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## Migrant vulnerability or asylum seeker/refugee vulnerability? More than complex categories

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### Abstract

The current theoretical socio-legal approach to vulnerability and vulnerable individuals, groups and populations is complex and wide-ranging. Unlike other traditional categories of “vulnerable groups”, the specific dimensions of migrant vulnerability raise issues that have not been properly resolved by laws, policies or judicial interpretation. This paper seeks to review and explain the reasons for the black-and-white legal categorical distinction between two types of people who migrate: “voluntary” migrants (economic, undocumented), and forced migrants (asylum seekers, refugees), based on their presumed internal or external “vulnerability”. It also reviews European asylum law to analyse the complex classification of asylum seeker/refugee vulnerability. This can help explain why some “particularly vulnerable categories” in

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compounded situations of intersectional vulnerability risk falling between the cracks. There is an urgent need to reassess the bivalent categories and the compact dimensions of migrant vulnerability, in order to find balanced internal coherence in the regulations that manage heterogeneous migration processes.

### **Key words**

Vulnerability; migrants; refugees; legal categories; intersectionality

### **Resumen**

El enfoque teórico socio-jurídico actual de la vulnerabilidad y de los individuos, grupos y poblaciones vulnerables es complejo y amplio. A diferencia de otras categorías tradicionales de “grupos vulnerables”, las dimensiones específicas de la vulnerabilidad migrante plantean cuestiones que no han sido debidamente resueltas por la ley, las políticas o las interpretaciones judiciales. Este documento pretende abordar y explicar las razones subyacentes a la neta distinción categórica en el ámbito jurídico entre quiénes migran: migrantes “voluntarios” (económicos, indocumentados), y migrantes forzados (solicitantes de asilo, refugiados), en función de su presunta “vulnerabilidad” interna o externa. También revisa la legislación europea en materia de asilo para analizar la compleja clasificación de la vulnerabilidad de los solicitantes de asilo/refugiados. Ello puede ayudar a explicar por qué algunas “categorías especialmente vulnerables” en situaciones compuestas de vulnerabilidad interseccional corren el riesgo de quedar desapercibidas. Es urgente reevaluar las categorías bivalentes y las dimensiones compactas de la vulnerabilidad migrante, para encontrar una coherencia interna equilibrada en las leyes que gestionan procesos migratorios heterogéneos.

### **Palabras clave**

Vulnerabilidad; migrantes; refugiados; categorías jurídicas; interseccionalidad

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## 1. Introduction

There is some conceptual, theoretical, and practical confusion about a learnt common sense in the doctrine about vulnerability (Alwang *et al.* 2001, Morawa 2003, Brown *et al.* 2017, Ferrarese 2018) including its hidden semantics (Giolo and Pastore 2018) and dimensions (Cole 2016, 263).

Within the philosophical polarisation about the “vulnerability turn” (Burgorgue-Larsen 2014), legal doctrine often reproduces a dichotomy between the liberal notion of vulnerability as an element inherent in all human beings (Fineman 2004, 2008, Turner 2006, Fineman and Grear 2013) and a notion of vulnerability centred on the needs and dependence of certain individuals or groups (Betts 2010, Chapman and Carbonetti 2011, Bossuyt 2015, Nifosi-Sutton 2017). Critical analytical perspectives fortunately predominate (Barrère 2016) over normative, moral, and ethical endeavours. These theoretical approaches suggest the need to either dissect empirical vulnerability, or examine the specificity and intersectionality (Crenshaw 1993) of some forms of vulnerability rather than others. They have noted the risk that focusing on the identity component of these vulnerable subjects, considering them as helpless victims (Freedman 2019), highlighting certain traits (Suárez Llanos 2013), and using “labels” (Luna 2009, Sajjad 2018) and stereotypes (Timmer 2011, 752) could have perverse effects.

A good part of the critical literature on migrant vulnerability (Jakuleviciene 2016, Atak *et al.* 2018, Freedman 2019, Spada 2020) has recently taken migration and asylum as illustrative sources. Some scholars, among others, Atak *et al.* (2018, 5) defend the importance of a distinction between vulnerability and precariousness (a social construction), because this word reveals that much of the “vulnerability” of the migrants is policy-driven and not depends of themselves. However, this literature has failed to set in-depth the limits of “migrant vulnerability” in correlation to the black-and-white legal categorical distinction of human mobility: “voluntary” migrants versus forced migrants.

Both international law and doctrine (Feller 2007) have traditionally attempted to separate the voluntary migrant population from the forced migrant population based on a legal categorisation and not on a factual expression (either forced or non-forced acts of human mobility). Each of them has been correlated with a different status and assigned to independent legal categories (migrant and refugee) in terms of recognising different degrees of vulnerability. In general, a migrant is a person who “voluntarily” moves from one place of usual residence to another with the intention of settling down in the country of destination in order to improve their living conditions; whereas a forced migrant is someone who has been forced to flee their country of origin or place of usual residence to avoid the effects of armed conflict, situations of generalised violence, human rights violations or natural or human-made disasters. If people in this situation have crossed an internationally recognised state border, they become asylum seekers; and if they have not crossed a state border, they are known as internally displaced persons. When asylum seekers claim a need for protection, they may be granted refugee status (as well as EU subsidiary protection) and the right not to be sent back to their country of origin (principle of *non-refoulement*). However, if the asylum claim is rejected, after an individual examination, they may become “unauthorised or deportable entrants” and lose their asylum status. By virtue of this dual category, asylum seekers and refugees are considered to be either vulnerable, particularly vulnerable, or non-vulnerable. This

vulnerable category is due to the “compelling” cause for them to leave their country of origin, the treatment received during their asylum process and the formal determination of their refugee status. In contrast, it is even permissible to question or deny the vulnerability of economic migrants and certainly, of undocumented or irregular migrants. This is argued on the basis of their “weak” reasons for leaving and their protection is not seen a legal obligation but only a moral or humanitarian need for States. Despite their migrant status, they may be exposed to situational vulnerability and to internal vulnerability, similarly to other traditional categories of “vulnerable groups or subjects”, including the refugee population (*Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations*, A/HRC/34/31, p. 5).

During the last decade, this internal and external migrant vulnerability has also intermittently been acknowledged by the jurisprudence of the European Court of Human Rights.<sup>1</sup> While it provides an exceptional avenue for recognition (Timmer 2011, Peroni and Timmer 2013, Hudson 2018, Ippolito 2018, La Barbera 2019), this does not seem to extend to non-asylum or refugee cases. It is true that in the leading case *MSS v Greece and Belgium*,<sup>2</sup> the Strasbourg Court noted the “vulnerability inherent in his situation as an asylum seeker”; however, this treatment was not accorded to other migration statuses,<sup>3</sup> except for unaccompanied minors. This was only based on certain pertinent circumstances: the individual’s very young age; being an undocumented immigrant; not being accompanied by their family from whom they had become separated; and having been left to their own devices.<sup>4</sup>

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<sup>1</sup> The ECtHR has used the term “vulnerable groups” in relation to asylum seekers together with the Roma population, persons with disabilities, persons in detention, persons with AIDS and even in relation to domestic violence. To cite a few examples: *D.H. and others v Czech Republic* (GS), application no. 57325/00, 13 November 2007; *T.M. and C.M. v Moldova*, application no. 26608/11, 28 January 2014.

<sup>2</sup> *M.S.S. v Belgium and Greece* (GS), application no. 30696/09, 21 January 2011. To name a few examples: *D.H. and others v Czech Republic* (GS), application no. 57325/00, 13 November 2007; *T.M. and C.M. v Moldova*, application no. 26608/11, 28 April 2014.

<sup>3</sup> ECHR (Grand Chamber) of 13 February 2020, *N.D. and N.T. v Spain*, Application no. (8675/15 and 8697/15), irregular entrants who did not use the border procedures available at designated entry points, including asylum seekers, can be immediately returned.

<sup>4</sup> As in these leading cases *MSS v Belgium and Greece* (GS), application no. 30696/09, 21 January 2011 para. 231; a special concern about minor refugees’ detention conditions: *Rahimi v Greece*, application no. 8687/08, 5 July 2011, *Tarakhel v Switzerland*, application no. 29217/12, 4 November 2014, *Sufi and Elmi v United Kingdom*, application no. 8319/07, 8 June 2011, *A.B. and others v Finland*, application no. 41100/2019, of 2 August 2019, *M.A. and others v Lithuania*, application no. 59793/17, 11 March 2019, *VM. and others v Belgium*, application no. 60125/11, 11 November 2016, *Bilalova et al.* 59793/17, 11 March 2019; unaccompanied minors: *Kanagaratnam v Belgium*, application no. 15297/09, 13 December 2011, *Popov v France*, application numbers 39472/07 and 39474/07, 19 January 2012; *A.B. and others v France*, application no. 11593/12, 12 July 2016, paras. 11–115, *R.M. and others v France*, application number 33201/11, 12 July 2016, para. 72–76, *A.M. v France*, application no. 24587/12, 12 July 2016, paras. 48–53, *R.K. and others v France*, application no. 68264/14, 12 July 2016, paras. 68–726; *R.C. and VC. v France*, application no. 76491/14, 12 July 2016, paras. 36–40, *Abdullahi Elmi and Aweys Abubakar v Malta*, application numbers 25794/13 and 28151/13, 22 February 2011, *Muskhadzhiyeva and others v Belgium*, application no. 41442/07, 19 January 2010. *SHD and others v Austria, Croatia, Macedonia, Serbia and Slovenia*, application no. 14165/16, 13 September 2019; reception conditions: *N.T.P. and others v France* no. 68862/13, 24 August 2018; health risk: *Ahmed v Malte*, application no. 55352/12, 9 December 2013, *Mahmundi v Greece*, application no. 14902/10, 24 January 2012. *Abdula and others v Greece*, application no. 62782/16, 28 October 2016, *Tsarpelas v Grèce*, application no. 74884/13, 26 April 2018, paras. 48–50. *Abdi Mahamud v Malta*, application no. 56796/13, 3 August 2016; *LGTBI asylum seekers O M v Hungary*, application no. 9912/15, 5 July 2016.

Logically, the first question that arises is whether all migrants are in a similar situation of vulnerability; in other words, whether some are more internally and externally vulnerable than others. When reviewing the lack of conceptual *compactness*<sup>5</sup> of migrant vulnerability in applicable law, policies, and case law, the second pertinent question is whether only some asylum seekers and refugees are particularly vulnerable, and how the Common European Asylum system classifies their vulnerability.

These questions give rise to a binary logic between an open-ended mode of migrant vulnerability and a reluctant preference for a particular mode of asylum seeker vulnerability. Vulnerability in this context can be understood as situational (external) and/or embodied (internal). In order to further investigate the scope of migrant vulnerability, the second section will review how the internal and individual dimension are applied for these separate categories. The internal dimension of vulnerability reaffirms certain individual characteristics that place a person in a situation of increased risk, making them especially vulnerable. However, economic migrants and forced migrants may also find themselves in cumulative situations of external vulnerability due to changing circumstances (associated with migration management) in which the displacement occurs during transit, at the border and at destination. The external dimension will be discussed in the third section. It is based on different possibilities of coming to harm, the de facto exposure to risk of harm, which differs between an asylum seeker/refugee and a migrant according to their legal categorisation. This has sometimes led to proposing that voluntary migrants are not vulnerable “enough” when compared to forced migrants, but this assumption is not supported by regulatory and empirical evidence. For instance, clear vulnerable cases include unaccompanied migrant children<sup>6</sup> and children who have been separated from their families if their parents have been denied refugee status, migrant women at risk (including victims of exploitation, violation, and abuse), and people with disabilities,<sup>7</sup> among others.

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<sup>5</sup> I use “compactness” or “compact” related to migrant vulnerability, according to figurative sense used in architecture discipline. In contrast to complex or compounded, I would explain that migrant vulnerability should be interpreted as a dense, non-porous material, with components (vulnerable subjects) positioned together using very little space, given their proximity to each other. Consequently, the higher density and compactness of migrant vulnerability generates less porosity between the interconnected components in close proximity to each other. The forms of porosity are the legal and political interferences because all of them tend to separate the inherent compactness of migrant vulnerability.

<sup>6</sup> For instance, the Preamble to the UN Convention on the Rights of the Child (A/RES/44/25) of 20 November 1989: “The child, by reason of his or her physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth” and establishing the right of a child temporarily deprived of his or her family environment to “special protection and assistance provided by the State”. A special protection recast by the Committee on the Rights of the Child in general comments 13 and 6 urged States to protect the “right of the child to be free from all forms of violence” and clarified that Art. 19 “also applies to children who do not have a primary or alternative caregiver or a person responsible for their protection and well-being, such as (...) children of migrant parents or unaccompanied children outside their country of origin”.

<sup>7</sup> The Convention on the Rights of Persons with Disabilities (UNCRPD, A/RES/61/106) of 24 January 2007 echoed this special vulnerability when it affirmed the need to guarantee protection to persons with disabilities who are at risk (armed conflict, humanitarian emergencies and natural disasters) and invited States Parties to recognise the freedom of movement and choice of residence and nationality for such persons, on the basis of equality. However, the UNHCR’s Executive Committee (ExCom) conclusions recognised “that the specific needs of persons with disabilities are often overlooked, especially in the early phases of humanitarian emergencies”.

The fourth section will discuss how some of the refugee population is classified as being “particularly” vulnerable in the Common European asylum system, considering only the sophisticated and uncontroversial dimension of asylum seeker/refugee vulnerability. I will look at how this population can be in different situations of vulnerability due to their special treatment, the special procedural guarantees provided, and their special reception needs. Finally, these categories and subcategories of asylum seekers/refugees with particular vulnerabilities will be critically reviewed from an intersectional perspective to determine their scope, and their complex adjustment to these bivalent categories, migration processes, and dimensions.

## **2. Migrant status: an internal or inherent category of vulnerability?**

The factors that create a vulnerable situation for the migrant population might be related to a particular aspect of a person’s identity or individual circumstance. According to a vulnerability’s taxonomy (Mackenzie *et al.* 2014, 1–29), inherent vulnerability refers to sources that are intrinsic to human condition and it can be a function of the following, either singly or in combination: intrinsic features of the individual including age, gender, ethnicity, nationality, religion, language, sexual orientation or gender identity, or migration status; the situation in, or reasons for, leaving their country of origin and their changeable or ensuing situation of internal vulnerability at transit or destination, etc. Starting from migration status as a different category of vulnerability, firstly, I will try to explain how these dimensions of embodied vulnerability play out differently for migrants vs. asylum seekers/refugees in international law; and secondly, I discuss the inconsistency of this controversial categorical distinction in applicable law, policy, and case law.

### *2.1. Different dimensions of internal vulnerability for migrants vs. asylum seekers/refugees*

If the content of UN conventions is considered, vulnerability is not a pre-acquired condition of migrants, since their legal status is not a cause but a result of their vulnerability. In other words, the vulnerability of economic migrants is not in itself inherent in racial characteristics, in national or ethnic origin, or in the underdeveloped conditions of the country or region of origin. This can be concluded from paragraphs 9, 11 and 12 of the Preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Doc. A/RES/45/158). Their vulnerable position is not due to their distance from their country of origin, but rather to the difficulties they face in the country where they work or want to settle, regardless of whether they are forced to return (Bustamante 2002, Jimena 2015). Therefore, it remains regardless of whether they entered a given country legally or not, and of the provisions regarding their lawful stay in a given country.

Within UN asylum regulations, vulnerability of origin (provided that it is sufficiently proven) is the cause of the declarative nature of the right to seek asylum (Art. 14 Universal Declaration of Human Rights – UDHR) and subsequently provides territorial protection status, which is reinforced by Art. 33 of the Geneva Convention (Convention relating to the Status of Refugees, 1951). Even though this protection is less controversial, it remains problematic because it is “fragmented in a vicious circle between true and false” (Spada 2020, 68). This is particularly true for asylum seekers whose countries of

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origin are objectively and subjectively unsafe, which results in application procedures that are quicker or easier than those employed for other applicants. A mode of individual performative vulnerability is recognised insofar as they are members of a disadvantaged group; however, given its heterogeneous and provisional nature, this is not devoid of controversy. As will be analysed in the fourth section of this paper, the individual vulnerability of subjects and groups has an “open-ended” definition in the EU’s legal asylum framework (Jakuleviciene 2016). In fact, it is closely linked to a double legal obligation to subsidiary protect the refugee’s own citizenship and to address the special needs of those particularly vulnerable groups among the vulnerable, or doubly vulnerable groups (De Bauche 2008, 103, Al Tamimi 2016).

In this way, migrants are essentially “different” in terms of their freedom and vulnerability, bearing in mind that other intrinsic features such as age, sex, ability, and health status are timeless, static, lasting or irreversible. Their vulnerabilities are constructed as being solid. Whereas “migrant” status is provisional and temporary in its different regulatory forms, it is constructed as a form of liquid and variable vulnerability, unlike the classic categories of “vulnerability”. In fact, nothing prevents certain features from becoming permanent, dynamic, irreversible, and timeless during the different phases of the normal or abnormal functioning of migration control (arrival, transit and destination). This is comparable to the other “strong” conditions of primary and secondary vulnerability (Casadei 2018) that are associated with the recognised vulnerability of asylum seekers/refugees. It explains why the “individual vulnerability” and the “vulnerability of origin” categories, in which asylum seekers/refugees are included, are more operational when they occur in combination with others in migration contexts. The need for the legal recognition of migrant vulnerability as a *compact* category *per se* (not due to the cumulative effect of other variables) is thus denied, including the vulnerability of undocumented migrants.

Going beyond the possible individual vulnerability of asylum seekers and refugees, the international standards of categorical protection paradoxically make the attribution of vulnerable status more difficult. Having predefined vulnerable groups does not necessarily imply being clear about the causes of the vulnerability of asylum seekers *per se*, as an individual or a collective category. Whereas these instruments have contributed to the protection of so-called vulnerable groups, they have also indirectly promoted membership approaches that consider subjects to be distinguishable on the basis of group indicators. They have done so both proactively, that is, based on the existence of a history of discrimination and a situation of past and present disadvantage for the individual or group to resist, respond or re-adapt to threats (Barrère and Morondo 2011, 19); and reactively, taking into account the likelihood that a situation of migrant vulnerability could become one of exclusion. Both immigration and asylum policies and their regulatory frameworks reinforce the “group approach”, in terms of classes of subjects with elements in common that must be classified to ensure that their needs are best met. This classification benefits those in the category of forced migration, as their special status within the migrant population alleviates migration control and social processes compared to the generic category of “voluntary” migrant. The process whereby an “irregular” migrant becomes an asylum seeker sometimes may be delayed or even become more complicated when their asylum claim is rejected, or an accelerated procedure is applied. For instance, between the places of first arrival, transit, and



destination (Schuster 2011, Meyer and Boll 2018), or during screening and border procedure. The possibility of enhancing the individual vulnerability of refugees *per se*, and of adding it to other possible forms of vulnerability, does not always reinforce protection. In fact, protection may be weakened because the integration of the universal-individual logic into the group approach may be contradictory, precisely due to its negative connotations and factual inaccuracy (Suárez Llanos 2013, 59). Moreover, situational vulnerability may be concurrent with it, as I will explain in section 3.

## 2.2. *The inconsistency of internal migrant vulnerability as a separate dimension*

According to the UN Human Rights Council (A/HRC/34/31, p. 5), the internal vulnerability faced differently by migrants and asylum seekers/refugees has often been created through law, policy, and judicial practice. Firstly, this is a result of a predetermined dichotomous categorisation of the migrant population (Collyer and De Haas 2012). It is epitomised by the expression “refugees are not migrants” (Feller 2005), including asylum seekers. There is a confluence of binary variables such as time/space, place/direction (Robertson 2018), “voluntary”/“involuntary” migration and separate legal frameworks that apply accordingly. Bakewell (2011, 17) pointed out that there is a level of semantic confusion between migrant status, category, and process. This confusion makes the terms of the legal and political debate “dangerously” ambiguous, as it results in a “protection” logic being applied for asylum seekers in contrast to a “management” logic being used for economic or undocumented migrants.

Specific examples of this self-serving dichotomy are fomented by the ambiguity of inherent migrant vulnerability in immigration and asylum regulations and in jurisprudence. On the one hand, the New Pact on Migration and Asylum of 2020 (COM (2020) 609 final, p. 12) openly consolidated a tendency to give greater protection to true asylum seekers and refugees, as opposed to maintaining forced or accelerated return as a preferential goal for irregular migrants. For instance, the Proposal for a Screening Regulation (COM/2020/612 final) clearly proposed the elimination of the fine line in international and EU law between different categories of unauthorised entrants: persons seeking international protection and other migrants. The exception are unaccompanied migrant children, given the risk factors at the border and in transit.

On the other hand, the Preamble of UNGA Resolution 60/169 (New York Declaration, A/RES/71/1)<sup>8</sup> on the protection of migrants recognised this *compact* migrant vulnerability (without distinguishing between voluntary or forced displacement) and listed many of its underlying causes. Unfortunately, this “false” generalisation of internal *compact* migrant vulnerability failed to be developed and translated into equivalent obligations for States (paragraphs 23 and 31 of the Resolution). It provided that States have the duty to recognise the vulnerability of asylum seekers (UNHCR Global Consultations on International Protection, EC/GC/01/12) as an *exceptional* migrant category (International Convention on the Rights of Persons with Disabilities, UNCRPD, A/RES/61/106). This is not to be recognised in abstract terms, but as an individual circumstance due to their status; and only in specific cases, due to the accumulation of other risk factors that

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<sup>8</sup> The definition of vulnerability is “the difficulties they face because of discrimination in society, differences in language, customs and cultures, as well as economic and social difficulties and obstacles to return to their States of origin, especially in the case of undocumented migrants or migrants in an irregular situation”.

exacerbates their vulnerability. For example, this applies to children, particularly those who are unaccompanied or who have become separated from their families. It is also applicable to older adults; people with mobility, sensory, intellectual, or other disabilities; those with chronic illnesses or other medical needs; victims or survivors of trafficking; and survivors of torture or trauma (A/HRC/34/31, p. 5).

Two judgments can serve to illustrate the differentiation regarding the interpretation of inherent migrant vulnerability (Baumgärtel 2019, 2020). In the case of *H.A. and others v Greece*,<sup>9</sup> concerning undocumented migrants, there was an attempt to find an analogy with the case of *M.S.S. v Belgium and Greece*. The judgment on the case of *M.S.S. v Belgium and Greece* ruled that asylum seekers should be considered a vulnerable group because of the hardship they had endured during their migration process, as well as due to possible traumatic experiences even before migrating. Therefore, similar reasons to those applicable to undocumented migrants were adduced. Their recognition as vulnerable (para. 233) was not so much related to the legal status of asylum seekers *per se* but rather to the situation resulting from acts and omissions in the relationship of State dependency and the obligation to provide special protection. Despite the fact that there is nothing to prevent undocumented migrants from being considered a vulnerable group (as they should be), the Court did not clearly state this, at least forcibly. Although this status seemed to be predominant, undocumented migrants were regarded not as vulnerable subjects, but rather as vulnerable objects. The Court only spoke of the “vulnerability inherent in his situation as an asylum seeker”, but not with respect to other immigration statuses, except in the case of unaccompanied minors.<sup>10</sup> Thus, asylum seekers are a vulnerable category for legal reasons: they lack effective rights to work, their right to stay in the territory is precarious by definition, and their status requires recognition. As the host State places them in this situation, it is positively required to ensure that their living conditions are not inhuman and degrading. While this notion of “vulnerability” encompasses all asylum seekers who have this legal status (not because of their identity or individual life circumstances), the Court established their belonging to a vulnerable group. By using deductive reasoning, it determined that State authorities have a specific duty to exercise reasonable care and must apply a higher degree of vigilance regarding vulnerable people. First the Court recognised asylum seekers as vulnerable persons and then applied the invoked protection rule. Inductive reasoning was used when monitoring the specific circumstances of the case. When the Court reached a conclusion on vulnerability linked to the notion of belonging to a highly vulnerable population group, it focused on the pertinent circumstances. This type of logic has been broken in some recent cases of inadmissible vulnerabilities<sup>11</sup> that have qualified or constrained the

<sup>9</sup> *H.A. and others v Greece*, application no. 19951/16, 28 February 2019, para. 112.

<sup>10</sup> See detention conditions and the vulnerability of unaccompanied minors; *Kanagaratnam v Belgium* application no. 15297/09, 13 December 2011. *A.B. and others v France*, application no. 11593/12, 12 July 2016, paras. 11–115, *R.M. and others v France*, application no. 33201/11, 12 July 2016, paras. 72–76, *A.M. v France*, application no. 24587/12, 12 July 2016, paras. 48–53, *R.K. and others v France*, application no. 68264/14, 12 July 2016, paras. 68–726 y *R.C. and VC. v France*, application no. 76491/14, 12 July 2016 paras. 36–40, *SHD and others v Austria, Croatia, Macedonia, Serbia and Slovenia*, application no. 14165/16, 13 September 2019, and the conditions of an informal camp in Calais, *Khan v France* application no. 12267/16, 28 February 2019, para. 73.

<sup>11</sup> *AME v The Netherlands*, application no. 51428/10, 5 February 2015. *Ilias and Ahmed v Hungary* application no. 47287/15, 21 November 2019.

extent of internal vulnerability attributable to such subjects (Ippolito 2018, Baumgärtel 2019, 2020).

### 3. External or situational migrant vulnerability

Situational vulnerability is context-specific and draws attention to potential temporary harm and to the actual occurrence of harm, according to circumstantial evidence: personal, political, economic, environmental situations, etc. (Goodin 1985, Mackenzie *et al.* 2014, 9). The inadequate and often harsh conditions in which migrant population are received at borders or at their destination can further exacerbate vulnerabilities. The factors that create a vulnerable situation for migrants might be the situation in their countries of origin and/or at transit or destination. Along with the more highly rated internal vulnerability, the reference to the external dimension of migrant vulnerability raises some implicit questions about the reasons for leaving their country of origin, and the changeable or ensuing vulnerable situation of harm at transit or destination, etc. Firstly, I will explain how these dimensions of external vulnerability have similar *de facto* applications for migrants vs. asylum seekers/refugees, and secondly, I will discuss the perversity of this dual situational dimension of vulnerability.

#### 3.1. *Similar dimensions of external vulnerability for migrants vs. asylum seekers/refugees*

There is similar evidence of external vulnerability for both migrants and asylum-seekers/refugees in different policies and regulations. The Global Compact for Safe, Orderly and Regular Migration (GCM, Objective 7, para. 23, f; and UN Doc. A/73/12) first referred to “migrant in vulnerable situations” because “migrants and refugees may face many common challenges and similar vulnerabilities in their journey: in transit, on arrival at their destination or while making a life in a new country”. In the terms proposed by the UN High Commissioner for Human Rights (A/HRC/34/31, p. 5), situational vulnerability encompasses the circumstances within specific and shared spaces or periods, as it “refers to circumstances *en route* or in countries of destination that render migrants at risk”. Migration processes are understood as a continuum that includes departure, transit, and arrival at the first destination, which may or may not be the same as the final destination. As stated by the UN Higher Commissioner for Human Rights, this frequently happens when migration “is through irregular routes, resulting in people being exposed to exploitation and abuse by smugglers, traffickers, recruiters, and corrupt officials; as well as risk of death aboard unseaworthy boats or during hazardous desert and other land crossings”.<sup>12</sup> The UNHCR has also considered some dysfunctional aspects of the asylum system as a source of vulnerability. In fact, it has argued that “risks can be exacerbated by lack of legal documentation, the absence of family or community support, limited knowledge of the local language, or discrimination. Migrants who find themselves in a country other than their own, which is beset by conflict, disaster, or other humanitarian crisis, would also fall within this category”.

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<sup>12</sup> An exception would be International Law Commission, *Draft articles on expulsion of aliens* (A/RES/69/119) of 10 December 2014. Art. 15 entitled “vulnerable persons” a reference to “children, elderly persons, persons with disabilities, pregnant women and other vulnerable persons subject to expulsion”.

Moreover, the United Nations have recognised that “although some migrants, such as children, elder people, women travelling alone and migrants with disabilities, are vulnerable, the majority are not intrinsically vulnerable” (Human Rights of Migrants, A/71/285, para. 59). Therefore, intrinsic migrant vulnerability is subject to highly exceptional conditions that are applicable to a minority, while migrants’ implicit resilience and external vulnerability must be proven *de facto*. This UN statement is poorly justified in terms of migrant resilience, according to Marzocco (2018), because no empirical evidence can be found to justify the assumption that “they are most often incredibly resilient and courageous, and make life-altering decisions” (*ibid.*). There is a general assumption that certain untouchable categories of vulnerable migrants are “only” less often vulnerable due to internal factors attributable to the subject. However, they may also be vulnerable because of their situation and, consequently, it is necessary to prove that actual harm can occur. This is not easy to do, except for minors in poor detention conditions, following the effects of *Tarakhel* case or due to precarious health based on the *Ahmed* doctrine.<sup>13</sup> Examples of situational vulnerability in this area notably include the existence of an active problem, third parties, or a structural emerging force; but they may also include assumptions of agency and individual choice that are non-existent.

Regarding the construction of this “liquid” situational vulnerability, the desired differences are largely seen in a temporal or a spatial context (Spada 2020, 70). If a migration project is undertaken for work or family reasons, vulnerability is (clearly or preferably) situational, because it specifically happens in the place of arrival through social relations with other newly arrived immigrants, migrants who have already settled down and the host society. While vulnerability for asylum applicants largely occurs remotely, once the asylum claim has been filed, it is solely linked to causes related to the country of origin. This can sometimes aggravate the primary vulnerability and become a secondary form of vulnerability. It may be triggered by situations that occur in transit or at the destination, given the importance of secondary movements, the collapse of the asylum system and the impossibility of resorting to legal channels. These situations include, for example, deficient, inhuman, or degrading conditions for asylum seekers in reception or detention centres, the transit area, or upon first arrival at the border and the limitation of free movement, among others.<sup>14</sup>

### 3.2. *The perversity of dual situational migrant vulnerability*

Whereas the legal protection system plays a key role in this dual process of situational vulnerability for migrants vs. asylum seekers, the socioeconomic structure, social support networks, and the social perception of the potentially vulnerable individual in the host country are also essential. There are different pointers to be considered in relation to situational vulnerability, depending on various categories. For economic migrants, aspects to consider in assessing their vulnerability include their special

<sup>13</sup> *Khlaifia and others v Italy* (GS), application no 16483/12, 15 December 2016, paras.11–19 and 143, paras. 161–164, 194.

<sup>14</sup> *Moxamed Ismaaciil and Abdirahman Warsame v Malta* application no. 52160/13, 52165/13, 12 April 2016, para. 94. *AS v Switzerland* application no. 39350/13, 30 July 2015. *SMH v The Netherlands*, application no. 5868/13, 9 June 2016, *N.A. and others v Denmark*, application no. 15636/16, 31 July 2016. *F.M. and others v Denmark* application no. 20159/16, 13 September 2016, para. 24.

circumstances upon arrival and the dependence on a certain administrative status for access to rights. All these are causes of situational vulnerability and should not be confused with the causes of the migration phenomenon itself, which combine complex endogenous and exogenous causes that are exacerbated by the law. For refugees and asylum seekers, factors of situational vulnerability concur with individual vulnerability, as they provide evidence of the causes of a well-founded fear and the need for protection. There is a point of no return that brings all vulnerable migrants close and at the same time distances them. There are multiple external factors that they cannot predict or control, and they must face them alone. These factors include a social welfare system that has contracted under austerity policies resulting from the economic crisis; the bureaucratic processes used to recognise their status; discrimination and exploitation; the efficiency (or inefficiency) of the reception system; and the criminalisation of humanitarian action in rescue operations.

In contrast, individual vulnerability relates to stereotyping or victimisation processes. This external but non-residual variant is subject to the scrutiny of direct and indirect state control. It is directly scrutinised through policies and regulatory frameworks that define the situation of vulnerability. This leads migrant subjects to be considered as either asylum seekers, potential refugees, or generic migrants until their legal protection status is confirmed. Indirect means of scrutiny include the interpretation of the Courts that assess the degree of “vulnerability” posed by their risk position; based on their interpretation, a decision is made for an asylum seeker to be regarded as vulnerable or highly vulnerable. This double control that is exercised over the situational vulnerability inherent in any migration process means that regulatory responses are reactive, since they involve questioning the applicant’s circumstances. Institutions seek to minimise the risk of vulnerability derived from migration situations by pleading for the need to have control. But they also try to blame migrants based on own conduct doctrine, by arguing that their external vulnerable situation is a consequence of their decision to move, of failing to choose the safest mechanisms “provided” by the State to process an asylum application, or of “deliberately” placing themselves at risk.<sup>15</sup> This control strategy reduces human mobility to the legal minimum and may cause indirect forms of abuse, violence to make repressive actions more effective. The perverse categorisation of situational vulnerabilities as capricious whitewashes the discretion of States to significantly reduce special-need situations. Consequently, it prevents the articulation of appropriate legal channels to recognise the dynamic and *compact* nature of migrant vulnerability.

#### **4. The classification of particularly vulnerable asylum seekers and refugees in the Common European asylum system**

While the European Union is presented as a receptive scenario for the legal articulation of vulnerability insofar as its protection, its actual clout is ambiguous. As indicated by Ippolito (2018, 464–467), there is a “selective and collective conceptualisation of asylum seeker vulnerability” apparently similar to the scheme adopted for migrants in the Return Directive (Directive 2008/115/EC). Regardless of migrant status, the umbrella

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<sup>15</sup> For instance, ECHR (Grand Chamber) of 13 February 2020, *N.D. and N.T. v Spain*, Application no. (8675/15 and 8697/15), known as own conduct theory, referred to as “improper conduct of the claimants”.

term of vulnerable people seems to include: unaccompanied minors, people with disabilities, elderly people, pregnant women, single mothers with children, and people who have been subjected to torture, rape and other serious forms of physical, mental and sexual violence.

Within the sophisticated dual dimension of particularly vulnerable asylum seekers and refugees, the European asylum legal system provides specific pathways for international protection under certain conditions precisely because of their “special” vulnerability. However, building this legal protection system is not an easy task. Firstly, because it is difficult to provide an exhaustive definition of the possible categories of particularly vulnerable refugees. And, secondly, because of the rejection resulting from the possible identity-based stereotypes related to migrant vulnerability (Barrère and Morondo 2011). In fact, the intention to provide legal certainty to vulnerability-related rules has been given new meaning by the work of the two supranational European jurisdictions: the Strasbourg and the Luxembourg Courts.<sup>16</sup> Their respective – and rather different – case laws have echoed a new emerging category of vulnerability as an asylum issue; and they seem reluctant to extend this to other migrant categories.

Basically, they have attempted to restructure the characteristics of the group and the subject (history, State control, references to international documents and other determinants) with varying degrees of success. By using “standardised” categories, the aim here is to provide a systematic outline of the regulatory guidelines used to cover the special needs required for particularly vulnerable refugees. This is not intended to provide a comprehensive account, which is outside the scope of this paper; rather, some categories are provided under the regulatory umbrella of “differentiated inclusion” that describes stratified rights as seen by Mezzadra and Neilson (2012, 183). These mainly include the simple categories specified in Article 21 of Directive 2013/33/EU and the asylum seekers/refugees/beneficiaries of subsidiary protection. They exclude the

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<sup>16</sup> As mentioned in note 5, see ECHtR leading cases concerning asylum seeker vulnerability and different ECJEU leading cases for people with mental disorders and victims of violence; unaccompanied minors, people with serious illness, sexual orientation, victims of torture and the situation in the country of origin. For instance, C-578/16 PPU, *C.K. and others v Slovenia*, Judgment of the Court (Fifth Chamber), 16 February 2017; C-163/17, *Abubacarr Jawo*, Judgment of the Court (Grand Chamber), 19 March 2019; C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, Judgment of the Court (Grand Chamber), 18 December 2014; Cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* Judgment of the Court (Grand Chamber), 21 December 2011; C-542/13 *Mohamed M'Bodj v État belge*, Judgment of the Court (Grand Chamber), 18 December 2014, paras. 39–47; C-353/16 *MP v Secretary of State for the Home Department*, Judgment of the Court (Grand Chamber), 24 April 2018; Case C-254/11 *K v Bundesasylamt*, Judgment of the Court, 6 November 2012; Case C-648/11 *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department*, Judgment, 6 June 2013; Case C-79/13 *Federaal agentschao voor de opvang van asielzoeker v Selver Saiciri et al.*, 27 February 2014; C-550/16 *A. and S. v Staatssecretaris van Veiligheid en Justitie*, Judgment of the Court (Second Chamber), 12 April 2018; Case C-233/18 *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, Judgment Grand Chamber, 12 November 2019; C-179/11 *Cimade y Groupe d'information et soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012; Cases C 148/13 to C 150/13, *A.B.C v Staatssecretaris van Veiligheid en Justitie*, Judgment of the court (Grand Chamber), 2 December 2014; Case C-473/16, *F v Bevándorlásiés Állampolgársági Hivatal (Office for Immigration and Citizenship, Hungary)*, Judgment of The Court (Fourth Chamber), 25 January 2018; C-652/16, *Administrativen sad Sofia-grad – Bulgaria) – Nigyar Rauf Kaza Ahmedbekova, Rauf Emin Ogla Ahmedbekov / Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, Judgment, 4 October 2018.

resettled, relocated or temporarily sheltered categories that would fall within humanitarian protection and are excluded from this analysis and focus on the “normalised” categories regarding a situation of special vulnerability (Table 1).

#### *4.1. A bird’s eye view of the situation of vulnerability for particularly vulnerable refugee categories*

Two aspects are especially remarkable in this overview, from a conceptual and critical perspective. Firstly, in opposition to national legislation, the European Union legal framework offers guidance on special reception needs and procedural guarantees that affect the asylum applications of those women considered particularly vulnerable (Freedman 2010). Secondly, guidelines are provided regarding those people considered minors who, on grounds of age, are not included in the group of young men aged from 18 to 24 years of age (specifically protected under the United Nations definition of “youth”. The rest of the vulnerable groups or subjects are merely mentioned and their circumstances are rarely covered in detail, with the exception of victims of trafficking and violence. Additional protection is only offered for women when they are considered especially vulnerable, as for pregnant women, women who have suffered forced pregnancies or abortions, women persecuted by laws, and women who have been victims of gender violence, trafficking, sexual exploitation, female genital mutilation, etc. (Freedman 2015, 45–68). The specific categories for women as international protection applicants are mainly the ones listed above, although they may be included in the other categories based on age, violence, illness, and disability criteria, among others. There are other traditional categories of vulnerable subjects in the specification processes that either should be included, such as members of religious minorities and the LGTBI population (Jakulevičienė *et al.* 2012), or should be expanded further, such as refugees with disabilities, given their triple disadvantaged situation (Crock *et al.* 2013).<sup>17</sup> As their special vulnerability cannot be denied, they can be encompassed within some of the broader categories from a group approach, despite not being explicitly included or generating some doctrinal controversy. There is no general consensus on the “vulnerability status” of the group just because they have non-heteronormative sexual preferences or sexual identities (Jansen and Spijkerboer 2011, Spijkerboer 2018).

Consequently, this particularly vulnerable refugee population can be in different situations of vulnerability due to their special treatment qualification, the special procedural guarantees provided, and their special reception needs (Brandl and Czech 2015, Caicedo 2018). The first two are associated with the internal dimension of vulnerability, while the last one depends on factual circumstances and reflects the external dimension of their vulnerability. Within the possible accepted combinations, the regulatory details of the rights and obligations of States show a congenital vulnerability in these particular groups and the need for enhanced protection. I believe that an intersectional approach to the compounded vulnerability of particularly

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<sup>17</sup> They are outside their country of origin. As they have been stripped of the protections of citizenship and habitual residence status, they live in fear of persecution if they are returned to the country from which they fled. They are ultimately hindered by the physical, mental, intellectual, or sensory disabilities that make their participation difficult.

vulnerable refugee categories is an ideal solution despite its limitations, as I will explain in section 4.2.

### *A) Special treatment qualification*

The granting of refugee status depends on whether the applicant belongs to a particular social group connected to a “closed” ground of persecution (Art. 1.A 2 Geneva Convention). For instance, disabled and LGBTBI asylum seekers must be identified as needing special treatment, unlike other categories.

In the case of people with disabilities (Straimer 2011), there is a discursive link between the medical model of disability and the treatment of people with “mental health problems” or “mental disorders” (Art. 20.4 Directive 2011/95). Both terms were introduced to encompass people with mental disabilities. Disability was not explicitly mentioned as a reason for persecution that qualifies for international protection in the so-called CEAS package, which has been considered “a missed opportunity” (Straimer 2011, Conte 2017). However, Straimer suggested that claims of persecution for reasons related to the applicant’s existing disability can be included in the category of belonging to a particular social group (i.e., people with disabilities), even if there is no guidance to ensure a “disability-sensitive interpretation” of this provision (Straimer 2011, 540). Directive 2011/95 only explicitly refers to “acts of a gender-specific or child-specific nature” as specific forms of persecution, and excludes acts based on disability grounds (section f, Article 9.2). In particular, Article 20.3 even uses two different terms: disabled people and people with mental disorders, something that is recurrent in jurisprudence. The latter include people with intellectual or psychosocial disabilities, creating an overlap between the two categories of people identified in the Directive. The scope of the obligation to provide a specific treatment after identification by the States is not obvious. Yet, it is clear that Member States must evaluate each individual’s situation (Art. 20.4), including any disabilities. In addition, the Directive requires Member States to ensure that refugees with disabilities, and in particular, refugee children who are victims of exploitation, torture, cruel, inhuman, or degrading treatment, or armed conflict are provided suitable healthcare, which covers treatment for those with mental disorders and the recognition of their specific needs, among others (Art. 30.2), and access to education (Art. 27). Straimer and other researchers (2011) have argued that European legislation is largely shaped by the medical model, and by an “image of people with disabilities as patients”, with the subsequent rejection of the social and human rights model derived from the Convention and used by theorists of so-called *Disability Studies* (Bernardini 2018).

Another controversial aspect is the Member State responsible for the examination of the asylum application according to the Dublin Regulation (Regulation (EU) No 604 /2013), as well as the formulation of the best interests of the child (Art. 20.5 Qualification Directive). Responsibility for examining the application does not specifically include or mention disability. The Dublin Regulation only refers to this with respect to family dependence (Art. 16): “where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident (...)”. Regarding minors, Recital 34 and the guarantees for minors contained in Article 6.5 Dublin Regulation for the examination



procedure mentions exchange of information, adequate training, and cooperation between States.

As Díaz Lafuente (2014) pointed out, something similar occurred at first when sexual orientation and gender identity were not recognised in any legal instrument as independent grounds for persecution. A turning point on sexual orientation and gender identity as a “social group” was Art. 10.1 (d) of Directive 2011/95/EU: “Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national laws of the Member States. Gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”. Another relevant provision in this regard was Art. 2 (f) of Directive 2011/95/EU, which established the eligibility criteria for subsidiary protection of people who do not qualify as refugees, but there is a fear that they will face a real risk of serious harm if they return to their country of origin.

Finally, for those asylum seekers who are victims of trafficking, the possibility of requesting international protection is expressed in the Anti-trafficking Directive (Directive 2011/36/EU, Art. 10.6 and Recital 18) in the following terms: “A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked”.

### *B) Special procedural guarantees*

The legal qualification of refugee status is not automatic for some categories whose credibility needs to be reinforced through evidence required during the asylum procedure. Directive 2013/32/EU on procedure specifically provides guarantees for unaccompanied minors in Art. 25 (adequate interviews, staff training, legal guardian), especially regarding the importance of determining age (Sedmak *et al.* 2018), while other applicants who need special procedural guarantees are only generally referred to (Art. 24.3) (Beduschi 2018). Art. 25.2 indicates that, if based on the statement provided and other pertinent evidence, States have doubts about an applicant’s age when examining an application, they may use medical examinations; if such doubts cannot be dispelled, the presumption that the applicant is a minor will prevail. The Directive on procedure further states that such examinations should not be “invasive” and should provide “a reliable result”; therefore, specific guarantees also apply to the procedure, including informed consent. These are especially sensitive about the consequences of hiding information in bad faith or using false documentation to mislead the authorities about age, which could result in the application being refused (Art. 27).

Art. 15 of Directive 2013/32 provides that the interview shall be suitable for minors, and that women have the right to a female interviewer and an interpreter, as well as to childcare without the presence of other relatives. However, several authors (Straimer 2011, Conte 2017, Ferri 2019) have been critical about these assurances, and have argued that they should be more detailed to be able to recognise possible assistance needs. For example, regarding people with disabilities, hearing-impaired people may face particular barriers to communication because they often do not speak the national sign language. People with physical or visual disabilities may find that access to public

buildings is a substantial barrier that may hinder their compliance with procedural requirements within very tight deadlines. Depending on the nature and severity of their impairment, people with mental, intellectual, or sensory impairments may have specific difficulties in accessing information. Article 15.3 (a) of Directive 2013/32 only refers to “cultural origin, gender, sexual orientation, gender identity or vulnerability” and Article 15.3 (e) mentions specific accommodations for children in the interview procedures, without an indication of the vulnerability of other segments of the population. Straimer (2011) has argued that other groups, including people with disabilities, are likely to be neglected, as there is no individual assessment of “special needs” or “vulnerability”. The only mechanism to assess how applicants’ personal circumstances may impact their credibility is a medical and legal report, in line with a general obligation to cooperate (Art. 13, para. 2). Whereas people with post-traumatic stress disorder can be considered to have a mental disability, their legal capacity can be revoked under section b) of Art. 14.2 b of this Directive. Specifically, it allows individual interviews to be omitted when the applicant is deemed “unfit or unable to be interviewed owing to enduring circumstances beyond his or her control”. Although Member States are obliged to consult a doctor, this may be insufficient to prevent a violation of the rights of persons with disabilities. When it comes to legal representation, it is also important to recognise the diverse capacities of people with mental or intellectual disabilities. A number of authors have concluded that the European legal framework does not have a “disability-sensitive approach”, and some criticism has also come from feminist perspectives to the effect that the “gender approach” is not sensitive enough either (Straimer 2011, Crock *et al.* 2013, Smith-Khan *et al.* 2014, Conte 2017, Ferri 2019).<sup>18</sup>

### C) *Special reception needs*

An applicant’s vulnerable situation may change due to factual circumstances associated with the risk of harm. Reception conditions are therefore of fundamental importance for external vulnerability in asylum procedure. Directive 2013/33 distinguishes between the situation of minors and unaccompanied minors (Art. 24) and specifically refers to the provisions of the Qualification Directive (Art. 31). This Directive is strongly focused on the need for a special procedure that safeguards their rights, with a legal guardian and different options for placing minors (foster family, adult relatives, specialised centres, or accommodation with special facilities for minors). Similarly, it specifies that “minors shall be detained only as a measure of last resort”, when less coercive measures cannot be applied effectively; and in the case of unaccompanied minors, only in special circumstances and for the shortest possible time. Prisons are expressly excluded in all cases. A joint interpretation of Articles 10.2 and 22.3 indicates that minors must have access to accommodation, leisure activities, games, and recreation appropriate to their age. These needs are intended to promote their “physical, mental, spiritual, moral and social development” (Art. 23.1). Access to schooling (Art. 14) and rehabilitation services

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<sup>18</sup> European Parliament’s Draft Report on the situation of women refugees and asylum seekers in the EU (2015/0000 (INI)) calls for the EU to provide more gender-sensitive guidelines to be applied as part of a broader reform of the EU migration and asylum system. Specific guidelines on female genital mutilation (FGM) are also provided in the Report. Furthermore, the Report engages in an in-depth discussion of the specific needs of refugee women and asylum seekers in terms of asylum procedures and integration challenges (Polzer 2010).

must be provided, and an evaluation of special needs and adequate monitoring must be carried out for minors who have been victims of exploitation, torture, cruel, degrading or inhuman treatment, armed conflicts, etc. (Art. 23.4).

Women also have a series of specific needs, one of which is to be in accommodation separately from men, pursuant to Art. 11.5 of Directive 2013/33. However, this need is not always met in practice, even in countries with well-established reception networks. In addition, they must have safe access to private bathroom facilities and be provided with healthcare and education. Special attention should also be paid to preventing girls and women from becoming victims of human trafficking or sexual or gender-based violence. Nevertheless, the Directive does not specify the measures to be taken to meet the special needs of asylum seekers with disabilities and leaves a wide margin of discretion for Member States to establish the necessary provisions to fulfil their EU and international commitments. Along with minors and unaccompanied minors (Arts. 23 and 24), only victims of torture or violence (Art. 25) are explicitly mentioned in these provisions.

The Reception Directive expressly identifies persons with disabilities as vulnerable individuals. Firstly, Art. 22 requires Member States to assess whether an asylum seeker “is an applicant with special reception needs”, and to indicate these needs. It also requires that this assessment be “initiated within a reasonable period of time after an application for international protection is made”. Secondly, another requirement is that “material reception conditions provide an adequate standard of living for all applicants”, which “protects their physical and mental health” (Art.17 of the Reception Conditions Directive). Asylum seekers with disabilities partly depend on having their needs recognised in order to obtain assistance, including healthcare according to Art. 25 International Convention on the Rights of Persons with Disabilities (UNCRPD). However, in practice, although Directive 2013/33/EU is a step forward for the international protection of refugees with disabilities (Conte 2017 347), there is a lack of specific procedures for identifying people with disabilities in reception and detention centres. In fact, many people with disabilities are identified on an informal or *ad hoc* basis, as noted by the FRA agency (FRA 2016). For instance, persons with special needs, including disabled people, cannot be detained unless their situation has been reviewed by a qualified professional who certifies that their health, including mental health and well-being, will not significantly deteriorate as a result of detention (Art. 11.2 Directive 2013/33). Moreover, Art.19.2 UNCRPD sets forth high standards in terms of special reception needs for disabled refugees and nationals, but Directive 2013/33/EU does not include rehabilitation services as part of the reception process (UNCRPD, Art. 26) and the removal of barriers for access to services and the built environment (UNCRPD, Art. 9). Consequently, Directive 2013/33 adopts a medical approach and fails to pursue a social model. It establishes a much lower protection threshold for this population, who are required to have material and psychological capacity to obtain refugee status through mechanisms for leading an independent life, despite their need for strong support for their evolving capabilities and diversities.

Regarding victims of trafficking, the most detailed guarantees of assistance and support are established both in the Directive against trafficking and in the Reception Directive – upon applying for asylum – in similar terms. They include a suitable standard of living

to guarantee subsistence. The Reception Directive establishes that the specific situation of the victims of trafficking must be taken into account (Art. 21); that their needs must be evaluated; and that, in the case of special needs, assistance must be guaranteed accordingly (Art. 22).

Nevertheless, Directive 2013/33 does not explicitly refer to LGTBI asylum seekers. This has generated controversy among specialised asylum organisations and groups for the defence of LGTBI rights regarding their consideration as beneficiaries of specific reception measures. Jansen and Spijkerboer (2011), among others, have argued that they are not in favour of all LGTBI asylum seekers being considered “vulnerable” in the sense provided in the Directive. However, many people in this population group should be considered vulnerable due to the kind of persecution they have suffered (torture, rape, psychological and/or physical violence...) and the discrimination and stigma they face in reception centres. Jansen and Spijkerboer also stated that, when there is a high level of discrimination in reception structures, this population often has specific reception needs. One of the problems related to the reception of LGTBI asylum seekers or refugees is that, after being persecuted in their countries of origin, they find themselves in a host society with prejudices and stereotypes that perpetuate the discrimination they had previously experienced, which cause feelings of fear and insecurity. In view of this, it is important to provide safe environments that meet the specific needs of each individual. However, enabling exclusive reception structures (except for security reasons) may also cause stigmatisation and social exclusion. It therefore seems necessary to rearrange the pre-established normative categories under an intersectional approach, despite the risks of bad faith identified by Clark (2009) in the forms of evaluation of vulnerability linked to suffering, false vulnerability, compassionate vulnerability, or convenient vulnerability.

#### *4.2. An intersectional approach to particularly vulnerable asylum seekers/refugees compounded categories*

Peroni (2018) holds that the traditional vulnerable categories used to analyse the situation of refugees and asylum seekers are useful but incomplete, insofar as they ignore the different dynamics at play in these legal categories. I contend that the traditional categories also fail to allocate a wider migrant status to these population groups. Following this logic in the breakdown of vulnerability, it is worth noting a single study by Flegar and Iedema (2019, 19) on female international protection applicants<sup>19</sup> because it questioned the group approach and the universal dimension of vulnerability in the CEDAW decisions. However, it did not clarify why, and to what extent, women asylum seekers are considered particularly vulnerable (victims of trafficking, due to their

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<sup>19</sup> Based on decisions adopted in 56 observations and 7 general recommendations of the UN Committee on the Elimination of Discrimination against Women (CEDAW), a broad combination of internal and situational vulnerabilities was collected, especially relying on individual complaints that have been filed to date. They include refugee women, asylum seekers, internally displaced persons, undocumented migrants, and trafficked women and children. Regarding female asylum seekers and refugees, they referred to vulnerability during the asylum process and reception obligations and highlighted the distinction between vulnerability in the country of origin, in transit and in the host country, which can sometimes overlap in terms of weak or potential victims.

risk of HIV/AIDS, exploitation and sexual abuse) during the asylum procedure compared to the general migrant control procedure.

Obviously, lack of awareness of such vulnerable situations does not deny their existence, but it does contribute to their legal invisibility based on the group approach and internal vulnerability positions. Some gaps can be identified in the sophisticated classification of the particularly vulnerable categories provided for in European asylum regulations. This is necessary considering their combination with the specific measures adopted to guarantee their protection and the limitations of these categories both *de jure* and *de facto*. As noted by Spada (2020, 73), it seems impossible to identify all the subcategorisation processes and particularly vulnerable compounded categories. Therefore, all heterogeneous situations of vulnerability must be effectively recognised in the legal framework because each person has their own particular fragility and some categories risk falling into the cracks in the system.

Notwithstanding the activity of the courts mentioned above, in legal practice it is possible to distinguish between a greater number of exponential categories that are not always summative but are increasingly gaining prominence in the UN conventional protection mechanisms. This has been stated in numerous cases brought before the Human Rights Committee and the Committee against Torture, as well as the CEDAW Committee, the Committee on the Rights of the Child and other opinions that have recognised the special vulnerability of unaccompanied minors, families with minors, victims of trafficking, gender violence, sexual violence, and victims of torture. However, it is also true that some cases have been rejected because their vulnerability has not been sufficiently proven. In the most obvious situations, there are fewer cases of vulnerability in asylum procedures among persons with disabilities or vulnerable on grounds of sexual orientation.<sup>20</sup> These include, for example, those in European reports on legal and

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<sup>20</sup> Regarding age determination and the best interests of the child, CRC/C/82/D/17/2017, case *M.T. v Spain*, 18 September 2019 and CRC/C/81/D/22/2017; case *J.A.B. v Spain*, 31 May 2019. Spain, 18 September 2019; and CRC/C/81/D/22/2017, case *J.A.B. v Spain*, 31 May 2019 and the case of unaccompanied minors and their transfer to Greece; CCPR/C/121/D/2770/2016, case *O.A. v Denmark*, 11 December 2017, para. 8.11; and CCPR/C/98/D/1465/2006, case *Dienekaba v Canada*, 7 April 2006, mother victim of gender-based violence and daughter under 7 years of age who would possibly be a victim of female genital mutilation if returned to their country of origin. For minors and families, CCPR/C/114/D/2360/2014, *Jasin v Denmark*, 25 September 2015, para. 8.9; CCPR/N6/d/2409/2014, *Abdilafir Abubakar Ali and Mayul Ali Mohamad v Denmark*, 16 June 2016, para. 7.8; CCPR/C/118/D/2608/2015, case of *R.A.A. and Z.K. v Denmark*, 29 December 2016; case *Hibaq Said v Denmark*, 9 October 2017 paras. 9.9 and 9.10 in the single mother case. However, it was not admitted in CCPR/1147D/2360/2014, *Warda Osman Jasin v Denmark*, 25 September 2015 on the situation of extreme vulnerability of the mother and her children with health problems on their removal to Italy CCPR/116/D/2402/2014, *A.A.I and A.H.A. v Denmark*, 22 June 2016, paras. 6.5 and 8. Also, in CCPR/C/118/D/2569/2015, case *B.M.I. and N.A.K. v Denmark*, 16 December 2016 in the case of an elderly daughter in need of medical treatment and depressive symptoms; CCPR/C/124/D/2734/2016, case *Fahmo Mohamad Hussein v Denmark*, 14 February 2019 para. 9.7; CCPR/114/D/2288/2015, *Osayi Omo-Amenaghawan v Denmark*, 15 September 2015, para. 7.5; CAT/C/65/D/758/2016, case *Adam Harui v Switzerland*, 8 February 2019, para. 9.9. See also, CAT/C/61/D/747/2016, case *H.Y. v Switzerland*, 7 September 2017 with post-traumatic stress disorder caused by acts of torture aggravating his health status if extradited as an ethnic Kurdish asylum seeker to Turkey, para. 10.7. Moreover, CEDAW/C/51/D/25/2010, *M.P.W. v Canada*, 13 April 2012, para. 10.8. Canada, 13 April 2012, para. 3.1. On the vulnerability of women asylum seekers during the asylum procedure: case *M.P.W.*, a woman asylum seeker victim of gender-based violence in her country of origin. CEDAW/C/42/D/15/2007, case *Zhen Zhen Zheng v The Netherlands*, 15 February 2009, the Committee rejected an asylum application from a woman who had been a victim of trafficking. Finally,

judicial analysis (Mustaniemi-Laakso *et al.* 2016, Mouzourakis *et al.* 2017, European Asylum Support Office – EASO – 2021, 23), and in FRA agency reports based on the gender factor, refugee women with disabilities, refugee girls, trafficked girls and elderly refugee women, among others. In general, some traditional vulnerable groups with special needs are easy to identify, namely, those with visible physical disabilities and the elderly. Other circumstances are also easy to detect and treat, such as pregnancy, tuberculosis, and chronic diseases; in contrast, finding unaccompanied minors or people threatened by human traffickers requires systematic identification. For instance, victims of torture, violence or human trafficking, and people with mental illnesses need even more identification support.

The table below summarises some compounded categories in addition to the more representative particularly vulnerable categories of asylum seekers and refugees. These categories are invisible within a single axis, but intersections can be identified between two or more internal or external conditions of vulnerability. The specific nature of such situations, in the words of Bernardini (2018, 292) and of Crock *et al.* (2013, 38–41), acquires “consistency” by intercepting the intersection between the various axes of discrimination. As a legal toolkit, it serves to “deconstruct and look behind and between” oversimplified and stratified categories (McCall 2005, 1771) of vulnerable subjects and their legal status.

These are outlined in the table below (regardless of legal status). It shows variables in the age and gender categories, which have been the most thoroughly covered. Although there is an intersection of different variants for each of the previously analysed categories, when combined, one always prevails over the other. They may be concurrent or exclusive (Zetter 2007). The addition of one variant or several variants for conditions or situations of vulnerability do not give rise to a “super-vulnerable” subject, but rather to a situation where proof to the contrary can be provided regarding the vulnerable subject. These compounded categories reinforce their applicable special protection and are consistent with the maxim that “all subcategories are by themselves particularly vulnerable, but some are more vulnerable than others”; or “they are more vulnerable than others if more variables are combined” (Peroni and Timmer 2013). Although the table provides estimated variants, it accounts for the difficulty in analysing these intersections. It also reflects the meaninglessness of excluding particularly vulnerable migrants because they share the same categories and circumstances within asylum seekers or refugees. More interestingly, it shows how the transforming effect that these intersections have on subjects results in complex vulnerabilities. These deserve guarantees and largely special needs, since they do not properly fit the previous general categories under the existing regulations. Particularly vulnerable migrants could have their own regulatory framework for protection because, despite not being exceptional or

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CRPD/C/20/D/23/2014, Case *Y. v United Republic of Tanzania*, 30 October 2018 on a minor with albinism for whom no medical assistance or rehabilitation was provided on the basis of Articles 16.4 and 17 of the Convention par. 8.7. In two cases, a family with a child diagnosed with autism and an unspecified psychosocial disability did not enter on the merits as domestic remedies were not exhausted, para. 6.13. CRPD/C/18/D/2015, case *O.O.J., E.O.J., F.J.J., E.J. v Sweden*, 5 October 2017 and CRC/C/81/D/47/2018, case *J.G. v Switzerland*, 28 June 2019, a case of a minor with a disability from Angola.

singular, and not being asylum seeker/refugee or migrants, they belong to new “generic” categories that can be largely adjusted to the circumstances of asylum and migration.

TABLE 1

<b>Categories</b>	<b>1 circumstance</b>	<b>2 circumstances</b>	<b>3 or more circumstances</b>
<b>M (minor)</b>	Girls	Girls with a physical or mental disability	Girl with a physical or mental disability victim of trafficking/MD (mental disorder)/TRPPSV (torture, rape, or physical, psychological or sexual violence)
<b>UM (unaccompanied minor)</b>	Unaccompanied minor girls	Unaccompanied minor girl with a physical or mental disability	Unaccompanied minor girl with a physical or mental disability who is a victim of trafficking/MD/TRPPSV
<b>PMD (physical or mental disability)</b>	Woman with a physical or mental disability	Pregnant woman with a physical or mental disability	Pregnant woman with a physical or mental disability who is a victim of trafficking/MD/TRPPSV
<b>E (elderly persons)</b>	Elderly woman	Elderly woman with a physical or mental disability	Elderly woman with a physical or mental disability who is a victim of trafficking/MD/TRPPSV
<b>PW (pregnant woman)</b>	Pregnant woman with a physical or mental disability	Trafficked pregnant woman/girl	Pregnant woman with a physical or mental disability who is a victim of trafficking/MD/TRPPSV
<b>SPF + M (single-parent family with a minor/minors)</b>	Single woman with a minor/minors	Single woman with a minor/minors with a physical or mental disability	Single woman who is a victim of trafficking/MD/TRPPSV with a minor/minors with a physical or mental disability
<b>VT (victim of trafficking)</b>	Child who is a victim of trafficking	Unaccompanied child who is a victim of trafficking	Woman/Man with a physical or mental disability who is a victim of MD/TRPPSV or trafficking
<b>SI (serious illness)</b>	Child with a serious illness	Child with a serious illness and a physical or mental disability	Woman/Man with a serious illness and a disability who is a victim of MD/TRPPSV
<b>MD (mental disorder) caused by TRPPSV (torture, rape, or physical psychological or sexual violence)</b>	Boy/Girl with an MD caused by TRPPSV	Boy/Girl with an MD caused by TRPPSV with a physical or mental disability	Woman with a disability and an MD caused by TRPPSV  LGTBI person with a disability and an MD caused by TRPPSV
<b>GM (Genital mutilation)</b>	Girl victim of genital mutilation	Disabled girl victim of genital mutilation	Female victim of genital mutilation and victim of trafficking, with an MD and a victim of TRPPSV

Table 1. Compounded migrant vulnerable categories.

Source: Author's research, based on evidence reported from applicable legal provisions and UN, UNCHR and EU agencies.

Looking closer, the table can be expanded to dissect subcategories and showcase the distinction between internal and external vulnerabilities used by the UNHCR. As not all

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of them fit into the two parameters, they may account for the greater heterogeneity which is key to the containment of vulnerability in case law. For example, based on age, there is a difference between minors and unaccompanied minors. Their minor status is an example of their internal vulnerability, whereas a situational or external vulnerability exists given their separation from their family in the migration process, either in transit, at the border or at the destination, or due to their having been subject to degrading reception or detention conditions. This is not the case for elderly people with inherent internal vulnerabilities based on the subject's capacity, except if they have a mental or physical dysfunction that occurred in the country of origin, including if this becomes aggravated throughout the migration process. It should also be considered that "mental or physical disability" is not included as a well-founded ground for persecution unless it can be labelled as applying to a "social group", as is already the case with migrant and refugee women who are victims of gender violence. This does not apply to the broad LGBTBI population. Although it is not provided for in the regulations, except for the literal reference in the Geneva Convention to "belonging to a certain social group", it is within the scope of an internal vulnerability (or a form of vulnerability that is inherent in the subject), that is, specifically for minors and unaccompanied minors.

## 5. Conclusions

Although migration processes are exposed or overexposed to vulnerability, migrant vulnerability has not always been properly addressed. The meaning attributed to vulnerability is imprecise, uncertain, and often contested. The discussions between the theorists of ontological and group approach perspectives do not provide useful contributions either. The scope of internal and external vulnerability, and especially, of migrant vulnerability in regulatory and judicial practice, have operated in a disparate and ambiguous way. There has been a tendency to move away from general assumptions about vulnerability and to prioritise quantitative aspects related to identifying possible "vulnerable individuals" (inherent or acquired characteristics, experiences suffered, individual situation). In contrast, qualitative aspects related to structural factors that reflect the dynamic, risk-generating vulnerable situation, which limit the ability to exercise rights and comply with obligations, have been somewhat disregarded.

It is not easy to naturalise migrant vulnerability by focusing only on legal protection statutes, especially if migration processes, conditions and categories are overlooked. This happens because some migrant subcategories cannot be judged *a priori* as being vulnerable, and situations of vulnerability depend on evidence of credibility and merit. Furthermore, belonging to a particularly vulnerable group does not in itself trigger special protection status and could lead to wrong practices, unless applicable legal provisions recognise it. In regulatory terms, vulnerability exists when the circumstances related to context, the individual and social institutions intersect, but this is not always clear for asylum seekers/refugees and migrants due to various constraints.

The main constraint is the understanding of migrant vulnerability, which is "trapped" in the dichotomous political-legal space between "asylum seekers/refugees" and "migrants". The motivations and experiences of those who engage in displacement vary depending on the legal response to the circumstances that cause risk of vulnerability among migrants. The rules place migrants in partial and overlapping categories, in order



to offer protection or ensure state control for specific sub-groups over others. The logic of classifying this population and the fluid nature of migratory experiences is incompatible with maintaining high standards on rights; in addition, the vulnerabilities of all migrant subjects are numerous and far-reaching. Asylum seekers and refugees are not just any kind of migrants; but it is also true that sometimes migrants become refugees later, and sometimes particularly vulnerable migrants need to be protected as refugees due to the lack of State protection. These interpretations focus on a static legal status and often fail to consider that the classification of migrants is dynamic (variable in time and space), relational (concerned with the creation of boundaries between different groups), and intersectional (inextricably linked to other categories of social difference).

Upon review of EU migration and asylum law and supranational case law, it seems clear that the use of specific categories or a “group approach” is a mechanism to distinguish and discriminate between certain situations that are more or less detectable; but it can also lead to misleading outcomes on migration vulnerability and increase State discretion. Recognising or denying the vulnerability of migrants as a *compact* group or for each individual, as if it were a legal-political dilemma, fails to assert their vulnerability. It only provides an open-ended qualification which lacks corrective force in terms of equality. Giving preferential treatment to the protection of some vulnerable migrant groups and excluding others cannot be done by default or to the detriment of the protection of others. The “group approach” tries to provide the best response to the needs arising from individual or situational vulnerability but in the context of migration it only benefits persons seeking international protection. In fact, when an “undocumented” migrant/asylum seeker and an economic migrant exchange roles, protection may sometimes not be immediate, or may even be delayed or aggravated for both categories.

Consequently, it cannot be ignored that the differential nature of this type of individual vulnerability for migrants is somewhat “forced” or far-fetched. It lies within the relationship between individuals and the State, thus generating situational vulnerabilities within a single subject that are neither easy to intuit nor clearly and intrinsically different. Economic migrants are subject to selective control regarding the forms of regular admission and stay rules, while asylum seekers/refugees are under subsidiary territorial protection of States. Therefore, there are various resources available to an individual for self-protection by demonstrating their status (the so-called resilience or their limited “capacity to escape” in the face of this situation). These circumstances are linked to access to citizenship, the right to migrate, access to and permanent stay in the labour market, undermined rights, stigmatisation, and lack of social recognition.

Another constraint that has been identified is that migrant vulnerability is “trapped” in mechanisms of discriminating control; and vulnerable asylum seekers are “trapped” in the reasoning of necessary “special” protection. This is because not all refugees can be considered vulnerable, and only some are “particularly vulnerable” (more than others). A bivalent logic seems to sacrifice generic migrant vulnerability in order to only admit the vulnerability of asylum seekers and refugees in certain (restricted) irrefutable cases based on a principle of identity, non-contradiction, and excluded third. However, these vulnerable categories ultimately generate perverse false positives and negatives. By

magnifying the categories of combined vulnerability, complexity is distorted in order to try to neutralise the structural causes of certain stereotypes that are difficult to (de)construct in legal practice. Further critical reflection on individual vulnerability is needed in the legal sphere and greater empirical evidence is required in view of its existing limits, biases, and limitations. This is especially useful to “automatically” categorise certain particularly refugees or asylum seekers and justify their special protection vis-à-vis others.

In fact, the subcategories of particularly vulnerable asylum seekers/refugees reviewed in the last section is legally constructed and may seem fixed, neutral and objective. However, in practice, they are constantly questioned in jurisprudence and policy, and they are continuously interacting. Applicants’ rights may be better served by the recognition of a classical category of “vulnerable refugee”, although this may simultaneously exclude others considered “alleged abusive applicants”. Choosing to label – or not to label – someone as a “vulnerable refugee” can be used to fragment the international protection regime and limit responsibility for preventing the causes of vulnerability from – what is perceived as – an abuse of the sustainability of the asylum system.

Unless there is a legal change, it is evident that the intersectional approach and its limitations are more operational in legal practice and, to a lesser extent, in the development of legal provisions. This approach clearly puts the practical observation of vulnerability into perspective. The ability to individualise certain situations or subcategories of particularly vulnerable subjects can lead to their (re)categorisation as a group, and it may even result in stereotyping such situations, making their identification a treatment issue rather than a recognition issue. This is only admissible if it promotes protection mechanisms that benefit the individual and do not conflict with the principle of non-discrimination. All categories of particularly vulnerable migrants need to give individuals the benefit of the doubt when assessing the credibility of their statements for eventual protection. If the combined circumstances of particularly vulnerability were analysed, there would be sufficient grounds for considering particularly vulnerable migrants to be asylum seekers/refugees. The only possible solution is (re)conceptualising “migrant vulnerability” as a *compact* notion and process and eventually grant applicants a more coherent migrant status.

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