, Italy is at the forefront of major secondary refugee movements to Europe, through the 'Central Mediterranean Route', which is also among the deadliest routes (McMahon and Sigona, 2018). Suffering and trauma experienced on the way, such as at the hands of human traffickers in Libya, are thus even more likely to figure in shaping the 'vulnerabilities' faced by protection seekers in Italy (Kuschminder and Triandafyllidou, 2019). Belgium, Germany and Norway are further along the migration route in Europe. All are nonetheless experiencing a great deal of internal turmoil over migration, which was exacerbated by the 2015 'refugee crisis' (Holmes and Castaneda, 2016) and this is likely to affect their policy responses to protection seekers and shape domestic application of 'vulnerability' assessments. This dynamic is illustrated by ongoing controversies over the *Wir schaffen das* policy in Germany and the fall of the Belgian coalition government over a disagreement on Belgium's adherence to the UN Global Compact on Migration (Desmet, Moonen and Ruys, 2020).

Norway is also an interesting case study from a legal perspective. It is not an EU Member State and thus not bound by EU law, but it is an associate member of the Schengen area. As such, it is indirectly influenced by EU legal developments through legal transplants, including increasing reliance on 'vulnerability' assessments to tailor the asylum procedure and the reception conditions of asylum seekers to the special needs that may result from a situation of vulnerability – as mandated by EU law.

The multiple factors differentiating the countries under study allow for a variety of perspectives on how to identify, assess and address the 'vulnerabilities' of protection seekers. Other practical factors, including pre-existing scientific networks, interpersonal relationships and the degree of expertise available in the countries under study, also played a role in defining the geographical scope of the research. The country

30 South Africa is also included in the scope of the study, but it will only be investigated at a later stage because of practical considerations related to the organisation of the fieldwork. South Africa has been selected because it experiences mainly secondary refugee movements in a context of South–South migration.

31 Refugees who have been deemed eligible by the UNHCR for their resettlement pool will only be considered for resettlement to Canada if they are referred to the Canadian authorities by a sponsor who will guarantee 'successful establishment' in Canada, including through financial support (Canadian report, p. 20).

selection was not made with the objective of identifying the consequences of any specific legal or institutional factors on domestic practices. Rather, it was made with a view to gaining a diversity of perspectives on how to identify and protect 'vulnerable' protection seekers, allowing us to detect both best practices and common issues – in line with the common research questions, which are further detailed below.

2. The Common Research Questions

All VULNER domestic reports were guided by the same research questions, which they tackled and refined in ways that were appropriate to the specificities of the domestic context: What do the relevant domestic laws, case law, policy documents, and administrative guidelines reveal about how 'vulnerabilities' are assessed and addressed in the countries under study? Do the relevant state and/or aid agencies have a legal duty to assess migrants' vulnerabilities, and if so, what procedures and legal and/or bureaucratic criteria should be used? How do decision-makers ('street-level bureaucrats') understand and perceive the existing requirement to address 'vulnerabilities'? How do they translate it into their everyday practices? What is their stance on existing legal requirements towards 'vulnerable' migrants? What loopholes do they identify?

All VULNER teams[32] followed a two-step approach, starting with a study of the manifestations of 'vulnerability' as a legal concept under domestic law. The analysis covered provisions related to the refugee status determination procedure as well as those related to the reception conditions of asylum seekers pending the examination of their application. The studies looked not just at statutory provisions but also included their respective authors' interpretations of the case law and the relevant administrative guidelines. When relevant in the domestic context and to better grasp local understandings of 'vulnerability', provisions related to specific procedures for obtaining a residence permit on humanitarian grounds have also been included in the scope of the analysis. In Lebanon and Uganda, the specificities of the local contexts have led to a focus on provisions regarding the assistance offered to refugees. In these countries, the question of who should obtain legal status is less relevant, either because there is no refugee status under domestic law (Lebanese report, p. 26) or because such a status is usually granted through widespread *prima facie* recognition (Uganda report, p. 15).

But the law does not cover every aspect of social reality, and its operationalisation involves adapting to realities on the ground through legal syllogism. Legal syllogism is not an automated, mechanical process. It entails some 'zones of uncertainty', within which decisions-makers have a margin of appreciation that they can use in strategic ways to achieve various objectives (Crozier and Friedberg, 1977, re-ed. 2014).

Street-level bureaucrats and judges always enjoy a certain leeway when implementing legal provisions in concrete cases, thereby generating additional practical norms that coexist with the legal frameworks and contribute to the actual production of 'vulnerability' as a legal and bureaucratic category (Bierschenk and Olivier de Sardan, 2019). Empirical studies on the practices of the street-level bureaucrats in charge of implementing public policies pertaining to migrants demonstrate that arriving at these practical norms inevitably involves working through multiple tensions and other factors, including the way public servants deal with their own emotions and moral dilemmas (Borrelli and Lindberg, 2018; Eule, Loher and Wyss, 2017).

32 With the exception of the Canadian team, which was prevented from conducting interviews because of COVID-19 restrictions.

This is especially true when implementing general legal requirements, such as the obligation to address the specific needs of 'vulnerable' protection seekers, the fuzzy nature of which leaves a relatively wide margin of appreciation to the actors in charge of its implementation on the ground. Moreover, the legitimising effect of such pronouncements can be mobilised to justify decisions made in specific cases.[33] For these reasons, the VULNER country reports combined the doctrinal study of the legal provisions with an empirical study of the implementation practices by the state authorities in charge (or, when relevant in the domestic context, NGOs and international organisations). These practices have been documented through in-depth and semi-structured interviews with public servants and judges involved in the daily operationalisation of the legal frameworks. The objective is to shed light on how they make concrete use of these provisions, paying particular attention to their own understandings of 'vulnerability', their perspectives, moral dilemmas, and any other concerns that play a role in their everyday work.

A total of 216 interviews were conducted by the VULNER consortium partners, following an interview guide based on the project's overall guidelines and research questions. These guidelines and questions, in turn, were further elaborated by each VULNER team with the domestic legal specificities in mind, and were turned into interview questions that would be relevant in each given context, paying particular attention to how detailed the domestic legal and administrative provisions towards vulnerable migrants are in a given country, and the extent to which these provisions shape concrete practices on the ground. Common ethical instruments were also established, thanks to the guidance and expertise of the VULNER ethical advisor, Anthony Good, who also made himself available to offer advice to researchers on how to deal with ethical dilemmas when conducting the interviews.

Based on these data, the national reports engage in a broader reflection on how the 'vulnerabilities' of migrants seeking protection are understood and conceptualised in the legal and administrative systems of the various countries under study: Is there a legal duty to address 'vulnerabilities'? How is it defined in matters of legal scope, substance and procedure? How is it addressed in internal administrative guidelines? What is the margin of appreciation left to social workers, public servants and judges in charge of implementing these provisions in concrete cases (or of overseeing their implementation)? How do they mobilize these provisions in their everyday work, and what factors external to the assessment of vulnerabilities may play a role (emotions, personal opinions, etc.)? The main findings of these reports are outlined below.

3. The Main Intermediate Findings

Each of the VULNER country reports reflects that team's own precise and detailed analyses of the relevant regulations and practices in the countries under study. It does so in a way that reflects the specificities of the domestic context and allows them to feed back into broader academic and policy debates, as well as to connect these broader debates to domestic ones in such a way that they also feed back into concerns at the domestic level. Taken together, the VULNER country reports also provide valuable information on common patterns in developing and implementing vulnerability assessments, and on the challenges that commonly arise on the ground when mobilising 'vulnerability' as a concept to guide state practices regarding protection seekers.

33 For an analysis of a similar strategy being deployed by case workers working for NGOs in London when defending their files before the authorities, see Mesaric and Vachelli, 2019.

These main common trends and challenges are highlighted below (3.2.), following a brief introduction of the main situations in which 'vulnerability' assessments, which are more or less formalised through national legislation and domestic-level administrative guidelines, are performed in the countries under study (3.1.).

3.1. The Legal and Bureaucratic Purposes of Vulnerability Assessments in the Countries under Study

The VULNER country reports reveal three different legal and bureaucratic purposes behind the 'vulnerability' assessments. The first purpose is to address special reception and procedural needs through procedural accommodations (such as the presence of a trusted person at the asylum hearing of an unaccompanied minors) and the provision of additional services (such as specialised health care or housing in a special unit). This first purpose of 'vulnerability' assessment is common in the Western countries under study. The second purpose is to guide the evaluation of the relevant circumstances of the case when deciding on applications for asylum or other residence permits based on protection grounds. This legal and bureaucratic approach to 'vulnerability' is much more contentious and elusive, and has seldom been formalised.

The third purpose is to decide on how international aid will be allocated to refugee populations. This approach has been observed and documented in Lebanon and in Uganda, where the most pressing issue is not identifying those who meet the legal requirements to obtain a protection status,[34] but offering assistance to refugee populations who are enduring dire living conditions.

3.1.1. 'Vulnerability' Assessments to Address Special Procedural and Reception Needs

In the EU, the Reception Conditions Directive and the Asylum Procedures Directive require EU member states to identify and address the special reception and procedural needs of asylum seekers. But they do not specify how this obligation must be met, and its implementation is left to the procedural autonomy of EU member states (EMN Luxembourg, 2021). The EU member states under study (Italy, Germany and Belgium) have adopted different strategies. Some, like Belgium, have formalised through domestic legislation the requirement to perform a 'vulnerability' assessment. Others, like Italy, leave it to public servants to perform such assessments on an informal, case-by-case basis.

In Belgium, the assessment of special needs is made following a two-step procedure. The Immigration Office (DVZ/OE) and the dispatching unit of the authorities in charge of organising the reception conditions (Fedasil) perform a preliminary vulnerability assessment from the very start of the procedure, when registering the asylum application. This assessment is made on the basis of a questionnaire, and may include a medical examination if needed (Belgian report, p. 25). As explained by Sarolea, Raimondo and Crine:

34 As mentioned above, Lebanon is not a party to the 1951 Refugee Convention, and Lebanese law does not provide for a legal status for refugees. In Uganda, most populations seeking asylum are recognized as refugees on a prima facie basis.

> *At the beginning of the asylum procedure, the Immigration Office, the medical service of the dispatching unit and its designation service immediately carry out an assessment of the vulnerability of the refugee status applicant. When designating a reception centre, the dispatching is based on the identification of vulnerability by the Immigration Office, in order to find a place adapted to the identified vulnerabilities. In the reception structures themselves, 'labels' have been set up, with specific spots reserved for 'specific target groups' (e.g. certain very complex medical cases, vulnerable women or UMs [Unaccompanied Minors]).* (Belgian report, p. 31)

More thorough assessments are then made by social workers in the reception centres and by public servants working for the asylum authority (CGVS/CGRA). Whether such additional assessments are carried out or not is determined pragmatically and on an ad hoc basis. The questionnaire that had been filled during a first and short interview by the Immigration Office serves as starting point for the further enquiries (Belgian report, p. 40).

In Italy, each of the actors involved is expected to perform their own assessment of the special needs in a pragmatic way when fulfilling their role within the asylum procedure. As noted by Marchetti and Palumbo:

> *Italy does not have a specific legal provision describing a formal assessment mechanism or procedure for the identification of and screening for vulnerable conditions […]. Identification of vulnerabilities can occur, of course, at any moment during the asylum procedure, from disembarkation or at any point of entry in the country, through interactions with local authorities, workers in the reception facilities, NGOs, international organizations, during interviews with lawyers, during medical screenings, or during the hearing with the TC [Territorial Commission, which is the administrative body responsible for deciding on asylum application]. Hence, many actors can be called upon to identify the existence of conditions or situations of vulnerabilities.* (Italian report, p. 41)

In Germany, the competence to decide on asylum applications and to organise the reception conditions for asylum seekers is divided between the federal authorities and the federated entities (the *Länder*). At the federal level, where asylum applications are examined on the ground, there is no formalised procedure to assess special procedural needs; they are, rather, met on a pragmatic, ad hoc basis (German report, p. 20). At the level of the *Länder*, which are entrusted with the task of organising the reception conditions for asylum seekers, the approaches vary greatly (German report, p. 37). Some *Länder*, like Berlin, have developed special, individual housing units for asylum seekers who are identified as 'vulnerable', whereas others, like Bavaria, favour collective housing as a rule (German report, p. 35). As noted by Kluth, Heuser and Junghans:

> *To date […], systematic instruction of the reception centres' staff, for example on the vulnerabilities of persons concerned by human trafficking, is not provided.* (German report, p. 20)

Norway and Canada are not EU member states and are not bound by EU law. They have nonetheless developed a similar approach when it comes to identifying and addressing the 'vulnerabilities' of asylum seekers, with a similar focus on special needs that have to be addressed as part of the asylum procedure if asylum seekers are to be guaranteed a fair chance to present their claim.

In Norway, so-called 'extra needs' are identified according to a formalised procedure that takes place upon arrival at the reception centre, following an approach that is similar to that developed in Belgium. As explained by Liden, Schultz, Paasche and Wessmann:

> *Norway is not bound by the EU Reception Directive (Directive 2013/33/EU) […] [but] [t]he expectation to identify a person's extra needs are included in guidelines on the arrival phase's administrative procedures and on health issues (Directorate of Health, 2011a). In Norway, the measures to identify protection seekers with extra needs are delegated to various institutions and sectors. The identification mechanism […] involves different actors accountable for different phases of the asylum procedures […]* (Norwegian report, p. 30).

The 'extra needs' are also examined in greater detail later on in the asylum procedure by the authority in charge of deciding on asylum applications, including during the asylum hearing (Norwegian report, p. 37).

In Canada, the issue of the reception conditions for asylum seekers is less pressing, as relatively few people cross the border irregularly compared to Europe. Most are being resettled from other countries, which requires them either to have a sponsor who will welcome them or to have sufficient financial resources to cover their own expenses (Canadian report, p. 23). The guidelines from the competent authorities thus mainly call for organising procedural accommodations for 'vulnerable' asylum seekers. They leave a wide margin of appreciation to the public servant conducting the asylum hearing to decide whether some accommodations are needed, and what these accommodations should be (Canadian report, p. 32). As noted by Kaga, Nakache, Anderson, Crépeau, Delisle, Fraser, Frenyo, Purkey, Soennecken and Tanotra:

> *[T]he legal and policy documents reviewed provide no clear answer to the question of how they (the public servants) are expected to deal with vulnerable migrants. […] Generally, in proceedings which include a hearing or an examination […], it is specified that officers may encounter vulnerable persons who might have to be treated differently. However, it is not clear who should be recognized as vulnerable and how an officer should assess such vulnerability.* (Canadian report, p. 32)

In all of the European countries under study and in Canada, the 'vulnerability' assessments performed to identify special reception and procedural needs have an overall tendency to focus on some personal characteristics, with particular attention to the special needs of children, women, LGBTQI+ asylum applicants and those with health and disability issues. The focus on these groups is not exclusive, and there is nothing that precludes the identification of other individual and context-specific special needs. But the VULNER country reports demonstrate that the relevant domestic legislation and guidelines show a predominant consideration for the special needs of those belonging to the aforementioned groups.

3.1.2. Vulnerability Assessments to Decide on Claims to Obtain Protection

Consideration of special needs during the asylum procedure also has an effect on how the merits of the application will be examined by the public servant in charge: once applicants have been identified as 'vulnerable' and in need of procedural accommodations, this will necessarily have practical consequences on how the legal criteria to obtain a residence permit will be implemented. In practice, the 'vulnerability' assessment that will allow the public servant to identify whether applicants are in need of procedural accommodations will also inform the enquiry on whether the conditions to obtain asylum or another

relevant domestic protection status are met, including whether there is a risk of serious human rights violations in the country of origin. In most of the European countries under study and in Canada, this process, in turn, supported the more or less explicit development of 'vulnerability' as a fluid criterion that supports the decision-making process on asylum applications.

In the EU, this approach is grounded in the Qualification Directive, which stipulates that public servants 'take into account' the vulnerabilities of the applicants when deciding on their asylum application.[35] Regular references to the 'vulnerability' of some applicants appear in the case law and decisions concerning asylum applications, which are commonly justified by reference to the specific 'vulnerabilities' of the applicant (Belgian report, p. 44; Italian report, p. 59; see also, outside the EU, the Norwegian report, p. 85). These 'vulnerabilities' are then assessed in a flexible way, with a focus on the position of the applicants in their countries of origin – as determined by factors such as age, gender, level of education and whether they have the benefit of a family support network in the home country. There is no systematicity in the analysis, however, which is not explicitly mandated in the legislation of any of the countries under study, but is instead informed by bureaucratic practices and jurisprudential constructions.

This raises the question of whether the tendency to rely on informal, context-specific and non-systematised vulnerability assessments has any actual effect on the decision-making process or if it is nothing more than a re-labelling of pre-existing practices and interpretations of the legal criteria for obtaining protection status. Refugee law in particular was always meant to be implemented by taking all individual circumstances into account when evaluating the risk of persecution in the home country, including 'the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences' (UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979, re-ed. 1992, at para. 41). The assessment of the vulnerabilities of asylum applicants is thus implicit in the decision-making process on asylum claims, and references to the specific vulnerabilities of some applicants that have been uncovered in these studies may thus be more the result of a different way of justifying decisions on asylum applications than of a different way of evaluating the situation.

The VULNER country reports indicate that the answer lies somewhere in between. On the one hand, 'vulnerability' is generally not recognised as a legal concept. That is, it is not identified and defined as such in the domestic legislation and case law, and asylum seekers who are considered 'vulnerable' are not entitled to a residence permit on those grounds alone. There is a great deal of fluidity in how 'vulnerabilities' are assessed, which makes it difficult to distinguish such an assessment from the mere implementation of the conditions to obtain refugee status in a way that takes all the relevant individual circumstances into consideration. Domestic courts also seem reluctant to engage with the concept in a way that would imply its legal recognition. They fear overstepping their competence of judicial review through a jurisprudential recognition of 'vulnerability', which, in their view, would amount to modifying the content of legislative norms. As noted by Sarolea, Raimondo and Crine with respect to Belgium:

35 Dir. 2011/95/EU, art. 20(3): 'Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.'

> *Faced with the politically sensitive issues raised by vulnerability, the Council of State has been cautious. The Council's hesitations in using vulnerability can be seen in many judgments. The Council of State usually confines itself to referring to the legal provisions of the case in hand without applying the notion of vulnerability that is sometimes inherent in them.* (Belgian report, p. 58)

Moreover, the use of 'vulnerability' is relatively loose when it comes to assessing asylum applications on their merits. It is mobilised in very different ways by the decision-makers, who then often make use of the elasticity of the concept to move beyond a focus on special needs to perform a more comprehensive assessment. As noted by Marchetti and Palumbo with respect to Italy:

> *[A]s some decisions of the Court of Cassation and some civil tribunals in the context of humanitarian protection have made clear, the elements of comparison for the assessment of subjective vulnerability can be various, including social integration, labour exploitation and the age of applicants, as well as sexual violence suffered in a transit country. The attention is then on a broad and inclusive understanding of vulnerability corresponding to the subjective condition of those who need protection in relation to fundamental rights, including, for instance, fundamental subsistence rights.* (Italian report, p. 81)

On the other hand, all of the country reports show that the increasing emphasis on 'vulnerability' is also accompanied by increasing attention to the protection needs of some asylum seekers with specific profiles, such as children, women who were victims of sexual exploitation and other forms of gender violence, often in connection with traditional practices such as female genital mutilation, and gender and sexual minorities. There thus remains a strong connection with the main factors of vulnerability usually identified in the relevant legislation and/or administrative guidelines on the assessment required to identify special reception and procedural needs.

Overall, the increasing success of 'vulnerability' indicates a tendency among decision-makers to decide on asylum applications in a way that is sensitive to gender as well as to the specific situation and protection needs of minors. This trend is confirmed by the more or less explicit use of 'vulnerability' as part of procedures other than the asylum procedure that are in place in some of the countries under study to protect vulnerable migrants with protection needs who do not qualify for asylum. These include, among others, the Italian humanitarian protection status (Italian report, p. 25), the Norwegian humanitarian protection status (Norwegian report, p. 103) and the Belgian residence permit for unaccompanied minors (Belgian report, p. 245).

3.1.3. Vulnerability Assessments to Decide on Claims to Humanitarian Aid

In **Lebanon and Uganda,** the legal context and social realities in which vulnerability assessments are performed differ. There is no refugee status determination procedure (Lebanon), or the refugee status is largely recognised prima facie (Uganda). Under domestic law, refugees with personal characteristics that are traditionally viewed, from a Western viewpoint, as involving special needs (such as minors, persons with disabilities, etc.) do not benefit from specific protection mechanisms that go beyond those that have been established to protect nationals who fall under these categories. Moreover, LGBTIQ+ refugees, who are often considered to have special protection needs in a Western context, face criminalisation and prosecution in both Lebanon and Uganda precisely for these characteristics (Lebanese report, p. 52; Uganda report, p. 38).

But vulnerability assessments are commonly performed by international organisations and NGOs as part of their aid programmes and to identify and prioritise those refugees who will be eligible. In Lebanon, UN agencies have developed vulnerability assessment tools to plan and develop their aid programmes intended for refugee populations. As explained by El Daif, Shuayb and Maalouf, these tools are based on a wide range of indicators that are intended to identify those refugees in a particularly vulnerable position and who are, therefore, in need of international aid:

> *Since 2012, three UN agencies (UNICEF, UNHCR, and WFP) partnered to issue annual assessments of Syria refugees' vulnerability i.e. the VASyR. Based on this experience, UNHCR decided to assess and issue starting 2017 an annual assessment of the vulnerability of refugees from other nationalities, the Vulnerability Assessment of Refugees of Other Nationalities in Lebanon (VARON). These assessments serve many purposes. For instance, they constitute an essential tool for planning, decisions, and needs-based program design, help building targeting models and their results are used by the sectors under the LCRP.*
>
> *Under these assessments, vulnerability is not defined but indicators to assess vulnerability are cited; these include sectors such as access to protection, shelter, WASH, education, health, food consumption, in addition to measuring the economic vulnerability, livelihoods and income, food security, assistance and household assets and energy.* (Lebanese report, p. 58)

The indicators are established on the basis of interviews with a sample of registered refugees. The data collected are then used to develop a standardised form that is used by the actors on the ground to identify the beneficiaries of international aid and the extent of that aid (Lebanese report, p. 58).

In Uganda, the humanitarian aid architecture involves numerous actors, leading to a multiplicity of focal points to address the specific needs of the most vulnerable refugees (Uganda report, p. 48). The various international organisations and NGOs that are active on the ground have each developed their own criteria and approaches to vulnerability assessment, which vary from the use of indicators to a looser and more pragmatic approach, depending on the organisational culture and on its target group. As noted by Nakueira:

> *[T]he focus on vulnerability categories was fluid and interviewees' definitions of vulnerable groups oscillated depending on the mandate, donor interests, and resources of the agency to which the person interviewed belonged.* (Uganda report, p. 46)

The regulations and practices in Lebanon and Uganda show yet another purpose of vulnerability assessments, which is much more directly connected to humanitarian policies and the primary objective of empowering individuals so that they can achieve self-reliance. This calls for caution when comparing the 'vulnerability' assessment mechanisms in these two countries with those in the other countries under study, as there is a greater focus on the socio-economic position of the refugees.

But the reports on Lebanon and Uganda also feed into a broader critical understanding of the implicit conceptions of human experiences that underpin the seemingly widespread consensus on the need to protect the most vulnerable refugees – including a widespread focus on the intrinsic characteristics (such as age, gender, etc.) of individuals often conceived in a non-situated way, instead of on their actual social position and how they mobilise social resources to support their resilience strategies. This is among the main common implementation challenges that the VULNER country reports have identified, as is explained in greater detail below.

3.2. Some Common Implementation Trends and Challenges

All VULNER country reports provide detailed information on the conceptual and practical challenges that arise in each of the countries under study when developing and implementing vulnerability assessments as part of the state's responses to the movement and needs of protection seekers. Most of these challenges arise from multiple, complex and intertwined domestic factors, such as the institutional structure of the state, the design of the asylum procedure and its relationship with other protection statuses, the target population, and the broader legal and constitutional traditions. But the VULNER country reports show that the main implementation challenges all relate to finding the right balance between, on the one hand, giving decision-makers sufficient leeway to address 'vulnerabilities' on the basis of the specific social position of each protection seeker, and on the other hand, establishing a consistent and coherent approach that supports fair and efficient bureaucratic processes.

In what follows, I highlight some of the most significant implementation trends that the VULNER country reports have identified and their main practical consequences. The VULNER country reports show an overall consensus, among state actors on the ground, that 'vulnerabilities' are socially embedded and that what they need is thus sufficient leeway to be able to address them properly – and not additional guidelines to inform them of what these 'vulnerabilities' are (3.2.1.). Increasing attempts are nonetheless being made at developing systematic and standardised vulnerability assessment tools and processes, as exemplified by the Norwegian and the Belgian case studies (3.2.2.). These attempts illustrate the current focus on immediate and practical needs – which is revealing of the divisions that remain behind the seemingly generalised consensus on the need to protect the most vulnerable protection seekers (3.2.3.).

3.2.1. A Consensus Among Actors on the Ground on the Socially Embedded Nature of Vulnerabilities

Interviews with state actors confirm the need to avoid focusing exclusively on a group-based approach to 'vulnerability' (Mustaniemi-Laakso, Heikkilä, Del Gaudio, Konstantis, Nagore Casas, Morondo, Hegde, and Finlay, 2016), and to give the decision-makers sufficient leeway to evaluate the individual situation of the protection seeker in a holistic and evolving way. As argued by Marchetti and Palumbo:

> *[T]he elasticity of the legal definition of vulnerability may be the best option to cover the range of complex situations and enable individual-based rather than group-based assessment. This aspect is surprising when considering that most of the implementation efforts by international organizations and the government are concentrated on standardizing policies and homogenizing practices. But in fact, adaptability of the notion is useful for legal applications in the case of humanitarian protection, because in such cases the existence of situations of vulnerability may play a key role.* (Italian report, p. 83)

Besides its advantages in terms of giving decision-makers the discretionary leeway required to tailor bureaucratic responses to the complex individual situation of each protection seeker, a flexible approach has the advantage of channelling the affects and emotions of street-level bureaucrats, who are often confronted with people living in dire conditions. The elasticity of 'vulnerability' allows them to justify in legal and bureaucratic terms the minor exceptions to generally applicable rules, which they deem necessary to meet particularly serious needs and situations.

Such exceptions are likely to benefit mainly those protection seekers who succeed in generating particularly high feelings of compassion and deservingness among decision-makers. But the possibility given to state actors to express their emotions and adapt their behaviour accordingly is not problematic in and by itself. It is an integral part of a humane bureaucratic system that seeks to address people's actual needs, as argued by Nakueira:

> *In the context of refugee management, certain emotions (sympathy) or gestures (such as listening) have the potential to alleviate, to whatever degree, the vulnerability or suffering of those who interface with aid workers or those who interface with the bureaucratic aid system.* (Uganda report, p. 49)

These findings on the flexible and elastic mobilisations of 'vulnerability' by state actors confirm, in the context of asylum and migration policy, a broader tendency identified by Brown in the implementation of social policies towards young people (Brown, 2017). In her work on the 'governance of vulnerability', Brown argues that 'vulnerability' is used by social services mainly as an adaptative tool that serves to tailor, justify and legitimise state intervention in specific cases. From that perspective, 'vulnerability' serves to bring flexibility and individualisation to the implementation of the legal and bureaucratic frameworks, rather than as a formalised bureaucratic tool and process.

Yet, interviews with decision-makers also show that they do not always feel comfortable in engaging in vulnerability assessments without additional guidelines. Decision-makers are very much aware that they are facing individuals who already find themselves in a particularly vulnerable position. This observation is confirmed by empirical studies, which have shown that the very circumstance of leaving one's country and becoming dependent on the authorities of another country, with a different language and unfamiliar social conventions, already implies a vulnerable position (Laacher, 2018). A Belgian judge interviewed by Sarolea, Raimondo and Crine testified that:

> *The migrant, whether he is an asylum seeker or a migrant, it does not matter, is in a situation of vulnerability as soon as he leaves everything, everything he knows and arrives somewhere where he knows nothing.* (Belgian report, p. 64)[36]

In such circumstances, state actors sometimes feel uncomfortable about making additional distinctions, especially in a context where they often have to work with limited resources and face chronic staff shortages. A broad, vague requirement to address vulnerabilities may not always make their everyday work any easier. Some feel as if the burden of deciding on how to allocate scarce resources is being shifted

36 The understanding state actors have of the vulnerable position in which the protection seekers find themselves is combined with the awareness of their agency and ability to develop their own resilience strategies (see, for example, the Belgian report, p. 68).

onto them, without providing them with the appropriate means and tools to support good quality decision-making. If not counterbalanced by clear guidelines, appropriate training and sufficient means, a somewhat loose policy requirement to address vulnerabilities may fail to have meaningful concrete effects on the ground, as decision-makers will not know how to engage with it.

Among the countries under study, Belgium and Norway have attempted to developing systematic vulnerability assessment processes, which include a standardised tool (questionnaire) and are implemented as part of the asylum procedure. A first systematic and standardized vulnerability assessment takes place upon the registration of the asylum application. It does not preclude informal and flexible vulnerability assessments at later stages. The Belgian and Norwegian experiences could usefully inform current policy debates at EU level relating to the development of systematic vulnerability assessment processes as part of a new 'border screening' procedure (COM, 2020, 612fin). These are further explored below, based on the main findings from the Belgian and Norwegian VULNER country reports.

3.2.2. Increasing Attempts at Developing Systematic and Standardised Vulnerability Assessment Tools and Processes

The promises of systematic vulnerability assessment processes and tools in terms of transparency and efficiency of state action are obvious: 'vulnerability' gets translated into clear criteria that allow decision-makers to easily identify which actions to take,37 and all protection seekers are guaranteed to benefit from an assessment of their specific needs. A systematic evaluation of the vulnerabilities at the start of the procedure also guarantees swift access to adequate care, and allows the decision-makers to identify the reception centre (or the special sections within a reception centre) to which the protection seeker should be assigned.

Despite their numerous advantages, standardised vulnerability assessment tools and processes are not without risks. A focus on certain predefined vulnerability factors and criteria may lead to hasty vulnerability assessments, amount essentially to a quick box-ticking exercise instead of a meaningful and comprehensive engagement with the personal situation and difficulties faced by protection seekers – thus limiting the potential of 'vulnerability' as a concept that adapts state intervention to actual needs.

Moreover, such standardised tools and processes have the effect of encapsulating vulnerabilities at a given point in time, whereas actual life challenges are constantly evolving, depending on multiple and complex factors, including the way they are (not) being taken care of. It is also illusory to believe that protection seekers will always be in a position to express their vulnerabilities and special needs at what is sometimes their very first encounter with a public servant from the host state. As noted by Sarolea, Raimondo and Crine, a sufficient amount of time is needed to create an atmosphere of trust that will allow the protection seekers to feel comfortable expressing their life challenges, especially when these involve very intimate aspects of their life, such as sexual orientation and traumatic events (Belgian report, p. 26).

Questionnaires filled in at the start of the procedure are thus useful in guaranteeing systematic vulnerability assessment and access to adequate care, but they should serve as a starting point for the vulnerability assessment process, and not for making a final determination on the protection seeker's vulnerable status. As argued by Sarolea, Raimondo and Crine:

37 In Norway, 'action cards' have been established to identify which particular action must be taken depending on the special needs that have been identified (Norwegian report, p. 40).

> *While it is important […] that vulnerabilities are identified and verbalised as early as possible with the active assistance of the applicant, it may also be appropriate for the applicants themselves to be given more time, with subsequent advice, to clearly identify any special needs they may have. There may therefore be a time lag between 'procedural' time (ideally as brief and brisk as possible) and 'human' time (or the reflection on special procedural needs that takes longer than the time required to complete a questionnaire).* (Belgian report, p. 26).

Liden, Schultz, Paasche, and Wessmann also remind us of the difficulties protection seekers may face in understanding the vulnerability assessment process and in providing adequate answers – especially when they find themselves in a particularly vulnerable position because of sickness and past trauma:

> *The increased bureaucratization of the asylum process may facilitate practice for caseworkers themselves (although even they struggle to maintain an overview of relevant sources), but it creates a barrier to clear communication with claimants. Sick or traumatized protection seekers may not be able to satisfy documentation requirements, and even educated, healthy adults may have trouble understanding the reasoning behind their decisions.* (Norwegian report, p. 147)

For these reasons, standardised 'vulnerability' assessment tools and processes should complement, and not replace, a flexible approach to vulnerability assessment. They should enable state actors to address vulnerabilities, not restrict their action or the way they consider vulnerabilities in implementing legal and bureaucratic norms. In a similar vein, a Belgian judge insisted that:

> *[T]oo many rules kill the rule, so in the end we have to leave a little bit of freedom of appreciation, not too many guidelines, because I mean, it must remain something natural to grasp a story, it must not be mechanical. We are not machines. And that's the big trend at the moment, and it's very dangerous, we're going to stop the procedure as it is at the moment, we're going to dehumanize it, and we're going to entrust it to machines in fact.* (Belgian report, p. 72)

This explains why, in Belgium and Norway, the initial 'vulnerability' assessment is supplemented by flexible ones that are performed throughout the procedure on an informal basis. Social workers in reception centres and public servants and judges in charge of evaluating the merits of the asylum application use the initial questionnaire as an assisting tool, not as a definitive one. In Belgium, for example, a judge testified about how he relies on the results of the initial vulnerability assessment to get a first glimpse of the case, without making a definitive decision on how vulnerable the position of the applicant actually is:

> *To identify them [the vulnerabilities], first of all I'm going to see the documents I received, there are still a lot of files where we have medical or psychological documents so that warns us about vulnerabilities. Then I'm going to see the person's story, so I already have an idea of their profile: is it a young academic or is it a young woman fleeing a forced marriage and so there already, based on their profile, I know that they will be more or less fragile or vulnerable. And then I'm going to see which persecutions are also put forward as a justification for fleeing one's country [...] it also warns me about the vulnerability of the person in view of what they have gone through.* (Belgian report, p. 70)

Despite their major advantages, the standardised vulnerability assessment tools and processes that are implemented at the start of the procedure should thus not be treated as definitive. Rather, they offer a basis for deeper vulnerability assessments that can be made at later stages in the procedure.

3.2.3. An Overall Focus on Immediate and Practical Needs

Most of the more or less formalised mechanisms in place and studied in the VULNER country reports focus on identifying those practical needs that can be immediately addressed, such as access to adequate health care or appropriate housing conditions. This leads to an approach that prioritises the most obvious needs, which can be easily and quickly identified through short interactions, over the more complex needs that stem from multiple, complex and intersecting factors. As explained by a Norwegian social worker:

> *We are capturing the more serious things, such as disabilities and whether a person is deaf. In these cases, we know where to start. You know in these cases that something needs to be done. Less visible needs are more difficult to discover. Vulnerabilities caused by what happened in their home country or on the journey to Norway are not easy to voice. They need to settle down before opening up to difficult experiences and feelings.* (Norwegian report, p. 59)

Such focus on immediate and practical needs has the advantage of supporting the quick and efficient action needed to alleviate suffering. But if exclusive, they can lead to unintended consequences, given the current bureaucratic context, which involves many state actors and where decision-makers perform their own more or less formalised vulnerability assessment of the specific needs that may arise within scope of their own duties. As noted by Liden, Schultz, Paasche, and Wessmann:

> *Although there are advantages to an identification procedure including different actors being responsible for identifying a person's special needs, there are also certain deficiencies: vulnerability is a peripheral aspect of these actors' main duties. Actors may lack sufficient competence—and time—in order to identify and address invisible and less obvious vulnerabilities, their multiple forms and the intersectionality of these.* (Norwegian report, p. 136)

An NGO case-worker in Italy shares that viewpoint:

> *Their vulnerability does not emerge, because there is no interest in letting it emerge. Commonly, there is not the competence to let it emerge, apart from when it is striking. A person in mental distress like schizophrenia, yes, but situations like depression and post-traumatic stress disorder are rarely recognized for what they are or represent.* (Italian report, p. 90)

The overall result is a fragmented approach in which there is no comprehensive engagement with the vulnerabilities faced by the protection seekers. As explained by Kaga, Nakache, Anderson, Crépeau, Delisle, Fraser, Frenyo, Purkey, Soennecken and Tanotra with respect to Canada, and following an analysis that could be extended to the other Western countries under study:

> *In most instances, the 'vulnerable' label is used primarily as a procedural override (i.e., it allows for a modification of or exemption from standard procedures and requirements; for instance, regarding the admission of individuals with higher medical needs, or in granting the decision maker a larger scope of discretion). These discretionary accommodations […] aim to address the potential inequalities faced by persons recognized as vulnerable to present their case and have a fair hearing. They are not aimed at addressing the underlying issues that contribute to a situation of vulnerability […].* (Canadian report, p. 15)

This is far from the ambition expressed in the UN doctrine on aid and development mentioned above, and which is reflected by the Global Compact on Migration: vulnerability assessments are not developed and implemented to empower migrants and allow them to lead independent lives, but rather to the limited extent required to manage populations hosted in state run reception structures and to ensure the fairness of the asylum procedure.

On the one hand, this limited approach to vulnerability assessments may be justified in view of the specificity of asylum and migration policies, which also seek to control and manage people's movements. The objective is to allow protection seekers a fair shot at presenting their claim, not to grant them a residence permit solely on account of their vulnerabilities. The granting of a legal status may often help them, it is true, to overcome their vulnerabilities. But it would also run counter to the control dimension which is inherent in every migration and asylum policy.

On the other hand, an exclusive focus on immediate and practical needs also risks feeding the illusion that 'vulnerabilities' can be assessed swiftly and neutrally, through a focus on some personal characteristics that can easily be identified and without having regard to the actual position of the protection seekers or to the possibility that their experiences of vulnerability may intersect in complex ways. As noted by Barbou des Places in her analysis of the new border screening procedure envisaged at EU level, such an approach may also lead to 'sanitised' vulnerability assessments based on a bureaucratic exercise that consists in ticking off boxes on a checklist without engaging in a comprehensive and individual assessment of concrete life challenges (Barbou des Places, 2021).

Developing more comprehensive vulnerability assessment mechanisms that avoid falling into the trap of sanitisation requires deepening the understanding of protection seekers' own experiences. In that respect, Nakueira's VULNER report on Uganda and El Daif, Shuayb and Maalouf's VULNER report on Lebanon show how the current vulnerability categories are met with much skepticism by local actors, who often feel like these categories do not reflect the actual protection needs as they encounter them on a daily basis.

El Daif, Shuayb and Maalouf argue that existing 'vulnerability' categories as developed and implemented by international aid organisations do not fully account for the specificities of the Lebanese context. They show how Lebanese actors concur that 'vulnerability' assessments are being made in a superficial way to justify donor priorities, rather than in a dialogue with local stakeholders that would address actual needs on the ground:

> *Two of our interviewees, who work with local NGOs partnering with the UNHCR, responded to this question [of how they view and understand the requirement to assess and address 'vulnerabilities'] with 'we see it as the donor sees it'.* (Lebanese report, p. 63)

Nakueira reaches a similar conclusion with respect to Uganda:

> *It is worth noting that donor interests or donor funding is a great determinant of which persons are targeted or categorised as 'vulnerable'.* (Uganda report, p. 36)

This criticism shows that, when implemented in the Global South, the current approach to vulnerability assessment that commonly prioritises some groups based on personal characteristics such as age, gender and health, conflicts with local actors' own perceptions and understandings of protection seekers' needs. It acts as a powerful reminder that vulnerability categories are still construed in a way that projects the receiving societies' own values and perceptions of who deserves protection. This may be inevitable. It is legitimate for receiving societies to assert their own values through the legislation and bureaucratic norms that pursue the ultimate objective of selecting the migrants who will be granted a residence permit.

But the consistency of the stated policy objective to address the specific needs of vulnerable protection seekers also requires a connection with their actual life challenges. For that reason, the second stage of the VULNER project, which is currently underway, consists in collecting empirical data on the experiences of the protection seekers through ethnographic fieldwork involving observation in the field and in-depth interviews. The objective is to supplement the results from the first phase of the research with a bottom-up perspective that will allow us to juxtapose and compare existing protection mechanisms with the experiences that protection seekers have of their own vulnerabilities, including how these experiences are shaped (and sometimes even produced) by the existing legal frameworks and protection mechanisms.

This will require us to tackle questions such as: How do the legal frameworks and the implementation practices affect concrete vulnerabilities as experienced by the migrants seeking protection? How do migrants seeking protection adapt their behaviour in turn to maximise their interests in the face of the legal frameworks and practices? How do they mobilize vulnerability to attain certain outcomes? Additional research reports will be written to present these outcomes.

CONCLUSION: 'Vulnerability', the Welfare State and Migration

The VULNER project is divided into two stages. The first stage has been completed and has resulted in a systematic mapping of existing domestic regulations and practices that address the vulnerabilities of protection seekers. These interim research results are presented and discussed in detail in the VULNER country reports, in a way that accounts for the domestic context and is based on each team's own legal and empirical conceptualisations.

This introductory report supplements the VULNER country reports by presenting the overall theoretical and methodological framework of the VULNER project. It also highlights the main implementation trends and challenges identified across the VULNER country reports, and which relate to the more or less formalised bureaucratic practices of vulnerability assessments that have been developed in each of the countries under study.

In the first part, this report showed that 'vulnerability' is an analytical concept that was designed to depict and analyse complex human experiences from an empirical perspective. However, it has long been used to develop and implement aid programmes, especially at UN level. 'Vulnerability' only flooded the legal and policy discourse on asylum and migration recently. This trend emerged in the 2010s as a result of policy and legal developments, such as the adoption of the UN Global Compacts and the development of ECtHR case law.

This shift of 'vulnerability' from the analytical sphere to the legal and policy spheres is at the origin of various conceptual challenges, as vulnerability becomes a tool of selection: the vulnerability label allows individuals to benefit from more favourable treatment and thus generates tensions in its definition by policy-makers, as well as in its implementation by decision-makers on the ground.

The specific implementation challenges were further discussed in the second part of this report. It showed that while a greater focus on the vulnerabilities of protection seekers has the potential to support state practices that are better tailored to the protection needs of migrants, asylum seekers and refugees, the standardisation of 'vulnerability' assessments through systematic bureaucratic tools and processes is not without risks. Such standardisation risks giving rise to a sanitised approach to 'vulnerability', which would fail to consider its socially embedded nature. A proper engagement with the actual vulnerabilities faced by protection seekers requires giving state actors on the ground sufficient leeway, allowing them to adapt their practices to the specific situation of each protection seeker as it evolves over time.

But the increasing success of 'vulnerability' in the policy discourse on migration is also a tale of how the Western welfare states address migrant movements in a social context characterised by sharp divisions over migration. It highlights two broader policy trends at play in Western societies. The first trend is the increasing success of the humanitarian discourse: humanitarian concepts such as 'vulnerability' are increasingly being mobilised to adjudicate claims to access state resources. As argued by Fassin in his work on the 'humanitarian reason' (Fassin, 2011), this also legitimises the control states exercise over populations residing on their territories, including migrant populations (Ticktin, 2011).

The second trend is the 'juridification' of these policy notions, that is, the use of the law and the legal system to further encapsulate them in legal categories that can be operationalised in more or less similar ways by the various state actors involved. This 'juridification', as Habermas argued in his theory on communicative ethics, channels the tensions that are likely to emerge as individuals and groups seize these concepts in order to compete for greater access to state resources. But it also gives new forms to these tensions as it restricts their expression to legal terms and means (Habermas, 1984; Loick, 2019).

Current debates on the use of 'vulnerability' as a tool to identify those who deserve protection are adding new dimensions to the longstanding debates on the use of certain categories – from which refugees themselves may feel estranged – to organize humanitarian responses (Zetter, 2007), and on how to comply with strict legal obligations to refugees in the face of multiplying norms and concepts that give states a greater margin of appreciation in their handling of migrants (Hathaway, 1997 and 2019). These debates remind us of the need to seek a balance between the establishment of workable concepts that can be implemented on the ground in relatively certain ways, and the need for a degree of flexibility that allows decision-makers on the ground to take contextual specificities into consideration.

The next stage of the VULNER research project will allow us to further delve into these debates, based on additional empirical data and analyses that will focus on protection seekers' experiences of their own 'vulnerabilities' and life challenges.

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The VULNER consortium consists of 9 academic partners from 6 different countries.